

IV. PROGRAMME OF WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

A. Report of the Secretary-General (A/CN.9/149* and Corr. 1 and 2)

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INTRODUCTION

1. The Commission, at its ninth session (1976), noted that it had completed, or would soon complete, work on many of the priority items included in its programme of work and that it was therefore desirable to review, in the near future, its long-term work programme. In the Commission's view, the establishment of a long-term programme of work would enable its secretariat to begin the necessary preparatory work in respect of items which it might wish to take up. The Commission instructed its secretariat to submit a report at its eleventh session (1978) after appropriate consultations with international organizations and trade institutions as to its contents.

2. The General Assembly, at its thirty-first session, welcomed the decision of the Commission to review its long-term programme of work and requested the Secretary-General to invite Governments to submit their views and suggestions on such a programme. (General Assembly resolution 31/99 of 15 December 1976.)

3. This report is submitted in compliance with the decision taken by the Commission at its ninth session (1976). The report seeks to do the following:

(a) To give an account of the programme of work, as originally agreed upon by the Commission at its first session and as subsequently expanded (chap. I);

(b) To give an account of the subject-matters falling

within the priority topics that have been completed (chap. II);

(c) To give an account of the subject-matters falling within the priority topics that have not yet been completed (chap. III);

(d) To give an analytical compilation of the proposals made by Governments and international organizations in respect of a new work programme (chap. IV); and

(e) Finally, to raise issues of working methods (chap. V).

In order to facilitate the discussion of items to be retained in the work programme of the Commission, there is set out, immediately after this introduction, a list of those subject-matters that were included in the first programme of work but have not yet been taken up and those that have been suggested by Governments and international organizations for inclusion in the future work programme.

4. The secretariat gratefully acknowledges the opportunity given to it by the Council for Mutual Economic Co-operation (CMEA) which kindly made arrangements for consultations between its member States and the Commission's secretariat. These consultations took place at the headquarters of CMEA in Moscow on 16 and 17 January 1978. The secretariat also gratefully acknowledges the opportunity to exchange views on the Commission's work programme with the member States of the Asian-African Legal Consultative Committee (AALCC), through the intermediary of Standing Sub-Committee on International Trade Law Matters of AALCC. These consultations took place at Doha from 19 to 23 January 1978. The resolution of the AALCC containing its proposals on the Commission's

* 4 May 1978.

** Notes by the Secretariat on subjects which may be included in the programme of work are reproduced in annexes I to III.

work programme is set forth in document A/CN.9/155.*

5. Steps have been taken to consult on the Commission's programme of work also with other international bodies representing other regions of the world. The secretariat expects to have such consultations with the member States of the Organization of American States and with the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe. An account of these consultations, if held before the eleventh session of the Commission, will be set forth in an annex to this report.

6. With respect to co-ordination of work, the Secretary of the Commission attended a meeting, held in Rome, on 27 and 28 February 1978, of a consultative group composed of the representatives of the secretariats of the Commission, UNIDROIT and the Hague Conference on Private International Law. A memorandum on this meeting is set forth in document A/CN.9/154.

LIST OF SUBJECT-MATTERS FOR POSSIBLE INCLUSION IN THE FUTURE WORK PROGRAMME¹

I. *Issues relating to international trade law*

1. Preparation of a code of international trade law (FP, NP; paras. 3 and 4)
2. Preparation of uniform conflict of law rules (NP; paras. 5 and 6)
3. Preparation of international contracts
Work directed to the unification of:
 - (i) Contracts of warehousing (NP; para 7 (a));
 - (ii) Contracts of barter (NP; para. 7 (b));
 - (iii) Contracts for the supply of labour, or contracts where the party who orders the goods supplies a substantial part of the materials (NP; para. 7 (c));
 - (iv) General conditions on the erection and technical servicing of machines and industrial plant (NP; para. 7 (d));
 - (v) Contracts of leasing (NP; para. 7 (e));
 - (vi) Standard contract terms (FP, NP; para. 8);
 - (vii) Consequences of frustration (FP);
 - (viii) *Force majeure* clauses (FP, NP; para. 10);
 - (ix) Penalty clauses (NP; para. 11);
 - (x) Certain contractual issues of general application (e.g. set-off, suretyship assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages, application of usages) (NP; paras. 12 and 13);
 - (xi) Contracts for quality control (NP; para. 14);

* Reproduced in this volume, part two, IV, B.

¹ In the list that follows, the letters "FP" indicate that the topic was formerly proposed for inclusion in the programme of work of the Commission, either at its first session or at a subsequent time. The letters "NP" indicate that the topic is a new proposal made for the purposes of deciding on a new programme of work. It will be noted that in several instances, former proposals have been repeated. The list does not include priority topics in respect of which work is not yet completed. These are set forth in chap. III of this report. The paragraph number noted after a topic indicates the relevant paragraph in the analysis of proposals of Governments and international organizations (chap. IV of this report) where the proposal relating to that topic is considered.

