Article 50

49. The exemption clause in article 50, although somewhat vague, is quite in line with *force majeure* clauses commonly used, and may be considered an improvement over article 74 ULIS 1964, which referred to some very hypothetical situations.

50. The exemption covers only liability in damages. The final relief from duty to perform would depend on circumstances such as whether performance is definitely impossible or the conditions have so radically changed that performance amounts to performance under a different contract (frustration). The ICC agrees that no attempt should be made to cover such cases. The choice as to avoiding the contract should lie with the party who performs it and not with the non-performing party.

51. Article 50 does not limit the other party's right to avoid the contract. In that respect a non-performing party who wants to limit his liability has to rely on contractual provisions.

52. To restrict liability to "fault" alone would probably be going too far, but as the term has been defined in the text in a specific way, any objection to the use of it may be more a matter of drafting than of substance. From business contracts the expression "beyond the control of a party" is more familiar and would therefore be preferable to "fault".

53. It is believed that the wording as a whole could be improved in the following way:

> "Where a party has not performed one of his obligations he shall not be liable for damages for such non-performance if he proves that it was due to circumstances beyond his control which he could not reasonably have taken into account at the time of the conclusion of the contract and the consequences of which he cannot reasonably be expected to prepare against or to overcome."

54. The clause about failure of a subcontractor to meet his obligations seems to correspond to what is frequently practised and is not believed to meet with any objection.

55. The ICC would like to stress that article 50 may be looked upon not as making exemption clauses of a contractual nature superfluous but as laying down some general principles and offering some protection when contracts are concluded without the help of extensive written documents. It may therefore be accepted to have a rather narrow clause as it is easier to restrict liability by a contractual arrangement than to enlarge it.

Article 55

56. Article 55 as article 82 ULIS 1964 limits damages to the loss which the party in breach ought to have foreseen at the time of conclusion of the contract. It may be doubted what the result of such restriction would be and whether it would be equitable, e.g. when applied to loss of profits on the buyer's part, to overtime pay which the buyer may have to pay to his workers to avoid delay on his side, to delivery fines and other forms of compensation which a seller may have to pay to his buyer, or to currency depreciations when buyer is in delay with payment, etc. Consideration might therefore be given to deleting the restriction in the last sentence of article 55 and relying on a provision of a more general nature. To delete any limitation of the loss for which one party has to compensate the other, would, however, not be advisable.

Article 58

57. The present rule in article 58 is an improvement over the rule in article 83 ULIS 1964. To add only 1 per cent to the official discount is much too little, as in many countries 2-3 per cent is generally added. As the seller, alternatively, may rely upon the rate applied to unsecured short-term commercial credits in his country, the article as a whole nevertheless is acceptable. It is recommended, however, that the surcharge be increased to at least 2 per cent.

Articles 64 to 67

58. See above, paragraphs 16 to 22.

E. Report of the Secretary-General: analysis of comments by Governments and international organizations on the draft convention on the international sale of goods as adopted by the Working Group on the international sale of goods (A/CN.9/126)*

CONTENTS

* 7 April 1977.

Introduction

1. In accordance with a decision taken by the Commission at its eighth session (1-17 April 1975), the text of the draft Convention on the International Sale of Goods adopted by the Working Group on the International Sale of Goods at its seventh session (5-16 January 1976) was transmitted to Governments and interested international organizations for their comments.[1]

2. As at 28 March 1977 comments had been received from the following Governments: Australia, Austria, Bulgaria, Finland, Germany, Federal Republic of, Hungary, Iraq, Madagascar, Netherlands, Norway, Pakistan, Philippines, Poland, Sweden, Union of Soviet Socialist Republics, United States of America, Yugoslavia and Zaire, and from a non-governmental organization, the International Chamber of Commerce (ICC). These comments have been reproduced in documents A/CN.9/125 and Add.1.*

3. At its eighth session, the Commission also requested the Secretariat to prepare an analysis of such comments for consideration by the Commission at its tenth session. The present document contains such an analysis.

4. In preparing the analysis, the comments have been arranged by articles and within each article by paragraphs or subparagraphs or, where appropriate, by subject-matter. Where the comments concerned the article as a whole, and not a particular paragraph of an article, they were analysed under the heading "article as a whole".

5. Where a proposal for the modification of the existing text of the draft Convention set forth a draft text to effect such modification, the analysis reproduces the proposed draft text only if it involved a modification of substance. Drafting suggestions which did not involve a modification of substance are neither reproduced nor described in the analysis. However, the name of the Government or organization which made the drafting suggestion is noted at the end of the discussion of the article or paragraph of an article to which the drafting suggestion pertained. The exact wording of a proposal can be ascertained by reference to the comments of the respondent concerned appearing in documents A/CN. 9/125 or Add.1.

Analysis of comments

A. Comments on the draft Convention as a whole

1. The majority of the respondents express the view that the provisions are, in general, acceptable (Australia, Austria, Finland, Germany, Federal Republic of, Hungary, Iraq, Madagascar, Norway, Sweden, United States of America, Yugoslavia, ICC). All these respondents indicate that particular problems still exist which are not resolved by the draft in its present form, and suggest appropriate solutions to resolve these problems.[2] No respondent expresses the view that the draft Convention is unacceptable.

2. The following reasons are given by the respondents mentioned above for their general approval of the draft Convention:

(*a*) That the draft Convention constitutes a suitable basis for the adoption of a new convention regulating the international sale of goods (Australia, Finland, Germany, Federal Republic of, Hungary, Norway, Sweden, United States of America, ICC);

(*b*) That the rules contained in the draft Convention relating to the issues dealt with therein are, in general, an improvement on the corresponding rules contained in the Uniform Law on the International Sale of Goods (ULIS) (Austria, Finland, Norway, Sweden);[3]

(*c*) That a new convention based upon the draft would probably attract wider acceptance than has ULIS (Australia, Norway, Yugoslavia, ICC);

(*d*) That the draft Convention would facilitate international trade by resolving legal problems currently encountered in the international sale of goods (Hungary, ICC);

(*e*) That the draft Convention has been developed with the participation of States reflecting a wider range of interests and of legal and economic systems than had ULIS (Hungary, Yugoslavia);

(*f*) That the draft Convention proceeds from the idea of the establishment of a new international economic order (Yugoslavia);

(*g*) That the draft Convention reflects an equitable balance between the different legal systems (Finland, Hungary, Yugoslavia);

(*h*) That the draft Convention as a whole reflects a balanced and carefully elaborated compromise between the sometimes conflicting interests of the parties to a contract for the sale of goods (Finland, Hungary, Yugoslavia).

Relationship with ULIS

3. The International Chamber of Commerce (ICC)[4] (para. 2) stresses the importance of the fact that a number of States have already ratified ULIS and that, therefore, unless there are compelling reasons, the new text should not differ from ULIS. ICC further states that it is important that in the elaboration of the transitional provisions, due consideration be given to the situation of States which have already ratified ULIS and the difficulties for these States of replacing the earlier convention by the new one.

4. Sweden (para. 8) states that the present draft Convention should be prepared in such a manner that it would be possible for a State bound by ULIS to become a party to it.

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* Reproduced in this volume, Section D above.

[1] The text of the draft Convention is found in A/CN.9/116, annex I (Yearbook . . . , 1976, part two, I, 2).

[2] These observations are noted below under the respective articles of the draft Convention.

[3] The Uniform Law on the International Sale of Goods annexed to the Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1964 (*United Nations Register of Texts of Conventions and other Instruments concerning International Trade Law*, vol. I, chap. I; United Nations publication, Sales No. E.71.V.3).

[4] The references are to the paragraph in the comments of the Government or the international organization concerned as reproduced in A/CN.9/125 or Add.1.

Relationship with the Convention on the Limitation Period and a future convention on the formation and validity of contracts

5. Australia (para. 3) and Norway (para. 4) support the approach taken by the Working Group that the draft Convention should, wherever possible, conform to the parallel provisions in the Convention on the Limitation Period. Australia, however, states that the provisions of that Convention should not be emulated at the cost of including in the present draft provisions that are not wholly appropriate. Norway, on the other hand, suggests that since the Commission or the future conference of plenipotentiaries might wish to adopt, in respect of some points in the proposed Convention on the International Sale of Goods, a formulation different from that in the Convention on the Limitation Period, the terms of reference of the future conference of plenipotentiaries should be extended to include consideration of certain possible amendments to the Convention on the Limitation Period in order to keep the wording of the two conventions uniform.

6. The Federal Republic of Germany (para. 3) suggests that the draft Convention on the International Sale of Goods should be co-ordinated with the future convention on formation and validity of contracts for the international sale of goods and that work on that project should be so speeded up that the latter convention could be considered at the same diplomatic conference as the draft Convention on the International Sale of Goods.

Relationship with the Hague Convention of 1955

7. Norway (para. 5) suggests that a right of reservation should be permitted in respect of the Hague Convention of 1955 on the applicable law in the field of international sale of goods.

Commentary on the draft Convention on the International Sale of Goods

8. The United States (paras. 2-7) proposes that a commentary be submitted with the draft articles to the General Assembly and that the text adopted by a diplomatic conference should be accompanied by a commentary. It is stated that the commentary would be extremely useful during the period when legal and business circles were considering whether to recommend ratification of the Convention by their Governments and, after the text has entered into force, it would help in promoting uniformity. The United States states that if a commentary does not accompany the text when it leaves the Commission, it will find it necessary to propose a considerable number of changes to the text to make it more detailed and to add cross-references.

9. The Netherlands (paras. 2-3) suggests that the commentary be made more complete by explaining why the modifications of and deletions from ULIS were thought necessary and what would be the practical effect of these differences between the draft Convention and ULIS.

Uniform law rather than convention

10. ICC (para. 3) expresses the view that the draft Convention should be presented in the form of a uniform law rather than a convention since, in their view, the ultimate goal of uniformity is more definitely achieved with a uniform law which would apply to the buyer and seller than by a convention which would apply to Contracting States.

Titles to sections

11. The Philippines (para. 1) and the United States (para. 6) suggest that all articles should have titles. The United States goes on to suggest that the titles to the articles should be placed in the commentary in brackets so as to indicate that they do not form part of the text of the articles themselves.

Terminology

12. Australia (para. 7) and the United States (para. 19) note that there are several different terms and expressions used in the draft Convention dealing with knowledge and constructive knowledge, the differences in meaning of which are not clear. Australia proposes that the draft Convention contain a standard, preferably by a definition, by reference to which particular states of mind are to be imputed. The United States proposes deleting "contemplated" in articles 6 (*a*) and 48 (2) and "had reason to know" in articles 2 (*a*) and 8 (2) in favour of "foreseen" and "ought to have known".

13. Yugoslavia (para. 8*b*) states its approval of the fact that at a number of places in the text of the draft Convention the term "short time" has been replaced by "reasonable time".

Clarity of drafting

14. Sweden (para. 3) notes that the draft Convention had a certain lack of clarity and precision. It notes, however, that a fairly high level of abstraction and vagueness was inevitable in rules that are to apply to a large number of States whose legal, social and economic systems differed. Nevertheless, Sweden recommends revising the text to make it as clear and stringent as possible.

General conditions

15. Pakistan (para. 1) suggests that it would be useful and desirable if, in the light of this Convention, the Commission would draw up general/specific contract specimens for use in international trade.

Inspection bodies

16. Pakistan (para. 2) states that it would be helpful if Member States were advised to create inspection/examination bodies in their respective countries in collaboration with the Chamber of Commerce and Industry for checking of quality, quantity, packing, delivery, conformity with samples, etc., which bodies would be liable along with the seller for any failure in respect of those matters.

States which have common legal rules

17. Sweden (para. 8) proposes that States which have common legal rules in respect of the sale of goods, such as Sweden, Denmark and Norway, should be able to

reserve the right to consider themselves as one State for the purposes of the Convention and therefore not be bound to apply this Convention to contracts for the sale of goods between themselves.

