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ANALYSIS OF COMMENTS AND PROPOSALS BY GOVERNMENTS RELATING
TO ARTICLES 71 TO 101 OF ULIS

Note by the Secretary-General

CONTENTS

	<u>Paragraphs</u>
INTRODUCTION	1 - 5
ANALYSIS OF THE COMMENTS AND PROPOSALS	6 - 94
Article 71	6 - 7
Article 72	8 - 9
Article 73	10 - 14
Article 74	15 - 25
Article 75	26 - 28
Article 76	29 - 35
Article 77	36 - 37
Article 78	38 - 39
Article 79	40 - 47
Article 80	48 - 50
Article 81	51 - 55
Article 82	56 - 59
Article 83	60 - 61

CONTENTS (continued)

	<u>Paragraphs</u>
Article 84	62 - 65
Articles 85 and 86	66 - 67
Article 87	68 - 69
Article 88	70 - 71
Article 89	72 - 73
Article 90	74 - 76
Articles 91-93	77 - 78
Article 94	79 - 80
Article 95	81 - 82
Article 96	83 - 84
Article 97	85 - 87
Article 98	88 - 90
Article 99	91 - 92
Articles 100-101	93 - 94
Rearrangement of the provisions of chapters IV-VI of ULIS	95

INTRODUCTION

1. The UNCITRAL Working Group on the International Sale of Goods at its fourth session decided that "at its next session it would consider articles 60 to 90 of ULIS". ^{1/} At its informal meeting held during the sixth session of the Commission, the Working Group decided that at its fifth session it would also consider articles 91 to 101 of ULIS.

2. At its above meetings the Working Group on the International Sale of Goods requested the representatives of its members listed below to examine articles 71 to 101 and to submit the results of their examinations to the Secretariat. ^{2/} The allocation of articles was as follows:

Articles 71-73: Union of Soviet Socialist Republics, in collaboration with Austria, Brazil and the United Kingdom;

Article 74: United Kingdom, in collaboration with Brazil, Ghana, Japan and the Union of Soviet Socialist Republics;

Articles 75-77: United States of America, in collaboration with France, Hungary, Iran and Japan;

Articles 78-81: France, in collaboration with Hungary, Tunisia and the United States of America;

Articles 82-90: Mexico, in collaboration with Austria, India and Japan;

Articles 91-101: Austria, in collaboration with the United Kingdom, Mexico and India.

3. The following reports relating to the above articles have been received:

(a) Comments and proposals on article 74 of ULIS by the representative of the United Kingdom, incorporating observations by the representative of Ghana (annex I);

(b) Comments and proposals on articles 75 to 77 of ULIS by the representative of the United States and observations of the representatives of France and Hungary (annex II);

(c) Comments and proposals on articles 78 to 81 of ULIS by the representative of France prepared in co-operation with the representatives of Hungary, Tunisia and the United States (annex III);

^{1/} A/CN.9/75, para. 181.

^{2/} Articles 60-70 of ULIS had already been on the agenda of the fourth session of the Working Group; however, the Working Group at that session decided to defer consideration of those articles until its fifth session. Reports by representatives of members of the Working Group on the above articles and an analysis thereof by the Secretariat is contained in documents A/CN.9/WG.2/WP.15/Add.1 and A/CN.9/WG.2/WP.15, respectively.

(d) Comments and proposals on articles 82 to 90 of ULIS incorporating observations by the representative of Austria (annex IV);

(e) Observations and proposals on articles 91 to 101 of ULIS by the representative of Austria, prepared in co-operation with the representative of Mexico (annex V);

(f) Amendments proposed by the representative of Norway for the revision of articles 61 to 101 of ULIS (annex VI).

The text of the above reports appear in annexes I to VI to the present analysis.

4. Pursuant to the decision of the Working Group, the Secretariat circulated the above reports among representatives of the members of the Working Group for comments. The comments received from the representatives of Austria, Hungary and Norway are reproduced in annexes VII to IX.

5. The proposals and comments made in the above reports and the comments thereon that deal with a single issue are considered together in this analysis. This report also includes comments on articles 71-101 that appear in previous documents in the Commission.

ANALYSIS OF THE COMMENTS AND PROPOSALS

Article 71

6. Article 71 of ULIS reads:

Except as otherwise provided in article 72, delivery of the goods and payment of the price shall be concurrent conditions. Nevertheless the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods.