(xii) Public tenders (NP; para. 15).

4. International payments
Preparation of uniform rules relating to:
 - (a) Electronic funds transfers (NP; para. 17);
 - (b) "Standby" letters of credit (NP; para. 18);
 - (c) Clauses protecting parties against fluctuations in the value of currency (NP; para. 19);
 - (d) Collection of commercial paper (NP, para. 20).
5. International commercial arbitration
 - (a) Study of means to make the UNCITRAL Arbitration Rules more effective (NP; para. 22 (a));
 - (b) Formulation of provisions for situations which cannot be dealt with by bilateral agreements (NP; para. 22 (b));
 - (c) Proposal relating to article V (1) (e) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NP; para. 23).
6. Transport² and transport insurance
 - (a) Drafting a convention on multimodal transport (NP; para. 24);
 - (b) Consideration of the law of charter parties (NP; para. 25);
 - (c) Consideration of legal issues relating to transport by container (NP; para. 26);
 - (d) Consideration of the law of transport insurance (NP; para. 27);
 - (e) Preparation of uniform rules relating to contracts for the forwarding of goods (NP; para. 28).
7. Agency
Legal issues arising out of agency contracts concluded for commercial purposes (FP, NP; para. 29).
8. Insurance (FP, NP; para. 30).
9. Products liability (FP, NP; para. 31).
10. Company law
The establishment and operation of commercial companies (NP; para. 32).
11. Intellectual property (FP)³
12. Legalization of documents (FP)⁴

II. *Issues arising from a possible reordering of international economic relations*

1. Legal implications of the new international economic order (NP; paras. 33 and 34).
2. Multinational enterprises (FP, NP; para. 35).

² It was proposed at the first session of the Commission that "transportation" be placed on the work programme of the Commission.

³ The Convention establishing the World Intellectual Property Organization (WIPO), Stockholm, 1967, states that the objectives of that organization are, *inter alia*, to promote the protection of intellectual property throughout the world through co-operation among States, and, where appropriate, in collaboration with any other international organization. WIPO became a specialized agency of the United Nations in December 1974.

⁴ The Convention abolishing the requirement of legalization for foreign public documents, The Hague, 5 October 1961, has been concluded under the auspices of the Hague Conference on Private International Law.

3. Transfer of technology (NP; para. 36).
4. Elimination of discrimination in laws affecting international trade (FP, NP; para. 37).

CHAPTER I. THE FIRST PROGRAMME OF WORK OF THE COMMISSION

A. General list of topics

1. At its first session, held at New York from 29 January to 26 February 1968, the Commission, following informal consultations between its members, unanimously accepted a working paper (A/CN.9/L.1/Rev.1) which read as follows:

I. List of topics

During the general debate the following topics were suggested by several delegations. A great number of delegations considered that all these topics should form the future work programme of the Commission. This list of topics is not exhaustive.

- (1) International sale of goods:
 - (a) In general;
 - (b) Promotion of wider acceptance of existing formulations for unification and harmonization of international trade law in this field including the promotion of uniform trade terms, general conditions of sale and standard contracts;
 - (c) Different legal aspects of contracts of sale like:
 - (i) Limitations;
 - (ii) Representation and full powers;
 - (iii) Consequences of frustration;
 - (iv) *Force majeure* clauses in contracts.
- (2) Commercial arbitration:
 - (a) In general;
 - (b) Promotion of wider acceptance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- (3) Transportation.
- (4) Insurance.
- (5) International payments:
 - (a) Negotiable instruments and banker's commercial credit;
 - (b) Guarantees and securities.
- (6) Intellectual property.
- (7) Elimination of discrimination in laws affecting international trade.
- (8) Agency.
- (9) Legalization of documents.

II. Priorities

The Commission decided that priority should be given to the following topics:

- (i) International sale of goods;
- (ii) International payments;
- (iii) Commercial arbitration.

III. Methods of work

Methods of work should be suitable to the particular topic under consideration.

- IV. Working groups, or sub-committees or other appropriate bodies of the Commission, should be appointed during the present session to deal respectively with the topics mentioned in paragraph II and submit their reports to the Commission at its next session.
- V. The Commission endorses the statement of the Chairman that it should take its decisions as far as possible by a consensus, failing which by a vote, as under the rules of procedure for the subsidiary organs of the General Assembly.

B. Priority topics

2. In the course of the same session, the Commission established a working group to advise it on the methods of work that should be followed in dealing with the three topics that had been given priority. The Working Group submitted a paper entitled "Methods of work for priority topics" (A/CN.9/L.3). After discussion, the Commission took a number of decisions on the methods of work for priority topics. These decisions are recorded in document A/CN.9/9, and may be summarized by reproducing the following passages:

International sale of goods

During the general debate the following items, falling within the scope of international sale of goods, were suggested by delegations:

- (a) International sale of goods in general;
- (b) Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods;
- (c) Hague Convention of 1955 on the Law Applicable to International Sale of Goods;
- (d) Elaboration of a commercial code;
- (e) Contracts of sale;
- (f) Different legal aspects of contracts of sale:
 - (i) Time-limits and limitations (prescription) in the field of international sale of goods;
 - (ii) Agency*;
 - (iii) Consequences of frustration;
 - (iv) *Force majeure* clauses in contracts;
- (g) General conditions of sale, standard contracts, Incoterms and other trade terms."