B. Comments on the provisions of the draft Convention

PART I. SUBSTANTIVE PROVISIONS

Chapter I. Sphere of application

ARTICLE 1

Article as a whole

1. Hungary (para. 6) and ICC (para. 4) state their approval of the scope of the application provisions.

2. Australia (paras. 4-5) suggests in respect of article 5 that careful consideration be given to the possibility that the draft Convention would apply to a transaction only if it was made so applicable by the parties to the transaction. Otherwise States which view the draft Convention quite favourably as a whole but which have reservations concerning particular issues might be reluctant to accede to it if its application is automatic.

Paragraph (1)

3. Bulgaria (para. 1) and the Philippines (paras. 2-3) suggest that the parties must not only have places of business in different States but also have different residences (Bulgaria) or be of different nationalities (Philippines). Bulgaria suggests that it is contrary to the aims of the proposed Convention for it to apply to two enterprises of the same nationality and residence even though one, or both, of the enterprises has places of business in different countries. The Philippines propose that article 1 (1) should read:

> "(1) This Convention applies to contracts of sale of goods entered into by parties of different nationalities whose places of business are in different States:"

4. ICC (para. 6) comments on the definition of "place of business" as found in article 6 (*a*) and Madagascar (para. 2) and ICC (para. 7) comment on the criterion of "closest relationship" as that term is used in article 6 (*a*). These comments are described in paragraphs 1 and 2 of the analysis of article 6.

5. The Netherlands (paras. 4-6) proposes reinstating the requirement found in article 1 of ULIS that the contract must possess one of the international aspects specified in that article. Without such a requirement the proposed Convention implies that it is applicable to a contract of sale which has been concluded in a country in which either the buyer or the seller has his place of business and in which the other party is temporarily present even though the goods are already in that country and delivery is to take place there. The Netherlands concludes that it is doubtful whether such a contract has sufficient international elements that it should fall within the sphere of application of the proposed Convention.

Paragraph (1) (b)

6. ICC (para. 5) states its approval of this provision that the draft Convention applies if the rules of private international law lead to the application of the law of a contracting State. It states that article 2 of ULIS which excludes the rules of private international law for the purpose of application of the uniform law, instead of leading to uniformity, results in a complicated system of reservations and in some circles has made ULIS unacceptable.

7. The Federal Republic of Germany (paras. 4-6) proposes the deletion of paragraph (1) (*b*). It states that the draft Convention should be limited to cases in which the parties to a contract of sale have their places of business in different contracting States. It also notes that States would be free to apply the draft Convention if the rules of private international law lead to the application of the law of that State, but that they should not be required by the draft Convention to do so. Furthermore, the Convention on the Limitation Period in the International Sale of Goods provides for application only between contracting States.

Paragraph (2)

8. Pakistan (para. 3) states that the place of business of the parties should be clearly defined in order to prevent triangular business which occurs in the case of re-export to a third State by the buyers.

9. The USSR (para. 1) submits a drafting proposal.

Proposed paragraph (3)

10. Norway (paras. 13-14) proposes that article 6 (*c*) be deleted and that a new article 1 (3) be inserted to read as follows:

> "(3) The Convention applies regardless of the nationality or the civil or commercial character of the parties or of the contract."

Norway states that this change would make it possible to take into consideration the civil or commercial character of the parties or of the contract for such purposes as determining the reasonable time for giving notice to the other party.

ARTICLE 2

Article as a whole

1. The Philippines (para. 4) suggests that the term "goods" should be defined in order to determine what goods will not be subject to the draft Convention.

2. The USSR (para. 2) suggests that consideration should be given to the advisability of including in the draft Convention provisions similar to those in article 5 of the Convention on the Limitation Period. Those provisions exclude claims based upon:

(*a*) Death of, or personal injury to, any person;

(*b*) Nuclear damage caused by the goods sold;

(*c*) A lien, mortgage or other security interest in property;

(*d*) A judgement or award made in legal proceedings;

(*e*) A document on which direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(*f*) A bill of exchange, cheque or promissory note.

Paragraph (a)

3. The USSR (para. 2) recommends that the text of this provision should be identical to that of article 4 of the Convention on the Limitation Period, namely:

"(*a*) of goods bought for personal, family or household use;"

4. The Netherlands (para. 7) states that the commentary does not make it clear why it is desirable to exclude from the application of the draft Convention a contract of sale concluded by correspondence between a sales agency and a buyer having his place of business in another country and thus to make it subject in principle to the legislation of the seller's country.

5. The United States (para. 19) makes a drafting proposal.

Paragraph (e)

6. Finland (para. 3), Norway (paras. 6-7) and the Philippines (para. 4) propose the deletion of paragraph (*e*) so that the draft Convention would apply to the sale of ships and aircraft. Alternatively, Norway proposes that paragraph (e) be drafted as follows:

"of any used ship or vessel which is, at the time of the conclusion of the contract, registered in a national [official] public register as having a gross tonnage of 10 tons or more;"

Paragraph (f)

7. Finland (para. 4) and Norway (para. 6) propose the deletion of this paragraph.

8. The USSR (para. 2) proposes that the word "gas" should be inserted in this paragraph since the terms of contracts for the sale of gas are *sui generis*.

ARTICLE 4

1. The Federal Republic of Germany (paras. 7-8) and Norway (paras. 8-9) note that article 4 may give rise to the mistaken belief that an agreement between the parties that the draft Convention should apply will result in setting aside the mandatory provisions of national law. The Federal Republic of Germany notes that this might occur even in the case of a domestic sales contract which has no connexion with a foreign country. Therefore, it proposes the deletion of article 4. Norway, on the other hand, proposes that article 4 be amended to read as follows:

"The present Convention 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 law."

2. The Federal Republic of Germany (para. 9) and Norway (paras. 10-12) also make proposals in respect of article 7 (1) which are based on the same concerns.

Proposed article 4 bis *on choice of law*

1. Poland (para. 9) proposes that a new article should be adopted to the effect that, unless the parties agreed otherwise, the law of the seller's country is to be regarded as the proper one with respect to a contract of sale of goods. Poland points out that this principle is commonly recognized in international trade.

2. The USSR (para. 17) makes a similar suggestion in that the law of the seller's country should apply to those questions which are not regulated or are only partly regulated by the Convention. The USSR suggests that such a provision might be made part of article 13 on the interpretation of the Convention.

3. In its comments on article 7 Norway (para. 10) notes that article 7 (1) does not solve the choice of law problem as would the Norwegian proposed amendment to article 4 (see para. 1 of the analysis of article 4). However, Norway suggests this problem might perhaps be left to national law and not be solved in the proposed Convention.

4. In its general comments Norway (para. 5) notes that a right of reservation to the present Convention should be opened in respect of The Hague Convention of 1955 on the applicable law in the field of international sale of goods.

ARTICLE 5

1. Australia (paras. 4-5) suggests that careful consideration be given to the possibility that the proposed Convention would apply to a transaction only if it is made so applicable by the parties to the transaction. Otherwise States which view the draft Convention quite favourably as a whole but which have reservations concerning particular issues may be reluctant to accede to it if its application is automatic.

2. Zaire (para. 3) expresses its approval of article 5 which, because of the differences in legal systems, gives States the option of not applying any given provision.

3. The Philippines (para. 5) proposes that after the term "exclude" the words "by express stipulation" should be added so as to indicate clearly that exclusion, derogation or varying of the provisions of the draft Convention may not be done by implication.

ARTICLE 6

Paragraph (a)

1. ICC (para. 6) states that it is important that there be a clear indication as to what constitutes a "place of business". It suggests that in order to qualify as a "place of business", there should be maintained a permanent business organization including localities and employees for the purpose of the manufacture or sale of goods or services. Such a place of business, usually called a branch, should be confused neither with a subsidiary which is a distinct legal entity, nor with "a permanent establishment" as it is defined under numerous double taxation agreements, e.g. the presence of an agent with power to conclude a sale.

2. Madagascar (para. 2) and ICC (para. 7) suggests that the criterion of "closest relationship" to the contract is unclear. ICC goes on to say that a place of business should be relevant for the application of the draft Convention only if the contract is concluded in the name of that place of business.

3. The United States (para. 19) submits a drafting proposal.

Paragraph (b)

4. Pakistan (para. 4) states that, instead of making reference to habitual residence, it is necessary to define clearly the meaning of a place of business.

Paragraph (c)

5. Norway (paras. 13-14) proposes the transfer of paragraph (*c*) to a new article 1 (3). See paragraph 10 of the analysis of article 1.

6. The Philippines proposes that, if its suggestion in respect of article 1 is accepted (see para. 3 of the analysis of article 1), the words "the nationality of the parties nor" should be deleted from paragraph (*c*).

ARTICLE 7

Paragraph (1)

1. The Federal Republic of Germany (para. 9) suggests that it is necessary to determine whether additional matters should be excluded from the sphere of application of the proposed Convention. For instance, national laws for the protection of the buyer purchasing on an instalment plan or "at the front door" should take precedence over the draft Convention. Most, but not all, of these cases are solved satisfactorily by the exclusion of the consumer purchase in article 2 (*a*) and the exclusion of the rules on the validity of contracts of sale in article 7 (1). However, the Federal Republic of Germany states that when drafting any such exclusion of the application of the proposed Convention in favour of national laws for the protection of consumers, care will have to be taken to preserve the justified interests of international trade in a clear delineation of the sphere of application.

2. Norway (paras. 10-12) proposes: (i) that words be inserted to indicate that the proposed Convention not only is not concerned with the validity of the contract, but also is not with the validity of any additional or subsequent agreement of the parties relevant to the sale; (ii) that the words "In particular this Convention is not," at the beginning of the second sentence be deleted as being misleading in relation to questions of validity, which are mandatory law; and (iii) that reference to the validity of a usage be transferred to a new article 8 (3). With some additional drafting suggestions proposed by it, Norway suggests that paragraph (1) should read as follows:

> "(1) This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. Except as otherwise expressly provided therein, the Convention is not concerned with:
>
> "(*a*) The formation of the contract;
>
> "(*b*) The validity of the contract or of any provision contained therein or in any other agreement relating to the sale;
>
> "(*c*) The effect which the contract may have on the property in the goods sold."

3. Norway (para. 10) also notes that article 7 (1) does not solve the choice of law problem, as would the Norwegian proposed amendment to article 4. However, it suggests that this problem might perhaps be left to national law and not be solved in the proposed Convention.

Paragraph (2)

4. Madagascar (para. 3) proposes the retention of article 7 (2) since questions of the effect of the contract on the property in the goods sold and on industrial or intellectual property often bring into play purely domestic considerations that vary from State to State and are difficult to resolve.

5. On the other hand, Australia (para. 6), the Federal Republic of Germany (paras. 10-11), ICC (paras. 25-26), and the USSR (para. 3) propose the deletion of article 7 (2) so that the question of the rights and obligations of the seller and the buyer arising out of the existence in any person of rights and claims which relate to industrial or intellectual property or the like would be covered by the proposed Convention. The Federal Republic of Germany and ICC make additional comments as follows:

(*a*) The Federal Republic of Germany (para. 10) indicates that, if article 7 (2) were deleted, article 25 on the seller's obligation to deliver goods free from the rights of third persons would control, a result which is stated to be justified.

(*b*) ICC (paras. 25-26), however, indicates that, if article 7 (2) were deleted, the matter would be governed by article 19. The existence of third party rights in industrial or intellectual property (or administrative regulations which restricted use of the goods) might render the goods unfit for use. According to article 19 (1) (*a*), the question would be whether the goods were unfit for the purposes for which they would ordinarily be used. However, the question whether they would be unfit for the particular purpose of being used in the buyer's country would have to be answered by application of article 19 (1) (*b*), which exempts the seller from liability when it was not reasonable for the buyer to rely on the seller's skill or judgement when deciding whether to purchase the goods.

