

EXPLANATORY REPORT (*)

on the

CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS

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I

BACKGROUND TO THE DRAFT CONVENTION

1. The origins of the Convention on Agency in the International Sale of Goods date back to studies initiated by Unidroit in 1935 which ultimately led to the publishing in 1961 of two draft Uniform laws relating respectively to agency in private law relations of an international character and to the contract of commission in the international sale or purchase of goods. This approach was based on a distinction well-known in continental law but unfamiliar to the Common law. The first draft sought to regulate the general case where authority is granted by one person to another to act in the former's name and on his behalf in dealing with a third party while the second, concerned with the specific case of commission agency, was intended to govern the relations which arise when a commission agent undertakes on the principal's behalf but in his, the agent's, name to buy from, or sell goods to, a third party. In addition, whereas the first draft covered the relations created between the principal and the third party as a result of the agent's acts, the second was primarily concerned with the mutual rights and duties of the commission agent and his principal.

2. In view of the difficulties which this approach entailed for Common law countries, a committee of governmental experts convened by Unidroit to end the deadlock suggested narrowing the field in which unification should be attempted and undertook the drafting of a new Uniform law dealing with the practical aspects of agency contracts of an international character for the sale and purchase of goods. In 1972 the committee adopted the text of a draft Uniform law the aim of which was on the one hand to regulate in a single text the effects of the acts of an agent and on the other to lay down a number of rules of general application to the internal relations between the principal and the agent in the context of the international sale of goods. The draft, together with an Explanatory Report prepared by the Secretariat ¹, was circulated among the member States of Unidroit in October 1973 and at the invitation of the Romanian Government a Diplomatic Conference for the adoption of the draft Convention was held in Bucharest from 28 May to 13 June 1979.

3. It soon became apparent however that the difficulties deriving from the complexity of the draft, and especially its ambitious scope of application which covered not only the "external" relations between the principal and the third party and between the agent and the third party but also the "internal" relations between the principal and the agent, were such that it would not be possible to finalise the text of the Convention at Bucharest. The articles adopted by the Conference, which concerned essentially the questions of the scope of application of the Convention and the establishment and scope of the authority of the agent, were appended to a Final Resolution ² which *inter alia* called upon Unidroit to take the necessary steps to ensure that the work begun at Bucharest be completed as soon as possible.

* The present report was drawn up in accordance with a decision taken by the Diplomatic Conference which adopted the Convention. However, it reflects the personal opinions of the author and does not constitute an authoritative instrument of interpretation of the text of the Convention.

The text of the Convention is to be found at page 161 *et seq*, of the Acts and Proceedings of the Geneva Conference for the adoption of the Unidroit draft Convention on Agency in the International Sale of Goods, (hereafter referred to as the "Acts and Proceedings of the Conference"), which were published in the Uniform Law Review, 1983, Vols. I-II.

¹ Study XIX - Doc. 55.

² Acts and Proceedings of the Conference, page 49.

4. Following consultations with a number of experts who had been present at the Bucharest Conference with a view to ascertaining the principal difficulties which would be encountered at a second Conference, the Governing Council of Unidroit decided at its 59th session, held in May 1980, that it would be premature to convene such a Conference on the agency draft in 1981, given the existence of a certain number of problems which called for further consideration. In consequence it was agreed to set up a restricted group of experts representing respectively the Common law, Civil law and Socialist systems, to examine the existing texts and to make recommendations.

5. The findings of the group, which were brought to the attention of the Governing Council at its 60th session in April 1981, were of the utmost importance for the future Convention. The group was unanimously of the opinion that the fact that international sales contracts are often in practice concluded through agents, together with the interest shown by a number of Governments in the adoption of a convention on agency on the basis of the successive drafts prepared within Unidroit, as well as considerations of a systematic character related to recent developments in the unification of the law governing international contracts of sale, and in particular the Hague Uniform Laws of 1964 and the Vienna Sales Convention of 1980, indicated the desirability of adopting a convention on some aspects at least of the law of agency.

6. With regard to the work already conducted by Unidroit on the subject of agency, the group believed that considerable progress had been made in the drafts which had culminated in that approved by the committee of governmental experts in 1972 but it came to the conclusion that the option taken at the Bucharest Conference in favour of a wide scope of application of the future Convention had been based on too ambitious a conception of the draft, and in particular on too great an approximation of its scope of application to that of Article 1 of the Hague Convention of 1978 on the Law Applicable to Agency. While such a wide scope of application might be acceptable in a convention concerned with the determination of the law applicable to agency relations, a Uniform law convention seeking to regulate many kinds of agency relationships, however remotely removed from the ultimate conclusion of an international sales contract, and in addition all aspects of the activity of such agents, was in the group's view quite another proposition, granted not only the considerable differences existing between various legal systems in their approach to agency in general, but also the distinctions drawn under the domestic law of many States between different kinds of agency contracts and intermediaries. Such a wide-ranging scheme of unification could only be brought about, even assuming it to be possible, with great difficulty and certainly not within a realistic time-scale whereas the elaboration of an international instrument with a narrower scope of application governing the effects of an agency situation on the relations between the principal or the agent on the one hand and the third party on the other would offer much greater prospects of success. These would be greatly increased if the scope of the prospective Convention were to be further restricted to those cases where one person is authorised to conclude, or purports to conclude, a contract for the sale of goods on behalf of another person, the principal, with a third party and when the places of business of the principal and the third party are situated in different States.

7. Although some members of the Governing Council had misgivings at the idea of restricting the scope of application of the future Convention to the so-called "external" relations between the parties, they were nevertheless prepared to follow the majority in adopting this approach on condition that this would not preclude the preparation by the Secretariat of Unidroit of a detailed study of the internal relations between the principal and the agent with a view to the possible drawing up of uniform rules in that connection.³

8. In these circumstances the Governing Council decided that a committee of governmental experts should be convened for the revision of the agency draft on the basis of a new text to be prepared by the Secretariat, taking account principally of the decision to delete Chapter III of the former draft dealing with the relations between the principal and the agent.⁴ This committee of governmental experts, in whose work not only the member States of Unidroit but also those States which were members of the

³ See also the text of the Final Resolution in the Acts and Proceedings of the Conference, page 175.

⁴ This new text was reproduced in Study XIX – Doc. 58.

United Nations Commission on International Trade Law (UNCITRAL) but not of Unidroit were invited to participate, together with observers from the interested international organisations, met in Rome from 2 to 13 November 1981. The committee thoroughly revised the text prepared by the Secretariat and came to the conclusion that the new draft approved by it ⁵ would provide a valid basis for discussion at a Diplomatic Conference for the adoption of the prospective Convention on Agency in the International Sale of Goods.

9. Shortly after the meeting of the committee of governmental experts the Government of Switzerland announced its willingness to host a Diplomatic Conference for the adoption of the draft Convention on Agency in the International Sale of Goods on the basis of the text drawn up by the committee of experts. The Conference was duly held in Geneva from 31 January to 17 February 1983 and was attended by delegations from 49 States with, in addition, observers from nine other States and seven intergovernmental organisations.

10. The text of the Convention on Agency in the International Sale of Goods was adopted on February 15 1983 and opened to signature on 17 February 1983 at the closing session of the Conference, on which occasion the Convention was signed by the representatives of Chile, the Holy See, Morocco and Switzerland.

II

GENERAL CONSIDERATIONS

11. Given the gradual narrowing down over the years of its scope of application, the Convention on Agency in the International Sale of Goods (hereafter referred to as "the Geneva Convention" or simply as "the Convention"), can no longer be viewed as an attempt to codify the law relating to international agency; rather it should be seen as a supplement, albeit an important one, to the existing conventions dealing with the international sale of goods, namely the 1964 Hague Conventions, which themselves originated as Unidroit drafts, relating to Uniform Laws on the International Sale of Goods and on the Formation of Contracts for the International Sale of Goods and, more recently, the United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as "the Vienna Convention") which may in the course of time be expected to supersede the 1964 Conventions on which it is based. Those conventions, indeed, do not deal with certain special aspects of contracts for the international sale of goods concluded through an agent and the fact that the Vienna Convention itself is the fruit of some 50 years work, first in Unidroit and then in UNCITRAL, is a testimony to the difficulties which had to be overcome in the elaboration of the Geneva Convention since unification in the field of agency is considerably more difficult to achieve than in relation to contracts of sale. This is so not only because the agency relationship is of a tripartite character but also on account of the distinctions made in the various legal systems with regard to the buying and selling of goods through agents. ⁶(6)

12. The first distinction which may be drawn is between cases of what continental legal writers term "direct" and "indirect" agency. In the typical case of direct agency, which is known to all legal systems, the principal and the agent agree that the agent shall act in the principal's name and on his behalf in dealing with a third party. This agreement or "contrat de mandat" as it is defined in the French Code Civil, and adopted in other legal systems, not only creates an agency relationship between the principal and the agent but also constitutes an authorisation whereby the agent may, when acting within that authorisation, directly bind the principal and the third party to each other. In such cases, the agent is not

⁵ See page 3 *et seq.* of the Acts and Proceedings of the Conference.

⁶ It should be understood that the following paragraphs contain only the briefest outline of the most typical examples of agency situations in the international sale of goods and of the general approaches adopted in the various legal systems. Such specific questions as the agent's acting without or in excess of his authority, ratification of such acts by the principal and the doctrine of apparent authority will be dealt with hereafter in the detailed commentary on the relevant articles of the Convention.

bound to the third party except in rare cases, as for example where the agent undertakes joint liability with the principal.

13. From this point on, however, marked divergencies appear between the Common law and the Civil law systems for under what may be termed the "unitarian" approach of the Common law, the effects normally ascribable to direct agency may also be produced in situations which in the Civil law would be classed as indirect agency. Thus a duly authorised agent in Common law jurisdictions may establish direct contractual relations between the principal and the third party even though the third party was unaware of the identity of the principal, once again with the consequence that the agent will, as a general rule, not himself be liable to the third party under the contract. Indeed the doctrine of the undisclosed principal goes one step further still in that the Common law recognizes, subject to certain limitations, a right of intervention on the part of a principal against a third party who did not know that the agent was acting as an agent at all and who believed that he was contracting with the agent as a principal. In this case the principal's right of intervention is balanced by the right of the third party to choose, but then he is bound by his choice, to proceed against the agent, who is both entitled and liable under the contract, or against the principal once the third party discovers his existence.

