

I. INTERNATIONAL SALE OF GOODS

1. Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (Geneva, 21 January-1 February) (A/CN.9/87)*

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INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session held in 1969. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, France, Ghana, Hungary,

India, Japan, Kenya, Mexico, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and the United States of America.¹

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the United

¹ The terms of two of the 14 members of the Working Group elected by the Commission at its second and fourth sessions, namely those of Iran and Tunisia, expired on 31 December 1973.

* 14 March 1974.

Nations Commission on International Trade Law on its second session.²

3. The Working Group held its fifth session at the United Nations Office at Geneva from 21 January to 1 February 1974. All members of the Working Group were represented.

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

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

(a) Provisional agenda and annotations (A/CN.9/WG.2/L.1)

(b) Analysis of comments and proposals by representatives of States members of the Working Group on articles 56 to 70 of ULIS: note by the Secretary-General (A/CN.9/WG.2/WP.15)

(c) Text of comments and proposals by representatives of States members of the Working Group on articles 56 to 70 of ULIS (A/CN.9/WG.2/WP.15/Add.1)

(d) Analysis of comments and proposals by representatives of States members of the Working Group relating to articles 71 to 101 of ULIS: note by the Secretary-General (A/CN.9/WG.2/WP.17)

(e) Text of comments and proposals by representatives of States members of the Working Group on articles 71 to 101 of ULIS (A/CN.9/WG.2/WP.17/Add.1)

(f) Comments of the representative of Hungary on article 74 of ULIS (A/CN.9/WG.2/WP.17/Add.2)

(g) Compilation of draft articles 1 to 59 to ULIS as approved by the Working Group at its first four sessions (A/CN.9/WG.2/WP.18)

(h) Issues presented by chapters IV to VI of the Uniform Law on the International Sale of Goods: report of the Secretary-General (A/CN.9/WG.2/WP.19).

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

7. At its first meeting, held on 21 January 1974, the Working Group, by acclamation, elected the following officers:

Chairman M. Jorge Barrera-Graf (Mexico)

Rapporteur . . M. Gyula Eörsi (Hungary)

8. The Working Group adopted the following agenda:

1. Election of officers

2. Adoption of the agenda

3. Continuation of consideration of articles 58 to 70 of ULIS

4. Consideration of articles 71 to 101 of ULIS

5. Future work

6. Adoption of the report.

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

10. The text of articles 58-101 as adopted or as deferred for further consideration appears in annex I* to this report. The texts of comments and proposals to representatives of members on articles 56 to 70 and on articles 71 to 101 ((A/CN.9/WG.2/WP.17/Add.1 and 2) appear as annexes II and III, respectively, and the report of the Secretary-General on issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19) as annex IV.

I. CONTINUATION OF CONSIDERATION OF ARTICLES 58 TO 70 OF ULIS

11. The Working Group at its fourth session, in addition to considering articles 18-55 of ULIS, commenced the consideration of articles 56-70. With respect to this second group of articles, the Working Group took action with respect to articles 56 and 57, and gave preliminary consideration to articles 58 and 59. Final action on these two articles was deferred until the present session.

CHAPTER IV. OBLIGATIONS OF THE BUYER

SECTION I. PAYMENT OF THE PRICE

A. Fixing the price (continued)³

Article 58

12. Article 58 of ULIS reads:

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

13. At the fourth session of the Working Group some representatives proposed that the words "in case of doubt" should be replaced by the words "unless otherwise agreed by the parties".⁴

14. Several representatives opposed the above proposal on the grounds that under article 5 of the revised text the agreement of the parties always prevails over the provisions of the uniform law and, therefore, there was no need to repeat this general rule in specific articles. Some representatives expressed the view that the expression "in case of doubt" should be deleted on the ground that it is but another way to refer to contractual stipulation or usage and is therefore superfluous. Other representatives asserted that doubts might arise in respect of whether there was a contractual stipulation for the case regulated in article 58.

15. At the fourth session it was proposed that a paragraph be added to resolve doubts as to whether the price should be paid in the currency of the seller or of the buyer.⁵

16. The Working Group decided to adopt article 58 of ULIS without any changes.

* Annexes I to IV are separately reproduced below in this chapter of the Yearbook, sections 2 to 5 respectively.

³ The headings of the report referring to specific topics are the same as in ULIS. They have been added to facilitate reference to the various parts of the report.

⁴ A/CN.9/75, para. 166; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

⁵ *Ibid.*, para. 169.

² Report of the United Nations Commission on International Trade Law on the work of its second session (1969). *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), UNCITRAL Yearbook, Vol. I: 1968-1970, part two, II, A.

B. Place and date of payment

Article 59

17. Article 59 of ULIS reads:

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

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

18. The Working Group at its fourth session adopted this article without changes, and deferred consideration of a proposed additional paragraph pending submission of a revised draft by the representative concerned.⁶ No such draft has been introduced.

19. With reference to the general rule of article 59 that payment shall be in the seller's country, one representative stated that sellers from developing countries sometimes preferred payment in the currency of third countries and quite frequently buyers in developing countries preferred to make payments for international purchases in their own countries. For this reason, it was suggested that the possibility of deviation from the general rule should be clearly expressed, and proposed the addition of the words "unless otherwise agreed" at the beginning of paragraph 1.

20. One representative suggested that in paragraph 2 of this article, after the expression "subsequent to the conclusion of the contract" the words "the risks or" should be inserted. The proposal was not supported by other representatives.

21. The Working Group decided to adopt article 59 of ULIS without any changes.

Article 60

22. Article 60 of ULIS reads:

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

23. One representative suggested deletion of the words "without the need for any other formality". Another representative expressed the view that article 60 had been inserted in ULIS to avoid the application of national rules requiring the performance of certain formalities before the price is due, and therefore, without the above-quoted words, the whole article would lose its purpose.

24. Some representatives expressed doubts as to the necessity for this article. Other representatives, however, were of the opinion that retention of the article would be useful.

25. The Working Group decided to adopt article 60 of ULIS without any changes.

New article 59 bis

26. The Secretary-General in his report on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19) came to the conclusion that subsection I B (articles 59 and 60) of ULIS entitled "Place and date of payment" was incomplete. In this report it was noted that while article 59 included certain rules on the place of payment, subsection I B of ULIS made no adequate provision for the time for payment. More particularly, this subsection failed to deal with the relationship between the time and place for payment by the buyer and the seller's handing over of the goods in the normal case where the contract called for despatch of the goods. It was noted that answers to some of the problems could be found in articles 71 and 72 of ULIS, but that it was not easy for a user of ULIS to piece together these scattered provisions on payment, and that articles 71 and 72 presented problems of clarity and completeness.

27. In order to provide for a more unified presentation of rules on the place and date of payment, the above report suggested that subsection I B of ULIS should include an additional article, and suggested the following text which could replace or follow article 60:⁷

"1. The buyer shall pay the price when the seller, in accordance with the contract and the present law, hands over the goods or a document controlling possession of the goods.

"2. Where the contract involves carriage of goods, the seller may either:

"(a) By appropriate notice require that, prior to dispatch of the goods, the buyer at his election shall in the seller's country either pay the price in exchange for documents controlling disposition of the goods, or procure the establishment of an irrevocable letter of credit, in accordance with current commercial practice, assuring such payment; or

"(b) Dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

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

28. All representatives who spoke on this question agreed in principle with the Secretary-General's proposal that a single subsection of ULIS should deal with all aspects of the place and time of payment. However, several comments were made in respect of the terms and language of the suggested draft.

29. Several representatives expressed the view that the terminology of the proposed draft should be brought into line with that of article 20 by replacing the words "hand over the goods" by "deliver the goods" or "place the goods at the buyer's disposal" and that an appropriate single expression should be used for the description of the documents falling within the scope of this article. It was noted that the expres-

⁶ *Ibid.*, para. 177.

⁷ A/CN.9/WG.2/WP.19, paras. 11 and 21; see annex IV to this report, reproduced below in section 5.

sion "documents controlling possession of the goods" and "documents controlling disposition of the goods" used in the draft may be construed as referring to different types of documents. One representative noted that in common law terminology "entitlement to goods" would seem to be an appropriate expression.

30. As regards paragraph 1 of the draft, one observer noted that the incorporation of the provisions of articles 71 and 72 in the new draft resulted in the loss of the important provision that the seller could make payment a condition for handing over the goods. He therefore suggested that a sentence to this effect should be added to the text.

31. Most comments were directed towards paragraph 2 (a) of the draft. Several representatives considered that this paragraph should be merged with or immediately followed by article 69. One observer expressed the view that the provision in this subparagraph entitling the seller to require the buyer, at the buyer's election, to pay the price or to procure the establishment of an irrevocable letter of credit prior to dispatch of the goods was contrary to commercial usage, and stated that the cost of procuring a letter of credit might in fact prove an excessive burden on the buyer. On the other hand, one representative suggested that the seller should also be entitled to require, where appropriate, the procurement of a performance bond.

32. A few drafting changes were also proposed in respect of subparagraph 2 (a) of the draft. Thus, one representative suggested the replacement of the expression "in accordance with current commercial practice" by "in accordance with usage"; another representative proposed that after the words "of the goods" the following phrase should be inserted: "or procure such documents relating to payment as will satisfy the seller's requirement under the contract, or will conform to current commercial practice in the particular trade". One observer proposed the deletion of the words "in the seller's country".

33. One representative was of the opinion that paragraph 2 (a) should also contain a provision stating the buyer's obligation to open a letter of credit if required by the contract and the consequences should he fail to do so.

34. The Working Group set up a drafting party (Drafting Party II), composed of the representatives of France, Ghana, Japan, United Kingdom and the observers for Norway and the International Chamber of Commerce, and requested the Drafting Party, taking into consideration the comments and proposals made in the plenary, to redraft the suggested new article.

35. Drafting Party II submitted its proposal to the 13th meeting of the Working Group on 29 January 1974. On the basis of that proposal, the Working Group decided:

(a) To delete article 69 of ULIS and replace it by the following new article 56 *bis*:

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

(b) To include in the law the following new article 59 *bis*:

"1. The buyer shall pay the price when the seller, in accordance with the contract and the present Law, places at the buyer's disposal either the goods or a document controlling their disposition. The seller may make such payment a condition for handing over the goods or the document.

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

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

(c) To delete articles 71 and 72 of ULIS.

C. Remedies for non-payment

Articles 61-64

36. Articles 61 to 64 of ULIS read as follows:

Article 61

"1. If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation.

"2. The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected."

Article 62

"1. Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

"2. Where the failure to pay the price at the date fixed does not amount to a fundamental breach of contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or, provided that he does so promptly, declare the contract avoided."

Article 63

"1. Where the contract is avoided because of failure to pay the price, the seller shall have the right to claim damages in accordance with articles 84 to 87.

"2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with articles 82 and 83."

Article 64

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

37. The Working Group at its fourth session decided to replace the separate sets of remedial provisions on the buyer's remedies for the seller's failure to perform his obligations by a consolidated set of such remedies in chapter III of ULIS. The Secretary-General in his report on issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19) came to the conclusion that the reasons for consolidating the remedial provisions in chapter III were also applicable to chapter IV.

38. As stated in the Secretary-General's report, several articles in chapter IV contain remedial provisions. Articles 61 to 64 provide for remedies for non-payment, articles 66-68⁸ for failure of the buyer to take delivery or to make a specification and article 70⁹ for failure of the buyer to fulfil any of his other obligations.

39. The Secretary-General suggested that the consolidated text of remedial provisions should follow the substantive provisions of chapter IV. The last such provision being article 69 of ULIS, and in view of the incorporation of articles 71 and 72 of ULIS in draft article 59 *bis*¹⁰ the Secretary-General proposed that the new remedial articles should provisionally be numbered as articles [70] to [72 *bis*].¹¹

40. The consolidated text as suggested by the Secretary-General in his report¹² reads as follows:

Article [70]

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

"(a) Exercise the rights provided in articles [71] to [72 *bis*]; and

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

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

Article [71]

"The seller has the right to require the buyer to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the seller has acted inconsistently with that right by avoiding the contract under article [72 *bis*]."

⁸ For text of these articles see paras. 71, 73 and 82 below.

⁹ For text of article 70 see para. 86 below.

¹⁰ See para. 35 (b) above.

¹¹ In order to avoid confusion of these articles with articles 70 to 72 of ULIS, in this report the numbers of articles [70] to [72 *bis*] suggested by the Secretary-General appear in square brackets.

¹² A/CN.9/WG.2/WP.19, para. 36; see annex IV to this report, reproduced below in section 5.

Article [72]

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

Article [72 bis]

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

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

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

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

Article [70]

41. The Working Group decided to adopt article [70] as proposed by the Secretary-General.

Article [71]

42. Several representatives expressed the opinion that the parallelism between this article and article 43 as adopted by the Working Group at its fourth session was inappropriate. It was emphasized that the main obligation of the buyer was to pay the price and restrictions in certain national laws on specific performance were not applicable to this obligation of the buyer. A number of representatives suggested that the law should clearly spell out that the above restrictions did not apply to the payment of the price.

43. One representative, supported by an observer, was of the view that the proposed language of article [71], and similarly that of article 43, was misleading because the provision restricting the seller's right to request performance was only set forth in the second phrase, as an exception. He, therefore, suggested that the article should clearly express that the seller has no right to request performance except if it is in conformity with the law of the court.

44. One observer held that the phrase "similar contracts of sale not governed by the Uniform Law" pointed to domestic contracts. He, therefore, suggested that the commentary should contain a clear statement to this effect. One representative supported this suggestion. Another representative suggested that the commentary should also take care of the modalities of payment.

45. Several representatives expressed the view that article 61, paragraph 2 of ULIS seemed to be superfluous on the grounds that it applied mainly to such types of trade which were governed by usage and under article 9 usages always prevail over the provisions of the law.

46. Several representatives and observers expressed views on whether the seller should be entitled to payment or damages in cases where the goods were duly offered or delivered and payment did not follow.

47. One delegate proposed that article [71] should contain a separate rule on payment and another on his obligations other than payment, as well as a provision to the effect that article [71] does not apply where the seller has avoided the contract.

48. The Working Group decided to set up a drafting party (Drafting Party III) composed of the representatives of Austria, Japan and the United States and the observer for ICC and requested the Drafting Party to prepare a revised text of article [71].

49. The Drafting Party submitted its proposal to the 13th meeting of the Working Group on 29 January 1974. The Working Group decided to adopt the proposal with slight modifications.

50. The article as adopted by the Working Group reads:

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

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

"3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article [72 *bis*]."

Article [72]

51. One observer suggested replacing the words "such performance" at the end of the first sentence by the expression "the performance of the contract".

52. The Working Group decided to adopt article [72] with the modification in paragraph 51 above. The article, as adopted reads:

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

Article [72] *bis*

53. One observer suggested that a new subparagraph (c) should be added to this article providing for the seller's right now contained in article 66, paragraph 1 of ULIS to avoid the contract "where the

buyer gives the seller good grounds for fearing that the buyer will not pay the price". This proposal was opposed by several representatives on the grounds that anticipatory breach was dealt with in other articles of ULIS.

54. Another observer noted that from the point of view of remedies distinction had to be made between cases where payment or delivery had already taken place and cases where payment or delivery had not yet taken place. In his view if the goods had not been delivered, the seller should be entitled to avoid the contract for non-payment without any further requirements; if, however, the goods had been delivered, the seller should have to give a reasonable time for payment before avoidance of the contract. In this connexion he expressed the view that it seemed to be unsound to copy the seller's obligations and apply them to the buyer.

55. One observer drew attention to his suggestion in annex VI of document A/CN.9/WG.2/WP.17/Add.1* to include a new paragraph 2 in article 66 of ULIS providing that the seller should not have the right to claim the return of the goods for non-payment unless in the contract the seller had retained the "property or a security right in the goods" until the price has been paid.

56. One observer introduced a new version for article [72 *bis*] and drew attention to the importance of the doctrine of parallelism, in particular to parallelism between articles 44 and [72 *bis*]. He emphasized that remedies applicable in case of failure of the seller to deliver the goods were not necessarily applicable to failure of the buyer to pay the price. He noted that his proposal was based on a principle adopted by the Working Group at its first session as contained in paragraph 100 of document A/CN.9/35.**

57. Another observer introduced an amendment to paragraph 2 of this article.

58. Several delegates expressed views on the above proposals and the possibility of their reconciliation with article [72 *bis*] suggested in the report of the Secretary-General.

59. The Working Group decided to defer final action on this article until its next session. At that session it will take into consideration the text suggested in the Secretary-General's report¹³ and the proposals mentioned in paragraph 56 (proposal A) and 57 (proposal B) above. These latter proposals read:

Proposal A

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

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

"(b) Where the goods have not yet been handed over, the failure by the buyer to pay the price or to perform any other of his obligations under the

* Annex III to this report; see below, section 4.

** UNCITRAL Yearbook, Vol. I: 1968-1970, part three, I, A, 2.

¹³ For the text of this proposal see para. 40 above.

contract of sale and the present law amounts to a fundamental breach.

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

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

Proposal B

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

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

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

"(c) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of 6 months [1 year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right in the goods."

SECTION II. TAKING DELIVERY

Article 65

60. Article 65 of ULIS reads as follows:

"Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over."

61. Several representatives were of the opinion that this article should be retained without any change. Others, however, expressed the view that the present language of the article presented various problems which had to be resolved. Some representatives suggested the deletion of the article.

62. Most comments were directed towards the first phrase of this article providing that the concept of "taking delivery" also included the buyer's doing all such acts as were necessary in order to enable the seller to hand over the goods.

63. Most representatives who spoke on the issue agreed in principle with the above requirement but considered that the language of the article should be improved. Several representatives held that the word "necessary" was too vague and, therefore, it needed

qualification or replacement by a less ambiguous expression. One representative suggested the replacement of the word "necessary" by the phrase "required by the contract". One observer opposed this formulation on the grounds that the buyer's obligations were not limited to those "required by the contract", e.g., he had to give the seller access to his premises in cases where the seller was required to deliver the goods there.

64. It was also suggested that the word "necessary" should be replaced by the expression "can reasonably be expected". This proposal was supported by a number of delegations, subject to eventual drafting improvements.

65. Some representatives suggested that the article should not be drafted as a definition of the concept of "taking delivery" but rather as an express provision to the effect that it was the duty of the buyer to do all such acts as are necessary to enable the seller to effect delivery. One representative noted that article 56 required the buyer to "take delivery".

66. Several representatives expressed the view that the provisions of article 65 should be merged with article 56, while others suggested its merger with article 67. One observer thought that article 20 would be the proper place to provide for the buyer's obligation now contained in article 65.

67. The Working Group at its second meeting on 21 January 1974, established a drafting party (Drafting Party I) composed of the representatives of Austria, Hungary and the United States and the observer for the Federal Republic of Germany and requested the Drafting Party to prepare a revised draft of article 65.

68. The drafting party submitted its proposal for a revised text of article 65 to the fifth meeting of the Working Group on 23 January 1974. In this proposal the drafting party noted that article 20 of ULIS as revised by the Working Group providing for the seller's obligations as regards delivery did not contain obligations of the seller corresponding to those imposed on the buyer by article 65 of ULIS, and suggested that this question should be considered at the second reading of the draft.

69. Several representatives commented on the text submitted by the drafting party. It was observed that the attempt to draft article 65 as a definition of "taking delivery" raised technical difficulties, for example, where the buyer actually took over the goods but had failed to give the seller the required co-operation in connexion with delivery, the approach used in article 65 of ULIS would seem to say that the buyer had not "taken delivery" although he received (or even consumed) the goods. Consequently, it was decided that article 65 should be drafted as a statement of the buyer's obligation to take delivery.

70. The Working Group decided to adopt the following text for article 65:

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

Article 66

71. Article 66 of ULIS reads:

"1. Where the buyer's failure to take delivery of the goods in accordance with the contract amounts to a fundamental breach of the contract or gives the seller good grounds for fearing that the buyer will not pay the price, the seller may declare the contract avoided.

"2. Where the failure to take delivery of the goods does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not taken delivery of the goods at the expiration of the additional period, the seller may declare the contract avoided, provided that he does so promptly."

72. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

Article 67

73. Article 67 of ULIS reads as follows:

"1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may declare the contract avoided provided that he does so promptly, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

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

74. The Secretary-General's report on issues presented by chapters IV to VI of ULIS noted that the remedial provision in this article was inconsistent with the remedial provisions in other articles of the Law, in that it provided for avoidance of the contract for any delay or failure to provide specifications without regard to whether this constituted a fundamental breach. The report suggested that in the interest of consistency, the expression "may declare the contract avoided, provided that he does so promptly" should be deleted from the text, so that delay or failure of the buyer to supply specifications would be subject to the general remedial provisions applicable to a breach of contract by the buyer.¹⁴ It was suggested that the above expression should be replaced by the following phrase: "may have recourse to the remedies specified in articles [70] to [72 *bis*]".

75. The above proposal was supported by some representatives, while others doubted whether the general remedial provisions were well suited for the special cases covered by article 67.

¹⁴ A/CN.9/WG.2/WP.19, para. 30; annex IV to this report; see below, section 5.

76. One representative suggested the deletion of the article as it provided for a question of detail only. One observer and some representatives emphasized that the article dealt with problems of high practical importance.

77. Some representatives were of the opinion that avoidance of the contract as allowed by the general remedial provisions was too strong a remedy for the buyer's failure to provide specifications and suggested that the only remedy in such cases should be the transfer to the seller of the power to make specification, coupled, where appropriate, with compensation for damage. One representative, supported by an observer, proposed that, in addition to these remedies, avoidance of the contract should also be allowed. Another representative held the view that the law should not provide for compensation but should leave that question to interpretation.

78. One representative expressed the view that specification was only a right and not an obligation of the seller. Another representative suggested that it should be made clear that the buyer is obliged to make specifications if the contract so provides.

79. One representative suggested that the seller should be obliged to give notice before resorting to remedies.

80. One representative submitted that article 67, after appropriate modifications, should be moved to chapter V of ULIS.

81. The Working Group decided to adopt in principle the proposal mentioned at the end of paragraph 74 above and to defer final action on this proposal and on the whole article until a later session.

Article 68

82. Article 68 of ULIS reads:

"1. Where the contract is avoided because of the failure of the buyer to accept delivery of the goods or to make a specification, the seller shall have the right to claim damages in accordance with articles 84 to 87.

"2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with article 82."

83. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

SECTION III. OTHER OBLIGATIONS OF THE BUYER

Article 69

84. Article 69 of ULIS reads:

"The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee".

85. The Working Group decided to delete this article and replace it by a new article 56 *bis*.¹⁵

Article 70

86. Article 70 of ULIS reads as follows:

"1. If the buyer fails to perform any obligation other than those referred to in sections I and II of this chapter, the seller may:

"(a) where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with articles 84 to 87; or

"(b) in any other case, claim damages in accordance with article 82.

"2. The seller may also require performance by the buyer of his obligation, unless the contract is avoided".

87. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

II. CONSIDERATION OF ARTICLES 71 TO 101 OF ULIS

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

SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

Articles 71-72

88. Articles 71 and 72 of ULIS read as follows:

Article 71

"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."

Article 72

"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 despatch 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."

89. The Working Group decided to delete these articles as the provisions thereof had been incorporated in article 59 *bis*.

¹⁵ For text of the new article see para. 35, subpara. (a).

Article 73

90. Article 73 of ULIS reads as follows:

"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."

91. Prior to the present session Governments and representatives on the Working Group submitted several comments on this article. It was noted in these comments that the unilateral decision of the seller as to the economic situation of the buyer might have serious consequences for the buyer;¹⁶ the suggestion was made that the buyer should be allowed to remedy the situation by providing assurances¹⁷ and it was held that the provisions of this article imposing obligations upon the carrier conflicted with those of municipal and international law concerning the carriage of goods.¹⁸

92. The Secretary-General in his report on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19), based on the above comments and the considerations contained in paragraphs 48 to 61 of that report, suggested the following modifications:

(a) A new paragraph 1 *bis* should be inserted in the article to read as follows:

"A party suspending performance shall promptly notify the other party thereof and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract."

(b) At the end of paragraph 2 the following new sentence should be added:

"The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers and other persons]."

(c) Paragraph 3 of the article should be deleted.

¹⁶ A/CN.9/WG.2/WP.17, para. 11.

¹⁷ *Ibid.*, paras. 12 and 14.

¹⁸ *Ibid.*, para. 13.

93. In respect of paragraph 1 of the article there was general agreement in the Working Group that the expression "the economic situation of the other party appears to have become so difficult" was too subjective and vague and, therefore, it should be replaced by a more objective and precise one. One representative expressed the view that as a matter of policy the right to a unilateral suspension might lead to arbitrary actions to the serious detriment of the buyer. One representative proposed the phrase "reasonable grounds for belief that a material part of performance will not be given when due". Another representative supported this proposal with the modification, however, that the words "for belief" should be replaced by "to conclude". One observer suggested the replacement of the expression "reasonable grounds" in the proposed text by a more unambiguous form.

94. Some representatives expressed the view that article 73 should be made to apply only in cases where credit had been extended and the terms of this credit were not observed. One representative suggested that the article be limited in scope to cases of bankruptcy and insolvency, and added that paragraph 2 would not be operative because the draft could not have any effect on carriers. It was suggested by one delegate that in many countries there was no reliable information on insolvency of companies and by another that the yearly balances were issued too late to provide for up-to-date information on the financial situation of the companies. Another representative held that the grounds for suspension of performance should be derived from the conduct of the defaulting party during performance. One observer noted his disagreement with all these proposals and another representative suggested that the article should only apply in case of a serious deterioration of the financial situation of the buyer.

95. The Working Group agreed in principle that a provision in line with paragraph 1 *bis* suggested by the Secretary-General (see paragraph 92 above) should be inserted in the article. However, several comments were made as to the content and language of such a provision.

96. One representative suggested that a provision should be inserted in paragraph 1 to the effect that the guarantee of performance must be satisfactory to or even accepted by the other party. Another representative was of the opinion that the text should also call for disclosure by the seller of his reasons for suspending performance. Still another representative suggested that the additional costs incurred by the buyer in securing the guarantee should be borne by the seller. This latter proposal was supported by one observer and opposed by another.

97. One observer suggested that the law should also allow the seller to claim a less drastic remedy than avoidance of the contract in addition to his suspension of performance of his obligations under the contract.

98. One representative proposed that the expression "documentary credit" in paragraph 1 *bis* should be replaced by the expression "letter of credit". Another drafting proposal suggested the insertion after "a party suspending performance" at the beginning of the paragraph of the expression "or preventing the handing over of goods".

99. In connexion with paragraph 2 one representative pointed out that the law in most countries allowed a seller to stop goods in transit only in clearly specified cases and suggested that the Uniform Law should also spell out the particular situation in which article 73 would be applicable.

100. One representative and one observer held that the deletion of paragraph 3 of article 73 as suggested in the report of the Secretary-General would leave third parties without any recourse and suggested that this paragraph should therefore be retained.

101. The Working Group requested the drafting party set up for consideration of article 75, paragraph 2 (Drafting Party IV),¹⁹ in view of the interrelation between articles 73 and 75, also to consider article 73 and prepare a revised draft thereof. The drafting party submitted to the Working Group at its 13th meeting a revised text of article 73. Many representatives and observers made comments on this draft and submitted proposals both on the substance and the language of the proposed text. In view of these comments and proposals, the Working Group requested Drafting Party IV to reconsider the draft it had recommended and to submit a revised version thereof.

102. Drafting Party IV submitted its revised draft of article 73 to the 15th meeting of the Working Group on 30 January 1974.

103. One representative expressed the view that there was a discrepancy between the proposed text and article 76 because the protection provided by the former was too narrow while that provided by the latter was too broad. The combined effect of these two articles was to force the parties to avoid the contract rather than to rely on the less drastic remedy of suspension of performance.

104. One observer pointed out that under paragraph 1 of the article the deterioration of the economic situation of a party could only be taken into consideration if this occurred or became known to the other party after the conclusion of the contract. He further noted that paragraph 3 was intended to cover also substantial delay in performance.

105. The representatives of Brazil, Ghana, Hungary and Kenya did not object to the adoption of this article, as suggested by the drafting party, but reserved the right to suggest modification of the text at a later session.

106. The Working Group decided to adopt article 73 as suggested by Drafting Party IV and noted the reservations mentioned in paragraph 105 above. The text of article 73 as adopted by the Working Group reads as follows:

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

"2. If the seller has already dispatched the goods before the grounds described in paragraph 1 become evident, he may prevent the handing over of the goods to the buyer even if the latter holds a docu-

¹⁹ See para. 121 below.

ment which entitles him to obtain them. The provision of the present paragraph relates only to the rights in the goods as between the buyer and the seller.

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

SECTION II. EXEMPTIONS

Article 74

107. Article 74 of ULIS reads as follows:

"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."

108. Studies submitted by members of the Working Group analysed the above article from the point of view of drafting and of substance.²⁰ As to substance, the central objection was that under paragraph 1 a party could be too readily excused from performing his contract. Thus, grounds for such excuse were not limited to physical or legal impossibility, or to circumstances where performance had been radically changed, but might extend to situations in which performance had become unexpectedly onerous; one commentary had envisaged the possibility that a seller might claim exemption under article 74 on the ground of an unforeseen rise in prices. Included in the studies were proposals for the redrafting of article 74 designed to narrow the grounds for excuse, and to clarify the relationship among the three paragraphs of the article. In discussing these proposals, several representatives supported the above objectives: i.e. to narrow the

grounds for exoneration and to make them more objective. In this connexion it was noted that it was important that exoneration should only be available on the occurrence of an objective obstacle or impediment.

109. Some representatives suggested that the central issue was the allocation of risks from unforeseen events, and suggested that the redraft of article 74 should refer to the risk factor. Others stated that while this was a correct analysis of the underlying problem, it would be difficult to draft explicitly in terms of risk allocation.

110. One representative and one observer suggested that the article should be drafted in terms of whether the party claiming exoneration had been at fault in failing to perform; others indicated that in their view the principle of fault should be used in the draft but this principle could come into play only following the occurrence of a serious event creating an impediment or obstacle to performance.

111. One observer suggested that a party who wished to be relieved of his liability for non-performance should have a duty to notify the other party. Another observer noted that in redrafting the provision it should be made clear that the exemption should be limited to liability for damages; the obligation to pay the price should not be excused.

112. One observer emphasized that article 74 could possibly be invoked in cases where damages were due to hidden defect in the goods sold. However, such interpretation would lead to a considerable extension of the causes of exemption which, in this particular field, were dealt with by the majority of the legal systems in a very restricted way. He, therefore, came to the conclusion that it would be appropriate to have a provision indicating clearly that article 74 would not be applicable in the case of damages caused by hidden defect in the goods.

113. The Working Group set up a drafting party (Drafting Party V) composed of the representatives of Ghana, Hungary, the United Kingdom and the USSR and the observer for Norway and requested the drafting party to prepare a revised draft of article 74.

114. Drafting Party V informed the Working Group at its 16th meeting on 30 January 1974 that it had not been able to agree on a final draft. It considered that further study would have to be made of the circumstances in which either party may declare the contract avoided (a matter which was partially covered by article 74, paragraph 3 of ULIS) and of the consequences which should follow from such avoidance. It suggested, however, that the draft provisionally adopted by the drafting party and an alternative proposal submitted by an observer should be included in the report to facilitate later consideration of this article.

115. The Working Group decided to record the text provisionally adopted by Drafting Party V and the alternative proposal submitted by an observer. The texts of these proposals read:

A. Text of article 74 provisionally adopted by Drafting Party V

"1. Where a party has not performed one of his obligations in accordance with the contract and the

²⁰ See sections I and X of annex III to this report, reproduced below in section 4.

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

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

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

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

B. *Alternative proposal*

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

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

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

"4. The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present law to

declare the contract avoided or to reduce the price, unless the impediment which gave rise to the exemption of the first party was caused by the act of the other party [or of some person for whose conduct he was responsible]."

SECTION III. SUPPLEMENTARY RULES CONCERNING THE AVOIDANCE OF THE CONTRACT

Article 75

116. 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 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 independence such deliveries would be worthless to him."

117. One representative drew attention to his comments in section I of document A/CN.9/WG.2/WP.17/Add.1* suggesting 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". Another representative noted that the provision allowing avoidance of the contract only if avoidance is done "promptly" was not in conformity with the general remedial provision on avoidance as suggested by the Secretary-General in article [72 *bis*] which allowed avoidance "within a reasonable time". The same representative noted that paragraph 1 of article 75 might be irrelevant in view of the provisions contained in article [72 *bis*].

118. As regards paragraph 2 of article 75 several representatives were of the opinion that an objective test was needed to determine the situation when the contract could be avoided in respect of future instalments. The test of worthlessness of goods to the buyer was considered to be too subjective and also too strict: even highly defective goods might not be worthless. One representative recalled his proposal in section II of document A/CN.9/WG.2/WP.17/Add.1* that the expression at the end of the paragraph "such deliveries would be worthless to him" should be replaced by the phrase "the value of such deliveries to him would be substantially impaired". Some representatives supported this modification; others thought that the original version of ULIS was preferable. In order to make the text more objective, one representative suggested that the words "to him" be replaced by the phrase "to a reasonable person in the buyer's position".

119. One observer drew attention to the difference in the English and French versions of this paragraph. The English version reads "such deliveries would be worthless to him" while the French text talks of "ces livraisons n'ont pas d'intérêt pour lui". The same ob-

* Annex III to this report, reproduced below in section 4.

server suggested that the approach found in the French version should be the basis for the new formulation. One representative suggested that the expression "such deliveries should not serve the purpose for which they were required" should be used. Another proposal favoured the phrase "such deliveries would not serve their normal purpose". This latter proposal, however, was objected to by several representatives.

120. One representative expressed the opinion that the reference in paragraph 2 to future deliveries might cause confusion because such deliveries were dealt with in paragraph 1 of the article. In his view, therefore, paragraph 2 should be confined to past deliveries.

121. The Working Group set up a drafting party (Drafting Party IV) composed of the representatives of France, Ghana, India, Japan and the United States and the observer for the ICC and requested the Drafting Party to prepare a revised draft of article 75. Drafting Party IV submitted its proposal to the Working Group at its 13th meeting on 29 January 1974 (see paragraph 126 below).

122. One representative expressed the view that there was little or no practical difference between the suggested text of article 75 incorporating the concept of fundamental breach and article 76 and, therefore, one of them seemed to be superfluous. Another representative, however, was of the opinion that these articles provided for different situations.

123. One observer suggested that the phrase "of any given delivery or" should be inserted in paragraph 2 before the words "of future deliveries" and that the expression "or serve any other reasonable purpose for the buyer" be added to the end of this paragraph. The former proposal was supported by another representative and both proposals objected to by several other representatives.

124. Some representatives pointed out that other articles of the law as revised by the Working Group provided for the right of the interested party to avoid the contract within a reasonable time and held that there was no reason for providing in this article for the exercise of the right of avoidance "promptly".

125. One observer suggested that paragraphs 1 and 2 should be merged by connecting them with a sentence commencing "He may at that time also declare the contract avoided in respect of ...".

126. The Working Group decided to adopt article 75 as suggested by the Drafting Party with a slight modification relating to the word "promptly". The text as adopted 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 a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

"2. A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the time, declare the contract avoided in respect of deliveries already made, if by reason of

their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract."

127. The Working Group further decided that articles 73, 75 and 76 should comprise a new section I within chapter III of the Law, entitled "Anticipatory breach" and that the provisions providing for exemptions (article 74 of ULIS) should follow that section.

Article 76

128. Article 76 of ULIS reads as follows:

"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."

129. The Working Group agreed to delete the word "fixed" in the first line of the article in accordance with the suggestion contained in paragraph 29 of document A/CN.9/WG.2/WP.17.

130. The above document also contained a proposal (paragraph 31) to revert to the 1956 wording of this article. That version provided that a party could declare the contract avoided if the other party "so conducts himself as to disclose an intention to commit a fundamental breach of contract". This proposal was supported by one representative who referred to the doctrine of repudiation and held that an anticipatory breach could never be safely assured unless an intention to this effect was disclosed. Having regard to rapidly improving technology and communication systems, there was some merit in restricting the scope of the article as proposed in paragraph 31 of A/CN.9/WG.2/WP.17. This proposal was opposed by several representatives.

131. Some representatives and an observer saw no difference between the case where future breach of contract would be a result of repudiation and where it would be due to another reason, as for instance the burning down of the manufacturer's workshop. One representative pointed out that a great majority of the States attending the 1964 Hague Conference voted for the elimination of the concept of intention from the text. However, he thought that article 76 should be confined to the conduct of the parties and suggested that the expression "from the conduct of the parties" should be inserted after the word "clear". This proposal was objected to by a number of representatives on the grounds that it would narrow the scope of the article. An observer proposed that the insertion should read: "from the conduct or situation of one of the parties, or the conditions on which his performance is dependent".

132. Several representatives expressed their views on the usefulness of merging articles 76 and 48 of ULIS and on the text proposed to this effect by one of the representatives.²¹ While some representatives agreed in principle with such a merger, one observer noted that he preferred to keep these articles separate.

133. One observer suggested that article 76 should contain a provision whereby a guarantee or adequate assurance of performance would prevent a declaration

²¹ A/CN.9/WG.2/WP.17, para. 33.

of avoidance. Some representatives who commented on this proposal expressed their disagreement therewith.

134. The Working Group decided to adopt article 76 of ULIS with the change mentioned in paragraph 129 above. The article as adopted reads:

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

Article 77

135. 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."

136. It was observed that this article repeated a rule that had already been established under the basic rules on remedies approved by the Working Group.

137. The Working Group decided to delete this article. It also noted that at its fourth session consideration of article 48 had been deferred pending action on articles 75 to 77. The Working Group decided to delete article 48.

Article 78

138. Article 78 of ULIS reads as follows:

"1. Avoidance of the contract releases both parties from their obligation 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."

139. One observer suggested that the right of the seller to claim the return of the goods should be restricted to cases where he had specifically reserved such right in the contract and even in such cases he should lose that right after the lapse of a certain period. Another observer supported the idea that the seller should only be allowed to claim return of the goods within a certain period but raised the question whether return of the goods could also be claimed where the buyer had gone into bankruptcy or where the goods had been incorporated into his property.

140. Several representatives disagreed with the above proposals. It was held that the party who had fulfilled his obligation should in principle be able to claim the return of whatever he had supplied. This would not apply if the goods had been incorporated in other property or where the buyer went into bankruptcy; in the latter case the national law of the buyer would apply.

141. One representative expressed concern about the solution in this article, according to which in cases where one of the parties avoided the contract that had been partly performed either party could have the right to treat the performance as interdependent and claim restitution without any limitation. He considered that

the solution in the United States Uniform Commercial Code, under which there was a presumption of divisibility, was better.

142. Another representative pointed out that there was some inconsistency between the provisions of the article and those of article 74. Paragraph 1 of this article provided that avoidance released both parties from their obligations "subject to any damage which may be due", while article 74 exempted the party from liability for damages.

143. One representative introduced the following proposal with the request that it should be considered at a later session of the Working Group:

"1. Where the contract is avoided for a fundamental breach which is not excused under article 74, the avoiding party is released from all of his obligations under the contract and may claim damages in accordance with article . . .

"2. Where the avoiding party has performed in whole or in part and has not avoided that part of the contract which has been performed, he may require the other party to perform his obligation with regard to that part. If that part of the contract has been avoided, the avoiding party may claim the return of what was supplied or paid. In either case, the avoiding party may claim damages for breach of the unperformed part in accordance with articles . . .

"3. If the party in breach has, at the time of avoidance, performed part of his obligation, he may claim as restitution the value of that part of the performance to the extent that such value exceeds any claims for performance, damages or restitution established by the other party."

144. The Working Group decided to defer final action on this article until its next session.

Article 79

145. Article 79 of ULIS reads as follows:

"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."

146. The Working Group agreed to adopt the proposals contained in paragraph 41 of document A/CN.9/WG.2/WP.17, that the phrase "or to require the seller to deliver substitute goods" be inserted after the words "avoided" in paragraph 1 of the article, and that the introductory phrase in paragraph 2 should be redrafted to read: "Nevertheless the preceding paragraph shall not apply:". The Working Group also agreed to insert the words "have been sold in the normal course of business or" after the introductory words "if part of the goods" in subparagraph 2 (c) and to add to the end of this subparagraph the phrase "or ought to have been discovered".