(*c*) Therefore, ICC favours the deletion of article 7 (2) with no further action. As a second choice, it would couple the deletion of article 7 (2) with the introduction of a new article 25 (2) stating that the seller is not liable to the buyer in respect of rights or claims of third persons based on industrial or intellectual property.

6. Finland (para. 5) and Norway (para. 12) propose that article 7 (2) be amended to begin as follows:

"(2) Except as otherwise provided in article 25 paragraph (2), . . ."

(*a*) Norway also submits a drafting proposal that the words "which relate" be deleted and the word "relating" be inserted.

(*b*) In its discussion of article 25, Finland (para. 9) proposes that the Convention provide either (i) that the seller is not liable for the loss caused to a buyer arising out of the fact that a third person had a right in the goods based on industrial or intellectual property, or (ii) that the seller is responsible to the buyer in respect of rights or claim of a third party based on industrial or intellectual property to the extent such rights or claims arise out of, or are recognized by, the law of the State where the seller has his place of business.

(*c*) In order to implement its suggestion, which was identical to the second alternative proposed by Finland, Norway (para. 18) proposes that a new article 25 (2) be inserted as follows:

> "(2) Whether a right or claim of a third person based on industrial or intellectual property amounts to a breach of contract by the seller, is determined according to the contract and the law of the State where the seller has his place of business at the time of the conclusion of the contract. The effects of such a breach are determined by the provisions on lack of conformity in this Convention."

7. Norway (paras. 18-19) and ICC (para. 27) also consider the question as to what remedies the buyer should have for breach of the seller's obligation under

the proposed article 25 (2). See the analysis of article 25, paragraph 5.

Chapter II. General provisions

ARTICLE 8

Article as a whole

1. Yugoslavia (paras. 10-11) expresses its approval of the deletion of the second sentence in paragraph 2 of article 9 of ULIS, under which usages prevail over the Uniform Law since usages "as it is well known, were created by the economically strong groups having positions of power on the world market". Yugoslavia queries, however whether the same result does not arise from the current text. It states, therefore, that it is indispensable to give careful consideration to the significance and impact of article 8 (2) of the draft Convention.

2. ICC (para. 8) states that it is important that the proposed Convention state the role which usages play in the determination of the legal relations between buyer and seller. Usages are as important for doing justice to the buyer as to the seller and quite independently of whether a party has its place of business in an industrialized country or in a developing country. ICC concludes that the essence of any rule as to usages is that the newcomer in the trade should not be able to plead his ignorance of the usages as a defence.

Local usages

3. ICC (para. 8) states that it is regrettable that article 8 does not deal with local usages. It notes, however, that it is its understanding that even under the present text so-called local usages are to be taken into consideration in some situations, e.g. where they are internationally known. ICC also states that, because article 8 represents a compromise which has been difficult to reach, it finds the present text acceptable.

Trade terms

4. Yugoslavia (para. 12) and ICC (paras. 9-11, 21) propose the reintroduction of paragraph 3 of article 9 of ULIS which provides:

> "Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

5. ICC proposes that, if this text is not acceptable, an alternative, previously proposed by some representatives at the second session of the Working Group (A/CN.9/52, para. 82; Yearbook . . . , 1971, part two, I,A,2), be adopted as follows:

> "Where expressions, provisions or forms of contract 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."

6. ICC (para. 11) notes that either provision would avoid two things: that trade terms might be interpreted with the help of the proposed Convention (e.g. by using the rules on the passage of the risk of loss as found in articles 64-67 of the draft Convention) and that local or national standards of interpretation might take precedence over international standards. ICC (para. 21) also notes that it understands that when a given delivery term such as "ex works", "FOB" or "CIF" has been agreed upon, even under the current text, the interpretation thereof is to be made with reference to the usages referred to in article 8. Sweden (para. 9) states that a provision should be inserted in article 8 to achieve these results, but does not specifically propose the reintroduction of article 9 (3) of ULIS.

Validity of usages

7. Norway (paras. 11 and 15) in discussing article 7 states that as regards the validity of a usage, the provision could well be transferred to a new paragraph (3) of article 8. It proposes a new text as follows:

> "(3) This Convention is not concerned with the validity of any usage."

ARTICLE 9

1. Hungary (para. 6) notes its approval of article 9, whilst ICC (para. 12) accepts it as a considerable improvement over the definition of "fundamental breach" in article 10 of ULIS which, it states, is too artificial and difficult to apply. Nevertheless, ICC regrets the vagueness of the present definition.

2. Austria (para. 2) and the Netherlands (paras. 8-9) express preference for the definition of "fundamental breach" in article 10 of ULIS. They make the following comments:

(*a*) The Netherlands states that article 10 of ULIS gives greater security for the parties affected by the contract. It submits that the requirement in the present text that one party know whether "substantial" detriment has resulted or will result for the other party would be difficult both for the party who is required to have such knowledge and for the courts, who might render widely differing judgements in this regard.

(*b*) Austria proposes that, if article 10 of ULIS were adopted, the words "*de même qualité*" in the French version be deleted. They are not in the English text and they are both ambiguous and superfluous.

3. Yugoslavia (para. 13) states that the question raised by article 9 is that of the meaning of "substantial detriment" and how will it be determined. It notes the simplicity and easy comprehension of the definition of "fundamental breach" in the present text in contrast with article 10 of ULIS which is complicated, hard to comprehend and difficult to apply in practice. It also notes that the definition in the present text narrows the scope of the provision as compared with that in article 10 of ULIS which appears to cover a larger number of situations.

4. The Federal Republic of Germany (paras. 12-13) states that the term "fundamental breach of contract" is not elucidated by defining it through reference to the vague idea of a "substantial detriment". The decisive point for determining whether the injured party can declare the contract avoided should be whether the result of the breach of contract is that the injured party no longer has an interest in the performance of the contract and whether this could have been foreseen by the party committing the breach at the time of the conclusion of the contract. It proposes the following text in replacement:

> "A breach committed by one of the parties to the contract is fundamental if its result is that the other party has no further interest in the performance of

the contract and if the party in breach at the time of the conclusion of the contract, foresaw or had reason to foresee such a result."

5. The Philippines (para. 7) proposes the deletion of the words "and the party in breach foresaw or had reason to foresee such a result". Unless these words are deleted, the party in breach will always allege that he neither foresaw nor had reason to foresee the substantial detriment which occurred. It should be sufficient that the substantial detriment in fact occurred.

6. Austria (para. 3) suggests that if the current text is maintained, it should be clarified at which moment the party in breach must have foreseen or had reason to foresee the result in order for the breach to be "fundamental".

ARTICLE 10

Paragraph (1)

1. Zaire (paras. 10-11) states that it is necessary to determine what are the "means appropriate in the circumstances". Since there are several means of communication as well as several circumstances, the question arises whether it is sufficient to use any means of communication.

2. Norway (para. 17) proposes that the words "Notices provided for by" be deleted and replaced by the words "Communications under", which would have the effect of making this paragraph applicable to all communications called for by the proposed Convention and not only to notices. Norway also proposes that the word "the" in the phrase "by the means appropriate . . ." be deleted, which would reduce the implication that only one means of communication might be appropriate in the circumstances. The text of article 10 (1) as proposed by Norway is as follows:

"(1) Communications under this Convention must be made by means appropriate in the circumstances."

3. The United States (para. 10) proposes the deletion of article 10 (1) in conjunction with a redrafting of article 10 (3). The text of article 10 as proposed by the United States is set out in paragraph 11 of this analysis.

Paragraph (2)

4. The USSR (para. 4) proposes that this paragraph be redrafted to make it clear that no prior notice need be given before a declaration of avoidance is forwarded to the party in breach and that the notice must be in writing. The text it proposes is as follows:

"(2) A declaration of avoidance of the contract is effective only if it takes the form of written notice to the other party."

5. Pakistan (para. 5) states that for a declaration of avoidance of contract, the notice given by a party should be well in advance in order to assess the reasons for the avoidance of contract and to evaluate its genuineness.

6. Norway (para. 17) submits a drafting proposal.

7. As a result of its proposal to delete article 10 (1), the United States (para. 10) proposes that article 10 (2) be renumbered as article 10 (1).

Paragraph (3)

8. Finland (para. 6), Norway (paras. 16-17) and the United States (paras. 8-10) propose that article 10 (3) should apply to other notices and communications in addition to those already mentioned in that article.

9. Finland (para. 6) proposes that article 10 (3) should also apply to notices given pursuant to articles 16 (1), 27 (2), 30 (2), 45 (2), 48, 49 and 50 (4).

10. Norway (paras. 16-17) states that article 10 (3) should apply to notices given pursuant to articles 16 (1), 27 (2), 47 (3) and 50 (4). However, it should not apply to notices under articles 28, 29 (2) and (3), 44, 46 and 47 (3), second sentence. Norway states that it is not clear whether the provision should apply to notices under articles 63 (1) and (2) or 65 (2). Norway proposes, therefore, the following text:

"(3) Where notice of lack of conformity, of avoidance or of suspension or any notice required by articles 27 paragraph 2 or 50 paragraph 4 is sent by appropriate means within the required time, the fact that the notice fails to arrive within such time, or that its contents have been inaccurately transmitted, does not deprive the sender of the right to rely on the notice."

11. The United States (paras. 8-10) proposes that article 10 (3) should be made to cover all communications called for by the proposed Convention. Such a policy would assure that the question of lost or delayed transmissions would be treated uniformly by all courts and tribunals in respect of all communications. It would also preclude the possible interpretation of article 10 (1) that a notice which is sent by other than the means appropriate in the circumstances would be denied any effect even though it arrived in time although not by an approved means. Therefore, the United States proposes the deletion of article 10 (1), the renumbering of article 10 (1), the renumbering of article 10 (2) as article 10 (1), the redrafting of article 10 (3) to read as set out below and its renumbering as article 10 (2). The text of article 10 as proposed by the United States is as follows:

"(1) A declaration of avoidance of the contract is effective only if notice is given to the other party.

"(2) If any other notice, request or communication provided for by this Convention is sent by means appropriate in the circumstances within the required time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice."

12. Poland (para. 12) states that article 10 (3) ought to be amended in order to balance the rights and obligations of the parties to a contract of sale of goods.

ARTICLE 11

Comments of the Working Group on the International Sale of Goods

1. In the report of the Working Group on the International Sale of Goods on the work of its eighth session (A/CN.9/128, paras. 33-35)* the Working Group notes that the different language versions of article 11 of the draft Convention and of the parallel text of article 3 of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) are not identical. The Working Group notes that the use of the expression "need not be evidenced by writing" in the English language version suggests that the article regulates only matters of evidence and of the proper form of the offer and the acceptance but that it does not overcome a

* Reproduced in this volume, part two, I, A, above.

national rule of law that a contract for the international sale of goods must be in writing either to be validly formed or to be enforceable before the courts of that country. It is further noted that the French language version uses the phrase "*aucune forme n'est prescrite pour . . .*" which suggests that the article goes to questions of validity and enforceability.

2. Awaiting the consideration by the Commission of article 11 of the present draft Convention, the Working Group decided to place in square brackets both article 3 of ULF and an alternative text proposed by the Secretariat. The alternative text proposed by the Secretariat is as follows:

"Neither the formation or the validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means."

3. The Working Group also notes that it might be possible to reach a compromise in relation to the problem of the form of contracts by retaining the substance of article 3 of ULF with a proviso that it does not overcome contrary provisions in the municipal laws of the place of business of either party.

Article as a whole

4. The Federal Republic of Germany (para. 14) and ICC (paras. 13-14) recommend that article 11 be retained as is.

5. The USSR (para. 5) proposes the deletion of article 11. It states that the question of the form of the contract should be regulated by the proposed Convention, on the Formation of Contracts for the International Sale of Goods. It goes on to state that if a decision is taken to retain a provision in the draft Convention on the form of contracts, that provision should stipulate that contracts must be in writing if so required by national legislation, even if the national legislation of only one of the parties to the contract so requires. The USSR also states that if the contract is not in writing, article 11 should provide either that the contract in such cases is void, or that the law of the State whose legislation requires that the contract be in writing should apply.

