I. INTERNATIONAL SALE OF GOODS

1. Report of the Working Group on the International Sale of Goods on the work of its sixth session (New York, 27 January-7 February 1975) (A/CN.9/100)*

CONTENTS

* Annexes to this report are reproduced in the present volume as Sections 2 to 5 of this chapter.

INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session held in 1969. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the United Nations Commission on International Trade Law on its second session.[1]

3. The Working Group held its sixth session at the Headquarters of the United Nations in New York from 27 January to 7 February 1975. All members of the Working Group were represented except Sierra Leone.

4. The session was also attended by observers from the following members of the Commission: Bulgaria, Federal Republic of Germany, Norway and Philippines, and by observers for the following international organizations: Hague Conference on Private International Law and International Chamber of Commerce.

5. The following documents were placed before the Working Group:

(*a*) Provisional agenda and notes (A/CN.9/WG.2/L.2);

(*b*) Revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the UNCITRAL Working Group on the International Sale of Goods at its first five sessions (A/CN.9/87, annex I),†

(*c*) Comments and proposals of representatives on the revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions: note by the Secretariat (A/CN.9/WG.2/WP.20).‡

(*d*) Pending questions with respect to the revised text of a uniform law on the international sale of goods: report of the Secretary-General (A/CN.9/WG.2/WP.21 and Add.1 and 2).§

6. The session of the Working Group was opened by the representative of the Secretary-General.

7. At its first meeting, held on 27 January 1975, the Working Group elected the following officers:

Acting Chairman: Mr. Gyula Eörsi (Hungary)

Rapporteur: Mr. Roland Loewe (Austria).

8. The Working Group adopted the following agenda:

(1) Election of officers

(2) Adoption of the agenda

(3) Provisions of the Uniform Law on the International Sale of Goods deferred by the Working Group for further consideration

(4) Second reading of the revised Uniform Law on the International Sale of Goods

(5) Future work

(6) Adoption of the report of the session.

9. In the discussion on the adoption of the agenda it was decided to proceed article by article through the revised text of the Uniform Law on the International Sale of Goods (ULIS) as it appears in annex I to document A/CN.9/87|| but to discuss matters not in square brackets only if there was substantial support for doing so.

[1] Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

† UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

‡ Reproduced in this volume, part two, I, 4.

§ *Ibid.*, part two, I, 3.

|| UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

10. In the course of its deliberations, the Working Group set up drafting parties to which various articles were assigned for redrafting.

11. Before proceeding to a discussion of the articles of the revised text of ULIS, the Working Group considered two general questions: (1) whether the articles should be in the form of a uniform law annexed to a convention or whether they should form part of an "integrated" convention, and (2) whether the revised text should include provisions in respect of formation of contracts.

12. As to the first question, the Working Group noted that the rules on the limitation period were cast in the form of an integrated convention. It was also noted that the same content could appear in either a uniform law or in an integrated convention.

13. The Working Group decided to draft the revised text in the form of an integrated convention and set up Drafting Party I, consisting of the representatives of Austria and the United Kingdom and the observer from the Hague Conference on Private International Law, to report to the Working Group on the changes in ULIS which would be necessary to create an integrated convention.

14. The Working Group adopted the recommendation of Drafting Party I that the title be changed to "Convention on the International Sale of Goods". The title of chapter I was changed to "Sphere of application". The present text of article 1, paragraph 3, which provides that "the present Law shall also apply where it has been chosen as the law of the contract by parties" was moved to a new article 3 *bis* and article 5, which provides that "the parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions" was moved to a new article 3 *ter*. Paragraphs (d) and (e) of article 4 were deleted and they will be considered when the clauses in respect of implementation, and declarations and reservations and the final clauses are considered. The only other changes considered necessary in the substantive part of the Convention were to replace all references to "the present Law", "the Uniform Law" and similar phrases by "this Convention".

15. As to the second question, the Working Group was of the opinion that there should be no attempt to incorporate the provisions on formation of contracts in the Convention.

16. The Working Group also agreed that the formulations in the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15)¶ should be followed to the largest extent possible whenever there was a similar text in the Sales Convention. It was pointed out, however, that the issues arising in limitation and sale of goods are different and that it would not be desirable to adopt the text of the Limitation Convention in the Sales Convention where that would lead to an inappropriate result.

PENDING QUESTIONS

Article 1

"1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States:

"(*a*) When the States are both Contracting States; or

"(*b*) When the rules of private international law lead to the application of the law of a Contracting State.

"2. [The fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.]

"3. The present Law shall also apply where it has been chosen as the law of the contract by the parties."

Subparagraph 1 (b)

17. It was suggested that subparagraph 1 (*b*) be deleted on the grounds that:

(i) The rules of private international law in some States could lead to the application of the law of one State to the obligations of the buyer and of a different law to the obligations of the seller. It would be difficult in such a situation to know whether under paragraph 1 (*b*) all of the provisions of the Convention would be applicable to any dispute between the parties or only those provisions relating to the buyer or the seller, as the case may be.

(ii) Subparagraph 1 (*b*) created the possibility of applying any one of three legal régimes to a contract of sale: the domestic law of the forum, the domestic law of the State of the other party to the contract and the Convention, rather than only two as before.

(iii) If the forum was not in a Contracting State but the rules of private international law of the forum referred the dispute to the substantive law of another State which was a Contracting State, the question would arise whether the forum would feel bound by this subparagraph to apply the Convention rather than the domestic law of the other State.

(iv) Subparagraph 1 (*b*) had no counterpart in the Limitation Convention.

18. In support of retaining subparagraph 1 (*b*) it was pointed out that the reason why it had no counterpart in the Limitation Convention was because rules of private international law in matters of the period of limitation were too unsettled and that the current text of article 1 was a compromise reached after long discussion on the earlier text of article 1 of the 1964 ULIS.

19. The Working Group decided to retain subparagraph 1 (*b*).

Paragraph 2

20. A proposal was made to add the words "and consequently the present Law shall not apply" following the word "disregarded" in paragraph 2. The Working Group was of the opinion that the proposal would make the meaning of the text clearer but that it was nevertheless desirable to keep to the text of the Convention on the Limitation Period (article 2 (*b*)). Therefore, no changes were made by the Working Group to article 1 and the square brackets were deleted.

¶ *Ibid.*, part three, I, B.

Article 2

"The present Law shall not apply to sales:

"1. (*a*) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless it appears from the contract [or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract] that they are bought for a different use;

"(*b*) By auction;

"(*c*) On execution or otherwise by authority of Law.

"2. Neither shall the present Law apply to sales:

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

"(*b*) Of any ship, vessel or aircraft [which is registered or is required to be registered];

"(*c*) Of electricity."

Subparagraph 1 (a)

21. The Working Group considered subparagraph 1 (*a*) which excludes consumer transactions from the scope of the Convention. Three approaches to drafting this subparagraph were suggested: the present text with the bracketed words, the present text with the bracketed words deleted and the text of article 4 (*a*) of the Limitation Convention.

22. It was observed that the main advantages of adopting the text of the Limitation Convention were its simplicity and the desirability of keeping the two Conventions in harmony. However, it was objected that this was not appropriate to the more complex problems of the law of sales. Moreover, the use of the subjective test in the Limitation Convention was feasible because the determination whether the transaction was an excluded consumer transaction did not need to be made until after a dispute had arisen whereas in the law of sales generally it was important to know from the outset what law applied. The Working Group decided to adopt a text based on the Limitation Convention and set up Drafting Party II consisting of the representatives of France, Hungary and the United States to draft a text.

23. One representative stated that the wording of subparagraph 1 (*a*) should be as close as possible to the Convention on the Limitation Period.

24. The Working Group considered two texts: the text proposed by Drafting Party II which excluded from the application of the Convention the sale "of goods bought for personal, family or household use if the seller knows or ought to know of the intended use", and a text proposed by an observer which excluded from the Convention the sale "of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not realize and had no reason to realize that the goods were bought for any such use".

25. In the ensuing discussion it was urged that it was important to state that the knowledge of the seller should be at the time of the conclusion of the contract. It was also observed that in some legal systems the use of the word "if" as used in the text proposed by Working Party II would require the party relying on the "if" clause to prove that which was in the clause. In contrast, the use of the word "unless", as in the text presented by the observer, would put the burden on the seller to prove his knowledge or lack of knowledge of the intended use of the goods.

26. The Working Group adopted the text proposed by the observer. However, several representatives expressed themselves in favour of the text proposed by the Drafting Party subject to certain amendments to meet the points raised in the discussion.

Subparagraph 2 (a)

27. The question was raised whether, by the effect of subparagraph 2 (*a*), documentary sales of goods were excluded from the convention. The Working Group agreed that they were not intended to be excluded, since documentary sales of goods were a major form of the international commercial sales of goods which the Convention was intended to govern. It was pointed out that there was an ambiguity in the French and Spanish texts which could be read to mean that sales of documents, and therefore documentary sales, were excluded. Nevertheless, the Working Group decided to retain the text in the various languages as it was in order to establish harmony with the Limitation Convention, but with the clear understanding that documentary sales of goods are governed by the Convention.

Subparagraph 2 (b)

28. The Working Group decided to delete the bracketed words in subparagraph 2 (*b*) in order to use the same language as the Limitation Convention. The discussion focused on the difficulty of distinguishing between registration of ocean vessels and the "administrative" registration of all boats, as is required in some countries. It was finally decided that the exclusion from the Convention of commercial sales of small pleasure craft, which is one of the results of deleting the bracketed words, was necessary in view of the precedent established by the Limitation Convention and the different registration régimes in different countries.

29. The Working Group decided that the structure of article 2 should conform to the structure of the corresponding provisions in article 4 of the Limitations Convention. Therefore, the new text of article 2 contains only one major paragraph listing six categories of sales not governed by the Convention.

Article 3

"1. [The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.] . . ."

30. The Working Group decided to replace paragraph 1 of article 3 by paragraph 1 of article 6 of the Convention on the Limitation Period in the International Sale of Goods, which reads as follows:

"1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services."

Article 4

"For the purpose of the present Law:

"(*a*) [Where a party has places of business in more than one State, his place of business shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;] . . ."

31. It was agreed to use the language of article 2 (*c*) of the Limitation Convention in substitution for the above text of subparagraph (*a*). This article differs from the present text in only minor editorial ways. It reads as follows:

"For the purposes of this Convention: . . .

"(*c*) Where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract; . . ."

Article 8

"The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage."

32. It was suggested that article 8 be deleted on the ground that it was not necessary and that, since what was covered by the Convention was obvious, it was not necessary to say what was not covered. However, the Working Group decided that article 8 served a useful purpose in that it made clear that provisions such as article 57 of the Convention in respect of the determination of a price which is not fixed or determinable are not intended to make valid a contract which would not otherwise be valid under the domestic legislation of one of the Contracting States.

33. It was suggested that the words "in particular" should be deleted as being misleading. However, there was no consensus for deletion and the words were retained.

Article 9

"1. [The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.]

"2. [The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.]

"3. [In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.]

"4. [Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties.]"

Paragraph 1

34. The Working Group agreed that the parties should be bound by any usage to which they have expressly or impliedly agreed and by any practices which they have established between themselves as provided in paragraph 1.

Paragraph 2

35. However, the question was raised as to what criteria should decide whether the parties had impliedly agreed to a usage, in particular whether the parties had to know specifically of the usage or whether they could be held to a usage of which they were unaware, if it was widely applied. The question was also raised whether, if the parties could be held to a usage of which they were unaware, the usage had to be in the particular trade or whether it was sufficient that the usage was used in international trade generally. Part of the discussion centred on the point at which the will of the parties to incorporate the usage could be implied and at what point it became hypothetical.

36. A different point of view considered usages as a means of imposing the will of the stronger party on the weaker. In this connexion reference was made to the interests of developing States whose merchants had not participated in the development of usages and who might not be aware of them.

Paragraph 3

37. Representatives who opposed a broad definition of implied usages were also opposed to paragraph 3 which provides that in case of conflict between a provision of the uniform law and usages applicable to the contract under paragraph 2, the latter shall prevail. In addition some representatives stated that as a constitutional matter or as a matter of public policy it was unacceptable that usages would take precedence over a statute or a convention.

Paragraph 4

38. The Working Group deleted paragraph 4. Some representatives were of the opinion that it was often difficult to find any meaning which was widely accepted and regularly given to various expressions, provisions and forms of contract which are used in international trade. Other representatives were of the view that the difficulties could be resolved by analogy to the provisions on usages. However, one observer doubted that this solution was adequate and regretted the deletion of this paragraph.

Drafting Party III

39. The Working Group set up Drafting Party III composed of the representatives of the Federal Republic of Germany, Japan and the United States of America to redraft paragraph 2 in the light of the discussion and to

make such changes in paragraph 1 as might be considered necessary.

40. Drafting Party III recommended the following text in replacement of the above text of article 9:

"1. The parties shall be bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The contract shall be considered, unless otherwise agreed, to include a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

41. The Drafting Party recommended the deletion of paragraph 3 of the present text of article 9 on the ground that it was unnecessary. Those usages which were incorporated into the contract under paragraphs 1 and 2 automatically took precedence over the provisions of this Convention by virtue of article 5[2] which embodies the principle of party autonomy.

42. There was considerable support in the Working Group for deleting all of article 9. There was also support for deleting paragraph 2 only. The Working Group, after deliberation, adopted the text of paragraph 1 as recommended by the Drafting Party and of paragraph 2 amended as below:

"2. The parties shall be considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Article 10

"[For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.]"

43. The Working Group agreed that the definition of "fundamental breach" was important because the remedy of avoidance of the contract rested upon it. After a number of drafting suggestions were considered, Drafting Party IV, consisting of the representatives of India and Mexico and the observer from the International Chamber of Commerce, was set up to draft a new text.

44. Drafting Party IV proposed the following text:

"For the purposes of this Convention, a breach of contract shall be regarded as fundamental whenever the failure of a party to perform the contract results in substantial detriment to the other party and the party in breach had reason to be aware thereof."

In explanation of this text it was stated that the Drafting Party was of the view that it was unsatisfactory to rely on a test under which the party not in breach would not have entered the contract or would not have had any interest in concluding the contract if he had anticipated the breach.

45. The Working Group accepted the recommendation of the Drafting Party, subject to minor drafting changes that were necessary for the purpose of establishing concordant texts in English and French. The text adopted by the Working Group is as follows:

"A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result."

Article 11

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as is practicable in the circumstances."

46. This article was deleted when the word "promptly" was dropped from the three places it appeared in the Convention, articles 38, 42 and 73.

Proposed new article 12

47. Consideration was given to a proposal submitted by an observer to create a new article 12 which would govern the obligation of a party in respect of the acts of those for whom he is responsible.[3] There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention, notably articles 76, 79 and 96.

Article 14

48. Consideration was given to a proposal submitted by an observer to add a new paragraph 2 to article 14 providing that if a notice has been sent properly and in time, the sender can rely upon it even if the notice does not arrive or arrives late.[4] This would be a generalization of the rule in article 39, paragraph 3 of the present text. It was observed that this was contrary to the rule throughout much of the world which places the risk of transmission on the party who chooses the means of communication. The proposal was withdrawn.

Article 15

"[A contract of sale need not be evidenced by writing and shall not be subject to any other require-

[2] Article 5 was moved to article 3 *ter*. As approved by the Working Group at this session it reads as follows: "The parties may exclude the application of this Convention or derogate from or vary the effects of any of its provisions."

[3] *Alternative A:* "Where the present Law refers to the act of (actual or presumed) knowledge of a party, such reference shall include the act or knowledge of his agent or of any person for whose conduct such party is responsible [provided that such agent or person is acting within the scope of an employment for the purpose of the contract]."

Alternative B: "For the purposes of the present Law the seller or the buyer shall be responsible for the act or the [actual or presumed] knowledge of his agent or of any person for whose conduct he is responsible, as if such act or knowledge were his own [, provided that such agent or person is acting within the scope of an employment for the purpose of the contract]."

[4] "2. Where any notice referred to in the present Law has been sent in due time by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the party giving such notice the right to rely thereon."

ments as to form. In particular, it may be proved by means of witneses.]"

49. The Working Group considered two points: first, whether article 15 was properly in a law of sales or whether it belonged in a law on formation and validity of contracts and second, whether the rule should be that contracts of sale need not be in writing or that they must be in writing.

50. Several attempts at formulating compromises were attempted which would preserve the freedom to create contracts not in writing for those States for whom this is a standard way in which business is done but at the same time to preserve the requirement of writing for the States which presently require it. All such attempts failed.

51. Similarly, certain representatives were in favour of deleting article 15 altogether. Other representatives expressed themselves in favour of the present text, which they considered essential for the Convention. Still other representatives considered that this article was partially formation, partially validity and partially proof. In view of the foregoing the Working Group decided to leave the article in brackets as an article in respect of which no agreement had been reached.

Article 16

"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except in accordance with the provisions of article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods."

52. After a discussion of the relationship between article 16, article 42, paragraph 1 and article 71, paragraph 2, the Working Group adopted the following new text of article 16:

"Where, in accordance with article 42, paragraph 1, or article 71 paragraph 2, one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention."

53. The current text was considered a more appropriate form for an integrated Convention. In addition, it does not speak of the enforcement of a judgement for specific performance, a subject thought not to be appropriate for a Convention on the law of sales.

Article 17

[In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application].]

54. Some representatives were in favour of the retention of this article as it was. The Working Group, nevertheless, decided to use the text of article 7 of the Convention on the Limitation Period. Consequently, the present text was adopted without the words "in its interpretation and application".

Title of section I

Delivery of the goods [and documents]

55. It was decided to delete the square brackets and keep the words "and documents" in the title.

Article 20

"Delivery shall be effected:

"(*a*) Where the contract of sale involves the carriage of goods, by handing the goods over to the carrier for transmission to the buyer;

"(*b*) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unascertained goods to be drawn from a specific stock or to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

"(*c*) In all other cases by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence."

56. The Working Group agreed with the suggestion of an observer that article 20 may not always give the results intended. The introduction to paragraph (*c*), i.e. "In all other cases", caused many fact situations to be assigned to paragraph (*c*) which obviously did not fit. Drafting Party V, consisting of the representative of the United Kingdom and the observers for Bulgaria and Norway, was set up to consider article 20. It reported a text which listed several means by which delivery could be made other than those covered by article 20 of the present text. However, after discussion, the Working Group decided to retain article 20 as it was except for the deletion of the word "all" in paragraph (*c*). This change makes it clear that paragraph (*c*) does not exclude an agreement of the parties that delivery should be made in another manner.

57. A number of minor drafting changes were accepted by the Working Group. The article is to begin "Delivery *of the goods* is effected:" to make it clear that article 20 does not govern the delivery of documents. In paragraph (*a*) the word "first" was inserted before the word "carrier". The words "or, in the absence of a place of business, at his habitual residence" were deleted from paragraph (*c*) because the matter is covered by article 4 (*b*).

Article 35

"1. The seller shall be liable in accordance with the contract and the present law for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition

at the time when risk would have passed had they been in conformity with the contract.]

"2. The seller shall also be liable for any lack of conformity which occurs after the time indicated in paragraph 1 of this article and is due to a breach of any of the obligations of the seller, including a breach of an express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period."

58. The consideration of article 35 was deferred until the discussion on passing of the risk at the next session of the Working Group.

Article 38

Paragraph 1

"1. The buyer shall examine the goods, or cause them to be examined, promptly."

59. The Working Group decided to delete the word "promptly" and to substitute "within as short a period as is practicable in the circumstances". At the same time article 11, which contained the definition of "promptly", was deleted.

Article 39

"1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in article 38 is found later, the buyer may none the less rely on that defect, provided that he gives the seller notice thereof within a reasonable time after its discovery. [In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a [longer] [different] period.]

"2. In giving notice to the seller of any lack of conformity the buyer shall specify its nature.

"3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon."

Paragraph 1

60. The bracketed language in the present text raised two problems: the maximum time-limit for giving notice of a lack of conformity of the goods if there is no contractual guarantee, and the effect of a contractual guarantee on that time-limit. One representative mentioned that a so-called "guarantee" that at the time of delivery the goods had the quality stipulated in the contract was not a guarantee which would affect the time-limit for giving notice.

61. The Working Group decided to retain the two-year limit in paragraph 1. However, several representatives were in favour of shortening the period to one year.

62. The Working Group was in agreement that if a guarantee was for a period longer than two years, the buyer should have at least as long as the guarantee period to give notice, subject to the rule in the first two sentences that he must give notice within a reasonable time after he has discovered the defect or ought to have discovered it. There was no consensus as to whether the buyer need only discover the defect within the guarantee period and give notice within some prescribed time thereafter or whether he also had to give notice within the guarantee period. The other problem on which there was no consensus was whether a guarantee period of less than two years should shorten the two-year time-limit during which notice could be given. Certain representatives stated that it was a question of the interpretation of the guarantee and that any rule of interpretation in the Convention in this connexion would be likely to be inappropriate.

63. The Working Group set up Drafting Party VI consisting of the representatives of Czechoslovakia, Japan and the United States and the observer of Norway. The following text was recommended by the Drafting Party for the completion of paragraph 1.

"However, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller at the latest within a period of two years from the date on which the goods were actually handed over except to the extent that such time-limit is inconsistent with a guarantee covering a different period."

The word "actually" was inserted before "handed over" in order to make it clear that the two-year time-limit begins at the time the buyer is in a position to examine the goods.

New paragraph 2

64. Drafting Party VI recommended the adoption of a new paragraph 2 which would have governed the relationship between a guarantee and the obligation to give notice of lack of conformity. This text was as follows:

"2. In case of breach of an express guarantee by the seller referred to in article 35, paragraph 2, the buyer shall lose the right to rely on such breach if he has not given the seller notice of the lack of conformity within a reasonable time after he has discovered it, but at the latest within a period of three months from the date of the expiration of the period of guarantee."

65. The Working Group accepted the first portion of the proposed amendment to paragraph 1 up to and including the words "were actually handed over". It rejected the remainder of the proposed paragraph 1 and of the entire text of the proposed paragraph 2 in favour of a new text of paragraph 2 based on the principle of party autonomy. A Drafting Party consisting of the representatives of Austria and the United Kingdom was set up to effect this mandate. The text of paragraph 2 as recommended by this Drafting Party and as adopted by the Working Group is as follows:

"2. The parties may, in accordance with article 5, derogate from the provisions of the preceding paragraph by providing for a period of guarantee."

Paragraphs 2 and 3

66. Paragraphs 2 and 3 of this article were renumbered paragraphs 3 and 4.

Article 41

"1. Where the seller fails to perform any of his obligations under the contract of sale and the present Law, the buyer may:

". . .

"(*b*) Claim damages as provided in article 82 or articles 84 to 87."

Paragraph 1

67. The references in subparagraph 1 (*b*) were changed from "article 82 or articles 84 to 87" to "articles 82 to 89".

Article 42

"1. The buyer has the right to require the seller to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the buyer has acted inconsistently with that right by avoiding the contract under article 44 or, by reducing the price under article 45 [or by notifying the seller that he will himself cure the lack of conformity].

"2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after prompt notice."

Paragraph 1

68. There was general agreement that the buyer's right to require the seller to perform the contract should not be linked to his right to have a court order specific performance of the contract. After discussion, and having redrafted article 16 (see para. 52 above), the Working Group decided to open the paragraph with the words "subject to article 16" and follow with a new text suggested by an observer.

69. A second problem in paragraph 1 was whether the words in brackets in the original text should be retained. Two representatives were in favour of retaining these words so as to emphasize the right of the buyer to cure the goods himself, even though the seller may be prepared to do so. However, the Working Group decided to delete the words in brackets.

Paragraph 2

70. In paragraph 2 the Working Group decided to delete the words "and after prompt notice" and substitute "and after request made within a reasonable time". One observer felt that the right of the buyer to require the seller to deliver substitute goods should be more clearly defined.

71. The new text of article 42 as adopted by the Working Group is thus as follows:

Article 42

"1. Subject to article 16, the buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in particular by avoiding the contract under article 44 or by reducing the price under article 45.

"2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after request made within a reasonable time."

Article [43 bis]

"1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 44 or the price reduced in accordance with article 45 [or has notified the seller that he will himself cure the lack of conformity].

"2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision."

Paragraph 1

72. An observer proposed adding the words "on account of delay" following the words "unless the buyer". The effect would have been that the buyer could have avoided the contract and thereby cut off the seller's right to cure a defect in the goods only if there was late delivery. The Working Group rejected the proposal.

73. The Working Group decided to delete the words in brackets in conformity with its decision in respect of article 42. The Working Group also amended the end of paragraph 1 to read:

"or *has declared* the price *to be* reduced in accordance with article 45."

Paragraph 2

74. The Working Group considered a proposal of an observer to amend the opening phrase of paragraph 2 as follows:

"2. If the seller requests the buyer to make known his decision *as to whether he will accept performance,* and . . .".

There was no consensus for adopting this amendment.

Article 44

"1. The buyer may by notice to the seller declare the contract avoided:

"(*a*) Where the failure by the seller to perform any of his obligations under the contract of sale and the present law amounts to a fundamental breach of contract, or

"(*b*) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 43.

"2. The buyer shall lose his right to declare the contract avoided if he does not give notice thereof to the seller within a reasonable time:

"(*a*) Where the seller has not delivered the goods [or documents] on time, after the buyer has been informed that the goods [or documents] have been delivered late or has been requested by the seller to make his decision under article [43 *bis*, para. 2];

"(*b*) In all other cases, after the buyer has discovered the failure by the seller to perform or ought to have discovered it, or, where the buyer has requested the seller to perform, after the expiration of the period of time referred to in article 43."

75. The Working Group considered the relationship between paragraph 2 and paragraph 1 of this article and the similar relationship between paragraph 2 and paragraph 1 of article 72 *bis*. In both articles, paragraph 1 states the buyer's (art. 44) or the seller's (art. 72 *bis*) right to avoid the contract. Paragraph 2 states that the party not in breach would lose that right if he does not give notice of the avoidance within a reasonable time. The point in time from which the reasonable time was to be measured varied depending on the circumstances.

76. There was no agreement in the Working Group on the question whether paragraph 2 (*a*) of the revised text was drafted in such a manner as to make it clear that it covered cases of both late delivery and non-delivery. In order to draft a text which would clearly govern cases of non-delivery, the Working Group set up Drafting Group VIII consisting of the representative of the United States and the observers from the Federal Republic of Germany and Norway. The Drafting Group was also requested to consider the similar problem in article 72 *bis*.

77. Drafting Group VIII recommended transferring paragraph 2 of article 44 to a new article 44 *bis* worded as follows:

"1. Where delivery is not effected, the buyer may give notice of avoidance at any time, subject to the provisions of articles 43, 43 *bis* and 44.

"2. In other cases the buyer shall lose his right to declare the contract avoided, if he does not give notice thereof to the seller within a reasonable time:

"(*a*) In respect of late delivery and subject to the provisions of articles 43 and 43 *bis*, after the buyer has become aware that delivery has been effected;

"(*b*) In respect of lack of conformity or any other breach not covered by subparagraph (*a*), after the buyer has discovered or ought to have discovered such breach, or where avoidance is based on the seller's failure to cure such breach in accordance with articles 43 or 43 *bis*, after the expiration of the applicable period of time referred to therein."

78. The text proposed by the Drafting Group was rejected by the Working Group on the grounds that it was hard on the seller because, in certain circumstances, it required two notices, one notice of his intention to avoid and a second notice of his actual avoidance. As a result of this decision of principle against the requirement of two notices, paragraph 2 of article 44 was deleted, as were the words "by notice to the seller" in the opening line of paragraph 1.

79. Two representatives stated that they reserved the right to return to this matter, which is reflected in article 72 *bis* as well as in this article, at a later time because there had not been sufficient time to reflect on the proposals during this session of the Working Group. One observer was of the view that the decision taken by the Working Group was not correct, and suggested that it should be reconsidered in the plenary session of UNCITRAL. Another observer remarked that, as a result of the decision to delete article 44 *bis* and 72 *ter* as they had been proposed by the Drafting Group, the right of a party to declare the contract avoided seems to subsist for an unlimited period of time and therefore he expressed his doubts as to the deletion of those provisions or of any other provision to a similar effect.

Article 46

80. Article 45 was added to the list of articles to which this article makes a cross-reference.

Article 52

81. The Working Group moved article 52 on the transfer of property to a new article 40 *bis*.

Article 57

"Where a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time."

82. Several representatives recommended deletion of article 57 on the ground that the problems of contracts of sale in which the price is not determined or determinable relate to the validity of the contract and should not be dealt with by the Convention. It was also observed that such contracts were and should be invalid and that nothing in this Convention should appear to give them validity.

83. Other representatives were of the view that article 57 did not make a contract valid if it was otherwise invalid under the appropriate law. They suggested that article 57 served the useful function of specifying how to determine the price if the price was not determined or determinable from the contract itself. In their opinion article 57 could take effect only if the contract was valid under the appropriate law.

84. Since there was no consensus to delete article 57, the Working Group decided to retain it in its present form.

Article 59

"1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place."

Paragraph 1

85. The Working Group decided to delete the words "or if he does not have a place of business, at his

habitual residence" since the matter is covered by article 4.

Article 59 bis

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity."

Paragraph 3

86. The Working Group discussed the proposal of an observer that paragraph 3 should read as follows:

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the *contract requires payment against documents or the parties have agreed upon other* procedures for delivery or payment, *that* are inconsistent with such opportunity."

87. There was no consensus to amend paragraph 3 as proposed by the observer. Some representatives stated that since a contractual requirement for payment against documents was inconsistent with a right of inspection prior to payment, the fact situation envisaged by the proposal was already covered by the "unless" clause in paragraph 3.

Article 67

"[1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may [have recourse to the remedies specified in articles 70 to 72 *bis,* or] make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

"2. If the seller makes the specification himself, he shall inform the buyer of the details thereof and shall fix a reasonable period of time within which the buyer may submit a different specification. If the buyer fails to do so the specification made by the seller shall be binding.]"

88. A proposal was made to delete this article on the grounds that it was superfluous. However, several representatives stated that the article could be useful in certain situations. The representatives who proposed the deletion stated that there was no opposition in principle to the article and the Working Group decided to retain it.

Paragraph 1

89. In order to make it clear that under the contract the buyer may have an obligation to specify the form, measurement or other features of the goods as well as a right to do so, paragraph 1 was amended to begin as follows:

"If the contract envisages that the buyer will subsequently determine . . ."

90. The Working Group adopted two amendments to make it clear that the seller has a right to specify if buyer does not, but has no duty to do so. In the first amendment the words "may have recourse to the remedies specified in articles 70 to 72 *bis,* or make the specification" were deleted in favour of "may, without prejudice to any other rights he may have under the contract and the present Convention, specify". In the second amendment the words "in accordance with the requirements of the buyer in so far as these are known to him" were deleted in favour of "in accordance with any requirement of the buyer that may be known to him".

91. The text of paragraph 1 of article 67 as amended by the Working Group is as follows:

"1. If the contract envisages that the buyer will subsequently determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have under the contract and this Convention, make the specification himself in accordance with any requirement of the buyer that may be known to him."