7. No comments were made on this article.

Article 72

8. Article 72 of ULIS reads:

1. Where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of article 19, effected by handing over the goods to the carrier, the seller may either postpone dispatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. In the latter case, he may require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.

2. Nevertheless, when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods.

9. The representative of Norway suggested that the words "either postpone despatch of the goods until he receives payment or" in paragraph 1 of this article should be deleted as misleading since in most cases there will be an agreement or

usage to the contrary. If deleted, the right to postpone despatch would depend on agreement or usage. He further suggested several drafting changes. The text of paragraph 1 as proposed by the representative of Norway reads:

"1. Where delivery is effected by handing over the goods to the carrier in accordance with subparagraph (a) of article 20, the seller may despatch the goods on terms that reserve to himself the right of disposal of the goods during the transit. The seller may require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods." 3/

Article 73

10. Article 73 of ULIS reads:

1. Each party may suspend the performance of his obligations, whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations.

2. If the seller has already despatched the goods before the economic situation of the buyer described in paragraph 1 of this article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.

3. Nevertheless, the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods, unless the document contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the document, when he acquired it, knowingly acted to the detriment of the seller.

11. The Arab Republic of Egypt criticized this provision on the ground that it would enable a seller to prevent the delivery of goods already despatched if he considered that the economic situation of the buyer justified such stoppage in transitu. Such a unilateral decision would open the door to arbitrary action and might have serious consequences for the buyer, in particular where the buyer was in a developing country having a vital need for certain goods. 4/

12. The representative of the United States suggested that this article should be broadened to allow the other party to remedy the situation by providing assurances. 5/

13. In respect of paragraph 2 of the article, Austria expressed the view that this paragraph, in imposing obligations upon the carrier, was in conflict with

3/ Annex VI, comments on article 72.

4/ A/CN.9/11/Add.3, p. 24, and A/7618, annex I, para. 95.

5/ Annex II, para. 7.

provisions of municipal and international law concerning the carriage of goods, and also placed an unreasonable burden on the carrier. 6/

14. The representative of Norway suggested that a new paragraph 4 should be added to this article. The paragraph would read:

"4. A party may not exercise the rights provided in paragraphs 1 and 2 of this article if the other party provides a guarantee for or other adequate assurance of his performance of the contract." 7/

Article 74

15. Article 74 of ULIS reads:

1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.

2. Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

3. The relief provided by this article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible.

(a) Paragraph 1

16. The representative of the United Kingdom made comments with respect to the form (annex I, paragraph 2) and substance (paragraph 5) of paragraph 1. These comments included the observation that the grounds for excuse in paragraph 1 were too broad since they were not limited to frustration but extend to cases where some unforeseen turn of events merely made performance unexpectedly onerous. In the opinion of that representative excuses for non-performance falling short of frustration should be either expressly provided for in the contract or ignored. 8/

17. The representative of Ghana supported the above opinion and noted that there were many considerations against recognition of, and giving legal effect to, circumstances other than frustrating events, to which the parties did not advert their attention at the time of making their contract. For example, it would be

6/ A/CN.9/11, p. 9.

7/ Annex VI.

8/ Annex I, para. 5.

very difficult to define such circumstances with sufficient precision to make for certainty and uniformity of application; it would be also difficult to bring those circumstances together into a single class by means of a definition, because of their possible diversity. Difficulties may further be caused by the wording of the article according to which an inquiry as to "the intention of the parties at the time of the conclusion of the contract" whether one of the parties would be bound to take into consideration or to overcome a circumstance, was not necessarily confined to the terms of the contract but could also be based on the not easily applicable standard "what reasonable persons in the same situation would have intended". The representative of Ghana suggested that, in view of these difficulties, the best solution would be to leave to the contracting parties to stipulate for such circumstances. 9/

18. The representative of the United Kingdom noted that several expressions in paragraph 1 of the article did not always clearly express the legislative intention. Thus the word "liable" was not used in the same meaning in this article as in other articles of ULIS; the expression "due to" introduced the problem of acceptable limits of cause and effect which cannot be settled in any easily identifiable principle; the phrase "regard shall be had to what reasonable persons in the same situation would have intended" also created difficulties since a reasonable seller and a reasonable buyer might have intended different things. 10/

19. The representative of the United Kingdom suggested that in order to accommodate the proposals mentioned in paragraphs 16 and 18 above, paragraph 1 of article 7⁴ be redrafted as follows:

"Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either that performance has become impossible owing to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome, or that, owing to such circumstances, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract; if the intention of the parties in these respects at the time of the conclusion of the contract was not expressed regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome." 11/

20. The representative of Norway suggested some drafting changes in the above text. The text as proposed by him reads:

"1. Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either (a) that performance has become impossible owing to circumstances of such nature which it was not contemplated by the contract that he should be bound to take into account or to avoid or to overcome, or (b) that, owing to such circumstances, performance would be so radically changed as to amount to the performance of a quite other obligation than that contemplated by the contract; if the intention of the parties in these

9/ Ibid., para. 7.