6. Bulgaria (para. 2) and the United States (para. 11) state that they accept article 11 as it is drafted. However, both of these States would add a second paragraph which would provide that the contract of sale should be in written form when the legislation of one of the parties so requires. The United States proposes the following text:

"(2) The provisions of paragraph (1) do not affect an otherwise valid restriction on the authority of a party to conclude a contract other than in a prescribed form or manner if that restriction is prescribed by statutory law of the State where the party has its place of business and is either known to the other party or is widely known and regularly observed by parties to contracts of the type involved."

7. The Philippines (para. 8) propose that for any sale to be enforceable it must be evidenced by writing, note or memorandum. It proposes the following text:

"A contract of sale to be enforceable must be evidenced by writing, note, or memorandum signed or acknowledged by the parties or their authorized agents, although it need not be subject to any other requirements as to form. It may be proved by means of proof generally recognized by the law of evidence."

Proof by means of witnesses

8. Madagascar (para. 4) and Yugoslavia (para. 16) state that they accept the first sentence of article 11 but propose that the second sentence be deleted. They state that proof by means of witnesses is unreliable.

9. Pakistan (para. 6) proposes that if a contract of sale is not evidenced by writing, the witness should be from the chamber of commerce or association of trade in respect of the commodity in question.

10. Zaire (para. 12) states that the proposed Convention should specify in article 11 which witnesses may prove a contract since the question arises whether witnesses might not be from States not parties to the contract.

ARTICLE 13

1. ICC (para. 15) states that the redrafting of article 17 of ULIS, which is now article 13 of the draft Convention, represents an improvement.

2. Poland (paras. 7-8) suggests that it would be advisable to precede article 13 by a general clause to the effect that in the interpretation and application of the stipulations of a contract, the intentions of the parties as well as the purpose they wish to achieve are to be taken into account.

Choice of law

3. For a suggestion by the USSR (para. 17) in respect of a choice of law provision which, it states, might go in article 13, see the analysis of proposed article 4 *bis*.

Chapter III. Obligations of the seller

ARTICLE 14

1. ICC (para. 16) states that the deletion of "conformity" as a prerequisite for "delivery" is welcomed by the ICC and that the suppression of the distinction between non-delivery or late delivery and delivery to the wrong place is also an improvement.

2. Pakistan (para. 7) states that the original documents should preferably be routed through authorized commercial banks to ensure realization of the amount in question.

Section I. Delivery of the goods and handing over of documents

ARTICLE 15

Definition of delivery

1. ICC (para. 17) notes that the current text no longer attempts to establish a general definition of "delivery", which would be very difficult, but gives a definition for a few of the more important cases.

2. The United States (para. 20) notes that article 15 as drafted might give the implication that article 15 defines the act of delivery. However, it states, the function of article 15 is to set out the acts required of the seller

to fulfil his obligation to deliver, parallel to the provisions of article 41 which set out the acts required of the buyer to take delivery. Indeed, in most cases where the buyer fails to come for the goods, the seller will resell them and there will never be delivery to the buyer in breach. The text proposed by the United States (which includes a drafting proposal, see also comments of the United States, para. 23 (*a*)) is as follows:

"If the seller is not required to deliver the goods at a particular place, the seller's obligation to deliver consists:

"(*a*) If the contract of sale involves carriage of the goods, in handing the goods over to the first carrier for transmission to the buyer,

"(*b*) If, in cases not within the preceding paragraph, the contract relates to

"(i) Specific goods, or

"(ii) Unidentified goods to be drawn from a specific stock or to be manufactured or produced,

and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, in placing the goods at the buyer's disposal at that place;

"(*c*) In other cases in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."

Conformity of the goods

3. ICC (para. 16) and the Netherlands (para. 11) state their approval of the decision that conformity of the goods to the contract is not a requirement for delivery.

4. Bulgaria (para. 4), on the other hand, states that it is reasonable that, if the goods delivered do not conform with the contract, there should be no delivery, since the parties have agreed on clearly specified goods. The requirement of conformity will obviate the need to apply all the rules concerning guarantees in the event that the goods should be faulty.

Delivery and passage of risk

5. Sweden (para. 10) states that it is difficult to see why different conditions for delivery and for passage of risk have been laid down and suggests that it should be possible to co-ordinate the rules further. See also the comments of Bulgaria in paragraph 6 of this analysis.

Paragraph (a)

6. Bulgaria (para. 8) proposes that a provision be added to article 15 (*a*) and to article 65 (1) to the effect that delivery is made and the risk passes when the goods are handed over to the first carrier.

Paragraphs (b) *and* (c)

7. Bulgaria (para. 3) proposes that subparagraphs (*b*) and (*c*) should be amended so that delivery is made by the seller handing over the goods, as in ULIS, rather than "by placing the goods at the buyer's disposal". This would reflect the fact that the delivery is a bilateral act which can be made only with the participation of the buyer.

8. The United States (para. 20) notes that even though the seller has fulfilled his obligation to deliver by "placing the goods at the buyer's disposal" at a particular place, there has been no physical delivery because the goods have not been handed over to or taken over by the buyer. For the text proposed by the United States, see paragraph 2, above.

9. Pakistan (para. 8) states that in article 15 (*c*) the place of delivery should be clearly defined in the contract to avoid any misunderstanding.

ARTICLE 16

The Philippines (para. 9) and the United States (para. 23 (*b*)) submit drafting proposals.

ARTICLE 17

1. ICC (paras. 22-23) proposes that paragraphs (*b*) and (*c*) be amended by a provision that the seller has to give the buyer notice of the seller's choice of the date of delivery. ICC also proposes that if the buyer wants to claim damages because of late delivery, he should give notice thereof to the seller promptly (or at least within a reasonable time) after actual delivery.

2. Pakistan (para. 9) proposes that a clause might be added to this article to explain reasons in case of delay.

ARTICLE 18

Finland (para. 7) proposes the deletion of article 18 on the grounds that it is unclear whether this provision adds anything to the declaration in article 14.

Section II. Conformity of the goods

ARTICLE 19

Paragraph (1)

1. The United States (paras. 23 (*c*) and (*d*) submits two drafting proposals.

Subparagraph (1) (b)

2. ICC (para. 24) states that the expression "expressly or impliedly made known to the seller at the time of contracting" should be understood in the sense that the responsibility of the seller is engaged only when such particular purpose has been made clear to him. If this is not the understood meaning of this expression, it would be advisable to clarify the text in such direction.

3. The USSR (para. 6) proposes that paragraph (1) (*b*) should read: "(*b*) are fit for any particular purpose expressly made known to the seller at the time of the conclusion of the contract;".

Burden of proof

4. The Federal Republic of Germany (paras. 15-16) proposes a new paragraph which would deal with the party upon whom the burden of proof lies in a dispute about the non-conformity of the goods. It proposes a text as follows:

"(3) The seller has to prove that the goods delivered by him conform to the contract. However, if the buyer wants to rely on a lack of conformity which he discovered after the expiration of the period within which he had to examine the goods under article 22, the buyer has to prove this lack of conformity. The buyer is considered to have discovered the lack of conformity before the expiration of this period if he

has given the seller notice of the lack of conformity within a reasonable time after the expiration of this period."

Limitation of remedies

5. Norway (paras. 21-23) proposes a new article 26 (3), modeled on article 34 of ULIS, which would restrict the buyer to the remedies provided by this Convention in case of breach by the seller. Norway suggests that if the proposed text is felt to be appropriate only in case of non-conformity of the goods, it might be made into a new article 19 (3). For the text proposed by Norway, see paragraph 3 of the analysis of article 26.

Administrative regulations and industrial and intellectual property

6. ICC (paras. 25-26) states that in its view questions concerning the seller's responsibility for ensuring that the goods comply with administrative regulations or that the goods do not infringe industrial or intellectual property rights are governed by article 19. For a further description of the proposals of ICC on this point, see paragraphs 5 (*b*) and (*c*) of the analysis of article 7.

7. Under the proposals of Finland (para. 9) and Norway (para. 18) in respect of articles 7 (2) and 25 a determination that the seller has failed in his obligation to deliver goods free from the claims of a third party based on industrial or intellectual property would be treated as a failure to deliver goods which conform to the contract.

ARTICLE 21

Austria (para. 4) notes that, although the last sentence in article 21 expressly says that the buyer retains any right to claim damages as provided in article 55, article 29 (1) does not contain such a provision. Austria proposes, therefore, that since there is no reason to distinguish between the two articles, the provision should either be contained in both articles or, because the provision is not necessary, it should be in neither of them.

ARTICLE 22

Paragraph (1)

1. Finland (para. 8) proposes the deletion of the words "or cause them to be examined" on the grounds that there are several provisions in the proposed Convention where no reference is made to the fact that measures incumbent on a party to the contract might be taken by someone else. Finland sees no reason why such words should be in one such provision and not in the others.

Other comments

2. Pakistan (para. 11) states that examination before shipment of goods is preferable. Ex-destination examination may cause expense and complications.

ARTICLE 23

Paragraph (1)

1. Pakistan (para. 12) states that the term "reasonable time" wherever it occurs in the draft Convention should be clearly determined and defined.[5]

Paragraph (2)

2. ICC (para. 28) proposes that the period during which the buyer may give notice of a lack of conformity of the goods should be shortened from two years to one year since shorter periods than two years are frequently used in international trade.

3. ICC (para. 29) states its satisfaction with the wording of this provision to the extent that it provides that the fact that there is a shorter period of guarantee in the contract is to be understood as a shortening of the period within which the buyer may rely on hidden defects in the goods.

ARTICLE 25

Substantive proposals

1. The substantive proposals made in respect of article 25 have been described above in paragraphs 5 and 6 of the analysis of article 7.

Relationship with other provisions

2. The United States (para. 21) proposes that article 25 be relocated so that it either immediately precedes or immediately follows article 19. In that matter it would be made clear that, to the extent the context permits, the rules in articles 20-24 would be made applicable to the obligations imposed by article 25 in the same way as they are applicable to the obligations imposed by article 19.

3. Norway (para. 20) suggests that consideration should be given to the relation between article 25 and the preceding articles in section II, and in particular the relation to article 23 (2). It suggests comparing articles 52 and 53 of ULIS.

Remedies for breach of obligation under article 25

4. ICC (para. 27) states that article 25 as finally drafted by the Working Group is incomplete in so far as it does not spell out the consequences if the goods are not free from rights or claims of a third person. It proposes that some provision should be reintroduced similar to that in article 25 (2) as found in the report of the Working Group on the International Sale of Goods on the work of its sixth session (A/CN.9/100, annex I; Yearbook . . . , 1975, part two, I, 2).

5. Norway (para. 19) suggests the the buyer should have generally available the remedies under articles 26 to 33, as well as under articles 47 to 49, for breach of the seller's obligation under article 25. Questions arise as to whether articles 27 (2), 31 and 32 should be applicable to claims under article 25, but if the existence of third-party claims are understood to constitute a lack of conformity of the goods, as they should, these provisions would also apply. However, it is less clear whether article 30 (1) (*b*) should also be applicable to cases under article 25 since the third-party claim may be more or less well founded.

[5] The term "reasonable time" appears in articles 17 (*c*), 23 (1), 27 (2), 29 (2), 30 (2), 45 (2) (*b*), 46 (1), 46 (2), 47 (3), 48 (1), 50 (4) and 56 (1). Similar terms also appear in articles 28, 29 (3) and 44.

Section III. Remedies for breach of contract by the seller

General observations on section III

1. The Netherlands (para. 10) states its approval of the decision of the Working Group to consolidate the remedies of the buyer in one set of provisions.