92. The Working Group was of the view that the extensive discussions in respect to article 67 demonstrated that it was properly a provision on remedies. Therefore, the Working Group decided to move the provision to a new article 72 *ter.*

Article 70

"1. Where the buyer fails to perform any of his obligations under the contract of sale and the present Law, the seller may:

(*a*) Exercise the rights provided in article 71 to 72 *bis;* and

(*b*) Claim damages as provided in articles 82 and 83 or articles 84 to 87."

Paragraph 1

93. The Working Group made only minor amendments. In subparagraph 1 (*a*) the references were changes to "articles 71 to 72 *ter*". At the end of subparagraph 1 (*a*) the word "and" was deleted. In subparagraph 1 (*b*) the references were changed to "articles 82 to 89".

Article 71

"2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present law, the seller may require the buyer to perform to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the present law."

Paragraph 2

94. In a decision similar to that made in article 42, the Working Group decided to begin this paragraph with the words "subject to the provisions of article 16 . . ." and to delete the portion of the paragraph which begins with "to the extent . . .".

The Working Group also decided to add the words "his obligation" to the new end of paragraph 2.

95. The new text of paragraph 2 is as follows:

"2. Subject to the provisions of article 16, if the buyer fails to take delivery or to perform any other obligation in accordance with the contract and this Convention, the seller may require the buyer to perform his obligation."

Article 72 bis

Alternative A

"[1. The seller may by notice to the buyer declare the contract avoided:

"(*a*) Where the failure by the buyer to perform any of his obligations under the contract of sale and the present law amounts to a fundamental breach of contract, or

"(*b*) Where the buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article 72.

"2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or, where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72.]"

Alternative B

"[1. The seller may by notice to the buyer declare the contract avoided:

"(*a*) Where the buyer has not paid the price or otherwise has not performed the contract within an additional period of time fixed by the seller in accordance with article 72; or

"(*b*) Where the goods have not yet been handed over, the failure by the buyer to pay the price or to perform any other of his obligations under the contract of sale and the present law amounts to a fundamental breach.

"2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly the seller shall where the goods have not yet been handed over, be deemed to have avoided the contract.

"3. The seller shall lose his right to declare the contract avoided if he does not give notice to the buyer before the price was paid or, where the goods have been handed over, promptly after the expiration of the period of time fixed by the seller in accordance with article 72.]"

Alternative C

"[2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time:

"(*a*) Where the buyer has not performed his obligations on time, after the seller has been informed that the price has been paid late or has been requested by the buyer to make his decision as regards performance or avoidance of the contract;

"(*b*) Where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72;

"(*c*) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of six months [one year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right, in the goods.]"

96. The Working Group adopted paragraph 1 of alternative A.

97. Drafting Group VIII recommended parallel action in article 72 *bis* to that which it recommended in article 44. In its proposal, paragraph 2 would have been transferred to a new article 72 *ter*, and what is now article 72 *ter* would have become article 72 *cuater*. The proposed article 72 *ter* would have been worded as follows:

"1. Where delivery is not taken or the price is not paid, the seller may give notice of avoidance at any time, subject to the provisions of articles 72 and 72 *bis*.

"2. In other cases the seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time:

"(*a*) In respect of late performance of the buyer's obligations and subject to the provisions of article 72, after the seller has become aware that performance has been rendered;

"(*b*) In respect of any other breach not covered by subparagraph (*a*), after the seller has discovered or ought to have discovered such breach, or where avoidance is based on the buyer's failure to perform within an additional period of time under article 72, after the expiration of the period of time referred to therein."

98. The proposed article 72 *ter* and, thereby, paragraph 2, alternative A, was rejected by the Working Group at the same time, and for the same reasons that paragraph 2 of article 44 was deleted (paras. 75 to 78 *supra*). As a result article 72 *bis* as approved by the Working Group consists of paragraph 1 of alternative A, with the words "by notice to the buyer" in the first line deleted.

Article 73

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the economic situation of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligation."

Paragraph 1

99. The Working Group discussed the criteria by which it would be determined that a party may suspend his performance. Some representatives stated that "a serious deterioration in the economic situation of the other party" was too vague a test to be employed without difficulty.

100. The Working Group decided to replace those words by "a serious deterioration in the capacity to perform or creditworthiness of the other party . . .".

101. The Working Group decided to replace the word "promptly" in paragraph 3 by the word "immediately".

Article 76

Alternative A

"[1. Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that, owing to circumstances which have occurred without fault on his part, performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account, or to avoid or to overcome the circumstances.

"2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would also be exempt if the provisions of that paragraph were applied to him.

"3. Where the impossibility of performance within the provisions of paragraph 1 of this article is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impossibility is removed, unless the performance required has then so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract.

"4. The non-performing party shall notify the other party of the existence of the circumstances which affect his performance within the provisions of the preceding paragraphs and the extent to which they affect it. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the circumstances, he shall be liable for the damage resulting from such failure.]"

Alternative B

"[1. Where a party has not performed one of his obligations [in accordance with the contract and the present Law], he shall not be liable [in damages] for such non-performance if he proves that it was due to an impediment [which has occurred without any fault on his side and being] of a kind which could not reasonably be expected to be taken into account at the time of the conclusion of the contract or to be avoided or overcome thereafter.

"2. Where the circumstances which gave rise to the non-performance constitute only a temporary impediment, the exemption shall apply only to the necessary delay in performance. Nevertheless, the party concerned shall be permanently relieved of his obligation if, when the impediment is removed, performance would, by reason of the delay, be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

"3. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the impediment, he shall be liable for the damage resulting from this failure.

"4. The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present Law to declare the contract avoided or to reduce the price, unless the impediment which gave rise to the exemption of the first party was caused by the act of the other party [or of some person for whose conduct he was responsible].]"

Alternative C

"[1. Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has [or to circumstances which have] occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment [the circumstances].

"2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

"3. Where the impediment to the performance of an obligation is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed.

"4. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform [of the circumstances which affect his performance and the extent to which they affect it]. If he fails to do so within a reasonable time after he knows of the impediment [circumstances], he shall be liable for the damage resulting from this failure.]"

102. The Working Group had three proposals before it: alternatives A and B which had been proposed at the fifth session of the Working Group (A/CN.9/87, annex I)** and alternative C which had been proposed by a representative (A/CN.9/WG.2/WP.20, annex VI).††

103. The Working Group was of the opinion that alternative C contained an appropriate combination of the two main positions which had been advanced at earlier sessions of the Working Group, i.e. (*a*) that the non-performing party should be excused from the consequences of his non-performance if he was impeded from performing by objective conditions, and (*b*) that

** UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.
†† *Ibid.*, part two, I, 4.

a non-performing party can be excused only if there was no fault on his part.

104. Certain minor amendments to the wording of alternative C were adopted by the Working Group and, in order to provide a text which could more easily be rendered into French, a slightly different paragraph 3 was adopted.

105. The text of article 76 as adopted by the Working Group is as follows:

"1. Where a party has not performed one of his obligations, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment.

"2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

"3. The exemption provided by this article shall have effect only for the period before the impediment is removed.

"4. The non-performing party shall notify the other party of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the impediment, he shall be liable for the damage resulting from this failure."

106. The Working Group considered a new article 76 *bis* which had been proposed in connexion with alternative C of article 76 and which read as follows:

"Where the non-performing party has notified the other party, in accordance with article [76], of an impediment to [circumstances which affect] the performance of one of his obligations, the rights of the parties shall be as follows:

"(*a*) The non-performing party may declare the contract avoided if by reason of the impediment [circumstances] above-mentioned, the performance required of him by the contract has become impossible or has so radically changed as to amount to performance of a quite different contract.

"(*b*) The other party may either (i) if he is the buyer, reduce the price in the proportion which the value of any goods delivered bears to the total value of the goods which the seller contracted to deliver, or (ii) declare the contract avoided if a reasonable person in his situation would not have entered into the contract if he had foreseen the non-performance and its consequences."

107. Although this proposal was supported by some representatives, other representatives thought it gave too much relief to the non-performing party. Still another view was that it was too complicated. The Working Group decided that it would not attempt to govern the consequences of non-performance beyond the relief given in article 76.

Article 78

"[1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due.]"

Paragraph 1

108. The Working Group recognized that the revised text of this article might lead to the conclusion that all provisions in a contract of sale are annulled when a contract is avoided. This was not the effect intended. For instance, an arbitration clause in the contract may be invoked to permit the arbitration tribunal to decide whether the avoidance was valid. After attempting several formulations to state which contract clauses are not annulled by avoidance, the Working Group decided to add a new sentence to paragraph 1 as follows:

"The avoidance shall not affect provisions for the settlement of disputes."

Article 79

"1. The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods in the condition in which he received them.

"2. Nevertheless the preceding paragraph shall not apply:

"(*a*) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

"(*b*) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

"(*c*) If part of the goods have been sold in the normal course of business or have been consumed or transferred by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered;

"(*d*) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

(*e*) If the deterioration or transformation of the goods is unimportant."

109. The Working Group decided to delete paragraph 2 (*a*) on the grounds that it was subsumed under paragraph 2 (*d*). Paragraph 2 (*d*) was moved to paragraph 2 (*a*) because it is the most important subparagraph of paragraph 2.

110. The Working Group decided to amend paragraph 1 by adding "substantially" before the words "in the condition". With the addition of the word "substantially" to paragraph 1, the Working Group decided that paragraph 2 (*e*) was no longer necessary and it was deleted.

111. In the original paragraph 2 (*d*) the words "or of returning them in the condition in which they were received" and "or of some other person for whose conduct he is responsible" were deleted.

112. The text of paragraph 2 (*d*), which will become paragraph 2 (*a*) in the new numbering, is thus as follows:

"(*d*) If the impossibility of returning the goods is not due to the act of the buyer."

Article 81

"1. . . .

"2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

"(*a*) Where he is under an obligation to return the goods or part of them, or

"(*b*) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods."

113. One representative stated that he believed it to be incorrect that paragraph 2 (*b*) applied only to the situation in which the buyer had exercised his right to have the contract avoided. In the view of that representative, the obligation to account must apply whether it is the buyer or the seller who has avoided the contract. Another representative took the view that the situation in which the seller had avoided the contract was covered by subparagraph 2 (*a*).

Article 82

"Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of contract."

114. Several representatives stated that the second sentence of this article should be deleted because it is a limitation on the right of full damages. The Working Group decided to retain the sentence. A reservation was expressed by one representative.

Article 83

"Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1 per cent."

115. The Working Group decided to delete the words "or, if he has no place of business, his habitual residence". The Working Group also decided to add to the end of the article the following words:

"but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller's country".

It was observed that since the rate of interest for commercial credits was often considerably more than 1 per cent higher than the official discount rate, the rule in the text was an invitation to the debtor to delay payment.

Article 84 (1)

"1. In case of avoidance of the contract, the party claiming damages may rely upon the provision of article 82 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided."

116. The Working Group considered whether to replace the words "on which the contract is avoided" by the words "on which delivery was or should have been effected". The Working Group did not reach a decision as to which text was preferable and decided to include both phrases in square brackets in the text for consideration at the seventh session.

FUTURE WORK

117. The Working Group decided to recommend to the Commission that its seventh session should be held in Geneva for two weeks early in 1976, preferably between 5 and 16 January. At its seventh session the Working Group will complete its examination of pending questions in the Convention on the International Sale of Goods and will approve the text of the Convention.

118. The Working Group noted that the Commission at its seventh session requested it to consider, upon the completion of its present work, the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the draft of the International Institute for the Unification of Private Law (UNIDROIT), in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods. The Working Group expects to be able to hold at its next session a preliminary discussion on the formation and validity of such contracts so as to give the Secretariat, if appropriate, directions as to the studies which the Working Group may wish it to undertake in that field.

119. The question was raised whether it was desirable to have the Convention accompanied by a commentary. Several representatives expressed themselves in favour of such a commentary on the ground that it would make the preparatory work more readily available. The Working Group was of the view that such a commentary would be useful but that it should have an unofficial character. The Working Group requested the Secretariat to draw up a commentary based on the reports on the work of its sessions and the various studies made and to transmit a draft commentary to representatives for unofficial comments. The Working Group also requested the Secretariat to structure the draft provisions adopted by it in the form of a convention and to submit the text to it at its next session.

2. Revised text of the Convention on the International Sale of Goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its first six sessions (A/CN.9/100, annex I)*

CONTENTS

Draft Convention on the International Sale of Goods[1]

CHAPTER I. SPHERE OF APPLICATION

Article 1 (Article 1)

1. The present Convention shall apply to contracts of sales of goods entered into by parties whose places of business are in different States:

(*a*) When the States are both Contracting States; or

(*b*) When the rules of private international law lead to the application of the law of a Contracting State.

2. The fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.

Article 2 (Article 2)

The present Convention shall not apply to sales:

(*a*) Of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not realize and had no reason to realize that the goods were bought for any such use;

(*b*) By auction;

(*c*) On execution or otherwise by authority of law;

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

(*e*) Of ships, vessels or aircraft;

(*f*) Of electricity.

Article 3 (Article 3)

1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

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

Article 4 (Article 1, paragraph 3)

The present Convention shall also apply where it has been chosen as the law of the contract by the parties.

Article 5 (Article 5)

The parties may exclude the application of the present Convention or derogate from or vary the effect of any of its provisions.

Article 6 (Article 4)

For the purpose of the present Convention:

(*a*) Where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(*b*) Where a party does not have a place of business, reference shall be made to his habitual residence;

* 18 February 1975.

[1] At its sixth session the Working Group decided that the rules on the international sale of goods should appear in the form of an integrated convention rather than as a uniform law annexed to a convention. In conformity with this decision the Working Group requested the Secretariat to prepare the text as it had been approved by the Working Group during its first six sessions in the form of a convention. The articles have been renumbered with the corresponding articles of revised ULIS (A/CN.9/87, annex I; UNCITRAL Yearbook, vol. V: 1974, part two, I, 2), in parentheses. Those matters which are still unresolved by the Working Group are in square brackets, including those headings which were not in the 1964 ULIS and which have been proposed by the Secretariat.

(*c*) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 7 (Article 8)

The present Convention shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Convention shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

CHAPTER II. GENERAL PROVISIONS

Article 8 (Article 9)

1. The parties shall be bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The parties shall be considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 9 (Article 10)

A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result.

Article 10 (Article 14)

Communications provided for by the present Convention shall be made by the means usual in the circumstances.

Article 11 (Article 15)

[A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.]

Article 12 (Article 16)

Where, in accordance with article 27, paragraph (1), or article 43, paragraph (2), one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.

Article 13 (Article 17)

In interpreting and applying the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.

CHAPTER III. OBLIGATIONS OF THE SELLER

Article 14 (Article 18)

The seller shall deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Convention.

SECTION I. DELIVERY OF THE GOODS AND DOCUMENTS

SUBSECTION 1. OBLIGATIONS OF THE SELLER AS REGARDS THE DATE AND PLACE OF DELIVERY

Article 15 (Article 20)

Delivery of the goods is effected:

(*a*) Where the contract of sale involves the carriage of goods, by handing the goods over to the first carrier for transmission to the buyer;

(*b*) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unidentified goods to be drawn from a specific stock or to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

(*c*) In other cases by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract.

Article 16 (Article 21)

1. If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the goods are not clearly marked with an address or otherwise identified to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.

Article 17 (Article 22)

The seller shall deliver the goods:

(*a*) If a date is fixed or determinable by agreement or usage, on that date; or

(*b*) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(*c*) In any other case, within a reasonable time after the conclusion of the contract.

Article 18 (Article 23)

Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage.

SUBSECTION 2. OBLIGATIONS OF THE SELLER AS REGARDS THE CONFORMITY OF THE GOODS

Article 19 (Article 33)

1. The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract. Where not inconsistent with the contract the goods shall:

(*a*) Be fit for the purposes for which goods of the same description would ordinarily be used;

(*b*) Be fit for any particular purpose expressly or impliedly made known to the seller at the time of contracting, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(*c*) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(*d*) Be contained or packaged in the manner usual for such goods.

2. The seller shall not be liable under subparagraphs (*a*) to (*d*) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect.

Article 20 (Article 35)

1. The seller shall be liable in accordance with the contract and the present Convention for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

2. The seller shall also be liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and is due to a breach of any of the obligations of the seller, including a breach of an express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period.

Article 21 (Article 37)

If the seller has delivered goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 55.

Article 22 (Article 38)

1. The buyer shall examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

2. In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

3. If the goods are redispatched by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known at the time, when the contract was concluded, of the possibility of such redispatch, examination of the goods may be deferred until they arrive at the new destination.

Article 23 (Article 39)

1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in article 22 is found later, the buyer may none the less rely on that defect, provided that he gives the seller notice thereof within a reasonable time after its discovery. However, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller at the latest within a period of two years from the date on which the goods were actually handed over.

2. The parties may, in accordance with article 5, derogate from the provisions of the preceding paragraph by providing for a period of guarantee.

3. In giving notice to the seller of any lack of conformity the buyer shall specify its nature.

4. Where any notice referred to in paragraph (1) of this article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.

Article 24 (Article 40)

The seller shall not be entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.

Article 25 (Article 52)

1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

2. Unless the seller already knows of the right or claim of the third person, the buyer may notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract.

SECTION II. [REMEDIES FOR BREACH OF CONTRACT BY THE SELLER]

Article 26 (Article 41)

1. Where the seller fails to perform any of his obligations under the contract of sale and the present Convention, the buyer may:

(*a*) Exercise the rights provided in articles 27 to 32;

(*b*) Claim damages as provided in articles 55 to 60.

2. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

Article 27 (Article 42)

1. Subject to article 12, the buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in particular by avoiding the contract under article 44 or by reducing the price under article 31.

2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver

substitute goods only when the lack of conformity constitutes a fundamental breach and after request made within a reasonable time.

Article 28 (Article 43)

Where the buyer requests the seller to perform, the buyer may fix an additional period of time of reasonable length for delivery or for curing of the defect or other breach. If the seller does not comply with the request within the additional period, or where the buyer has not fixed such a period, within a period of reasonable time, or if the seller already before the expiration of the relevant period of time declares that he will not comply with the request, the buyer may resort to any remedy available to him under the present Convention.

Article 29 (Article 43 *bis*)

1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision.

Article 30 (Article 44)

The buyer may declare the contract avoided:

(*a*) Where the failure by the seller to perform any of his obligations under the contract of sale and the present Convention amounts to a fundamental breach of contract, or

(*b*) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 29.

Article 31 (Article 45)

Where the goods do not conform with the contract, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity.

Article 32 (Article 46)

1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles 28 to 31 shall apply in respect of the part or quantity which is missing or which does not conform with the contract.

2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

Article 33 (Article 47)

1. Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

2. Where the seller has proferred to the buyer a quantity of goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 55. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 34 (Article 56)

The buyer shall pay the price for the goods and take delivery of them as required by the contract and the present Convention.

SECTION I. PAYMENT OF THE PRICE

Article 35 (Article 56 *bis*)

The buyer shall take steps which are necessary in accordance with the contract, with the laws and regulations in force or with usage, to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee.

A. FIXING THE PRICE

Article 36 (Article 57)

When a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time.

Article 37 (Article 58)

Where the price is fixed according to the weight of the goods, it shall, in case of doubt, be determined by the net weight.

B. PLACE AND DATE OF PAYMENT

Article 38 (Article 59)

1. The buyer shall pay the price to the seller at the seller's place of business or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place.

2. Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller.

Article 39 (Article 59 *bis*)

1. The buyer shall pay the price when the seller, in accordance with the contract and the present Convention places at the buyer's disposal either the goods or a document controlling their disposition. The seller

may make such payment a condition for handing over the goods or the document.

2. Where the contract involves the carriage of goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity.

Article 40 (Article 60)

Where the parties have agreed upon a date for the payment of the price or where such date is fixed by usage, the buyer shall, without the need for any other formality, pay the price at that date.

SECTION II. TAKING DELIVERY

Article 41 (Article 65)

The buyer's obligation to take delivery consists in doing all such acts which could reasonably be expected of him in order to enable the seller to effect delivery, and also taking over the goods.

[SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER]

Article 42 (Article 70)

1. Where the buyer fails to perform any of his obligations under the contract of sale and the present Convention, the seller may:

(*a*) Exercise the rights provided in articles 43 to 46;

(*b*) Claim damages as provided in articles 55 to 60.

2. In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

Article 43 (Article 71)

1. If the buyer fails to pay the price, the seller may require the buyer to perform his obligation.

2. Subject to the provisions of article 12, if the buyer fails to take delivery or to perform any other obligation in accordance with the contract and this Convention, the seller may require the buyer to perform his obligation.

3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article 45.

Article 44 (Article 72)

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for such performance. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present Convention.

Article 45 (Article 72 *bis*)

The seller may declare the contract avoided:

(*a*) Where the failure by the buyer to perform any of his obligations under the contract of sale and the present Convention amounts to a fundamental breach of contract, or

(*b*) Where the buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article 44.

Article 46 (Article 67)

1. If the contract envisages that the buyer will subsequently determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have under the contract and this Convention, make the specification himself in accordance with any requirement of the buyer that may be known to him.

2. If the seller makes the specification himself, he shall inform the buyer of the details thereof and shall fix a reasonable period of time within which the buyer may submit a different specification. If the buyer fails to do so the specification made by the seller shall be binding.

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I. ANTICIPATORY BREACH

Article 47 (Article 73)

1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

2. If the seller has already dispatched the goods before the grounds described in paragraph 1 become evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them. The provision of the present paragraph relates only to the rights in the goods as between the buyer and the seller.

3. A party suspending performance, whether before or after dispatch of the goods, shall immediately notify the other party thereof, and shall continue with performance if the other party provides adequate assurance of his performance. On the failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract.

Article 48 (Article 74)

1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear a fundamental breach in respect of future instalments, he may declare the con-

tract avoided for the future, provided that he does so within a reasonable time.

2. A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of deliveries already made if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract.

Article 49 (Article 75)

Where prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided.

SECTION II. EXEMPTIONS

Article 50 (Article 76)

1. Where a party has not performed one of his obligations, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment.

2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

3. The exemption provided by this article shall have effect only for the period before the impediment is removed.

4. The non-performing party shall notify the other party of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the impediment, he shall be liable for the damage resulting from his failure.

SECTION III. EFFECTS OF AVOIDANCE

Article 51 (Article 78)

1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. The avoidance shall not affect provisions for the settlement of disputes.

2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently.

Article 52 (Article 79)

1. The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods substantially in the condition in which he received them.

2. Nevertheless the preceding paragraph shall not apply:

(*a*) If the impossibility of returning the goods is not due to the act of the buyer;

(*b*) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 22;

(*c*) If part of the goods have been sold in the normal course of business or have been consumed or transferred by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

Article 53 (Article 80)

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 52 shall retain all the other rights conferred on him by the present Convention.

Article 54 (Article 81)

1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 56, as from the date of payment.

2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

(*a*) Where he is under an obligation to return the goods or part of them, or

(*b*) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 55 (Article 82)

Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of contract.

Article 56 (Article 83)

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business plus one per cent but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller's country.

Article 57 (Article 84)

1. In case of avoidance of the contract, the party claiming damages may rely upon the provisions of article 55 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on the date [on which delivery was or should have been effected] [on which the contract is avoided].

2. In calculating the amount of damages under paragraph 1 of this article, the current price to be

taken into account shall be that prevailing at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 58 (Article 85)

If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, instead of claiming damages under articles 55 or 57, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

Article 59 (Article 88)

The party who relies on a breach of the contract shall adopt such measures as may be reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Article 60 (Article 89)

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Convention.

SECTION V. PRESERVATION OF THE GOODS

Article 61 (Article 91)

Where the buyer is in delay in taking delivery of the goods or in paying the price the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 62 (Article 92)

1. Where the goods have been received by the buyer, he shall take reasonable steps to preserve them if he intends to reject them; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the seller.

2. Where goods dispatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination.

Article 63 (Article 93)

The party who is under an obligation to take steps to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 64 (Article 94)

1. The party who, in the cases to which articles 61 and 62 apply, is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.

2. The party selling the goods shall have the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them and shall transmit the balance to the other party.

Article 65 (Article 95)

Where, in the cases to which articles 61 and 62 apply, the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with article 64.

CHAPTER VI. PASSING OF THE RISK

Article 66 (Article 96)

Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller.

Article 67 (Article 97)

1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.

2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk of this loss or deterioration shall remain with him, unless he discloses such fact to the buyer.

Article 68 (Article 98)

1. In cases not covered by article 67 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

2. When the goods have been placed at the disposal of the buyer but have not been taken over or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last moment when he could have taken the goods over without committing a breach of the contract. [However, where the contract relates to the sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been clearly identified to the contract and the buyer has been informed of such identification.]

[*Article 69* (Article 98 *bis*)

1. Where the goods do not conform to the contract and such non-conformity constitutes a fundamental breach, the risk does not pass to the buyer so long as he has the right to avoid the contract.

2. In the case of a fundamental breach of contract other than for non-conformity of the goods, the risk does not pass to the buyer with respect to loss or deterioration resulting from such breach.]

3. Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved or deferred for further consideration by the Working Group at its first five sessions (A/CN.9/100, annex II)*

CONTENTS

INTRODUCTION

1. The Working Group on the International Sale of Goods, at its fifth session (Geneva, 21 January to 1 February 1974), invited representatives of Member States and the observers who attended that session, to submit to the Secretariat their comments and proposals on the text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions.**

2. At the time of issuing this note, comments and proposals had been received from the representatives of Austria, Bulgaria, Mexico, Norway, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland. The text of these comments and proposals is set forth in the annexes to this note.

I. COMMENTS BY THE REPRESENTATIVE OF AUSTRIA CONCERNING THE PRELIMINARY DRAFT OF THE NEW ULIS

[*Original: French*]

A. GENERAL COMMENTS

The following observations seek to be brief and not to touch on too many points on which consensus has already been reached within the Working Group.

At the present stage it seems appropriate to abandon the concept of a uniform law annexed to a convention and purely and simply to envisage a convention which would itself contain the basic provisions, as in the case of the Convention on the Limitation Period of 14 June 1974. It would then be necessary to draft a short preamble and final clauses.

B. COMMENTS ON VARIOUS ARTICLES

Article 1

The restriction of the sphere of application to relations between Contracting States (para. 1 (*a*)) is regrettable. It would, however, be preferable to delete paragraph 1 (*b*) which introduces an element that is foreign to the unification of substantive law and whose merits can be contested. Paragraph 2 should be retained.

Article 2

It would be useful to retain the part of the sentence within square brackets in paragraph 1 (*a*). Paragraph 2 (*a*) should state clearly whether or not documents controlling disposition of the goods, such as bills of lading are also excluded. Article 59 *bis*, paragraph 2, seems to indicate that they are not.

Article 4

The wording of subparagraph (*a*) should be reviewed in the light of the parallel provision in the Convention on the Limitation Period. In the event that it is decided to opt for the form of a simple convention (see section A, second paragraph above), subparagraph (*d*) could be omitted while subparagraph (*e*) would have to be expanded.

Article 8

There does not seem any point in including this article. Its inclusion in the 1964 ULIS can be explained by the fact that that Law provided that all matters which were not expressly settled therein were to be settled in conformity with its spirit.

Article 9

Paragraph 2 could be simplified.

Article 11

The expression "promptly" or "prompt" seems now to be used only in article 38, paragraph 1, and article 42, paragraph 2. Elsewhere, mention is made of a reasonable time. Either the definition of promptly could be deleted or the content of the article could be trans-

* 18 February 1975.

** Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (A/CN.9/87), paragraph 245 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The revised text of the Uniform Law is set forth in annex I of the progress report (reproduced in UNCITRAL Yearbook, vol. V: 1974, part two, I, 2).

ferred to article 38, paragraph 1. For article 42, paragraph 2, see below.

Article 15

It would be preferable to retain this provision.

Article 16

This article is incorrectly worded for it cites the 1964 ULIS. If the draft uniform law becomes a draft convention (see section A, second paragraph above), this article would become superfluous as article 42, paragraph 1, would be sufficient by itself.

Article 17

The Austrian delegation has always been of the opinion that this declaration of principle could be dispensed with.

Article 39

The last sentence in paragraph 1 should be retained. It should end with the words "a longer period".

Article 42

The end of paragraph 1 could be retained. The combination of "prompt" at the end of paragraph 2 and "reasonable time" in article 39, paragraph 1, would create a system which would be difficult to understand; it would be better to delete any reference to the giving of notice in article 42, paragraph 2.

Article 43 bis

The end of paragraph 1 could be retained.

Article 44

The words "by notice to the seller" in paragraph 1 duplicate the more precise formulation in the introductory sentence of paragraph 2; they should therefore be deleted.

Article 67

The article should be retained where it is. The remedy mentioned in the words in square brackets in paragraph 1 seems to go too far; it is sufficient that the right of specification should pass to the seller. These words should therefore be deleted.

Article 72 bis

It would seem appropriate to take alternative A as a basis for further discussion of this very complicated article.

Article 76

Paragraphs 1, 3 and 4 of alternative A are consistent with paragraphs 1, 2 and 3 of alternative B in so far as the content is concerned. However, both paragraph 2 of alternative A and paragraph 4 of alternative B seem to merit inclusion. Alternative A could be improved by the addition of paragraph 4 of alternative B which would become paragraph 5 of that text.

Article 79

Paragraph 2 (*a*) is already covered by paragraph 2 (*d*) and is therefore superfluous. The French text of paragraph 2 (*d*) should refer to "le fait de l'acheteur" instead of "son fait". Paragraph 2 (*e*) should be dropped for the same considerations which led to the deletion of article 33, paragraph 2, of the 1964 ULIS.

Article 84

The words "on which the contract is avoided" at the end of paragraph 1 should be replaced by the words "on which delivery was or should have been effected".

Article 89

As one delegation proposed, it should be added that, in case of fraud, the damages can in no case be less than those to be allocated under the uniform law (or convention, see section A, second paragraph above) where there is no fraud.

Article 98

The sentence in square brackets in paragraph 2 should be retained.

Article 98 bis

The article should be retained. However, it seems that the wording of paragraph 2 could be improved and might, for instance, read as follows:

> "Where the seller commits a fundamental breach of contract other than for non-conformity of the goods, the risk does not pass to the buyer with respect to loss or deterioration of the goods resulting from such breach."

II. Comments and proposals of the representative of Bulgaria

[*Original: French*]

1. Article 1, paragraph 3, should be discussed with a view to incorporating in the Law the principle set forth in the last part of article 4 of 1964 ULIS, namely, that the application of the Uniform Law by virtue of the choice and will of the parties shall not affect the application of any mandatory provisions of law in the State in whose territory one of the parties has his place of business which would have been applicable if the parties had not chosen the Uniform Law as the law of the contract.

The rationale for such a provision is the principle that the will of the parties cannot override mandatory rules, which have binding force.

2. With regard to article 3, paragraph 1, it is felt that the proposed formulation may give rise to doubts as to whether the Law covers deliveries (contracts of sale) of industrial complexes and plant, that is to say, entire factories. The text seems to mean that they are excluded from the sphere of application of the Law, but it would be desirable to clarify this question by adding to the text a reference to such deliveries, by way of example.