Selected items

In view of the wide scope and complex nature of the concept of international sale of goods as laid down above, at this early stage the Commission found it impractical to deal with all the facets of the subject at the same time. Accordingly, the Commission selected some of the main items within the topic, i.e.:

- (a) The Hague Conventions of 1964;
- (b) The Hague Convention on Applicable Law of 1955;
- (c) Time-limits and limitations (prescription) in the field of international sale of goods;
- (d) General conditions of sale, standard contracts, Incoterms and other trade terms.

International payments

During the general debate the following topics, falling within the scope of international payments, were suggested by delegations:

- (a) Negotiable instruments;
- (b) Bankers' commercial credits;
- (c) Guarantees and securities.

Rather than making a comprehensive study of international payments as a whole, the Commission found it convenient . . . to deal separately with (i) negotiable instruments; (ii) bankers' commercial credits and (iii) guarantees and securities. Consistent with the object of the Commission, i.e. the progressive harmonization and unification of the law of international trade, it was agreed that the consideration of these items by the Commission should relate primarily to international transactions.

* Under this item it is intended to deal both with the common law concept of "agency" and the concepts of "représentation" (in French) and "full powers" in other systems.

...
International commercial arbitration

The Commission decided . . . to request the Secretary-General, in consultation with the organs and organizations concerned, to prepare a preliminary study of steps that might be taken with a view to promoting the harmonization and unification of law in this field, having particularly in mind the desirability of avoiding divergencies among the different instruments on this subject.

International legislation on shipping

3. At its second session (1969), the Commission decided to include international legislation on shipping among the priority items in its programme of work and established a working group, requesting it to indicate the topics and method of work on this subject. The Working Group submitted a report to the Commission at its fourth session (1971), recommending a programme of work in this area (A/CN.9/55).^{*} After considering the Working Group's report, the Commission decided to examine "the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968) . . . with a view to revising and amplifying the rules as appropriate . . .".

CHAPTER II. WORK COMPLETED BY THE COMMISSION

(a) *International sale of goods*

(i) *Draft Convention on the International Sale of Goods*

1. The text of this draft Convention was approved by the Commission at its tenth session (1977).

(ii) *Draft Convention on the Formation and Validity of Contracts for the International Sale of Goods*

2. It is expected that the Commission will approve the text of this Draft Convention at its eleventh session, and will then also have considered the question whether the provisions on the formation and validity of contracts should be the subject-matter of a separate convention.

3. The General Assembly, by resolution 32/145 of 16 December 1977, expressed the view that both draft Conventions should be considered by a conference of plenipotentiaries at an appropriate time, to be decided at its thirty-third session (1978) in the light of the recommendations to be submitted by the Commission.

(iii) *Prescription (Limitation) in the International Sale of Goods*

4. A Convention on the subject was adopted by a Conference of Plenipotentiaries held at New York from 20 May to 14 June 1974.

(b) *International payments*

Bankers' commercial credits

5. The Commission, at its eighth session (1975),

^{*} Yearbook . . . 1971, part two, III.

commended the use of the 1974 revision by the International Chamber of Commerce of "Uniform Customs and Practice for Documentary Credits" in transactions involving the establishment of a documentary credit.

(c) *International commercial arbitration*

6. The Commission, at its ninth session (1976), adopted the UNCITRAL Arbitration Rules. The General Assembly, by resolution 31/98 of 15 December 1976, recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly by reference to such arbitration rules in commercial contracts.

(d) *International legislation on shipping*

7. The United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules") was adopted by a Conference of Plenipotentiaries held at Hamburg from 6 to 31 March 1978.

CHAPTER III. PRIORITY TOPICS IN RESPECT OF WHICH WORK IS NOT YET COMPLETED

1. Among the so-called "priority topics" referred to in chapter I of this report, the following matters have not yet been completed:

(a) *International sale of goods*

(i) *1955 Hague Convention on the Law Applicable to the International Sale of Goods*⁵

(ii) *General conditions of sale and standard contracts*

2. The Commission, at its tenth session (1977), decided to postpone work on "general" general conditions and to review the matter at its eleventh session in the context of its new programme of work.

(b) *International payments*

(i) *Draft Convention on International Bills of Exchange and International Promissory Notes*

3. It is expected that the Working Group on International Negotiable Instruments will need one or two more sessions to complete its work. Consequently, a draft Convention together with a commentary and the observations of Governments and interested international organizations will probably be placed before the Commission at its thirteenth session (1980).