2. The USSR (para. 18) suggests that the possibility be considered of combining the provisions concerning remedies for breach of contract by the seller (chap. III, sect. III) and remedies for breach of contract by the buyer (chap. IV, sect. III).

3. ICC (para. 31) notes that the consolidated system of remedies covering the seller's failure to deliver as well as his delivery of goods which did not conform to the contract may at first look appealing because of its simplicity. It notes, however, that delivery of defective goods and failure to deliver at all give rise to problems of different kinds and the rules in this connexion have had to be more or less differentiated in the present draft. Therefore, it states, the preference for a consolidated system of remedies shown in the draft may be more a matter of presentation than of substance. Nevertheless, ICC does not object to the approach now taken, provided that the remedies for different kinds of breaches are differentiated sufficiently.

4. Yugoslavia (para. 14) notes that the provisions dealing with sanctions in the case of breach of contract have been rendered more concise and simplified, but that they are less systematized or clear. Furthermore, as a result of reducing the number of articles, there are frequent references in the text to other articles of the proposed Convention. It finds that these references are a burden, especially to the businessmen to whom such an approach of cross-referencing is inconvenient.

5. Although Sweden (paras. 4-6) accepts the structure of the draft that all of the remedies for breach of contract by the seller are dealt with in one section and all of the remedies for breach of contract by the buyer are dealt with in another section, it finds that a number of adverse consequences follow from this structure.

ARTICLE 26

Article as a whole

1. The USSR (para. 7) states that if paragraph (1) is intended to mean that damages may be claimed in addition to the exercise of the rights provided in articles 27-33, and not as an alternative, then the meaning of paragraph (2) is not clear.

2. Pakistan (para. 14) states that the rules contained in paragraphs (2) and (3) should apply only if they are included in the contract.

Exclusivity of remedies

3. The Netherlands (para. 10) and Norway (paras. 21-23) propose the adoption of an additional provision similar to article 34 of ULIS that the buyer has no rights other than those conferred on him by the draft Convention. Norway proposes the following text as a new paragraph (3) of article 26 to come between the present paragraphs (2) and (3):

> "(3) The rights conferred on the buyer by this Convention exclude all other remedies based on lack of conformity of the goods [or on other failure by the seller to perform his obligations], except in case of fraud."

Norway suggests that if it is felt that this provision should relate only to cases of lack of conformity (which would be accomplished by deleting the words in brackets), the proposed provision could be inserted as a new paragraph (3) of article 19.

Notice of claim for late delivery

4. Sweden (para. 11) suggests that if the seller has not delivered the goods in time and the buyer wishes to claim damages for the delay, he ought to be required to make his claim known within a specified time-limit.

ARTICLE 27

Buyer's right to require cure

1. Yugoslavia (para. 15), the ICC (paras. 32-34) and Sweden (para. 12) comment on the question as to whether the present text of article 27 authorizes the buyer to require the seller to cure any defect in the goods.

(*a*) Yugoslavia assumes that that right does not exist and proposes the inclusion of that portion of article 42 of ULIS which authorized such a requirement. That portion of article 42 reads as follows:

> "1. The buyer may require the seller to perform the contract:
>
> "(*a*) if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects;"

(*b*) ICC says it is not clear whether the buyer could require the seller to cure any defect in the goods.

(*c*) Sweden agrees with the statement in paragraph 3 of the commentary to article 27 (A/CN.9/116, annex II; Yearbook . . . , 1976, part two, I, 3) that the present text of article 27 does so authorize the buyer.

(*d*) ICC and Sweden both state that such a right to cure should be contingent upon the possibility that the seller could remedy those defects and that he could do so without unreasonable cost to himself. Sweden suggests that such a clarification might go into article 27 (2).

Substitute goods

2. ICC proposes that the buyer's right to require substitute goods when the lack of conformity constitutes a fundamental breach should be expressly stated to be limited to unascertained (generic) goods, as it is in article 42 (1) (*c*) of ULIS. It should also be stated that the duty to deliver substitute goods falls on the seller only if he can do so without unreasonable efforts or costs to himself.

3. Norway (paras. 24-25) recommends that the time-limit in paragraph (2) for requesting substitute goods be applicable to any request for performance in cases where the seller has made delivery but where the goods do not conform with the contract. Norway proposes the deletion of paragraph (2) and the insertion of the following text:

> "(2) If the seller has made delivery, but the goods do not conform with the contract, the buyer loses his right to require performance, unless such request is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

"(3) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only where the lack of conformity constitutes a fundamental breach."

See also the Norwegian proposals in respect of article 28.

Non-delivery

4. Sweden (para. 13) states that in a case of non-delivery the buyer should be able to require the seller to deliver the goods only if he presents his request within a reasonable period of time after the last deadline for delivery.

ARTICLE 28

Effect of request for performance on remedies during additional period of time

1. The USSR (para. 8) raises the question whether article 28 should be understood to mean that the penalty provided for in the contract (for example, for delay in delivery) should also be regarded as a remedy to which the buyer cannot resort during the additional period of time provided in this article.

Remedies if performance is made during additional period of time

2. ICC (para. 37) states that article 28 must be understood to mean that if performance follows immediately upon a request, the buyer cannot avoid the contract because of late delivery. However, ICC states, a request for performance could be understood as readiness to receive the goods only if delivery follows promptly.

3. Finland (para. 10), the Federal Republic of Germany (paras. 17-18) and Norway (paras. 26-29) propose that the text should make it clear that the buyer retains his right to exercise the appropriate remedies once the additional period has expired.

(*a*) Finland proposed an additional sentence as follows:

"After the period has expired, the buyer may resort to any remedy which is not inconsistent with performance by the seller on the buyer's request."

(*b*) The Federal Republic of Germany proposes an additional sentence as follows:

"However, the buyer is not deprived of any right he may have to claim damages for delay in the performance."

(*c*) For the proposal of Norway, see the third sentence of the proposal of Norway in the following paragraph of this analysis.

Other proposals

4. Norway states that the main purpose of article 28 is not to provide for a right to request performance, but to regulate the buyer's power to fix an additional period for performance. It states that this purpose should come more in the forefront of the text. Therefore, Norway proposes the following text:

"Subject to the provisions of article 27, the buyer may fix an additional period of time of reasonable length for performance by the seller. During such period the buyer cannot resort to any remedy, unless the seller declares that he will not comply. After the period has expired, the buyer may resort to any remedy which is still open to him and not inconsistent with performance by the seller of the buyer's request."

5. Norway also states that where the buyer does not fix an additional period of time of fixed length, as in its text proposed in paragraph 4 of this analysis, the suspensive effect of the buyer's request for performance should be for a reasonable period of time. However, Norway suggests that such a period of unfixed reasonable time should not have the effect of authorizing the buyer to avoid the contract under article 30 (1) (*b*). To implement these suggestions, Norway proposes modifications to article 30 (see para. 9 of the analysis of article 30) and the following text as a new paragraph (2) to article 28:

"(2) Where the buyer requests the seller to perform, without fixing an additional period referred to in paragraph (1), the request is assumed [, for the purpose of the provisions thereof,] to include the fixing of a period of reasonable length."

6. Sweden (para. 14) notes that article 28 does not apply if "an additional time period of reasonable length" was not stated as part of the request for performance. However, it states, even if no time-limit or a time-limit of less than reasonable length (e.g. "promptly") has been stated, the buyer should not be able to avoid the contract if performance is made either at once or within the period indicated.

Request for cure

7. In its comments on article 30 (1) (*b*) the Federal Republic of Germany (paras. 23-24) proposes that the buyer be given the right to declare the contract avoided if the seller fails to cure a lack of conformity after having been requested to do so under article 28. See paragraph 3 of the analysis of article 30 for the proposed text.

8. For additional proposals in respect of the buyer's right to require the seller to cure a failure of performance, see paragraph 1 of the analysis of article 27. For proposals in respect of the seller's right to cure, see paragraph 1 of the analysis of article 29.

ARTICLE 29

Relationship of cure to other remedies

1. Finland (para. 11) and the Federal Republic of Germany (paras. 20-22) note that the seller's right to cure his failure to perform his obligations is limited to cases where no unreasonable inconvenience or unreasonable cost is caused to the buyer. Finland, therefore, proposes that the seller's right to cure be given priority over the buyer's declaration of avoidance or reduction of the price by deleting that portion of the text after the words "unreasonable expense". On the other hand the Federal Republic of Germany proposes that only the words "or has declared the price to be reduced in accordance with article 31" be deleted. In addition, the Federal Republic of Germany proposes that in article 31 it be made clear that the seller's right to cure failures under article 29 takes precedence over the buyer's right to have the price reduced.

Paragraph (1)

2. As noted in the analysis of article 21, Austria (para. 4) proposes that the drafting of articles 21 and 29 (1) be made identical in respect of the buyer's retention

of any right he might have to claim damages under article 55.

Paragraphs (2) and (3)

3. ICC (para. 38) proposes the deletion of the words in paragraph (2) "or, if no time is indicated, within a reasonable time" and the words "or within a reasonable period of time" in paragraph (3). By this deletion the seller would have an additional period of time within which to perform only if he has requested of the buyer whether he would accept performance during a specified period of time.

4. Sweden (para. 15) suggests that the rule of paragraph (2) should be limited to those cases in which the seller indicates in his request a reasonable time within which he intends to perform. It states that if such an indication is not made, the buyer would sometimes find it so evident that he would not accept the goods that he might not bother to reply.

5. The United States (para. 23 (*e*)) submits a drafting proposal in respect of paragraphs (2) and (3).

ARTICLE 30

Ipso facto *avoidance*

1. Hungary (para. 6), ICC (para. 30) and Yugoslavia (para. 8*a*) state their approval of the deletion of the provisions on *ipso facto* avoidance and their replacement by the rule that avoidance takes place only upon notice given by the party not in breach. Yugoslavia notes that the doctrine of *ipso facto* avoidance could have serious and harmful consequences to the developing countries.

2. The Netherlands (paras. 12-14) notes that the elimination of *ipso facto* avoidance makes for greater clarity in the cases of articles 26, 30 and 62 of ULIS but that *ipso facto* avoidance does not raise as serious difficulties when commercial usage requires the buyer to purchase goods to replace those which the seller has failed to deliver or which do not conform to the contract and it is reasonable for the buyer to do so, or when commercial usage requires the seller to resell the goods and it is reasonable for him to do so. In these two cases articles 25 and 61 of ULIS provide for *ipso facto* avoidance. This has the advantage that one party cannot speculate on the direction in which prices might fluctuate by putting off his decision concerning performance or avoidance in a case where a replacement purchase or resale is in conformity with usage and is possible.

Paragraph (1) (b)

3. The Federal Republic of Germany (paras. 23-24) proposes that the buyer's right to declare the contract avoided should exist also in the case where the seller does not cure a non-conformity of the goods within a reasonable additional period of time as well as when he does not deliver the goods within that period of time. The Federal Republic of Germany notes that in many cases the buyer's interest in the performance of the contract would be infringed by defective delivery just as much as by a failure to deliver at the agreed time. It proposes a text as follows:

> "(*b*) If the seller has been requested to make delivery or to cure a lack of conformity under article 28 and has not complied with the request within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request."

4. Bulgaria (para. 6) proposes the deletion of paragraph (1) (*b*), the result of which would be that a contract could be avoided only in the event of a fundamental breach of contract.

5. The Federal Republic of Germany (para. 23) and ICC (para. 39) state that insignificant defects should not give rise to a right to avoid the contract under article 30 (1) (*b*). The Federal Republic of Germany states that this seems to be self-evident and, consequently, to require no express rule. ICC (para. 39) states that if only a part of the goods are missing or a defect has not been remedied within an additional period of time, the situation should come under subparagraph (*a*) and that a fundamental breach should be a prerequisite for avoidance. However, ICC does not state whether it believes such to be the necessary consequences of the current draft or whether it believes that an amendment to the text is called for.