3. With regard to article 9 of ULIS and of the revised text concerning the priority of commercial usages over the Law, we consider that the opposite course should be adopted, in other words, that, in the event of conflict between the Law and usages, the Law should prevail and should apply unless the parties have agreed otherwise. The arguments in favour of this course are the variety of existing usages that are unknown to parties in international trade and the fact that the other course might adversely affect the security of their relations. The purpose of the Law, after all, is exactly the opposite: to establish uniformity and

security. Moreover, both the Uniform Law and newer and more modern laws include provisions that reproduce current usages and commercial practice.

4. The wording of article 10 is too complicated, although the substance is satisfactory. Simpler wording would be advisable, for example: "A breach of contract shall be fundamental wherever a reasonable person (normally a merchant) would not have concluded the contract if he had supposed at the time of its conclusion that the party in breach would commit that breach."

5. It would be better to keep articles 12 and 13 of ULIS rather than to delete them, as is done in the draft revised text.

6. With regard to article 15, on the form of the contract, we consider reasonable and acceptable the proposed amendment that "the contract . . . shall be in writing if so required by the laws of at least one of the countries in the territories whereof the parties have their place of business" (A/CN.9/52, 5 January 1971, para. 115).* This amendment would make the Law more acceptable to a greater number of States, including those whose legislation stipulates that international commercial transactions shall be in writing.

7. We support the proposed amendment to article 17 to the effect that private international law shall apply to questions which are not settled by the Uniform Law (A/CN.9/52, para. 133).* The Uniform Law must provide a rule on how to decide matters which are not regulated by that Law, i.e., in the event of omissions. One such matter might be, for example, a claim for compensation or damages over and above the amount stipulated in the penalty clause.

8. Article 20 might be amended by providing for and regulating the case of delivery of the goods to the buyer by handing them over for storage or bond warehousing to a third party who would hold and take possession of them on behalf of the buyer.

Similarly, provision should be made here for effecting delivery by handing over the goods to the buyer (or to his representative). This is the most common and priority case, and gives rise to all others. By so doing, the controversial and difficult problems raised by the definition of "delivery" would not have to be gone into. The same procedure was used with regard to delivery to the carrier. The concept of "handing over" was used. The use of that concept and its definition are two different matters. The question of defining delivery which led to argument and difficult controversies, does not come up.

Provision should also be made for effecting delivery of the goods by handing over the documents giving title to possession and disposal of the goods.

9. Article 33, paragraph 2, should be amended so as to state that the seller shall not be liable when the buyer knew or could not have been unaware of defects of the goods, not only at the time of contracting but also "at the time of delivery of the goods, in the case of the goods concerned".

10. It is proposed that article 38, paragraph 2, should be amended by adding the words "and at the place where the buyer first has the opportunity to examine the goods".

It would be well to delete from paragraph 3 the words "and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispatch". If, nevertheless, the seller did not know of the possibility, the responsibility of the seller should be maintained in cases in which it is not possible for the goods to be examined at the place of destination, for example, at the port or station itself.

This article should include as a basic provision the rule that the examination of the goods shall be performed at the time and place and in the manner specified in the contract.

11. We hold that the wording of article 41 of the 1964 ULIS is preferable to the new text, as it gives an exhaustive list of the rights and penalties applicable in the event of the seller failing to perform his obligations.

12. We feel the same way about article 48, which should not be deleted. The same applies to articles 50 and 51, because they deal with the sale of goods through documents conferring title to and the right to dispose of the goods, the handing over or transmission of the documents constituting delivery of the goods.

13. With respect to article 57, we believe that a contract of sale must not be considered valid if the price is not or cannot be determined. For that reason, we do not share the view that the price generally prevailing should be made payable, as that would lead to difficulties and instability.

14. We find the wording of article 65 of the 1964 ULIS more felicitous and acceptable. The phrase "all such acts which could reasonably be expected" is more subjective than the phrase "all such acts as are necessary" used in the original version.

15. It would be desirable to amend article 59 *bis* by adding to it the substance of article 72, paragraph 2, of the 1964 ULIS which states that "when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods". That provision gives a decisive rule for this case (sale against documents) whereas the text of article 59 *bis*, paragraph 3, is a general provision for such cases to be governed by the provisions of the contract.

16. With regard to article 76 of the revised text, dealing with relief from liability, we feel that alternative B is more acceptable. The article should state that in the event that performance of the obligations is impossible, the obligations of the parties to the contract are extinguished.

17. We would prefer to keep article 90 of the 1964 ULIS because it contains a rule which is in conformity with the relevant provisions of most legislations and is consistent with practice.

* *Ibid.*

III. Comments and proposals of the representative of Mexico on articles 1 to 17 of the revised text of ULIS

[*Original: Spanish*]

Article 1, paragraph 2

1. The text of this paragraph, which is awaiting approval, reads as follows:

[*The fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.*]

2. The new text approved by the Working Group responds to the need for simplification as advocated by the delegation of Norway during the first session (January 1970), as stated in document A/CN.9/35, paragraph 42 and annex V.* The idea of simplification was taken up by the delegations of the USSR[1] and the United Kingdom.[2] However, the criteria proposed by Norway—which retained the inter-State transport criterion (alternative I), or the criterion that the offer and the acceptance have not been effected in the same State (alternative II)—were not those that prevailed in the text approved; instead, taking the simplification principle further, the approved text retains only the requirement common to all the proposals, namely, that the parties must have their places of business in different States.[3] This also agrees with one of the alternatives (No. III) that the Working Group took into account at its first session concerning the contents of a uniform law; furthermore, that alternative corresponds in substance to article III of the 1964 Hague Convention.[4]

3. Nevertheless, as was noted as early as the second session of the Working Group (A/CN.9/52, para. 22), the simplification of article 1, considered alone, would broaden the scope of the Law's applicability; consequently, the so-called "consumer sales" were excluded,[5] and it was also indicated that the parties would be considered not to have their places of business in different States—and therefore ULIS would not apply —if at the time of the conclusion of the contract one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State.[6]

4. Later, at the third session of the Working Group (January 1972), the first modification of article 5 was transferred to article 2, paragraph 1 (*a*), and the second, with drafting changes, remained as article 1, paragraph 2, but was not approved by the Working Group (A/CN.9/62, annex I).*

5. This part of the paper by the Mexican delegation is confined to the above-mentioned article 1, paragraph 2, since it is the only paragraph of article 1 that the Working Group left pending.

6. In our view, this paragraph should be interpreted as a severe restriction on the scope of the application of ULIS because in the event of the parties' having their places of business in different States, which is stated in article 1, paragraph 1, as a condition for the application of the Uniform Law, the requirement is that that circumstance should be known by the parties, for one of the following reasons: first, that it was stipulated in the contract; second, that it flows from other operations or dealings between them; or, third, that the fact may be inferred from information disclosed by the parties either before or at the conclusion of the contract.

If none of the three conditions stated in paragraph 2 applies, the parties should be considered not to have their places of business in different States, and therefore ULIS would not be deemed to apply under the conditions laid down in article 1, paragraphs 1 (*a*) and (*b*).[7] On the other hand, ULIS would apply in the case of paragraph 3, concerning which it is immaterial whether the parties have their places of business in the same State or in different States.

7. In connexion with this restriction imposed on the scope of the application of ULIS, the first question that arises is whether the restriction is justified: on the assumption that it is so justified, the second question is whether the criteria proposed in paragraph 2 are the most convenient and appropriate.

(*a*) As to the first question, we do consider it justified for ULIS to apply only when the parties know that their places of business are in different States, and we believe that therefore ULIS should not apply when the said places of business are in the same State (except in the case of article 1, paragraph 3), or when the parties are not aware of the fact that their places of business are in different States, either because that fact was not stipulated in the contract itself or in other agreements or because no information was given.

This restriction is certainly wider than that established in article 1, paragraphs 1 (*a*), (*b*) and (*c*), of the current text of ULIS, which provide for the application of the Law in each of the three cases indicated therein, whether or not the parties know or have reason to know that their places of business are in different States.

We prefer the solution provided in the version of paragraph 2 that we are now considering, as proposed by the Working Group, since it is based on concrete, objective and explicit information, such as a stipulation in a contract or in other dealings, or the information disclosed by the parties.

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* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

[1] Observations and proposals by Mr. G. S. Burguchev, contained in a letter dated 3 August 1970 from the Secretariat addressed to the members of the Working Group (reproduced in UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2, annex C to the report of Working Party II).

[2] Uniform Law of International Sales, Revision of Article 1.

[3] This was the criterion adopted by the Working Group. See document A/CN.9/35, p. 8 *et seq.*, and annex III (UNCITRAL Yearbook, vol. I. 1968-1970, part three, I, A, 2) as well as the report on the second session (A/CN.9/52), p. 8 *et seq.* (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[4] A/CN.9/35, para. 11 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2). However, the new text of article 1 of ULIS omits the reference to habitual residence where a party does not have a place of business, as indicated in the said article III.

[5] For the text of article 5, para. 1 (*a*), as approved by the Working Group, see document A/CN.9/52, paras. 51-57 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[6] A/CN.9/52, paras. 13 and 25 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[7] It is not clear, however, that in paragraph 1 (*b*) ULIS ceases to apply in the case we are now considering.

(*b*) Furthermore, the solution we are now analysing seems preferable not only to the current text of ULIS but also to the previous proposal by the Working Group (see para. 3 above), under which the parties would be considered not to have their places of business in different States if they neither knew nor had reason to know at the time of the conclusion of the contract that the contrary was the case. This formula, which has been justly criticized for introducing a subjective element—namely, the knowledge of one of the parties that the place of business of the other is in a State different from that of his own—is also unacceptable because it appears to place the burden of proof on the demonstration of a negative fact, namely, that the party neither knew nor had reason to know that circumstance.

8. Consequently, we support the contents of article 1, paragraph 2, as proposed by the Working Group; however, we wish to propose an addition because the text approved appears to be insufficiently clear. To say "The fact that the parties have their places of business in different States shall be disregarded" does not necessarily imply that in such cases ULIS would not apply; the fact is that, however strange the opposite conclusion might appear to be, such an expression could be interpreted as implying that, in the cases to which the provision refers, the parties are presumed to have their places of business in different States and that, consequently, ULIS is indeed applicable.

We therefore propose that this text should read:

"The fact that the parties have their places of business in different States shall be disregarded, and consequently the present Law shall not apply, whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract."

Article 2, paragraph 1 (a)

9. In paragraph 1 (*a*), the following formula was left unresolved and kept in square brackets by the Working Group at its third session (Geneva, January 1972):

[*or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.*]

10. We support this text, not so much for the purpose of symmetry and analogy with article 1, paragraph 2, but rather because this wording limits the scope of the restriction introduced into ULIS for the case of the so-called "consumer sales".

It is justifiable to exclude from the application of a law governing international trade goods ordinarily bought for personal, family or household use; but when they are bought for a different use and that fact arises from *the contract,* ULIS should apply.

11. In order to nullify the effect of the fact that the goods are ordinarily intended for consumption, either of two conditions should suffice: an express stipulation in the contract of sale or in any other dealings between the parties (indicating, of course the buyer's intention to acquire for "different use" the goods which are the subject of the contract) or information disclosed to the seller.

Article 2, paragraph 2 (b)

12. The Working Group, during its second session,[8] left pending the question of the inclusion in this paragraph, which exempts from the application of ULIS "any ship, vessel or aircraft", of the words:

[*which is registered or is required to be registered*].

13. These words seem unacceptable to us. If the exemption of the transaction from ULIS were made subject to the registration of the ships, vessels or aircraft, the legal regulations would depend on a fact independent of the buyer and possibly unknown to him; an element of uncertainty absent from the other conditions of paragraph 2 [2 (a) and (c)], which refer to easily identifiable goods without laying down any additional requirement, would also be introduced.

14. *A fortiori,* the stipulation that the goods "are required to be registered" should be rejected, because it makes reference to provisions of the different internal laws of the parties, and there are no grounds for supposing that they will be known to parties under the jurisdiction of different States.

15. In any case, if the intention is to limit the scope of this exemption to exclude—and consequently to leave subject to ULIS regulations—sales of smaller boats or aircraft, reference should be made to ships, vessels or aircraft which, as set forth in the report of the Working Group,[9] *are under internal laws, normally subject to national registration,* and not to local or municipal registration.

16. We therefore advocate that this exclusion of ships, vessels or aircraft should be restricted *to those for which national registration is normally required.*

Article 3, paragraph 1

17. Approval of paragraph 1 of this article is still awaiting approval, although the report of the Working Group on its second session gives the impression that it has been approved.

The text of the paragraph is the following:

[*The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.*]

18. The paragraph in question constitutes an addition to article 6 of ULIS, which becomes article 3, paragraph 2 of the Working Group draft under consideration. However, the two paragraphs of article 3 have opposite effects: whereas the first excludes the contracts referred to from ULIS, the second places in the same category as sales, and therefore includes within the scope of ULIS, "contracts for the supply of goods to be manufactured or produced".

19. We support the criteria adopted in the new text by the Working Group, namely, that article 2, which excludes specific sales of goods from the scope of ULIS, should be supplemented by another *exclusion,* not of contracts for the sale of goods but of other contracts

[8] A/CN.9/52, paragraph 55 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[9] *Ibid.*

under which the obligations of the parties are other than those characterizing contracts for the sale of goods, and that article 3 itself should embody the rule which assimilates to contracts for the sale of goods covered by ULIS those other contracts under which the seller assumes the obligation of producing the goods that are to be the object of the future sale.

20. Moreover, in our view it is clear that when the obligations of the parties are *substantially* other than the delivery of and payment for the goods, the contract is not one for the sale of goods, and accordingly, there is no reason for applying ULIS. This aspect of the obligations will inevitably have to be determined and precisely stipulated in each concrete case, whether the rule under consideration is retained or rejected; however, as indicated in paragraph 67 of the report of the Working Group (A/CN.9/52),* this will not prevent the parties to the complex transactions involved in such mixed contracts from specifically providing for the applicability of ULIS, in accordance with the principle of autonomy of will embodied in article 1, paragraph 3.[10]

21. For the reasons stated above, we propose that the Working Group should give final approval to the text of article 3, paragraph 1.

Article 4 (a)

22. The text of this subparagraph refers to the case in which one or both of the parties have several places of business, in which case article 1, paragraph 4, requires that, in order for ULIS to apply, one place of business of one party and one of the other party should be situated in different States. The text, which is awaiting approval, reads as follows:

> [*Where a party has places of business in more than one State, his place of business shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.*]

23. This rule, which introduces the concepts of *principal place of business* and *place of business having a closer relationship to the contract,* seeks to fill a gap in the current text of article, paragraph 1, of ULIS, which does not provide for cases in which one of the parties to the contract has two or more places of business. The text was approved by the Working Group, as shown by the reports on its second session (A/CN.9/52, paras. 23-31)* and its third session (A/CN.9/62, annex I).**

24. The solution under consideration has been criticized for introducing subjective elements; however, we do not think such a criticism is valid, since the method of determining the location of a particular place of business would depend not on any decision or specification by the parties but on an objective fact that existed prior to the contract, such as that the place of business was the buyer's or seller's principal place of business, or that in view of the circumstances *known to* or *contemplated by* the parties at the time of the conclusion of the contract, there existed a place of business having a closer relationship to the contract.

25. The determination of the place of business in accordance with the criteria laid down in the text under consideration may give rise to litigation and problems of proof. It must be recognized, however, that litigation and uncertainties would not be avoided if ULIS failed to make provision for this case; for if one of the parties, for example the buyer, has a place of business, possibly even the one with the closest relationship to the contract, in the State in which the seller is domiciled, and another, which may be his principal place of business, in another contracting State, what criterion would be applied to resolve the conflict?

Moreover, there would be difficulties of proof in any event; under the text in question, which imposes the burden of proof on whoever seeks to specify the location of the principal place of business or that having a closer relationship to the contract, they might be less severe than under one which places the burden on whoever has to prove that the places of business of the two parties are in different States, although, as previously mentioned, one or both of the parties have or may have several places of business in the same State or in different countries.

26. It might be thought that in order to prevent litigation and problems of proof, an alternative solution could be that ULIS should embody an absolute presumption of the international nature of the sale of goods *whenever* the parties have their places of business (whatever they might be) in different contracting States. However, such a solution would very greatly widen the scope of the application of ULIS, so as to exclude only the sales listed in article 2 (and those expressly excluded by the parties under the terms of article 5).

27. Moreover, another principle mentioned above (whose final approval we have advocated (see paragraph 9 above)), namely, that embodied in article 2, paragraph 1, is of relevance to the problem of the existence of places of business in different States. According to that principle, the fact that the parties have places of business in different States is not sufficient; that fact must also appear from the contract of sale or other dealings between the parties, or from previous information received by one of them.

In supporting this principle and proposing the addition indicated in paragraph 9 above, we rejected the inclusion in ULIS of the concept of absolute presumption (to which we referred in paragraph 26 above). On the contrary, we hold that the existence in different countries of the places of business of the parties should be known to the latter, through any of the means set forth in article 1, paragraph 2. Do we, then, need to include not only article 1, paragraph 2, but article 4 (*a*) as well?

We think so, because article 1, paragraph 2, requires knowledge by one of the parties that the other party has his place of business in a different country, whereas the conditions of article 4 (*a*) are fulfilled when one or both parties have places of business in more than

* UNCITRAL Yearbook, vol. II, 1971, part two, I, A, 2.
** UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.
[10] Which corresponds in essence to the present article 4 of ULIS.

one State. In other words, the former rule results in either the application or the non-application of ULIS; that of article 4, on the other hand, presupposes the application of ULIS but defines and specifies the place of execution of the contract (the principal place of business, or the one with a closer relationship to the contract) for the purpose of delivery of the goods, inspection of their quality, payment, etc.

28. For all of the above reasons, we advocate the retention of article 4 (*a*).

Article 9

29. At its second session, the Working Group submitted the following text (A/CN.9/52, para. 73)* to UNCITRAL for consideration:

"1. *The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.*

2. *The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.*

3. *In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.*

4. *Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties.*"

30. In the above text, paragraph 1 is identical to article 9, paragraph 1 of ULIS; paragraph 3 is substantially the same as the second version of article 9, paragraph 2 of ULIS (but instead of reading: "usages shall prevail", as now provided for by ULIS, it reads "*such* usages shall prevail"), and paragraph 4 is similar to article 9, paragraph 3 of ULIS, with the two following changes: (*a*) the wording in ULIS, "they shall be interpreted according to the meaning given to them in the trade concerned" has been replaced by the following: "they shall be interpreted according to the meaning *widely accepted and regularly given* to them in the trade concerned". (*b*) it is proposed that the following be added to paragraph 4, "*unless otherwise agreed by the parties*".

31. More substantial amendments have been made to the first part of article 9, paragraph 2 of ULIS. It is proposed that the reference to "usage which reasonable persons in the same situation as the parties usually consider to be applicable to their contract", be deleted, since this expression neither defines nor distinguishes objectively and clearly the usage to be applied to the contract, and because the concept of "*reasonable persons*", besides being vague, would give rise to inexactitude and confusion, since "two reasonable men from different parts of the world might consider different usages as regularly applied to their contracts."[11]

32. Instead of the first version of paragraph 2, the Group recommends a new paragraph 2, in which the usages which would be impliedly applicable should be stipulated, i.e. those of which the parties are or should be aware because they are widely known in international trade and regularly observed under contracts of the type involved.

33. It should be first stated that in our opinion the following principles established by article 9 both under the existing Law and in the text recommended by the Working Group should be observed and maintained: (*a*) that the parties to a contract of international sale of goods should be bound by usages and practices of international trade; (*b*) that such usages should prevail over ULIS in the case of a conflict between them and it, and (*c*) that also in this respect the autonomy of the parties, now established as a general principle in article 3 of ULIS (article 5 of the new text) should be recognized.

34. The amendments proposed by the Working Group are in general acceptable to us. However, there are some differences concerning paragraphs 2, 3 and 4; these are discussed below and subsequently changes are proposed (paras. 36-38).

35. With reference to paragraph 2, we do not think that the implied application of the usages requires the two qualifications included in paragraph 32 above. Either of the two qualifications would be sufficient for the respective usage to be considered applicable. In other words, any usage would be applied of which the parties are or should be aware because it is widely known in international trade, regardless of whether "it is regularly observed by parties to contracts of the type involved".

In the case of a local usage (which is none the less applied and known in international law) that does not have this latter characteristic, but of which the parties are or should have been aware, it will be applicable to the contract. Clearly, the burden of proof for these facts, one subjective (that the party is or should be aware of it) and the other objective (that it is known, i.e., is applied in international law), would be incumbent on whoever invokes the application of the usage, as it is also clear that the parties may provide in their contracts that the usages should not apply (or that these should not prevail over ULIS).

Similarly, if a usage in international trade is regularly observed in contracts of the type involved, it will be applicable to the case in point, even if the parties were not aware of it. On this assumption, the usage would be normative, with the same compulsory nature as the Law and, therefore, should be known to the parties; for it not to be applicable, it would have to be expressly excluded by the provisions of the contract, in application of the principle of the autonomy of the parties.

Secondly, (still with reference to para. 2) the wording "shall include" used in the first part of this para-

* UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

[11] According to the objection raised by the Hungarian delegation which proposed to the Working Group the text under consideration.

graph is inappropriate, since, assuming that this paragraph provides for the implied—not express—application of the usages, the only usages applicable should be those to which the paragraph itself refers and no other.

Finally, article 9, paragraph 2 should be redrafted and simplified in order to avoid repetition and ambiguous or confusing expressions such as the word *"parties"* (in contracts of the type involved).

36. The text we propose, in the light of the objections raised in the above three paragraphs, is as follows:

[2. *It shall be considered that the usages that the parties have impliedly made applicable to their contract shall be those of which they are or should be aware because such usages are widely known in international trade, or those which are regularly observed in contracts of the type involved.*]

37. In article 9, paragraph 3, the clause "unless otherwise agreed by the parties" is superfluous and inappropriate. It is superfluous, because the principle of autonomy provided for in article 5 of the text recommended by the Working Group (article 3 of ULIS) makes this wording unnecessary. It is inappropriate, because it might be considered, on interpreting ULIS, that when this wording or something similar is not used in its other provisions, the principle in article 5 is not applicable. This same objection can be made to article 9, paragraph 4.

Therefore, we propose that paragraph 3 should read as follows:

[3. *In the event of conflict with the present Law, such usages shall prevail.*]

38. In paragraph 4, besides omitting the expression "unless otherwise agreed by the parties", for the reasons given in the preceding paragraph, we share the criticisms which some representatives in the Working Group made concerning this provision, and agree with the text proposed at that time (see A/CN.9/52, para. 82).* which reads as follows:

[4. *Where expressions, provisions or forms of contracts commonly used in commercial practice are employed, the meaning usually given to them in the trade concerned shall be used in their interpretation in accordance with the provisions of paragraphs 1 and 2.*]

Article 10

39. At its second session, the Working Group decided to defer discussion of article 10 of ULIS until the substantive rules of the Uniform Law were discussed (A/CN.9/52, para. 84). The text of article 10 is as follows:

[*For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.*]

40. A problem arose in the discussions of this text concerning the expression *"reasonable person"*; suggestions were made to delete it or replace it (paras. 85 and 86 *ibid.*). Clearly, the basic criticisms that may be levelled against this term are similar to those made concerning article 9, paragraph 2 (see para. 31 above), with the added objection that this term "would lead to different interpretation by the courts in different countries" (end of para. 86, *ibid.*).

41. However, there is no reason to postpone discussion of the problem of fundamental breach since the Working Group, in its five sessions, has considered the principles of ULIS and has, at least provisionally, adopted the articles dealing with the concept of fundamental breach.

42. The articles of ULIS approved by the Working Group which refer explicitly to a fundamental breach of contract are the following:

(a) *With regard to non-performance by the seller:* Articles 42, paragraph 2; 43, paragraph 1; 44, paragraph 1 (a);[12] 46, paragraph 2;[13] and 52, paragraph 2.[14]

(b) *With regard to non-performance by the buyer:* Article 72 *bis,* paragraph 1 (*b*).

(c) *With regard to non-performance by either party:* Article 74, paragraph 1;[15] and article 75.

(d) *In the case of passing on of risks:* Article 98 *bis,* paragraphs 1 and 2.

43. The problems of the definition of fundamental breach, as given in article 10, are essentially still present in the Working Group's new version of ULIS, since although it is true that the notion of fundamental breach is resorted to in some cases where no provision for it is made in the present ULIS (articles 42, para. 2; 75, para. 1; and 98 *bis*), in the other articles the previous system is retained.

Similarly, the present version is still open to the same objections and criticisms which were directed at a definition based on a subjective datum (that the party knew, or ought to have known) and on so many hypothetical assumptions: (i) that a reasonable person (ii) in the same situation as the party damaged by the non-performance (iii) would not have entered into the contract (iv) if he had foreseen the breach and its effects.

44. Such a concept and such a definition cannot be satisfactory, since it defines nothing and leaves the solution of any problem up to a difficult analysis of the intentions of the parties, and ultimately to the discretion of the interpreters or the judge. A simpler and

* UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

[12] This rule, together with article 72 *bis*, grants the right to declare the contract avoided by reason of non-performance by the other party.

[13] This is equivalent to article 74, which provides for the consequences of non-performance by the buyer in the case of sales *by instalments.*

[14] This rule corresponds to article 52, paragraph 3, of ULIS; however, the latter provision presupposes the existence of a fundamental breach, as defined in article 10, if the buyer is to have the right to declare the contract avoided and to damages, whereas the rule cited in the text inverts the solution and considers a fundamental breach to exist when the seller fails "to take appropriate action in *response to the request*" of the buyer, independently of the definition contained in article 10.

[15] This rule is equivalent to article 75, paragraph 1, of ULIS; however, the latter does not require the existence of a fundamental breach but merely requires fear of future non-performance.

clearer objective criterion should be striven for. In our opinion, such a criterion would be that *the non-performance alters substantially*[16] *(to a significant extent) the scope or content of the rights of the affected party*. We believe that this criterion, applied to each and all of the articles we have enumerated in paragraph 42 above, would yield a simpler and fairer solution in the various hypothetical situations.

45. This criterion would, in fact, apply more naturally in the case of article 42, paragraph 2, in which the definition of article 10, on the other hand, seems to be improper, for it is based on the idea that the party damaged by the non-performance may declare the contract avoided, whereas article 42 has as its purpose the maintenance of the contract.

It would also apply more satisfactorily in the cases provided for in articles 44, paragraph 1 (*a*); 74, paragraph 1;[17] 46, paragraph 2; 75; and 98, paragraphs 1 and 2.

In the case of article 43 *bis*, paragraph 1, i.e. the case of delay, the new criterion would be more in keeping with the other two principles of "unreasonable inconvenience" and "unreasonable expense".

Lastly, in the case of article 52, paragraph 2, the criterion we propose and the definition given in article 10 would be equally applicable, since that article defines and states a concept proper to a fundamental breach for the cases of rights or claims of third parties; nevertheless, we believe that it would be easier to prove that the rights or claims affect or alter substantially the rights of the innocent party than it would be to test the extremes of article 10.

46. We therefore propose the following definition for article 10:

> *"For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever non-performance of any obligation by either of the parties alters substantially (or to a significant extent) the scope or content of the rights which are possessed by the other party and which are derived from the contract or from this Law."*

Article 15

47. The text of this article, which is awaiting approval, is the following:

> [*Article 15. A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.*]

48. In its consideration of this text, the Working Group failed to reach unanimous agreement at its second session, owing to one delegation's position that the contract should be concluded in writing if the national law of either party so required.[18] Accordingly, it was agreed to refer the article to the Commission for final consideration.[19]

49. We support the text proposed by the Working Group, which is substantially the same as that of ULIS. We believe, in fact, that the above-mentioned requirement of municipal law should not be applied to international sales governed by ULIS if it is desired to give the latter the uniform character it should have, if it is desired to avoid any uncertainty or surprise in the mind of the party opposed to the omission of the written form and if, in addition, it is desired to eliminate serious problems concerning the application and interpretation of its provisions.

50. Indeed, the considerations indicated in report A/CN.9/52, paragraph 117, of the Working Group[20] are persuasive both with regard to retaining the abovementioned text, even though it refers to an element of form which would be more proper to the Uniform Law on the Formation of Contracts and is already contained therein (article 3), and with regard to the difficulties that would result from the adoption of any of the modifications or intermediate solutions which were analysed by the Working Group and which are referred to in paragraphs 118-122 of the said report.[21]

51. It should be borne in mind, in support of the text under examination, that the principle of autonomy of will which is indicated in the article of the very text of ULIS permits either of the parties to the contract of sale to require a written form without necessitating or justifying a special reservation in article 15;[22] obviously in countries in which foreign trade constitutes a monopoly reserved to the States, *this requirement* by one of the parties would be facilitated.

Article 17

52. The Working Group at its second session proposed the following text to replace the present text of article 17 of ULIS:

> *"In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity* [*in its interpretation and application*]."

53. This text was not adopted unanimously by the Working Group but referred to UNCITRAL for decision, together with other proposals that were made.[23]

54. We think that the text submitted by the Working Group is unsatisfactory because, in our view, it is incomplete. We are not opposed to retaining it since it indicates the two features or principal characteristics of ULIS, namely, its international character and the need to promote uniformity in the international sale of goods; however, we believe that it should be supplemented by a second paragraph as was proposed at the aforementioned second session,[24] which would provide

[16] In favour of the expression "substantially" we may cite two articles of ULIS in which it is used, namely, article 3, paragraph 1 (see above, para. 17) and article 73, paragraph 1.

[17] Paragraph 2 in each of these articles would limit the scope of the principle.

[18] See A/CN.9/52, para. 115. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[19] *Ibid.*, para. 123.

[20] As well as the study and the comments by the United Kingdom delegation at the second session.

[21] The requirements of written form would in fact, as the United Kingdom report stated, pose such serious additional problems as those of defining what should be meant by "writing" (telex, teletype, etc.), whether the formality should be one *ad substantiam* or *ad probationem*, whether the consequence of non-compliance with such a formality should entail declaring the contract avoided or simply denying execution of it, and the like.

[22] See our position in paragraph 37 above with regard to a similar problem.

[23] See A/CN.9/52, paras. 126-137 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[24] *Ibid.*, p. 131.

for the application of the general principles on which the Law is based in the case of questions concerning matters governed by the Law which are not expressly settled therein or, in other words, cases involving gaps not covered by ULIS.

55. It is inevitable that gaps will be encountered in the interpretation and application of ULIS; such gaps might occur because of the omission of express provisions concerning questions covered by the Law (excluding, of course, questions relating to matters beyond the scope of ULIS, as set forth in articles 5 and 8 of the present text) or because some provisions, despite the best efforts of those contributing to and preparing the final text of the Law, might be vague and inadequate. Accordingly, we believe that the text proposed by the Working Group (see para. 52 above) would not be adequate to fill these gaps and to assist interpreters of the Law without giving them undue powers of discretion which could lead to interpretations contrary to the spirit and history of ULIS. It would be necessary to adopt one of two solutions: to include either a reference to the general principles of the Law[25] or a reference to the rules governing conflicts of laws in the various national legal systems. The latter solution would be prejudicial to the uniformity and the international character of the Law.