(ii) *Uniform Rules applicable to international cheques*

4. The Commission, at its fifth session (1972), requested the Working Group "to consider the desirability of preparing uniform rules applicable to international cheques and the question of whether this can best be achieved by extending the application of the draft [convention on international bills of exchange and international promissory notes] to international cheques or by drawing up a separate uniform law on interna-

⁵ It is noted that the consideration of this Convention, for the purpose of establishing a more widely acceptable text, is within the original mandate of the Working Group on the International Sale of Goods set up by the Commission at its second session (1969).

tional cheques, and to report its conclusions to the Commission at a future session.”

5. The Working Group requested the Secretariat, in consultation with the UNICITRAL Study Group on International Payments, to make inquiries regarding the use of cheques in international payments and the problems presented, under current commercial and banking practices, by divergencies between the rules of the principal legal systems. The Working Group is expected to take up the question of cheques upon termination of its work on bills of exchange and promissory notes.

(iii) *Security interests in goods*

6. The Commission, at its tenth session (1977), requested the Secretariat to submit, at its twelfth session (1979), a further report on the feasibility of uniform rules on security interests and on their possible content and, in particular, to ascertain the practical need and relevance of an international security interest for international trade.

(c) *International commercial arbitration*

7. In accordance with a decision taken by the Commission at its tenth session (1977), the Secretariat is preparing studies regarding the recommendations by the Asian-African Legal Consultative Committee⁶ and is conducting consultations in this regard. A report on this matter will be submitted to the Commission at its twelfth session (1979).

CHAPTER IV. ANALYSIS OF PROPOSALS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE FUTURE WORK PROGRAMME OF THE COMMISSION⁷

1. *Issues relating to international trade law*

A. *Completion of existing work programme*

1. The Byelorussian SSR, Czechoslovakia, German Democratic Republic and Union of Soviet Socialist Republics propose the completion of work on the items included in the programme of work drawn up at the first session of the Commission.

2. The Asian-African Legal Consultative Committee (AALCC), Hungary and the United States propose continuance of the work on security interests. AALCC and the United States note the importance of security interests in international trade.⁸

⁶ These recommendations are set forth in a note by the Secretary-General (A/CN.9/127) (Yearbook... 1977, part two, III).

⁷ The proposals of Governments were sent in response to a request for such proposals made in a note verbale of the Secretary-General dated 1 February 1977. The Secretariat held consultations at Moscow with the Council for Mutual Economic Assistance on the future work programme on 16 and 17 January 1978, and the proposals made by States members of CMEA at those consultations were transmitted by the CMEA secretariat by letter dated 25 January 1978. In the analysis set forth below, the proposal of a State which was so transmitted is identified by placing the abbreviation "CMEA" in parentheses after the name of the State. It may be noted that some of the States participating in those consultations have sent independent replies to the note verbale dated 1 February 1977.

⁸ At its tenth session (1977) the Commission requested the Secretary-General to submit to the Commission at its twelfth session a report on the feasibility of uniform rules on security interests and on their possible content, taking into account the comments and sugges-

B. *Preparation of a code of international trade law*

3. Czechoslovakia, Bulgaria (CMEA), Hungary (CMEA) and Poland (CMEA) propose the preparation of a code of international trade law.

4. Czechoslovakia, while recognizing that the preparation of such a code would be a long-term project, notes that the commencement of preparatory work is desirable for the following reasons. The present system of unifying special areas of international trade law can eventually produce a lack of harmony between the various instruments of unification, both because the instruments might contain potential conflicts, and because the same problems may be resolved differently in different instruments. Further, areas will remain where divergent national laws would apply.

C. *Preparation of uniform conflict of law rules*

5. Bulgaria (CMEA), the Byelorussian Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary (CMEA), Poland (CMEA) and the Union of Soviet Socialist Republics propose the preparation of uniform rules to resolve conflict of law issues arising out of an international trade transaction.

6. Czechoslovakia notes that, until a uniform code of international trade law is widely adopted, conflicts of potentially applicable national laws will arise in relation to international trade transactions, and that therefore the unification of the relevant conflict of law rules would enhance legal security in international trade.

D. *Uniform rules relating to international contracts*

(i) *Uniform rules for certain types of contracts*

7. It is proposed that the formulation of uniform rules be undertaken on the following:

(a) The contract of warehousing⁹ (German Democratic Republic, Germany, Federal Republic of,¹⁰ (CMEA) and Hungary (CMEA));

(b) Contracts of barter¹¹ (AALCC, Czechoslovakia and USSR (CMEA)). It is noted that such contracts are becoming increasingly important in transactions between developing and developed countries (AALCC), and that they are not regulated by the draft Convention on the International Sale of Goods (Czechoslovakia);

(c) Contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services, and contracts for the supply of goods

tions made in the Commission, and to carry out further work on the subject in consultation with interested organizations and banking and trade institutions, and in particular to ascertain the practical need and relevance of an international security interest for international trade UNCTRAL, report on the tenth session (A/32/17), para. 37; Yearbook... 1977, part one, II, A).