10/ Ibid., para. 2.

11/ Ibid., para. 5.

respects at the time of the conclusion of the contract was not expressed, regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome." 12/

21. Another aspect of the provision in paragraph 1 was raised by the representative of Czechoslovakia who, at the second session of the Commission, expressed the view that article 7⁴ did not deal with sufficient precision with the question whether the seller could escape liability because of governmental interference in private contractual relations, as for example where a government prevented goods sold to a foreign buyer from being shipped to the buyer. 13/

(b) Paragraph 2

22. The representative of the United Kingdom suggested that because of inconsistencies in the language of this paragraph, set forth in the comments, paragraph 2 of article 7⁴ should be redrafted. The text recommended by him, 14/ with certain drafting changes proposed by the representative of Norway, 15/ reads as follows:

"Where the circumstances which gave rise to the non-performance constitute only a temporary impediment to performance, the /exemption/ /Norway: relief/ provided by this article shall cease to be available to the non-performing party when the impediment is removed, /save that if/ /Norway: provided that/ performance would then, by reason of the delay, be so radically changed as to amount to the performance of /an obligation quite different from/ /Norway: a quite different obligation than/ that contemplated by the contract, the exemption shall be permanent."

(c) Paragraph 3

23. The Government of Austria noted that under the present text of ULIS the party who was the beneficiary of the obligation which was not performed and was liable for reciprocal performance, retained the possibility of declaring the contract void. In many cases he could only do so if he acted "promptly"; if for any reason he failed to act promptly he was obliged to perform without being entitled to reciprocal performance. In the view of Austria, this would constitute a hardship for that party. 16/

24. The representative of the United Kingdom expressed the opinion that article 7⁸ of ULIS, which is primarily concerned with avoidance on breach, might not be well suited to dealing with the consequences of frustration since the effects of avoidance, as laid down in article 7⁸, might be too drastic when non-performance was not due to any fault. 17/ The same representative noted further that there was no need to state in this paragraph that the party who had not performed might nevertheless avoid the contract on some other ground; there was nothing in

12/ Annex IX, para. 1.

13/ A/CN.9/31, para. 136.

14/ Annex I, para. 3.

15/ Annex IX, para. 1.

16/ A/CN.9/31, para. 135.

17/ Annex I, para. 5 (ii).

paragraph 1 to suggest that he might not do so and inclusion of this language might give rise to doubt as to what was intended. For this and other reasons explained in the report, this representative suggested that paragraph 3 be expressed as follows:

"The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present Law to declare the contract avoided or to reduce the price, unless the circumstances which gave rise to the exemption of the first party were caused by the act of the other party or of some person for whose conduct he was responsible." 18/

(d) Other proposals

25. Norway suggested that the party who wished to be relieved of his liability for non-performance should have a duty to notify the other party of the impediment so that failure to notify would entail liability to pay damages for the loss sustained by the other party through lack of proper notification. 19/

Article 75

26. Article 75 of ULIS reads:

1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations, under the contract in respect of any instalment, the other party has good reason to fear failure of performance in respect of future instalments, he may declare the contract avoided for the future, provided that he does so promptly.

2. The buyer may also, provided that he does so promptly, declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their interdependence such deliveries would be worthless to him.

27. In respect of paragraph 1 of this article, the representative of the United States suggested that in order to bring this article into conformity with the provisions on fundamental breach, the expression "failure of performance" should be replaced by the expression "a fundamental breach". 20/ The comments of the representative of France 21/ and those of the representative of Norway 22/ supported this proposal.

28. In respect of paragraph 2, the representative of the United States held that the word "worthless" was too strong and suggested the substitution of the

18/ Ibid., para. 4.

19/ A/CN.9/31, para. 134.

20/ Annex II, para. 3.

21/ Ibid., para. 9.