56. Consequently, we support the following formulation of article 17, which has as its first paragraph the text proposed by the Working Group (see para. 52 above) and as its second paragraph the present text of article 17 of ULIS;

Article 17

1. *In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity.*

2. *Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.*

IV. Amendments proposed by the representative of Norway to the revised text of ULIS

[*Original: English*]

Article 1

Paragraph 3 shall read:

"3. The present Law shall also apply where it has been chosen as the law of the contract by the parties, *to the extent that this does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the present Law.*"

Comment

Cp. ULIS arts. 4 and 8.

Article 8

In the *second sentence* the two words "in particular" are misleading and should be deleted.

Article 12 (new)

Alternative A:

Where the present Law refers to the act or (actual or presumed) knowledge of a party, such reference shall include the act or knowledge of his agent or of any person for whose conduct such party is responsible [provided that such agent or person is acting within the scope of an employment for the purpose of the contract].

Alternative B:

For the purposes of the present Law the seller or the buyer shall be responsible for the act or the [actual or presumed] knowledge of his agent or of any person for whose conduct he is responsible, as if such act or knowledge were his own [, provided that such agent or person is acting within the scope of an employment for the purpose of the contract].

Comment

See articles 76, 79 (*d*), 96, cp. arts. 9 (2), 10, 33 (2), 38 (3), 40, 42, 76, 82, 89, 97.

Article 14

Add the following as a new *paragraph 2*:

"2. Where any notice referred to in the present Law has been sent in due time by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the party giving such notice the right to rely thereon."

Comment

See ULIS article 39 (3); cp. arts. 21 (1), 39 (1), 43 *bis* (2), 44, 72 *bis*, 73 (3), 74, 76 (3), 94.

Article 16

This article should be retained but redrafted as follows (cp. articles 42 and 71 subpara. 3):

"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except *to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the present Law.*"

Article 20

In *subparagraph* (b) replace the word "unascertained" by "*unidentified*".

In *subparagraph* (c) delete the reference to "habitual residence", cp. article 4 (*b*).

Article 21

In *paragraph 1* substitute "appropriated" by "*identified.*"

Article 33

Paragraph 1 shall read:

"1. The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner

[25] Which all legal systems and most national legal orders expressly recognize, as was noted in the study on article 17 prepared by Prof. Tunc for the Working Group's second session.

required by the contract [and which,]. *Where* not inconsistent with the contract, *the goods shall*:

"(*a*) *be* fit for the purposes for which goods of the same description would ordinarily be used;

"(*b*) *be* fit for any particular purpose expressly or impliedly made known to the seller at the time of contracting, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(*c*) possess the qualities of goods which the seller has held out to the buyer as sample or model;

(*d*) *be* contained or packaged in the manner usual for such goods."

Comment

The meaning will be clearer by omitting the words "and which" in the initial passage. (Subparas. (*a*) and (*b*) are not necessarily cumulative with the first sentence.)

In *paragraph 2* the word "liable" is used in a broader sense than liability for damages, cp. "tenu" in the French text. Should this be reflected by using "*responsible*" in the English text? The same applies to article 35.

Article 35

Paragraph 1 should read:

"1. The seller shall be *responsible* in accordance with the contract and the present Law for any lack of conformity which exists at the time when, *according to the provisions of articles 97 and 98,* the risk passes *to the buyer,* even though such lack of conformity becomes apparent only after that time."

Comment

The present passage in brackets should be deleted and substituted by a reference to the pertinent articles in chapter VI on passing of the risk, i.e. present articles 97 and 98, but not present 98 *bis* (in the Norwegian proposals *infra* the pertinent articles will be 97, 98 and 98 *bis* but not 98 *ter*).

As regards *paragraph 2,* see comments to article 39.

Article 39

In *paragraph 1* the second full stop sentence seems superfluous and may perhaps be deleted.

The last full stop sentence of paragraph 1 should be transferred to a new *paragraph 2* and read as follows:

"2. *Notwithstanding the provisions of the preceding paragraph,* the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, [except *to the extent that such time-limit is inconsistent with* a guarantee [undertaking] *by the seller* covering a *different* period]."

Add the following as a further *new paragraph 3:*

"3. In case of breach of a guarantee [or other undertaking] by the seller referred to in article 35, paragraph 2, the buyer shall lose the right to rely on such breach if he has not given the seller notice of the lack of conformity within a reasonable time after he has discovered or ought to have discovered it. The buyer shall, however, lose his right to rely on such a guarantee [undertaking] if he has not given notice to the seller within a period of [1 year] from the date of the expiration of the period of guarantee."

The present *paragraph 2* will be new *paragraph 4.*

The present *paragraph 3* should be transferred to article 14 as a new *paragraph 2.*

Comment

Dealing with the problem of guarantee one should consider three possible categories of guarantees or undertakings:

(1) A guarantee that the goods are without any lack of conformity existing at the time of delivery (original lack of conformity), eventually combined with an agreement on the period within which complaints may be advanced. Any reference in the text to this type of guarantee or agreement is superfluous (see article 5).

(2) A guarantee or an undertaking by the seller that the goods will remain fit with certain qualities for a specified period, see article 35, paragraph 2. This type of guarantee gives rise to special problems which should be dealt with separately in article 39; see proposed paragraph 3 *supra.* Such a guarantee may have certain impacts on the two years period presented in the present paragraph 1, but not necessarily. If the period of such guarantee is longer, it seems to be reasonable to presume that it covers also an original lack of conformity which the buyer ought not to have discovered before the expiration of the two years period. If the period is shorter, there seems to be no justification for a corresponding presumption, unless the guarantee is combined with an agreement (express or implied) that any complaint should be advanced within the shorter period, cp. under (1) *supra.*

(3) An undertaking by the seller to remedy any defect which may appear (arise, be discovered) within a specified period. Such an undertaking is usually implied in a guarantee referred to in article 35, paragraph 2 (and under (2) *supra*).

If the problem of a guarantee or undertaking as mentioned under (2) and (3) is dealt with in a separate paragraph 3 as proposed *supra,* it would presumably not be necessary to refer to any guarantee in the proposed paragraph 2. If this nevertheless is deemed desirable, the language in brackets should be used in order to make it clear that the two years period may be inconsistent with a guarantee covering a different period, a question which will depend on the contract.

The proposed distinction between an original lack of conformity (new paragraph 2) and a guarantee against later defects (new paragraph 3) will make it clear that the buyer has a choice between basing his claim on the one or the other category, and that the pertinent period may be different in the two cases.

Article 41

Subparagraph (b) should read:

"(*b*) Claim damages as provided in articles *82 to 89.*"

Article 42

Paragraph 1 should read:

"1. The buyer has the right to require the seller to perform the *contract, unless* the buyer has acted inconsistently with that right, *in particular* by avoiding the contract under article 44 or by reducing the price under article 45 [or by notifying the seller that he will himself *provide for the* cure *of* the lack of conformity]."

Comment

The condition for requiring *specific* performance is proposed to be incorporated into article 16. The buyer should otherwise have the right to require performance, even if specific performance can not be enforced under article 16. The present text adopted by the Working Group is difficult to apply as long as the parties do not know which court will ultimately be seized with the case.

In *paragraph 2* substitute at the end for the words "and after prompt notice" the following: "*and provided that he gives notice thereof within a reasonable time as provided in article 44.*"

Article 43 bis

In *paragraph 1,* delete the passage (exception) starting with "unless". This passage seems inconsistent with the right given to the seller in the preceding passage. It is also (or might be construed to be) contrary to the corresponding provisions in ULIS (articles 43 and 44). If the exception should be retained, it would have to be redrafted, e.g. as follows:

"1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer, on *account of delay,* has declared the contract avoided in accordance with article 44 or has declared the price *to be* reduced in accordance with article 45."

Paragraph 2 has a somewhat wider scope than the buyer's decision under paragraph 1 and should commence as follows:

"2. If the seller requests the buyer to make known his decision *as to whether he will accept performance,* and . . ."

Article 44

Paragraph 2 shall read:

"2. The buyer shall lose his right to declare the contract avoided if he does not give notice thereof to the seller:

(*a*) with respect to avoidance based on non-delivery or later delivery [and subject to the provisions of article 43 *bis*], within a reasonable time after the buyer has been informed that the goods [or documents] have been delivered late;

(*b*) with respect to avoidance based on lack of conformity or any other breach not covered by the preceding subparagraph, within a reasonable time after the buyer has discovered or ought to have discovered such breach, or, where avoidance is based on the seller's failure to cure such breach in accordance with articles 43 or 43 *bis,* after the expiration of the applicable period of time referred to therein."

Article 47

Paragraph 1 should read:

"1. Where the seller tenders delivery of the goods before the date fixed, the buyer *may refuse* to take *such* delivery *if it will cause him unreasonable inconvenience or unreasonable expense.*"

Article 52

This article 52 and section III of chapter III should be transferred forward to section I of the same chapter as a *new article 40 bis* under a new *subsection 3*: Obligations of the seller as regards transfer of property. (The subsections 1, 2 and 3 might better be designated as subsections A, B and C.)

Article 59 bis

For the sake of clarity the provisions of ULIS article 72, paragraph 2 should be added to or incorporated into *paragraph 3* of article 59 *bis.* This paragraph could then read:

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the *contract requires payment against documents or the parties have* agreed upon other procedures for delivery or payment, *that* are inconsistent with such opportunity."

SECTION III

The placement of article 67 in relation to section III may be questioned. Article 67 should perhaps be transferred forward to a place before section III, for instance as the last article under section II.

Article 70

In *paragraph 1* delete the word "*and*" between subparas. (*a*) and (*b*); cp. article 41.

Subparagraph (b) should read:

"(*b*) Claim damages as provided in articles *82 to 89.*"

Article 71

Paragraph 2 should read (cp. articles 16 and 42 (1)):

"2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present Law, the seller may require the buyer to perform *his obligation.*"

Article 72 bis

In *paragraph 1* the provision of *subparagraph* (b) seems to have been given too wide a scope. Cp. ULIS articles 62 (2) and 66 (2) and revised article 44, paragraph 1, subparagraph (*b*). It is proposed to draft the present subparagraph (*b*) as follows:

"(*b*) Where the buyer has not *paid the price* [*or taken delivery*] within an additional period of time fixed by the seller in accordance with article 72."

In *paragraph 2* Norway prefers *alternative C.* This would be the case even if the Working Group decides to delete the last sentence (starting with "In any event . . .").

Article 73

Paragraph 1 should commence as follows:

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, *the appearance of* a serious deterioration . . ."

Article 74

Paragraph 2 should read:

"2. A buyer, avoiding the contract in respect of *any given delivery or of* future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of *previous* deliveries, if by reason of *the* interdependence *of the deliveries, the goods* already *delivered* could not [neither] be used for the purpose contemplated *by the* contract [*nor serve any other useful purpose for the buyer?*]."

Article 76

Norway prefers *alternative B*. We can also support support paragraph 2 under alternative A. The article would then read:

"1. Where a party has not performed one of his obligations, he shall *neither be required to perform nor* be liable in damages for such non-performance if he proves that *it was due to an impediment* [which has occurred without fault on his side and being] *of a kind* which *a party in his situation could not reasonably be expected either to take into account* at the time of the conclusion of the contract or to avoid or overcome.

"2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and provided the subcontractor would also be exempt if the provisions of that paragraph were applied to him.

"3. Where the *circumstances which gave rise to the non-performance constitute* only a temporary *impediment,* the exemption provided by this article shall *apply only to the necessary delay in performance. Nevertheless, the party concerned shall be permanently relieved of his obligation if, when the impediment is removed, the performance has* so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

"4. The non-performing party shall notify the other party of the existence of the *impediment* and *its effect on his ability to perform.* If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the *impediment,* he shall be liable for the damage resulting from such failure.

"5. *The exemption provided one of the parties by this article shall not deprive the other party of any right which he has under the present Law to declare the contract avoided or to reduce the price, unless the impediment which gave rise to the exemption of the first party was caused by* [*the act of*] *the other party.*"

Article 78

Add the following as a *new paragraph 3:*

"3. If the contract has been avoided in part, the provisions of this article shall apply to such part only."

Article 79

In *paragraph 2* transfer the present *subparagraph* (d) forward to the front as a new subparagraph (*a*) and shift the other subparagraphs accordingly. The reference to some other person should be deleted; see proposed article 12 *supra.*

Article 82

Add after the word "which" in the third line, the following text omitted by error in annex I: "the party in breach had foreseen or ought to have foreseen at the time of".

Transfer the provision of article 85 to the present article 82 as a *new paragraph 2* reading:

"2. If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, *as part of the damages referred to in the preceding paragraph,* recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

Article 83

The reference to "habitual residence" may be deleted, see article 4, subparagraph (*b*).

Article 84

Add after the word "price" in the fourth line of *paragraph 1,* the words "on the date" omitted by error in annex I.

Article 85

See above the proposal of transfer of article 85 to article 82 as a new paragraph 2.

Article 88

Substitute the words "as may be reasonable" by: "as *are* reasonable". The fourth line should read: "may claim a reduction in the damages *equal to* the amount *by* which the *loss* should have been mitigated."

Add the following at the end as a *new paragraph 2:*

"2. *Where it is reasonably possible for the buyer to buy goods in replacement of the goods to which the contract relates, or for the seller to resell the goods, and he nevertheless neglects to do so within a reasonable time after the breach of the contract by the other party the damages shall not include any loss which could have been avoided or mitigated thereby.*"

CHAPTER VI. PASSING OF THE RISK

Article 96

Same as ULIS (adopted by the Working Group), but substitute "damage to" for "deterioration of" and delete the reference to some other person; see proposed article 12 *supra.*

Article 97

"1. Where the contract of sale involves carriage of the goods *and the seller is not required to deliver*

them at a particular destination, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer. *(If, however, the seller is required to deliver the goods at a particular destination, the risk shall not pass to the buyer until the goods either are taken over by him or are placed at his disposal at such place when time for delivery has come.]* (cp. U.S. Uniform Com. Code Section 2-509)

"2. The *provisions of* paragraph *1* shall also apply if at the time of the conclusion of the contract the goods are already in transit. If, however, the seller at that time knew or ought to have known that the goods *or part thereof* had been lost or *damaged,* the risk of *such* loss or *damage* shall remain with him, unless he discloses such fact to the buyer.

"3. *Nevertheless, if the goods are not marked with an address or otherwise clearly identified for delivery to the buyer, the risk shall not pass until the seller has given the buyer notice of the consignment and, if necessary, sent some document specifying the goods."*

Comment

To meet practical situations paragraph 1 should be made more elaborate than the provision adopted by the Working Group at the fifth session CP. U.S. Uniform Com. Code, Section 2-509.

The new paragraph 3 corresponds to ULIS article 100; cp. revised article 21, paragraph 1, second sentence.

Article 98

1. In cases not *within* article 97 the risk shall pass to the buyer [from the *moment*] when the goods *are taken* over by him.

2. *If, however, the seller is authorized or required to deliver the goods by placing them at the buyer's disposal at a place other than any place of the seller [at a place of the buyer or of a third person], the risk shall pass when time for delivery has come and the goods are so delivered.*

Comment

Paragraph 2 is new and takes care of situations where delivery is effected in accordance with article 20, subparagraph (*b*). Cp. ULIS article 97 (1). See also the report of the Working Group from its fifth session (A/CN./9/87)* under paragraphs 236-238.

Article 98 bis

1. *In all cases where the buyer has failed to take delivery in due time, the risk shall pass to the buyer at the latest* from the moment when the goods are placed at *his* disposal *and he has committed* a breach of contract *by failing to take delivery.*

2. Where the contract, *in cases outside article 97,* relates to sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have *been marked with an address, separated or otherwise* clearly identified to the contract and the buyer has been *notified* of such identification, *if necessary, specifying the goods.*

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

Comment

Paragraph 1 corresponds to present article 98, paragraph 2, first sentence. Paragraph 2 corresponds to the second sentence of the same paragraph (in brackets).

Article 98 ter

Alternative I:

If the seller has committed a fundamental breach of contract, the provisions of articles 97-98 bis *shall not impair the remedies afforded the buyer on account of said breach.*

Alternative II:

If the buyer avoids the contract or requires substitute goods in the case of fundamental breach of contract by the seller, the seller shall bear the risk of loss of or damage to the goods occurring even after the moment when the risk would otherwise, according to the provisions of articles 97-98 bis, *have passed to the buyer.*

Alternative III:

Delete the whole article 98 *ter;* cp. article 79, subparagraph 2 (*d*).

Comment

Alternative II corresponds quite closely to the present article 98 *bis.* Alternative I treats the same problem in a different way, which is principally recommended. However, the whole provision of this article could well be deleted since the problem virtually is solved by the provisions of article 79, paragraph 2, in particular subparagraph (*d*).

V. Observations of the representative of the Union of Soviet Socialist Republics

[*Original: Russian*]

1. It would be advisable in formulating the articles contained in the draft law under consideration which are similar to articles in the Convention on Prescription (Limitation) in the International Sale of Goods to bring them into line with those articles. In particular, the bracketed portions of article 1, paragraph 2, article 2, paragraph 1 (a), article 3, paragraph 1, article 4, paragraph (a) and article 17 relate to articles in that Convention.

2. Paragraph 4 of article 9 should be omitted for the reasons set out in paragraph 82 of the report of the second session of the Working Group (A/CN.9/52).*

3. The law should not regulate questions relating to the form of contracts and the consequences of the non-observance thereof, and therefore article 15 should be deleted from the text of the law.

If, however, it is decided to retain in the law the provision on the form of contracts, then it should be indicated that contracts must be drawn up in writing if that is required by the national legislation of one or more of the parties. With regard to the consequences of disregarding the requirement for a written contract, the law could provide either that such a contract would be considered invalid or that the laws of the state requiring a written contract should be applied.

* UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

As has already been observed, depending on what decision is taken about this article, it may prove necessary to revise article 14 and to widen the concept of "communications."

4. The brackets should be removed in article 35, paragraph 1, article 39, paragraph 1 (except for the word "longer"), and in articles 42, 43 *bis* and 98.

5. The wording of article 57 is unacceptable. The price should be determined or determinable.

6. In order to simplify the text of the law article 67 could be omitted.

7. In article 72 *bis* the most acceptable alternative is Alternative A.

8. In preparing the final wording of article 76 of the draft law it would be advisable to work on the basis of Alternative A.

9. In article 82 it would be preferable to include the possibility of full damages for proven losses.

10. The Working Group in drafting the law worked on the assumption that references to actions of the seller or the buyer always cover the actions of the persons for whom they are responsible as well. Therefore for the sake of clarity a special article containing that principle could be included in the law, and the words "or of some other person for whose conduct the seller is responsible" could be omitted from article 96.

VI. Study by the representative of the United Kingdom on problems arising out of article 74 of the revised text of ULIS

[*Original: English*]

1. I undertook at the end of the fifth session of the Working Group to prepare a study of the unresolved questions presented by article 74 of ULIS, in the light of what was said at plenary meetings of the Working Group and of discussions of Drafting Party V (see progress report on the fifth session, A/CN.9/87,* paras. 107-115).

2. The revised text contained in annex 1 of the progress report sets out two versions of article 74 of ULIS (now renumbered 76), alternative A, provisionally adopted by the Drafting Party, and alternative B, proposed by the Observer for Norway. The two alternatives differ, I think, in two principal respects. They differ in their definitions of the circumstances in which exemption from liability in damages shall be available (para. 1). And they differ in that alternative A does not deal with the availability of any other remedies (because the Drafting Party considered that this needed further examination), whereas alternative B does make provision for reduction of the price and avoidance of the contract (paras. 2 and 4). Three main questions arise out of these differences. (*a*) In what circumstances is a non-performing party exempt from liability in damages? (*b*) In what circumstances may either party declare the contract avoided? (The remedy of reduction of the price presents no serious problem.) (*c*) What are the consequences of avoidance of the contract?

(a) When is a non-performing party exempt from liability in damages?

3. Before the differences between alternatives A and B are considered, there is a preliminary point which needs to be established. The non-performing party may be exempt from liability in damages without having the right to declare the contract avoided. This is obvious in the case of temporary delay (the possibility of which is envisaged in paragraph 3 of alternative A and paragraph 2 of alternative B). If for example, the seller is prevented from delivering by a temporary suspension of export licences, he may be exempt from liability in damages, but he will not normally be able to avoid the contract. But this is not the only possible instance. The impediment to performance may concern some other obligation. For example, the seller may have undertaken to pack the goods in plastic containers, and the export of such containers may be prohibited. The seller may be exempt from liability in damages for not providing these containers, but it obviously does not follow from this exemption that either he or the buyer can declare the contract avoided. This difference between the circumstances in which a party is exempt from liability in damages and those in which he (or the other party) may avoid the contract, is half hidden in a shift of meaning in the word "obligation" between paragraph 1 and paragraph 2 of alternative B (and similarly in the ULIS version). Paragraph 1 speaks of "non-performance of one of his obligations" (which may, for example, be the obligation to deliver by a certain day, or to pack in plastic containers), but paragraph 2 speaks of relief from an obligation which has become "quite different from that contemplated by the contract". This must refer to the totality of obligations created by the contract (or, perhaps better, the central or essential obligations) and not to the particular obligation mentioned in paragraph 1. This is not to say, of course, that the two may not coincide, as for example, where export licences have been permanently suspended and the obligation affected by paragraph 1 is therefore the obligation to deliver at all. In this case, if the seller is exempt from liability in damages, he or the other party should obviously be able to avoid the contract. (See part (*b*) of this study.)

4. In the light of this distinction between non-performance of an obligation and non-performance of the contract (a distinction which, though not easy to define, is implicit in ULIS and in alternative B), the difference between the formulation of paragraph 1 in alternative A and in alternative B becomes more significant. Alternative A sets up two tests for the availability of exemption from liability in damages. Performance of the obligation in question must either have become impossible or have "so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract". Of these two tests, that of impossibility can be applied either to a particular obligation (such as the obligation to deliver by a certain day, or the obligation to pack in plastic containers) or to the contract as a whole, but the test of radical change will usually be appropriate only to the performance of the contract as a whole. It might therefore be suggested that only the test of impossibility should be retained. But to this suggestion

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

the objection is that "impossibility" has different meanings in different systems. (It was to meet this objection that the concept of radical change was introduced into paragraph 1.) Since therefore the test of impossibility by itself leads to ambiguity, and since the addition of the test of radical change may lead to confusion between the particular obligation and the contract as a whole, it seems better to adopt in this respect the looser approach of alternative B (or something like it), and to leave the concept of radical change to the provisions dealing with the avoidance of the contract as a whole, where it is appropriate (see part (*b*) of this study). The text of alternative C (see para. 9, below) offers alternative formulations in terms either of "circumstances" (as in ULIS) or of "impediment" (as in alternative B).

5. On the other hand, it seemed from the discussion in the Drafting Party that the form of words relating to fault in paragraph 1 of alternative A was more likely to receive general approval than that in alternative B (though it may well be that the difference is ultimately one of words rather than of substance). It is therefore adopted in alternative C.

6. Alternative B has nothing to correspond to paragraph 2 of alternative A, which is self-explanatory. The need for this provision was, I think, generally accepted in the Drafting Party, and it is included in alternative C.

7. The first part of paragraph 3 of alternative A (corresponding to the first sentence of paragraph 2 of alternative B) is obviously necessary, but the second part (and the second sentence of alternative B) introduces the concept of radical change and is more appropriate to the provision on the availability of the remedy of avoidance (see part (*b*) of this study). It is therefore omitted in alternative C.

8. Paragraph 4 of alternative B is concerned with remedies other than exemption from liability in damages and is therefore left for consideration in part (*b*) of this study.

9. If these proposals are accepted, the revised version of article 76 (previously article 74) will be concerned only with the availability of exemption from liability in damages and will run as follows:

Article [76]

Alternative C:

1. Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has (or to circumstances which have) occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment (the circumstances).

2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

3. Where the impediment to the performance of an obligation is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed.

4. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform [of the circumstances which affect his performance and the extent to which they affect it]. If he fails to do so within a reasonable time after he knows of the impediment [circumstances], he shall be liable for the damage resulting from this failure.

(B) WHEN MAY THE CONTRACT BE DECLARED AVOIDED?

10. As has been said in paragraph 2 of this study, alternative A does not deal with this question, but alternative B does make some provision. Under paragraph 4 of alternative B (which approximately follows ULIS in this respect), the other party may reduce the price (where this is applicable) or avoid the contract, and the right to avoid the contract is subject to the normal rules governing breach, i.e., the non-performance must amount to a fundamental breach.[26] Under paragraph 2 the non-performing party may avoid the contract, but only when a radical change of circumstances has followed a temporary impediment. When the radical change is not preceded by a temporary impediment, or where the performance is not merely changed but is impossible, the non-performing party can do nothing. This is plainly not what is intended, but it seems to be the effect of the paragraph as drafted. What is required is a provision that the non-performing party may avoid the contract when performance of it has, by reason of the circumstances referred to in paragraph 1, become impossible or has radically changed.

11. The test for the existence of a right to avoid is therefore different for the two parties. For the non-performing party the test is that of impossibility or radical change; for the other party the test is that of fundamental breach. That the test should be different seems right. For example, a temporary suspension of export licences may not have any great effect on the character of the performance required of the seller, but it may well make the goods worthless for the purpose for which the buyer intended them. And conversely, if the authorities in the seller's country impose an export tax of 1,000 per cent, this will no doubt effect a radical change in the character of the performance required of the seller, but it should not be ground for the buyer to avoid the contract (if for some reason of his own he wishes to do so). But though the test of fundamental breach seems right in substance, there is some inelegance and a risk of confusion in using the language of breach when there has been, because of

[26] The text actually speaks of "any right which he has to declare the contract avoided", but presumably the "*Nachfrist*" provisions would not apply in this situation, and nor presumably would articles [74] and [75]. But the uncertainty in this respect is an additional argument in favour of providing for the consequences of avoidance for non-performance under article [76] separately from those of avoidance for non-performance or breach. See below.

the circumstances provided for in paragraph 1 of article [76], not a breach but a justifiable failure to perform. It seems better, even though more prolix, to incorporate here an adapted form of the definition of fundamental breach given in article 10. This accords with the wider proposal, which is made in part (*c*) of this study, that the consequences of avoidance for non-performance under article [76] should be independent of those of avoidance on breach.

12. The provision for these remedies would best be made in a separate article, draft of which is set out below. A small change has been made in the formulation of the test of radical change to take account of what has been said in paragraph 3 of this study. It should be noted that if any change is made in the final version of article 10, the formulation in (b) (ii) of the text below should be reconsidered.

Article [76 bis]

Where the non-performing party has notified the other party, in accordance with article [76], of an impediment to [circumstances which affect] the performance of one of his obligations, the rights of the parties shall be as follows.

(*a*) The non-performing party may declare the contract avoided if by reason of the impediment [circumstances] above-mentioned, the performance required of him by the contract has become impossible or has so radically changed as to amount to performance of a quite different contract.

(*b*) The other party may either (i) if he is the buyer, reduce the price in the proportion which the value of any goods delivered bears to the total value of the goods which the seller contracted to deliver, or (ii) declare the contract avoided if a reasonable person in his situation would not have entered into the contract if he had foreseen the non-performance and its consequences.

(C) THE CONSEQUENCES OF AVOIDANCE

13. Assuming that the contract has been avoided, alternative B leaves the consequences of that avoidance to be settled by articles 78-81 (and so does ULIS). But those articles are drafted with breach in mind and are not necessarily suitable to the situation where non-performance is not due to the fault of either party. This is obvious in the case of article 79, but some of the other provisions are of doubtful suitability.[27] On the other hand, it is not easy to say with confidence what provisions ought to be put in their place.

14. Three hypothetical cases may help to show where the difficulties lie. It is assumed that the question whether a party may avoid or not has been settled in accordance with the preceding paragraphs of this study.

Case (1). The contract provides for the goods to be delivered by instalments and for the price to be paid on completion of all deliveries. After half the deliveries have been made, the authorities in the seller's country prohibit further export of the goods in question. The buyer is unable to return the goods. The market value of the goods has risen, but the actual benefit to the buyer is less than either the market value or the proportionate part of the price (because, for example, the purpose for which he needed the goods can only be met by a complete delivery, and there will be long delay in obtaining substitute goods from any alternative source).

Case (2). Contract for delivery by instalments, followed by prohibition on further exports, as in case (1). The buyer is unable to return the goods because he has resold at a price considerably higher than the contract price and higher also than the current market price; or he cannot return them because he has incorporated them in a building, and the cost of obtaining substitute goods is higher than the contract price.

Case (3). The seller has contracted to make and supply goods to the buyer's specification, the price to be paid on delivery. Before the goods have been delivered, but after the seller has incurred considerable expense in preparatory work (such as design or the acquisition of machine tools), export of the goods is prohibited, or some impediment within the meaning of *article [76] prevents the buyer from taking delivery.*[28]

In all these cases the seller has incurred expenditure, but has received no benefit. In case (1) the benefit to the buyer is less than the value of the goods, however computed. In case (2) the benefit to the buyer is higher than the value of the goods. In case (3) there is no benefit to the buyer at all.

15. There seem to be in principle five possible solutions.

(*a*) The solution adopted by alternative B and by ULIS, which requires the buyer to return the goods, or, if that is impossible, *to account for* the benefits which he has derived from the goods. This means that in case (1) the seller will get less than the market value of the goods and less than a proportionate part of the price; that in case (2) he will get the benefit of the buyer's advantageous resale or of the rise in the market price; and that in case (3) he will get nothing.

(*b*) To allow the seller to claim the amount of the benefit to the buyer, provided that this does not exceed the expenditure incurred by the seller. This is the solution commonly applied by those systems which have a general doctrine of unjustified enrichment. The practical result will be the same as in solution (*a*) for case (1) and case (3), but in case (2) the seller will be limited to the amount of his expenditure (which may possibly be higher than the contract price if he made a bad bargain in the first place).

(*c*) To allow the seller to claim the amount of the benefit to the buyer, provided that this does not exceed the proportionate part of the contract price. The practical result will be the same as in solutions (*a*) and (*b*) for cases (1) and (3), but the limit on the seller's recovery in case (2) will be different. This is the solution of the American Restatement—Contracts.

[27] It should be noted that the revised article 81, para. 2 (*b*), in any case needs correction, in so far as it applies only to the case where it is the buyer who has exercised his right to declare the contract avoided. It must apply whether it is the buyer or the seller (as in the original ULIS version).

[28] It cannot make any difference from whose "side" the impediment comes, unless that party is at fault, an eventuality which is provided for in para. 1 of article (76), alternative C.

(*d*) To allow the seller to claim the amount of the benefit to the buyer, provided that this is not less than the proportionate part of the contract price. The result will be the same as in solution (*a*) for case (2), and the same as in solutions (*a*) (*b*) and (*c*) for case (3), but in case (1) the buyer will bear the loss caused by the termination of the contract.

(*e*) To adopt a system of discretionary apportionment of benefits and losses. This can, of course, be adapted to produce any of the results already considered for cases (1) and (2), but it alone can provide a solution to case (3) which does not simply leave the loss on the seller. A system on these lines is adopted in England and in some other Common Law jurisdictions.