6. Norway (para. 30) proposes a drafting change in article 30 (1) (*b*) to be adopted if its proposals in respect of article 28 are adopted.

Paragraph (2)

7. ICC (para. 40) states its approval of the introduction of the provisions in respect of the loss of the right of avoidance.

8. Bulgaria (para. 6) proposes the simplification of paragraph (2). It states that the buyer should forfeit his right to declare the contract avoided if he has accepted performance which does not conform with the contract without immediately protesting.

9. Norway (para. 31) proposes a drafting change in article 30 (2) (*b*) to be adopted if its proposals in respect of article 28 are adopted. The proposed drafting change would also make reference to article 29. The text as proposed is as follows:

> "(*b*) In respect of any other breach than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time applicable under articles 28 or 29."

ARTICLE 31

1. Finland (para. 11) and the Federal Republic of Germany (paras. 20-22) state that it should be made clear that the seller's right to cure a failure to perform under article 29 should take precedence over the buyer's right to reduce the price. Both States propose amendments to article 29 to achieve this result. The Federal Republic of Germany suggests that article 31 also be amended to make this result clear but does not propose a specific text.

2. Pakistan (para. 15) suggests that reduction in price should be clearly defined in the contract or be mutually agreed upon thereafter.

3. The United States (para. 23*d*) submits a drafting proposal.

ARTICLE 32

Paragraph (2)

1. The USSR (para. 9) proposes that in paragraph (2) after the words "if the failure to make delivery

completely" the word "and" should be replaced by "and/or" since a fundamental breach of the contract may occur where only one element is present (e.g. failure to make delivery completely, or failure to make delivery in conformity with the contract) and it is not necessary for both to be present.

Proposed paragraph (3)

2. Norway (para. 39) suggests that as an alternative to its proposed amendment of article 48 (2), a new article 32 (3) might be added to the effect that if a buyer avoids a contract in respect of any delivery, there is the possibility of his avoiding the contract as to deliveries already made as well as to future deliveries. See paragraph 2 of the analysis of article 48 for the proposed text.

Chapter IV. Obligations of the buyer

Section I. Payment of the price

ARTICLE 36

1. Pakistan (para. 16) and the USSR (para. 10) state that the price must be determined or determinable. The USSR, therefore, proposes the deletion of this article.

2. ICC (paras. 41-42) proposes that article 36 be amended so that, if a contract has been concluded but does not state the price or expressly or impliedly make provision for its determination, the price to be charged would be the price prevailing at the time of delivery rather than the price prevailing at the time of the conclusion of the contract.

3. The United States (para. 23 (*f*)) submits a drafting proposal.

ARTICLE 39

Paragraph (1)

1. Finland (para. 12) states that the second sentence of paragraph (1) does not seem to add anything to the first sentence and proposes that it be deleted.

Paragraph (2)

2. The United States (para. 23 (*g*)) submits a drafting proposal.

Paragraph (3)

3. Pakistan (para. 16) states that the time-limit during which the goods can be examined must be defined.

ARTICLE 40

The USSR (para. 11) proposes that article 40 read as follows:

> "The buyer must pay the price on the date fixed or determinable by the contract or this Convention without the need for any request or other formality on the part of the seller."

Section II. Taking delivery

Section III. Remedies for breach of contract by the buyer

General observation on section III

The USSR (para. 18) suggests that the possibility be considered of combining the provisions concerning remedies for breach of contract by the seller (chap. III, sect. III) and remedies for breach of contract by the buyer (chap. IV, sect. III).

ARTICLE 42

The USSR (para. 12) states that this article gives rise to the same doubts as does article 26, i.e. that if paragraph (1) is intended to mean that the seller could claim damages in addition to exercising the rights provided in articles 43 and 46, and not as an alternative, then the meaning of paragraph (2) is not clear.

ARTICLE 43

1. The Philippines (para. 10) and the United States (paras. 12-14) suggest that the seller's right to require the buyer to perform his obligations should be limited in certain ways as described in the following paragraphs.

2. The Philippines proposes that the seller be able to require the buyer to perform his obligations only if the seller has already performed his own obligations under the contract. The text of article 43 as proposed by the Philippines is as follows:

> "The seller, after he has duly complied with his obligation under the contract, may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement."

3. The United States proposes that the seller be able to require the buyer to perform his obligations, and especially the obligations to pay the price and to take delivery of the goods, only if it is not reasonable for the seller to mitigate any loss resulting from the breach by reselling the goods. The text of article 43 as proposed by the United States is as follows:

> "The seller may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement or in the circumstances the seller should reasonably mitigate the loss resulting from the breach by reselling the goods."

4. The United States goes on to suggest an alternative solution which involves a modification of article 59 (see para. 2 of the analysis of article 59). The United States concludes by stating that, if neither of these suggestions was adopted, it would be desirable to limit the action for the price to cases in which the buyer has accepted the goods or the goods have been destroyed or damaged after the risk has passed.

5. Sweden (para. 13) states that when the buyer has not paid the price the seller should be able to require him to do so only if he has made his request within a reasonable period of time after the last deadline for payment.

ARTICLE 44

Proposals and comments similar to those in respect of article 28

1. Finland (para. 13), the Federal Republic of Germany (para. 19) and Norway (para. 32) propose that if their proposals in respect of article 28 are accepted, similar (in the case of Norway) or identical amendments should be made to article 44.

2. The USSR (para. 13) states that article 44 gives rise to the same doubts as article 28, i.e. as to whether this article should be understood to mean that a penalty provided for in the contract (for example, for delay in performance) should also be regarded as a remedy to which the buyer could not resort during the additional period of time provided for in this article.

Proper time-limit not stated

3. Sweden (para. 14) notes that article 44 does not apply if "an additional time period of reasonable length" is not stated as part of the request for performance. However, it states, even if no time-limit or a time-limit of less than reasonable length has been stated (e.g. "promptly"), the seller should not be able to avoid the contract if performance is made either at once or within the period indicated.

4. Norway (para. 32) proposes a new paragraph on the buyer's right to request the seller to make known whether he will accept performance, a provision modelled on article 29. If Norway's proposals noted in paragraph 1 of this analysis were accepted, the new paragraph would be paragraph (3) of this article. The new text as proposed by Norway is as follows:

"(3) Where the seller has not requested performance, the buyer may request the seller to make known whether he will accept performance. If the seller does not comply within a reasonable time, the buyer may perform within the time indicated in his request, or if no time is indicated, within a reasonable time. The seller cannot, during either period of time, resort to any remedy which is inconsistent with performance by the buyer. A notice by the buyer that he will perform within a specified period of time or within a reasonable time is assumed to include a request under this paragraph that the seller make known his decision."

ARTICLE 45

Ipso facto *avoidance*

1. The comments in respect of *ipso facto* avoidance of Hungary (para. 6), ICC (para. 30) and Yugoslavia (para. 8*a*), which are summarized in paragraph 1 of the analysis to article 30, and of the Netherlands (paras. 12-14), which are summarized in paragraph 2 of the analysis to article 30, apply also to article 45.

Paragraph (1)

2. ICC (paras. 43-45) proposes that article 45 (1) be amended so that once the seller has allowed the buyer to take possession of the goods, he could not take them back from the buyer unless the buyer has failed to pay the price within the additional period set by the seller pursuant to article 44. ICC states that where the buyer has not yet taken delivery of the goods, the rule expressed in the current text of article 45, i.e. that the seller has an immediate right to avoid the contract if there is fundamental breach, is acceptable.

3. Sweden (para. 4) states that if the buyer has paid the price but failed to take delivery, there is no reason why the seller should be able to avoid the contract. It would be enough for the seller to have the possibility of selling the goods on the buyer's account.

Paragraph (1) (b)

4. Bulgaria (para. 6) proposes the deletion of paragraph (1) (*b*), the result of which would be that a contract could be avoided only in the event of a fundamental breach of contract.

5. Norway (para. 32) proposes that, if its suggestion in respect of article 28 is accepted, article 44 should be amended as proposed in paragraph 32 of its comments and that article 45 (1) (*b*) should be amended to conform with the proposed amendment to article 30 (1) (*b*) as set out in paragraph 30 of its comments.

6. The United States (para. 22) notes that in international sales the critical step in the buyer's performance is often not the buyer's actual payment of the price but the establishment of "a letter of credit or a banker's guarantee", as stated in article 35. Therefore the United States proposes that article 45 (1) (*b*) be amended to read as follows:

"(*b*) if the buyer has been requested under article 44 to pay the price, or to take the necessary steps with respect to payment required under article 35, or to take delivery of the goods, and has not complied with the request within the additional period of time fixed by the seller in accordance with article 44 or has declared that he will not comply with the request."

Paragraph (2)

7. Bulgaria (para. 6) proposes the simplification of article 45 (2). It states that the seller should forfeit his right to declare the contract avoided if he has accepted performance which does not conform with the contract without immediately protesting.

8. ICC (para. 46) proposes that article 45 (2) should be amended so that the seller would have to react to the fact of the buyer's breach within a reasonable period of time after the discovery of the breach and make his choice as to whether he will avoid the contract upon the expiry of an additional period of time set by him or set out a new additional period.

9. Norway (paras. 33-37) suggests that article 45 (2) should distinguish between late payments and other delays in performance. It states that the right of avoidance because of late payment should remain open until the entire payment has been made. However, once the entire payment has been made, it should be too late to declare the contract avoided because of the late payment.

10. Norway also suggests that in respect of any other breach (including delay in taking delivery), the seller should be able to declare the contract avoided even after he has received payment if he has requested performance by the buyer under article 44. This is considered to be preferable to the alternative that once payment had been made, the seller's right to declare the contract avoided is lost no matter what is the nature of the breach.

11. Norway proposes the following text of article 45 (2) to implement these suggestions:

"(2) However, in cases where the buyer had paid the price the seller loses his right to declare the contract avoided if he has not done so:

"(*a*) in respect of late payment, before the seller has become aware that payment has been made; or

"(*b*) in respect of any other breach than late payment, within a reasonable time after the seller knew

or ought to have known of such breach, or after the expiration of any additional period of time applicable under article 44."

ARTICLE 46

Norway (para. 38) proposes that the last sentence of paragraph (2) should read:

"If the buyer fails to do so after having received the request, the specification made by the seller is binding."

Chapter V. Provisions common to the obligations of the seller and of the buyer

Section I. Anticipatory breach

The United States (para. 16) proposes that the caption to section I of chapter V should be expanded to read: "Section I. Anticipatory breach; instalment contracts". This proposal is made in conjunction with the proposal of the United States in respect of article 48 (1).

ARTICLE 47

Relationship between article 47 and article 49

1. Bulgaria (para. 7) states that the present wording of articles 47 and 49 does not show any clear difference between them. It goes on to state that article 49 seems to be superfluous unless it is included in the form of an addition to article 47.

2. Sweden (para. 16) and ICC (paras. 47-48) on the other hand state that the general rule in article 49, that prior to the date for performance a party can declare the contract avoided only if it is clear that the other party will commit a fundamental breach, should be relied upon rather than the rule in article 47. Sweden states that article 47 should be limited to suspending performance. ICC states that article 47 could be abused by one party requesting security from the other party, e.g. by requesting a letter of credit or a performance guarantee, when such security was not contracted for at the time of the conclusion of the contract. Therefore, it proposes that the last part of paragraph (3) (after the word "thereof" in the first sentence) and every reference to "adequate assurance" be deleted.

Paragraph (1)

3. The United States (para. 23 (*h*)) submits a drafting proposal.

Paragraph (2)

4. Finland (para. 14) proposes that the second sentence of paragraph (2) be deleted as it does not seem to add anything to article 7.

