

sive condition, it will become effective at the moment the condition occurs.

"(2) If a contract has been concluded under a resolutive condition, it will become ineffective at the moment the condition occurs.

*"Article 10 ter*

"(1) If a contract has been concluded subject to the approval of a third party, it will become effective at the moment this approval is given.

"(2) This will apply also in case the contract was concluded by a representative with reservation as to be approved by the person represented.

*"Article 10 quater*

"(1) In case a contract of sale is subject to authorization by a state organ, it will become effective only at the moment this authorization has been given.

"(2) In case a contract of sale contravenes a legal prohibition or is aimed at an impossible service, it will be void.

*"Article 10 quinques*

"(1) In the cases referred to under article 10 *ter* and article 10 *quater* the other party shall be immediately informed of the granting of the approval or authorization.

"(2) If the information is not given within two months after conclusion of the contract the contract shall be regarded as not concluded."

3. The Hungarian proposal under A/CN.9/WG.2/VIII/CRP.8 should be supplemented by another principle and adopted into the draft Convention:

"In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."

### C. Note by the Secretary-General: Draft Convention on the Formation of Contracts for the International Sale of Goods (A/CN.9/143)\*

1. The Working Group on the International Sale of Goods requested the Secretary-General to circulate the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (UNIDROIT) to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention on the Formation of Contracts for the International Sale of Goods prepared by the Working Group should be included.<sup>1</sup>

2. The text of the draft law prepared by UNIDROIT is set out in the annex to this note.

#### ANNEX

#### Draft of a uniform law for the unification of certain rules relating to validity of contracts for the International Sale of Goods<sup>a</sup>

##### Article 1

1. The present law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

(a) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(b) Where the acts constituting the offer and the acceptance have been effected in the territories of different States;

(c) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

3. The application of the present law shall not depend on the nationality of the parties.

4. In the case of contracts by correspondence, offer and accept-

\* 6 January 1978.

<sup>1</sup> Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 305 (reproduced in the present volume, part two, I, A).

<sup>a</sup> This text was prepared under the auspices of the International Institute for the Unification of Private Law (UNIDROIT). The English and French language versions are the texts approved by the Governing Council of UNIDROIT on 31 May 1972 and set out in the following bilingual publication of UNIDROIT: ETUDE XVI/B, Doc. 22, U.D.P. 1972. The Russian and Spanish versions have been prepared by the United Nations Secretariat.

ance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article . . . of the Convention dated . . . relating to a Law for the unification of certain rules relating to validity of contracts of international sale of goods is in force in respect of them.

6. The present law shall not apply to contracts of sale:

(a) Of stocks, shares, investment securities, negotiable instruments or money;

(b) Of any ship, vessel or aircraft, which is or will be subject to registration;

(c) Of electricity;

(d) By authority of law or on execution or distress.

7. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

8. The present law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

9. Rules of private international law shall be excluded for the purpose of the application of the present law, subject to any provision to the contrary in the said law.

##### Article 2

1. The present law shall not apply to the extent that the parties have agreed, expressly or impliedly, that it is inapplicable.

2. However, in the case of fraud and in the case of threat, the present law may not be excluded or departed from to the detriment of the aggrieved party.

##### Article 3

1. Statements by and acts of the parties shall be interpreted according to their actual common intent, where such an intent can be established.

2. If the actual common intent of the parties cannot be established, statements by and acts of the parties shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was.

3. If neither of the preceding paragraphs is applicable, the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties.

*Article 4*

1. In applying the preceding article due consideration shall be given to all relevant circumstances, including any negotiations between the parties, any practices which they have established between themselves, any usages which reasonable persons in the same situation as the parties usually consider to be applicable, the meaning usually given in any trade concerned to any expressions, provisions or contractual forms which are commonly used, and any conduct of the parties subsequent to the conclusion of the contract.

2. Such circumstances shall be considered, even though they have not been embodied in writing or in any other special form; in particular, they may be proved by witnesses.

3. The validity of any usage shall be governed by the applicable law.

*Article 5*

There is no contract if, under the provisions of the preceding articles, an agreement between the parties cannot be established.

*Article 6*

A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

(a) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

(b) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance; and

(c) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

*Article 7*

1. A mistake of law shall be treated in the same way as a mistake of fact.

2. A mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated.

*Article 8*

A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded.

*Article 9*

The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods.

*Article 10*

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be

avoided for fraud if the other contracting party knew or ought to have known of the fraud.

*Article 11*

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

*Article 12*

1. Avoidance of a contract must be by express notice to the other party.

2. In the case of mistake or fraud, the notice must be given promptly, with due regard to the circumstances, after the party relying on it knew of it.

3. In the case of threat, the notice must be given promptly, with due regard to the circumstances, after the threat has ceased.

*Article 13*

1. In case of mistake, any notice of avoidance shall only be effective if it reaches the other party promptly.

2. In any event, the notice shall only be effective if it reaches the other party within two years after the conclusion of the contract in the case of mistake or within five years after the conclusion of the contract in the other cases.

*Article 14*

1. Notice of avoidance shall take effect retroactively, subject to any rights of third parties.

2. The parties may recover whatever they have supplied or paid in accordance with the provisions of the applicable law.

3. Where a party avoids a contract for mistake, fraud or threat, he may claim damages according to the applicable law.

4. If the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake.

*Article 15*

1. If the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. He must make such a declaration promptly after having been informed of the manner in which the mistaken party had understood the contract.

2. If such a declaration is made, the mistaken party shall thereupon lose his right to avoid the contract and any other remedy. Any declaration already made by him with a view to avoiding the contract on the ground of mistake shall be ineffective.

*Article 16*

1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller.

## **D. Report of the Secretary-General: commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods (A/CN.9/144)\***

**INTRODUCTION**

1. The Working Group on the International Sale of Goods was established at the second session of the

\* 22 November 1977.

United Nations Commission on International Trade Law. At that session, the Commission at its 44th meeting on 26 March 1969 requested the Working Group to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the Formation of