147. One representative drew attention to the proposal contained in paragraph 45 of document A/CN.9/WG.2/WP.17. However, the proposal was opposed by some delegates who held that it did not cover cases in which goods had perished or deteriorated because of their own nature. It was proposed that this difficulty could be solved by adding to the end of the subparagraph the words "or is due to the nature of the goods"; however, this proposal was opposed on the ground that the addition would make the exception too broad. It was stated that subparagraph 2 (d) to which the proposal related provided for cases where a defect was present in the goods at the time of their handing over and in such cases the buyer's right of avoidance should be presumed regardless of the fact that the goods might have perished before discovery of the defect.

148. Several representatives suggested that the difference between the proposed language and paragraph 1 of the article might create confusion; because of this and other reasons mentioned above, subparagraph (d) should be retained without any change. The representative of France reserved his country's position on subparagraph 2 (d) until final adoption of chapter VI on passing of the risk.

149. One representative suggested deletion of subparagraph (e) in line with the Working Group's decision to eliminate from article 33 the former paragraph 2. This proposal was supported by another representative and opposed by some observers.

150. The Working Group decided to adopt article 79 as follows:

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

"2. Nevertheless the preceding paragraph shall not apply:

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

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

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

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

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

151. One representative suggested that since article 79 deals with a problem unique to the buyer, at the second reading of the Law the Working Group should place this article in chapter III. He further suggested that the Working Group at the same time should consider redrafting article 79 to read as follows:

"1. Where the buyer has taken over all or part of the goods called for under the contract and subsequently discovers a non-conformity that would justify avoidance, the buyer shall lose his right to avoid that part of the contract where it is impossible for him to return the goods in the condition in which he received them."

2. To read as the text of paragraph 70 (2) adopted by the Working Group in paragraph 146 above.

3. To read as Article 80 of ULIS.

Article 80

152. Article 80 of ULIS reads as follows:

"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."

153. Several opinions were expressed as to the need for this article.

154. The Working Group decided to retain this article with the addition mentioned in paragraph 50 of document A/CN.9/WG.2/WP.17. The article as adopted reads:

"The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 79 shall retain all the other rights conferred on him by the present law."

Article 81

155. Article 81 of ULIS reads as follows:

"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:

"(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."

156. The Working Group decided to adopt this article with the modification mentioned in paragraph 54 of document A/CN.9/WG.2/WP.17. The article as adopted 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:

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

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

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 82

157. Article 82 of ULIS reads as follows:

"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."

158. The discussion on this article was focused on the draft text contained in paragraph 57 of document A/CN.9/WG.2/WP.17. Most representatives and observers who spoke on the issue supported the proposal, some with certain modifications.

159. Several representatives held that the restriction, in both ULIS and the proposed text, of the amount of damages which could be claimed for breach of contract was not an equitable solution in all situations. However, most speakers agreed that some restriction on consequential damages was necessary. The views which were expressed differed as to whether the principle of foreseeability contained both in ULIS and the proposed text was sufficiently objective.

160. One representative suggested the deletion of the second paragraph of the draft proposal.

161. One representative recalled the comments contained in paragraph 58 of document A/CN.9/WG.2/WP.17 concerning the French text of this article. One observer noted that the omission of any reference to loss of profit might cause doubts in the English text as well.

162. The Working Group decided to set up a drafting party (Drafting Party VI) composed of the representatives of France, Hungary, India, Japan, Mexico and the USSR and the observer for Norway and requested the Drafting Party to prepare a revised draft of this article.

163. Drafting Party VI submitted its proposal to the Working Group at its 16th meeting on 31 January 1974.

164. The representatives of Brazil and the USSR expressed the opinion that restriction on damages contained in the second sentence of the draft proposal was

not necessary and reserved their rights to return to this question at a later stage.

165. The Working Group took note of the reservations in paragraph 164 above and decided to adopt the text proposed by Drafting Party VI. The text as adopted reads:

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

Article 83

166. Article 83 of ULIS reads as follows:

"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 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 per cent."

167. The Working Group after consideration of the proposals in paragraph 61 of document A/CN.9/WG.2/WP.17 decided to adopt article 83 without any change.

Article 84

168. Article 84 of ULIS reads as follows:

"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."

169. Most representatives and observers who spoke on this article concentrated their comments on the method of assessment of damages. Several representatives expressed the view that the defaulting party should compensate for the loss actually sustained by the other party and thus put the injured party in the position that he would have been in had the contract been duly performed, irrespective of whether in such a case compensation would be higher than if calculated on the basis provided for in article 89. It was pointed out that under article 86, which referred to loss of profit, the injured party may also claim compensation caused by the breach of the contract.

170. The proposal contained in paragraph 63 of document A/CN.9/WG.2/WP.17, suggesting that the reference in paragraph 1 of article 84 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", was supported by a number of representatives. It was pointed out that this language eliminated the possibility of speculation while the present language of ULIS opened the door thereto because the injured party was free to avoid the contract on a date when market conditions were most favourable for him.

171. Several representatives supported the present solution in ULIS while others proposed different formulations. Several representatives suggested that article 84 should be worded in such a way as to show clearly that the aggrieved party had the option to rely either on this article or on article 82. One representative, supported by another, suggested that distinction should be made between cases where avoidance occurred before the date agreed for delivery and those where avoidance occurred after that date. Another representative proposed the assessment of damage on the basis of the "current price on the date on which damages were actually paid".

172. One representative noted that the expression "current price" in the text may lead to some problems of interpretation in respect of goods which were not quoted on the market.

173. One representative expressed the view that the purpose of this article was to set forth guidelines for the amount of damage. This view was opposed by an observer who held that the article contained substantive provisions as to the maximum amount of damages.

174. The Working Group decided to set up a drafting party (Drafting Party VII) composed of the representatives of Austria, Brazil, Japan and the United States and requested the Drafting Party to prepare a draft of this article.

175. Drafting Party VII submitted its proposal to the 15th meeting of the Working Group on 30 January 1974.

176. The Working Group decided to adopt the text proposed by the Drafting Party with a minor modification suggested by some representatives. The text as adopted reads:

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

"2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

Article 85

177. Article 85 of ULIS reads as follows:

"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."

178. One representative, supported by others, suggested that it was important that this article should provide not only for the manner in which the replacement or resale of the goods should be effected but also for the time within which such act had to take place. He therefore suggested the addition at the end of the article of the expression "if the resale or replacement occurred in a reasonable manner and within a reasonable time after avoidance".

179. Some representatives expressed the view that article 85 was not necessary and should be deleted because application of other articles containing general rules on damages to the special cases dealt with in this article would lead to the same result as provided for in article 85. The deletion of this article, however, was objected to on the basis that the provisions contained therein were of an important practical nature and eliminated the need to go through a difficult construction of interpretation of other articles to arrive at the same solution.

180. Several representatives pointed out the close relationship between articles 82 to 89 and suggested that these articles be considered in conjunction.

181. The Working Group requested the Drafting Party set up for consideration of article 84,²² in view of the comments and proposals of representatives on this article, to prepare a draft on article 85.

182. Drafting Party VII submitted its proposal to the Working Group at its 15th meeting on 30 January 1974. The Working Group decided to adopt the text submitted by the Drafting Party with a minor modification. The text as adopted reads:

"If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, instead of claiming damages under articles 82 or 84, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

Article 86

183. Article 86 of ULIS reads as follows:

"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."

184. Several representatives suggested deletion of this article on the grounds that the revised text of article 82 made article 86 unnecessary.

185. The Working Group decided to delete this article.

²² See para. 174 above.

Article 87

186. Article 87 of ULIS reads as follows:

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

187. The Working Group decided to delete this article.

Article 88

188. Article 88 of ULIS reads as follows:

"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."

189. One representative suggested the deletion of this article; others, however, were of the opinion that the article served a useful purpose and that it should be retained.

190. Several drafting proposals were submitted. It was suggested that it was the judge who had to decide what measures the injured party could be expected to take in order to mitigate the damages and, therefore, the word "all" before the expression "reasonable measures" should be deleted. Another proposal which received considerable support called for replacement of the expression "all reasonable measures" by the phrase "such measures as may be reasonable in the circumstances". A further proposal suggested that if reference to "loss" was retained then the words "including loss of profit" should be inserted in the text. Finally, it was suggested that the phrase "in the amount of loss which could have been reasonably avoided" should be added to the end of the article.

191. The Working Group requested the Drafting Party originally set up for consideration of article 84 (Drafting Party VII)²³ to consider also article 88 and to prepare a draft text thereof.

192. Drafting Party VII submitted its proposal to the Working Group at its 15th meeting on 30 January 1974 (see paragraph 194 below).

193. One representative commenting on the text submitted by the Drafting Party suggested that the phrase "reduction in the damages in the amount which . . ." in the draft should be replaced by the words "reduction in the amount of damages which . . .".

194. The Working Group decided to adopt the draft as submitted by Drafting Party VII. The text as adopted reads:

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

Article 89

195. Article 89 of ULIS reads as follows:

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

²³ See para. 174 above.

196. Several comments were made as to the need for this article. Those who preferred its deletion noted that national law would apply even in the absence of this article. The view was also expressed that in case of deletion of this article an express provision would have to be included in the Law that the provisions of the Law were without prejudice to the effect of national law in cases of fraud.

197. Several representatives expressed their agreement with the substance of the proposal contained in paragraph 73 of document A/CN.9/WG.2/WP.17. One representative pointed out that this proposal would in practice raise the question of contract validity which was outside the scope of the Law. He noted further that fraud and contract validity were matters of public policy regulated by mandatory provisions of national law.

198. The Working Group decided to retain article 89 of ULIS without any change.

199. On the basis of a proposal by an observer, the Working Group further decided to delete the subtitles in chapter V, section IV of ULIS.

SECTION V. EXPENSES

Article 90

200. Article 90 of ULIS reads as follows:

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

201. After a discussion on the need for this article and its relation with usages of international trade the Working Group decided to delete this article.

SECTION VI. PRESERVATION OF THE GOODS

Article 91-95

202. Articles 91 to 95 of ULIS read as follows:

Article 91

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

Article 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 authorized 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."

Article 94

"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."

Article 95

"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."

203. In respect of article 91 one representative expressed the view that this article was only useful in cases where property had passed before delivery.

204. Another representative noted that the notion of right to reject in article 92 was not defined and not previously used in the Law.

205. The Working Group decided to adopt articles 91-95 of ULIS without any change.

CHAPTER VI. PASSING OF THE RISK

206. Chapter VI of ULIS: Passing of the risk (articles 96-101) was considered by the Working Group in three steps: (1) the introductory provision contained in article 96; (2) a group of three interconnected substantive articles (articles 97-99); (3) two concluding articles (articles 100-101).

Article 96

207. Article 96 of ULIS reads as follows:

"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."

208. Consideration was given to whether this article should be retained or whether it should be omitted as unnecessary.

209. On the one hand, it was suggested that the provision that when the risk has passed to the buyer he shall pay the price "notwithstanding the loss or deterioration of the goods", stated an obvious consequence of the passing of risk, and was unnecessary. Attention was directed to article 35 as approved by the Working

Group. It was further indicated that the article appeared to state a definition of risk of loss, but was inadequate for that purpose.

210. On the other hand, it was stated that although the rule of article 96 might be obvious to lawyers who had worked with the Uniform Law, a statement of this rule in chapter VI could be helpful to others. Most representatives were of the view that article 96 should be retained. One representative suggested that this article should be placed after articles 97-99.

211. A question was raised concerning the retention of the concluding phrase of the article, dealing with loss or deterioration which was due to an act of the seller "or some other person for whose conduct the seller is responsible". It was noted that this principle was operative, without express provision, throughout the Uniform Law; to state this principle in isolated instances would cast doubt on the general principle. It was concluded that this involved a question to which attention should be given by the Working Group in its final reading of the draft.

212. The Working Group decided to approve article 96, but to defer final action on the phrase "or of some other person for whose conduct the seller is responsible" until a further session.

Articles 97-99

213. The Working Group considered together the provisions of three related articles—articles 97-99. These articles read as follows:

Article 97

"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 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."

Article 98

"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."

Article 99

"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."

214. The report of the Secretary-General on issues presented by chapters IV and VI of the Uniform Law discussed the provisions of chapter VI of ULIS with special reference to the decision of the Working Group, at the third session, to delete the definition of "delivery" in article 19 of ULIS.²⁴ This report (paragraph 76) proposed a revision and consolidation of the above articles. One aspect of this proposal was that risk would pass when the goods were "handed over" to the buyer or to a carrier; the report discussed the allocation of risk of roles in relation, *inter alia*, to the question as to which party, under normal commercial practice, would be more likely to have effective insurance coverage for the goods (paragraphs 70-73).

215. The Working Group discussed the question as to whether the central concept for transfer of risk should be "delivery" of the goods or the "handing over" of the goods to the buyer. Some representatives preferred the use of "delivery" as the key concept, and suggested that the rules on risk in chapter VI should refer to the rules on "delivery" in article 20. In their view, article 20 constituted an adequate definition of "delivery"; on the other hand it was suggested that article 20 defined the seller's duty of performance, and that under article 20 the seller's duty could be performed even though the buyer never took over physical possession of the goods.

216. Some delegates questioned the clarity of the concept of "handing over" the goods; it was suggested that placing the goods at the buyer's disposal on the seller's premises might be considered as "handing over" the goods. In reply it was noted that "handing over" had been used in various articles of ULIS and in article 20 as approved by the Working Group, and that the term had been clearly understood as referring to a transfer of possession in which the buyer or carrier took over the goods. Some representatives stated that the Uniform Law should be clear on this point, in order to place the risk of loss with the party who would have possession and control of the goods, and who would be most likely to have effective insurance coverage. Consideration was given to expressions which would be clearer on this point, such as "taking over" the goods.

217. In the light of these discussions, one representative proposed a draft proposal which the Working Group used as the basis for its further deliberations. This proposal was as follows:

Article 97

"1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when

the goods are handed over to the carrier for transmission to the buyer.

"2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

Article 98

"1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

"2. Paragraph 1 shall also apply in the case of delivery of goods not conforming to the contract when the buyer has neither requested the delivery of new goods nor declared the contract avoided.

"3. When the goods have been placed at the disposal of the buyer but have not been taken over, or have been taken over belatedly by him, and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last date when he could have taken the goods over without committing a breach of the contract."

218. The Working Group considered article 97 of the above proposal which dealt with passing of the risk when the contract involved carriage of the goods. It was noted that paragraph 1 constituted a combination of the provisions of articles 19 (2) and 97 (1) of ULIS.

219. It was observed that paragraph 1 was inconsistent with the definition of certain important trade terms; for example, "C.I.F.", as defined in Incoterms, provided for the passage of risk when the goods passed the ship's rail. It was suggested that in view of the importance of such trade terms, paragraph 1 should include a specific reference to usage such as "subject to article 9". On the other hand, several representatives supported the view that the Uniform Law gave effect to the terms of the contract (article 5) and to applicable usage (article 9); to make a specific reference in certain instances would cast doubt on this general principle.

220. The Working Group approved paragraph 1 of article 97 of the above proposal.

221. With respect to paragraph 2 of the same draft article, it was noted that the proposal was a revision of article 99 of ULIS.

222. The Working Group approved the first sentence of the above paragraph 2.

223. Questions arose with respect to the second sentence, which dealt with cases where the seller, at the time of the contract, knew or ought to have known that the goods had been lost or deteriorated. It was suggested that on these facts to permit risk to pass to the buyer at the time of conclusion of the contract was unfair to the buyer in a situation that could amount to fraud. In addition, since the contract was made while the goods were in transit the provision would present difficult problems of proof as to the point in the course of transit when further damage would occur. Attention was directed to the redraft of article 97 (3)

²⁴ A/CN.9/WG.2/WP.19, chapter III, paragraphs 64-105; see below, section 5.

in the report of the Secretary-General (paragraph 76)²⁵ whereby, on these facts, risk would remain with the seller unless he disclosed the loss or damage to the buyer.

224. The Working Group then considered article 98, which deals with contracts which do not involve carriage of the goods. In paragraph 1, attention was given to the provision that risk would pass to the buyer when the goods "were placed at his disposal and taken over by him". Some delegates suggested that "handing over" the goods would be clearer, and that the reference to placing the goods at the buyer's disposal was unnecessary and confusing, since the buyer could hardly "take over" the goods unless the goods had been placed at his disposal. Other delegates preferred the proposed language on the ground that it avoided the problems with respect to "handing over" the goods, as discussed above. The Working Group approved paragraph 1.

225. Paragraph 2 dealt with the effect of non-conformity of the goods on the transfer of risk, and on the ability of a buyer to avoid the contract after the loss or destruction of non-conforming goods. It was noted that placing this paragraph in article 98 made the provision inapplicable to cases where the contract involved carriage of the goods (article 97). It was agreed that this unintended result should be avoided by dealing with the above problem in a new article [98 *bis*].

226. Paragraph 3 deals with the effect of delay by the buyer in taking over the goods. The word "date" was replaced by "moment". With this modification, the paragraph was approved.

227. The Working Group decided to supplement the above provisions by a further article similar to paragraph 2 of article 98 of ULIS dealing with contracts which related to unidentified (unascertained) goods. The article, as proposed by an observer and adopted by the Working Group, reads:

"Where the contract relates to unidentified goods, the risk shall in no case pass to the buyer until the moment when the goods have been manifestly identified to the performance of the contract and the buyer has been informed of such identification."

228. In connexion with the above new article some representatives suggested that the expression "the contract relates to unidentified goods" might not be sufficiently clear.

229. Some delegates suggested that this chapter should include an article dealing specifically with transfer of risk when goods were held by a third party, such as a bailee or warehouseman. Other delegates were of the view that such a provision was not necessary, and would complicate the text. It was decided not to draft such a provision at this time.

230. The Working Group decided to set up a drafting party (Drafting Party VIII), composed of the representatives of Austria, Hungary, Japan and the United States, and requested it to prepare draft provisions on (a) the situation dealt with in article 97 (2) (second sentence) (i.e., the seller knew or ought to have known that the goods had been lost or deteriorated)

(see paragraph 223 above) and (b) a new article on the question mentioned in paragraph 225 above.

231. Drafting Party VIII submitted its proposals to the Working Group at its 18th meeting on 31 January 1974. The proposals constitute (a) a revision of the second sentence in article 97 (2); (b) an added sentence for article 98 (2); (c) a new article 98 *bis*. These proposals were incorporated in an integrated text of articles 97, 98 and 98 *bis* as follows:

Article 97

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

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

Article 98

"1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

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

Article [98 bis]

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

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

232. The first proposal involved a redrafting of the provisions of article 97 (2) (second sentence) dealing with cases in which the seller knew or ought to have known that the goods had been lost or had deteriorated. The proposed language was approved by the Working Group.

233. The second proposal was for the addition of a sentence to article 98 (2) to deal with cases where goods were not identified at the time of the making of the contract. The Drafting Party proposed this addition as a clarification of the provision earlier adopted by the Working Group as a new article (see paragraph 227 above); under the proposal the new article would not be included in the text of the Law. The Drafting

²⁵ See annex IV to this report, reproduced in section 5 below.

Party proposed that the provision dealing with unidentified goods should be placed in relation to article 98, which dealt with cases not involving carriage of the goods, and where risk of loss in the event of buyer's delay might pass to the buyer while the goods were retained by the seller.

234. One observer proposed that the provision on unidentified goods should be kept in a separate article so that the rule on identification and notice should also apply to cases involving carriage. This was rejected on the ground, among others, that such a provision would interfere with the transfer of risk when the goods are handed over to the carrier; the notice of shipment might in some cases appropriately be given to the buyer somewhat after delivery to the carrier and the commencement of the transit; a rule that risk of loss is only transferred at the time of notice would present practical problems of proof concerning the time of damage during transit. It was also observed that in the normal case the delivery to the carrier constituted an identification of the goods.

235. One representative suggested that the last sentence of article 98, paragraph 2, after deletion of the introductory word, "however", should become a separate paragraph 3. One observer suggested that the phrase "identified to the contract" in the above sentence should be replaced by the phrase "identified for the performance of the contract".

236. One observer suggested that the following text be included in article 98 of the draft as paragraph 4:

"4. When time for delivery has come and delivery is effected (pursuant to article 20) by placing the goods at the buyer's disposal at his place or at the place of a third person, the risk shall thereby pass to the buyer."

237. The observer who submitted this proposal stated that the proposed provision would be subject to the subsequent article making identification a further condition for passing of the risk. The provision covered, for example, such cases where the goods are deposited with, or to be manufactured by, a third person.