16. Solution (*e*), though perhaps the best in terms of ideal justice, involves a considerable exercise of judicial discretion and a corresponding amount of uncertainty, and is probably inappropriate in the context of the Uniform Law. Solution (*b*) presents considerable difficulties in determining what part of the total expenditure of the seller is to be attributed to the performance of this particular contract. (The same difficulty would of course affect solution (*e*)). Solution (*d*) is objectionable because it treats a contract for delivery by instalments for a price payable on completion as amounting necessarily to a series of separate contracts for a proportionate part of the price, whereas solution (*e*) treats it as only presumptively so amounting, and allows the buyer to rebut the presumption by showing that the actual benefit is less than the proportionate part of the price. (Solution (*a*) ignores the question.) The choice, therefore, lies between solution (*a*) and solution (*c*). In regard to solution (*a*) there seems no merit in requiring the buyer to return the goods, if he can, since this will in some cases make the amount which the seller recovers depend on the chance of whether the goods can be returned or not.

17. The draft which follows expresses solution (*c*), but an alternative is given to express solution (*a*), but without any provision for the return of the goods.

Article [*76* ter]

1. If either party declares the contract avoided under the provisions of article [76 bis], both parties shall be released from further performance of their obligations under the contract.

2. (*a*) If the seller has received any part of the price *he shall account to* the buyer for it, together with interest at the rate fixed by article 83 as from the date of payment.

(*b*) If the buyer has received any part of the goods he shall account to the seller either for the benefit which he has derived from them or for such proportion of the price as the value of the goods delivered bears to the total value of the goods which the seller contracted to deliver, whichever is the less.

*Alternative draft of paragraph 2 (*b*) to express solution (*a*)*

(*b*) If the buyer has received any part of the goods he shall account to the seller either for their market value or for the benefit which he has derived from them, whichever is the less.

(D) CONSEQUENTIAL AMENDMENTS

18. If the proposals made above for articles [76], [76 *bis*], and [76 *ter*] are accepted, the following consequential amendments will be necessary. The heading of section II of chapter V should be altered to "Relief in case of supervening impediment". The heading of section III of chapter V should be altered to "Effects of avoidance for breach of contract". It would probably be wise to move section II to a position after section V (and renumber the sections). This would make the distinction between non-performance on breach and non-performance because of supervening impediment clearer.

(E) APPLICATION OF ARTICLE [76], ETC. TO LIABILITY FOR DEFECTS

19. The question was raised in discussion (see para. 112 of the progress report) whether article 74 of ULIS, or its eventual replacement, could apply to liability for latent defects in the thing sold (i.e., to non-performance of one or more of the seller's obligations as to conformity). The answer seems to be that article 74 of ULIS and all the drafts considered might be so interpreted as to do so in some circumstances. For example, if the seller could show that the defect was due to a human error which could not be foreseen or guarded against (and it would be admittedly very difficult to show this), he could argue that this was an "impediment" or a "circumstance" within paragraph 1 of article [76]. More realistically perhaps, if he could show that the defect was not one which could have been foreseen or guarded against in the light of the technical knowledge available at the time, he could argue that he was exempt. Of course, he would be exempt only from damages; the buyer could still avoid the contract or reduce the price. But the exemption could be very important in excluding liability for consequential damage (as where the defect has involved the buyer in liability to third parties). The buyer would be unable to recover these damages (unless he had made express provision in the contract). It is true that this is the normal result in some systems, unless the seller was aware of the defect, but it does not seem to have been the intended effect of ULIS. I have not, however, yet found a formula which would certainly exclude liability for latent defects from the exemption set up by paragraph 1 of article [76]. To exclude from the ambit of paragraph 1 all obligations as to the conformity of the goods would be much too wide; and no variation on "impediment" or "circumstances" seems capable of certainly achieving the intended result. To do so would probably involve a more extensive remodelling of the Uniform Law.

4. Report of the Secretary-General: pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex III)*

INTRODUCTION

1. The Working Group on the International Sale of Goods at the fifth session (January 1974) completed its initial examination of the Uniform Law on the International Sale of Goods (ULIS).[1] The revised text of a uniform law which resulted from this examination is set forth in annex I to the report on the Working Group's fifth session.[2] This revised text sets forth a number of provisions in square brackets to indicate that the Working Group had not reached consensus as to these provisions, or that it wished to give further attention to questions of substance or of drafting. In two instances, alternative texts are set forth.

2. The Working Group at the fifth session, in planning its further work, requested the Secretariat to prepare a study of the pending questions presented by the revised text, indicating possible solutions therefor, and taking into consideration the comments and proposals of representatives submitted before 31 August 1974.[3] The present report has been prepared in response to this request.

DISCUSSION OF PENDING QUESTIONS WITH RESPECT TO THE REVISED TEXT OF A UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

3. The order of presentation in this report follows that of the revised text of the Uniform Law on the International Sale of Goods as approved by the Working Group. The chapter headings were inserted by the Secretariat in preparing the revised text for reproduction in annex I of the report on the fifth session; these headings have not been considered by the Working Group. The descriptive titles for the articles of the revised text have been inserted by the Secretariat in the preparation of this report. The Working Group, in preparing the revised text, so far as possible, retained the numbering of the articles of 1964 ULIS; this numbering, which facilitates reference to the original text of ULIS and to earlier revisions by the Working Group, necessarily leads to gaps in the numbering where articles of the 1964 ULIS have been deleted or consolidated with other articles.

CHAPTER I. SPHERE OF APPLICATION OF THE LAW

Article 1: basic rule on sphere of application

A. *Introduction: basic rules on application*

4. Article 1 sets forth the basic rules on the Law's sphere of application. These rules deal with two questions: (1) The required internationality of the transaction (e.g., when is a sale "international"); (2) The required contact between the transaction and a Contracting State (Problems of private international law).

(1) *Internationality of the transaction*

(a) *Introduction*

5. This issue was dealt with in article 1 of 1964 ULIS by requiring two types of internationality. *Firstly*: The parties to the contract of sale must have their "places of business in the territories of different states"; *Secondly*: In addition, the transaction must satisfy one of three alternative tests (subparagraphs (*a*), (*b*) and (*c*) of article 1(1)) relating to the international movement of the goods or the international character of the offer and acceptance.

6. The Working Group considered these tests at its first and second sessions, and concluded that the second type of criterion (international shipment of the goods and the international character of the offer and acceptance) was difficult to apply in concrete situations. The basic reasons were set forth in detail by the Working Group in the report on its second session.[4] The Working Group noted that international shipment often was not part of the obligation of the contract: In sales "ex works" and in many "F.O.B." (or "F.O.R." "F.O.T.") transactions, the destination of the goods was of no concern to the seller; in other situations, where the goods were in course of shipment at the time of the contract of where the seller might supply the goods at his election either from local stocks or by international shipment, the origin of the goods would be of no concern to the buyer. In all these situations the question of international movement of goods would be in doubt at the time of the making of the contract—although at that time the governing legal régime needed to be known or determinable. The Working Group also concluded that the alternative tests of internationality in 1964 ULIS relating to the place of the making of the contract (article 1(1), subparagraphs (*b*) and (*c*)) were unworkable since international transactions were often concluded by a series of international communications; in these circumstances, it was often difficult to determine *where* the contract had been made.[5]

7. In view of these difficulties, the Working Group concluded that the sphere of application of the law would be clarified by retaining only one of the requirements set forth in article 1 of ULIS: the requirement that the parties to the sales contract have their places of business in different States.[6]

8. The above clarification would broaden the scope of the Law. To avoid excessive breadth, and to preserve various types of regulatory laws enacted for the

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* 18 February 1975.

[1] The 1964 Hague Convention Relating to a Uniform Law on the International Sale of Goods and annexed Uniform Law (ULIS) appear in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I (United Nations Publication, Sales No. E.71.V.3) at chap. I, 1.

[2] Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, herein cited as Working Group, report on fifth session. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[3] Working Group, report on fifth session, para. 245 (*c*). The comments and proposals so submitted by representatives are reproduced in a note by the Secretary-General, contained in annex II to that document, which will be cited as "Comments by representatives" (UNCITRAL Yearbook, vol. V: 1974, part two, I, 3).

[4] Progress report of the Working Group on the work of its second session (cited as "Working Group, report on second session"), A/CN.9/52, para. 17, (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[5] Working Group, report on second session, para. 19 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[6] The Working Group also noted that ULIS did not deal with the common problem where a party has places of business in two or more States. *Ibid.*, para. 23. This is dealt with in article 4 (*a*) of the redraft.

protection of consumers, the Working Group decided to exempt consumer transactions from the law; this exemption appears in article 2 (*a*). With these modifications the Working Group concluded that the scope of application of the Uniform Law would be clearer. The Commission at its fourth session reaffirmed its approval of the approach taken by the Working Group with respect to the scope of the Law.[7] It should be noted that the United Nations Convention on the Limitation Period in the International Sale of Goods, adopted on 12 June 1974 (A/CONF.63/15), adopted the same approach as that of the Working Group on Sales: the only criterion as to the internationality of the transaction is that "the buyer and seller have their places of business in different States" (article 2 (*a*)).[8]

(b) *Pending issue: knowledge that the other party has his place of business in another State*

9. The only aspect of article 1 which was left open for further consideration was the wording of a provision designed to preclude application of the Law when the foreign character of a party was unknown to the other party—as, for example, when a sales transaction was effected through a broker or agent who did not disclose that he was acting for a foreign principal.[9] A provision, initially prepared by the Working Group at its second session, was redrafted in its present form at the third session, and appears as paragraph 2 of article 1. The Explanatory Report does not disclose any difficulty of substance with the provision;[10] however, paragraph 2 was placed within square brackets, apparently so that the drafting could be given further consideration. In the meantime, the provision has been carefully re-examined in the observations submitted by the representative of Mexico, and a clarifying amendment has been proposed by him.[11] The Working Group will also wish to note that the present language of paragraph 2 of the revised text was adopted in the United Nations Convention on the Limitation Period in the International Sale of Goods (article 2 (*b*)).

(2) *Contact between the transaction and a Contracting State*

(a) *Introduction*

10. ULIS directed the *fora* of Contracting States to apply the Law to all international sales even though neither the seller nor buyer (nor the sales transaction) had any contact with any Contracting State (ULIS article 1(1), article 2 (exclusion of rules of private international law)). This broad rule of applicability of the Law (sometimes termed the "universalist" approach) was subject to the possibility of reservations under articles III, IV and V of the 1964 Hague Sales Convention.

11. At the first session of the Working Group it was observed that the "universalist" approach of 1964 ULIS had proved to be a barrier to the adoption of ULIS, and that the complex pattern of reservations which resulted from that approach made it difficult for parties to an international sale to know which States might apply the Law to their transaction. At that session, the Working Group gave initial consideration to a revised text reflecting the approach that now appears in article 1, para. 1;[12] under the current text the Law applies to sales contracts between parties whose places of business are in different States:

"(*a*) When the States are both Contracting States; or

"(*b*) When the rules of private international law lead to the application of the law of a Contracting State."

12. UNCITRAL at its third session (1970) approved the approach reflected in the present text[13] and the above-quoted provision was drafted and approved at the third session of the Working Group.[14]

13. The observations submitted by the representative of Austria suggested that it was unfortunate that paragraph (*a*) was restricted to sales between parties both of whom are in Contracting States. It was further suggested that, in any event, it would be advisable to delete paragraph (*b*) on the ground that this reference to the rules of private international law was alien to unification of substantive law, and was inadvisable.[15]

B. *Applicability of law by choice of parties; relation to mandatory rules*

14. Article 1(3) of the current draft states:

"The present Law shall also apply where it has been chosen as the law of the contract by the Parties."

15. The observations submitted by the representative of Norway suggested that, at the end of the above provision, the following should be added:

". . . to the extent that this does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the present law."

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[7] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 69 (UNCITRAL Yearbook, vol. II: 1971, part one, II, A) (cited as "UNCITRAL, report on fourth session").

[8] A/CONF.63/15; herein cited as "Convention on Limitation".

[9] Working Group, report on second session, para. 25. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[10] Working Group, report on third session, annex II (A/CN.9/62/Add.1, paras. 6-10, UNCITRAL Yearbook, vol. 3: 1972, part two, I, A, 5).

[11] Comments by representatives (A/CN.9/WG.2/WP.20). Observations of Mexico, para. 8.

[12] The Working Group, report on first session, paras. 10-25. (UNCITRAL Yearbook, vol. 1, 1968-1970, part three, I, A, 2). The initial text, at para. 19, was subject to stylistic modifications to produce the current text quoted above.

[13] UNCITRAL, report on third session, paras. 22-31. (UNCITRAL Yearbook, vol. 1: 1968-1970, part two, III, A). Commission considered possible reservations as to sphere of application.

[14] Working Group, report on third session, annex I; annex II (A/CN.9/62/Add.1; UNCITRAL Yearbook, vol. 3: 1972, part two, I, A, 5), paras. 1-14.

[15] The United Nations Convention on the Limitation Period in the International Sale of Goods employed the approach in article 1(1) (*a*) of the present sales draft as the sole basis for applicability of the Convention (article 3(1)); in that Convention, recourse to the rules of private international law is rejected (article 3(2)). In the field of limitation (prescription) the rules on private international law vary so widely, even in basic approach, that recourse to such rules was considered inappropriate. See Commentary on the draft convention, A/CN.9/73, introduction, para. 4, commentary on article 3, paras. 3-5 (UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

16. The commentary accompanying the above suggestion draws attention to articles 4 and 8 of ULIS. Article 4 of ULIS also deals with the effect of a contract that the uniform law shall apply, and at the end of article 4 includes the language proposed by the representative of Norway. Article 8 of ULIS has been retained without change in the present draft.

17. The inclusion of the language proposed above was considered by the Working Group at its second session. The Working Group concluded that the effect of mandatory rules should be dealt with in a general provision, since this problem could also arise when the Law is automatically applicable—as contrasted with applicability resulting from the agreement of the parties.[16] In the latter regard, it should be noted that the omission from the Law of "consumer" sales (article 2(1)) avoids many, if not most, of the situations in which there are mandatory rules of law; under most legal régimes in commercial transactions full effect is given to the agreement of the parties.

Article 2: Exemptions

18. Article 2 provides for two types of exemptions from the law. The first paragraph exempts certain types of *transactions*—e.g., consumer sales as defined in subparagraph (*a*). The second paragraph excludes certain types of *commodities*.

A. *Consumer sales: paragraph 1* (a)

19. As has been mentioned, paragraph 1 (*a*) excludes consumer sales—an exclusion not found in 1964 ULIS. The reasons for this exclusion appear in the report of the Working Group's second session (paras. 22, 57); the language of the current text was adopted at the third session.

20. The current text states the basic rule for exclusion in objective terms—"goods of a kind and in a quantity *ordinarily* bought by an individual for personal, family, household or similar use"; under this language the purpose of the particular buyer is irrelevant. However, the provision adds an exception based on the purpose of the buyer in the instant transaction: the sale would be covered by the Law if the buyer did not in fact purchase the goods for personal, family, household or similar use, and that fact is made evident in specified ways. Thus, the Law would govern the sale if the above-mentioned purpose of the buyer appeared "from the contract". Following these last words, the current text includes in brackets: "[or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract]".

21. The principal reason for including the bracketed language was that a buyer's proposed use for goods would not normally be stated or otherwise appear in the "contract" but the seller might know from communications or information apart from the contract that the buyer bought the goods for a commercial purpose, as contrasted for personal or household use.

22. The only comments directed to this provision (Austria and Mexico) state that the bracketed language should be retained.

[16] Working Group, report on second session, paras. 38-41 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

B. *Negotiable documents representing goods: paragraph 2* (a)

23. The comments by Austria suggest that a problem of interpretation may arise under paragraph 2 (*a*), which excludes sales

"(*a*) Of stocks, shares, investment securities, *negotiable instruments* or money".

24. The question is raised as to whether the exclusion of sales of "negotiable instruments" might be construed to exclude sales of goods effected by the transfer of negotiable documents of title, such as negotiable bills of lading or warehouse receipts.

25. Certainly such a construction would be inconsistent with the intent of the draftsmen of ULIS (where the same provision is employed) and of the Working Group. The reference to "negotiable instruments" was clearly intended to exclude only such instruments calling for the payment of *money*—such as negotiable notes, bills of exchange or cheques. Any ambiguity on this point would be serious, for the transfer of goods is often effected by the delivery of negotiable documents of title controlling delivery of the goods. The Working Group might consider rewording the end of paragraph 2 (*a*) to read:

". . . money or negotiable instruments calling for the payment of money".

C. *Ships, vessels and aircraft: the question of registration; paragraph 2* (b)

26. A pending question is presented by paragraph 2 (*b*) whereby the Law shall not apply to sales "(*b*) of any ship, vessel or aircraft [which is registered or is required to be registered]". The bracketed language was drafted to take the place in article 5(1) (*b*) of ULIS of the similar phrase "which is or will be subject to registration". The Working Group inserted the square brackets to indicate that these words present a problem for further drafting.[17] The exclusion was not meant to depend on whether the vessel was registered, or was required to be registered, at the time of sale; instead, the intent was to exclude the type of vessels which, in normal course, would become subject to national legislation.

27. This problem is considered in the observations submitted by the representative of Mexico who has proposed a draft provision to effectuate the intent of the Working Group.[18]

Article 3: "mixed" contracts

28. Article 3 deals with the applicability of the law to "mixed" contracts—i.e., contracts which combine the sale of goods (article 1(1)) with other obligations which, standing alone, would not fall within the Law.

29. Paragraph 2 of article 3 is identical with article 6 of ULIS which is directed to the case where the party who orders goods "undertakes to supply an essential and substantial part of the materials" necessary for the manufacture or production of the goods in question.

[17] Working Group, report on second session, para. 55. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[18] Comments by representatives (A/CN.9/WG.2/WP.20); observations of Mexico, paras. 11-16.

The Working Group concluded that this provision of ULIS, while satisfactory in itself, was an incomplete and unsatisfactory approach to the problem of "mixed" contracts, since this problem could also arise where the principal obligation relates (e.g.) to the supply of services, or land, or other matters other than the delivery of and payment of goods. It was recognized that such contracts could arise in an infinite variety of combinations, so that detailed provisions would not be practicable. However, a general rule was considered necessary; to fill this gap in the law, paragraph 1 was prepared by the Working Group at its second session.[19] The report on that session does not indicate any objection of substance or any specific problem of drafting. The representative of Mexico, in his observations, examines this provision and finds it satisfactory; the other observations submitted by representatives do not comment on this provision.

Article 4: definitions and other provisions related to sphere of application

A. *Rule on applicability when a party has more than one place of business: paragraph (a)*

30. Paragraph (*a*) was drafted by the Working Group to supply a serious omission in 1964 ULIS. Under ULIS (and the current draft) the Law is applicable only when the seller and the buyer have their places of business in different States. However, parties often have places of business in two or more States: one of those places of business may be in a State where the other party has a place of business.[20] In these situations, problems as to the applicability of the Law arise for which 1964 ULIS provides no solution.

31. The Working Group concluded that it was necessary to include a rule dealing with this question, and at the second session prepared the provision that now appears as paragraph (*a*) of article 4.[21] At that session, this provision was the subject of considerable discussion, and was placed in square brackets to permit later reconsideration.

32. The observations submitted by Mexico for the present session analyse article 4 (*a*) and concludes that it is satisfactory.

33. On the other hand, the observations submitted by Austria suggest that article 4 (*a*) should be reviewed in the light of the comparable provision embodied in the United Nations Convention on the Limitation Period in the International Sale of Goods. Article 2 (*c*) of that Convention provides:

> "(*c*) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;"

34. A provision identical with that prepared by the Sales Working Group was submitted to the Conference on the Limitation Period; at the Conference it was suggested that the drafting of the provision could be simplified. The above-quoted article 2 (*c*) resulted from that suggestion.

35. The Working Group may wish to conform article 4 (*a*) of the Uniform Law on Sales to the provision approved by the Conference on Prescription.

B. *References to reservations; uniform law or convention: article 4 (d) and (e)*

36. The observations of Austria note that the current draft (like 1964 ULIS) is in the form of a uniform law annexed to a convention, whereas the Convention on the Limitation Period embodies the uniform rules in the Convention. It is suggested that the manner of presentation should conform to that of the Convention on the Limitation Period.

In considering this suggestion it should be recalled that the Convention on Limitation opens with a short preamble and sets forth the uniform rules in part I, substantive provisions. These uniform substantive rules are followed by part II, implementation; part III, declarations and reservations and by part IV, final clauses.

37. It is further suggested that if the "integrated" approach of the Convention on Limitation is adopted, paragraph (*d*) of article 4 could be omitted, while paragraph (*e*) (which refers to the possibility of a declaration under article [II] of the Convention) should be drafted in greater detail.

Paragraph (d)

Paragraph (*d*) of article 4 states:

> (*d*) A "Contracting State" means a State which is party to the Convention dated . . . relating to . . . and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

38. The Working Group at its second session noted that the foregoing provision "takes account of the possibility that a new convention might provide for reservations such as those permitted under article V of the 1964 Sales Convention whereby the law is applicable only when it is chosen as the applicable law by the parties".[22]

39. The Working Group and the Commission have not yet taken a position on the inclusion of a provision on reservations like that of article V of the 1964 Hague Convention. It would simplify the problem of presentation with respect to article 4 (*d*) if the Working Group could take a decision on whether the current sales convention should include a provision on reservations like article V of the 1964 Convention.

40. Article V was included in the 1964 Convention because several States were dissatisfied with certain

[19] Working Group, report on second session, paras. 61-67. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[20] Under 1964 ULIS, the question whether the place of business is in a Contracting State could be decisive under the reservations permitted in article III of the Convention. Under the rules on sphere of application, prepared by the Working Group, this issue had wider significance.

[21] Working Group, report on second session, paras. 13, 23-25. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2). The provision then appeared as article 2 (*a*), but was moved to its present position at the third session.

[22] Working Group, report on second session, para. 34. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2). The provision then appeared as article 2 (*e*).

basic provisions of ULIS. The Working Group may now wish to consider whether the current revision has sufficiently removed such objections so that a provision like article V need not be included in the current convention.

Paragraph (e)

Paragraph (*e*) of article 4 states:

> (*e*) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated . . . relating to . . . is in force in respect of them.

41. The reference to a declaration under article [II], relates to a declaration by two or more States, having closely related legal rules, that transactions among their area would not be governed by the Convention. Such a provision was included in the Convention on Limitation in part III: declarations and reservations (article 34). In the Convention on Limitation, the substantive articles on sphere of application (articles 1-7) do not include a reference to the above provision in part III providing for a reservation restricting the scope of application.* From the foregoing, it will be noted that if the approach of the Convention on Limitation is followed, the reference to declarations in paragraph (*e*) of article 4 would be deleted, and a provision permitting declarations, comparable to article II of the 1964 Hague Convention, would be included in a later part of the Convention on Declarations and Reservations. (Compare part III of the Convention on Limitation.)

42. The Working Group may conclude that, in some settings, substantive provisions that are subject to modification by reservation should include references to the possibility of such reservations. Such references may be useful to direct attention to reservations which otherwise might be overlooked. These considerations have some weight even where the uniform rules are in one part of a convention and provisions on reservations are included in another part. (e.g., the "integrated" approach employed in the Convention on Limitation.) However, such a reference may not be important with respect to the type of reservation referred to in article 4 (*e*), since most lawyers in States (or regions) with similar or uniform laws may be aware of the possibility that international conventions would include provisions for reservations preserving such laws.

The choice between an "integrated" convention and a uniform law annexed to the convention

43. If the Working Group should decide to delete paragraphs (*d*) and (*e*) of article 4, it would not be necessary to decide at this time whether the revised sales convention should follow the approach of 1964 ULIS (which annexes a Uniform Law to the Convention) or of the Convention on Limitation (which incorporates the substantive uniform rules in part I of the Convention). On the other hand, the Working Group may find it useful to consider and decide the matter at this time.

44. As has been noted, the Convention on Limitation provides a precedent for an "integrated" approach. This approach seems to have certain technical advantages in relation to constitutional and legislative practices of some States. On the other hand, the Working Group may wish to consider the following considerations: (1) a uniform law on the international sale of goods is of basic importance and is of substantial size; these facts may incline some States, in implementing the convention, to enact its substantive provisions as a separate uniform law; (2) perhaps more important, some States have adopted the 1964 Hague Convention, which annexes the substantive provisions as a Uniform Law. Such States will wish to consider replacing the 1964 ULIS with the revised law prepared by UNCITRAL. This step, which would contribute significantly to international unification, may be facilitated if the UNCITRAL convention does not deviate on this point from the approach of the 1964 Hague Convention.

Article 5: effect of agreement of the parties

45. This article is based on article 3 of 1964 ULIS, but has been redrafted in the interest of simplicity and clarity. As was noted by the Working Group at its second session, "article 3 of ULIS and of the proposed revision both emphasize that the provisions of the Uniform Law are supplementary and yield to the agreement of the parties".[23] However, the revision by the Working Group brings out more clearly than the 1964 ULIS that the parties may either (1) totally exclude the law or (2) "derogate from or vary the effect of any of its provisions".

46. No comments or proposals in the studies submitted to the present session have been directed to this article.

Articles 6 and 7

47. These articles of ULIS have been integrated into other articles of the current draft. Article 6 of ULIS appears in article 3(2) and article 7 appears in article 4 (*c*).

Article 8: subjects excluded from the law

48. This article, which is the same as in 1964 ULIS, was adopted by the Working Group at its second session; the report noted that no comments or proposals had been made in connexion with the article.[24] The article is designed to make clear that certain questions are excluded from the scope of the law, e.g. formation, title to property, validity.

49. The observations submitted by the representative of Austria to the present session suggest that the article is unnecessary and should be deleted. It is suggested that article 8 had been included in 1964 ULIS because that Law included a provision (article 17) which provided that questions concerning matters governed by that law "which are not expressly settled therein shall be settled in conformity with the general principles" on which the law is based. The Working Group has deleted this language and replaced it with a provision emphasizing that in interpreting the Law

* The text of the Convention is reproduced in UNCITRAL Yearbook, vol. V: 1974, part three, I, B.

[23] Working Group, report on second session, para. 46. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[24] *Ibid.*, para. 71.

regard should be had to its international character and to the need to promote uniformity.[25]

50. The need for article 8 has been diminished by the deletion of the above language in article 17 of 1964 ULIS. Moreover, in the absence of article 8 there seems little likelihood that a reader would suppose that the law dealt with the formation of the contract, or the effect of the contract on the property in the goods sold. But there may be utility in preserving at least the provision of article 8 that the present Law does not deal with the validity of the contract or of usages. Substantive provisions of the uniform law state that the seller shall deliver the goods and the buyer shall pay for them in accordance with the contract, and article 9 gives general effect to usages. Without a provision like article 8, some courts may conclude that the convention setting forth these rules would override national rules concerning validity of the contract or of usages. Moreover, deletion of this provision contained in ULIS might give rise to the incorrect inference that such deletion implied that the rule of ULIS is rejected.

51. The representative of Norway, in his observations, suggests that the words "in particular", which open the second sentence, are misleading and should be deleted.

CHAPTER II. GENERAL PROVISIONS (ARTICLES 9-17)

Article 9: usages and practices

A. *Basic rule as to usages and practices: paragraph 1*

52. Paragraph 1 is the same as article 9(1) of ULIS. Under this provision, the parties are bound (1) "by any usage which they have expressly or impliedly made applicable to their contract" and (2) "by any practices which they have established between themselves". The two parts of the paragraph are distinct, in that the first part relates to patterns established generally in a trade or line of commerce, while the second part relates to practices that have been followed by these parties in relation to each other—i.e. their own "course of dealing". Both parts of this paragraph proceed on the theory that such usages and practices are part of the contractual undertaking of the parties, either by express agreement or by an implied expectation that performance will follow such established patterns.[26]

B. *Implied applicability of usages: paragraph 2*

53. The principal difficulty with article 9 has arisen from paragraph 2 of 1964 ULIS. As has been noted, under paragraph 1, the parties are bound by any usage which they "have *expressly or impliedly* made applicable to their contract". To this, paragraph 2 of 1964 ULIS adds:

> "2. They shall *also* be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract . . .".

54. Members of the Working Group and of the Commission have raised questions concerning the extent to which paragraph 2 extended beyond paragraph 1, and concerning the justification for such extension.[27] It will be noted that article 9(1) of ULIS gave effect to any usage which the parties have "expressly *or impliedly* made applicable to their contract", and that paragraph 2 provided that the parties shall "also" be bound to certain further usages, this wording suggested that paragraph 2 was not based on the presumed expectation of the parties but upon some other principle which was unstated, possibly some normative obligation independent of the implied contractual undertaking by the parties. It was also noted that the references to what "*reasonable* persons" in the same situation as the parties "*usually consider*" to be applicable to *their* contract" injected elusive factors into the formula and would be difficult to apply in practice.

55. To meet these difficulties paragraph 2 of article 9 of ULIS, was redrafted by the Working Group to set forth a definition of those usages which under paragraph 1, the parties had "impliedly made applicable to their contract". Under this redraft, the usages which the parties "shall be considered as having impliedly made applicable to their contract" are determined under two tests: (1) whether the parties are (or should be) aware of the usage and (2) whether the usage "in international trade is widely known to, and regularly observed by parties to contracts of the type involved".

56. Under this revision, the second of these tests is stated twice—once in connexion with usages of which the parties *are* aware, and once in connexion with usages of which the parties *should be* aware. This repetition seems to be the reason for comments that the provision is complex and should be simplified. The observations submitted by Mexico include a redraft of this provision which simplifies the text by avoiding this repetition.[28] It will also be noted that this proposed redraft would somewhat broaden the applicability of usage, and facilitate proof by a party relying on usage, since, under this redraft, the conclusion that the parties are or should be aware of a usage could be based on *either* (1) the fact that the usage is widely known in international trade *or* (2) the fact that the usage has been regularly observed in contracts of the type involved.[29]

57. In previous consideration of this topic, some members of the Working Group have expressed concern over the breadth of the recourse to usage per-

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[25] The observations submitted by Mexico (paras. 52-56) propose that the substance of article 17 of 1964 ULIS be added as a second paragraph of the present redraft. See para. 79, below.

[26] Article 9(1) needs to be considered in relation to article 5 (a clarification of ULIS 3), which gives effect to the agreement of the parties, by which they "may exclude the application of the present law or derogate from or vary the effect of any of its provisions".

[27] Working Group, report on first session, paras. 73-90 (UNCITRAL Yearbook, vol. 1: 1968-1970, part three, I, A, 2); report on second session, paras. 72-82 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2); UNCITRAL, report on third session, paras. 35-42 (UNCITRAL Yearbook, vol. 1: 1968-1970, part two, III, A).

[28] Comments: observations by Mexico, paras. 29 to 38. The proposed redraft appears at para. 36 (reproduced in this volume, part two, I, 3).