⁹ UNIDROIT is currently examining the feasibility of formulating draft uniform provisions on the liability of persons other than the carrier having custody of the goods before, during or after the transport operation. A "Preliminary report on the Warehousing Contract" (ref.: Study XLIV—Doc. 2, 1976) was issued, and circulated for comments by Governments and interested organizations. In May 1977, a study group was established on this subject.

¹⁰ The proposal of the German Democratic Republic (CMEA) was that the responsibility for goods before and after transport be considered, and this would involve consideration of the liability of warehousemen.

¹¹ See annex II to this report, containing a note by the Secretariat on the international contract of barter.

to be manufactured or produced where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production (AALCC and Czechoslovakia). It is noted that such contracts are important (AALCC), but excluded from the scope of the draft Convention on the International Sale of Goods (Czechoslovakia);

(d) General conditions on the erection and technical servicing of machines and industrial plant (Byelorussian SSR and USSR);

(e) The contract of leasing in international trade (Hungary).

(ii) *Standardization of contractual terms or clauses*

8. The United States and AALCC note the value of standard contract provisions, or trade terms, accepted on a wide basis, in the solution of contractual problems in international trade. It is noted that such provisions can resolve problems not capable of solution by legal principles of general application (United States) and that they can also foster the establishment of legal norms acceptable to both developing and developed countries (AALCC).

"General" general conditions

9. Czechoslovakia and Hungary (CMEA) note that the feasibility of drafting "general" general conditions for use in international trade should be considered.¹²

"Force majeure" clauses

10. Bulgaria (CMEA), the Byelorussian SSR, Hungary (CMEA), Poland (CMEA) and the USSR propose the formulation of standard clauses regulating the effect of the failure to fulfil his obligations by a party to an international trade contract due to an impediment beyond his control ("force majeure" clause).

Penal clauses

11. Poland proposes the formulation of standard clauses regulating the imposition of fines and penalties in international trade contracts.¹³

(iii) *Unification of the rules on certain contractual issues arising in relation to all types of contracts*

12. Czechoslovakia notes the desirability of drafting uniform rules on certain contractual issues of general application, such as set-off, suretyship, assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages and application of usages. It notes that such unification would be a preparatory step towards the eventual formulation of an international trade code.

¹² At its tenth session (1977), the Commission decided "to postpone work on 'general' general conditions and to review the matter when it considers, at its eleventh session, the proposals of the Secretary-General for its long-term programme of work" (A/32/17, para. 36). It may be noted that the Asian-African Legal Consultative Committee has prepared a standard form of FOB and FAS Contract for use in sales of certain types of commodities, and is currently preparing a standard form of CIF (maritime) Contract for sales of light machinery and durable consumer goods.

¹³ See annex I to this report, containing a note by the Secretariat on liquidated damages and penalty clauses.

13. The Byelorussian SSR and the USSR propose the unification of rules on the transfer of property rights.

(iv) *Unification of rules for certain needs ancillary to the formation or performance of contract*

Contracts for quality control

14. Czechoslovakia notes the need for uniform rules for contracts regulating the relations between an agency which checks the quality of goods, and the party who employs such an agency, because of the importance of such contracts, and the current lack of uniform rules on that subject.

Public tenders

15. Czechoslovakia also proposes the formulation of uniform rules regulating public tenders, as such tenders are important in connexion with the formation of contract, and the draft Convention on the Formation of Contracts for the International Sale of Goods does not deal with such tenders.

E. *International payments*

16. The following proposals are made in relation to this subject.

Electronic funds transfers

17. The United States proposes the study of legal issues arising from the transmission of funds and the making of payments by electronic means. It notes that, while there is increasing use of electronic fund transfers, there has been insufficient development of rules to resolve the legal problems thereby created.¹⁴

"Standby" letters of credit

18. Australia proposes the formulation of uniform rules regulating the issue of "standby" letters of credit, used to secure the performance of a borrower's obligations under an international loan which is independent of any sales transaction. Under such "standby" letters of credit, the banker reimburses the lender in the event of the borrower's default. In support of this proposal, Australia notes:

(a) The increasing use of such letters of credit in international trade; and

(b) That, in the absence of uniform rules as to the conditions under which payment has to be made under such letters, there is a possibility of abuse by dishonest beneficiaries.

Clauses protecting parties against fluctuations in the value of currency

19. Hungary (CMEA) and Poland (CMEA) propose the formulation of clauses which would protect a party to whom monetary obligations are owed against fluctuations in the value of currency.

¹⁴ See annex III to this report, containing a note by the Secretariat on electronic funds transfer.