238. The above proposal was opposed by some representatives as being too loose. One representative, however, accepted the proposal, provided that the phrase "at the place of a third person" were replaced by the phrase "in the warehouse of a third person in accordance with the buyer". Another representative expressed the view that the concept of "third person" in the proposal was too broad. The Working Group concluded that it could not take action on this proposal at the present session. Some representatives expressed the view that the proposal dealt with an important problem that should be considered at a later stage.

239. The new article [98 *bis*] proposed by the Drafting Party dealt with the effect of breach of contract by the seller on the transfer of risk to the buyer. It was noted that the two paragraphs of the article gave different effect to fundamental breach with respect to (1) non-conformity of the goods and (2) other types of breach (such as delay, improper shipment and the like). Some representatives supported this proposal; others noted that the proposal was novel and interesting, and deserved further consideration, but hesitated to give approval within the time indicated.

240. One observer noted that the question dealt with in the article had already been solved in paragraph 2 (a) of article 79, the correctness of which interpretation was doubted by two representatives. The question was also raised as to whether users of the Law would see the relationship between chapter VI and article 79. The same observer proposed the following language for the article: "Where the seller has failed to perform his obligations under the contract of sale and the present law, the provisions of articles 97 and 98 shall not impair the remedies afforded the buyer because of such failure of performance".

241. The Working Group decided to:

(a) Adopt article 97 as proposed by the Drafting Party (paragraph 231 above);

(b) Adopt article 98 (paragraph 231 above) except for the last sentence in paragraph (2) which would be considered at the next session;

(c) To defer final action on the proposed new article [98 *bis*] until its next session;

(d) Not to include in the Law the previously adopted new article on unidentified goods (paragraph 227 above).

Articles 99-101 of ULIS

242. Articles 99 to 101 of ULIS read as follows:

Article 99

"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."

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."

243. It was observed that some of the provisions in these articles had been embraced within articles approved by the Working Group, and that others were unnecessary and unhelpful.

244. The Working Group decided to delete articles 99-101 of ULIS.

III. FUTURE WORK

245. The Working Group, taking into consideration the proposals contained in document A/CN.9/WG.2/L.1, concerning methods of work and after a debate on the item, decided:

(a) To request the Secretariat to circulate among representatives of member States of the Working Group and the observers who attended the session the text of the uniform law as adopted or deferred for further consideration before 15 March 1974;

(b) To request the representatives of Member States and the observers who attended the session to submit to the Secretariat their comments and proposals on the text preferably by 31 August 1974;

(c) To request the Secretariat, taking into consideration the comments and proposals of representatives submitted before the above date, to prepare a study of the pending questions, including possible solutions thereon, and to circulate the study to members of the Working Group before 30 November 1974;

(d) To hold the sixth session of the Working Group, from 10 to 21 February 1975, subject to approval by the Commission.

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

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UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS*

CHAPTER I

SPHERE OF APPLICATION OF THE LAW

Article 1

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

* Square brackets in the text of the law indicate that no final decision was taken by the Working Group on the provisions enclosed. The headings in ULIS have been retained, where appropriate; for ease in reference, some new headings, not contained in ULIS, have been inserted by the Secretariat; all such new headings are enclosed in square brackets.

(a) When the States are both Contracting States; or
(b) When the rules of private international law lead to the application of the law of a Contracting State.

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

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

Article 2

The present Law shall not apply to sales:

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

(b) By auction;

(c) On execution or otherwise by authority of law.

2. Neither shall the present Law apply to sales:

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

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

(c) Of electricity.

Article 3

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

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

Article 4

For the purpose of the present Law:

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

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

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

(d) A "Contracting State" means a State which is Party to the Convention dated . . . relating to . . . and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

(e) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated . . . relating to . . . is in force in respect of them.

Article 5

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

Article 6

(Transferred to article 3, paragraph 2)

Article 7

(Transferred to article 4 (c))

Article 8

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

CHAPTER II

GENERAL PROVISIONS

Article 9

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

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

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

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

Article 10

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

Article 11

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

Article 12

(Deleted)

Article 13

(Deleted)

Article 14

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

Article 15

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

Article 16

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

Article 17

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

CHAPTER III

OBLIGATIONS OF THE SELLER

Article 18

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

SECTION I. DELIVERY OF THE GOODS
[AND DOCUMENTS]*Article 19*

(Deleted)

SUBSECTION 1. OBLIGATIONS OF THE SELLER AS
REGARDS THE DATE AND PLACE OF DELIVERY*Article 20*

Delivery shall be effected:

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

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

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

Article 21

1. If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the

goods are not clearly marked with an address or otherwise appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

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

Article 22

The seller shall deliver the goods:

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

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

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

Article 23

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

Articles 24-32

(Incorporated into articles 41-47)

SUBSECTION 2. OBLIGATIONS OF THE SELLER AS
REGARDS THE CONFORMITY OF THE GOODS*Article 33*

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

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

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

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

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

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

Article 34

(Deleted)

Article 35

1. The seller shall be liable in accordance with the contract and the present Law for any lack of conformity which exists at the time when the risk passes, even

though such lack of conformity becomes apparent only after that time. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

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

Article 36

(Incorporated into article 33)

Article 37

If the seller has delivered goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 82.

Article 38

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

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

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

Article 39

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

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

3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other

appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.

Article 40

The seller shall not be entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.

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

Article 41

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

(a) Exercise the rights provided in articles 42 to 46;

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

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

Article 42

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

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

Article 43

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

Article [43 bis]

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

2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the

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

Article 44

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

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

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

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

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

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

Article 45

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

Article 46

1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles [43, 43 *bis*, and 44] shall apply in respect of the part or quantity which is missing or which does not conform with the contract.

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

Article 47

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

2. Where the seller has proffered to the buyer a quantity of goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

Article 48

(Deleted)

Article 49

(Deleted)

Article 50

(Transferred to article 23)

Article 51

(Deleted)

SECTION III. TRANSFER OF PROPERTY

Article 52

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

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

Article 53

(Deleted)

Article 54

(Transferred to article 21)

Article 55

(Incorporated into articles 41 to 47)

CHAPTER IV

OBLIGATIONS OF THE BUYER

Article 56

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

SECTION I. PAYMENT OF THE PRICE

Article 56 bis

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

A. FIXING THE PRICE

Article 57

Where a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged

by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time.

Article 58

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

B. PLACE AND DATE OF PAYMENT

Article 59

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

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

Article 59 bis

1. The buyer shall pay the price when the seller, in accordance with the contract and the present Law, places at the buyer's disposal either the goods or a document controlling their disposition. The seller may make such payment a condition for handing over the goods or the document.

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

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

Article 60

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

Articles 61-64

(Incorporated into articles 70 to 72 *bis*)

SECTION II. TAKING DELIVERY

Article 65

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

Article 66

(Incorporated into articles 70 to 72 *bis*)

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

Article 67

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

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

Article 68

(Incorporated into articles 70 to 72 *bis*)

Article 69

(Deleted)

Article 70

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

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

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

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

Article 71

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

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

3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article 72 *bis*.

Article 72

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

Article 72 bis

Alternative A (text suggested in document A/CN.9/WG.2/WP.19):¹

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

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

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

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

Alternative B (text of proposal A in paragraph 59 of the report of the Working Group on its fifth session):²

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

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

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

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

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

Alternative C (text of proposal B in paragraph 59 of the Working Group on its fifth session):³

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

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

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

(c) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of 6 months [1 year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right in the goods.]

CHAPTER V

PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I. ANTICIPATORY BREACH

Article 73⁴

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

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

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

Article [74] (previously article 75)

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

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

Article [75] (previously article 76)

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

¹ See in this volume, section 5 below.

² See in this volume, section 1 above.

³ *Ibid.*

⁴ Four member States reserved the right to suggest modification of the text at a later session (report of fifth session, paragraph 104; see in this volume section 1 above).

SECTION II. EXEMPTIONS

*Article [76] (previously article 74)**Alternative A* (text provisionally adopted by Drafting Party V):

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

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

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

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

Alternative B (text of alternative proposal in paragraph 114 of the report of the Working Group on its fifth session):⁵

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

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

⁵ See in this volume section 1 above.

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

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

Article 77

(Deleted)

SECTION III. EFFECTS OF AVOIDANCE

Article 78

[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.]

Article 79⁶

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

2. Nevertheless the preceding paragraph shall not apply:

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

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

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

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

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

⁶ One member State has reserved its position in respect of paragraph 2 (d) of this article until final acceptance of the provisions on transfer of risk. (Report on fifth session, paragraph 148; see in this volume section 1 above.) Another representative suggested that at the second reading of the text, the Working Group should transfer this article into chapter III and revise its language in accordance with the proposal contained in paragraph 151 of the report.

Article 80

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 79 shall retain all the other rights conferred on him by the present law.

Article 81

1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 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:

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

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

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 82⁷

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

Article 83

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as 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 per cent.

Article 84

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

2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

⁷ Two members of the Working Group reserved the right to return to this article at a later stage (report on fifth session, paragraph 164; see in this volume section 1 above).

Article 85

If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, instead of claiming damages under articles 82 or 84, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

Article 86

(Deleted)

Article 87

(Deleted)

Article 88

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

Article 89

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

Article 90

(Deleted)

SECTION V. PRESERVATION OF THE GOODS

Article 91

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

Article 92

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

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

Article 93

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

Article 94

1. The party who, in the cases to which article 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.

Article 95

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.

CHAPTER VI

PASSING OF THE RISK

Article 96

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

Article 97

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

2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had

been lost or had deteriorated, the risk of this loss or deterioration shall remain with him, unless he discloses such fact to the buyer.

Article 98

1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

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

[Article 98 bis]

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

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

Article 99

(Deleted)

Article 100

(Deleted)

Article 101

(Deleted)

3. Texts of comments and proposals by representatives on articles 56 to 70 (A/CN.9/87, Annex II) *

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* Previously issued as document A/CN.9/WG.2/WP.15/Add.1 of 16 November 1972.

I

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE
OF THE USSR*Articles 56-60 of ULIS**Article 56*

This article does not give rise to any objection.

Article 57

It seems appropriate to exclude this article from the Uniform Law. In our view, the Law should not provide, even indirectly and restrictedly, for a possibility of concluding sale contracts without stating a price or making provision for the determination of the price.

According to the legislation and practice of many countries, the price is an indispensable or essential element of such contracts, failing which there shall be no contract made at all. It should be mentioned that under article 8 the Uniform Law shall not be concerned with the formation and validity of the contract.

Apart from the inappropriateness of the provision itself, i.e. imposing the obligation on the buyer to pay the price "generally charged" by the seller ("habitulement pratiqué par le vendeur") where no price or a manner of determining thereof has been agreed by the parties, such a provision seems also unacceptable for obvious practical considerations, namely: how may one definitely decide which price is being "charged" by the seller, what kind of evidence might be sufficient or conclusive. Other contracts may well contain a good deal of conditions different from those of the contract made with the buyer concerned and affecting the matter of price at varying degrees. Evidently it is not always possible to find completely identical contracts, particularly for the supply of machines and equipment. In trade practice, prices often depend upon a variety of factors including the volume of other transactions, the business relations and settlements between the parties with regard to other transactions, covering long periods of their commercial dealings. Not infrequently sellers provide various allowances and rebates to buyers either at the time of concluding a contract or thereafter, which fact may not be reflected in any way in the contract itself.

It should be noted also that the provision in question is generally concerned not with the obligations of the buyer but, rather, with the matter of determining the price.

Article 58

It would be recommendable to replace the words "in case of doubt" with the words "unless otherwise agreed by the parties".

Article 59

This article does not give rise to any objection.

Article 60

Generally it would seem advisable to discuss at the next meeting of the Working Group a possibility of formulating provisions on the date of payment along the lines recommended with regard to the date

of delivery at the third session of the Working Group, Geneva, 17-28 January 1972 (A/CN.9/62, para. 22).¹

In any case it would seem useful, for the purpose of simplifying the present text of article 60 of ULIS, to omit the words "without the need for any other formality" (as has been done by the Working Group at its last session in reconsidering article 20 of ULIS—paragraph 22 of the above-mentioned document A/CN.9/62). The above words, as they stand at present, are not sufficiently clear; a question may first be raised as to what kind of "formalities" are meant: do they refer to a demand of payment or the effecting of payment, do they mean formalities to be complied with by the seller or buyer, etc.

II

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE
OF GHANA*Articles 56-60 of ULIS**Article 56*

This article does not seem to need any comment.

Article 57

The text of this article, in its first part, seems by implication to make provision for cases in which the price is not expressly stated; the contract may make provision for its ascertainment.

The second part of the text does address itself to the question: "What if the contract does not provide a mode for ascertaining the price?" (A subsidiary question, which the text does not pause to answer in its first part, is whether the provision for determination of the price may be deduced by way of implication, where no such provision is expressly made. This will be considered later.)

The delegation of Ghana has been very impressed by the very closely reasoned argument of the representative of the USSR against leaving the price to be fixed in the uncertain manner at present made possible by this article. In municipal law, the concept of the "market price" or the "reasonable price"—not always regarded as the same—may render the uncertainty inherent here manageable; in the field of international sale such a concept is likely to be impracticable except in the comparatively few cases of particular commodities whose prices are fixed by the operations of recognized commodity exchanges.

The delegation of Ghana believes that "the price generally charged by the seller at the time of the conclusion of the contract" is not certain enough, as a test, to be an adequate substitute for the "market price"/"reasonable price" concept in municipal sale law. The reasons stated by the representative of the USSR in the third paragraph of his comment are sufficient to show the unsatisfactory nature of this criterion.

On purely theoretical grounds, also, the text may well create difficulties among jurists and legal advisers

¹ UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5.

who, on doctrinal grounds, cannot regard a sale contract as "concluded" when no price is fixed or fixable by reference to some part of the contract.

For these reasons, the delegation of Ghana finds the present text of article 57 unsatisfactory. That raises a further question. Must it be deleted altogether, or must ULIS make specific provision for this case?

The delegation of Ghana believes that deletion would create an unsatisfactory situation; businessmen will be left in doubt as to the status of a sale contract that was concluded in all important respects except for the fixing of the price. As this situation may be expected not to occur only during negotiations, when nothing is regarded by either party as binding, it seems necessary to legislate specifically for it. For this reason, the delegation of Ghana does not share the view that article 57 should be excluded altogether. It should be modified to meet the difficulty outlined by the representative of the USSR.

The delegation of Ghana believes that one way of doing this would be to retain the first part of article 57 (subject to a small modification to be discussed shortly) and to insist that the agreement shall not generate any obligations for either party until a price agreeable to both has been settled.

If such a rule has the appearance of unnecessary finality, it at least has the merit of certainty in an area where certainty is of paramount importance. It seems that its apparent harshness can be reduced by making it possible to ascertain the price by reasonable implication from other terms of the contract where these bear on the question. To leave no room for doubt, the possibility of drawing such an implication from other terms of the contract ought, it is thought, to be expressly provided for. A possible amendment to article 57, giving effect to these observations, would read as follows:

No contract shall be enforceable by either party under the present Law unless it states a price or makes express or implied provision for the determination of the price; unless the parties thereto expressly or by implication otherwise agree.

The concluding clause in this proposed amendment leaves the door open in the cases where the parties deal with each other in circumstances where it is reasonable to assume that, either because they contracted with reference to a recognized commodity market, or because they have agreed to suspend negotiations on the single issue of price, it is in their mutual interest for the other agreed provisions of the contract to be enforceable.

Article 58

The delegation of Ghana prefers the clause "unless otherwise agreed" to the phrase "in case of doubt" in this article. It seems better to create a definite *prima facie* link between the price and the actual commodity sold (as distinguished from the commodity and its packaging, etc.), and to leave the parties free to modify this if they wish, than to leave this role to cases of "doubt" whose nature is not specified in the law and which, in any case, could be difficult to identify.

Article 59

Paragraph 1. For economic reasons, Ghana and, it is believed, many other developing nations, will find it difficult to commit themselves unreservedly to the rule set out in this paragraph.

The impact of unavoidable exchange control legislation in several of these countries will normally make it difficult, if not altogether impossible, for a buyer in these countries to give such an unreserved undertaking as is entailed in a promise to pay at the seller's place of business, as literally understood. Conversely, where municipal exchange control legislation allows this, a seller in a country with inconvertible currency may well prefer to be paid by a buyer in a country with convertible currency in the latter's country or usual place of business, and wish to stipulate for this in his contract. It would not be satisfactory for such a stipulation to oblige the seller by implication to hand over the goods in the country of the buyer.

For these reasons the delegation of Ghana would prefer this rule to be made facultative by prefacing it with the words: "unless otherwise agreed".

Paragraph 2. This paragraph does not create any problems for the delegation of Ghana.

Article 60

The delegation of Ghana shares the view of the representative of the USSR on the desirability of deleting the words "without any other formality" from the text of this article.

It seems desirable, as noted by the representative of the USSR, also to try to approximate as far as possible the rules relating to date of payment to the principles underlying the newly recommended rules relating to the time of delivery.

III

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF MEXICO

Articles 56-60 of ULIS

CHAPTER IV

OBLIGATIONS OF THE BUYER

Article 56

(No change)

SECTION I. PAYMENT OF THE PRICE

A. Fixing the price

Article 57

1. Payment of the price consists in the delivery to the seller or to another person indicated by the seller of the monies or documents provided for in the contract.

2. Where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract or, in the

absence of such a price, the one prevailing in the market at the time of the conclusion of the contract.

3. Except as otherwise provided in the contract or established by usages, the price shall be paid in the currency of the country of the seller.

Article 58

1. When the currency indicated in the contract for the payment of the price gives rise to doubts, the currency of the country of seller shall be deemed as applicable.

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

Article 59

...

Addition of the following new paragraph (3):

3. The buyer shall comply with all the requirements of his national laws in order to permit the seller to receive the price as provided in the contract.

Comments

1. The obligations of the buyer are established in those articles, specifically the price and the place and the date at which the same should be paid.

2. With respect to the first of these articles, namely, article 56, we do not propose any change, since it limits itself to establish the two basic obligations of the buyer; and corresponds to article 18 in the structure of ULIS, which establishes the respective obligations of the seller.

3. In so far as concerns article 57, that is the one which establishes the rules for the fixing of the price, it is our opinion that it should cover an additional situation, namely in what does the payment of the price consist as well as the rules which are applied when no price is fixed in the contract.

4. As to the payment of the price, we believe it should be indicated that the same consists in the delivery of the monies or documents provided for in the contract. We consider that these principles be fixed in order to expressly regulate both the cases of direct payment to the seller—exceptional in international sale transactions—as well as payment through a bank and/or through documents.

5. In connexion with the rules which should be applied when a fixed price is not stated in the contract, they should provide not only the price generally charged by the seller at the time of the conclusion of the contract, but also the case in which said reference is not possible, or when the seller does not normally state the price, in which hypothesis we believe that the price prevailing in the market should be applied also at the time of the conclusion of the contract.

6. With reference to article 58, it is our opinion that two hypotheses be foreseen. The first hypothesis concerns the currency in which payment should be made, when the one indicated in the contract might refer indistinctly to the countries involved in the contract; that is, when the name of the money is the

same in various countries (dollars, francs, pesos, etc.). In such event, we believe that the money of the country of the seller should govern. The second hypothesis is the one currently provided for in ULIS, namely the one relative to the fixing of the price in accordance with the weight of the goods.

7. In connexion with the problems of the place and date of payment, it is our belief that a provision should be added to article 59 to resolve the problems arising when exchange controls exist in the country of the buyer. In such a case, we believe it advisable that ULIS establish a simple rule, namely that the fulfilment of all the requisites fixed by the internal legislation of the buyer shall be his obligation in order that the seller receive the price agreed upon in the terms of the contract.

This rule is important, since if the exit of money from the country of the buyer were to be prevented, it would grant rights to the seller, either to consider the contract *ipso jure* avoided to detain or vary the shipment of the goods or even to claim damages.

8. Finally, as to article 60, we do not propose any amendment, but we would like to note that this provision could be actually omitted, inasmuch as it does not establish any special rule which was not provided in other articles of ULIS. The contractual agreement, or the usages in the absence of the agreement to which this article 60 refers, are provided for in article 1 and 9 of ULIS.

Furthermore, the special references to the application of the usages in this article and others of ULIS, notwithstanding the general regulation of article 9, are not convenient, since they can be interpreted as limitations to the scope of said article 9, or because in other situations, in which ULIS does not contain express reference to usages, it might be considered that the same would not be applicable.

IV

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF THE UNITED KINGDOM

Articles 56-60 of ULIS

1. Articles 56-60 deal with certain obligations of the buyer, in particular the payment of the price.

2. *Article 56*: no comment.