ARTICLE 48

Partial avoidance

1. The United States (para. 15) notes that there is no provision which authorizes the seller to make a partial avoidance of the contract equivalent to the provision in article 32 which allows the buyer to do so. The United States notes that where the buyer's performance is seriously deficient with respect to one instalment, the seller should be permitted to refuse his counter-performance in respect of that instalment even though the failure in respect of that instalment does not give him good reason to fear a fundamental breach in respect of future instalments. Therefore the United States proposes that a new paragraph (1) be added to article 48 and that the current paragraphs (1) and (2) be renumbered as paragraphs (2) and (3). The text as proposed by the United States is as follows:

"(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment."

Paragraph (2)

2. Norway (para. 39) proposes that paragraph (2) should be amended, or alternatively a new article 32 (3) should be added, so that if a buyer avoids a contract in respect of any delivery, there is the possibility of his avoiding the contract as to deliveries already made as well as to future deliveries. Norway proposes the following text for paragraph (2):

"(2) If a buyer avoids the contract in respect of any delivery [under a contract for delivery of goods by instalments] and if, by reason of the interdependence with such delivery, other previous or future deliveries cannot be used for the purpose contemplated by the parties in entering into the contract, the buyer may also, provided that he does so at the same time, declare the contract avoided in respect of such previous or future deliveries."

3. The United States (paras. 19, 23 (i)) submits two drafting proposals.

Order of articles 48 and 49

4. Austria (para. 5) proposes that the order of articles 48 and 49 should be reversed for systematic reasons.

ARTICLE 49

1. Bulgaria (para. 7) proposes the deletion of article 49 as being superfluous in the light of article 47.

2. Austria (para. 5) proposes that the order of articles 48 and 49 should be reversed for systematic reasons.

Section II. Exemptions

ARTICLE 50

Article as a whole

1. Hungary (para. 6) states its approval of the text of article 50 while the ICC (para. 49) states that it is a considerable improvement over article 74 of ULIS.

Paragraph (1)

2. Australia (para. 9) states that the proposed Convention does not deal satisfactorily with the problems of non-performance due to causes other than fault on the part of the non-performing party. It states that quite different considerations should apply in the adjustment of rights between the parties to a contract where its performance is impeded by circumstances for which neither party is responsible from those considerations which should apply where one of the parties has by his own

fault been responsible for non-performance or misperformance and so has caused loss to the other party. In particular it notes (para. 10) that the present provisions are inadequate where there is a temporary impediment to performance. See paragraph 11 of analysis under this article.

3. Austria (paras. 6-7) and the Federal Republic of Germany (paras. 25-26) propose a new text for paragraph 1 which would eliminate any reference to the term "fault" in order to avoid any confusion with the use of the term of "fault" under national laws. The text as proposed by both respondents is as follows:

"(1) If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which he could not reasonably have been expected to take into account or to avoid or to overcome."

Austria also notes that the expression *"de même qualité"* should be deleted from the French version of the text.

4. ICC (paras. 52-53) proposes a redrafting of paragraph (1) so as to eliminate the use of the word "fault" and to use in its place the words "beyond the control of a party". The text as proposed by the ICC is as follows:

"(1) Where a party has not performed one of his obligations he shall not be liable for damages for such non-performance if he proves that it was due to circumstances beyond his control which he could not reasonably have taken into account at the time of the conclusion of the contract and the consequences of which he cannot reasonably be expected to prevail against or to overcome."

5. Norway (para. 40) proposes a redraft of paragraph (1) as follows:

"(1) Where a party has not performed one of his obligations he is not [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 beyond his control and of a kind which a party in the same situation could not reasonably be expected neither to take into account at the time of the conclusion of the contract nor to avoid or overcome."

6. The USSR (para. 14) proposes a new text of paragraph (1) as follows:

"(1) If a party has not performed one of his obligations, he is not liable for such non-performance if he proves . . .".

7. The United States (para. 17) states that article 50, while being generally satisfactory, does not sufficiently distinguish between the case of the destruction of specific goods which the parties assumed would be in existence (see example 50A in the commentary, A/CN.9/116, annex II)* and the destruction of goods that the seller planned to use to fulfil the contract (see example 50B in the commentary). The deficiency could be remedied if a requirement is added to article 50 that the non-occurrence of the impediment must have been an implied condition of the parties to the contract. The United States proposes the following revision of article 50 (1), which also contains some drafting suggestions in the second sentence:

"(1) If a party has not performed one of his obligations, he is not 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 and whose non-occurrence was an implied condition of the contract. For this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it after it occurred."

Paragraph (2)

8. The Federal Republic of Germany (paras. 27-28) proposes that paragraph (2) be deleted. It explains that paragraph (2) may constitute an unreasonable hardship for the seller. If the seller is relieved from liability under paragraph (1) for his own failure to perform, his liability for a subcontractor's fault appears to be justified at the most if he can claim and recover indemnity from the subcontractor. Such a claim for indemnity will, however, often fail for reasons of law or of fact, e.g. because of an agreement limiting liability or because of the subcontractor's insolvency.

9. ICC (para. 54) states that the provisions of paragraph (2) seem to correspond to what is frequently practised.

Paragraph (3)

10. The USSR (para. 14) proposes the deletion of paragraph (3).

11. Australia (para. 10), Norway (para. 41) and the United States (para. 24) propose that article 50 should take account of the fact that after there has been a temporary impediment to performance, the performance that would then be required of the party in order to carry out his own obligations under the contract may well be radically different from the performance contemplated when the contract was entered into.

(*a*) Norway proposes the following text:

"(3) The exemption provided by this article has effect for the period during which the impediment existed. However, the party concerned shall be permanently relieved of his liability [obligation] if, when the impediment is removed, the performance has so radically changed as to amount to a performance quite different from that contemplated by the contract."

(*b*) The United States (para. 24) proposes a new text, previously proposed by the United Kingdom during the seventh session of the Working Group on the International Sale of Goods (5-16 January 1976), as follows:

"(3) The provisions of paragraphs (1) and (2) are applicable only for the period during which the impediment existed. However, the non-performing party shall be permanently relieved of his obligation if, when the impediment is removed, the performance has so changed that the contract has become materially more burdensome than had the impediment not occurred."

12. See the comments of ICC, Poland and Sweden discussed in paragraphs 14, 15 and 16 of analysis under this article.

Remedies other than damages

13. ICC (paras. 49-53), Norway (para. 42), Poland (paras. 3-6) and Sweden (paras. 17-19) consider the remedies other than damages available to a party when

* See Yearbook . . . , 1976, part two, I, 3.

the other party does not perform one of his obligations under the contract but that failure is justified under article 50. See also the comments of Australia and the United States discussed in paragraph 11 of analysis under this article.

14. ICC (paras. 49-53) states that the current text is adequate in this respect and that article 50 should not be amended to contain any provisions granting final relief from the obligations under the contract on the grounds that performance has become impossible or that the conditions have changed so radically that performance would amount to performance of a different contract. The party who wishes to avoid the contract could rely on article 30 or 45, as the case may be, of the present text.

15. Poland (paras. 3-6) suggests that the proposed Convention should include a provision dealing with the principle *rebus sic stantibus* according to which any party has a right to renegotiate the conditions of a contract or to call for its termination. Therefore, Poland proposes to have the following added at the end of article 50:

> "If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination."

16. (*a*) Sweden (paras. 17-19) notes that the exemption from liability for damages may become worthless where the other party can force performance. Therefore, the duty to perform should also be exempted during the period of the impediment. After the impediment is removed, the party seeking performance should be required to request it. Should the impediment last a long time, the Convention should indicate that the obligation to perform ceases entirely.

(*b*) Sweden also suggests that the right to avoid the contract or to reduce the price should not be affected by article 50.

17. Norway (para. 42) suggests that article 50 should be amended to make it clear that the provisions on price reduction and avoidance of the contract are not affected by article 50 and, to implement this suggestion, proposes a new paragraph (5) as follows:

> "(5) Nothing in this article prevents a party from avoiding the contract or reducing the price in accordance with the provisions of this Convention on account of a failure by the other party to perform any of his obligations."

Section III. Effects of avoidance

Proposed article on effects of avoidance

Austria (para. 8) proposes to add a new article before article 51 in which the obligation to pay damages is stated fundamentally, in a way similar to the "exemption" in article 50.

ARTICLE 54

Paragraph (2)

Austria (para. 9) suggests that the buyer ought to be bound to account to the seller not only for all benefits which he has derived from the goods or part of them, but also for all benefits which he reasonably could have derived from them.

Section IV. Damages

Relationship between articles 55, 56 and 57

1. Australia (para. 11), Norway (paras. 43-49) and the USSR (paras. 15-16) comment on the relationship between articles 55, 56 and 57.

2. Australia and Norway state that the claimant should not be entitled to choose the damage formula in articles 55, 56 or 57 which is the most favourable to him in the particular case. They state that articles 56 and 57 should serve as illustrations of the operation of article 55 in particular circumstances.

3. In order to eliminate the possibility that the claimant could choose a damage formula which would give him a recovery in excess of his loss as measured by the difference in price as actually established, Norway proposes (see especially para. 48) that the reference to article 55 which is currently found in articles 56 (1) and 57 (1) should be deleted. It notes (para. 47), however, that other items of loss would continue to be governed by the rules of article 55 read in conjunction with article 59.

4. As an alternative, Norway (para. 49) proposes that article 56 (1) be amended by deleting the words "if he does not rely upon the provisions of articles 55 or 57" and substituting the words "as part of the damages referred to in article 55". If this proposal is adopted, article 56 (2) should be deleted as superfluous. Norway further notes that the claimant's option to invoke either article 56 or article 57 would follow from the wording in article 57.

5. The USSR (paras. 15-16) proposes that both article 56 (2) and article 57 (3) be amended to read as follows:

> "The provisions of paragraph (1) of this article do not preclude the right to seek other damages also, if the conditions of article 55 are satisfied."

The USSR notes that this proposal is prompted by a desire to avoid a direct reference to loss of profit since, in the first place, it is already referred to in article 55, where it is stated that damages are understood to cover loss of profit, and, in the second place, in such a situation it is difficult to imagine the loss of profit over and above the difference in prices.

ARTICLE 55

Foreseeability of loss

1. ICC (para. 56) expresses its doubts whether the limitation on the amount of damages which a claimant could recover to an amount no greater than "the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract" would be equitable in a number of circumstances. ICC suggests that consideration might be given to the deletion of this restriction in the last sentence of article 55 and to relying on a provision of a more general nature. However, it notes that deletion of any limitation of the loss for which one party has to compensate the other would not be advisable.

Damages in case of fraud

2. Norway (paras. 52-53) proposes the addition of a new article regulating the effect of fraud in the performance of the contract on the damages which could be recovered. This proposal is noted below following the analysis of article 59.[6]

ARTICLE 56

Paragraph (1)

1. Norway (paras. 43-49) proposes that the reference to article 55 be deleted from article 56 (1), as described in paragraph 3 of the analysis under section IV (Damages) above. As an alternative Norway proposes an amended text of article 56 (1), as described in paragraph 4 of that same analysis.

Paragraph (2)

2. The USSR (para. 15) proposes an amended text of article 56 (2), as described in paragraph 5 of the analysis under section IV (Damages) above.

3. If the Norwegian alternative proposal noted in paragraph 1 of this analysis is adopted, Norway (para. 49) proposes that article 56 (2) be deleted as superfluous.

ARTICLE 57

Paragraph (1)

1. Austria (para. 10) suggests that damages under this provision should be based on the current price on the date delivery is performed or should be performed while Bulgaria (para. 9) suggests that they should be based on the current price at the time of the failure to deliver the goods or at the time when the buyer could reasonably procure the same goods. Both Austria and Bulgaria state that the current wording of article 57 (1) allows a party to speculate on price changes by delaying the date on which he declares the contract avoided.

2. Norway (paras. 43-49) proposes that the reference to article 55 be deleted from article 57 (1), as described in paragraph 3 of the analysis under section IV (Damages) above.