Collection of commercial paper

20. Czechoslovakia proposes the consideration of uniform rules for the collection of commercial paper.¹⁵

Bank guarantees

21. Czechoslovakia proposes the consideration of problems arising out of bank guarantees.¹⁶

F. *International commercial arbitration*

22. The United States and AALCC propose further study on measures to promote international commercial arbitration. It is proposed that attention should be given:

(a) To means whereby the UNCITRAL Arbitration Rules can be made more effective (United States);

(b) To formulating provisions which, while maintaining the principle that arbitration as a means of dispute settlement depended on the will of the parties, would remedy situations which cannot be dealt with by bilateral agreement (United States);

(c) To the specific proposals already submitted by AALCC to the Commission (AALCC).¹⁷

23. ICC proposes that, if the Commission were to examine the possibility of revising the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, it should consider the effect of article V(1)(e) of that Convention. Under that provision, recognition and enforcement of an award may be refused if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. The ICC notes that, as a result, even if an award is set aside or suspended by a competent authority because of a particular local rule, the award could not be enforced in countries in which it would otherwise be valid, and that this creates difficulties in arbitration practice.

G. *Transport**Multimodal transport*

24. The United States notes that, after the Commission's work in preparing a draft Convention on the Carriage of Goods by Sea, it appears to be the appropriate body to prepare a draft Convention on multimodal transport.¹⁸

Charter-parties

25. Czechoslovakia (CMEA), the Byelorussian SSR and the USSR propose the consideration of the law relating to charter-parties.¹⁹

¹⁵ The International Chamber of Commerce has published "Uniform Rules for the Collection of Commercial Paper" (1967).

¹⁶ The International Chamber of Commerce is currently drafting uniform rules on contract guarantees.

¹⁷ For these specific proposals, see document A/CN.9/127 (Yearbook . . . 1977, part two, III).

¹⁸ In pursuance of resolution 1734 (LIV) of the Economic and Social Council, the Trade and Development Board, by its decision 96 (XII) of 10 May 1973, established an Intergovernmental Preparatory Group to elaborate a preliminary draft of a convention on international intermodal transport. The work of this Group is not yet completed.

¹⁹ The UNCTAD Working Group on International Shipping Legis-

Transport by container

26. Hungary proposes that work be undertaken on legal issues relating to transport by container.²⁰

Transport insurance

27. The Byelorussian SSR, Czechoslovakia (CMEA) and the USSR propose the consideration of the law of transport insurance.²¹

Contracts for the forwarding of goods

28. The Byelorussian SSR, Czechoslovakia and the USSR propose that work be undertaken in relation to contracts for the forwarding of goods in international transport.²²

H. *Agency*

29. Bulgaria (CMEA), the German Democratic Republic, Hungary, Poland (CMEA) and the USSR propose the examination of legal issues arising out of contracts of agency concluded for commercial purposes, including brokerage contracts and contracts for commercial representation.²³

J. *Insurance*

30. Hungary proposes the examination of legal problems in insurance.

K. *Products liability*

31. Mexico proposes that further work be under-

lution, at its first session (1969), adopted the subject of charter-parties as part of its programme of work. At its fourth session (1975), the Working Group considered a study by the UNCTAD secretariat on this subject, and requested the secretariat to make additional studies. It is expected that that Working Group will again consider this subject in 1979 in the light of the additional studies.

²⁰ In response to decision 6 (LVI) of the Economic and Social Council, the Trade and Development Board has, by its decision 118 (XIV) of 13 September 1974, established an *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport. The work of this Group is not yet completed.

²¹ The UNCTAD Working Group on International Shipping Legislation, at its first session (1969), adopted the subject of marine insurance as part of its programme of work. The UNCTAD secretariat is currently preparing a study on legal and commercial problems in this field, and it is expected that the Working Group will consider this study in 1978.

²² UNIDROIT prepared in 1966 a draft Convention on the contract of international forwarding agency of goods.

²³ (a) A Committee of Governmental Experts, established under the auspices of UNIDROIT, completed in 1972 a draft convention providing a uniform law on agency of an international character in the sale and purchase of goods. This draft Convention will be submitted to a diplomatic Conference in 1979.

(b) The Commission of the European Communities has commenced work toward harmonization of the laws of States members of the European Economic Community (EEC) concerning the practice of the profession of "commercial agent". A draft directive on the subject was prepared and submitted by the Commission to the Council of Ministers of the EEC in December 1976.