3. *Article 57*: this provides for the fixing of the price if it has not been stated. It has been objected that a contract would not exist if the price were not fixed. But the article is expressly confined to cases where a contract has been concluded. The chances of an international sales contract being concluded without the price being fixed are very small indeed, but it could happen in exceptional cases, and the article should stay. (The example has been given of publishers who distribute catalogues and whose order forms do not repeat the prices.)

4. The "price generally charged by the seller at the time of the conclusion of the contract" would presumably (as a result of article 9) be established first of all by the course of dealing between the parties, and if that did not show a price, the price generally charged by the seller to third parties would be appli-

cable. Whilst there might be a conflict between the two prices—i.e. the previous price paid by the buyer and the price charged by the seller to third parties at the time of the contract—in my view the previous price between the parties would be the valid price. It does not seem to be worth complicating the article by mentioning this expressly.

5. *Article 58*: no comment.

6. *Article 59*: this article adopts the rule that the debtor shall seek out the creditor. This is in accordance with English Law and is supported by the United Kingdom.

7. *Article 60*: it might be argued that this article is unnecessary since there is an obligation to pay the price. However, some legal systems require notice to establish delay in payment except where the parties have agreed on a date for a payment. This article places a date fixed by usage on the same level as a date determined by agreement. The words "without the need for any other formality" could be omitted.

V

COMMENTS AND PROPOSALS OF THE REPRESENTATIVES OF AUSTRIA AND THE UNITED KINGDOM

Articles 61 to 64 of ULIS

GENERAL OBSERVATIONS

1. Both representatives consider that this group of articles does not give rise to any fundamental objections. Articles 61 to 64 ought, however, to be harmonized with articles 24 *et seq.*, which have not yet been finalized by the Working Group.

Article 61

2. The two representatives have no comments on paragraph 1 of this article.

3. Mr. Loewe (Austria) points out that this process of harmonization might require the deletion of paragraph 2 of article 61 and the replacement of *ipso facto* avoidance ("résolution de plein droit") in paragraph 1 of article 62 by another system. Personally, he regrets the disappearance of the system of *ipso facto* avoidance and finds the text for replacement proposed by the Drafting Group at the session held in Geneva in January 1972 to be extremely unattractive and complicated.

4. Mr. Guest (United Kingdom) points out that it may be very doubtful in practice whether or not "it is in conformity with usage and reasonably possible for the seller to sell the goods", so that it will be difficult to decide whether the seller is entitled to sue for the price or only to claim damages. As a general rule, under the Sale of Goods Act, 1893 (United Kingdom), the seller may only maintain an action for the price (i) when the property (ownership) in the goods has passed to the buyer, or (ii) when the price is payable on a day certain irrespective of delivery. The relevant provisions of the 1893 Act are attached as appendix A to this report. It may also be helpful for the Working Group to consider article 2, section 2-709, of the Uniform Commercial Code (United States of America), which is attached as appendix B.

Article 62

5. The observations of Mr. Loewe on article 62, paragraph 1, are contained in paragraph 3 above. Mr. Guest agrees that it will be necessary to replace *ipso facto* avoidance with different provisions.

6. Neither representative has any comments on paragraph 2 of this article.

Article 63

7. Both representatives consider that this article is probably useful.

Article 64

8. Both representatives consider that article 64 should be retained—it corresponds with paragraph 3 of article 24 of the Working Group's draft.

Appendix A

SALE OF GOODS ACT, 1893

s.27 It is the duty ... of the buyer to accept and pay for [the goods] in accordance with the terms of the contract of sale.

s.49 (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. ...

Note

In English Law, the seller may also claim payment of the price if the goods perish after the risk of their loss has passed to the buyer.

If the contract merely provides for payment against shipping documents, and the buyer refuses to accept the tender of the documents, the seller cannot claim the price, for the property in the goods will not pass until the documents are transferred and the price is not payable on a day certain irrespective of delivery (*Stein, Forbes and Co., v. County Tailoring Co.* (1917) 86 L.J.Q.B.448 (c.i.f.); see also *Colley v. Overseas Exporters* [1921] 3 K.B.302 (f.o.b.—buyer fails to nominate effective ship—no action for price)).

Where the seller cannot maintain an action for the price, he may still claim damages for non-acceptance under section 50 of the 1893 Act.

Appendix B

UNIFORM COMMERCIAL CODE, ART. 2

Section 2-709. Action for the price

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes impossible he may resell them at any time prior to the collection of the judgement. The net proceeds of any such resale must be credited to the buyer and payment of the judgement entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 2-610), a seller who is not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

VI

PROPOSAL OF THE REPRESENTATIVE OF JAPAN ON ARTICLE 68 OF ULIS

In the process of examination of articles 65-68 of ULIS, although we are still to continue our examination, our experts and I would like to make the suggestions intermediately that the word "accept" in paragraph 1 of article 68 should be replaced by "take".

VII

COMMENTS BY THE REPRESENTATIVE OF HUNGARY OF OF THE PROPOSAL OF THE REPRESENTATIVE OF JAPAN ON ARTICLE 68 OF ULIS

We appreciate highly your proposal and agree with your suggestion that the word "accept" in paragraph 1 of article 68 should be replaced by "take".

VIII

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF FRANCE

Articles 69 and 70 of ULIS

Articles 69 and 70, which constitute chapter IV, section III, of ULIS, entitled "Other obligations of the buyer", have given rise to only very few comments (see

primarily documents A/CN.9/31, paragraphs 130 and 131).²

Article 69

1. Japan submitted that the provisions of this article made no provision for the many disputes that could arise between buyers and sellers regarding documentary credits, e.g. disputes over contracts providing for a letter of credit without specifying its precise contents, the time of opening the credit or the amount involved.

This point is well taken, but it might be asked whether such provisions, which are more than implicit in the existing text, would not overburden the text, without any great advantage, in comparison with the other ways of making provision for or guaranteeing payment of the price, namely, the acceptance of a bill of exchange and the giving of a banker's guarantee.

Article 70

2. Austria expressed the view that it was difficult to understand why the seller could only declare the contract avoided if he did so promptly, and that an additional period of time for the buyer to perform would be in the latter's interest.

It appears that the structure of this article is exactly the same as that of article 55, which contains identical provisions concerning other obligations of the seller. Logically, therefore, article 70 should be given the same wording as article 55. However, the Working Group was unable to consider any revision of the latter article at its last session (see document A/CN.9/62,³ para. 15, and annex I, para. 36), and it requested the representative of Japan to submit, together with the representatives of other countries including Austria, a study on that article in combination with the study on articles 50 and 51.

² UNCITRAL Yearbook, Vol. I: 1968-1970, part three, I, A, 1.

³ UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5.

4. Texts of comments and proposals by representatives on articles 71 to 101 (A/CN.9/87, Annex III)*

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* Sections I to IX originally appeared in document A/CN.9/WG.2/WP.17 Add.1, of 27 November 1973; section X was first issued in document A/CN.9/WG.2/WP.17/Add.2, of 31 December 1973.

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I

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE
OF THE UNITED KINGDOM, INCORPORATING OBSER-
VATIONS BY THE REPRESENTATIVE OF GHANA*Article 74 of ULIS*

1. This article presents difficulties at two levels, at the level of form and at that of substance. At the level of form, the language used does not always clearly express what was presumably the legislative intention, and at the level of substance the legislative intention may, it is suggested, produce unsatisfactory results in some circumstances. Since the question of substance may be controversial the question of form is discussed first, though the two questions cannot be kept entirely separate.

FORM

Paragraph 1

2. (a) "He shall not be liable...." It appears from paragraph 3 that this is intended to refer only to liability in damages (or possible in some cases liability to specific performance, since the article includes situations in which performance is not impossible but is nevertheless excused; see below). But in the terminology of ULIS (e.g. art. 35(2), 36), and still more clearly in that of the new draft (e.g. art. 33(2), 35), the word "liable" embraces subjection to any remedy, including avoidance. The text should therefore be:

"He shall neither be required to perform nor be liable for his non-performance. . . ."

(b) "If he can prove that it was due to . . ." The phrase "due to" is not very felicitous. The non-performing party is, in effect, being afforded an opportunity to excuse his non-performance, and in the absence of a clear understanding as to what is meant by "due to" (the French text is equally open), two difficulties arise. (i) Even before the matter comes before a tribunal, it will be possible for the non-performing party, by relying on a generally long chain of causation, to argue that his non-performance was "due to" a wide range of factors. Thus, Professor Tunc's commentary envisages the possibility that a seller might claim exemption on the ground of an unforeseen rise in prices. In such a case the non-performance would presumably be "due to" the rise in prices in the sense that the rise in prices is the reason why the seller has not performed (i.e. the seller has found it uneconomic to do so). Admittedly, in such case the seller would have to prove that "according to the intention of the parties or of reasonable persons in the same situation", he was not bound to take into account or overcome the rise, but nevertheless the scope for dispute seems dangerously wide. (ii) If the dispute is brought before a tribunal, the acceptable limits of cause and effect cannot be settled on any easily identifiable principles. The resulting doubt and divergence between national jurisdictions ought to be avoided if possible. But since the wide scope of the phrase was apparently the legislative intention, the question of revision is considered under the heading of "Substance", below.

(c) "Regard shall be had to what reasonable persons in the same situation would have intended". This

formulation appears to have been a compromise, and it may be the best that can be achieved, but if it is taken to mean what it says it will create difficulty, since a reasonable seller and a reasonable buyer might well have intended quite different things. It will presumably in fact be construed as requiring the court to decide whether the party could reasonably have been expected to "take into account" etc. the circumstances. It would be better to say this, e.g.:

"Regard shall be had to what the party in question could reasonably have been expected to take into account or to avoid or to overcome".

Paragraph 2

3. This presents three difficulties: (i) it does not state the primary rule, i.e. that if the delay is not inordinate, the obligation is only suspended; (ii) it expresses the exemption in terms of suspension of the obligation, whereas paragraph 1 has expressed it in terms of exemption from liability; this duplication of concepts, seems to serve no practical purpose, and might possibly give rise to doubt as to what was intended; (iii) from the Common Law point of view at least, the phrase "the party in default" is confusing, since it suggests that the party is in some way at fault, whereas paragraph 1 assumes that he has proved that he is not. These difficulties could be met by the following text:

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

Paragraph 3

4. This appears to envisage two possibilities: (i) that the party who has not performed may nevertheless want to avoid the contract on some other ground; (ii) that the other party, though he cannot claim damages (because of the exemption provided by paragraph 1), may wish to avoid or (if he is the buyer) reduce the price. Subject to the question of substance (below), it is not unreasonable to provide for (ii) expressly, since the pattern of remedies adopted in this article is foreign to, for example, Common Law systems; but it is less clear why (i) is included. It seems to be illogical and superfluous. There can of course be circumstances in which the party who is exempted from liability in damages by paragraph 1 may nevertheless reasonably wish to avoid the contract on some other ground (for example, a seller who is exempted from liability for late delivery, may wish to avoid the contract because of the seller's subsequent refusal to pay the price) but there is in any event nothing in paragraph 1 to suggest that he may not do so. To exempt a party from liability to damages does not logically exclude him from avoiding the contract on some other ground. Since therefore the inclusion of (i) seems to serve no useful purpose and may give rise to doubts

as to what was intended, it seems best to redraft the clause to deal only with (ii), 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."

(The present paragraph 3 speaks of "relief" and not of "exemption", but this seems, once again, to multiply concepts unnecessarily.)

SUBSTANCE

5. At the level of substance the article is open to several criticisms.

- (i) It deals both with the situation where the contract has, in Common Law terms, been frustrated (i.e. performance has become impossible or illegal, or in the words of paragraph 2, has so radically changed as to be performance of an obligation quite different from that contemplated by the contract), and also with the situation where non-performance is excused for some less fundamental reason. (See the remarks above on paragraph 1: "If he can prove it was due to. . .") To allow a party to claim exemption because some unforeseen turn of events has made performance unexpectedly onerous, is out of place in the context of sale of goods for the reasons which are set out at greater length by the representative of Ghana below. Excuses for non-performance falling short of frustration should be either expressly provided for in the contract or ignored. This approach could be expressed by redrafting paragraph 1 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."

- (ii) The article allows the contract to be avoided (subject to the usual conditions) where performance is excused. Where avoidance takes place, the position of the parties is governed by ULIS article 78. This is primarily concerned with avoidance on breach, and it may not be well suited to the dealing with the consequences of frustration. In particular the party from whom restitution is claimed may have incurred expense

in performance of the contract; if this expense has resulted in a benefit to the other party, this benefit may presumably be set off against the restitution claimed; but if the expense has not resulted in any benefit, no set-off seems to be allowed.

6. Revision of article 78 is not of course within the scope of this study, but the problem is mentioned because it is an aspect of the larger question whether avoidance on frustration should be covered by the same rules as avoidance on breach. Avoidance, if coupled with the effects laid down in article 78, may be too drastic a remedy where the non-performance is not due to any fault. For example, if an f.o.b. buyer were unable, owing to circumstances within article 74 (1), to give effective shipping instructions, the buyer would be exempted from damages for this non-performance, and it is obviously right that the seller should be relieved of his obligation to deliver; but it is not so obvious that he should be allowed to avoid the contract. For this would entitle him to obtain restitution of any part-performance he might have rendered, on condition of restoring the price (art. 78 (2)). This could cause injustice to the blameless buyer where the market is rising. Similar cases of injustice to the seller could arise on a falling market. If problems such as this are to be dealt with, a special scheme of remedies for the situation envisaged in art. 74 will be necessary.

Addendum to (i) above by the representative of Ghana

7. Whether, apart from frustrating events, a sale law should recognize and give legal effect to other circumstances to which the parties did not advert their attention at the time of making their contract, and if so, what such effect should be, seems primarily to be a question of legislative policy. The considerations against giving legal recognition to such circumstances are many, and among them the following seem to be important:

(a) Such circumstances are very difficult to define with sufficient precision to make for certainty and uniformity of application. This is particularly important in a law intended for application in legal systems of several nations with differing traditions of jurisprudence;

(b) In the nature of things, they are very difficult to bring together into a single class by means of a definition, because of their possible diversity. It is, therefore, impossible in principle to make a single rule, applicable to all of them, without introducing a rather questionable element of arbitrariness. The alternative to a single definition, would be to envisage and to set out expressly a series of non-frustrating situations which may for some reason or another be thought to be of sufficiently important effect to warrant their being regarded as factors affording some sort of relief (not necessarily of the same kind) to one of the contracting parties. This alternative promises to result in inelegance without any guarantees of comprehensiveness. It is doubtful if the possible practical results of such a legislative effort would justify the effort involved;

(c) Such cases have traditionally been best left to the contracting parties themselves to stipulate for;

(d) The very wording of the present paragraph 1 shows how difficult it is to provide for such situations

in a general legislative text. The paragraph speaks of "...circumstances which, according to the intention of the parties *at the time of the conclusion of the contract*, [one of the parties] was not bound to take into account or overcome". The italicized words do not necessarily confine an inquiry about the intention of the parties to the terms of the contract as they are written or proved by oral evidence, and "what reasonable persons in the same situation *would have intended*" is not an easy standard to apply after the event;

(e) The traditional jurisprudence of sale law, both in Civil Law and Common Law, has generally ignored this matter, probably because of problems such as those set out above, and neither system appears to be any the worse for this omission.

II

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE OF THE UNITED STATES AND OBSERVATIONS OF THE REPRESENTATIVES OF FRANCE AND HUNGARY

Articles 75-77 of ULIS

1. A draft report on articles 75 to 77 of ULIS was prepared by the representative of the United States and circulated to the representatives of France, Hungary, Iran and Japan for their comments. Such exceptions as they took have been set out in the appendix to this final report; otherwise it is assumed that they are in agreement.

Scope

2. Articles 75 to 77 purport to contain "Supplementary grounds for avoidance" of the contract. Article 75 is limited to contracts for delivery in instalments while article 76 applies to contracts for sale generally. Article 77 states one effect of avoidance under the preceding two articles.

Article 75

3. Article 75 (1) provides that when either party's failure to perform as to one instalment, under a contract for delivery in instalments, gives the other "good reason to fear failure of performance in respect to future instalments", he may avoid the contract for the future. In order to bring this article into conformity with the provisions on fundamental breach, it would be desirable to change the quoted language to read: "good reason to fear a *fundamental breach* in respect to future instalments".

4. Article 75 (2) goes on to allow avoidance by the buyer as to deliveries already made as well, "if by reason of their interdependence such deliveries would be worthless to him". (No need was seen to give the seller such a right.) The requirement that past deliveries be made "worthless" seems too strong. It would be desirable to substitute for the quoted language: "if by reason of their interdependence *the value of such deliveries to him would be substantially impaired*".

Article 76

5. Article 76 allows a party to avoid when prior to the "date fixed" for performance "it is clear that one of the parties will commit a fundamental breach

of contract". A minor improvement would be to delete the word "fixed" which might be read as limiting the application of the article to contracts in which a date is expressly stated. There is, however, a more basic difficulty with this section which attempts to incorporate into ULIS common law notions of "anticipatory breach".

6. The original language of article 76 (then article 87 of the 1956 draft) was: "when . . . either party so conducts himself as to disclose an intention to commit a fundamental breach of contract". Although this language was broadened at the Hague, to go beyond the conduct of a party, Professor Tunc's commentary on article 76 justified it in terms of the original narrower language:

It is not right that one party should remain bound by the contract when the other has, for instance, *deliberately declared* that he will not carry out one of his fundamental obligations or when he *conducts himself* in such a way that it is clear that he will commit a fundamental breach of the contract [emphasis supplied].

It would be desirable to revert to the original narrower language. The common law doctrine of "anticipatory breach", on which article 76 is presumably based, is limited to the conduct of the party. Furthermore, the broader language of article 76 may lead to an unjust result.

7. Suppose that as a result of events other than the conduct of, say, the seller, it becomes clear to the buyer that the seller will not be able to perform (and has no legal excuse). Notwithstanding the seller's insistence that he will be able to perform in spite of these events, the buyer avoids under article 76. To everyone's surprise, when the time for performance comes, the seller is able to perform and is willing to do so. But under article 76, not only is the contract avoided, but, under article 77, the seller is liable for damages—even though no *conduct* on his part justified the buyer in thinking that there would be a breach. It would therefore be preferable to revert to the language of the earlier draft (quoted above), and to leave the hypothetical case just stated to be dealt with under article 73 (allowing suspension of performance when "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"). It may be desirable to broaden article 73 for this purpose and to allow the "other party" to remedy the situation by providing assurances, but this question goes beyond the scope of this draft study. It should be noted that article 48, which is also beyond the scope of this draft study, would have to be brought into line with article 76 if the change suggested here is made.

Article 77

8. Article 77 states one effect of avoidance under article 75 or 76—the party avoiding may claim damages. Since article 78 (1) says that avoidance on any ground leaves the parties "subject to any damages which may be due", article 77 seems unnecessary. Furthermore, it is misleading to include it under the heading "Supplementary grounds for avoidance" rather than "Effects of avoidance". It should be omitted.

COMMENTS OF THE REPRESENTATIVE OF FRANCE

Articles 75-77

9. (a) Your drafting proposal designed to bring this provision into conformity with the provisions on fundamental breach merits approval.

(b) While the aforementioned amendment tends to limit more precisely the circumstances in which the parties may request avoidance of the contract, the amendment that you are proposing to paragraph 2 has the opposite effect.

10. It is difficult to determine whether the deliveries would be worthless to the buyer because this would require a subjective judgement.

11. Your proposal would have the effect of replacing the words "pas d'intérêt" by the words "peu d'intérêt", which would considerably heighten the uncertainty and would increase the risk of litigation. I would therefore prefer not to change the paragraph which already favours the buyer to the detriment of the seller, since it applies only to the former.

Article 76

12. The replacement of the word "fixed" by a more general, less exact term appears to me to be a desirable improvement.

13. On the other hand, the advantage of reverting to the language of article 87 of the 1956 draft is questionable.

14. I agree that the evidence of a future or contingent situation is very often unsatisfactory.

15. That is why the claimant or court is reassured when the defendant himself has revealed his intention not to perform the contract without actually committing a fundamental breach.