Paragraph (2)

3. Pakistan (para. 17) notes that in calculating the amount of damages, "invoice value" should preferably be the basis.

Paragraph (3)

4. The USSR (para. 16) proposes an amended text of article 57 (3), as described in paragraph 5 of the analysis under section IV (Damages) above.

ARTICLE 58

Rate of interest

1. The Federal Republic of Germany (paras. 29-30) is of the view that the seller should not be able to claim such a high interest rate in every case of delay in payment of the purchase price, but only if he is actually compelled to take a loan at such a rate of interest. Furthermore, interest rates for unsecured short-term credits vary greatly depending on such factors as the customer's credit-worthiness. It proposes the deletion of the following words at the end of article 58:

> "but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business."

2. ICC (para. 57) suggests that the surcharge over the official discount rate which the seller might recover be increased from 1 per cent to at least 2 per cent.

ARTICLE 59

Mitigation by choosing remedy

1. In conjunction with its discussion of articles 55, 56 and 57, Norway (para. 43) notes that paragraph 4 of the commentary to article 56 (A/CN.9/116, annex II; Yearbook . . . , 1976, part two, I, 3) and paragraph 3 of the commentary on article 59 state that article 59 does not require the injured party to choose the remedy which would be the least expensive to the party in breach or the formula for the calculation of damages under article 55, 56 or 57 which would result in the lowest amount of damages. Norway states that, without admitting the correctness of this interpretation of these articles, the strong emphasis on the free choice of the claimant in the present text of articles 56 (1) and 57 (1) may permit an interpretation of article 59 which will reduce the duty of the claimant to mitigate the loss far beyond what is today the law in many countries. It therefore proposes amendments to articles 56 and 57 to eliminate this possible interpretation. The proposals are discussed in paragraphs 3 and 4 of the analysis under section IV (Damages) above.

Right to recover the price

2. The United States (paras. 12-14) makes alternative proposals in respect of articles 43 and 59. Its primary proposal (see paragraphs 3 and 4 of the analysis of article 43) is that article 43 be amended so that the seller could not require the buyer to pay the price if "in the circumstances the seller should reasonably mitigate the loss resulting from the breach by reselling the goods". However, if that proposal is not accepted, the United States proposes that the second sentence of article 59 be amended to read as follows:

> "If he fails to adopt such measures, the party in breach may claim a reduction in the damages, including any claim for the price, in the amount which should have been mitigated."

Duty to notify

3. Norway (para. 50) suggests that as part of the duty to mitigate the injured party should give notice of the breach to the party in breach, within a reasonable time. It is stated that this is of practical importance in cases where the party in breach may otherwise be unaware of the breach or the consequences thereof or may be in a better position to take measures to mitigate the loss. Therefore, Norway proposes the following addition to article 59:

> "These measures shall include, where appropriate, notice within a reasonable time to the party in breach for the purpose of enabling him to mitigate the loss."

[6] The similar provision in ULIS, i.e. article 89, has the effect, in particular, of restricting the application of that portion of article 82 of ULIS (equivalent to article 55 of the present text) which limits the damages which could be recovered to those which are foreseen or foreseeable by the party in breach.

Proposed new article on fraud

Norway (paras. 52-53) notes that article 89 of ULIS, which provides that in case of fraud, the determination of damages is to be made by reference to national law, has been deleted. Norway proposes that this decision should be reconsidered and that the draft Convention should regulate the effect of fraud in the performance of the contract on the damages which could be recovered.

Proposed new article on penalties

Poland (paras. 10-11) proposes that a new article be included in the draft Convention which would govern penalty clauses in a contract. It states that such a provision would facilitate, to a considerable degree, any claim of damages for breach of contract. Regulation of the question of penalties would also eliminate the existing lack of uniformity in this field in the various legal systems.

Section V. Presentation of the goods

ARTICLE 63

1. Pakistan (para. 18) states that it is reasonable to determine a time limit within which the notice required by paragraph (1) could be given and that the other party should be duly intimated. It also states that the preservation cost referred to in paragraph (3) should be intimated to the buyer by the seller.

2. The United States (para. 23 (*j*)) submits a drafting proposal in respect of paragraph (1).

Chapter VI. Passing of risk

ARTICLE 64

Article as a whole

1. Bulgaria (para. 10) suggests placing this article before the other articles of chapter VI, since it states the general rule for the passing of risk.

2. Austria (para. 11) states that this article should make it clear that only an act of the seller done before the handing over of the goods can be taken into account in determining whether loss or damage to the goods excuses the buyer from paying the price.

Delivery and passage of risk

3. Sweden (para. 10) states that it is difficult to see why different conditions for delivery and for passage of risk have been laid down and suggests that it should be possible to co-ordinate the rules further.

ARTICLE 65

Paragraph (1)

1. The Federal Republic of Germany (para. 31) states that article 65 (1) does not give a reasonable solution to the case where the seller undertakes to ship the goods from a particular place. For instance, in a situation in which a seller who has his place of business at an inland point contracts to provide for shipment of the goods from a particular seaport, the risk should pass when the goods are handed over to the sea carrier and not when they are handed over to the first carrier who carries them to the seaport. It therefore proposes that the following sentence be added to paragraph (1):

> "However, if the seller is required to hand the goods over to the carrier at a particular place, the risk does not pass to the buyer before the goods are handed over to the carrier at this place."

2. Bulgaria (para. 8) suggests that a provision should be added to article 65 (1) (and to article 15 (*a*)) to the effect that delivery is made and the risk thus passes when the goods are handed to the first carrier, a rule which it says would reflect international commercial practice.

3. The United States (para. 18) suggests that article 65 (1) should be made clearer in two respects. It should be made clear that article 65 (1) does not lead by negative implication to the result that the risk of loss in CIF or C and F contracts passes at destination rather than at the time the goods are handed over to the carrier. It should also be made clear that the seller's retention of control of the goods through taking a bill of lading does not derogate from the usual rules on risk of loss. The proposal of the United States, as set out below, also deletes the words "when the goods are handed over to the first carrier" and substitutes the words "when the goods are handed over to a carrier". The text of article 65 (1) as proposed by the United States is as follows:

> "(1) If the contract of sale involves carriage of goods and the seller is not required to hand the goods over to the buyer at a particular destination, the risk passes to the buyer when the goods are handed over to a carrier for transmission to the buyer. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk."

Paragraph (2)

4. Austria (para. 12) suggests that paragraph (2) should be amended in order to make it clear that in sales involving carriage of the goods, as well as in other sales, the risk passes to a buyer no earlier than at the moment of the conclusion of the contract.

5. Norway (para. 54) states that the risk in respect of goods sold in transit should not pass on shipment if the shipment is of unascertained or unidentified goods in bulk transmission to different consignees.[7] It therefore proposes that paragraph (2) read as follows:

> "(2) Where the contract of sale relates to goods already in transit, the risk is borne by the buyer as from the time when such goods were handed over to the first carrier for transmission to the seller or another consignee. However, the risk of loss of goods sold in transit does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods [or part thereof] had been lost or damaged, unless the seller discloses such fact to the buyer."

Proposed paragraph (3)

6. Norway (para. 55) proposes that a new paragraph (3) be adopted as previously proposed by it in the

[7] Norway makes no such proposal in respect of article 65 (1). That the risk does not pass on shipment under article 65 (1) if the shipment is of unascertained or unidentified goods in bulk transmission to different consignees, see para. 5 of the commentary to article 65, A/CN.9/116, annex II (Yearbook..., 1976, part two, I, 3).

Working Group on the International Sale of Goods (A/CN.9/WG.2/WP.25, article 67). That proposal reads as follows:

"(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 notice of the consignment and, if necessary, sent some document specifying the goods."

7. For similar proposals in respect of article 66, see paragraphs 6-9 of the analysis under article 66.

ARTICLE 66

Paragraph (1)

1. Bulgaria (para. 5) and the Netherlands (paras. 15-16) propose that the rule in article 97 (1) of ULIS, i.e. that the risk passes to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and of the Uniform Law, should be reinstated.

(*a*) Bulgaria goes on to say that, in line with its recommendations in respect of article 15, described in paragraph 4 of the analysis of article 15, delivery and the passage of the risk should take place only when the goods are handed over to the buyer rather than when they are placed at his disposal.

(*b*) The Netherlands states that the risk should not pass if the goods are not in conformity with the contract unless, as in article 97 (2) of ULIS, the buyer has neither declared the contract avoided nor required goods in replacement.

2. Norway (paras. 56-60) proposes a complete redraft of article 66, the full text of which is set out below in paragraph 9 of this analysis. As to the current paragraph (1), Norway proposes, *inter alia,* the deletion of the words "as from the time when the goods were placed at his disposal" to make it clear that the risk passes when the goods are taken over by the buyer. (See also paragraph 4, below.)

3. ICC (paras. 19-20) proposes on the other hand that article 66 (1) should be amended to provide that where the delivery term of the contract calls for the seller to place the goods at the disposal of the buyer during a specified period of time, the risk of loss should pass at the time the goods are placed at the buyer's disposal and not when they are taken over by him (article 66 (1)) or when the buyer is in breach for having failed to take them over (article 66 (2)). ICC states that such a rule, which is similar to that found in the Incoterm definition of "ex works", would reflect commercial practice.

Paragraph (2)

4. In its complete redrafting of article 66, Norway (paras. 56 and 57) proposes that the first sentence of paragraph (2) be consolidated with the current paragraph (1) in a new paragraph (1).

5. Norway (paras. 56, 58-59) also proposes that a new paragraph (2) be adopted which would govern the time at which the risk passes where the goods are at a place other than a place of business of the seller, such as a public warehouse. Norway notes that it has been suggested that the buyer "takes over" the goods when an appropriate act has occurred after which the third person is responsible to the buyer for the goods (and that the risk in such cases passes even before the buyer has committed a breach of contract by failing to take over the goods physically).[8] Norway further notes that it has been submitted that such an appropriate act includes the handing over of a negotiable document of title (e.g. a negotiable warehouse receipt) or the acknowledgement by the third person that he holds the goods for the benefit of the buyer. While Norway considers this interpretation not to be justified by the current text and one which would bring about uncertainties in applying the concept of "take over", it states that the problem calls for a clear provision. The text proposed by Norway is set out as paragraph (2) of its proposed redraft of article 66.

Paragraphs (2) and (3). Identifying goods to the contract

6. Norway (paras. 56 and 60) also proposes that the second sentence of the current paragraph (2) be restated, with a drafting change, as a new paragraph (3).

7. The United States (para. 25) proposes that a new paragraph (3) be added which would read as follows:

"(3) If the goods are not identified for delivery to the buyer, by marking with an address or otherwise, they are not clearly identified to the contract, unless the seller gives notice of the consignment and, if necessary, sends some documents specifying the goods."

The United States notes that its proposal is based upon one previously made by Norway during the seventh session of the Working Group on the International Sale of Goods.

8. For a similar proposal in respect of article 65, see paragraph 6 of the analysis under article 65.

Text proposed by Norway

9. The complete text of article 66 as proposed by Norway (para. 56) is as follows:

"(1) In cases not covered by article 65 the risk passes to the buyer when the goods are taken over by him or, where he has not done so in due time, from earlier moment when the goods have been placed at his disposal and he has committed a breach of contract by failing to take delivery.

"(2) If, however, the buyer is required to take over the goods at a place other than any place of the seller, the risk passes when the time for delivery has come and the buyer is aware, or has received notice, of the fact that the goods are placed at his disposal at such place.

"(3) Where the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been separated or otherwise clearly identified to the contract."

ARTICLE 67

The comments of the Netherlands (paras. 15-16) as described in paragraph 1 of the analysis under article 66 are also directed at article 67.

[8] See para. 2 of the commentary to article 66, A/CN.9/116, annex II (Yearbook . . . , 1976, part two, I, 3).