22/ Annex IX, para. 3.

expression "the value of such deliveries to him would be substantially impaired" for the words "such deliveries would be worthless for him". 23/ This proposal was supported by the representative of Norway 24/ and opposed by the representative of France on the ground that the suggested text would considerably heighten the uncertainty that already existed as a result of the subjective character of the word "worthless". 25/ The proposed change in the language of this paragraph was also opposed by the representative of Austria. 26/

Article 76

29. Article 76 of ULIS reads:

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

30. The representative of the United States examined this article upon the request of the Commission. Two proposals were made as a result of this examination. The first was to delete the word "fixed" since it might be read as limiting the application of the article to contracts in which a date is expressly stated. 27/ The representative of France supported this proposal. 28/

31. The other proposal made by the representative of the United States was to revert to the original language of this article as it appeared in article 87 of the 1956 draft of the Uniform Law, and to restrict the common law notion of anticipatory breach introduced by article 76 in the present text of the Law to cases where one of the parties "so conducts himself as to disclose an intention to commit a fundamental breach of contract". 29/ This proposal was objected to by the representatives of France and Hungary.

32. In the view of the representative of France, reversion to the original language of this article, thereby ruling out avoidance in cases where the defendant did not state his intentions, might involve the contracting party in excessive risk. 30/ This opinion was supported by the representative of Austria. 31/

33. The representative of Hungary objected to the proposal referred to in paragraph 31 above on the ground that conduct short of repudiation might also create uncertainties; there was, therefore, no reason to restrict the possibility of avoidance to cases where anticipation of a breach was based on the conduct of either party. He noted further that articles 76 and 48 were overlapping and suggested that both these articles be replaced by a single article which would constitute a separate section entitled "Anticipatory breach" in chapter V. The proposed article is as follows:

23/ Annex II, para. 4.

24/ Annex IX, para. 3.

25/ Annex II, para. 9 b.

26/ Annex VII, para. 3.

27/ Annex II, para. 5.

28/ Ibid., para. 12.

29/ Ibid., paras. 5-7.

30/ Ibid., paras. 13-19.

31/ Annex VII, para. 4.

/...

"Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a breach, the other party shall be entitled from this time on to exercise the rights provided in this Law for that particular breach." 32/

34. The above objections of the representatives of France and Hungary to the proposal referred to in paragraph 31 were shared by the representative of Norway. He also agreed with the proposal in paragraph 33 above that article 76 should be harmonized with article 48 but opposed the amalgamation of those articles into one single article. 33/ Instead, he suggested that article 76 be deleted; to cover the provisions contained therein article 48 should be redrafted and a new article 68 should be inserted. The suggested texts read:

"Article 48

The buyer may exercise the rights /as/ provided in articles 43 to 46 /and to claim damages as provided in article 82 or articles 84 to 87/, even before the time fixed for delivery, if it is clear that the seller will fail to perform /any of/ his obligations."

"Article 68

The seller may exercise the rights /as/ provided in articles 65 and 66 /and claim damages as provided in article 82 or articles 84 to 87/, even before the time fixed for performance, if it is clear that the buyer will fail to perform /any of/ his obligations." 34/

35. In respect of the Hungarian proposal that articles 48 and 76 should be merged, the Working Group will recall that it decided at the third session that the problem of "anticipatory breach" posed by article 48 should be studied in connexion with the related provisions on this problem that appear in later sections of ULIS. 35/ At its fourth session the Working Group provisionally approved the Secretary-General's recommendation (A/CN.9/75, annex II, para. 176) that article 48 be included in the consolidated set of remedies and decided to postpone final action on that article until it considered articles 75-77 on anticipatory breach. 36/

Article 77

36. Article 77 of ULIS reads:

Where the contract has been avoided under article 75 or article 76, the party declaring the contract avoided may claim damages in accordance with articles 84 to 87.

37. The representative of the United States noted that since damages could be claimed under article 78 (1), this article was unnecessary. In addition it was misleading to include it under the heading "Supplementary grounds for avoidance" rather than "Effects of avoidance". Consequently the article should be deleted. 37/ The representative of Norway agreed with this proposal. 38/

32/ Annex II, paras. 20-22.

33/ Annex IX, para. 4.

34/ Annex VI.

35/ A/CN.9/62, annex I, para. 30.

36/ A/CN.9/75, para. 134.

37/ Annex II, para. 8.

38/ Annex IX, para. 3.