[29] The reasons for this approach are explained at para. 35 of the observations by Mexico, *supra* (reproduced in this volume, part two, I, 3).

mitted under paragraph 2 of article 9. This scope has been clarified and narrowed under the text prepared by the Working Group at its second session and under the simplified redraft proposed by Mexico. However, if members would still be concerned about the breadth of this provision, consideration might be given to making more explicit the justification for recourse to custom: the expectation that the other party will perform in the manner that is customary in the trade. The draft text prepared by the Working Group and the redraft by Mexico are much more helpful in this regard than was ULIS, for these drafts tie paragraph 2 to the basic rule of paragraph 1 by the phrase "The usages which shall be considered as having *impliedly made applicable to their contract* . . ."; the emphasized language indicates that the basic test is the expectation of the parties in making the contract. However, the justification and scope of the provision might be made even more explicit by language along the following lines, which is based on the redraft proposed by Mexico.

Draft proposal for paragraph 2

"2. The parties shall be considered to have impliedly made applicable to their contract a usage which is *so* widely known in international trade or [and] so regularly observed in contracts of the type involved *as to justify an expectation that it will be observed with respect to the transaction in question.*"

58. It will be noted that the underscored language at the end of the above redraft takes the place, in the current draft, of the tests that the parties "are aware" or "should be aware" of a certain usage. Substituting this objective test for the subjective tests in article 9(2) of ULIS is suggested because the proof of the state of mind of the other party is inherently difficult: the only practicable approach is through the second phrase "*should be* aware". But it is doubtful that "awareness" (or the obligation *to be* "aware") of a usage is the most appropriate ultimate test. The ingredient of a usage that would justify its inclusion as part of the contract is that degree of knowledge of the usage in international trade or its regular observance in international trade which would justify an expectation that it would be observed in the transaction in question. Perhaps this essential idea is implicit in the current draft of article 9(2) but the provision might be easier to apply if this ultimate test were made explicit.

C. *Rules of the present Law and agreement of the parties: paragraph 3*

59. Paragraph 3 states:

"3. [In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.]"

The observations by Mexico suggest (para. 37) that the final phrase "unless otherwise agreed by the parties" should be deleted. Attention is drawn to the general rule of article 5 (ULIS article 3) giving effect to the agreement of the parties; it is also noted that misunderstanding could result if only some of the provisions of the Law state that the agreement shall prevail.

60. It will be noted that the proposed deletion is made possible since paragraph 2 of the redraft (unlike article 9(2) of ULIS) makes it clear that the ground for the applicability of usages is an implied agreement by the parties. It might also be suggested that, in view of this approach, all of paragraph 3 is redundant. Article 9(1) refers to both (1) usages and (2) practices which the parties have established between themselves. Paragraph 9(3) refers only to usages—perhaps on the ground that article 9(2) of ULIS made certain usages effective independently from an implied contractual undertaking. Under the Working Group redraft, usages and practices are given parallel treatment. Hence, it would seem advisable either (a) to delete paragraph 3 or (b) to modify paragraph 3 by adding after "such usages" the words "*and practices*".

D. *Interpretation of commercial terms: paragraph 4*

61. The observations by Mexico suggest (para. 38) that paragraph 4 be revised to conform to a proposal set forth in the report on the second session of the Working Group (para. 82). It will be noted that this proposal is designed to make the rules on interpretation of commercial terms conform to the rules in paragraphs 1 and 2 of this article. In addition, this proposal would delete, as unnecessary, the concluding phrase "unless otherwise agreed by the parties".

Article 10: definition of "fundamental breach of contract"

A. *Introduction*

62. Article 10 of ULIS sets forth a definition of "fundamental breach of contract", a concept employed in numerous articles of 1964 ULIS.[30]

63. The Working Group at its second session gave preliminary consideration to article 10 of ULIS, but concluded that a decision on this provision should be deferred until after consideration of the substantive provisions that employ the concept of "fundamental breach of contract".[31]

64. In its review of the substantive provisions of ULIS, the Working Group has retained the concept of "fundamental breach", although the consolidation of the various sets of remedial provisions in ULIS has sharply reduced the number of occasions in which it has been necessary to use this concept.

65. The most important of these provisions are (*a*) article 44(1)(*a*), under which the buyer may declare the contract avoided where the seller has committed a "fundamental breach of contract", and (*b*) the parallel provision of article 72 *bis* governing avoidance of the contract by the buyer.[32]

[30] Articles 26(1), 27, 28, 30, 32, 43, 52(3), 55(1)(*a*), 62, 66, 70(1)(*a*) and 76.

[31] Working Group, report on second session, paras. 83-88. (UNCITRAL Yearbook, vol. II: 1971, part 2, I, A, 2).

[32] The basic provisions of ULIS are written in terms of the right (e.g.) of the buyer to "declare the contract avoided" rather than in terms of his right to reject (or duty to accept) defective goods. This approach could give rise to some doubt as to the legal situation that arises when the seller's tender of performance in some respect fails to conform to his contractual performance but does not amount to a "fundamental breach". It is clear that in this circumstance the buyer may not "declare the contract avoided", but the drafting approach of ULIS does not clearly state that the buyer has a duty to receive and accept the tender—subject, of course, to a right to be compensated by damages. It is assumed that such a duty may be implied from the general structure of the remedial provisions of ULIS; this construction is aided by article 98 *bis* (para. 1) as redrafted by the Working Group.

66. The definition of "fundamental breach of contract" thus plays an important role in connexion with the right to avoid a contract. However, the right of avoidance may be established without using the test of "fundamental breach": This is true by virtue of provisions authorizing the buyer (art. 43) and the seller (art. 72) to request the other party to perform within a specified additional period of time of reasonable length (the *Nachfrist* notice); failure to comply with this request is an independent ground for avoidance without recourse to the concept of "fundamental breach" (article 44(1)(*b*) and 72 *bis* (1)(*b*)).[33]

B. *Criticisms of the definition of "fundamental breach" in article 10: proposals*

67. Studies and comments submitted by States and organizations prior to the second session, and observations made at the second session of the Working Group, criticized article 10 on the ground that it was too complex, and also on the ground that the article included subjective standards that would be difficult to apply.[34] The observations submitted to the present session by Mexico thoroughly analyse the criticisms of this article, and propose a revision which is designed to overcome these difficulties.[35] It will be noted that this proposal eliminates the subjective test (i.e. what a party "*knew* or ought to have *known*"), and also the related speculative element as to whether a "*reasonable* person" would have "entered into the contract *if* he had foreseen the breach and its effects". Instead, this proposal employs a single objective criterion: whether the breach *substantially* alters the scope or contents of the rights of the other party.

68. The Working Group will wish to give careful consideration to such an approach which would simplify and clarify article 10. In considering the basic approach to this question, it may be relevant to note that deviations from perfect performance occur in a virtually infinite number of settings and degrees, so that it will be impossible in this law (as it has been impossible in national legal systems) to prescribe detailed rules; the most that can be done is to point to the basic issue: whether the breach has substantially impaired the value of performance required under the contract.[36]

69. If the Working Group decides to simplify article 10 along the lines of the above proposal, consideration might be given to a possible clarification of the phrase which refers to the alteration of "the scope and contents of the *rights*" of the other party. From one point of view (at least in the English version) it may be difficult to conclude that a breach has altered the *rights* of the other party; his rights have been established by the Law and have not been altered by the breach; it might be more appropriate to refer to the extent to which the breach has impaired the value of the performance required by the contract. A proposed revision of article 10, based on the proposal of Mexico, that would take account of the above drafting point, is as follows:

Proposed revision of article 10

For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever such breach substantially [to a significant extent] impairs the value of the performance required by the contract and the present Law.

Article 11: definition of "promptly"

70. The observations of Austria note that the term "promptly" is used only in articles 38(1) and 42(2)[37] and also, in discussing article 42, suggest that paragraph 2 be revised in a manner that would omit a reference to prompt notice. It is suggested that if this change is made the definition of "promptly" be transferred to article 38 or, in the alternative, omitted.

71. It would appear desirable to postpone action on this suggestion until after the consideration of article 42, and possibly until after the consideration of all the substantive rules in which the term "promptly" is or might be employed.

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[33] There may be a problem of construction with respect to the buyer's request under article 43 (and the consequent automatic right to avoidance under article 44(1)(*b*) as applied to minor non-conformity in the seller's tender of delivery. Thus, under article 43, the buyer may fix an additional period not only "for delivery" (as in cases where the seller has delivered no goods) but also "for curing of the defect or other breach". This problem would occur when the seller tenders a slightly smaller quantity than that specified in the contract (98 bags instead of 100) or where a small part of the goods (e.g. 2 bags) are deficient in quality, and where these deficiencies do not constitute a "fundamental breach of contract". If the buyer refuses to accept the goods and requests a perfect tender within a specified time, and the seller (perhaps because of remoteness from the buyer) is unable to make a perfect tender, may the buyer declare the avoidance of the contract? The controlling provision is article 44(1)(*b*), under which the buyer may declare the contract avoided "(b) Where the seller has not *delivered the goods* within an additional period of time fixed by the buyer in accordance with article 43". The question is whether the emphasized phrase "delivered the goods" refers only to a delivery in perfect conformity with the contract, or whether this phrase extends to a delivery that is non-conforming but where the breach is not "fundamental". Under the latter construction, the *Nachfrist* notice under article 43 would set a limit to the period of time within which the seller may tender delivery that substantially conforms to the contract, and the time within which the seller may cure a defective tender (article 43 *bis*) but would not provide a basis for avoidance of the contract where the breach is not fundamental. The same questions could arise under articles 72 and 72 *bis* of the redraft and under the corresponding sections of 1964 ULIS.

[34] Analysis of comments and proposals (A/CN.9/WG.2/WP.6, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 1). Working Group, report on second session, paras. 83-88 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[35] Comments, observations of Mexico, paras. 39-46; the proposed redraft appears at para. 46 (reproduced in this volume, part two, I, 3).

[36] One study, based on standard contracting practices, indicated that it may be inadequate to consider only the degree of the breach, and indicated that a relevant consideration is whether compensation for the breach can be clearly and adequately assured. For instance, in the case discussed above, where the contract calls for 100 units and the seller tenders only 98, or where 2 of the units are defective, there is a decisive difference between cases (a) where the seller in tendering the goods demands cash payment for all 100 units and (*b*) where the seller voluntarily makes a full adjustment in the price for the missing or defective units. In case (*a*) the buyer is asked to take a substantial burden and risk in pressing the seller for a cash refund, while in case (*b*) such burdens of litigation and of possible deterioration of the seller's financial position are avoided. Thus, cases (*a*) and (*b*) could lead to different results as to avoidance although from a narrow viewpoint the degree of breach is the same. See 97 U. Pa. L. Rev. 457.

[37] Comments, observations by Austria (article 11) (reproduced in this volume, part two, I, 3).

Proposed new article 12: act or knowledge of agent

72. The observations of Norway, in setting forth proposed amendments to the current revised text, note that some of the articles (e.g. 76(4) and 96) state that a party is bound by the acts of another person for whose conduct the party is responsible. On the ground that such a principle should be effective throughout the Law, it is proposed that such a general principle be included in the law as a new article 12. It is further proposed that this new article should also state that references to knowledge of a *party* (e.g. arts. 33(2), 38(3)) shall include the knowledge of an agent or of any person for whose conduct the party is responsible.

Article 13

73. This article of ULIS was deleted by the Working Group.

Article 14: communications

74. The observations by Norway propose adding a second paragraph to this article which would state a general rule dealing with notices which are sent by appropriate means but which are delayed or fail to arrive. The commentary cites several articles which refer to notices; only one of these (39(3)) deals with the above problem. The proposed new paragraph of article 14 would set forth a general rule based on article 39(3).

75. Examination of the various articles which deal with notices reveal that some (e.g. 21(1)) require that a party "send" a notice while others (e.g. 39(1), 94) require a party to "give" notice; still others use neutral expressions like "notice" or "notify" (cf. art. 74 ("declare")). Under most of these articles, litigation could arise concerning the effect of delay or miscarriage of communications. Hence, a general rule on the question would seem to be useful.

Article 15: requirements as to form of contract

76. This article has been thoroughly discussed by the Working Group and by the Commission.[38] Two sets of observations submitted for the current session refer to article 15; both conclude that the article should be retained.[39] The observations by Mexico draw attention to the complexities and divergencies among rules of national law on this question, as summarized in the report on the Working Group's second session (para. 117). It is also noted that the fact that the parties *may* make a contract without the formality of a writing does not imply that they *will* make such informal contracts or that the parties are without means to protect themselves from a false claim that an informal contract has been made.

77. It may also be noted that the Law does not attempt to codify or supersede national rules on the authority of an agent to bind his principal. To illustrate this point, we may suppose that at the beginning of a negotiation, the principal notifies the other party as follows: "The agent negotiating with you has no authority to conclude an agreement; any contract will be authorized only when it has been approved in writing by our Vice-President in charge of Sales". Unless this notice is withdrawn or modified, there would be a presumption that, unless the contract is concluded in the prescribed manner, (1) there was no intent to conclude a contract and (2) any attempt by the subordinate negotiator to conclude a contract would be unauthorized and would not bind the principal. It will be noted that both of the above issues (which in practical application are closely intertwined) lie outside the scope of the present Law, and would not be controlled by the rule of article 15. Article 15, in stating that there is no general legal requirement of a writing, does not affect the inference in some settings that a contract *has not* been made in the absence of a writing and does not overturn applicable rules as to whether an agent has authority to bind his principal. The latter point would seem to be particularly significant where a Government, by rule of law, defines the circumstances in which a subordinate official has the authority to bind the Government or a State trading organization.

Article 16: limitation on right of specified performance

78. The observations by Austria note that this article erroneously refers to the 1964 Convention. (The provision was designed to refer to any provision on reservations as to specific performance comparable to that in article VII of the 1964 Convention.) A redraft of this article that, *inter alia,* would correct this matter, has been submitted by Norway.[40]

Article 17: general rule of interpretation

79. The observations of Austria express the view that this general rule could be omitted. The observations of Mexico propose that this provision be maintained, and that a second paragraph be added preserving the rule of article 17 of 1964 ULIS whereby matters governed by the present law which are not expressly settled therein "shall be settled in conformity with the general principles on which the present law is based".

80. It should be noted that this subject was discussed at the United Nations Conference on the Limitation Period in the International Sale of Goods. The Conference included in the Convention on Limitation, as article 7, a provision which (except for stylistic adjustments) follows article 17 as approved by the present Working Group. The provision adopted by the Conference on limitation is as follows:

> In the interpretation and application of the provisions of this Convention, regard shall be had to its international character and to the need to promote uniformity.

CHAPTER III. OBLIGATIONS OF THE SELLER (ARTICLES 18-55)

A. GENERAL INTRODUCTION

81. The Working Group gave preliminary consideration to chapter III of ULIS at the third session, and

[38] Working Group, report on second session, paras. 113-123. UNCITRAL, report on fourth session (1971), paras. 70-80 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[39] Comments: observations by Mexico (paras. 47-51) and by Austria (article 15) (reproduced in this volume, part two, I, 3).

[40] Comments, observations by Austria (art. 16) and by Norway (redraft of art. 16) (reproduced in this volume, part two, I, 3).

took final action at the fourth session.[41] The Working Group based its work on comments and proposals by members of the Group,[42] and on reports by the Secretary-General on "Delivery" in ULIS,[43] *ipso facto* avoidance[44] and the obligations of the seller in chapter III of ULIS.[45]

(1) THE CONCEPT OF "DELIVERY"

82. One of the troublesome problems presented by chapter III resulted from the use by ULIS of a single concept—"delivery"—as a solvent for a number of different issues, such as the time for the payment of the price and the transfer of risk of loss.[46] This effort to make a single concept provide the solution for different practical problems led to a definition of "delivery" which was artificial and which was so complex that it led to unintended consequences. For example, article 19(1) of ULIS provides that "Delivery consists in the handing over of goods which conform with the contract". No difficulty would have arisen from a provision that a seller has a *duty* to *deliver* goods which conform to the contract, but the above definition of "delivery" led to the surprising conclusion that if the buyer accepts non-conforming goods (subject, of course, to a price adjustment or damage claim) and uses (or even consumes) them, the goods are never "delivered" to the buyer. More important, the attempt to use this concept in allocating risk of loss meant that it was necessary to piece together widely separated provisions of the Law (e.g. arts. 19 and 97), with results in some circumstances that seemed to have been unintended by the draftsmen. In the light of these considerations, the Working Group at the third session decided that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery", and at the fourth session decided to delete article 19.[47] As a further consequence, articles 20-23 could deal directly with the steps required of the seller to perform his contractual *duty to deliver* the goods, without attempting to compress into one article a definition of the concept of "delivery".

(2) CONSOLIDATION OF SEPARATE SETS OF REMEDIAL PROVISIONS

83. Chapter III of 1964 ULIS contained six separate sets of remedial provisions applicable to breach by the seller. Thus, separate remedial provisions were provided for the following substantive obligations: (1) date of delivery (arts. 26-29); (2) place of delivery (arts. 30-32); (3) conformity of the goods (arts. 41-49); (4) handing over documents (art. 51); (5) transfer of property (arts. 52-53) and (6) other obligations of the seller (art. 55).

84. These separate remedial systems differed from each other in ways that appeared to be accidental; some of the separate systems, without apparent reason, omitted provisions that were included in the other systems. In addition, the boundary-lines between the various systems were not clear. Thus, with respect to the separate remedies as to (1) date of delivery and (2) place of delivery, it was noted that if the goods were late in arriving one could state either that the goods (1) were at the right place but at a late date or (2) at the specified date were at the wrong place. It was also difficult to distinguish between (1) non-delivery of part of the goods and (2) non-conformity, where boxes were empty or part of the goods were worthless. The difficulty of ascertaining which remedial system would be applicable created possibilities for confusion and litigation. Finally, it was noted that these six remedial systems contributed to the length and complexity of ULIS—characteristics which had been one of the grounds for serious criticism of ULIS and a barrier to its widespread adoption.[48]

85. For these reasons, the Working Group at its fourth session, approved a single consolidated set of remedial provisions applicable to chapter III; these provisions appear in the revised text as articles 41-47. As a result of this consolidation, it was possible to delete the remedial provisions appearing in articles 24-32, 48, 51, 52(2) and (3), 53 and 55. This consolidation simplified the structure of article III and reduced its length by over one third.

(3) AUTOMATIC (IPSO FACTO) AVOIDANCE OF THE CONTRACT

86. Two types of avoidance of the sales contract were provided in 1964 ULIS: (1) avoidance by a declaration or notice from the innocent party to the party in breach;[49] and (2) automatic (*ipso facto*) avoidance for which no notification need be given.[50] The Working Group at its third session concluded that *ipso facto* avoidance created uncertainty as regards the rights and obligations of the parties and should be eliminated from the remedial system of the Law.[51] This decision has been preserved in the consolidated system

[41] Working Group, report on third session (A/CN.9/62, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); Working Group, report on fourth session (A/CN.9/75), UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[42] See Analysis of comments and proposals relating to articles 18-55 of ULIS (A/CN.9/WG.2/WP.10, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3) and documents cited in the reports on third session (para. 7). UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5) and on the fourth session (para. 6) (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[43] A/CN.9/WG.2/WP.8 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1).

[44] *Ibid.*, p. 41.

[45] A/CN.9/WG.2/WP.16, reproduced in annex II to the Working Group's report on its fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[46] See the report of the Secretary-General on "delivery" in ULIS, cited above at note 3.

[47] Working Group, report on third session, A/CN.9/62/Add.1, para. 17; (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3) para. 21.

[48] The problems presented by the separate sets of remedial provisions and draft provisions consolidating the remedial provisions into a single unified system are set forth in the report of the Secretary-General on the obligations of the seller (chapter III of ULIS). This report (A/CN.9/WG.2/WP.16, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2) was reproduced as annex II to the report of the Working Group on its fourth session.

[49] Articles 24, 26, 30, 32, 41, 44, 55, 62, 67, 70, 75 and 76.

[50] Articles 25, 26, 30, 61 and 62.

[51] Working Group, report on third session, annex II (A/CN.9/62/Add.1), para. 29 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5). The reasons underlying this decision are explained more fully in the report of the Secretary-General on *ipso facto* avoidance in ULIS, A/CN.9/WG.2/WP.10 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3).

of remedies, discussed above, which was approved by the Working Group at its fourth session.

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER III. OBLIGATIONS OF THE SELLER

Article 18: general obligations of the seller

87. This article is in substance the same as in ULIS. The article serves to introduce the reader to the structure of chapter III; in addition, the closing phrase is useful in making explicit that the seller shall carry out the various aspects of his performance "as required by the contract and the present Law". Article 5 of the revised text (based on article 3 of ULIS) provides that the parties may derogate from or vary the effect of any of the provisions of the Law, but an obligation of the seller to perform the sales contract in accordance with the provisions of the contract is made explicit by the present article.

SECTION I. DELIVERY OF THE GOODS

Article 19 (deleted)

88. This article of ULIS, which set forth a definition of the concept of "delivery", was deleted by the Working Group[52] for reasons that have been summarized.

SUBSECTION 1. OBLIGATIONS OF THE SELLER AS REGARDS THE DATE AND PLACE OF DELIVERY

Article 20: manner of effecting delivery

89. The Working Group reached consensus on this article.[53] The only pending proposals are the following drafting suggestions by Norway: (1) In paragraph (*b*), to replace the word "unascertained" by "unidentified", to conform with the drafting of article 98(2).[54] (2) In paragraph (*c*), to delete the final phrase "or, in the absence of a place of business, at his habitual residence", since the effect of the absence of a place of business is dealt with by a general provision in article 4(*d*).

Article 21: delivery to a carrier

90. The observations submitted by Norway suggest that the word "appropriated" should be replaced by "identified"; the reason, as was noted above under article 20, is to conform with the drafting of article 98(2).

Articles 22-23

91. There are no pending proposals with respect to these articles.[55]

Articles 24-32 (deleted)

92. These nine articles of ULIS set forth separate remedial systems regarding the failure of the seller to perform his obligation, with respect to (1) the date of delivery and (2) the place of delivery. These articles have been deleted in view of the approval of a consolidated set of remedies for chapter III, which appear in articles 41-47 of the revised text. The reasons for this revision have been summarized above.

SUBSECTION 2. OBLIGATIONS OF THE SELLER AS REGARDS THE CONFORMITY OF THE GOODS

Article 33: basic rules on conformity

93. The Working Group reached consensus on this article.[56] Certain stylistic modifications are set forth in the revised provisions submitted by Norway.

Article 34 (deleted)

Article 35: time for determining conformity

94. Article 35(1) of 1964 ULIS states the basic rule as follows: "whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes". The report of the Secretary-General on the Obligations of the Seller[57] observed that while such a rule is not always stated expressly in codifications of the law of sales, it is a necessary implication of rules on risk of loss, and may be illustrated by the following situation: A contract calls for the sale of "No. 1 quality cane sugar, F.O.B. Seller's city" (under this contract, the risk of loss in transit falls on the buyer). The seller ships No. 1 cane sugar, but during transit the sugar is damaged by water and on arrival the quality is No. 3 rather than No. 1. In this situation, of course, the buyer has no claim against the seller for non-conformity of the goods, since the goods did conform to the contract at the point when risk of loss passed to the buyer; the buyer's responsibility for deterioration after that point is a necessary consequence of the provisions of the contract (or of the Law) as to risk of loss. Although it might seem that such a principle is so self-evident that it need not be stated, it was concluded that it might be useful in the interest of clarity to state the principle explicitly.[58] The Working Group retained this principle as the first sentence of article 35(1), subject to redrafting, and the addition of a concluding phrase designed to show that the rule is applicable even if the lack of conformity is latent.[59]

95. The first paragraph of article 35, consisting of the basic rule as approved by the Working Group, and a second sentence which has not yet been considered by the Working Group, is as follows:

> 1. The seller shall be liable in accordance with the contract and the present Law for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

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[52] Working Group, report on fourth session, para. 21 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[53] *Ibid.*, paras. 22-29.

[54] Reasons for the use of "identified" in place of "ascertained" or "appropriated" are set forth in the Report of the Secretary-General, Issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19), also reproduced as annex IV to the Working Groups report on its fifth session, para. 84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[55] Working Group, report on fourth session, paras. 31-35 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[56] *Ibid.*, paras. 37-44.

[57] Report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to the Working Group's report on its fourth session), paras. 65-72 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

[58] *Ibid.*, para. 65.

[59] Working Group, report on fourth session, paras. 46-52 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

96. The Working Group concluded that it was not feasible to consider the second sentence until after the rules on passing of the risk had been formulated.[60] Indeed, this complex provision is one of the consequences of the attempt in ULIS to use the concept of "delivery" as a means of solving problems of risk of loss.[61] With the simpler formulation of the rules on risk adopted by the Working Group, this and other complex provisions are no longer needed. This view is reflected in the observations by Norway, which also propose certain drafting changes in the article as approved by the Working Group.[62]

97. Under the redraft proposed by Norway, the second paragraph of article 35, dealing with express guarantees, would be omitted, and in lieu thereof a special provision on the time for giving notice under a guarantee would be added to article 39. Such a change in emphasis and arrangement would appear to be helpful. The second paragraph of article 35, as it now stands, may not be necessary, for the provisions of an express guarantee would be given effect under the general principle that the parties are legally bound by the provisions of their contract.[63]

Article 36

(Incorporated into article 33)

Article 37: early delivery

98. There are no pending questions with respect to this article.

Article 38: time and place for inspection of the goods

99. There are no pending questions with respect to this article. However, the close relationship between this article and article 39 (notice of lack of conformity) makes it advisable to recall the decisions taken by the Working Group with respect to article 38.

100. The Working Group considered article 38 at its first session.[64] Under article 38 of 1964 ULIS (paras. 1 and 2), the buyer was required to examine the goods "promptly" at "the place of destination"; the only exception was that provided under paragraph 3 where, under limited circumstances, "the goods are redispatched by the buyer *without transshipment*". The Working Group noted that these rules governing the time and place for inspection were linked to the important rules of article 39 under which the buyer "shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he has discovered the lack of conformity or *ought to have discovered it*". Thus the time for giving "prompt" notice began to run at destination; delay in the case of redispatch of the goods was permitted only in certain cases where there was no "transshipment", and the concept of "transshipment" was undefined and unclear. The Working Group concluded that the rules of ULIS on the required time and place for inspection by the buyer were impractical as applied to "chain" contracts and to containerized shipments. The Working Group noted that failure to give "prompt" notice after that specified time and place for inspection led to the drastic consequences that the buyer would "lose the right to rely on a lack of conformity of the goods"—i.e., he would be required to pay the full price for defective goods.[65] Consequently, the Working Group approved more flexible rules in paragraph 3 of article 38; this redraft, *inter alia*, deleted the "transshipment" restriction. The rules of paragraphs 1-3 were reviewed and approved by the Working Group at its third session.[66]

101. Paragraph 4 of article 38 provided that, in the absence of agreement by the parties, the methods of examination would be governed "by the law or usage *of the place where the examination is to be effected*". It will be noted that the phrase *"is to be"* (in French, *"doit être"*) assumes that the inspection must be made at a predetermined place, whereas in international practice the place for inspection may be determined by circumstances that arise subsequent to the sale; as already stated the revision of paragraph 3 reflected the need for such flexibility. In addition, the emphasis in paragraph 4 on the law or usage "of the place" of examination could lead to the application of local rules or usages which would be inconsistent with the principle that international transactions should be governed by *international* practices and usages. See article 9 (2). Consequently, the Working Group deleted paragraph 4 of article 38.[67]

Article 39: notice of lack of conformity

102. In discussing article 38, above, attention was directed to the close relationship between its rules on the time and place for inspection and the rules of article 39 on notice of lack of conformity. It will be observed that failure to give such notice as required by this article has drastic consequences: the buyer "shall lose the right to rely on" the failure of the goods to conform with the contract, i.e. he must pay the full price for defective goods and has no claim for damages.

103. The rigors of this requirement of article 39 have been somewhat mitigated by making the rules of article 38 on the time and place of inspection somewhat more flexible (see paras. 100-101 above). In addition, the Working Group concluded that the requirement of article 39 (1) that the buyer shall notify the seller "promptly" (as defined in article 11), should be modified to permit the buyer to notify the seller "within a reasonable time" after the buyer has discovered the lack of conformity or ought to have discovered it.

104. The principal pending question under the present article relates to the retention of a two-year outside limit on the time for giving notice. At the end of

[60] *Ibid.*, para. 48.

[61] Both article 35(1) (second sentence) and article 97(2) of ULIS are complex provisions necessitated by the rule that goods are not "delivered" when they are not in conformity with the contract.

[62] Comments, observations by Norway (redraft of art. 35).

[63] E.g., articles 5 and 18 of the revised draft. See also report of the Secretary-General on obligations of the seller, para. 69. There could be little doubt under the revised text that the parties are legally obligated to perform the provisions of their contract of sale. If there should be doubt on this score, the most appropriate approach would be to include an explicit general provision to this effect.

[64] Working Group, report on first session, paras. 105-111 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2).

[65] *Ibid.*, paras. 106, 107.

[66] Working Group, report on third session, para. 109 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

[67] Working Group, report on fourth session, paras. 57-63 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

paragraph 1 the following sentence appears in square brackets:

> [In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a [longer] [different] period.]

105. This provision is the same as in article 39 (1) of 1964 ULIS, except that the Working Group inserted the word "different" as a possible substitute for the word "longer".[68]

106. Such a cut-off period presents a significant issue of policy, which received considerable attention at the Working Group's fourth session.[69]

107. Several representatives considered that such a cut-off period was important: claims notified to the seller more than two years after delivery of the goods would be of doubtful merit and when the seller received his first notice of such a contention at such a late period it would be difficult to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture. These representatives emphasized that the retention of such a cut-off period was essential for the acceptability of the Law.

108. Several other representatives were of the view that the seller received adequate protection from the requirement that the buyer give notice of the lack of conformity "within a reasonable time after he has discovered the lack of conformity or ought to have discovered it". In the rare case where the application of this standard would permit the giving of notice after the expiration of two years, to preclude the buyer from relying on the non-conformity would be unjust.

109. In the course of its discussion at the fourth session, the Working Group gave attention to the relationship between a two-year cut-off period for notice and the UNCITRAL uniform rules on the limitation period in the international sale of goods.[70] Subsequent to that discussion the Convention on the Limitation Period has been finalized and opened for signature.[71] Under that Convention, claims arising from a contract of international sale of goods are subject to a general limitation period of four years (article 8). A claim arising from a defect or other lack of conformity in the goods accrues on the date on which the goods are *actually handed over* to, or their tender refused by, the buyer (article 10 (2)); the limitation period is not extended where a latent defect is discovered subsequent to the receipt of the goods.[72]

110. Various (and conflicting) inferences could be drawn concerning the significance of the Convention on the Limitation Period with respect to the current problem. On the one hand it might be suggested that the Limitation Convention makes no special provision for late discovery of latent defects. On the other hand it could be suggested that the limitation period of four years following the handing over of the goods adequately protects the seller with respect to the late discovery of latent defects; the defect would need to be discovered (and notice given) in advance of the four-year period to permit legal proceedings to be brought within that period.