14. In the continental systems however a different picture emerges. In principle it is only in the case of direct agency as described in paragraph 12 above that the agent acting within his authorisation may directly bind the principal and the third party. All other cases fall within the category of indirect agency. that is to say where the principal authorises the agent to carry out transactions on the principal's behalf but in the name of the agent, the intention being that the agent should assume all rights and liabilities vis-a-vis the third party while being bound to the principal as an agent in relation to that principal who himself remains outside the contract concluded between the agent and the third party. The typical, and by far the most important, example of indirect agency in the law of sale is commission agency where the agent buys or sells goods in his own name on behalf of the principal. This institution is unfamiliar to the Common law which does not recognize the distinction between direct and indirect agency, although the effects of the latter are in practice produced in the Common law in cases where a principal does not authorise the agent to bind him directly or where the agent and the third party agree that the agent is binding himself alone.

15. Notwithstanding these fundamental differences of approach between the Common law and Civil law systems, and indeed important conceptual variations among the latter ⁷ an examination of practice will show that a number of departures from principle have been made with the result that in certain Civil law systems the indication of the principal's name is not considered necessary for the effect of direct agency to be brought about ⁸ while there are cases where the effects of direct agency are produced even by the intervention of a commission agent acting in his own name. ⁹

16. In these circumstances, and given the ever-increasing volume of international trade, the main aim of the Convention is to establish as simple and clear a regime as possible to govern the legal consequences of the acts of an agent who has been authorised by a principal to conclude a contract of sale of goods with a third party and to this end it has been framed in such a way as to regulate virtually all situations which are common in international trade.

17. From a structural angle, the Convention contains a Preamble and 35 articles divided into five chapters as follows:

Chapter I - Sphere of application and general provisions (Articles 1 to 8)

Chapter II - Establishment and scope of the authority of the agent (Articles 9 to 11)

⁷ In particular the theory of the rigid distinction drawn in some systems between on the one hand the contract between the principal and the agent and on the other the agent's power of representation, i.e. his power to enter into a contract with the third party for the account of the principal, for which see paragraph 54 *et seq.* below.

⁸ E.g. Swiss "Code des Obligations", Art. 32; German theory of "Handeln für den, den es angeht".

⁹ E.g. German HGB, § 392, II; Swiss "Code des Obligations", Art. 401; Italian Civil Code, Arts. 1705, II, 1706, I 1 and 1707.

Chapter III - Legal effects of acts carried out by the agent (Articles 12 to 16)

Chapter IV - Termination of the authority of the agent (Articles 17 to 20)

Chapter V - Final provisions (Articles 21 to 35)

III

COMMENTARY ON THE PROVISIONS OF THE CONVENTION

Preamble

18. The structure of the preambular provisions follows closely that of the Vienna Convention. Apart therefore from references to the desirability of establishing common provisions concerning agency in the international sale of goods and to the objectives of the Vienna Convention itself, the Preamble stresses the development of international trade as an important element in promoting friendly relations among States, bearing in mind the New International Economic Order, and the value of the uniform rules contained in the Convention as a contribution to the removal of legal barriers in international trade and to the promotion of the development of international trade.

CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

19. This chapter comprises eight articles, four of which (Articles I to 4) concern the sphere of application of the Convention, while four others (Articles 5 to 8) contain general provisions relating to the application and interpretation of the Convention. The language of a large number of these provisions is based on that in corresponding articles of the Vienna Convention and, in the case of Articles 3 and 4, on that to be found in the Hague Convention on the Law Applicable to Agency (hereafter referred to as "the Hague Convention").

Article 1

20. This article sets out the basic rules regarding the substantive sphere of application of the Convention and to this end *paragraph (1)* provides for a first condition, namely that for the Convention to apply the agent must have authority, or purport to have authority, on behalf of the principal to *conclude a contract of sale of goods with a third party*. It is indeed clear that with the decision not to deal in the Convention with the internal relations between the principal and the agent there was no longer any justification for its applying to those cases, typified by the institution of commercial agency in Civil law countries, where the agent is simply authorised to negotiate on behalf of the principal but not to conclude a contract on his behalf.

21. The second point to notice regarding the language of paragraph (1) is that the agent must have *authority or purport to have authority* to act (in the French text "*a le pouvoir d'agir ou prétend agir*") on behalf of the principal for the Convention to apply. This wording is sufficiently broad to cover the most frequent agency situations in the sale of goods, namely those where the agent acts within the authority conferred on him by the principal, those where the agent exceeds his authority or acts as a total *falsus procurator* or where his acts are deemed to be based on apparent authority conferred by the principal. Although the difference in wording between the English and French texts is due essentially to stylistic considerations, it must be admitted that a literal reading of the French text, which employs the expression "prétend agir", suggests that the Convention might cover the institution of *negotiorum gestio*. Given, however, the improbability of cases of *negotiorum gestio* arising in international trade other than in highly exceptional circumstances, the slight difference between the two language versions would seem to be of virtually no practical consequence.

22. *Paragraph (2)* makes it clear that the Convention governs not only the conclusion of the contract by the agent but also any acts undertaken by him for the purpose of concluding it or in relation to its performance. It is not however necessary for the agent actually to conclude the contract for the provisions of the Convention to apply, provided he had authority to do so or purported to have such authority. Nor is the Convention concerned with the validity of the sales contract as such given that the applicability of the Convention is dependent not on whether the contract of sale itself is valid but on whether the agent had authority to conclude or purported to have authority to conclude the contract.

23. *Paragraph (3)* affirms the principle that the Convention is concerned only with relations between the principal or the agent on the one hand, and the third party on the other, so that by implication it does not deal with the internal relations between the principal and the agent. As will become apparent from the commentary on a number of articles of the Convention, and in particular Articles 9 and 17, a total disassociation of the external and internal relationships has not however been achieved by the Convention and indeed it was the view of a number of its authors that such a disassociation, even if possible in strictly theoretical terms, was not in practice feasible.

24. With regard to *paragraph (4)*, it is sufficient to note that by stating that the Convention applies whether the agent acts in his own name or in that of the principal, it emphasizes the fact that the Convention is to apply irrespective of whether the agency is, in Civil law phraseology, direct or indirect, or in other words whether the agent is a "*représentant*" or, for example, a "*commissionnaire*", in which connection attention may be drawn to a question of terminology. The three parties involved in the agency relationship are referred to in English from paragraph (1) onwards by the terms "principal", "agent" and "third party", all of which belong to the legal vocabulary of the English language. There is, however, a difficulty in French as the relationships governed by the Convention comprise both agency ("*la représentation*") and the contract of commission ("*le contrat de commission*"). In order to underline the widening of this notion and to avoid a possible restrictive interpretation of these terms, the person in the centre of the relationship considered, who acts on behalf of another, is referred to throughout in the French version by the term "intermédiaire". He may be either a "représentant" or a "commissionnaire" in the French sense. The fact that the term "intermédiaire" has no precise legal meaning makes it suitable to indicate the party characterising the whole legal category considered. This single terminological innovation seems sufficient to rule out all risk of confusion; it was however decided to retain the French terms "représenté" and "représentation" for which no suitable substitute was found.

Article 2

25. The provisions of this article lay down further conditions for the applicability of the Convention. In the first place, the principal and the third party, that is to say the two parties with the direct interest in the contract of sale, must under *paragraph (1)* have their places of business in different States, a requirement similar to that to be found in respect of the buyer and seller in Article 1 (1) of the Vienna Convention.

26. What must be international in character is not therefore the agency contract, since the principal and the agent may have their places of business in the same State, but the contract of sale, the intention of the authors of the Convention being that it should, as a general rule, be applicable to cases falling under the Vienna Convention; it should however be noted that the coincidence is far from complete. In the first place the Geneva Convention will, subject to the conditions of paragraph (1) (a) or (b) being satisfied, apply whether or not the principal and the third party have their places of business in States which are Parties to the Vienna Convention. The Geneva Convention may also apply to cases where a commission agent concludes a contract for the sale of goods in a State where both he and the third party have their places of business, which would not be regarded as an international sale of goods under the Vienna Convention, always provided however that the principal has his place of business in a State different from that of the commission agent and the third party. This is however an inescapable consequence of the concept that the places of business of the principal and the third party should be

crucial in determining the international character of the relationship and the solution would not seem to create any conflict with existing conventions regulating the international sale of goods.

27. Sub-paragraphs (a) and (b) further restrict the scope of application of the Convention. The additional alternative requirements laid down are that either the agent must have his place of business in a Contracting State, or that the rules of private international law lead to the application of the law of a Contracting State, this latter provision corresponding to Article 1 (1) (b) of the Vienna Convention.

28. *Sub-paragraph (a)* seeks to strike a balance between the view of those who favoured a very wide sphere of application of the Convention, i.e. that it should apply whenever one of the three parties to the agency relationship has his place of business in a Contracting State, and those who preferred a more restricted scope, designed in particular to avoid a possible source of conflict with the provisions of Article 11 (b) of the Hague Convention, which stipulates that the internal law of the State in which the agent has acted shall apply if the third party has his business establishment or, if he has none, his habitual residence in that State. It was in this connection argued that in a case for example where an agent, with his place of business in a State Party to the Geneva Convention, concludes a contract with a third party in the State where the third party has his place of business and that State is not a Party to the Geneva Convention, then a judge in a State Party to both the Geneva and the Hague Conventions would, under Article 11 (b) of the Hague Convention, be required to apply the internal law of the State of the third party's place of business and, at the same time, to apply the rules of the Geneva Convention in accordance with Article 2 (1) (a) thereof.