Article 78

38. Article 78 of ULIS reads:

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

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

39. The representative of the United Kingdom, in his comments on article 74, noted that article 78 was primarily concerned with avoidance on breach and it might not be well suited to dealing with the consequences of frustration. In the opinion of this representative, the combination of avoidance with the remedies provided in this article might result in too drastic a remedy where the non-performance was not due to any fault. 39/

Article 79

40. Article 79 of ULIS reads:

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

2. Nevertheless, the buyer may declare the contract avoided:

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

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

(c) if part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered;

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

(e) if the deterioration or transformation of the goods is unimportant.

41. The representative of Norway suggested that the phrase "or to require the seller to deliver substitute goods" be inserted after the word "avoided" in paragraph 1 of the article, and that the introductory phrase in paragraph 2 should be redrafted to read: "2. Nevertheless, the preceding paragraph shall not apply:". 40/

42. In respect of subparagraph 2 (a) the representative of Hungary suggested that this subparagraph should be deleted since it was simply one case to which subparagraph (d) applied. 41/

39/ Annex I, para. 5 (ii).

40/ Annex VI, suggested text for new article 75.

41/ Annex III, para. 9.

43. The representative of Hungary suggested further that subparagraph 2 (c) should be amended to read: "(c) if parts of the goods have been sold, consumed ...". 42/ The representative of Austria disagreed with the addition of the word "sold" which, in his opinion, would lead too far. 43/

44. The representative of Norway suggested that the following words should be added to the end of subparagraph 2 (c): "or ought to have been discovered." 44/

45. Concerning subparagraph 2 (d) the representative of France suggested that this subparagraph should be redrafted: (a) to make it compatible with the provision of article 97, paragraph 1, whereby risk passes to the buyer when delivery is effected, and (b) to restrict the return of goods to cases where they have retained their substantial qualities. A text proposed by him was supported, with the addition of a few words, by the representative of Hungary. The proposed text, including this addition, reads as follows:

"(d) If the impossibility of returning the goods with their substantial qualities intact or in the condition in which they were received is due to the act of the seller /Hungary:/ or of some other person for whose conduct he is responsible." 45/

46. The representative of the United States stated that, in general he agreed with the above proposal, provided that return of the goods was still possible where the deterioration was due to the defect in the goods. 46/ The representatives of Tunisia, Austria and Norway, on the other hand, disagreed with the proposed text. The representative of Tunisia was of the opinion that the original text of subparagraph 2 (d) should be maintained; 47/ the representative of Austria made the same proposal but suggested that in order to adjust the original language of this subparagraph to that of paragraph 1, the words "or of returning them" should be deleted. 48/ Norway noted that it was important that the exceptions in paragraph 2 of article 79 should cover, inter alia, the perishing, deterioration and transportation resulting from the very nature of the goods (e.g. perishable goods), regardless whether such perishing, etc. was caused by non-conformity of the goods or by some other circumstance. Since other subparagraphs of article 79.2 did not cover such cases it was necessary that subparagraph 2 (d) should include them as well as fortuitous (accidental) events. 49/

42/ Ibid., para. 11.

43/ Annex VII, para. 6.

44/ Annex VI, text of new article 75, para. 2.

45/ Annex III, paras. 6-8.

46/ Ibid., para. 12.

47/ Ibid., para. 13.

48/ Annex VII, para. 6.

49/ Annex IX, para. 6.

47. In respect of subparagraph 2 (c) the representatives of France and the United States doubted whether, in view of the vagueness of its wording, this subparagraph should be maintained. 50/ On the other hand, the representative of Tunisia thought that the idea expressed in the subparagraph should be maintained but agreed that less ambiguous language was needed. 51/ The Hungarian representative suggested the use of the wording earlier adopted for article 33, paragraph 2. 52/ The representative of Austria agreed with this suggestion. 53/

Article 80

48. Article 80 of ULIS reads:

The buyer who has lost the right to declare the contract avoided by virtue of Article 79 shall retain all the other rights conferred on him by the present Law.

49. The representatives of France and Tunisia considered this article as superfluous and suggested its deletion: on the other hand, the representatives of Hungary and the United States preferred its retention. 54/ The representative of Austria supported the latter view if article 77 should be deleted. 55/

50. The representative of Norway suggested that after the word "avoided" the following phrase should be included: "or to require the seller to deliver substitute goods". 56/

Article 81

51. Article 81 of ULIS reads:

1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by Article 83, as from the date of payment.