16. You would like to rule out avoidance in cases where the defendant did not state his intentions.

17. However, a rule of this kind might involve the contracting party in excessive risk. Let us take the case of a shipowner who orders a very special type of vessel from a shipyard. Later it becomes "clear" that the economic position of the buyer has substantially deteriorated and that bankruptcy proceedings are deemed inevitable. In such a case it would seem preferable to allow the seller to avoid the contract even if the shipowner, attempting to regain the confidence of his creditors, were to confirm his wish to purchase the vessel in question.

18. Admittedly, after the manner of French criminal law where confession is considered to be the most conclusive of evidence, it would be preferable in such a case for the two parties to agree to avoid their contract when one of the parties has acknowledged that he is either unable or unwilling to perform his obligations.

19. However, the present wording leaves wider discretion to the court, although the adjective "manifeste"—which, to my mind, is closer in meaning to "obvious" than to "clear"—leaves very little room for uncertainty. Besides, subsequent events would resolve any uncertainty.

COMMENTS OF THE REPRESENTATIVE OF HUNGARY

20. (a) Article 76 and article 48 are overlapping. Article 76 is broader than article 48 because it deals with all cases of fundamental breach and not only with non-conformity on the one hand and is narrower than article 48 on the other because it deals only with fundamental breach whereas article 48 covers both fundamental and non-fundamental breach in the restricted domain of non-conformity. The first question is whether two separate and overlapping articles are needed for the purposes of anticipatory breach. One article might suffice. The next question is what its substance should be.

(b) Many good reasons speak for the proposal made by Professor Farnsworth which would restrict the field of anticipatory breach and create greater certainty of law than the present text. On the other hand there might be some arguments in favour of the present solution. It might be justified to ask: why does the buyer have to wait till the date fixed for performance has elapsed when it is already clear that the seller will commit a fundamental breach? More precisely, why does he not have to wait if the breach is due to a conduct of the seller and why does he have to wait if the breach is a result of some other cause?

21. The answers given by Professor Farnsworth to these questions are twofold:

(a) "Suppose that as a result of events other than the conduct of, say, the seller, it becomes clear to the buyer that the seller will not be able to perform (and has no legal excuse). In spite of the seller's insistence that he will be able to perform in spite of these events, the buyer avoids under article 76. To everyone's surprise, when the time for performance comes, the seller is able to perform and willing to do so." In this case, in my opinion, the avoidance is void as it has become clear from the results that at the time of the avoidance it could not have been clear that the seller would commit a fundamental breach. The buyer avoids the contract at his own risk in cases of anticipatory breach except express repudiation by the seller. A conduct short of repudiation might also re-create uncertainties.

(b) "Under article 76, not only is the contract avoided, but, under article 77, the seller is liable for damages—even though no conduct on his part justified the buyer in thinking that there would be a breach." It is suggested that in this case the seller will have a good defence under article 74.

22. Thus it is submitted that we delete both article 48 and article 76 and draft an article on the following lines:

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.

It is not easy to find a place for this (or a similar) text in the Uniform Law, because it goes beyond "supplementary grounds for avoidance". Perhaps it could constitute a separate section entitled "anticipatory breach" in chapter V.

III

OBSERVATIONS AND PROPOSALS BY THE
REPRESENTATIVE OF FRANCE*Articles 78-81 of ULIS*

1. In accordance with the decision taken by the UNCITRAL Working Group, the French rapporteur, in collaboration with the Hungarian, Tunisian and United States rapporteurs, considered articles 78-81 of ULIS. This gave rise to the following observations:

(a) Article 79, paragraph 2 (d)

2. It seems to the French rapporteur that the effect of article 79, paragraph 2 (d), which provides that the seller must bear the risk attaching to the goods if the impossibility of returning them is not due to the act of the buyer or of some other person for whose conduct he is responsible, is not in conformity with the intention of the drafters (cf. Professor Tunc's commentary, which indicates that the idea was to relieve the buyer from his obligation to return the goods where the impossibility of his doing so was due to the act of the seller or to some chance happening).

3. Moreover, such a wording would hardly be compatible with article 97, paragraph 1, which provides that normally the risk shall pass to the buyer when delivery of the goods is effected.

4. Again, this provision allows for the return of the goods in a condition other than that in which they were received by the buyer.

5. It would therefore be preferable to specify that the possibility of returning the goods shall be subject to their having retained their substantial qualities.

6. The French rapporteur accordingly proposes the following wording for article 79, paragraph 2 (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 fact of the seller."

7. The Hungarian rapporteur agrees in principle with the French proposal.

8. He suggests the addition of the following words: "or of some other person for whose conduct he is responsible".

9. The Hungarian rapporteur also believes that subparagraph (a), which is simply one case to which subparagraph (d) applies, should be deleted.

10. The numbering would then have to be changed, with subparagraph (d) becoming subparagraph (a).

11. The Hungarian rapporteur also favours an addition to article 79, paragraph 2 (c), so it would read: "if part of the goods have been sold, consumed or transformed by the buyer ...".

12. The United States rapporteur also agrees in principle to the French proposal, provided that return of the goods is still possible where the deterioration is due to the defect in the goods.

13. However, the Tunisian rapporteur considers that it would be better to retain the ULIS wording.

14. He maintains that article 79, paragraph 2 (d), as it stands in compatible with article 96. The passing of the risk is always subject to prior performance of the obligations of the seller. If the seller has failed

to perform his obligations, the buyer must be able to declare the contract avoided in the manner provided for in ULIS.

(b) Article 79, paragraph 2 (e)

15. The French rapporteur questions the desirability of this subparagraph, the inevitably vague wording of which may cause many disputes.

16. Does the deterioration have to be unimportant in the eyes of the seller or the buyer, or of both parties?

17. The United States rapporteur endorses this comment. In the view of the Hungarian Government, however, the answer to this question depends on the wording eventually adopted for article 33, paragraph 2. The Tunisian Government would like the subparagraph to be reformulated in order to obviate the difficulties that have been noted but believes that the idea, which by and large does protect the interests of the buyer, should be retained.

(c) Article 80

18. The French rapporteur considers that this article is superfluous and indeed may lead to some errors of interpretation, since it was decided that the Law would have only supplementary effect and, where that point is concerned, this provision may appear ambiguous.

19. The Tunisian rapporteur agrees with that view, but would like the deletion of the article to be negotiated in exchange for provisions which would become mandatory or would be matters of public policy.

20. The Hungarian and United States rapporteurs prefer the retention of this provision.

(d) Article 81

21. The French rapporteur noted that implementation of this provision might prove very difficult and somewhat inequitable.

22. The appraisal of any benefits derived from the goods by the buyer would appear to be a subjective and arduous operation. Since it is generally the buyer who has the contract avoided, he will surely grudge having to compute the amount of this claim against him by the seller. One might add that the problem will be even worse where he purchased the goods in dispute for his personal use.

23. This means that the seller will have great difficulty in producing proof. On the other hand, he is required to refund to the buyer the sums of money which have been paid to him, an amount of interest being automatically added.

24. It is therefore suggested that the buyer should also be allowed to use this apparently simple method of computation, so that one may envisage two cash claims being easily set off against each other.

25. This will not mean, of course, that the seller cannot claim the payment of interest for his exclusive benefit on the ground that the goods were unusable or practically worthless for his purposes. However, unless he proves his claims, the buyer will be considered to have derived the same benefits from the goods as the seller himself has derived from the price of the goods.

26. The United States rapporteur does not consider this discussion to be of great importance, since

it seems likely to him that the burden of proof will rest on the plaintiff.

27. The Tunisian rapporteur agrees that computation of the indemnity payable by the buyer will be complicated, and he proposes that consideration should be given to finding an improved wording for this provision.

IV

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE OF MEXICO INCORPORATING OBSERVATIONS BY THE REPRESENTATIVE OF AUSTRIA

Articles 82-90 of ULIS

1. The title of section IV: Supplementary rules concerning damages (*Règles complémentaires en matière de dommages-intérêts*) must be simplified, in order that it only refer to damages, whereby, this title would correspond with the wording of other titles of the same ULIS (for example: sections V and VI under the same chapter V, as well as chapter VI). Furthermore, this section contains the fundamental rules on damages, not the supplementary or complementary rules thereto.

2. I believe that subsections A and B should be reduced to one article, given the fact that the general rule contained under article 82 does not only apply to damage when the contract is not avoided, but also when same is avoided, pursuant to the stipulations in article 87. Moreover, the rules under articles 83 through 87 should be considered as special cases for the determination of damages. Consequently, this first subsection A must refer to the determination of damages, inasmuch as all the articles thereunder (articles 82 through 87) make reference to the same problem.

3. *Article 82*: This article is substantially maintained in its present form; the modifications I propose are:

(a) In the first paragraph add the adverb "actually" so as to require that payment for damages correspond to those really suffered. This change is in accord with the comment made by Professor Tunc (Commentary on the Hague Convention of 1 July 1964).

(b) Article 89 expressly excluded from the rule established in article 82 since its application within the different internal legislations, may result in a higher indemnity for damages.

(c) Instead of the phrase "ought to have foreseen" in the first part of the second sentence, I propose that similar verbal expressions be used and perhaps clearer than those contained in ULIS such as "had foreseen, or ought to have foreseen"; and, in lieu of the phrases "then were known or ought to have been known", in the second part of the same sentence, "then knew or ought to have known" be used.

Note: The representative of Austria has indicated that the French version of this article should maintain the reference as to *perte subie* and *gain manqué*, I am not certain whether the French text does require such provision, as I believe that reference to *dommages-intérêts* at the beginning of the article is sufficient to understand both concepts, *perte subie* and *gain manqué*. It seems to me that

such is the scope of article 1149 of the French Code. There is no doubt whatsoever that the Civil Code of Mexico, upon referring to the concept which is equivalent to *dommages-intérêts* (*daños y perjuicios*) includes both the losses suffered as well as the profits which were not earned. The text of article 2108 and 2109 of the Code is the following:

Artículo 2108. Se entiende por daño la pérdida o menoscabo sufrido en el patrimonio por la falta de cumplimiento de una obligación.

Artículo 2109. Se reputa perjuicio la privación de cualquiera ganancia lícita, que debiera haberse obtenido con el cumplimiento de la obligación.

Article 2180. By damage shall be understood the loss of or deterioration caused to property by failure to fulfil an obligation.

Article 2109. By impairment shall be understood the loss of any licit profit which should have been derived from the fulfilment of the obligation.

However, if experts of law and French language, should judge that it is not sufficient to talk about *dommages-intérêts*, the expression *perte subie* and *gain manqué* should, of course, remain within the text.

4. *Article 83.* The text is maintained, our proposal merely omitting the additional 1 per cent assessment with respect to interests on such sum as is in arrear—which I do not believe is justified. The expression (in any event) remains in parenthesis, inasmuch as I believe same is superfluous.

5. *Article 84.* The representative of Austria has proposed that the reference under this article to the *jour où le contrat est résolu* be replaced by the expression *jour où la délivrance a eu lieu ou aurait dû avoir lieu*, which would avoid doubts and problems to the party exercising the right to avoid the contract. I believe that this suggestion is wise and advisable and consequently, the text should be changed accordingly.

6. *Article 85.* No changes.

7. *Article 86.* No changes.

8. *Article 87.* This article is omitted since it seems unnecessary given the new text proposed for article 82.

9. Subsection C (General provisions concerning damages). I propose that it be changed to:

B. General provisions

10. *Article 88.* No changes.

11. *Article 89.* The addition of a second paragraph is proposed, which would reflect, in a very express form, what Professor Tunc, upon commenting ULIS indicates as being implicit in the rule, namely that the damages as referred to therein shall never be less than those which may result from applying the rules of articles 82 through 88.

12. Section V. Expenses. No changes.

13. *Article 90.* We suggest that this article commence by using the phrase "except as otherwise agreed" since the parties may reach an agreement as to different rules other than those established under this article.

14. The text of articles 82-90 as suggested appears in the appendix hereto.

Appendix

DAMAGES

A. *Determination of their amount**Article 82*

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.

Article 83

Where the breach of contract consists of a delay in the payment of the price which does not cause the avoidance of the contract, 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.

Article 84

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 delivery took place or ought to have taken place.

2. (No changes.)

Article 85

(No changes.)

Article 86

(No changes.)

Article 87

(Omitted.)

B. *General provisions**Article 88*

(No changes.)

Article 89

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present law. However, such damages shall never be less than those which may result from applying the rules of articles 82 through 88.

SECTION V. EXPENSES

Article 90

(No changes.)

V

OBSERVATIONS AND PROPOSALS BY THE REPRESENTATIVE OF AUSTRIA PREPARED IN CO-OPERATION WITH THE REPRESENTATIVE OF MEXICO

Articles 91-101 of ULIS

1. Articles 91-95, relating to preservation of the goods, call for little comment. At the very most, it might be helpful to the interpretation of the end of paragraph 1 of article 94 if the words *en temps utile* were inserted between the words *pourvu qu'elle lui ait donné* and *un avis* in the French text.

2. On the other hand, articles 96-101, concerning passing of the risk, should be fairly substantially re-drafted and simplified.

3. First of all, one may wonder whether article 96, which, in a roundabout way, contains nothing other than a perhaps questionable definition of the term "risk", serves any purpose. Although I have no strong feelings on the matter, I should be inclined to delete that article.

4. In article 97, paragraph 2, the words "handing over" which occur twice should be replaced by the word "delivery".

5. Paragraphs 2 and 3 of article 98 no longer conform to article 20 (b) and (c). Those provisions state clearly when delivery occurs. Paragraphs 2 and 3 of article 98 do not add very much but tend rather to confuse matters. It will be better to delete them.

6. *Comments by the representative of Mexico.* I agree with all your points of view. The only small change I would suggest is that in the first paragraph of article 98 the expression "handing over" in the English version and *remise* in the French version be replaced by "delivery" and *délivrance*, respectively. Obviously, the foregoing is a consequence of your proposal to modify the second paragraph of article 97 to this effect.

7. Article 99 apparently follows an old rule of maritime law. However, I am not convinced that the mode of transport should affect the relations between seller and buyer (even though the sale of a bill of lading seems to fall outside the scope of ULIS) and that the buyer can be obliged to pay the price for goods which no longer existed at the time of the conclusion of the contract, whether or not that fact was known by the seller. It therefore seems to me that we must avoid any possibility of a passing of the risk prior to the conclusion of the contract of sale. A provision to that effect would be better inserted in article 97.

8. *Comments by the representative of Mexico.* I also share your criticism with respect to article 99; however, inasmuch as said rule reproduces "an old rule of maritime law", I believe your suggestion to add another paragraph to article 97 (which may be the second paragraph in order that the one which currently appears as the second becomes the third paragraph), which would say what you indicate, namely, that the risks shall never be transferred prior to the conclusion of the sales contract, is wise and advisable. Strictly speaking, and in consideration of the rule provided for in article 97, such principle would be unnecessary. However, I insist that inasmuch as a tradi-

tional rule of maritime law is involved—which perhaps has already been included in some international convention—problems of interpretation would be prevented if the Law established the opposite principle in an express manner.

9. There is no longer any reason for article 100, since the former paragraph 3 of article 19 has been deleted and those parts of it to which article 100 refers have not been incorporated in article 20. The points raised concerning article 99 also apply to article 100, which could therefore be deleted.

10. With respect to article 101, Professor Tunc's commentary states that it is intended to avoid misunderstandings. I feel that on the contrary it creates misunderstandings, and I would favour its deletion also.

11. The text that I would propose, with the agreement of the representative of Mexico, would therefore read as follows:

Article 96

(Deleted.)

Article 97

(1) (Unchanged.)

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

(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.

Article 98

[(1)] Where delivery 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, delivery could have been made in accordance with the contract.

(2) (Deleted.)

(3) (Deleted.)

Article 99

(Deleted.)

Article 100

(Deleted.)

Article 101

(Deleted.)

VI

PROPOSALS BY THE REPRESENTATIVE OF NORWAY FOR
THE REVISION OF ARTICLES 71 TO 101 OF ULIS

Article 48

The buyer may exercise the rights [as] provided in articles 43 to 46 [and 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*.

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 56

SECTION I. PAYMENT OF THE PRICE

Articles 57 to 60

SECTION II. OTHER OBLIGATIONS

Article 61

Same as ULIS article 69.

Article 62

Same as ULIS article 65.

SECTION III. REMEDIES FOR THE BUYER'S
FAILURE TO PERFORM

Article 63

Cf. ULIS
art. 70 and
rev. art. 41

1. Where the buyer fails to perform any of his obligations [his obligations relating to payment of the price, taking delivery of the goods or any other obligation] under the contract of sale or the present Law, the seller may

(a) Exercise the rights [as] provided in articles 64 to 67;

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

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

Article 64

ULIS art.
61. Cf. rev.
art. 42

The seller has the right to require the buyer to perform the contract [his obligations] to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law [according to article 17], unless the seller has acted inconsistently with that right by avoiding the contract under article 66.

Article 65

ULIS art.
62, para. 2,
art. 66,
para. 2, Cf.
rev. art. 43

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for performance of the contract [obligations]. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before

the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present Law.

Article 66

ULIS arts. 62, 66 and 70. Cf. rev. art. 44

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

(a) Where the failure by the buyer to perform his obligations under the contract and the present Law amount to a fundamental breach of contract, or

(b) Where the buyer has not performed within an additional period of time fixed by the seller in accordance with article 65, or

ULIS art. 66, para. 1

(c) Where the buyer's failure to perform his obligation to take delivery of the goods gives the seller good grounds for fearing that the buyer will not pay the price.

New

2. Where the goods have been taken over by the buyer, the seller cannot declare the contract avoided according to the preceding paragraph and *claim the return* of the goods unless the contract provides that the seller shall retain the property or a security right in the goods until the price has been paid, and such provision is not invalid as against the buyer's creditors according to the law of the State where the buyer has his place of business. [The provisions of article 4 subparagraphs (a) and (b) shall apply correspondingly.]

Cf. rev. art. 44, para. 2

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

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

(b) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 65.

Article 67

Same as ULIS article 67.

Article 68

Cf. ULIS arts. 76-77 and art. 48

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.

Comments

1. The draft arts. 61 to 67 shall replace ULIS arts. 61 to 70. The drafting is based on the revised arts. 41 to 44 as adopted during the last meeting of the Working Group.

2. Art. 61 is the same as ULIS art. 69, and art. 62 the same as ULIS art. 65.

3. Art. 63 replaces ULIS arts. 63, 64, 68 and 70 (cf. rev. art. 41).

4. The matters dealt with in ULIS Arts. 61, 62 and 66 are dealt with in the draft arts. 64 to 66, which have been drafted in accordance with the text of arts. 42 to 44 as adopted at the last meeting of the Working Group.

5. As regards ULIS art. 61 para. 2, see proposed new art. 82 *infra*.

6. The draft art. 65 para. 2, which is new, is based on the Uniform Scandinavian Sales Act, section 28 para. 2.

7. Art. 68 deals with anticipatory mora and corresponds to ULIS arts. 76-77 and 48. ULIS arts. 76-77 are proposed to be deleted (and art. 48 to be correspondingly extended to cover also damages).

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

Article 69

Same as ULIS article 90.

Article 70

1. Same as ULIS article 75 para. 1.

Cf. ULIS art. 77

2. Same as ULIS article 75 para. 2.

3. The party exercising the right to declare the contract avoided, in whole or in part, as provided in the preceding paragraphs of this article, may claim damages in accordance with articles [84 to 87].

SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

Article 71

Same as ULIS article 71.

Article 72

ULIS art. 72

1. Where delivery is effected by handing over the goods to the carrier in accordance with subparagraph 1 (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.

2. Same as ULIS article 72 para. 2.

Comments

In the third and fourth line of the present paragraph 1 the words "either postpone despatch of the goods until he receives payment or" are a bit misleading since in most cases there will be an agreement or a usage to the contrary. It seems better to delete this passage, so that any right to postpone despatch would depend on agreement or usage.

Article 73

1. Same as ULIS article 73 para. 1.
2. Same as ULIS article 73 para. 2.
3. Same as ULIS article 73 para. 3.

New

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.

[Transfer present art. 74 to new art. 87.]

SECTION II. SUPPLEMENTARY RULES CONCERNING EFFECTS OF AVOIDANCE AND DELIVERY OF SUBSTITUTE GOODS

[Transfer present article 75 to new article 70 and delete present articles 76-77 (cf. Article 48, new article 68 and new para. 3 of new article 70).]

Article 74

Same as ULIS article 78.

Article 75

ULIS art. 79. Cf. ULIS art. 97, para. 2 (which is proposed to be deleted)

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

2. Nevertheless, the *preceding paragraph shall not apply*:

(a)

(b) As in ULIS art. 79 para. 2.