29. The actual text of paragraph (1) (a) however represents the predominant feeling that there was on the one hand a need for an objective connecting factor to limit the sphere of application of the Convention and, on the other, that the criterion of foreseeability of the application of the Convention was of prime importance in determining what that connecting factor should be. This requirement seemed best to be met by the choice of the agent's place of business since he is the only person whose identity is necessarily known to both the principal and the third party, each of whom could be presumed to be aware of the agent's place of business or to be in a position to ascertain it. As regards the possible conflict with the Hague Convention, it was recalled at the Diplomatic Conference that Article 2 (1) (a) contains a rule determining the sphere of application of a convention aimed at the unification of substantive law rather than a provision unifying choice of law rules in a convention on private international law and that it was not therefore necessary to follow in every detail the rules relating to choice of law established by the Hague Convention. In addition, the suggested conflict of conventions might be more apparent than real as, in the first place, problems could only arise if the court seized of the case were in a State Party to the Hague Convention for otherwise that court would not be obliged to apply it, while secondly, if it were contended that sub-paragraph (a) did indeed lay down a rule of private international law, then a court in a State Party to both conventions might invoke Article 22 of the Hague Convention which provides that "the Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes a party" (see below paragraph 111 of this Report). Finally, the practical argument was advanced in support of the solution contained in paragraph (1) (a) that it would scarcely be conducive to the good order of international trade if the acts of an agent with his place of business in a State Party to the Geneva Convention concluding contracts on behalf of his principal in the course of a business trip taking in a number of States were to be subject to the national law of each of the States where he acted, and only to the rules of the Convention where the States in question were Parties to the Geneva Convention.

30. The alternative requirement for the application of the Convention laid down in *paragraph (1) (b)* of Article 2 is that the rules of private international law of the forum lead to the application of the law of a Contracting State, although it should be recalled that the reservation to Article 2 (1) (b) provided for in Article 28 of the Convention permits States, especially the Socialist States which have enacted special legislation to deal with international trade transactions, to apply that legislation in preference to the Convention in cases other than those contemplated by Article 2 (1) (a).

31. *Paragraph (2)* constitutes a necessary qualification to the general rule laid down in paragraph (1) in those cases where the third party neither knew nor ought to have known at the time of contracting that the agent was acting as an agent for if the agent had his place of business in the same State as the third party, the latter would have thought that he was concluding a purely domestic sales contract. The effect of paragraph (2) is to remove such cases from the scope of application of the Convention which will however apply if the third party knew or ought to have known that his co-contractant's, i.e. the agent's, place of business was in a State different from his own as there would then be no "surprise" element as to the international character of the transaction.

32. *Paragraph (3)* is modelled closely on Article 1 (3) of the Vienna Convention. Indeed the only difference is the addition of the words "of sale" after "contract" in line 2, evidently unnecessary in the Vienna Convention, which serves to emphasize the close link between that instrument and the Geneva Convention. The effect of the provision is to follow a modern tendency of disregarding the distinction drawn in a number of legal systems between contracts of a civil character and those of a commercial character depending on the nature of the transaction considered or the character of the parties.

Article 3

33. This article excludes certain agency relationships from the sphere of application of the Convention because of their special character although it has not been considered necessary to exclude agency relations in respect of the sale of certain kinds of property so as to secure conformity with Article 2 of the Vienna Convention, as the reasons for excluding such property or certain contracts of sale from the application of the Vienna Convention were not thought to be decisive in a convention on agency where different considerations applied.

34. *Paragraph (1) (a)* excludes "the agency of a dealer on a stock, commodity or other exchange" on account of the special rules which exist in most countries in regard to such transactions and which often vary according to the market concerned. It should be noted in this connection that the use of the words "a dealer on a stock, commodity or other exchange" should be interpreted in a broad sense so as to cover not only dealings on the floor of an exchange but also those conducted by modern means of telecommunications.

35. As regards the exclusion of agency of an auctioneer under *paragraph (1) (b)* it is to be noted that sales by auction are also excluded from the sphere of application of the Vienna Convention (Article 2 (b)). The authors of the Geneva Convention likewise wished to avoid including auction sales, principally because the auctioneer is considered as being the agent between the buyer and the seller.

36. *Paragraph (1) (c)* is modelled on Article 2 (c) of the Hague Convention, the only difference being the substitution of the words "in the law of matrimonial property" for the phrase "in matrimonial property regimes" in the English text. Since however it was not the intention in any way to alter the meaning of the provision it would seem in order to refer to the Explanatory report on the Hague Convention where it is stated that "the intention of Article 2 (c) is to exclude cases of non-consensual agency in the fields of family law, matrimonial property and succession. These kinds of agency belong more to the law governing personal status and property rights than to the law of contract"¹⁰. The author of that report further notes that the cases of agency falling within the provision are those which in Civil law systems would be regarded as "représentation légale" as opposed to "représentation volontaire" and that it is the concept of "représentation légale" which it is sought to convey in English by the expression "agency by operation of law".

37. The purpose of *paragraph (d)* is to prevent the Convention affecting national rules regarding the possibility to act on behalf of a person without capacity and extends to cases such as those of tutors or guardians who hold their power by law or through a judicial authorisation and not by virtue of a contract

¹⁰ Hague Conference on private International Law: Actes et documents de la Treizième session, Tome IV, page 411, paragraph 130 *et seq.*

of agency. The term "capacity to act" has been chosen in preference to the words "full legal capacity" which had been adopted at Bucharest, as what is here at issue is not legal capacity in the sense of capacity to have rights and duties, which is enjoyed by all natural and legal persons, but rather contractual capacity.

38. Like sub-paragraph (c), *sub-paragraph (e)* is taken over from the Hague Convention (Article 2 ((d))), this time however without any change in the wording. As is pointed out in the Explanatory report on the Hague Convention, the cases falling under this provision, like those mentioned in Article 3 (1) (c) of the Geneva Convention, have little relevance to a convention concerned with commercial law¹¹. It is also indicated in that report that "the judicial or quasi-judicial authority which has created the agency or has it under its direct control will normally apply its own rules to regulate the operation of the agency"¹² and that there will often be an overlap between agency falling under those paragraphs of the Hague Convention which are reproduced as paragraphs (c) and (e) of Article 3 (1) of the Geneva Convention. It should moreover be borne in mind that the reference to agency subject to the "direct control" of a judicial or quasi-judicial authority is designed to limit the kind of agency covered by these words to agency under the direction of the court, as, for example, where the agent cannot take any steps in the course of his agency without first referring to the court¹³. In the course of its discussions the Conference sought to find language which would reflect more clearly the intended underlying correspondence between the words "quasi-judicial" in the English version and "administrative" in the French. This attempt however proved to be no more successful than that of the authors of the Hague Convention and it was therefore ultimately decided to retain the language employed in that instrument.

39. Although it was not thought necessary to follow the precedent of Article 2 (a) of the Vienna Convention which excludes the application of that Convention to "goods bought for personal, family or household use", it was nevertheless felt by a number of delegations that the increasing trend in favour of consumer protection could result in special provisions being enacted in certain States which might be in conflict with the rules of the Convention. For this reason *paragraph (2)* of Article 3 provides that nothing in the Convention affects any rule of law for the protection of consumers. The expression "any rule of law" is to be understood in the broadest possible sense in that it refers not only to the national law of the forum but also to the rules of any other law which might, in accordance with the rules of private international law, be applicable by the judge seized of the case.

Article 4

40. Apart from a few minor drafting amendments to the French text, Article 4 reproduces the corresponding provision of the Hague Convention (Article 3). *Paragraph (a)* is concerned with the representation of a company¹⁴ by its organs, acting as such, which in many Civil law systems is not regarded as a case of agency at all. The Convention does not therefore apply when such an organ acts within the authority conferred on it by law or by its constituent documents. If however, such an organ acts outside the authority conferred on it, it is no longer acting as an organ and is in the same position as any other agent of the company. In these circumstances the provisions of the Convention will apply to determine the legal effects of the acts carried out by the organ. Similarly, they will apply in those cases where the organ acts not by virtue of the actual authority conferred upon it in its capacity as such, but rather on the basis of a special authorisation conferred in relation to a particular transaction or type of transaction.

41. *Paragraph (b)* of Article 4 provides that "the trustee shall not be regarded as an agent of the trust, of the person who has created the trust or of the beneficiaries", so as to avoid the possibility of courts in countries unfamiliar with the concept of the trust treating the trustee as an agent for the purposes of the

¹¹ Ibid. page 409, paragraph 121.

¹² Ibid. page 411, paragraph 133.

¹³ Ibid. page 412, paragraph 135.

¹⁴ The word "company" is used in this report to embrace the terms "corporation, association, partnership or other entity" to be found in Article 4 (a) and the, word "organ" to designate the "organ, officer or partner" mentioned in that provision.

Convention. As pointed out however in the Explanatory report on the Hague Convention, a trustee may act as a principal, as for example when he appoints an agent to sell trust property, or even as an agent of persons unconnected with the trust ¹⁵.

Article 5

42. This article corresponds, subject to the necessary changes to take account of the agency situation as opposed to sales contracts, to Article 6 of the Vienna Convention. It endorses the widely accepted view that international trade law conventions should not as a rule deprive the parties of their freedom at any time to choose alternative rules to govern their transaction. Set against this consideration however is the need to protect each of the three persons involved from any prejudicial effects on his rights under the Convention of an agreement between the other two parties to exclude the application of the Convention or to derogate from or vary its provisions. This qualification of the autonomy of the will of the parties found expression in Article 5 (2) of the draft as submitted to the Conference which provided that "any such exclusion or derogation agreed upon by only two of the parties shall not affect the rights of the other party under this Convention".