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

50/ Annex III, paras. 15-17.

51/ Ibid., para. 17.

52/ Ibid., para. 17.

53/ Annex VII, para. 7.

54/ Annex III, paras. 18-20.

55/ Annex VII, para. 8.

56/ Annex VI, suggested next for new article 76.

(a) where he is under an obligation to return the goods or part of them; or

(b) where it is impossible for him to return the goods or part of them, but the contract is nevertheless avoided.

52. The representatives of both France and Tunisia considered that under paragraph 2 computation of the benefits which the buyer had derived from the goods would be a complicated and subjective operation, especially where the goods were bought for the buyer's personal use. The Tunisian representative was of the opinion that this difficulty could be eliminated by an improved wording of the article: on the other hand, the representative of France suggested that since the seller was allowed automatically to add interest to the price to be refunded by the buyer, the buyer should be allowed to determine the equivalent of the benefits derived by him from the goods. In the view of the French representative, such a provision would eliminate the somewhat inequitable provision of this article and would result in the set-off of two cash claims against each other - except, of course, where the goods were unusable or practically worthless for the purposes of the buyer. 57/

53. The representative of Austria disagreed with the above proposal on the ground that, if accepted, the seller would be subject to a forfeiture that in most cases would not correspond to the actual benefit received by the buyer. He further drew the attention to the fact that the sale of consumer goods had been excluded from the scope of application of the law and thus the difficulty of the computation of benefits derived from such goods did not justify the acceptance of the French proposal. 58/

54. The representative of Norway suggested that subparagraph 2 (b) of this article should be redrafted as follows:

"(b) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods." 59/

55. The Commission requested the representative of Mexico, in co-operation with the representatives of Austria, India and Japan, to examine chapter V, section IV (articles 82 to 90) of ULIS. In his report the representative of Mexico suggested that in view of the fact that the general rule on damages as contained in article 82 applied both where the contract was avoided and where it was not, this section should be redrafted accordingly and its title should be changed to "Damages". He further suggested that subtitle A should be changed to "A. Determination of their amount" and subtitle "B" should be deleted. 60/ The suggestions

57/ Annex III, paras. 21-27.

58/ Annex VII, para. 9.

59/ Annex VI, text of new article 77.

60/ Annex IV, paras. 1-2.

in respect of articles 82 and 90 of the representative of Mexico are referred to under the headings article 82 through article 90 below, following the text of the corresponding article of ULIS.

Article 82

56. The text of article 82 of ULIS reads:

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

57. The representative of Mexico suggested that this article be redrafted as follows:

"Damages for a breach of contract by one party shall consist (whether the contract is avoided or not) of a sum equal to the loss actually suffered by the other party.

Except as provided for by article 89, such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he knew then or ought to have been known to him as a possible consequence of the breach of the contract." 61/

58. The representatives of Austria and Norway made similar comments on the above text. The former representative suggested, with respect to the French version of the Mexican text of this article, that the expressions "perte subie" and "gain manqué" of article 82 (1) of ULIS should be maintained. In his reply to this comment the representative of Mexico expressed the view that the expression dommages-intérêts at the beginning of the article included both concepts but did not object to the maintenance of those expressions provided that experts of law and French language considered it necessary. 62/ The representative of Norway suggested that the text should contain an express reference to loss of profit. 63/

59. In the view of the representative of Hungary, the insertion of the word "actually" in the first paragraph of the Mexican text might create the impression that only damnum emergens was due. The representative of Hungary doubted further

61/ Ibid., Annex.

62/ Ibid., para. 3 (c).

63/ Annex IX, para. 11.

whether the insertion of the words "had foreseen or" in the second paragraph of the suggested text was appropriate; a party who foresaw losses and nevertheless failed to fulfil the contract might have acted in bad faith. 64/

Article 83

60. The text of article 83 of ULIS reads:

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

61. The representative of Mexico suggested the deletion of the words "plus 1%" at the end of the article and noted that the words "in any ~~event~~" in the second phrase of this article seemed to be superfluous. 65/ The representative of Norway, on the other hand, noted that the official discount rates are often much lower than the rates paid in private business. He therefore suggested that the expression "at a rate equal to the official discount rate" should be substituted by the phrase "at a rate of 6%, but at least at a rate of 1% more than the official discount rate" and, consequently, as also suggested by the Mexican representative, the words "plus 1%" at the end of the article should be deleted. 66/

Article 84

62. Article 84 of ULIS reads:

1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

2. In calculating the amount of damages under paragraph 1 of this Article, the current price to be taken into account shall be that prevailing in the market in which the transaction took place or, if there is no such current price or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

63. The representative of Mexico suggested that, in view of the considerations mentioned in paragraph 55 above, the introductory words "In case of avoidance of

64/ Annex VIII, paras. 1-2.