(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 *or ought to have been discovered*;

(d)

(e) As in ULIS art. 79 para. 2.

Article 76

ULIS art. 80 The buyer who has lost the right to declare the contract avoided *or to require the seller to deliver substitute goods* by

virtue of *article 75*, shall retain all other **rights conferred on him by the present Law.**

Article 77

ULIS art. 81

1. Same as ULIS article 81 para. 1.

2. Same as ULIS article 81 para. 2, except. *subpara. (b)* which shall read:

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

SECTION III. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 78

Same as ULIS article 82.

Article 79

ULIS art. 83

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate of 6 per cent, but at least at a rate of 1 per cent more than 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 [article 4 (a) and (b) apply].

Comments

The official discount rates are in many countries fixed rather arbitrarily, based on monetary and other financial considerations, and are often much lower than the rates to be paid in private business. It is therefore proposed to fix a minimum rate of 6 per cent corresponding to the rate established in the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes (article 49).

Article 80

Same as ULIS article 84.

Article 81

Same as ULIS article 85.

Article 82

New

The damages referred to in articles 80 and 81 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.

Comments

The provisions contained in ULIS art. 25, art. 42 paragraph 1 (c) and art. 61 paragraph 2 exclude the right to performance of the contract in cases where it is in conformity with usage and reasonably possible

to purchase goods to replace, or to resell, the goods to which the contract relates. These provisions have important consequences for the calculation of damages according to art. 84 paragraph 1 and art. 85 [new arts. 80-81], because they mean that in the cases in question the damages will be calculated on the basis of the current price at the time when it is in conformity with usage and reasonably possible for the buyer to purchase goods in replacement, or for the seller to resell the goods. The majority of the Working Group has been in favour of deleting the provisions contained in *ULIS arts. 25, 42 paragraph 1 (c) and 61 paragraph 2*. In view of this it seems to be desirable to add a provision to ensure that the deletion of the said provisions in *ULIS* does not affect the substance of the provisions in arts. 84 and 85 [new 80-81] as they now appear in the *ULIS* context. It should also be kept in mind that the abolishment of the concept of *ipso facto* avoidance will influence the content of the rule in present article 84 paragraph 1, since the time of avoidance may be shifted and delayed, especially in the case of non-delivery. This will be mitigated by the proposed provision in new article 82.

Articles 83 to 86

Same as *ULIS* articles 86 to 89. [In the renumbered article 83 the references should be corrected to articles 80 to 82.]

SECTION IV. EXEMPTIONS

Article 87

Same as *ULIS* article 74.

SECTION V. PRESERVATION OF THE GOODS

Articles 88 to 92

Same as *ULIS* articles 91 to 95.

CHAPTER VI. PASSING OF THE RISK

Article 93

Same as *ULIS* article 96.

Article 94

- ULIS* art. 97
1. The risk shall pass to the buyer when delivery of the goods is effected.
 2. Same as *ULIS* article 101.

Comments

Paragraph 1 should be formulated so as not to make the passing of the risk dependent on a (faultless) delivery on time.

The *present paragraph 2* is deleted as superfluous on the background of the revised article 20; cf. *present article 79 paragraph 2* (new art. 75 para. 2).

Articles 95 to 97

Same as *ULIS* articles 98-100. [In the new art. 97 the reference in the first line should be corrected to the second period of revised article 21, paragraph 1.]

VII

OBSERVATIONS BY THE REPRESENTATIVE OF AUSTRIA

Articles 74-101 of *ULIS*

1. Since I have a very limited time at my disposal to consider the various proposals, I can give below only a brief expression of opinion without elaborating on the reasons for adopting the various attitudes. I must also reserve the right to modify, if necessary, one or other of the views expressed below if in the course of the discussion at the next meeting of the Working Group convincing arguments are put forward.

Article 74

2. The suggestions of the United Kingdom representative appear to be generally acceptable.

Articles 75 to 77

3. With regard to paragraph 1 of article 75, I can accept the amendments proposed by the United States representative. I should however prefer to retain in paragraph 2 the phrase "would be worthless to him".

4. With regard to article 76, I would prefer, like the French representative, to retain the text (with the exception of the word "fixed"), although I have doubts regarding the Hungarian representative's interpretation according to which the avoidance of the contract would appear to be conditional.

5. I support the proposed deletion of article 77.

Articles 78 to 81

6. I am in favour of deleting subparagraph (a) of article 79, paragraph 2, but I do not agree with the Hungarian representative's wish to add in subparagraph (c) (which would become subparagraph (b)), the word "sold". That appears to me to be going too far. Similarly, I cannot support the French representative's proposal to amend subparagraph (d) (which would become subparagraph (c)), which may perhaps arise from a misunderstanding. The first part of the wording proposed is unnecessary. It would suffice to use the same language as in paragraph 1 and state: "if the impossibility of returning the goods 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".

7. I agree with the Hungarian representative that the action to be taken on subparagraph (e) (which would become subparagraph (d)) should depend on the decision concerning article 33, paragraph 2.

8. In view of the wish to delete article 77, the retention at least of article 80 is in my view desirable.

9. I am not entirely convinced by the criticism of article 81 (particularly paragraph 2). In particular, the example of purchase for personal use does not appear to me relevant, since it has been decided to exclude retail sales from the scope of application of the Uniform Law. It is clear that the calculation called for by paragraph 2 will often be more difficult than that which is required for the application of paragraph 1. That does not seem to me to be an adequate reason for making the buyer liable to pay an almost fixed sum which will hardly ever correspond to the real benefits (or lack of benefits).

Articles 82 to 90

10. The Mexican representative took account of my views in drafting his comments; I have therefore nothing further to add.

Articles 91 to 101

11. I have nothing to add to the proposals which the Mexican representative and I have already submitted with regard to this group of articles.

12. The amendments to all the articles from 61 to 101 submitted by the observer for Norway, depart to such an extent from the text of the 1964 Uniform Law on the International Sale of Goods, particularly with regard to presentation, that it would require considerably more time to examine them than the period allocated to members of the Working Group. I cannot therefore for the time being make any comments about the document which will no doubt be carefully examined in the course of the next session.

VIII

OBSERVATIONS BY THE REPRESENTATIVE OF HUNGARY
FOR THE REVISION OF ARTICLES 82-90

Article 82 (1)

1. "Loss actually suffered" might create the impression that only *damnum emergens* is due, particularly if the reader asks the question why did the UNCITRAL modify the ULIS text. This impression seems to be strengthened by using the word "actually".

Article 82 (2)

2. I wonder whether "had foreseen" should appear in the text. If the party actually foresees losses on the part of his partner in case of his breach, does he not act in bad faith?

Article 84

3. In substance I agree with the idea expressed in this article. A problem, however, might arise in connexion thereof in cases where the goods were delivered with a delay.

	(a)	(b)	(c)
(i) the price fixed by the contract:	100	100	100
(ii) price at the date of delivery:	150	100	80
(iii) at the actual date of delivery:	130	80	100

(a): The buyer has no damage if the prices under (ii) and (iii) are contrasted with the price fixed by the contract. If, however, the seller had delivered in time the buyer could have sold the goods for 150 and at the time of actual delivery he can sell them only for 130. If he receives only 30—which seems to be the proposed solution—he will have a loss of 20.

(b): The buyer would have had no damage if the seller had delivered at the time fixed by the contract. At the time of actual delivery he has a loss of 20 and it is fair that he obtains 20 in damages.

(c): The buyer would have had a loss of 20 if the seller had delivered in time. At the date of actual de-

livery he has no damage, the rule is correct, subject to 2.

4. It is not quite clear from the proposed text whether the victim of the breach or the judge is given a right of option between the price on which the delivery took place and on which it was due, or whether in cases where delivery actually took place later than the time of performance, the price on that later date is binding for the purposes of assessing the damages. If the buyer has an option in this field, case under (c) might lead to an unwarranted result: the buyer would be entitled to claim 20, and if the buyer had no option, he would lose 20 in the case under (a).

Article 90

5. The term "delivery" in the ULIS means only delivery of goods which conform to the contract, and in the UNCITRAL draft it covers also delivery of non-conform goods (see e.g. art. 97 and the comments of the representative of Austria thereto). Having regard to this fact ought art. 90 not be amended or supplemented? Are these rules applicable also in cases of delivery of goods which are not in conformity with the contract? In such cases the seller will most probably have further expenses.

Articles 96-101 of ULIS

6. The simplifications proposed by the representative of Austria and the representative of Mexico are very well-founded. The only remark I should like to make is that perhaps article 96 could be retained, although it seems to be sufficiently clear that most if not all legal systems are rather unanimous in leading to the same result and thus the article might be quite unnecessary. My concern is rather related to drafting techniques and the niceties thereof. I do not see in article 96 an endeavour to define risk, but rather a disposition in case the risk passes and I feel somewhat uneasy to describe facts without providing for the legal consequences.

7. If this is correct then the legal consequences should follow the statement of facts to which they are related. Therefore, if the Working Party would decide to retain article 96 of the ULIS, then it should appear as article 99.

IX

OBSERVATIONS BY THE REPRESENTATIVE OF NORWAY
ON THE REPORTS ON THE REVISION OF ARTICLES 74-101

Article 74 of ULIS

1. I have no objections to the proposals made by the United Kingdom, but would prefer the following language in paragraphs 1 and 2:

"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 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.

"2. Where the circumstances which gave rise to the non-performance, constitute only a temporary impediment to performance, the *relief* provided by this article shall cease to be available to the non-performing party when the impediment is removed, *provided that* performance would then, by reason of the delay, not be so radically changed as to amount to the performance of a *quite other* obligation than that contemplated by the contract."

2. In the revised ULIS Norway has proposed to transfer this article to a new article 87.

Articles 75-77 of ULIS

3. I support the United States proposal regarding *article 75 (1)* and have no objection to their proposals concerning *article 75 (2)* and *article 77*. Norway has proposed to transfer these provisions to a new *article 70* in the revised ULIS.

4. As regards the United States proposal to narrow the language of *article 76* I share the doubts expressed by the French and Hungarian representatives. Like the representative of Hungary I think that *article 76* should be harmonized with *article 48*, but I would not amalgamate them into one single article. I refer to the Norwegian proposal to transfer *article 76* to a new *article 68*, cf. also the proposed revised *article 48*.

Articles 78-81 of ULIS

5. Norway has proposed to transfer *article 79* to a new *article 75* and to extend the scope to cover also the buyer's right to require the seller to deliver substitute goods (cf. ULIS *article 97 (2)*). Further, in *paragraph 2 c*, it is proposed to add as an alternative after the word "discovered" the following: "or ought to have been discovered".

6. As regards *article 79 paragraph 2 d* I am not in favour of the French proposal, even with the amendment proposed by Hungary. In my opinion it is important that the exceptions in *paragraph 2* cover, among others, perishment, deterioration or transformation as a result of the very *nature of the goods* (e.g. perishable goods), regardless of whether the perishment etc. is caused by their non-conformity. Such cases are not covered by other subparagraphs than *subparagraph 2 d*. *Subparagraph 2 d* should therefore include these cases as well as fortuitous (accidental) events and the conduct of the seller or a person for whose conduct he is responsible. I have no objection to amalgamating subparagraphs *2 a* and *2 d*, provided that perishment as a result of the defect is still mentioned.

7. I have no objection to the present *subparagraph 2 e* of *article 79*.

8. *Article 80* should be kept and extended to cover the buyer's right to require the seller to deliver substitute goods (cf. the new *article 76* proposed by Norway).

9. As regards *article 81* I refer to the new *article 77* proposed by Norway, in particular the proposed extension of *subparagraph 2 b*. I have no comment on the French suggestion.

Articles 82-90 of ULIS

10. I refer to the new (renumbered) *articles 78-86*, cf. *69*, proposed by Norway.

11. I have no objection to the title etc. of sections proposed by Mexico. As regards the draft text of *article 82* proposed by Mexico, I miss an express reference to loss of profit (cf. *article 86*).

12. Concerning *article 83* Norway has proposed (in a new *article 79*) to fix an interest rate of a minimum 6 per cent, so as not to depend entirely on official discount rates, which in many countries may be fixed rather arbitrarily.

13. Regarding *article 84* it should be kept in mind that the abolishment of the concept of *ipso facto* avoidance will influence the content of the rule in present *paragraph 1*, since the time of avoidance may be shifted and delayed, especially in the case of non-delivery (resp. non-payment of the price). I therefore agree with the representative of Austria that one should reconsider whether the best rule is to rely on the current price on the date of actual avoidance. The date of actual delivery (resp. time for delivery) is proposed by Austria and Mexico. This date seems, however, to be less satisfactory in cases of transport and delivery to a carrier (in which case the buyer may not yet have knowledge of the breach) as well as in cases of non-delivery (in which case the buyer may not yet have had sufficient reason or even the right to avoid the contract until some further time has passed). It should therefore be considered 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 that date should be the basis. In the case of non-delivery (or non-payment) one should rely either on the date of actual avoidance or on the earliest date on which the contract could have been avoided. Further it should be considered to make it clear in the text whether damages always may be increased if *any additional* damage is proved (cf. *article 86*).

14. Norway has proposed to insert a *new article* after present *article 85* (a new *article 82*) for cases where it is 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. Cf. present ULIS *articles 25, 42 (1) c* and *61 (2)*.

15. Norway has proposed to transfer present *article 90* on expenses to the beginning of chapter V, as an initial *article 69* (without separate section and title).

Articles 91-101 of ULIS

16. I would prefer to keep *article 96*.

17. As regards *article 97* I refer to the new *article 94* proposed by Norway. The present *paragraph 2*

is proposed to be deleted as superfluous on the background of the rev. article 20, cf. present article 79, paragraph 2.

18. I have no serious objections to the present articles 98-100. In article 100 the reference in the first line should be corrected to the second period of rev. article 21, paragraph 1. I think there may still be room for article 100.

19. Norway has proposed to transfer article 101 to article 97 (new article 94) as a new paragraph 2.

X

COMMENTS OF THE REPRESENTATIVE OF HUNGARY ON ARTICLE 74 OF ULIS

1. *On the comments and proposals of the United Kingdom, "Form", paragraph 1 (a):** It is indeed clear from article 35.2 and 36 ULIS that the word "liable" embraces subjection to any remedy. In this case, however, it might be superfluous or even misleading to use other words in article 74. This might create the impression that articles 35.2 and 36 do not cover the same field covered by the proposed text of paragraph 1 in comment (a). It might be asked why do articles 35.2 and 36 not use the same words. The extensive meaning of the word "liable" can also be deduced from paragraph 3, article 74.

2. *Ibid., paragraph 1 (b):* I wonder whether the proposed text under the heading "Substance" eliminates the evils which the proposal strives to eliminate.

(a) An "absence of clear understanding" is also present in respect of "radically changed" or "an obligation quite different", not to speak of the fact that the proposed text also contains the incriminated expressions (*in fine*).

(b) "Impossibility" is also subject to "doubt and divergence between national jurisdictions".

(c) The difficult problem of cause and effect is not eliminated by the proposed text, only transferred to another level ("impossibility owing to such circumstances").

(d) The proposed text is much more complicated than the original. As it is one of the aims of the Working Group to simplify the ULIS. I wonder whether it brings such improvements as to warrant such a result.

3. *Ibid., paragraph 2:*

(a) The original rule in ULIS applies also while the temporary impediment has not yet come to an end, the proposed rule does not. Under this latter rule a radical change becomes relevant only when the temporary impediment has ceased to exist. I believe that a "radical change" should be relevant also before the temporary impediment has been removed.

(b) This indicates a shortcoming of ULIS. Why should the "radical change" be relevant only where there is a temporary impediment? Moreover: what is the reason for concentrating in paragraph 1 on the causes of breach and in paragraph 2 on the results thereof? From this point of view the text of paragraph 1 as suggested by the representative of the United Kingdom is far better than that of the ULIS, provided that it would apply to paragraph 2 as well because it combines the cause and the result of the breach and provided that the word "impossibility" is omitted (see under 5 below). But if such a distinction should nevertheless be maintained for different sets of breach, the division line should not run between temporary impediment and other cases of breach but perhaps between delay and other cases of breach. This needs further consideration. Consequently we should either have the "either . . . or" construction of the text suggested by the representative of the United Kingdom or use "due to" (or any other expression) in paragraph 1 and "radical change" in paragraph 2 for all cases of delay.

4. *Ibid., paragraph 3:* I wonder whether "the contract avoided" should be inserted. This would, to a great extent, reduce the meaning of "liability" in paragraph 1 to damages. Exemption would then mean only exemption from paying damages and from requiring specific performance which is anyway heavily restricted (see article 41, ULIS).

5. "Restriction" to frustration: Both the representative of the United Kingdom and the representative of Ghana advocate the "restriction" of the field of application of article 74 to frustration. I have the impression that the provisions of ULIS do not provide for a broader scope for exemptions than it would provide for if based on frustration. Frustration is after all a common law term and concept and ULIS tries to find words equally workable under many civil law systems as well.

As it seems, the two distinguished delegates feel uneasy in respect of the very Continental brevity of the expression "was due to". Perhaps their doubts and misgivings might be reduced by supplementing the expressions in paragraph 1: "he was not bound to take into account or avoid or overcome" by the following words (subject to linguistic improvement): "or did not fall within his sphere of risk". This might be about as vague as any wording we can find in this field but would at least cover the case of an unforeseen rise in prices mentioned under the heading: Form, paragraph 1 (b) by the representative of the United Kingdom. In that case the word "impossibility" might not appear in the text. This concept is namely much narrower in many civil law systems than the "impossibility" of frustration. It usually covers only physical and legal impossibility, although the Germans frequently used the term "economic impossibility" also (particularly before the doctrine of "*Wegfall der Geschäftsgrundlage*" was generally accepted) in which case impossibility would by and large cover the "impossibility" of frustration.

* See above in this annex, section I.

5. Report of the Secretary-General: issues presented by chapters IV to VI of the Uniform Law on the International Sale of Goods (A/CN.9/87, Annex IV)

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INTRODUCTION

1. This is a sequel to the report presented to the Working Group at its fourth session.¹ That report examined unresolved problems presented by the Uniform Law on the International Sales of Goods (ULIS)² in chapter III, "Obligations of the seller"; in response to a request by the Working Group, the report set

¹ "Obligations of the seller in an international sale of goods: consolidation of work done by the Working Group and suggested solutions for unresolved problems: report of the Secretary-General" (A/CN.9/WG.2/WP.16; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2), herein cited as "Report of the Secretary-General on obligations of the seller". This report was reproduced as annex II to the progress report of the Working Group on the International Sales of Goods on the work of its fourth session (A/CN.9/75), herein cited as "Report on fourth session" (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3).

² The Uniform Law (ULIS) is annexed to the Convention Relating to a Uniform Law on the International Sale of Goods which was signed at The Hague on 1 July 1964. The Convention and Uniform Law appear in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I, at chap. I, 1 (United Nations publication, Sales No. E.71.V.3), herein cited as "Register of Texts".

forth proposed legislative texts dealing with these problems.

2. The proposals included the consolidation and unification of the separate sets of remedial systems contained in chapter III of ULIS. Part I of the present report includes a comparable proposal with respect to the separate sets of remedial provisions in chapter IV, "Obligations of the buyer". Subsequent parts of the present report consider possible solutions to problems presented by chapters V and VI of ULIS, as revealed by the comments and proposals by Governments,³ and adjustments that may be advisable for conformity with decisions taken at prior sessions of the Working Group.⁴

³ See "Analysis of comments and proposals by Governments relating to articles 71 to 101 of ULIS" (A/CN.9/WG.2/WP.17), herein cited as "Analysis".