43. Given however the approach of restricting the sphere of application of the Convention to relations between the principal or the agent on the one hand and the third party on the other, attempts were made to simplify, the language of Article 5 and in the text submitted by the Committee of the Whole to the Conference it was provided that "the third party may agree with the principal or with the agent to exclude as between themselves the application of this Convention or ... derogate from or vary the effect of any of its provisions". It was however suggested that this text was defective in that the words "as between themselves" would not allow for the possibility of an agent agreeing with the third party on the basis of his principal's instructions to vary the provisions of, or exclude, the Convention in regard to the relations between the principal and the third party. In consequence the text was redrafted and adopted in its final form to read "the principal, or an agent acting in accordance with the express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or, ... to derogate from or vary the effect of any of its provisions".

44. As it stands, the provision fully meets the twofold aim of protecting the third party and of permitting full effect to be given to the wishes of the principal but at the same time it must be read in the light of the general principles of the law of contract as well as of Article 6 (1) of the Convention which calls for the observance of good faith in international trade in its interpretation, so as to avoid the possible implication that the principal and the third party may by virtue of Article 5 make agreements prejudicial to any rights of the agent under the Convention.

45. Finally, in connection with Article 5, it is to be noted that the possibility to derogate from or vary the effect of any of the provisions of the Convention does not extend to the requirement of writing when this must be satisfied in accordance with the provisions of Article 11.

Article 6

46. This provision, which corresponds word for word to Article 7 of the Vienna Convention, is directed principally to those called upon to settle disputes relating to the application or interpretation of the Convention. *Paragraph (1)* encourages them on the one hand to have regard to the international character of the Convention and thus to avoid interpreting it simply in the light of their own legal principles and traditions, and on the other hand to ensure the observance of good faith, which is of crucial importance for the development of international trade.

47. *Paragraph (2)* for its part deals with the problem of gaps in the Convention and provides that, where possible, matters not expressly dealt with in it should be settled in conformity with the general

¹⁵ Hague Conference on Private International Law: Op. cit. page 415, paragraph 148.

principles on which it is based. In the absence of such principles, a judge should not automatically have recourse to the law of the forum but rather to the law applicable by virtue of the rules of private international law.

Article 7

48. This article, the language of which follows very closely that of Article 9 of the Vienna Convention, describes the extent to which usages and practices, always assuming of course that their validity is recognized, are binding in the relations between the principal or the agent on the one hand, and the third party on the other. The effectiveness of usages and practices affecting the relations between the principal and the agent naturally falls outside the scope of the Convention in view of the wording of Article 1 (3), although nothing will prevent a court from taking account of such usages, for example in determining whether there may be an implied authorisation under Article 9 (1).

49. By the combined effect of the two paragraphs of the article usages or practices agreed by the principal and the third party, or by the agent and the third party, are binding on them. For a usage or a practice to be impliedly applicable to their relations under *paragraph (2)* it must meet two conditions: it must be one "of which the parties knew or ought to have known" and it must be one "which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned". The expression "parties to agency relations of the type involved in the particular trade concerned" is intended to emphasize the link between the usage and the agency relation and at the same time the relevance of that usage to the particular trade with which the underlying contract of sale is concerned. The trade may for example be restricted to a certain product, region or set of trading partners. Usages or practices which are binding on the parties will, in the event of conflict with any provisions of the Convention, prevail according to the principle of the autonomy of the parties stated in Article 5.

Article 8

50. This article deals with situations in which one of the parties has more than one place of business or has no place of business. These are matters of crucial importance for the determination of whether the Convention will apply in a given case since, under Article 2, it is necessary that the places of business of the principal and the third party be in different States and, unless Article 2 (1) (b) applies, that the agent's place of business be in a Contracting State. It becomes necessary therefore to determine which place of business is relevant for the purpose of Article 2.

51. According to *paragraph (a)* of Article 8, the relevant place of business is that which has "the closest relationship to the contract of sale" since it is through the contract of sale that the relations between the principal or the agent on the one hand and the third party on the other, have been created. The language of paragraph (a) follows that of Article 10 (a) of the Vienna Convention subject to three minor differences. In the first place it proved necessary in the Geneva Convention to refer expressly to "the contract of sale" and not just to the "contract" as does the Vienna Convention, so as to avoid any possible source of confusion between the sales contract and any agency contract which may have been concluded between the principal and the agent. Secondly, the Vienna Convention refers to "the contract and its performance" while there is no reference to performance in the Geneva Convention. There was some support at the Conference for a proposal to include an express reference to performance of the contract of sale in Article 8 (a) so as to make it clear that not only the place of the conclusion of the contract but also the place where it is negotiated and the place where the goods contracted for are to be delivered should be taken into account in determining which place of business should be regarded as being relevant. In view, however of certain drafting difficulties it was ultimately decided to include no reference to performance in Article 8 (a), on the understanding however, that no departure in substance from Article 10 (a) of the Vienna Convention was intended. Finally, the words "at the time of contracting", already used in Article 2 (2) of the Convention, are to be considered as having exactly the

same meaning as the longer phrase "at any time before or at the conclusion of the contract" employed in the Vienna Convention.

52. *Paragraph (b)*, which follows word for word Article 10 (b) of the Vienna Convention, deals with the case where a party has no place of business. Most international transactions of the type contemplated by the Convention are concluded by businessmen who have recognised places of business. Occasionally, however, a person who does not have an established place of business may enter into a contract of international sale of goods or act as an agent in connection with such a contract. Paragraph (b) provides that in this situation reference is to be made to his habitual residence.

CHAPTER II - ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

53. The three articles of this chapter were the source of lengthy debate at the Diplomatic Conference which adopted the Convention. In particular they constitute, as also to a certain extent do the provisions of Chapter IV relating to termination of authority, an exception to the general approach of the Convention of not dealing with the internal relations between the principal and the agent. The reason for this change of approach in Chapter II, and in particular in Article 9, is that independently of theoretical considerations it is in practice the intention of the principal that the agent should carry out certain acts in the principal's name or on his behalf which sets in motion the chain of events which lead to the establishment of the external relations. The general feeling at the Conference was however that objective criteria should be laid down to determine whether or not in a given case this intention may be ascertained and these criteria have been expressed in the concept of the express or implied authorisation of the agent by the principal.

54. If however logic has to a certain extent been sacrificed to accommodate overriding practical considerations, the distinction drawn in a number of Civil law systems under the concept of separation or the "Abstraktions-prinzip", between on the one hand the mandate, that is to say the contract between the principal and the agent, and on the other the power of representation or in other words the agent's power to enter into a contract with a third party for the account of the principal, has been maintained through the distinction drawn between the authorisation as such and the authority.

55. This doctrine of separation has not been followed in all Civil law countries however and it is indeed unknown in the Common law where an agent acting on behalf of a principal within the authority conferred on him is, as it were, identified with the principal. Thus the agent's authority is not, as under the doctrine of separation, an abstract element but rather it derives from the mandate or authorisation and is indeed inseparable therefrom.

56. The wording of Article 9 will be discussed below in the detailed commentary on that provision but it should be noted that it does not confirm or deny any of the theoretical approaches briefly described in the preceding paragraphs of this Report as nowhere in the Convention is the relationship between authorisation and authority defined. In accordance with the general approach of the authors of the Convention the aim has been to establish a pragmatic basis for the determination of the legal effects of acts carried out by the agent which are dealt with in Chapter III.

Article 9

57. *Paragraph (1)* provides that "the authorisation of the agent by the principal may be express or implied". While the notion of the principal's expressly authorising the agent to act on his behalf is clear enough, the concept of implied authorisation was the subject of extensive discussion during the Conference and calls for some comment. On the one hand certain delegations, especially those whose law adopts a more formalistic approach and many of which insist on authorisation being in writing, were opposed to the inclusion of implied authorisation and sought at least the possibility of being able to enter a reservation similar to that concerning written form in Article 11. A majority however stressed the importance of implied authorisation in business practice and considered that if provision were not made

for it then the Convention would lose much of its value. They were also sceptical as to the desirability and even the feasibility of introducing language which would describe the concept in greater detail and while admitting that implied authorisation could arise from a written document, they believed that the concern expressed by the delegations opposed to the inclusion of a reference to implied authorisation was to a large extent met by the possibility of a reservation on written form.

58. Whereas implied authorisation differs from express authorisation in the sense that agreement of the principal to the agent's acting on his behalf must be inferred from conduct or from other circumstances, as for example by the principal's consenting to certain acts by the agent over a period of time which have not been expressly authorised by him, the two notions share the common feature that the principal actually intends the agent to act on his behalf. This distinguishes implied authorisation from the doctrine of so-called "apparent authority" (see below paragraph 84 *et seq.* of this Report), where although the principal may not have intended that a person should act on his behalf, nevertheless the principal's conduct is such that it is possible to construe a holding out or a representation by him that the person with whom the third party is dealing is in fact to be regarded as the duly authorised agent of the principal. This concept bears a close kinship to both the Common law doctrine of agency by estoppel or holding out and the Civil law doctrines of "Scheinvollmacht", "Procura apparente" and "mandat apparent" as these are found in the German, Italian and French legal systems respectively. Put another way, it could be stated that whereas in the case of implied authorisation it is the agent who is led by the principal's conduct to believe that he has the authority to act on behalf of the principal, in the circumstances which give rise to apparent authority it is the third party who is led to believe by the principal's conduct that the agent has such authority.

59. Although there was some support at the Conference for maintaining a reference to the doctrine of apparent authority in Chapter II, a majority of delegations were opposed to such a solution. In the opinion of some of them "apparent authority" is no authority at all. Certainly it could in no way be regarded as being based on any authorisation by the principal so that it would be illogical to deal with it in the same manner, or even in the same context, as actual authorisation, and in these circumstances it was decided that the question of apparent authority should be regulated in Chapter III and more particularly in Article 14 (2).

60. *Paragraph (2)* of Article 9 extends the agent's authority to perform all of the acts that may prove to be necessary to achieve the purposes of the agency but which were not foreseeable at the time of authorisation and which had therefore not been the subject of special authorisation, or which, without being expressly referred to in the authorisation, would normally be performed by the agent in relation to the contemplated transaction. It is, in other words, the authority deriving from the authorisation which is implied rather than the authorisation itself.