65/ Annex IV, para. 4.

66/ Annex VI, comments on new article 79.

the contract" should be deleted. Thus the article would commence with the words "Where there is a current price ...". He further expressed his agreement with the proposal of the Austrian representative that the reference under this article to the date "on which the contract is avoided" should be replaced by a reference to the date "on which delivery took place or should have taken place". 67/ This latter proposal, however, was not shared by the representative of Norway who expressed the view that the contractual delivery date or the date of actual delivery were not satisfactory in cases of non-delivery and delivery to a carrier. In the latter case it would be better to rely on the date on which the goods are handed over to the buyer or placed at his disposal at the place of destination unless the buyer has declared the contract avoided on an earlier date, in which case the date of avoidance should be the basis for the calculation of damages. On the other hand, in cases of non-delivery or non-payment, either the date of actual avoidance or the earliest date on which the contract could have been avoided should serve as such basis. 68/

64. The representative of Hungary noted that it was not clear from the text of this article whether in case of delayed delivery the injured party had an option between (a) basing his claim for damages on the price that prevailed on the contractual delivery time and (b) basing it on the price that prevailed on the actual delivery date. Such an option might lead to unwarranted results. 69/

65. At an earlier stage of the revision of ULIS, in 1968, the Government of the United Arab Republic commented that the meaning of the term "transaction" in the phrase "prevailing in the market in which the transaction took place" was not clear. In the view of that Government that term might be construed to refer to the place where preliminary negotiation took place, or the place where the contract was concluded, or the place where the contract was to be executed. 70/

Articles 85 and 86

66. Articles 85 and 86 of ULIS read:

Article 85:

If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

67/ Annex IV, para. 5.

68/ Annex IX, para. 13.

69/ Annex VIII, paras. 3-4.

70/ A/CN.9/31, para. 139.

Article 86:

The damages referred to in articles 84 and 85 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract, in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract.

67. No change was suggested in the text of these articles. However, the representative of Norway noted that since the Working Group was in favour of deleting the provisions contained in articles 25, 42 (1) (c), and 61 (2) of ULIS, it was desirable to add a provision to the revised text to ensure that the deletion of the said provisions does not affect the substance of the provision in articles 84 and 85. Consequently, he proposed that a new article following articles 85 and 86 (in the Norwegian draft articles 80 and 81) should be inserted in the uniform law. The proposed article reads:

"The damages referred to in articles 85 and 86 shall not, however, exceed the difference between the price fixed by the contract and the current price at the time when it would be in conformity with usage and reasonably possible for the buyer to purchase goods to replace, or for the seller to resell, the goods to which the contract relates. 71/"

Article 87

68. Article 87 of ULIS reads:

If there is no current price for the goods, damages shall be calculated on the same basis as that provided in article 82.

69. In view of the changes suggested in respect of article 82, the representative of Mexico proposed the deletion of article 87. 72/

Article 88

70. Article 88 of ULIS reads:

The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages.

71. The representative of Mexico suggested that the subtitle preceding article 88

71/ Annex VI, comments to new article 82.

72/ Annex IV, para. 8.

should be changed to "B. General provisions" and that the text of the article should be maintained in its original language. 73/

Article 89

72. Article 89 of ULIS reads:

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

73. The representative of Mexico suggested that the rule which was implicitly contained in the present text of ULIS should be more clearly expressed. Consequently, he proposed that the following sentence be added to Article 89: "However, such damages shall never be less than those which may result from applying the rules of articles 82 through 88." 74/

Article 90

74. Article 90 of ULIS reads:

The expenses of delivery shall be borne by the seller; all expenses after delivery shall be borne by the buyer.

75. The representative of Mexico suggested that the following expression should be added to the text at the beginning of this article: "Except as otherwise agreed" 75/

76. The representative of Hungary noted that under the revised draft of the uniform law the term "delivery" covered not only /as in ULIS/ delivery of goods which conformed to the contract, but also delivery of non-conforming goods, and raised the question whether that change in the concept of the said term did not require appropriate change in the provision of this article. 76/

Articles 91-93

77. Articles 91 to 93 of ULIS read:

Article 91

Where the buyer is in delay in taking delivery of the goods or in paying the price the seller shall take reasonable steps to preserve the goods; he

73/ Ibid., paras. 9 and 10.