(c) The Hague Conference on Private International Law has adopted a Convention on the Law Applicable to Agency. This convention determined the law applicable to relationships of an international character arising where the agent has the authority to act, acts or purports to act on behalf of a principal in dealing with a third party. The Convention covers (a) the relationship between principal and agent, and (b) the relationship of both principal and agent with third parties arising from the agent's activities.

taken on liability for damage caused by defective products.²⁴

L. *Company law*

32. Bulgaria (CMEA) and Madagascar propose that work be undertaken on the establishment and operation of commercial companies.²⁵

2. *Issues arising from a possible re-ordering of international economic relations*

A. *Legal implications of the new international economic order*

33. The Asian-African Legal Consultative Committee (AALCC) proposes that the Commission should draw up its programme of work with due regard to the policies underlying the new international economic order.²⁶ It notes that, in respect of items included by the Commission in the programme of work established at its first session, the Commission had carried out its work within the context of existing legal frameworks and that, for this reason, its work did not in every instance fully reflect the interests of the world community as a whole nor the relevant resolutions of the sixth and seventh special sessions of the General Assembly concerning the new international economic order. It further suggests the establishment of a working group to study the implications for international trade law of the new international economic order.

34. Czechoslovakia, Hungary and Yugoslavia also propose that work should be undertaken on issues arising from the re-ordering of international economic relations, including legal issues relating to the new International Economic Order. They note that such work would lead to the resolution of international economic problems, and a strengthening of trade relations between States.

Multinational enterprises

35. Czechoslovakia, the German Democratic Republic, Hungary and Poland (CMEA) propose the consideration of legal problems arising from the activities of multinational enterprises. The German Democratic

Republic notes that these activities have an adverse effect on the economies of developing countries.²⁷

Transfer of technology

36. Czechoslovakia proposes that work be undertaken on the transfer of technology.²⁸

B. *Elimination of discrimination in laws affecting international trade*

37. Czechoslovakia, Hungary, Poland (CMEA) and the USSR propose the consideration of legal issues arising from the principle of non-discrimination in international trade. Bulgaria (CMEA), Hungary (CMEA), Poland (CMEA) and the USSR (CMEA) specifically note that attention should be given to the application in international trade of the principles underlying the most-favoured-nation clause.²⁹

CHAPTER V. ISSUES RELATING TO THE ESTABLISHMENT OF A NEW PROGRAMME OF WORK

The mandate of the Commission

1. The mandate of the Commission is defined in section I of General Assembly resolution 2205 (XXI) of 17 December 1966 as "the progressive harmonization and unification of the law of international trade, in accordance with the provisions set forth in section II³⁰ below". When the current work programme was established at the first session of the Commission, attention was directed to a definition of the law of international trade as "the body of rules governing commercial relationships of a private law nature involving different countries". However, there was general agreement that the formulation of a definition was not essential at that stage of the work of the Commission.³¹ While the work so far completed by the Commission has exclusively related to commercial relationships of a private law nature, some proposals for the future work programme (such as work on legal issues related to the new international economic order) will involve subjects of a public economic law nature. In its comments on the future work programme, Yugoslavia has noted the utility of considering the mandate of the Commission in

²⁴ At its tenth session (1977) the Commission decided not to pursue work on this subject, and that the matter be reviewed in the context of its future programme of work at a future session if one or more member States of the Commission should take an initiative to that effect. (A/32/17, para. 44).

²⁵ The Commission of the European Communities is working on the harmonization of the company law of the member States of EEC. This projected harmonization covers such issues as the merger of companies (sociétés anonymes), the structure of such companies and their accounts, and the contents and dissemination of prospectuses containing stock offerings. In addition, an *ad hoc* working group of the Council of Ministers of EEC will examine the draft Statute for European Companies (le statut des sociétés anonymes européennes) which is aimed at the creation of a community-wide law on companies (droit communautaire des sociétés anonymes).

²⁶ On the new international economic order, see General Assembly resolutions 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order", and 3202 (S-VI) of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order"; resolution 3281 (XXIX) of 12 December 1974, entitled "Charter of Economic Rights and Duties of States, and resolution 3362 (S-VII) of 16 September 1975 entitled "Development and International Economic Co-operation". The resolution of AALCC embodying its proposal relating to the new international economic order is contained in document A/CN.9/155 (Yearbook . . . 1971, part two, III).

²⁷ For the previous decision of the Commission on this subject and an exchange of letters pursuant to that decision with the Commission on Transnational Corporations, see document A/CN.9/148. It may also be noted that para. 4 (g) of General Assembly resolution 3201 (S-VI) noted above and section V of General Assembly resolution 3202 (S-VI) noted above, relate to the regulation and control of the activities of transnational corporations.

²⁸ This subject is under consideration by an UNCTAD Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology. It may also be noted that paragraph 4 (b) of General Assembly resolution 3201 (S-VI) noted above, and section IV of General Assembly resolution 3202 (S-VI) noted above, relate to the transfer of technology.

²⁹ The subject of the most-favoured-nation clause is under consideration by the International Law Commission, which at its twenty-eighth session (1976) adopted draft articles on this subject. The draft articles have been circulated to Governments for their comments, and it is expected that the International Law Commission will, at its thirtieth session (1978) consider the draft articles in the light of the comments submitted, and complete its work.

³⁰ Section II of the resolution sets forth the organization and functions of the United Nations Commission on International Trade Law.