Article 10

61. This article provides that authorisation need not be given in or evidenced by writing, that it is not subject to any other requirement as to form and that it may be proved by any means, including witnesses. By so doing, it allows maximum freedom to businessmen and in this respect follows Article 11 of the Vienna Convention. In passing, it may be mentioned that the Conference considered the possibility of including a provision similar to Article 13 of the Vienna Convention which provides that for the purposes of that Convention "writing" includes telegram and telex. It was however decided not to introduce such a provision since the model in the Vienna Convention had not made full allowance for more modern forms of communication as, for example, where information appears on a screen but is subsequently erased.

Article 11

62. It is well known that the legislation of certain States, especially the Socialist States, requires all acts relating to foreign trade concluded by their economic organisations to be made in writing and it was principally at the request of those States that Article 11 was introduced. The effect of Article 11 is to permit a State to make a declaration under Article 27 to the effect that any provision of Article 10, Article 15 or Chapter IV of the Convention which allows an authorisation, ratification or termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in that State. The wording of Article 11 is based on that of Article 12 of the Vienna Convention but it is of necessity more developed as it is essential to cater not only for authorisation and ratification, which are in principle subject to no requirements as to form by virtue of Articles 10 and 15 (8) respectively of the Geneva Convention, but also for the provisions of Chapter IV thereof which deal with termination of the agent's authority and where no reference whatsoever is made to formal requirements. It should moreover be recalled that it is expressly provided that the parties cannot derogate from the provisions of Article 11, a stipulation which reiterates the exception already made to the contractual freedom of the parties to derogate from or vary the effect of the provisions of the Convention in Article 5 (1) (see above, paragraph 45 of this Report).

63. Finally, it should be noted that the Conference gave lengthy consideration to the possibility of including a provision to the effect that Article 11 should not apply to cases of undisclosed agency where the third party did not know that the agent had his place of business in a State which had made a declaration under Article 27. The purpose of this proposal was analogous to that underlying Article 2 (2), and more precisely to avoid the "surprise" element which would arise for a third party who would, for example, be deprived of the possibility of exercising his rights directly against the principal under Article 13 by an undisclosed principal with his place of business in a State which had made a declaration under Article 27 invoking the absence of written form of the authorisation conferred on his agent. It was however ultimately decided not to include such an exception to the rule contained in Article 11, partly because it risked upsetting the delicate compromise achieved by Articles 10 and 11 when read as a whole and to which the supporters of Article 11 attached the utmost importance as a precondition for their acceptance of the Convention, partly because the situation contemplated by the proposed exception was one which it was difficult to envisage arising frequently in practice so that the problem was more apparent than real, and finally because in those highly exceptional cases where it might arise recourse could be had to the reference in Article 6 (1) to the observance of good faith in the interpretation of the Convention.

CHAPTER III - LEGAL EFFECTS OF ACTS CARRIED OUT BY THE AGENT

64. With the decision no longer to include provisions in the Convention governing the relations between the principal and the agent this chapter, which had always constituted the most original part of the instrument, now indisputably constitutes its core. In particular, it represents a serious attempt to bridge the gap between the Common law and the Civil law systems, especially in Article 13, and indeed only minor changes have been made to the solution already contained in the 1972 draft. Thus the legal effects of acts carried out by the agent are determined essentially according to two different criteria, the first of which is whether the agent acts within the scope of his authority (Articles 12 and 13) or whether he acts outside the scope of that authority or without authority (Articles 14, 15 and 16). The second distinction relates to the character of the agency itself since it is only in the cases falling under Article 12, which envisages a somewhat expanded form of the continental concept of direct agency, that the agent's acts will directly bind the principal and the third party, all other cases, including the contract of commission and undisclosed agency, coming within the scope of Article 13 which contemplates the direct intervention of the principal against the third party or vice versa only when certain conditions have been satisfied.

65. Finally, by way of general introduction to Chapter III, it should be stressed that it was the clear understanding of the Conference that the language used in the various articles has no bearing on the

question of the burden of proof, in particular in connection with the intention of the parties as to whether the agent intends to bind himself only or rather to bind the principal and the third party to each other.

Article 12

66. This article establishes the general principle covering one of the most common situations. If the agent acts within the limits of his authority and the third party knows or ought to know that he is acting as an agent, there will be a direct contractual relationship between the third party and the principal. Whether or not the agent declares that he is acting in the name of the principal and whether or not he names him is irrelevant so that in certain cases it is possible that the third party will not know to whom he is bound at the time of the conclusion of the contract.

67. There are, however, two exceptions to the general principle laid down in Article 12. In the first place, the principal, or the agent in agreement with the principal, may stipulate with the third party that there will be no direct exercise of rights between the principal and the third party (Article 5). The fact that the agent intends to bind himself only may however be implied by the circumstances. This is, for example, the case where he acts as a commission agent. This provision is very important from a practical point of view as it submits to the regime laid down in Article 13, and not to that of Article 12, the relationships arising from the activities of those agents - such as commission agents - who are deemed to be acting in such a way as to accept sole liability.

68. In other words, two situations may arise when a sales contract has been concluded by an agent whom the third party knew, or ought to have known, to be acting as an agent:

(a) nothing suggests that the agent is binding himself alone, in which case the contract binds only the third party and the principal unless it has been agreed or the circumstances indicate that the agent shall incur concurrent liability with the principal, or

(b) it appears that the agent intends to bind himself alone, to the third party, in which case only the direct right of action provided for in Article 13 is available between the third party and the principal.

69. Lastly in connection with Article 12, it should be noted that although the authors of the Convention did not consider an express mention to be necessary, it is indeed the time of the conclusion of the contract of sale which is decisive with regard to the third party's knowledge or presumed knowledge of the fact that the agent is acting as an agent.

Article 13

70. Perhaps the single most important article of the Convention, Article 13 continues where Article 12 leaves off in the sense that while still being concerned with the situation where the agent is acting within the scope of his authority, it governs those cases which have already been excluded from the application of Article 12 by that provision itself namely:

(a) where the agent acts on behalf of a principal but the third party neither knew nor ought to have known that he was acting as an agent at the time of the conclusion of the contract with the third party; and

(b) where it has been agreed or simply understood that the agent is binding himself only vis-à-vis the third party even though he is acting on behalf of another person, a situation typified by the contract of commission. In these circumstances *paragraph (1)* of Article 13 provides that where the agent acts on behalf of a principal his acts shall bind only the agent and the third party. This solution, were it not qualified by the remaining provisions of Article 13, would in essence reflect the general approach of Civil law systems to indirect agency but it would be at variance with the Common law approach which concedes that a direct relationship between the principal and the third party may arise in such situations, as for example where the third party discovers the existence of an undisclosed principal and elects to sue him.

71. The solution adopted by paragraph (2) *et seq.* of Article 13 is situated somewhere between these two positions. It reflects the idea that, in general, in a situation of this kind the agent binds only himself but that when their interests clearly so require the principal and the third party may act directly one against the other although such direct exercise of rights may be excluded if it has been so agreed by the third party and the agent acting in accordance with the express or implied instructions of the principal (see below paragraph 81).

72. Since in the normal situation the agent will fulfil his obligations on both sides so that no direct relationship need be established between the principal and the third party, it is only in exceptional circumstances that it will be necessary to grant a right of action to the principal or the third party against the other, and it is in *paragraph (2)* of Article 13 that the conditions for the exercise of such rights are laid down.

73. *Paragraph (2) (a)* is concerned with the case where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations to the principal and it is accordingly provided that in such cases the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent. This provision calls for careful consideration. In the first place, it will be seen that few restrictions are placed upon the principal's right of intervention since it is irrelevant whether the non-fulfilment of the agent's obligations to the principal arises from a direct breach by the agent of his obligations to the principal or from the third party's failure to perform his obligations to the agent or for any other reason. Since however there were doubts in some quarters as to whether failure by the third party to perform could be imputed to the agent as a failure of performance, it was considered necessary to make specific reference to the third party's failure of performance. Moreover, it is not necessary that the time for performance by the agent of those obligations should actually have passed since it is sufficient that he is not "in a position to fulfil" them, as could be the case if the agent were to become insolvent before performance was due. On the other hand, the principal may only exercise against the third party the rights acquired on his, the principal's behalf, by the agent as it is not the intention of the provision to permit him, for example, to enforce against the third party the agent's right to the payment of commission. Finally, in connection with paragraph (2) (a), it should be noted that the third party may only set up against the principal the defences which he can himself raise against the agent, and not those defences which the agent might set up against the principal.

74. The conditions under which the principal may exercise a direct right of action against the third party are to be contrasted with the situation under *paragraph (2) (b)* in which it is provided that where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent. In the first place it will be seen that the third party's right of direct action against the principal arises where there is default by the agent. It must however be pointed out that the difference in wording between the conditions for the exercise of the direct right of action by the third party under paragraph (2) (b) and those regarding the exercise of the direct right of action by the principal under paragraph (2) (a) takes account of the fact that the agent is *vis-à-vis* the third party in some way the *alter ego* of the principal. In these circumstances it was not considered necessary to refer specifically in paragraph (2) (b) to failure by the principal to perform his obligations towards the agent, for example by not making available goods for delivery to the third party, with the consequence that the agent is unable to fulfil his obligations to the third party, although it is evident that a direct action will be open to the third party in such cases, as is borne out by the language of paragraph (4) of Article 13.

75. On the other hand there is an important difference between the situations governed by sub-paragraphs (a) and (b) as regards the defences available respectively to the third party and to the principal in that whereas the former may only invoke against the principal the defences which he might set up against the agent, the principal may set up against the third party both the defences which the agent would have had against the third party and those which the principal may invoke against the agent. This imbalance is however more apparent than real for the aim and the result of the provisions is

that the defendant, whether he be the principal or the third party, will not be placed in a worse position than he would have been had the right of direct action not been available to the plaintiff, a situation which would come about if the principal were not allowed to set up against the third party the defences which he, the principal, may have against the agent. Moreover, the solution is one which recognizes that while the agency relationship is a tripartite one, the third party stands on one side and the principal and the agent on the other. Finally, one significant practical effect of paragraph (2) (b) is that it permits a principal to set up against a third party a right of set-off which he may have against a commission agent, a consideration which was regarded by some as being of prime importance when the compromise substantially reflected in Article 13 was hammered out by the committee of governmental experts in 1972.