111. It has been generally agreed that if a cut-off period is specified in the law, some provision should be made for claims arising under an express guarantee covering a longer period. The problem is illustrated by a guarantee that a complex machine or an industrial plant will maintain a specified level of soundness and performance for a period of three years. It might be supposed that a two-year cut-off period would be so inconsistent with such a guarantee that the contract would override the statutory provision by virtue of article 5 (article 3 of 1964 ULIS). On the other hand, it has been generally considered that the matter is sufficiently doubtful (and important) to require a specific qualification of the two-year cut-off provision.

112. The two-year cut-off provision in 1964 ULIS attempted to deal with the problem by the following clause: "unless the lack of conformity constituted a breach of a guarantee covering a longer period". As a matter of drafting, the above provision seems inadequate, since the provision fails to specify the period for notice applicable to a breach of such a guarantee. Under one view, the above language would seem to make the cut-off period completely inapplicable; under another reading, the two-year period would be extended to the end of the guarantee period—a construction that would allow little or no time for notice when the breach occurs near or at the end of the guarantee period.[73] These same ambiguities would also be present if the bracketed word "different" replaced the word "longer". In addition, a reference to a "guarantee covering a *different* period" than two years could be construed to extend to a wide variety of so-called "guarantees" which really are limitations on the seller's obligations: i.e. a "guarantee" providing that the seller's obligation is limited to replacing any defective part if the buyer notifies the seller within 30 days after he receives the goods.

113. The observations submitted by the representative of Norway recommend that the two-year cut-off

[68] For prior discussion see: Working Group, report on third session, paras. 21 and 22, and annex II to the report, paras. 74-80 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); Working Group, report on fourth Session, paras. 64-77 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[69] Working Group, report on fourth session, paras. 66-70 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[70] *Ibid.*, paras. 66 and 68. In this discussion it was recognized that distinct legal issues were presented by a cut-off period for notice and a limitation period for action. However, it was suggested that both related to the extent to which an action could be maintained when latent defects came to light a substantial period of time after delivery. In the preparation of the uniform rules on the limitation period, it was proposed by several delegates that a special limitation period of two years should be applicable to claims based on non-conformity of the goods, and that this period should not be subject to extension where the defect was discovered after the expiration of the period.

[71] A/CONF.63/15.

[72] The effect of an express guarantee stated to have effect for a certain period of time dealt with in article 11 of the Convention on the Limitation Period) considered at paras. 111-113, below.

[73] See report of the Secretary-General, obligations of the seller (A/CN.9/WG.2/WP.16; annex II to Working Group report on fourth session, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

period be maintained. On this assumption, provisions are proposed to deal with express guarantees; these provisions seem to meet the drafting difficulties that have been outlined above.

114. There are no pending questions concerning paragraph 2, as revised by the Working Group.[74]

Delayed communication: paragraph 3

115. Attention is directed to the proposal under article 14 (paras. 74-75, above), that a second paragraph be added to article 14 which would set forth a general rule based on article 39 (3). If that proposal is adopted, paragraph 3 of article 39 would, of course, be deleted.

Article 40: knowledge by the seller

116. There are no pending questions with respect to this article.

SUBSECTION 3. OBLIGATIONS OF THE SELLER AS REGARDS TRANSFER OF PROPERTY

Article 40 bis *(relocating article 52, below)*

117. The remedial provisions of articles 41-47, below, were designed to be applicable to all of the obligations of the seller, including his obligation to transfer property in the goods. That obligation is now set forth in article 52. In connexion with the revision of the remedial provisions, it was contemplated that the substance of article 52 should precede articles 41-47 which provide remedies for breach. As is noted in the observations of the representative of Norway, it would be appropriate to relocate that provision among the substantive obligations of the seller, as article 40 *bis*.

SECTION II. REMEDIES FOR BREACH OF CONTRACT BY SELLER (ARTICLES 41-47)

118. This section sets forth consolidated remedial provisions which are applicable to any breach of contract by the seller. The background for the provisions has been summarized at paragraphs 83 to 85 above, and is set forth more fully in the report on the Working Group's fourth session and in the report of the Secretary-General that was considered at the session.[75]

Article 41: buyer's remedies in general

119. The representative of Norway notes that paragraph 1 (*b*) should read "as provided in articles 82 to 89". The representative of Bulgaria suggests that it would be preferable to follow the style of 1964 ULIS, and refer more exhaustively to the types of remedies which are available to the buyer.[76]

Article 42: specific performance of the contract

120. The right to require specific performance, as set forth in article 42 of 1964 ULIS, was subject to important exceptions set forth in article VII of the 1964 Sales Convention. This separation of the rule from the exceptions was confusing.[77] Consequently, the Working Group consolidated the two provisions.[78]

121. The representative of Austria suggests that paragraph 1 be maintained, including the final phrase which the Working Group placed in square brackets. This representative also suggests a drafting change in paragraph 2.

122. The representative of Norway proposes a redraft of article 41, paragraph 1, which omits any reference to "specific performance". The commentary to this proposal states that the right to specific performance is subject to a general limiting rule in article 16 and adds that the buyer should "have the right to require performance, even if specific performance can not be enforced under article 16".

123. One problem presented by this approach is the need to maintain the distinction between (1) the substantive obligations of the parties as derived from the contract and the Law and (2) remedies for breach of those obligations.

124. The substantive obligations of the seller appear in section I—articles 18-40; the remedies for breach of these obligations are set forth in section II—articles 41-47. Article 44, of course, is in this latter category.

125. The basic substantive obligation of the seller is to perform the contract of sale; this obligation is clearly set forth in section I—articles 18-40. When, in addition, in the section II on remedies the Law states that the buyer "has the right *to require* the seller *to perform* the contract", many readers would assume this established a legal *remedy* to compel performance (a remedy sometimes called the remedy of "specific performance").

126. Under article 16, any provision of the Law that a party is "entitled to *require* performance" would lead to a remedy of specific performance only to the extent that specific performance could be required under the law of the *forum*. Article 16 consequently serves as an exception to article 42, and to the comparable provision in article 71. The problem of drafting thus seems to be whether readers of articles 42 and 71 will be aware of this exception set forth in article 16, or whether some specific reference to this exception should be included in those articles.

127. Prior reports have suggested that the scope of the remedy of specific performance is not of great practical significance. Even in domestic trade, in areas where a remedy to compel performance is theoretically available, that remedy is seldom invoked since the buyer usually must supply his needs before the goods can be provided by means of litigation;[79] these practical

[74] The reasons for the revision of this provision of 1964 ULIS are summarized in report of the Secretary-General on obligations of the seller, para. 91.

[75] Working Group report on fourth session, paras. 79-82 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to Working Group report on fourth session, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2), paras. 27-29, 93-101, 158-162, 177.

[76] Comments, observations of Bulgaria and Norway (reproduced in this volume, part two, I, 3). As to the insertion of "and" after para. 1 (*a*), see article 70, and para. 133 foot-note 84 below.

[77] See report of the Secretary-General on obligations of the seller (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2), paras. 117-124.

[78] Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3), paras. 87-97.

[79] Report of the Secretary-General on obligations of the seller (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

limitations have added significance in international trade. The only significant interest is to avoid confusion in the drafting; the more explicit text prepared by the Working Group was designed to minimize the possibility that the rule of article 16 might be overlooked.

Article 43: buyer's notice fixing additional period

128. There are no pending questions with respect to this article. The significance of this article, and of the parallel provision in article 72 (the *Nachfrist* notice) have been discussed in connexion with the definition in article 10 of "fundamental breach" (para. 66 above).

Article 43 bis*: cure by seller*

129. The only pending question indicated by the Working Group is the retention of the concluding language in brackets: "[or has notified the seller that he will himself cure the lack of conformity]". The observations of the representative of Austria conclude that this language should be retained.[80]

130. The observations by Norway propose alternative drafting changes for paragraph 1 designed to broaden the scope of the provision. A clarifying amendment is also proposed for paragraph 2.[81]

Article 44: avoidance of the contract

A. *Introduction*

131. Where the seller has failed to perform his obligations under the circumstances described in paragraphs 1 (*a*) and (*b*) the buyer may "declare the contract avoided". The most significant consequence is that the buyer is no longer obligated to receive and accept the goods.[82]

132. As was noted in the general introduction to this chapter (para. 86 above), two types of avoidance were provided in 1964 ULIS: (1) avoidance by a declaration by the innocent party to the party in breach; (2) automatic (*ipso facto*) avoidance. The Working Group concluded that automatic (*ipso facto*) avoidance left the parties in doubt as to their obligations under the contract. Consequently, in the revised text avoidance is effected only by a declaration transmitted to the other party.

133. The very concept of "avoidance" of the contract, which was employed in 1964 ULIS and retained by the Working Group, is subject to misinterpretation, since "avoidance" of the contract could imply that all rights and duties under the contract thereby come to an end. On the contrary, it is intended that a party who "avoids" the "contract" because of breach by the other party will retain the right to recover damages that resulted from the breach. Since the concept of "avoidance of the contract" could be understood as wiping out a claim for damages for breach of contract, 1964 ULIS inserted several provisions that were designed to prevent such a misinterpretation.[83] The revised text prepared by the Working Group meets the problem in article 78 (1): "Avoidance of the contract releases both parties from their obligations thereunder, *subject to any damages which may be due*".[84]

B. *Pending questions*

134. In paragraph 2 (*a*), at two points, after the words "the goods" the words "[or documents]" were provisionally added.[85] The issue is whether specific references to "documents" are needed at this point in the Law. The seller's obligation to supply necessary documents is dealt with in general provisions in articles 18 and 23. If specific references were to be made to documents wherever documents would be required in performance of the contract, a substantial number of such references would be required and there would be a danger that such references might be incomplete. The Working Group might conclude that it would be better to rely on the general rules on the obligation to supply documents.[86]

135. The representative of Norway proposes the restructuring of the subparagraphs in paragraph 2.[87] The Working Group may conclude that this would add to the clarity of the provision.

Article 45: reduction of the price

136. There are no pending questions with respect to this article.

Article 46: Non-conformity as to part of delivery

137. There are no pending questions with respect to this article.

Article 47: early tender; excess quantity

138. The first paragraph, based on article 29 of 1964 ULIS, seems to say that the buyer may reject an early delivery even if the advance arrival of the goods causes the buyer no inconvenience or expense. Such a rule would be inconsistent with other provisions of the law.

139. The representative of Norway proposes a redraft that would meet the above problem.[88] Another approach would be to conclude that this paragraph does not deal with a sufficiently significant problem to require a separate provision.

Articles 48-51 (deleted)

140. The matter dealt with in article 48 of 1964 ULIS is covered in chapter V, section I, anticipatory breach, at article 75 below.

141. Article 49 of 1964 ULIS establishes a rule of limitation (prescription) which is applicable to one of the various types of claim that may arise from a sales

[80] Comments, observations by Austria (reproduced in this volume, part two, I, 3).

[81] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[82] Article 72 *bis* similarly empowers the seller to declare the contract avoided, with the consequence that the seller is no longer obligated to supply the goods to the buyer.

[83] 1964 ULIS, art. 24 (2) ("may also claim damages"); art. 41 (2) (same); art. 52 (3); art. 55 (1) (*a*); art. 63 (1) and 78.

[84] This intent is reinforced, in the corresponding provision in article 70, by the word "and" at the end of paragraph 1 (a); the Working Group may wish to make articles 41 and 70 consistent on this point. It should be borne in mind that article 78 has been bracketed by the Working Group. If paragraph 1 of article 78 should be deleted, the effect of "avoidance" would be subject to serious doubt.

[85] Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[86] The bracketed cross-reference at the end of paragraph 2 (*a*) will need to be reviewed in the light of the decision on the final phrase of article 43 *bis*, para. 1.

[87] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[88] *Ibid.*

contract; this provision is inadequate for the further reason that it fails to deal with various problems that are presented by a rule of limitation (prescription). The Commission at its third session decided that this provision should be deleted from the present law, and that the matter would be governed by the Convention on Limitation.[89]

142. In 1964 ULIS, articles 50 and 51 comprised a separate section entitled "Handing over of documents". Article 50, the only substantive provision in the section, now appears among the consolidated substantive obligations of the seller as article 23.[90] Article 51 has become unnecessary in view of the establishment of consolidated provisions on remedies (articles 41-47).

Article 52: transfer of property

143. As has been noted under proposed article 40 *bis* (para. 117 above), article 52 should be moved to a position among the substantive obligations of the seller, in advance of the consolidated remedial provisions.

Articles 53-55 (deleted)

144. The Working Group concluded that article 53 of ULIS (like article 34) was unnecessary and should be deleted.[91] Article 54 was placed among the other substantive obligations of the seller as article 21. Article 55 constituted one of the six separate remedial provisions provided by 1964 ULIS and became unnecessary in view of the consolidated set of remedies.

CHAPTER IV. OBLIGATIONS OF THE BUYER (ARTICLES 56-70)

A. GENERAL INTRODUCTION

(1) CONSOLIDATION OF SEPARATE SETS OF REMEDIAL PROVISIONS

145. Chapter IV of 1964 ULIS follows the system of organization employed in chapter III of that law: performance of the sales contract is subdivided into categories and separate remedial provisions are established for each category. (See the general introduction to chapter III at paras. 83-85, above.) The performance by a buyer that is of practical importance to the seller is simply the payment of the price at the appropriate time and place. None the less, performance by the buyer is divided into three categories, and separate remedial provisions are provided for each.[92] As in chapter III of 1964 ULIS, the attempt to subdivide an essentially unitary contractual duty results in ambiguities as to which set of remedial provisions is applicable. In addition, the three sets of remedial provisions differ in ways that appear to be accidental.[93] Consequently, the Working Group at its fifth session decided that chapter IV (like chapter III) should be reorganized by consolidating the rules on the substantive obligations of the buyer and, similarly, by establishing a consolidated set of remedial provisions applicable to any breach by the buyer of his obligations under the sales contract.[94]

(2) CONSOLIDATION OF RULES ON PLACE AND DATE OF PAYMENT

146. A second problem of organization under 1964 ULIS was presented by subsection I B, "place and date of payment" (articles 59-60). The report of the Secretary-General submitted to the Working Group at its fifth session noted that the foregoing provisions fail to deal with the one issue that is of greatest practical importance: the time for buyer's payment in relation to performance by the seller. To deal with this question it is necessary to read articles 59 and 60 in connexion with widely scattered articles in various other parts of the law: article 69 in section III, articles 71 and 72 in chapter V and article 19 in chapter III. Then, after a reader has assembled these various provisions, it is difficult to work out a clear solution for the most important problems that arise in international trade.[95] For these reasons, the Working Group decided to establish consolidated provisions in chapter IV on the payment of the price.[96]

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 56: general obligations of the buyer

147. This article (like article 18 in chapter III) introduces the reader to the structure of the chapter, and also makes explicit the duty of the buyer to perform the contract of sale "as required by the contract and the present Law". This article, as approved by the Working Group, is the same as article 56 in 1964 ULIS.[97]

SECTION I. PAYMENT OF THE PRICE

Article 56 bis: *assuring payment of the price*

148. As has been noted (para. 146 above), one aspect of the fragmentation in 1964 ULIS of the various aspects of the buyer's performance is the separate treatment, in articles 57-60, 69 and 71-72, of related aspects of the buyer's obligation to pay the price. As a

[89] UNCITRAL, report on third session (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A), para. 34. See also the Convention on Limitation (A/CONF.63/15); Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3), para. 135.

[90] See Working Group report on fourth session (UNCITRAL Yearbook, vol. IV, 1973, part two, I, A, 2), paras. 21-26.

[91] Working Group report on fourth session, para. 146; (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); Report of the Secretary-General, obligations of the seller, para. 157 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

[92] Remedial provisions for section I (payment of the price) are in articles 61-64, for section II (taking delivery) are in articles 66-68 and for section III ("other obligations") are in article 70.

[93] For example, article 67 of 1964 ULIS seems to provide that any delay by the buyer in providing specifications empowers the seller to avoid the contract, even if that delay is of little or no significance—an approach that is inconsistent with articles 26(1), 30(1), 32(1), 43, 45(2), 52(3), 55(1)(a), 62(1), 66(1) and 71(1)(a).

[94] Working Group report on fifth session, paras. 36-59, 71-72, 86-87 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[95] Report of Secretary-General, issues presented by chapters IV-VI, paras. 4-21.

[96] In the revised draft, these provisions appear as articles 56, 56 *bis*, 57, 58, 59, 59 *bis* and 60. Article 59 *bis* replaces 71 and 72, which appear in chapter V of 1964 ULIS. See Working Group report on fifth session, paras. 26-35 (UNCITRAL Yearbook, vol. V; 1974, two, I, 1).

[97] Working Group report on fourth session, para. 150. (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

result of the decision to consolidate these substantive provisions, a revision of article 69 of 1964 ULIS has been placed in section I (payment of the price) as article 56 *bis*.[98] There are no pending questions with respect to this article as revised by the Working Group.

A. FIXING THE PRICE

Article 57: price not stated in contract

149. This article reflects revisions in article 57 of 1964 ULIS, as made by the Working Group at its fourth session.[99] The most significant modification was to make provision for the case where the seller at the time of contracting had not generally established a price for the goods in question.[100]

Article 58: net weight

150. There are no pending questions.[101]

B. PLACE AND DATE OF PAYMENT

Article 59: place of payment

151. There are no pending questions.[102]

Article 59 bis: *time of payment*

152. As has been noted (para. 146, above), section 1B of 1964 ULIS ("place and date of payment") failed to deal with the basic question of the time when the buyer must pay in relation to performance by the seller.[103] The present position, approved by the Working Group at its fifth session, supplies this omission.[104]

153. The only pending question is presented by a proposal, in the observations submitted by the representative of Norway, that a reference to "payment against documents", which appears in article 72(2) of 1964 ULIS, be incorporated in paragraph 3 of article 59 *bis*.[105] The observations of the representative of Bulgaria are to similar effect.[106]

Article 60: no formalities required before payment

154. There are no pending questions.[107]

Articles 61-64 (deleted)

155. These four articles in 1964 ULIS established a remedial system for those aspects of the buyer's obligation which were set forth in articles 57-60. With the establishment of a consolidated and unitary system of remedies for chapter IV (articles 67-72 *bis*, below), articles 61-64 became unnecessary.[108]

SECTION II. TAKING DELIVERY

Article 65: in general

156. This article embodies certain clarifying amendments to the corresponding provision of 1964 ULIS. The most significant of these is that the article now is addressed to the buyer's *obligation* to take delivery, instead of attempting to define the concept of "taking delivery".[109]

157. The observations submitted by the representative of Bulgaria suggest that the word "necessary", as used in 1964 ULIS, would be preferable to the phrase "could reasonably be expected of him".[110]

Article 66 (deleted)

158. Article 66 in 1964 ULIS is one of the separate remedial provisions which has been incorporated in the consolidated system of remedies. (Articles 70-72 *bis*, below).

SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Article 67: specification by buyer

159. The present article of the revised text is based closely on article 67 of 1964 ULIS. The one significant change is the omission of the provision that the seller may avoid the contract for any delay in providing specifications, even though that delay is slight and

[98] Working Group report on fifth session, paras. 35 (*a*), 84-85. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[99] Working Group report on fourth session, paras. 151-164 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[100] The observations submitted by the representative of Bulgaria oppose the inclusion of such an article. This issue would appear to have been considered by the Working Group and resolved at its fourth session. See Working Group report on fourth session, paras. 152-153 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

[101] Article 58 is the same as in 1964 ULIS. See Working Group report on fourth session, paras. 165-171 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report on fifth session, paras. 12-16 (UNCITRAL Yearbook, vol. V: 1974, part three, I, 1).

[102] Article 59 is the same as in 1964 ULIS. See Working Group report on fourth session, paras. 172-177 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report on fifth session, paras. 17-21 (UNCITRAL Yearbook, vol. V: 1974, part three, I, 1).

[103] Report of the Secretary-General on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19, annex IV to Working Group report on fifth session), paras. 4-21 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[104] Working Group report on fifth session, paras. 26-35 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). This provision leads to the deletion of articles 71 and 72 of ULIS.

[105] Comments, observations by Norway (reproduced in this volume, part two, I, 3). The report of the Secretary-General on issues presented by chapters IV-VI, at paras. 18-20, considered the advisability of retaining the "payment against documents" language in article 72(2) of 1964 ULIS and concluded that the more general language, approved by the Working Group, would be preferable. It would appear that the more specific language "payment against documents" would produce unintended results in case No. 1 as discussed at paras. 19-20 of the above report. In addition, the phrase, "when the contract requires payment against documents" in article 72(2) of ULIS is subject to at least two interpretations: (1) The contract provides (or implies) that the buyer may not receive the bill of lading until he pays; this provision may not always be intended to preclude inspection before payment—as in cases where the contract also provides that payment is not due until after arrival of the goods. (2) The contract may use the phrase "payment against documents" in a setting where course of dealing or usage that imply that the buyer may not inspect before he pays. Of course, on this second hypothesis, no statutory provision is needed since the correct result is produced by virtue of the agreement of the parties. See articles 5 and 9 of the revised text.

[106] Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

[107] Article 60 is the same as in 1964 ULIS; see Working Group report on fifth session, paras. 22-25 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[108] Working Group report on fifth session, paras. 36-59 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). See also the general introduction to chapter IV, at para. 145, above.

[109] Working Group report on fifth session, paras. 60-70 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). See also the general introduction to chapter III at para. 82, above, with respect to the problems presented in 1964 ULIS by the concept of "delivery".

[110] Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

of no importance to the seller.[111] Instead, the revised text makes applicable the general provisions on the remedies of the seller. The Working Group approved the revised text in principle, but deferred final action until a later session.[112]

160. The observations by the representative of Norway suggest that this article should be removed from section III (remedies for breach of contract by the buyer); the end of the preceding section is suggested. (Stated differently, the heading for section III would be placed immediately after the article rather than immediately before the article.) The observations by the representative of Austria suggest that the article should remain in its present position. These observations also suggest that the reference in brackets to recourse to remedies should be deleted; authorizing the seller to make the specification, under this view, would be adequate.[113]

Article 70: seller's remedies in general

161. This is the first of four articles setting forth a consolidated set of remedies afforded to the buyer in the event of breach by the seller. Article 70 is closely patterned on article 41 which is the initial article on remedies afforded to the seller.[114]

162. The only pending questions are certain amendments for stylistic conformity proposed by the representative of Norway.[115]

Article 71: requiring the buyer to pay the price or take delivery

163. The present article is parallel to article 42, which deals with the right of the buyer to compel the seller to deliver the goods ("specific performance"). The representative of Norway proposes drafting changes in this article comparable to those proposed for article 42. See the discussion under article 42 at paragraphs 120-127 above. Account should also be taken of article 16, which contains a general rule limiting the right of specific performance.

Article 72: seller's notice fixing additional period

164. This article provides that the seller may request performance, and fix a time therefor (the *Nachfrist* notice); failure to comply with this request provides a basis for avoidance of the contract without establishing a "fundamental breach". This article corresponds to article 43 and presents no pending questions.[116]

Article 72 bis: *avoidance of the contract by the seller*

165. This article, dealing with avoidance of the contract by the seller, is comparable to article 44, which deals with avoidance by the buyer. As was noted in connexion with article 44 (para. 132, above) and in the general introduction to chapter III (para. 89, above), the Working Group at its third session decided to eliminate the concept of automatic (*ipso facto*) avoidance of the contract; instead, avoidance of the contract must be based on a declaration by one party to the other.

166. At the fifth session, the Working Group was not able to reach a final decision as to the drafting of this article and concluded that it would give further consideration to three proposals (alternatives A, B and C) which are set forth in the revised text that appears as annex I to the report on the fifth session.[117]

167. One typical situation with which this article must deal may be illustrated by the following case (case No. 1): a contract of sale provided that the buyer would establish an irrevocable letter of credit for the price on 1 June, and that the seller would ship the goods on 1 July. On 1 June the buyer had not yet established the letter of credit.

168. The problem presented by the foregoing facts is whether the seller may immediately declare the avoidance of the contract, with the consequence that he need not perform even if the buyer establishes the letter of credit on 2 June, and without regard to whether the delay constituted a fundamental breach of contract. (The same problem would arise from any delay by the buyer in providing shipping instructions or specifications for the goods, or in performing any other aspect of his obligations under the contract.)

169. Alternative A approaches the above problem in the same manner as article 44: the seller may declare the avoidance of the contract either if (para. 1(*a*)) the delay constitutes a fundamental breach or if (para. 1 (*b*)) the buyer fails to comply with a *Nachfrist* notice under article 72.

170. Alternative B provides rules that, in part, depend on whether the goods have been handed over to the buyer. Where the goods have been handed over, this proposal (para. 1 (*a*)) seems to permit avoidance only on the buyer's failure to comply with a *Nachfrist* notice under article 72. Where the goods have *not* been handed over (para. 1 (*b*)), avoidance depends on the existence of a fundamental breach; apparently the *Nachfrist* device is unavailable.

171. Alternative C deviates from alternative A only with respect to paragraph 2, which deals with the circumstances under which the seller may lose the right to declare the contract avoided.

172. The emphasis which alternative B places on the question whether the goods have been handed over suggests that this alternative was not directed to problems like those illustrated by case No. 1, above, but instead reflected concern lest a seller, who has delivered goods on credit, might attempt to use "avoidance" of the contract as a basis for recapture of the goods. It may be doubted whether such attempts would be

[111] Report of the Secretary-General on issues presented by chapters IV-VI, para. 30 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[112] Working Group, report on fifth session, paras. 73-81 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[113] Comments, observations by Norway and Austria (reproduced in this volume, part two, I, 3).

[114] Working Group report on fifth session, paras. 40-41 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[115] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[116] Working Group report on fifth session, paras. 50-52 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[117] Working Group report on fifth session, paras. 53-59. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). In the revised text in annex I to this report, a draft provision set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at para. 36, is designated alternative A; alternative B reproduces proposal A introduced at the fifth session, and alternative C reproduces proposal B introduced at that session.

frequent under the conditions of international trade; indeed, under some legal systems "avoidance" of the contract does not establish a ground for recovery of goods that have been delivered to the buyer unless the parties have expressly agreed that the seller retains title (or other "security" interest) in the goods which he may enforce if the buyer fails to pay.[118] In any event, such consequences of avoidance of the contract are more closely related to the provisions of article 78 (2).[119]

173. The observations submitted by the representative of Austria support the approach of alternative A; the observations submitted by the representative of Norway suggest drafting modifications in paragraph 1 of alternative A, and, with respect to paragraph 2, prefer the approach of alternative C.[120]

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I. ANTICIPATORY BREACH

Article 73: suspension of performance; stoppage of goods in transit

174. Article 73 of 1964 ULIS provided that one party could suspend performance because of the deterioration of the economic situation of the other party. These rules were substantially revised by the Working Group at its fifth session.[121] The principal revisions are as follows: (1) The principal ground for suspension has been made narrower: there must be a "serious deterioration" in the economic situation of the other party; (2) A second ground has been added: conduct by the other party "in preparing to perform or in actually performing the contract"; (3) The provisions on stoppage in transit are made expressly applicable only as between the seller and the buyer; (4) Under 1964 ULIS, the party suspending performance need not notify the other party, and the consequences following suspension are not stated;[122] a new paragraph 3 included in article 73 provides that a party suspending performance shall give the other party prompt notice thereof, and shall continue with performance if the other party provides adequate assurance for performance. (Typically, such assurance would be provided by an irrevocable letter of credit or, in some areas, by a bank guarantee.)

175. Although at the fifth session some representatives reserved their position with respect to the redraft, the only observation submitted for consideration at the present session is a drafting suggestion by the representative of Norway that the words "the appearance of" be inserted prior to the word "a serious deterioration".

Article 74: delivery by instalments

176. This article is based on article 75 of 1964 ULIS, subject to drafting changes made by the Working Group.[123] The observations submitted by the representative of Norway include a proposed redraft of the second paragraph.[124]

Article 75: avoidance prior to date for performance

177. This article is the same as article 76 of 1964 ULIS, except for a minor drafting change made by the Working Group at the fifth session.[125] There are no pending questions with respect to this article.

SECTION II. EXEMPTIONS

Article 76: excuse for non-performance

178. This article (article 74 in 1964 ULIS) deals with the circumstances in which a party will be relieved of liability even though he fails to perform the contract: the underlying legal issue is referred to in various ways which include the terms *force majeure,* impossibility and supervening disability. This problem was discussed by the Working Group at its fifth session, and was the subject of intensive work by a drafting party established during that session.[126] At the end of the session, the Drafting Party reported that it had not been able to agree on a final draft, but had provisionally adopted a text, which, together with an alternative proposal submitted by an observer, should be included in the report to facilitate later consideration of the article. (These two texts are referred to as alternative A and alternative B, respectively.)

179. At the end of the fifth session, the representative of the United Kingdom (who also had served as Chairman of the Drafting Party) agreed to prepare a study of the unresolved questions presented by this article, and has submitted a detailed study on this subject.[127] It would not be feasible to summarize this study; it will be sufficient to note that the study, in addition to analysing the problem, sets forth draft provisions for three articles which deal with distinct aspects of the problem.[128]

180. Draft provisions are also proposed in the observations submitted by the representative of Norway, and comments on the topic are included in the observations by the representatives of Austria and of Bulgaria.[129]

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[118] Working Group report on fifth session, para. 56 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1), refers to a proposal that would limit the right to reclaim goods to those circumstances described above.

[119] See Working Group report on fifth session, paras. 138-144 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[120] Comments, observations by Austria and Norway (reproduced in this volume, part two, I, 3).

[121] Working Group, report on fifth session, paras. 90-106 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). Article 73 of ULIS was analysed, and draft proposals for revision were set forth in report of the Secretary-General on issues presented by articles IV-VI of ULIS, paras. 48-63 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[122] Report of the Secretary-General on issues presented by chaps. IV-VI of ULIS, paras. 51-58 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[123] Working Group report on fifth session, paras. 116-127 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[124] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[125] Working Group report on fifth session, paras. 128-134 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[126] *Ibid.*

[127] Comments, study by the representative of the United Kingdom of problems arising out of article 74 of ULIS (reproduced in this volume, part two, I, 3).

[128] The study, at paragraph 9, presents a revision of article 76; this draft, labelled alternative C, is concerned only with exemption from liability in damages. At paragraph 12, the study proposes a second article [76 *bis*] which is addressed to the circumstances in which the contract may be avoided. At paragraph 17, the study proposes a third article [76 *ter*] which deals with the consequences of avoidance.

[129] Comments, observations by Austria, Bulgaria and Norway (reproduced in this volume, part two, I, 3).

Article 77 (deleted)

181. This article of 1964 ULIS is one of several provisions which are designed to make clear that a party who "avoided" the contract for breach does not lose the right to claim damages (see para. 133, above). The Working Group concluded that this point already resulted from other articles and, consequently, that this article should be deleted.[130]

SECTION III. EFFECTS OF AVOIDANCE

Article 78: damages; return of goods or payments

182. This article of the revised text is the same as in 1964 ULIS. However, in view of proposals for revision made at the fifth session, the Working Group deferred final action on the article.[131]

183. The text of one proposal, set forth in the report on the fifth session, would differentiate between the effect of avoidance as to the innocent party (the "avoiding" party) and the party in breach, and also would distinguish between total and partial avoidance.[132] No proposals have been submitted subsequent to the session with respect to this article.