74/ Ibid., para. 11.

75/ Ibid., para. 13.

76/ Annex VIII, para. 5.

shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 92

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

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

Article 93

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

78. No comments were made on these articles.

Article 94

79. Article 94 of ULIS reads:

1. The party who, in the cases to which articles 91 and 92 apply, is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.

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

80. The representative of Austria suggested that, in the French text of the first paragraph, the words "en temps utile" should be inserted between the words "pourvu qu'elle lui ait donné" and "un avis". 77/

77/ Annex V, para. 1.

/...

Article 95

81. Article 95 of ULIS reads:

Where, in the cases to which articles 91 and 92 apply, the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with article 94.

82. No comments were made on this article.

Article 96

83. Article 96 of ULIS reads:

Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible.

84. The representative of Austria, with the agreement of the representative of Mexico, expressed the view that this article served no purpose since it only contained a questionable definition of the term "risk"; the article, therefore, could be deleted. ^{78/} This proposal was opposed by the representative of Hungary who held that this article did not endeavour to define the concept of risk but rather to provide for cases where the risk had passed; he noted further that drafting techniques required that legal consequences should follow and not precede the descriptions of facts to which they related. The Hungarian representative suggested therefore that this article, if retained, should appear as article 99 of the revised draft. ^{79/} The representative of Norway also expressed the view that this article should be retained. ^{80/}

Article 97

85. Article 97 of ULIS reads:

1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law.

2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in

^{78/} Ibid., para. 3.

^{79/} Annex VIII, paras. 6-7.

^{80/} Annex IX, para. 16.

accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement.

86. The representative of Austria suggested that the words "handing over" wherever they appear in paragraph 2 of this article, should be replaced by the word "delivery". 81/ With the agreement of the representative of Mexico, he further proposed that the provisions of article 99, with slight drafting changes, should be brought over in this article as paragraph 3. The text of the proposed new paragraph reads:

"3. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time of the handing over of the goods to the carrier. However, where the seller knew or ought to have known, at the time of the conclusion of the contract, that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract." 82/

87. The Norwegian representative proposed that article 97 be replaced by the following text:

"1. The risk shall pass to the buyer when delivery of the goods is affected.

2. Same as article 101 of ULIS." 83/

Article 98

88. Article 98 of ULIS reads:

1. Where the handing over of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.

2. Where the contract relates to a sale of unascertained goods, delay on the part of the buyer shall cause the risk to pass only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done.

3. Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery.

81/ Annex V, para. 4.

82/ Ibid., para. 7 and proposed text of article 97.

83/ Annex VI, text of new article 94.

89. The representative of Mexico proposed that the expression "handing over" should be replaced by the word "delivery" in paragraph 1 of this article. 84/

90. The representative of Austria suggested that since article 20, paragraphs (b) and (c) contained clear provisions as to the time when delivery occurred, paragraphs 2 and 3 of this article should be deleted. 85/

Article 99

91. Article 99 of ULIS reads:

1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.

2. Where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract.

92. The representatives of Austria and Mexico jointly suggested that the provisions of this article, with slight drafting changes, should be transferred to article 97 as a new paragraph 3. The revised text appears above in connexion with article 97 (para. 86, above).

Articles 100-101

93. Articles 100 and 101 of ULIS read:

Article 100

If, in a case to which paragraph 3 of Article 19 applies, the seller, at the time of sending the notice or other document referred to in that paragraph, knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document.

Article 101

The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses.

94. The representatives of Austria and Mexico suggested that both article 100 and article 101 should be deleted. Article 100 refers to paragraph 3 of article 19,

84/ Ibid., para. 6.

85/ Ibid., para. 5.

which had been deleted, while article 101 would only serve to create misunderstanding. 86/ The representative of Norway, on the other hand, was of the opinion that the provisions of both articles should be maintained. 87/

Rearrangement of the provisions of chapters IV - VI of ULIS

95. The representative of Norway suggested, in addition to proposals concerning changes in the text of articles 71 to 101, that the provisions of those chapters IV to VI should be rearranged. The proposal is contained in annex VI.

86/ Ibid., paras. 9-10.

87/ Annex IX, paras. 18-19.