76. Paragraphs (3), (4) and (5) aim at facilitating the practical application of the direct exercise of rights provided for by paragraph (2). *Paragraph (3)* in particular obliges the party who intends to exercise the rights to notify his intention, on the one hand to the agent and, on the other, to the third party or principal, as the case may be. From the time of this notification neither the principal nor the third party may fulfil his obligations by dealing with the agent: the only rights which can still be exercised are those belonging to the third party and to the principal in application of paragraph (2).

77. *Paragraphs (4) and (5)* oblige an agent who fails to fulfil or is not in a position to fulfil his obligations to the third party by reason of the principal's failure of performance to communicate the name of the principal to the third party and, in the event of the third party failing to fulfil his obligations under the contract to the agent, to communicate the name of the third party to the principal. Although communication of the name of the principal to the third party or vice versa is not a condition for the exercise of the direct right of action it is clearly necessary to permit its effective exercise in those cases where the identity of one is unknown to the other and for this reason the obligation of disclosure has been included in Article 13 even though no sanction is laid down under the Convention in the event of the agent's refusing to comply with it.

78. It should moreover be noted that the agent's duty of disclosure does not extend to those cases where the agent is himself responsible for the failure to perform and although there was some support for an extension of the duty of disclosure to cover such cases a number of arguments were adduced against it. In particular, it was suggested that it was unclear why, in the case of paragraph (4), an agent acting in his own name should communicate the principal's name to the third party when the agent was himself at fault, although there would be valid reasons in the converse situation dealt with in paragraph (5) for the agent's communicating the name of the third party to the principal. This was however a question touching on the internal relationship between principal and agent and therefore fell outside the scope of the Convention. Moreover, it was pointed out that the proposed extension of the duty of disclosure under paragraphs (4) and (5) could undermine the concept of confidentiality which lies at the basis of commission agency and that it might encourage commission agents not to respect the provisions of paragraphs (4) and (5) by refusing to disclose the name of the principal or the third party since they would in any event already be open personally to an action for damages for failure to perform their obligations to the principal or to the third party as the case might be. In these circumstances it was decided not to extend the scope of paragraphs (4) and (5) to cover default by the agent himself.

79. Lastly, in connection with these two paragraphs, some clarification may be in order regarding the difference in wording between paragraph (4), which speaks of the agent failing or not being in a position to fulfil his obligations to the third party because of the principal's failure of performance, and paragraph (5), which simply refers to the case where the third party fails to fulfil his obligations under the contract to the agent. The reason is that whereas the third party is a party to the contract of sale and is himself alone responsible for the performance of his obligations thereunder, the agent's failure to perform his obligations towards the third party may result from the principal's failure to perform his obligations towards the agent, whence the reference in paragraph (4) to such failure which was unnecessary in paragraph (2) (b) as has been explained above in paragraph 74 of this Report.

80. *Paragraph (6)* deals with the special situation in which it appears from the circumstances of the case that the third party would not have entered into the contract had he had knowledge of the principal's identity at the time of dealing with the agent. Behaviour of this kind could be motivated, for instance, by reasons of competition, exclusive agreements, international embargo and commercial policy such as the refusal to sell to businesses of certain types or size, or to those using certain commercial methods. The provision does not touch on the delicate question of refusal to sell or to purchase; it limits itself to laying down the rule that, in cases of this kind, direct exercise of rights by the principal against the third party, as provided for in paragraph (2), is excluded. It is indeed logical not to oblige the third party to have dealings against his will with a party with whom he does not wish to enter into a contract although nothing prevents the third party himself exercising the rights conferred upon him by paragraph (2) against the principal if he so desires. In the converse case to that contemplated by paragraph (6), namely, where a principal chooses to conceal his identity or indeed his very existence when purchasing goods, perhaps indeed because of the nature of those goods, there seemed to be no justification for allowing him to withdraw from the contract if the third party subsequently turns out not to be to his liking.

81. *Paragraph (7)* allows the agent and the third party to exclude the direct exercise of rights between the principal and the third party under Article 13 (2) on condition that the agent has expressly or impliedly been instructed to do so by the principal. Although some delegations to the Conference considered the provision to be superfluous on the ground that derogations from paragraph (2) of Article 13 could in any event be made under Article 5 of the Convention others insisted on its inclusion, given the innovation in respect of the rules governing contracts of commission under the national law of some States constituted by Article 13 (2). For paragraph (7) to operate however, it is necessary for the agent to have been instructed to that effect by the principal, even if the instructions are implied, as would be the case where the agent had, without opposition from the principal, regularly excluded the operation of paragraph (2) when dealing with third parties in certain countries or trade branch. In the absence of such instructions no agreement between the agent and the third party will be binding on the principal, without prejudice to any responsibility which the agent may incur towards the third party in consequence of the third party's being exposed to a direct action by the principal under Article 13 (2).

82. On the other hand, in those cases where the agent fails to follow the instructions of the principal to agree with the third party to derogate from or vary the effect of Article 13, paragraph (2), the principal will however be bound by the provisions of that paragraph, without prejudice of course to any action he may have against the agent. In effect, the failure of the agent to comply with the principal's instructions in this regard is, according to the unanimous view of those delegations which expressed themselves on the question at the Conference, not to be seen as amounting to an exceeding of the agent's authority and thus as bringing the case within Article 14 (1), since the question of direct action between the principal and the third party is not of the essence of the sales contract which the agent was authorised to conclude but is rather accessory thereto.

Article 14

83. This is the first of the series of articles dealing with those cases where the agent acts without authority or outside the scope of his authority, the two situations being treated in the same manner not only for reasons of logic but also because of the difficulty which could arise in practice of deciding in given circumstances whether the agent has acted in excess of his authority or without authority. *Paragraph (1)* is limited to laying down the principle, which applies as a general rule in all legal systems, that where an agent acts without authority or outside the scope of his authority his acts do not bind the principal and the third party to each other, although it must be borne in mind that ratification by the principal in accordance with Article 15 may have the effect of bringing a given case within the scope of Article 12 or Article 13. Article 14 (1) is, moreover, silent as regards the relations between the agent and third party since, apart from the possible liability of the agent under Article 16, the circumstances of the case and in particular the intention of the parties as to whether the agent was binding himself will determine, whether or not contractual relations have been established between him and the third party.

84. *Paragraph (2)*, which lays down a partial qualification to the rule contained in paragraph (1), deals with the exceptional case of apparent authority to which reference has already been made in paragraph 58 of this Report. As worded, paragraph (2) provides that where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on the principal's behalf and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the agent's lack of authority. In other words it seeks to describe the state of mind of the third party and establishes the legal effects of his *bona fide* belief, induced by the conduct of the principal, that the agent actually had authority to act on the principal's behalf and that he was acting within the scope of that authority.

85. Exception was taken to the use of the words "lack of authority" by some delegations which did not subscribe to the view that apparent authority is not authority at all and which furthermore believed that it was inequitable to give the third party a choice whether or not to consider the principal as being bound by the agent's acts without at the same time giving a similar option to the principal. Moreover, it was pointed out that paragraph (2) risked causing prejudice to the principal as the third party might delay his decision as to whether or not he would proceed against the principal so as to take maximum advantage of variations in market conditions.

86. By way of reply to these criticisms it was recalled that the imbalance is more apparent than real since there was nothing to prevent the principal removing the element of uncertainty by ratifying the acts of his agent in accordance with Article 15 (1) and thereby establishing a position of equality with the third party who would himself be bound by the ratification unless the principal had failed to ratify within a reasonable time and the third party had promptly notified the principal of his refusal to be bound (Article 15 (2)). As to the possibility of the third party's playing the market at the principal's expense, it was suggested that if the case were one which, had the agent acted within his authority, would have fallen under Article 13, then the third party would only be able to proceed directly against the principal if the conditions laid down in that article were satisfied. Moreover nothing in the Convention would prevent the agent performing and enforcing the contract against the third party who would be getting precisely what he had bargained for as his expectation at the time of the conclusion of the contract was that it would be he and the agent who would be responsible for the performance of the obligations arising thereunder. If, on the other hand, the circumstances under which Article 14 (2) were to operate concerned an Article 12 situation than it would only be in those cases where the principal chose not to put an end to the uncertainty by ratification that the one-sided situation, which had after all come about entirely, through the principal's own conduct, could arise, although his position would be no worse than that of any other party to a contract who, though unwilling himself to perform, remains exposed to an action by the other party to obtain damages for breach or to secure performance.

87. Lastly in connection with Article 14 (2), it should be noted that it contains no reference to the requirement of written form and fears were expressed at the Conference by delegations from some of the Socialist States that this omission might constitute an important exception to the rule laid down in Article 11. The view was however widely expressed that this seemed to be more a theoretical than a practical problem in that even assuming the unlikely hypothesis that the conduct of a principal with his place of business in a State making a declaration under Article 27 were to be caught by the language of Article 14 (2), then the principle of good faith would dictate that it would only be in those cases where the third party neither knew nor ought to have known that either the principal or the agent had his place of business in an "Article 27" State that he could successfully invoke Article 14(2).

Article 15

88. The possibility for a principal to ratify an act of an agent performed without authority or in excess of his authority, with the consequence that such acts produce the same effects as they would have done if initially carried out with authority, is known to most legal systems. The principle of ratification is set out in *paragraph (1)* of Article 15 and, it will be noted, is of general application in that it is irrelevant whether the agency is disclosed or undisclosed, direct or indirect, or whether the case is one of apparent authority

under Article 14 (2). This is not, however, to say that the consequences of ratification will be the same in all cases since while ratification will have the effect of binding the principal and the third party to each other in Article 12 situations, in those contemplated by Article 13 the result of ratification is merely to permit the possibility of a direct action being exercised by the principal or by the third party, as the case may be, provided that the conditions established by paragraphs (2) and (3) are satisfied.