³¹ UNCITRAL, report on the first session, (A/72/16), paras. 23 and 24 (Yearbook . . . 1968-1970, part two, I, A).

view of the possible inclusion in the work programme of subjects of this nature.

Co-ordination of work of other organizations

2. General Assembly resolution 2205 (XXI) states that the Commission shall further the progressive harmonization and unification of the law of international trade by, *inter alia*,

- (i) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (ii) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
- (iii) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade.³²

3. The object of these provisions appears to be to make the Commission the body responsible for organizing and directing all work connected with the unification of international trade law. However, up to the present stage of the Commission's work this object has not been fully realized. While the work of some organizations is to some extent carried on in collaboration with the Commission, other organizations both within the United Nations family and outside it sometimes work in areas of international trade law without any reference to the Commission. Several factors may have contributed to this. In some instances, the programme of work of other organizations was established at about the same time the Commission was established, and accordingly there was no proper opportunity for co-ordination. Again, certain organizations do not appear readily to accept the pre-eminence of the Commission in the field of international trade law. Furthermore, the Commission has been mainly concerned with working on its priority subjects, and has directed less attention to co-ordination. It would, however, be appropriate at this stage to examine the question of co-ordination, not only because it has been stressed by some Governments,³³ but because a lack of assertion by the Commission of its proper role could have unfortunate consequences: duplication of work, and a gradual erosion of the area of competence of the Commission. The Commission may therefore wish to consider the methods by which a better co-ordination of work can be achieved.

Methods of work

4. In carrying forward its work, the Commission has adopted a variety of working methods, i.e. established working groups or study groups, entrusted work to a Special Rapporteur, authorized the engaging of consultants, and requested studies to be made by the Secretariat. These working methods have proved ade-

³² Para. 8, subparas. (a), (f) and (g) of the resolution.

³³ Czechoslovakia and the German Democratic Republic, in their comments on the future work programme, note the need for closer co-ordination. Czechoslovakia stresses the need for close co-ordination with other United Nations bodies, in particular with UNCTAD and the International Law Commission, and notes the possibility of collaborating with UNCTAD in its work on charter-parties and marine insurance. It also notes the desirability of co-ordination with UNIDROIT and the Hague Conference on Private International Law. The importance of co-ordination was also stressed during the deliberations leading to the establishment of the first work programme of the Commission (A/7216, paras. 25-28).

quate in relation to the current programme of work where the method of work most appropriate to the subject in question has been selected. The Commission may wish to consider whether any modifications to these working methods are desirable, with particular reference to the future programme of work.

Possible scope of the future work programme

- (i) *Period of projection of the future work programme*

5. In its comments on the future work programme, the United States notes that it is undesirable to include in the future work programme projects that would take many years to complete, since the current rapid growth and change in international trade might result in the projects when completed being of little utility. Certain proposals, however, such as the drafting of a Trade Code, involve work extending over many years. The Commission may wish to consider this issue.

- (ii) *Establishment of working groups*

6. Owing to financial restrictions, the Commission is not free to establish more than three working groups at any one time. At present, the working group on negotiable instruments has yet to complete its work. It is expected that this work in so far as it relates to the preparation of a draft convention on international bills of exchange and international promissory notes, will be completed in 1979.

ANNEX I*

Note by the Secretariat: liquidated damages and penalty clauses

1. The United Nations Commission on International Trade Law at its tenth session requested the Secretary-General

"to consider, as part of the study on the future long-term programme of work of the Commission which is to be presented at the eleventh session of the Commission, the feasibility and desirability of establishing a uniform régime governing liquidated damage clauses in international contracts".^a

This report is written in response to that request.

2. The request by the Commission arose out of a proposal submitted during the course of the tenth session that the draft Convention on the International Sale of Goods include a provision on liquidated damages and penalty clauses^b in contracts for the international sale of goods. During the ensuing discussion, it became apparent that there was considerable support for the idea behind the proposal, i.e. that uniform rules regulating liquidated damages and penalty clauses would be an important contribution to the facilitation of international

* Originally issued as A/CN.9/149/Add.1 on 1 May 1978.

^a UNCITRAL; report on the tenth session A/32/17, annex I, para. 513 (Yearbook . . . 1977, part one, II, A).

^b A significant difficulty in terminology exists which goes to the substance of the subject-matter of this report. In the French, Russian and Spanish languages the technical name for the type of clauses under discussion is "penalty clause". Common law countries distinguish "penalty clauses" from "liquidated damages clauses" for purposes of determining the validity of such clauses. Other legal systems which recognize the validity of clauses which serve as a means of encouraging performance of the contract well as of those intended as an estimate of damages nevertheless use different terms to describe such clauses and differentiate between them in regard to their legal consequences. Since the choice of terminology in a given legal system sometimes leads to expectations as to the consequences arising out of the use of such a clause, it was thought best, at this stage of the Commission's consideration, to use terminology which minimized these expectations.