Article 79: necessity for return of goods

184. This article, as adopted at the fifth session, is similar to article 79 of 1964 ULIS.[133]

185. The observations submitted by the representatives of Austria suggest that in paragraph 2, subparagraph (*a*) is covered by paragraph (*d*) and therefore may be deleted; it is further suggested that subparagraph (*e*) may be deleted. The representative of Norway suggests that subparagraph (*d*) should be placed first. In addition, the reference in paragraph (*d*) to acts of other persons should be deleted in view of a general provision on this point to be added as article 12. (See para. 72, above).

Articles 80 and 81

186. No pending questions or proposals have been presented with respect to these articles.[134]

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 82: basic rule on measure of damages

187. This article, which includes minor modifications by the Working Group of article 82 in 1964 ULIS, appears at paragraph 165 of the report on the fifth session. (In annex I, through a typing error in the second sentence after "the loss which" there is an omission of the phrase "the party in breach had foreseen or ought to have foreseen at the time of . . .").*

188. The observations submitted by the representative of Norway propose that article 85 (with a drafting adjustment) be moved to article 82 as paragraph 2.[135]

Article 83: interest on sums in arrear

189. The Working Group approved this article in the same form as in 1964 ULIS.[136] The only current proposal is the suggestion of the representative of Norway that the reference to "habitual residence" is unnecessary in view of the general provision in article 4 (b).[137]

Article 84: calculation of damages

190. This article, as approved by the Working Group, appears at paragraph 176 of the report on the fifth session. (In reproducing this article in annex I, in paragraph 1 the words "on the date" were omitted before the concluding phrase "on which the contract is avoided".)*

191. The revised text differs from the corresponding article of 1964 ULIS in two significant respects: (1) the party claiming damages may, if he chooses, rely instead on the general rule of article 82; 1964 ULIS seemed to restrict a buyer who has avoided the contract to article 84; (2) article 84 of ULIS had referred, in paragraph 2, to "the market in which the transaction took place"—a test which in international sales would be difficult of application. In place of this language, the revised text refers to "the place where delivery of the goods is to be effected". (In the revised text, the place for such delivery is specified in article 20.)

192. The only pending question is the suggestion by the representative of Austria that the test for measuring damages in paragraph 1 should refer to the date on which the goods were (or should have been) delivered, rather than to the date on which the contract was avoided.[138]

Article 85: goods resold or bought in replacement

193. The revised text is based closely on 1964 ULIS, but requires that the resale or repurchase be made not only in a reasonable "manner" but also "within a reasonable *time* after avoidance".[139]

194. As has been mentioned under article 82 (para. 191, above), the representative of Norway suggests that the rule of article 85 should appear as a second paragraph of article 82; a drafting change to show the relationship between the two paragraphs is included in the proposal.[140]

Articles 86 and 87 (deleted)

195. The Working Group at its fifth session concluded that, in view of the revision of other articles in

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

[130] Working group report on fifth session, paras. 135-137 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[131] *Ibid.*

[132] *Ibid.*, para. 143. Partial avoidance is provided for in articles 46 and 74 of revised text.

[133] *Ibid.*, paras. 145-156. The text of a proposal appears at para. 151.

[134] *Ibid.*, paras. 152-154 (art. 80); 155-156 (art. 81).

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

[135] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[136] Working Group, report on fifth session, paras. 166-167 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[137] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[138] Comments, observations by Austria. This proposal was made at the fifth session and was considered by the Working Group: report on fifth session, para. 170 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[139] Working Group, report on fifth session, paras. 177-182 (reproduced in this volume, part two, I, 3).

[140] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

this section, articles 86 and 87 of 1964 ULIS became unnecessary.[141]

Article 88: mitigation of loss

196. This article requires the innocent party to take steps to mitigate the damages resulting from breach by the other party. The Working Group at its fifth session slightly relaxed the obligation imposed under 1964 ULIS; instead of "*all* reasonable measures", the innocent party is required to adopt "such measures as may be reasonable *in the circumstances*"; certain clarifying revisions also were made.[142]

197. The representative of Norway proposes stylistic modifications in this provision, and proposes that it be supplemented by a second paragraph which would deal with the obligation of the buyer to buy goods in replacement and with the obligation of the seller to resell.[143] It would appear that this new paragraph would provide illustrations of the most important applications of the general principle stated in the article.

Article 89: damages in cases of fraud

198. This article, which permits recourse to applicable national rules to determine damages in cases of fraud, is the same as in 1964 ULIS. The representative of Austria proposes an amendment designed to make clear that proof of fraud would *not reduce* the damages recoverable under the uniform law.[144]

Article 90 (deleted)

199. The Working Group decided at the fifth session that this article was unnecessary and was of doubtful value in relation to the usages of international trade. The observations submitted by the representative of Bulgaria suggest that the article should be retained.[145]

SECTION V. PRESERVATION OF THE GOODS

Articles 91 to 95

200. These five articles of 1964 ULIS deal clearly and usefully with a practical problem: the need to preserve goods when the buyer delays in taking delivery or when the goods are rejected after their receipt by the buyer. The Working Group decided to approve these articles without change, and there are no pending questions with respect to them.[146]

CHAPTER VI. PASSING OF THE RISK

A. GENERAL INTRODUCTION

201. In 1964 ULIS, the basic rule on passing of the risk is the provision in article 97 (1) that risk shall pass to the buyer "when *delivery* of the goods is effected . . .". As a result, consequences of great practical significance turn on the concept of "delivery". This concept was the subject of an elaborate definition in article 19.

202. The Working Group, at its third session (January 1972), gave intensive consideration to the use in ULIS of "delivery" and concluded that its approach was unsatisfactory.[147] Part of the difficulty arose from the fact that this single concept governed too many distinct problems: e.g. the definition of the parties' contractual obligations; the time for payment of the price; passing of the risk of loss.[148] As a result, the definition became very complex. In addition, parts of the definition which had been developed to deal with one of these problems produced unintended consequences with respect to other problems to which it was applied. For example, in an attempt to deal with the problem of risk of loss when goods were non-conforming, the definition of "delivery" in article 19 provided that "delivery" consists in the handing over of goods "which conform with the contract"—with the result that non-conforming goods were accepted and used by the buyer were never "delivered" to him. Such a definition of "delivery" was not only artificial, but it would lead to the unintended result that the risk of loss indefinitely remained with the seller while the goods were used (or even consumed) by the buyer. To compensate for this problem, article 97 (2) set forth a complex provision providing (in effect) for the retroactive passing of risk where the buyer has neither declared the contract avoided nor required goods in replacement.[149]

203. Another example of the complication that resulted from the attempt to deal with problems of risk of loss by way of a general definition of "delivery" is provided by articles 19 (3) and 100. Article 19 (3) included in the definition of "delivery" one of the aspects of performance by transmission by carrier. This provision was found to be inadequate as applied to problems of risk, with the result that an exception to article 19 (3) had to be set forth in article 100, which opens: "If, in a case to which paragraph 3 of article 19 applies . . .". The necessity to refer back and forth between the definition of "delivery" in article 19 and the special rules on risk in chapter VI made it difficult to read and understand the law; in addition, this approach so complicated the drafting process that unintended and unfortunate consequences were produced by a literal application of these various provisions.[150]

204. In the light of these considerations, the Working Group at its third and fourth sessions took two basic decisions. The first was to delete the definition of "delivery" in article 19, and formulate the rules at the outset of chapter III (e.g. article 20) in terms of

[141] Working Group, report on fifth session, paras. 183-187 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[142] *Ibid.*, paras. 188-194.

[143] Comments, observations by Norway (reproduced in this Yearbook, part two, I, 3).

[144] Comments, observations by Austria (reproduced in this volume, part two, I, 3).

[145] Working Group, report on fifth session, paras. 200-201 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

[146] Working Group, report on fifth session, paras. 202-205 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[147] Working Group, report on third session (annex I), paras. 17-19 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

[148] The problem is discussed more fully in the report of the Secretary-General on delivery in ULIS (A/CN.9/WG.2/WP.8, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1).

[149] This special provision on risk of loss did not, however, remove the basic difficulty in other settings that resulted from the fact that ULIS seemed to say that the goods were never "delivered" to the buyer even though he used (or consumed) them.

[150] Examples of such unintended consequences are given in the report of the Secretary-General on delivery in ULIS, at paras. 6-25 (risk of loss); 37-40 (time and place for payment of the price).

the specific steps that sellers shall take to fulfil their contractual obligations to supply or deliver goods (see para. 82, above).[151] The second decision was that problems of risk of loss (the subject of chapter VI) would not be controlled by the concept of "delivery".[152]

205. This second decision was implemented, at the fifth session, by redrafting provisions of chapter VI so that risk of loss passes to the buyer when the seller performs designated acts of performance of the contract —e.g. (article 97 (1)) when "the goods are handed over to the carrier for transmission to the buyer".[153] The problem of the effect of non-conformity of the goods (which, under 1964 ULIS was dealt with, in part, by an artificial definition of "delivery") is handled by an article (98 *bis*) addressed directly to the effect of non-conformity on risk of loss. The result is a presentation of the rules on risk of loss more unified and clearer than in 1964 ULIS. The presentation is also somewhat briefer, since the Working Group concluded that articles 99, 100 and 101 had become unnecessary.

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER VI

Article 96: in general

206. This general introductory article makes explicit the rule (which is necessarily implicit in rules on passing of the risk) that loss or deterioration (damage) which occurs after the risk of loss has passed to the buyer does not excuse the buyer from paying for the goods. (Compare article 35 at para. 97 above.) This article, as approved by the Working Group, is the same as in 1964 ULIS. However, a decision was deferred as to whether the article should retain the reference to acts of a third person "for whose conduct the seller is responsible".[154] The representative of Norway proposes that such specific references be deleted in favour of a general provision (proposed article 12, para. 72, above).[155]

Article 97: risk where the contract involves carriage

207. Paragraph 1 of this article states the basic rule which (in the absence of agreement or usage) would apply to the most typical international sale: where the contract involves carriage of the goods, risk shall pass "when the goods are handed over to the carrier for transmission to the buyer". The result is the same as that reached under 1964 ULIS through a combination of article 19 (2) and article 97 (1).

208. The observations of the representative of Norway suggest that the text approved by the Working Group be made explicitly inapplicable where "the seller is not required to deliver [the goods] at a particular destination".[156] A similar exception ("and no other place for delivery has been agreed upon") appears in article 19 (2) of 1964 ULIS; the above observations note that the proposed language is also found in one of the modern formulations of commercial law.[157]

209. The Working Group may wish to consider whether such an exception is necessary, and whether it might lead to misunderstanding. Presumably the contractual requirement "To deliver" at a particular destination should be given effect in the present article only in cases where such a requirement is expressed in a manner (like "*ex ship*") which implies that transit risk remains on the seller. On this assumption, the proposed language may be unnecessary, since all of the provisions of the law yield to agreement by the parties (articles 8, 9 (4); specific provision) to this effect need not be made in individual articles.[158] In addition, a reference to a requirement "to deliver" at a particular destination could lead to misunderstanding in connexion with rules on risk of loss. Since the seller usually makes the arrangements for carriage, the contract or shipping instructions often specify the place to which the seller is to dispatch the goods. In addition, some of the most common forms of price quotations ("C. I. F." and "C. & F.") imply that transit risks fall on the buyer even though the seller must bear the cost of freight to the named destination. In these, and in other types of quotations ("freight prepaid: freight allowed", and the like), framing the issue in terms of whether the seller is required "to deliver" has been a source of confusion;[159] the problems can be solved more readily in terms of the narrower and more specific issue as to whether the provision in question implies an exception to the general rule that transit risks pass to the buyer when the seller delivers the goods to the carrier. As has been noted, such an implication from the contract is given effect by article 8 and 9 (4) of the revised text.

210. Omitting such a special reference to a requirement "to deliver" would also make unnecessary the further provision, proposed in the observations by the representative of Norway, dealing with the passing of risk at "destination". Under the simpler text approved by the Working Group, if the contract states (article 8), or uses a trade term which implies (article 9 (4)), that transit risks remain on the seller, the point at the desti-

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[151] Preliminary discussions at the third session culminated in decisions at the fourth session. Working Group, report on third session (annex II) paras. 18-27; report on fourth session, paras. 16-29 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

[152] Working Group report on third session (annex II) para. 17 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

[153] Draft proposals for such a reformulation of chapter VI were set forth and analysed in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, paras. 64-105 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[154] Working Group report on fifth session, paras. 207-212 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[155] Comments, observations by Norway (reproduced in this volume, part two, I, 3). It is further suggested that the words "deterioration of" be replaced by "damage to". This change seems useful since "deterioration" might imply natural spoilage or evaporation, whereas the article is concerned with casualties in transit.

[156] Comments, observations by Norway (reproduced in this volume, part two, I, 3).

[157] The observations by Norway refer to the United States Uniform Commercial Code, section 2-509 (subparagraph (1) (*a*)).

[158] The question whether the exception should be retained was discussed in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at para. 80 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[159] It would appear that the "delivery" concept in article 19 (2) of ULIS which the current proposal would in substance restore, made it necessary for ULIS to add article 101, which provides: "The passing of the risk shall *not necessarily* be determined by the provisions of the contract concerning expenses". The Working Group deleted this cryptic and unhelpful provision.

nation at which risk passes would, of course, be governed by any applicable provision of the contract or by usage implied by trade term. In the absence of such a provision, the transfer of risk would be governed by article 98 of the revised text. Under that article, risk would pass to the buyer when he takes over the goods; when the buyer is late in taking over the goods, risk passes to him from the moment when such a delay constitutes a breach of contract.[160]

211. The observations by the representative of Norway propose clarifying amendments for paragraph 2 of article 97, and also propose the addition of a third paragraph based on ULIS article 100, which the Working Group decided to delete.[161]

Article 98: risk where the contract does not involve carriage

212. The comments of the representative of Norway propose clarifying amendments for paragraph 1, and a revision of paragraph 2, based on a text placed before the Working Group at the fifth session.[162] The considerations with respect to the need for such a special provision would seem to be similar to those applicable to the proposal for a special provision as to delivery at "destination" (see para. 210, above). (One aspect of this proposal is to subdivide article 98, as approved by the Working Group, into two articles which would be numbered 98 and 98 *bis*.)

213. In paragraph 2 of this article, the second sentence, dealing with identification of the goods, was placed within brackets. The observations by the representative of Austria conclude that this sentence should be retained.[163]

Article 98 bis: *effect of non-conformity on passing of the risk*

214. The above article has been considered by the Working Group, but final action was deferred until the present session.[164] The significance of this article has been discussed in paragraph 205, above. The representative of Austria concludes that the article is needed, but proposes a redraft of paragraph 2. Amendments for the article are also proposed by the representative of Norway.[165]

[160] In the proposed addition to deal with transfer of risk at "destination", the concluding phrase "when time for delivery has come" may be less clear than is article 98 (2) in dealing with casualties that occur during a period allowed to the buyer for taking the goods.

[161] Working Group report on fifth session, para. 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The report of the Secretary-General on issues presented by chapters IV-VI of ULIS, para. 87, discussed the question whether art. 100 of 1964 ULIS was needed in the setting of the revised rules on risk (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[162] Comments, observations by Norway (reproduced in this volume, part two, I, 3); Working Group report on fifth session, paras. 233-238 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[163] Comments, observations by Norway (reproduced in this volume, part two, I, 3). Reasons for retention of this provision are set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at paras. 83-84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[164] Working Group report on fifth session, paras. 239-240, 241 (*c*) (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[165] Comments, observations by Austria, Norway (reproduced in this volume, part two, I, 3). The latter proposal is in an article numbered 98 *ter*.

5. Report of the Secretary-General (addendum): pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex IV)*

1. This annex completes the analysis of the observations submitted by representatives of the Working Group on the International Sale of Goods with respect to pending questions. At the time documents A/CN.9/WG.2/WP.21 and Add.1 were prepared, some of these observations, in particular those submitted by the representative of the Union of Soviet Socialist Republics, had either not yet been received or were not available in English. For the sake of completeness those comments of other representatives which were not mentioned in the report of the Secretary-General are noted herein.

Article 1

2. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 2 in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

3. The representative of Mexico suggested that the language of paragraph 2 did not make it sufficiently clear that the Uniform Law would not apply if the fact that the parties had their places of business in different States did not appear in the contract or from the dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Therefore, he suggested the addition of the words "and consequently the present Law shall not apply" following the word "disregard".

4. The representative of Bulgaria suggested the insertion of a provision indicating that if parties who are not otherwise governed by the Uniform Law choose it as the law of the contract, that will not affect the application of any mandatory provisions of law which would otherwise have been applicable. This matter is discussed in the report at paragraphs 14-17.

Article 2

5. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 3

6. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 in order to make the provision the same as the

* 18 February 1975.

nation at which risk passes would, of course, be governed by any applicable provision of the contract or by usage implied by trade term. In the absence of such a provision, the transfer of risk would be governed by article 98 of the revised text. Under that article, risk would pass to the buyer when he takes over the goods; when the buyer is late in taking over the goods, risk passes to him from the moment when such a delay constitutes a breach of contract.[160]

211. The observations by the representative of Norway propose clarifying amendments for paragraph 2 of article 97, and also propose the addition of a third paragraph based on ULIS article 100, which the Working Group decided to delete.[161]

Article 98: risk where the contract does not involve carriage

212. The comments of the representative of Norway propose clarifying amendments for paragraph 1, and a revision of paragraph 2, based on a text placed before the Working Group at the fifth session.[162] The considerations with respect to the need for such a special provision would seem to be similar to those applicable to the proposal for a special provision as to delivery at "destination" (see para. 210, above). (One aspect of this proposal is to subdivide article 98, as approved by the Working Group, into two articles which would be numbered 98 and 98 *bis*.)

213. In paragraph 2 of this article, the second sentence, dealing with identification of the goods, was placed within brackets. The observations by the representative of Austria conclude that this sentence should be retained.[163]

Article 98 bis: *effect of non-conformity on passing of the risk*

214. The above article has been considered by the Working Group, but final action was deferred until the present session.[164] The significance of this article has been discussed in paragraph 205, above. The representative of Austria concludes that the article is needed, but proposes a redraft of paragraph 2. Amendments for the article are also proposed by the representative of Norway.[165]

[160] In the proposed addition to deal with transfer of risk at "destination", the concluding phrase "when time for delivery has come" may be less clear than is article 98 (2) in dealing with casualties that occur during a period allowed to the buyer for taking the goods.

[161] Working Group report on fifth session, para. 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The report of the Secretary-General on issues presented by chapters IV-VI of ULIS, para. 87, discussed the question whether art. 100 of 1964 ULIS was needed in the setting of the revised rules on risk (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[162] Comments, observations by Norway (reproduced in this volume, part two, I, 3); Working Group report on fifth session, paras. 233-238 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[163] Comments, observations by Norway (reproduced in this volume, part two, I, 3). Reasons for retention of this provision are set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at paras. 83-84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

[164] Working Group report on fifth session, paras. 239-240, 241 (*c*) (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[165] Comments, observations by Austria, Norway (reproduced in this volume, part two, I, 3). The latter proposal is in an article numbered 98 *ter*.

5. Report of the Secretary-General (addendum): pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex IV)*

1. This annex completes the analysis of the observations submitted by representatives of the Working Group on the International Sale of Goods with respect to pending questions. At the time documents A/CN.9/WG.2/WP.21 and Add.1 were prepared, some of these observations, in particular those submitted by the representative of the Union of Soviet Socialist Republics, had either not yet been received or were not available in English. For the sake of completeness those comments of other representatives which were not mentioned in the report of the Secretary-General are noted herein.

Article 1

2. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 2 in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

3. The representative of Mexico suggested that the language of paragraph 2 did not make it sufficiently clear that the Uniform Law would not apply if the fact that the parties had their places of business in different States did not appear in the contract or from the dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Therefore, he suggested the addition of the words "and consequently the present Law shall not apply" following the word "disregard".

4. The representative of Bulgaria suggested the insertion of a provision indicating that if parties who are not otherwise governed by the Uniform Law choose it as the law of the contract, that will not affect the application of any mandatory provisions of law which would otherwise have been applicable. This matter is discussed in the report at paragraphs 14-17.

Article 2

5. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 3

6. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 in order to make the provision the same as the

* 18 February 1975.

corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

7. The representative of Bulgaria pointed out that it would be helpful if the text of paragraph 1 made it clear whether or not the Law applies to the sale of entire industrial complexes and factories. His comments point out that the text of paragraph 1 would seem to exclude it. In considering this proposal it might be kept in mind that the law governing the sale of goods between the members of the Council for Mutual Economic Assistance, the General Conditions of Delivery of Goods Between Organizations of the Member Countries of the Council for Mutual Economic Assistance (CMEA General Conditions of Delivery, 1968) do apply to the sales of entire plants. See articles 24, 25, 26, paragraph 6, 29, paragraph 2.

Article 4

8. The representative of the Soviet Union recommended retention of the bracketed language in paragraph (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 9

9. The representative of Bulgaria urged that the rule of paragraph 3 should be reversed. In case of conflict the Law should prevail over usages unless the parties have agreed otherwise. He suggested that the current text would impose a variety of existing usages that are unknown to parties in international trade.

10. This concern should be largely overcome by the redrafting of paragraph 2. As the representative of Austria points out, paragraph 2 needs simplification but its point is that the only usages which bind the parties are those of which the parties are aware or should be aware because of the widespread use of the usage. The proposal of the representative of Mexico[1] simplifies and slightly changes the criteria, but the basic test remains the same, the usage is so widely used and known that it justifies an expectation that it will be observed with respect to the transaction in question.

11. The representative of the Soviet Union called for the omission of paragraph 4 for the reasons set out in paragraph 82 of the report on the second session of the Working Group. These reasons, which were not accepted by the Working Group at that time, were first: "that the language of paragraph 4 attempts to draw a line between the effect of usages (*a*) for the purpose of supplementing or qualifying terms and (*b*) for the purpose of interpreting terms. [This distinction was said to be] artificial and will pose practical difficulties. The second ground is that paragraph 4 binds a party to an international usage even though that party did not know and had no reason to know it".[2]

12. The redrafting of paragraph 2 as suggested by the representative of Mexico may satisfy the second of these two grounds.

Article 10

13. In addition to the proposal of the representative of Mexico for a redraft of article 10 in order to simplify it and to eliminate the subjective element, the representative of Bulgaria has also suggested a proposed revision.

Article 12

14. The representative of Bulgaria recommended keeping article 12 of the 1964 ULIS on the definition of "current price". This article was dropped from the text by the Working Group at its second session.[3]

15. The only provision in ULIS which employs the term "current price" is in article 84 on the damages in case of avoidance of the contract. "The Working Group considered that it was inappropriate to set up a general definition for a term which was used in only one operative article of ULIS. Including a definition of 'current price' in article 84 would not unduly burden the provisions of that article."[4] Nevertheless, no consideration was given to defining "current price" when article 84 was discussed by the Working Group at its fifth session.[5]

Article 13

16. The representative of Bulgaria recommended keeping article 13 of the 1964 ULIS which defines the phrase "a party knew or ought to have known" rather than deleting it as the Working Group recommended at its second session.[6] Apart from the difficulties with the definition given by the 1964 ULIS, difficulties which are discussed at length in the report of the Working Group on its second session,[7] it was pointed out that the precise term being defined was used only in articles 99, paragraph 2, and 100. Subsequently, the Working Group recommended dropping these two articles.[8]

Article 14

17. The representative of the Soviet Union expressed the belief that the definition of "communication" may need to be broadened if article 15 is retained.

Article 15

18. The representative of the Soviet Union recommended the deletion of article 15 because it relates to the form of contracts and the consequences of the non-observance thereof. The representatives of Bulgaria and, if article 15 is to be kept, of the Soviet Union recommended amending article 15 to provide that the contract must be in writing if the laws of at least one

[1] Comments of the representative of Mexico, para. 36 (reproduced in this volume, part two, I, 3).

[2] Report of the Working Group on the International Sale of Goods on the second session, A/CN.9/52, para. 82 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

[3] Report of the Working Group on the International Sale of Goods on the work of the second session, A/CN.9/52, para. 97. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

[4] *Ibid.*, para. 99.

[5] Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, paras. 168 to 176 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

[6] Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, para. 101. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

[7] *Ibid.*, at paras. 102 to 109.

[8] Report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, paras. 242 to 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

of the countries in which the parties have their business so requires. This matter was discussed at length by the Working Group at its second session[9] and by the Commission at its fourth session.[10] No decision was reached and the Commission concluded that the Working Group should give further consideration both to the principle of freedom of the parties to conclude oral contracts as well as to any modifications of the specific language of the text of article 15.[11]

Article 17

19. The representative of the Soviet Union suggested that this article should be identical to the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

20. The representative of Bulgaria supported the suggestion previously made in the second session of the Working Group[12] that this article should be supplemented by the following:

> "Private international law shall apply to questions not settled by the Uniform Law."

In support of this proposal it was suggested that the Uniform Law cannot attempt to provide a rule for all problems, which might arise and that the matter is best handled by referring back to the law appropriate under the rules of private international law.

20a. When this matter was discussed by the Working group at its second session, the members agreed that it involved questions of principle that should be decided by the Commission.[13]

21. At its fourth session, the Commission concluded that it was not practicable to reach a decision on this matter until the revised text of ULIS could be read as a whole. Therefore, it concluded that the Working Group should further consider the matter at an appropriate time and take into consideration the observations made at that session of the Commission.[14]

Article 20

22. The representative of Bulgaria suggested that this article might be amended by providing for and regulating several means by which delivery could be effected which are not currently mentioned in article 20:

(*a*) Handing over the goods for storage or bond warehousing to a third party, who would hold and take possession of them for the buyer;

(*b*) Handing over the goods to the buyer himself or to his representative;

(*c*) Handing over the documents giving title to possession and disposal of the goods.

23. Article 20 was drafted by the Working Group at its third session, to present a complete and unified answer to the question at what point, and more specifically at what place, does the seller complete his obligation as to delivery of the goods. Completeness and unity were achieved by introducing paragraph (*c*) by the words "in all other cases". The result is that article 20 now provides the place at which the seller is obligated to effect delivery of the goods if the contract of sale involves the carriage of goods (para. (*a*)) or if the contract relates to specific goods or to unascertained goods and the other criteria of paragraph (*b*) are met. "In all other cases [delivery shall be effected] by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence." (para. (*c*)).

24. It would seem that each of the examples mentioned by the representative of Bulgaria would currently fall under paragraph (*c*). The Working Group may wish to consider whether the current language of article 20 leads to the result desired.

25. It would also appear that in the English version of article 20 (*b*) the words "were at or" were inadvertently left out following the word "goods" in the third line.

Article 33

26. The representative of Bulgaria recommended amending paragraph 2 to provide that the seller shall not be liable when the buyer knew or could not have been unaware of defects of the goods "at the time of delivery of the goods, in the case of the goods concerned". The adoption of this proposal would lead to the result that the buyer could not accept goods which he knew had a defect and hold the seller responsible for the reduced value of the goods.

27. The words "subparagraphs (*a*) to (*d*) of" in paragraph 2 might be deleted since subparagraphs (*e*) and (*f*) of paragraph 1 of the 1964 ULIS have previously been deleted.

28. In the English language version the comma in the last line of paragraph 2 should follow the word "unaware" rather than the word "of".

Article 35

29. The representative of the Soviet Union recommended the retention of the second sentence in paragraph 1 by removing the brackets.

Article 38

30. The representative of Bulgaria recommended amending article 38, paragraph 2 by adding the words "and at the place where the buyer first has the opportunity to examine the goods". The purpose of the amendment would be to extend the time during which the buyer could discharge his obligation to examine the goods beyond the point of time at which "the goods arrive at the place of destination" if at that time the buyer did not have an opportunity to examine the goods.

31. If the Working Group accepts this proposal, it might consider redrafting the text which has been

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[9] Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, paras. 113 to 123. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

[10] Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), paras. 70 to 80. (UNCITRAL Yearbook, vol. II: 1971, part one, II, A.)

[11] *Ibid.*, para. 80.

[12] Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, para. 133. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

[13] *Ibid.* at para. 137.

[14] Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 91. (UNCITRAL Yearbook, vol. II: 1971, part one, II, A.)

suggested. The current language seems to imply that examination could be deferred until the goods arrive at two physically separate places, the place of destination and the place where the buyer can examine the goods.

32. The representative of Bulgaria also recommends deleting from paragraph 3 the words "and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispatch". This recommendation is similar to that in respect to paragraph 2 in that under certain circumstances it would prolong the seller's responsibility for the quality of the goods for a longer period of time than would the current text if the buyer could not examine the goods at the port of destination.

Article 39

33. The representative of the Soviet Union recommended retention of the sentence in brackets in paragraph 1, using the word "different" rather than "longer".

Article 42

34. The representative of the Soviet Union recommended keeping the bracketed language in paragraph 1.

Article 43 bis

35. The representative of the Soviet Union recommended keeping the bracketed language in paragraph 1.

Article 44

36. The representative of Austria suggested that the words "by notice to the seller" in paragraph 1 duplicate the more precise formulation in the introductory sentence of paragraph 2 and recommended that they be deleted.

Articles 48, 50 and 51

37. The representative of Bulgaria recommends reinsertion of articles 48, 50 and 51 of the 1964 ULIS. As noted in A/CN.9/WG.2/WP.21/Add.1, paragraphs 140 and 142, the problems covered by these articles are treated elsewhere in the current revision.

Article 57

38. The representative of the Soviet Union found the wording of article 57 "unacceptable" and stated that "the price should be determined or determinable".

Article 67

39. The representative of the Soviet Union suggests that the entire article might be eliminated for the sake of simplicity.

40. The Working Group might wish to note that the bracketed language in paragraph 1 should be "have recourse to the remedies specified in articles 70 to 72 *bis*, or".

Article 72 bis

41. The representative of the Soviet Union supports alternative A.

Article 76

42. The representative of the Soviet Union stated that in preparing the final wording of this article, it would be advisable to mention the basis of alternative A.

Article 78

43. If the Working Group accepts the proposals of the representative of the United Kingdom in respect to article 76, it may wish to consider the relationship of the proposed article 76 *ter*[15] and of the current article 78.

44. The representative of Norway proposed a new paragraph 3 which would read as follows:

"3. If the contract has been avoided in part, the provisions of this article shall apply to such part only."

Article 82

45. The representative of the Soviet Union suggested that it would be preferable to include the possibility of full damages for proven losses.

Article 83

46. The second line of the English language version should read "on such sum as *is* in arrear".

Article 84

47. See the comments to article 12 above.

Article 96

48. The representative of the Soviet Union suggested deletion of the bracketed language in this article in favour of a general provision on the liability of the seller or buyer for the actions of the persons for whom they are responsible. This proposal is similar to that of the representative of Norway.[16]

Article 98

49. The representative of the Soviet Union recommended retention of the bracketed sentence in paragraph 2.

[15] Comments, observations by United Kingdom, para. 17 (reproduced in this volume, part two, I, 3).

[16] Comments, observations by Norway (reproduced in this volume, part two, I, 3).