89. As regards the language of Article 15 (1), it has been suggested that the formulation of the second sentence "on ratification the act produces the same effects as if it had initially been carried out with authority", might give rise to some difficulty in a case not unknown in practice, namely where an agent sells goods without the authority of the principal and where the principal, after selling and delivering the same goods to another person, then ratifies the first contract concluded by the agent. Taken at its face value, the provision could be considered as meaning that although title to the goods has effectively been transferred to the person to whom they have been delivered, this right of ownership may be affected by the ratification by the principal of the contract which the agent acting without authority purported to conclude. The problem would however seem to be more apparent than real once it is recalled that Article 1 (3) provides that the Convention is concerned only with the relations between the principal and the third party and between the agent and the third party, with the consequence that it cannot affect the rights of other persons. Any such conflict would therefore fall to be determined by the applicable law.

90. In order to give the third party the possibility of an option similar to that of the principal and to attenuate the unjustified advantage that the latter could draw from a situation of which he would be the sole arbiter, *paragraph (2)* permits the third party in certain circumstances to refuse to be bound by ratification in those situations where he neither knew nor ought to have known of the agent's lack of authority at the time of the agent's act. In this case a purported ratification by the principal will be ineffective if at any time prior to it the third party, after becoming aware of the lack of authority, gives notice of his refusal to be bound by any ratification. This provision gives a certain measure of protection to the third party but it does not deal with the situation where the principal delays ratifying for the purpose of speculating on the market and it is to meet this eventuality that the second sentence of *paragraph (2)* provides that where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal of such refusal.

91. In the converse situation contemplated by *paragraph (3)*, where the third party either knew or ought to have known of the agent's lack of authority, he may not refuse to become bound by the ratification before the expiration of the time agreed for ratification or, failing such agreement, before such reasonable time as the third party may specify. "The word "however" at the beginning of *paragraph (3)* is intended to spell out the fact that the time at which the third party's knowledge is critical is, as in *paragraph (2)*, that when the act was performed by the agent.

92. *Paragraph (4)* lays down the rule that the third party may refuse to be bound by a partial ratification while *paragraph (5)* provides that the ratification will take effect only when notice of it reaches the third party or when the ratification otherwise comes to his attention, and that, once effective, it may not be revoked. The language of *paragraph (4)* and in particular the requirement concerning notification of ratification were the subject of considerable discussion at the Conference and it should be stressed that although ratification must come to the actual attention of the third party, this is not equivalent to requiring an express notice of ratification. The situation is thus different from that in respect of *paragraph (2)* where the dispatch rule is applied to the third party's refusal to be bound by a subsequent ratification by the principal.

93. *Paragraph (6)* provides that ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification while *paragraph (7)* lays down what is in effect a conflicts of law rule by providing that if the act has been performed on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.

94. *Paragraph (8)* raises the same problem of written form as that already discussed in connection with Article 10 and a similar solution has been adopted in that ratification is subject to no requirements as to form (see paragraph 61 *et seq.* above). Although some doubt was expressed by certain delegations in connection with the possibility of ratification being otherwise than express, a large majority insisted on the need for a specific reference to ratification being inferred from the conduct of the principal, as would be the case where he began delivering or continued to deliver goods to the third party in accordance with the contract which his agent had purported to conclude after discovering that the agent had in fact acted outside the scope of his authority, for example by accepting a lower price for the goods than that established by the principal.

Article 16

95. *Paragraph (1)* of this article lays down the rule that an agent who acts without authority or outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been had the agent acted with authority and within the scope of his authority. In other words the agent may be liable to the third party not only for actual loss suffered by him but also for any prejudice deriving from the fact that the agent did not have the authority which he claimed to have. It should moreover be noted that although paragraph (1) makes no reference to performance by the agent this will always be a clear alternative to the payment of damages in those cases where the agent is himself bound under the contract of sale to the third party and where performance would be the normal way for the agent to discharge his obligations under the contract. Similarly, it is to be borne in mind that although ratification by the principal will relieve the agent of liability under Article 16 (1), it will not of itself dispense the agent from performance of any of his obligations towards the third party under the contract of sale; this will occur only if the third party obtains satisfaction from the principal by the exercise of the direct right of action under Article 13.

96. The fact that Article 16 is concerned with damage suffered by the third party as a consequence of his genuine belief that the agent was acting on the basis of authority and within that authority is clearly brought out by the exception contained in *paragraph (2)* of Article 16 according to which the agent will not be liable if the third party either knew or ought to have known that the agent had no authority or that he was acting outside the scope of his authority. In such cases the third party's rights against the agent will once again be limited to those which may have accrued to him under the contract of sale.

CHAPTER IV - TERMINATION OF THE AUTHORITY OF THE AGENT

97. With the deletion after the Bucharest Conference of the chapter in the draft Convention dealing with the internal relations between the principal and the agent, it became apparent that it would no longer be appropriate to establish rules governing the termination of the contract of agency itself, but rather to seek to regulate the termination of the agent's authority. Both in the committee of governmental experts which met in Rome in 1981 and at the Diplomatic Conference in Geneva, differences of opinion emerged however regarding the extent to which such rules should be included in the Convention and in particular how far Chapter IV should lay down substantive rules concerning the termination of authority. The most restrictive view was that notwithstanding the fact that Chapter IV now dealt with termination of authority rather than with termination of the contract of agency, the question was still one essentially concerned with the internal relations between the principal and the agent. It would therefore be illogical in the light of Article 1 (3) to specify the cases in which authority is terminated. Moreover, it was observed that problems could arise if under the Convention authority were to be terminated by, for example, the death of the principal, whereas under the applicable law it would not be terminated, or *vice versa*. In addition it was suggested that apart from the great difficulties which would be encountered in reaching agreement as to which circumstances should or should not be considered as terminating authority under the Convention, a flexible solution whereby it would be left entirely to the applicable law to determine in which cases authority is terminated would be more attractive. The Convention would thus concentrate on the effects of such termination.

98. A solution of this kind was strongly opposed by those who thought it incorrect to see the termination of authority solely in terms of the relations between the principal and the agent as it was of critical importance for the third party also, this being demonstrated by the problem of the relevance of the third party's knowledge of the facts causing termination. In these circumstances it would be necessary for the third party to know what those facts were and it seemed therefore to be highly desirable to bring about as great a degree of unification as possible of the grounds for termination in the interest of the certainty of international trade. Moreover, it was recalled that Article 9 stated that authorisation may be express or implied and, if the argument invoked were to be carried to its logical conclusion, then Article 9 should likewise be deleted for the reason that it too was concerned essentially with the internal relations between the principal and the agent. It was also argued that a simple reference to the applicable law would solve nothing and could even be a source of confusion in that the Convention itself would not seek to establish criteria as to what would be the law applicable to cases of termination of authority. Finally, it was suggested that in the light of the deletion of the former chapter governing relations between principal and agent, a decision to reduce still further the number of substantive provisions might make the Convention less attractive to States.

99. The provisions contained in Articles 17 and 18 of the Convention represent a compromise between the two positions and at the same time reflect the sentiments of a majority of delegations. Thus the number of cases in respect of which it is specifically stated that the agent's authority is terminated has been substantially reduced so as to include only those which are recognized by almost all legal systems, while in all other situations it is the applicable law which will determine whether or not the agent's authority is terminated. The chapter is completed by two articles relating to the effects of termination of authority which are described below.

Article 17

100. Of the three sub-paragraphs of this article, *sub-paragraph (a)*, which provides that the authority of the agent is terminated when this follows from any agreement between the principal and the agent and *subparagraph (b)*, under which authority is terminated on completion of the transaction or transactions for which it was created, call for no specific comments. *Sub-paragraph (c)* has however been the subject of lengthy debate although it has perhaps also been the centre of some misunderstanding. In the first place it must be understood that the statement that the agent's authority is terminated on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement, is directed to the external relations. In other words, although the unilateral act of the principal or the agent will, subject to Article 19, be effective in the relations with the third party, it is not the intention of the authors of the Convention that it should affect the mutual rights and obligations of the principal and the agent as between themselves and in particular the wording of Article 17 (c) must not be construed in the sense that there will be no remedy as between the principal and the agent if one or the other acts in breach of their agreement.

101. The second point to be made concerning sub-paragraph (c) relates to the concern expressed in some quarters at the absence of any provision corresponding to Article 31 (3) of the 1972 draft which provided an exception to the general rule governing revocation in connection with the so-called "power coupled with an interest" or "power given as a security", which are in some legal systems irrevocable. Apart, however, from the fact that the granting of such powers is probably of minimal practical importance in the international sale of goods it is arguable that a distinction should be drawn between irrevocable authority and a power coupled with an interest in that a contract creating the latter is not a pure agency contract but rather a kind of combined contract involving on the one hand a granting of authority and on the other an assignment of a right arising out of an agency relationship, or a contractual according of a security interest. Since therefore it was not intended to deal with such situations in the Convention they may be regarded as falling outside its scope.

Article 18

102. This article is to be seen as a complement to Article 17, providing as it does that the agent's authority will also be terminated when the applicable law so provides. It was agreed not to include a list of examples of cases falling under Article 18, such as the death, loss of capacity or bankruptcy of the principal or the agent, or supervening impossibility or illegality of the acts to be performed by the agent, not only because some of them might not be universally regarded as constituting grounds for termination but also because the various legal systems might draw distinctions in certain cases, such as death or loss of capacity, according to whether they affect the principal or the agent.

103. In addition, it should be noted in connection with Article 18 that no indications are given regarding the determination of the applicable law and so, as under Article 6 (2), that law will be the one declared to be applicable in accordance with the rules of private international law of the forum.

Article 19

104. Despite a suggestion to the effect that when authority is terminated under Article 18 the applicable law should also govern the effects of such termination, Article 19 lays down a rule of general application to all cases of termination, namely that it does not affect the third party unless he knew or ought to have known of the termination or of the facts which caused it. This constitutes an extension of the corresponding rule to be found in Article 35 of the 1972 draft which was limited to cases of revocation or renunciation, and even then subject to some exceptions, for example in respect of authority made public by statutory registration or publication.

105. The final text of the provision represents therefore a step in the direction of granting further protection to the third party although it should not be forgotten that the words "or ought to have known" have introduced the notion of constructive notice. While some misgivings were voiced at the incorporation of this doctrine into mercantile law, the general view was that it left a certain degree of discretion to the judge in evaluating the facts of the case, which would prevent possible abuses by the third party of a requirement of actual knowledge, for example where the principal is a very well-known person whose death has been given wide publicity and where the third party attempts to deny knowledge of such death.

106. Set against this notion of the presumed knowledge of the third party it should however be stressed once more that Article 19 applies in all situations, although until the final reading by the plenary Conference the draft Convention contained an article providing an important exception to the rule laid down in Article 19, the effect of which was that when the third party knew of the authority of the agent only from the agent, without any confirmation by the conduct of the principal, termination of the authority would have effect upon the third party as soon as the agent had notice of it, even if the third party had no notice of it. The provision was however the subject of considerable criticism not only on the ground that it created too broad an exception to the general rule in Article 19, but more particularly because it was seen as being over-protective to the principal, and with its failure to obtain the necessary two-thirds majority on the occasion of the final reading it was accordingly deleted, thus leaving intact the general rule laid down in Article 19.

Article 20

107. This article provides that notwithstanding the termination of authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests. Although the need for such a provision may be queried on the ground that it is concerned with the internal relations between the principal and the agent, the rule would seem to have a certain interest for third parties who will thus be aware of the fact that although the authority has been terminated the agent remains authorised, and some would suggest under a duty, to protect the principal from damage after the termination of the authority.

CHAPTER V - FINAL PROVISIONS

108. With the exception of Articles 25, 29 and 30, the final provisions of the Convention are modelled on the corresponding articles of the Vienna Convention which represent the most recent expression in this respect of the will of the international community in conventions dealing with international trade law elaborated within the framework of the United Nations.

Articles 21 and 22

109. Based on Articles 89 and 91 of the Vienna Convention, these provisions designate the depositary and lay down the procedure for signature of the Convention as well as for the deposit of instruments of ratification, acceptance, approval and accession. The Convention having been finalised in Geneva, it was unanimously agreed by the Conference that the depositary for the Convention should be the Government of Switzerland and, following the precedent of the Vienna Convention which allowed a generous time limit during which that instrument should remain open for signature, it is stipulated in Article 22 that the Convention shall remain open for signature at Berne until 31 December 1984.

Article 23

110. This article is modelled on Article 90 of the Vienna Convention. As explained by the initial sponsor of the proposed article at the Conference, it makes allowance for the possibility of regional unification that would not be covered by Article 26 and at the same time might make Article 32 more acceptable to some States. In addition it would have the effect of substituting for the regime established by the Convention that of any future international agreement, there being no existing agreements in this field, in those cases where the principal and the third party or, in the case referred to in Article 2 (2), the agent and the third party, have their places of business in States Parties to such agreement.

111. It should however be noted that concern was expressed by certain delegations at the Conference that difficulties could arise from the inclusion in the Convention of a provision identical to Article 90 of the Vienna Convention given that Article 22 of the 1978 Hague Convention provides that: "The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes a Party". In these circumstances a judge in a State which was Party to both the Geneva Convention and the Hague Convention could find himself faced with two international instruments, each of which sought to give way to the other, so that a conflict could arise on account of the difference, already alluded to above in paragraph 28 of this report, between Article 2 (1) (a) of the Geneva Convention and Article 11 of the Hague Convention. So as to avoid therefore the possibility of Article 23 being interpreted in such a way as to give precedence to the Hague Convention, the scope of the provision is limited to agreements containing "provisions of substantive law", the intention being that in the event of conflict the Geneva Convention will prevail.

Articles 24 and 25

112. These two articles deal with the special situation of federal States when faced with the acceptance of private law Conventions. Article 24 is, subject to the absence of the words "according to its constitution" in line 2 of paragraph (1), taken over almost textually from Article 93 of the Vienna Convention.

113. On the other hand Article 25, which has no correspondence in the Vienna Convention, contains a formula to be found in the most recent conventions of the Hague Conference on Private International Law and in particular in the 1980 Convention on International Access to Justice (Article 27). It was agreed that the introduction of Article 25, which was of special importance to one delegation, in view of its particular domestic requirements, in no way constitutes any qualification of the obligations of a Federal State under the Convention, which would remain precisely the same as those of unitary States. Moreover it was recognized that Article 25 in no way qualifies Article 24 and that it does not affect in any way the

purpose or effect of the Federal State clause contained in Article 24, which meets the need of certain Federal States in a particular way.

Article 26

114. The language of this provision follows that of Article 94 of the Vienna Convention. As distinguished from Article 23 of the Geneva Convention, which concerns formal agreements between Contracting Parties thereto, *paragraph (1)* of Article 26 recognizes the primacy to be accorded to the law of Contracting States which have the same or closely related legal systems on matters governed by the Convention and which declare that the Convention shall not apply in the same situations as those mentioned under Article 23. *Paragraphs (2) and (3)* govern cases analogous to those dealt with in paragraph (1) where the declaration is made by a Contracting State in respect of its relations with one or more non-Contracting States, and where such a non-Contracting State subsequently becomes a Contracting Party to the Convention.

Article 27

115. Article 27 in effect constitutes a reservation clause which permits those States which wish to do so to avail themselves of the provisions of Article 11 (see above, paragraph 62 *et seq.*). Its language is, subject to the necessary adaptation, based on that of Article 96 of the Vienna Convention.

Article 28

116. This provision, which permits Contracting States to declare that they will not be bound by Article 2 (1) (b) of the Convention, follows the precedent established by Article 95 of the Vienna Convention. As explained above in paragraph 30 of this Report, it was considered to be of particular importance by certain delegations as their countries have special legislation relating to international economic relations, legislation which, according to their rules of conflict, applies in principle whenever their national law applies. The narrower scope of application of the Convention limited to the situations contemplated by Article 2 (1) (a) was therefore in their view preferable and in these circumstances the inclusion of the provision was also supported by other delegations on the ground of reciprocity.

Article 29

117. This article addresses a special problem encountered by States, in particular the Socialist States, the whole or specific parts of whose foreign trade are carried on exclusively by specially authorised organisations. The concern of the delegations representing those States was that purely internal organisations in those States, which have no direct dealings with foreign enterprises in the context of the international sale and purchase of goods, might be considered to be principals for the purpose of Article 13 (2) (b) and (4) and thus be exposed to a direct action by the foreign third party. To avoid this situation arising, Article 29 provides that the specially authorised organisations shall not, when acting as buyers or sellers in foreign trade, be considered to be agents in their relations with the internal organisation in the State in question. States wishing to avail themselves of the possibility of making the declaration for which provision is made in Article 29 may do so either in respect of the whole of their foreign trade, if it is conducted exclusively by specially authorised organisations, or alternatively in respect of organisations specified in the declaration if only specific parts of their foreign trade are so conducted.

118. It should be noted that although the article is intended to cater for the needs of the Socialist States in particular, it may also be of importance to other States, certain sectors of whose international trade are carried out by agencies occupying a monopolistic or quasi-monopolistic position.

Article 30

119. The effect of *paragraph (1)* is to permit States to extend the sphere of application of the Convention beyond that established by Articles 1 to 4. *Paragraph (2)* indicates two examples of such an extension, namely to contracts other than those for the sale of goods and to cases where the places of business mentioned in Article 2 (1) are not situated in Contracting States. In point of fact, since it is only the agent's place of business which is critical for the application of the Convention under Article 2 (1) (a), it would have been sufficient simply to refer to his place of business in Article 30 (2) (b) but this is a minor point and need give rise to no misunderstanding as the language of Article 2 (1) (a) is unequivocal.

120. It should furthermore be recalled that even if a State makes no declaration under Article 30 it is always free to make provision in its national law for a wider scope of application than is established by the Convention, for example by making it applicable to all purely domestic agency relations. The practical effect of Article 30 may therefore be somewhat limited and its presence in the Convention should in consequence be seen rather as an invitation to States to consider the possibility of extending, the application of the regime laid down by the Convention to other situations.

Articles 31 and 32

121. These provisions, dealing respectively with declarations made under the Convention and with the prohibition of reservations other than those expressly authorised by it, have been taken over virtually unchanged from Articles 97 and 98 of the Vienna Convention.

Article 33

122. Subject to the necessary drafting amendments, Article 33 reflects the content of paragraphs (1) and (2) of Article 99 of the Vienna Convention, including the requirement of ten instruments of ratification, acceptance, approval or accession for the entry into force of the Convention.

Article 34

123. Whereas Article 33 is concerned with the entry into force of the Convention as regards the international obligations of the Contracting States arising under it Article 34 indicates the time as from which specific acts of the agent will be governed by the Convention. It therefore provides that the Convention shall apply to those individual transactions where the agent offers to sell or purchase, or accepts an offer of sale or purchase, on or after the date when the Convention enters into force in respect of the Contracting State referred to in Article 2 (1), that is to say the State where the agent has his place of business or the State to the application of whose law the rules of private international law lead. Thus acceptance by the agent of an offer to sell or purchase goods after the entry into force of the Convention in respect of a State in which he has his place of business will result in the application of the Convention even if the offer was made before its entry into force.

Article 35

124. Couched in almost identical language to that of Article 101 of the Vienna Convention, this article makes provision for denunciation of the Convention and for the time at which such denunciation shall be effective.