⁴ Earlier reports of the Working Group: report on first session (January 1970) (A/CN.9/35), UNCITRAL Yearbook, Vol. I: 1968-1970 part three, I, A, 2; report on second session (December 1970) (A/CN.9/52), UNCITRAL Yearbook, Vol. II: 1971, part two, I A, 2; report on third session (January 1972) (A/CN.9/62), UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

I. CHAPTER IV. OBLIGATIONS OF THE BUYER

A. SUBSTANTIVE OBLIGATIONS OF THE BUYER WITH RESPECT TO PERFORMANCE OF THE CONTRACT

1. Action taken at fourth session

3. The Working Group at its fourth session considered four articles (56-59) in chapter IV of ULIS dealing with the substantive obligations of the buyer. Article 56 of ULIS (a general introductory provision) was approved without modification. The Working Group approved a revised version of article 57 (fixing the price), and deferred action on article 58 (net weight) until the current (fifth) session. With respect to article 59 (place of payment), the Working Group approved paragraphs 1 and 2; consideration of a proposed third paragraph (compliance with national law to permit the seller to receive the price) was deferred until the current session.⁵

2. Place and date of payment: articles 59 and 60

4. Articles 59 and 60 of ULIS comprise a subsection entitled: "B. Place and date of payment". Analysis of these two sections discloses that they are incomplete with respect to the *date* for payment of the price, and most particularly with respect to the important practical question of the relationship between the time for payment and for the handing over or dispatch of the goods. The omission seriously impairs the clarity and workability of the law. Merchants need a clear, unified picture as to both *where* and *when* payment is to occur; and the vital aspect of payment needs to be placed in relationship to step-by-step performance of the sales contract by both parties.

5. To analyse the rules of ULIS that bear on the subject of section 1B, "Place and date of payment", it will be necessary to examine the interrelationship among several articles of ULIS. Following this analysis, an attempt will be made to unify and simplify the rules in question.

6. At first glance it would be assumed that article 59 (1) of ULIS attempts to deal with the relationship between payment by buyer and seller's performance. Article 59 (1) states that "where the payment is to be made against handing over of the goods or documents, [the buyer shall pay] at the place where the handing over of documents takes place." However, examination of this provision shows that it is a tautology. The "rule" only applies "where the payment is to be against the handing over of the goods or of documents". This premise for the rule on the place of payment necessarily assumes that the place for handing over the goods (or documents) and the place for payment of the price must be the same; articulating the conclusion that the payment shall be made at the place of the handing over of the goods merely restates the premise in different words and adds nothing to the

general rule of ULIS that the parties shall perform the agreements they undertake. Such a circular statement is presumably harmless. But it must be borne in mind that article 59 fails to set forth a norm which (in the absence of contractual provision) deals with the question as to *when* the buyer is obliged to pay for the goods in relation to the time for the handing over of the goods or documents.

7. To find an answer to this basic question it is necessary to piece together other widely separated and complex provisions of ULIS. Over 10 articles later, it is possible to find in article 71 the following sentence: "Except as otherwise provided in article 72, delivery of the goods and payment of the price are *concurrent conditions*". "Concurrent conditions" is a legalistic concept not readily understandable by merchants, or even by lawyers from different legal systems; this provision is, however, presumably intended to express two important norms: (1) the buyer is not obliged to pay before he receives the goods; (2) the seller is not obliged to surrender the goods before he is paid. Both of these norms implement a common principle: reliance on the credit of another party, in spite of its frequency, calls for an assessment of the facts at hand and consequently is not required unless the parties have specifically so agreed.

8. One difficulty is that under the above provision in article 71 of ULIS, the price is to be paid concurrently with "delivery" (in the French text, *délivrance*). In ULIS, "delivery" (*délivrance*)—unlike "handing over" (*remise*)—does not refer to the surrender of possession or control of the goods. Instead, "delivery" is a complex and artificial concept the implications of which must be gathered from widely separate and complex provisions. To implement article 71 it is necessary in ULIS to look first at article 19, which sets forth rules on "delivery"; the Working Group at its third session found that article 19 was unsatisfactory, and at the fourth session decided that this article should be deleted.⁶ In place of the attempt to define the concept of "delivery" the Working Group at the fourth session approved rules in article 20 on the steps to be taken by the seller to carry out his obligation to effect delivery.⁷

9. Under article 71 the rule that delivery and payment are "concurrent conditions" is applicable "except as otherwise provided in article 72". Article 72 applies only "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". In this setting, article 72 provides rules designed to reinforce the general proposition of article 71 to the effect that the seller is not required to either dispatch the goods or surrender control over the goods to the buyer until the buyer has

⁵ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 150-177. The Working Group also deferred consideration of articles 60-70 of chapter IV (*ibid.*, para. 178). See also: "Compilation of legislative texts approved by the Working Group at its first four sessions" (A/CN.9/WG.2/WP.18) herein cited as "Compilation", reproduced in this volume, part two, I, 2, above.

⁶ Report on third session (January 1972) (A/CN.9/62/Add.1) (UNCITRAL Yearbook, Vol. III: 1972, part two: I, A, 5), paras. 15-21; Report on fourth session (1973) (A/CN.9/75), paras. 16-21 (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3). See also report of the Secretary-General on "delivery" in ULIS (A/CN.9/WG.2/WP.8) (UNCITRAL Yearbook, Vol. III: 1972, part two: I, A, 1), paras. 37-40 and annex III.

⁷ Report on fourth session, paras. 22-29; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

paid for the goods. However, the intended result is obscured by the reference to "delivery" of the goods.⁸

10. To sum up, section IB, "Place and date of payment" (articles 59 and 60), fails to deal with the most important problems under this heading; widely scattered provisions in articles 19, 71 and 72 touch on these basic questions but the answers are unclear and, on occasion, unfortunate. It would seem advisable to set forth a more complete presentation under the above heading in section IB, "Place and date of payment".

11. Such a presentation, which draws on the rules of articles 71 and 72, is set forth below as a redraft of article 60. It will be noted that paragraph 2 of the redraft takes account of the role played by documentary letters of credit in facilitating the exchange of goods for the price. The operative provisions on payment in ULIS virtually ignore this basic commercial arrangement.⁹ The detailed operations of the documentary letter of credit must, in the interest of flexibility, be left to commercial usage; however, a direct reference to the documentary credit seems essential in a modern commercial law. Further questions can best be considered after examination of the draft provision, which follows:

(a) *Proposed redraft of article 60 [bis]*

1. The buyer shall pay the price when the seller, in accordance with the contract and the present law, hands over the goods or a document controlling possession of the goods.

2. Where the contract involves carriage of the goods, the seller may either:

(a) By appropriate notice require that, prior to dispatch of the goods, the buyer at his election shall in the seller's country either pay the price in exchange for documents controlling disposition of the goods, or procure the establishment of an irrevocable letter of credit, in accordance with current commercial practice, assuring such payment; or

(b) Dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

⁸ It will be noted that the quoted rule of article 72 permitting the seller to require payment at destination against surrender of documents applies when two conditions are met: (1) the contract involves carriage of the goods and (2) "delivery" under article 19 (2) is effected by handing over goods to the carrier. In view of the role which "delivery" in ULIS plays in connexion with risk of loss (see article 97 of ULIS) the above rule of article 72 would seem to be inapplicable when the contract provided that risk in transit would remain with the seller. In such shipments the seller would have as much or more justification for surrendering the goods at destination only when the buyer pays, but the use of the "delivery" concept in ULIS makes it difficult to reach this necessary result.

⁹ Article 69 of ULIS refers to various payment devices, including the documentary credit, but the provision is without independent effect for it is expressly dependent on provisions in the contract or the applicability of usages or laws or regulations in force. This article consequently adds little or nothing to other provisions of ULIS. See articles 3 and 9, as approved by the Working Group; these articles are reproduced in the Compilation (A/CN.9/WG.2/WP.18; reproduced in this volume, part two, I, 2),.

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

(b) *Discussion of draft provision*

12. Paragraph 1 serves two basic functions. The first is to define the time when payment of the price is due. The time is specified in terms of the seller's performance in handing over the goods (or documents controlling them). This approach is appropriate in terms of the nature of performance of a sales contract. The seller's performance, in procuring or manufacturing the goods and, in the normal case, readying them for shipment involves more complex processes than the payment of the price. Often, under the contract or applicable usage, there is some leeway in time for the seller to complete these processes and to tender the goods to buyer or dispatch them by carrier. (See ULIS, article 21.) Before the seller is ready to perform the contract the price is not due; when the point is reached, the price is due—unless, of course, the parties have agreed on delivery on credit. The draft in paragraph 1 thus establishes a norm for the time of payment—an essential feature that is lacking from the section of ULIS entitled "Place and date of payment".

13. The second function of the draft is to articulate the accepted commercial premise that, in the absence of specific agreement, neither party is obliged to extend credit to the other; i.e., the buyer is not obliged to pay the seller until he has control over the goods, and the seller is not required to relinquish control until he receives the price.

14. The draft in paragraph 1 takes account of the fact that control over the goods may be effected by possession of a document that controls possession of the goods. The phrase "document controlling possession of the goods" would be understood to refer to documents such as negotiable bills of lading or similar documents of title under which the carrier requires surrender of the document in exchange for delivery of the goods.¹⁰

15. Paragraph 2 applies the basic principles of paragraph 1 to the circumstances that arise when the contract calls for carriage of the goods.

16. Paragraph 2 (a) affords the seller the opportunity to require that the price be paid before he dispatches the goods. In the sales governed by this law, the goods normally will be shipped to another country; the carriage will often be to a distant point and subject to substantial freight expense. Paragraph 2 (a) affords the seller the opportunity to avoid two hazards: (a) if the price is paid at destination, exchange control restrictions may make it impossible for the seller to receive the benefit of the sale; (b) if the buyer rejects the goods at a distant point the seller may incur serious expenses in reshipping or redisposal of the goods—expenses

¹⁰ Whether a document controls possession of the goods depends on the provisions of the document in question and on applicable law. The reference in paragraph 1 to the effect of the document seems preferable to referring to the designations of such documents, such as "negotiable bill of lading" or "document of title", since such designations lack a uniform meaning.

which, in view of the uncertainties inherent in litigation and the buyer's credit, the seller may never be able to recover. Such considerations seem to underlie provisions in articles 59 and 72 of ULIS, but it is hoped that the statement of such rules as part of a unified presentation on the date and place of payment will be clearer and less subject to gaps and technicalities.

17. Under paragraph 2 (a), it will be noted that if the seller requires payment before dispatch of the goods, the buyer may elect to follow the customary and efficient procedures for handling such payment by establishing an irrevocable letter of credit in the seller's country.¹¹ Pursuant to the general rule in paragraph 1 and "current commercial practice" (paragraph 2), payment under the letter of credit would be due only on the presentation of documents that control possession of the goods.¹²

18. Paragraph 3 brings together, in the setting of the exchange of goods for the price, rules on the right to inspect before payment which appear in articles 71, 72 (1) and 72 (2) of ULIS. These three provisions of ULIS seek to express the general rule that the buyer may inspect the goods before he pays for them unless the arrangements for payment on which the parties have agreed are inconsistent with such inspection. Paragraph 3 of the draft states this as a single, uniform rule which is designed to avoid problems of interpretation that could arise under ULIS from the necessity to reconcile paragraph 1 and paragraph 2 of article 72. Under 72 (1) of ULIS (last sentence) the handing over of goods at destination would normally be arranged by sending the documents (including a negotiable bill of lading) to a collecting bank in the buyer's city, which would surrender the documents in exchange for payment of the price.¹³ In such a payment article 72 (1) states that "the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods". On the other hand, paragraph (2) states:

"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 an opportunity to examine the goods."

19. The difficulty of reconciling these provisions of paragraphs 1 and 2 of article 72 of ULIS can be illustrated by the following cases:

(a) *Case No. 1.* The contract calls for payment of the price on presentation of a negotiable bill of lading at the point of arrival of the goods and only after arrival of the goods.

(b) *Case No. 2.* The contract calls for such payment against documents prior to the time when arrival

of the goods could be expected, or at a place remote from the place of arrival.

20. In case No. 1, inspection would be feasible, and the seller may be expected to provide therefor by an appropriate instruction on the bill of lading or by appropriate instruction to the carrier. In case No. 2, the terms of the contract show that inspection before payment was inconsistent with the procedures for delivery and payment to which the parties have agreed. Under the proposed draft, an effective tender of delivery by the seller would require that an opportunity for inspection be provided in case No. 1, but not in case No. 2. It seems difficult to work out satisfactory solutions for these standard situations under paragraphs 1 and 2 of article 72 of ULIS.

21. It will be noted that the above draft provision is designated as "Article 60 [bis]". This designation reflects the fact that questions have been raised as to the need for article 60 of ULIS.¹⁴ If the Working Group decides to delete this article, the above draft provision could take its place. If the Working Group retains article 60 of ULIS, the above draft provision could appropriately follow this article.

B. REMEDIES FOR BREACH OF CONTRACT

1. Consolidation of separate sets of remedial provisions applicable to breach of the sales contract by the buyer

22. Chapter IV of ULIS, entitled "Obligations of the buyer", sets forth only a few substantive rules as to the buyer's obligations but intersperses among these provisions three separate sets of remedial provisions that apply when the buyer fails to perform one or another of his substantive obligations. Thus, in chapter IV, separate remedial provisions appear in: (a) articles 61-64 (remedies for non-payment), (b) articles 66-68 (remedies for failure to take delivery), and (c) article 70 (remedies for failure to perform "any other" obligation). This fragmentation of remedial provisions parallels the approach of chapter III of ULIS, "Obligations of the seller". The Working Group at its fourth session decided that the separate sets of remedial provisions in chapter III should be consolidated.¹⁵ The reasons for consolidating the remedial provisions in chapter III appear also applicable to chapter IV. The report of the Secretary-General presented to the Working Group at its fourth session analysed in detail the problems resulting from the creation of separate sets of remedial provisions for various aspects of the performance of a sales contract. As the report noted, unifying such provisions has the following advantages:¹⁶

¹¹ It seems adequately clear that the letter of credit has been "established" if it has either been issued or confirmed in the seller's country.

¹² Under "current commercial practice" the letter of credit may also require the presentation of other documents related to the shipment. See ICC, *Uniform Customs and Practice for Documentary Credits, Register of Texts*, Vol. I, chap. II, B. However, specifying such details in an international convention would probably result in excessive rigidity.

¹³ The collecting bank, acting for the seller, would normally hold both the bill of lading and a sight draft, drawn by the seller, calling for payment of the price. On payment of the draft, the collecting bank would surrender the bill of lading.

¹⁴ See the analysis of comments and proposals presented to the Working Group at its fourth session (A/CN.9/WG.2/WP.15, *UNCITRAL Yearbook*, Vol. IV: 1973, part two, I, A, 1), paras. 25-26. The need for article 60 of ULIS may be further diminished by adoption of the provisions on time for payment set forth in the above draft proposal.

¹⁵ Report on fourth session (A/CN.9/75; *UNCITRAL Yearbook*, Vol. IV: 1973, part two, I, A, 3), paras. 79-137.

¹⁶ The report of the Secretary-General (A/CN.9/WG.2/WP.6) is reproduced as annex II to the report on fourth session (A/CN.9/75; reproduced in *UNCITRAL Yearbook*, Vol. IV: 1973, part two, I, A, 2). Consolidating the remedial provisions is discussed at paras. 27-57, 111-155, and 158-162. The reasons for such consolidating are summarized at para. 177.

(a) A unified structure avoids gaps, complex cross-references and inconsistencies which result from such separate sets of remedial provisions. As a result, unified provisions can be drafted with greater simplicity and clarity;

(b) All of the substantive provisions on what the party *shall do* can be placed together and need not be interrupted by complex and technical rules on remedies for non-performance. Such a unified presentation of substantive duties makes it easier for merchants to understand, and perform, their obligations;

(c) Repetitive and overlapping provisions can be omitted, thereby simplifying and shortening the law. As the Secretary-General's report pointed out, the length and complexity of ULIS has been the subject of widespread comment; meeting these criticisms should be of assistance in facilitating the more widespread adoption of the Uniform Law.

23. In view of the action by the Working Group consolidating the separate sets of remedial provisions in chapter III, "Obligations of the seller", it seems likely that the Working Group would wish to consider a comparable consolidation in chapter IV, "Obligations of the buyer". Consequently, this report will consider first the provisions on the substantive obligations of the buyer. Examination of chapter IV discloses that it contains very few substantive provisions on performance by the buyer. This fact, reflecting the relatively narrow scope of the buyer's performance (payment of the agreed price), enhances the desirability and feasibility of consolidating (a) the substantive provisions and (b) the remedial provisions of chapter IV.

24. The first four of the substantive provisions in chapter IV, articles 56 to 59, were considered by the Working Group at its fourth session.¹⁷ Article 60, and a proposed article 60 *bis*, were considered above (paragraph 11).

25. Articles 61-64 of ULIS comprise a subsection entitled "C. Remedies for non-payment". For reasons mentioned above (paragraphs 22-23), these remedial provisions will be considered later in connexion with a consolidation of the remedies of the seller.

26. Section II of ULIS, entitled "Taking delivery" (articles 65-68) is primarily composed of remedial provisions that duplicate those of subsection C of section I of ULIS. One of the relatively few substantive provisions in this section is article 65. This article constitutes merely a definition of "taking delivery". (The buyer is required to "take delivery" by article 56.) Retention of article 65 in its present form seems to present no problems.¹⁸

¹⁷ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 150-177. It will be noted that article 58 (computation by net weight) was placed in square brackets with final action deferred until the present session (*ibid.*, para. 171). Action on a proposed third paragraph for article 59 was similarly deferred (*ibid.*, paras. 173-177).

¹⁸ The analysis of comments and proposals presented to the Working Group at its fourth session stated that no comments had been made on this article (A/CN.9/WG.2/WP.15; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 1, paras. 33-34).

27. Article 66 sets forth remedial provisions for failure of the buyer to take delivery. (This article parallels article 62, which sets forth remedial provision for failure of the buyer to pay the price.) For reasons stated above (paragraphs 22-23), a consolidated set of remedial provisions will be set forth later (paragraph 36 below) following a unified presentation of the buyer's substantive duties.

28. Article 67 of ULIS is primarily concerned with the substantive rights and duties of the seller and the buyer when the contract gives the buyer the right to make certain specifications with respect to the "form, measurement or other features of the goods". In addition, this article includes in paragraph 1 a brief clause providing a remedy for failure of the buyer to make such a specification. The text of article 67 (with remedial provision in *italics*) is as follows:

Article 67

1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may *declare the contract avoided, provided that he does so promptly*, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

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

29. It will be noted that the italicized remedial provision is so brief that it could be retained in this article without significantly impairing the advantages (discussed at paragraphs 22-23 above) of establishing a single, consolidated set of remedies applicable to breach of contract by the buyer. However, this remedial provision presents certain issues of policy that the Working Group may wish to consider.

30. Under article 67 (1) of ULIS, if the buyer fails to make a specification "*on the date expressly or impliedly agreed upon*", the seller may "*declare the contract avoided*, provided that he does so promptly". Under this provision, the seller may promptly declare the contract avoided without regard to the extent of the delay in making the specification and without regard to whether the delay constitutes a fundamental breach of contract. In this respect, the above provision is inconsistent with articles 26 (1), 30 (1), 32 (1), 43, 45 (2), 52 (3), 55 (1) (a), 62 (1), 66 (1) and 70 (1) (a) of ULIS and with the remedial provisions applicable to breach by the seller established by the Working Group at its fourth session.¹⁹ Under all of these provisions, the severe remedy of avoidance of the contract is avail-

¹⁹ Report on fourth session (A/CN.9/75); UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3, para. 108 (article 44 (1) (a)); see also Compilation (A/CN.9 WG.2/WP.18, reproduced in this volume, part two, I, 2 above).

able only for a fundamental breach of contract.²⁰ It is not evident that a brief delay by the buyer in supplying specifications to the seller would always be more serious than a delay by the seller in supplying the goods or a delay by the buyer in paying for them. Hence, in the interest of consistency and of sound policy, it would seem desirable to delete the italicized remedial provisions from article 67, so that delay or failure of the buyer to supply specifications would be subject to the general remedial provisions applicable to a breach of contract by the buyer.²¹

31. Article 68 sets forth remedies for failure of the buyer "to accept delivery of the goods or to make a specification". For reasons indicated above (paragraphs 22-23) the substance of this provision will be included in a consolidated remedial provision for chapter IV. (See paragraph 36 below.)

32. Article 69 sets forth, in one brief sentence, the only substantive provision in subsection III, "Other obligations of the buyer". Even this article is without independent effect, for the buyer's obligation is confined to taking those steps with respect to guaranteeing payment of the price that are "provided for in the contract, by usage or by laws and regulations in force". It seems unnecessary to repeat that the buyer shall perform his contract; ULIS in article 9 gives effect to usages; and it seems that "applicable" laws and regulations would continue to be "applicable" without such a vague (and circular) provision. Setting up this separate section on "Other obligations of the buyer" probably resulted from the creation of separate categories for the buyers' duties ("Section I. Payment of the price"; "Section II. Taking delivery"), each with its own remedial system. This attempt to categorize the buyer's duties created the need for a residuary "catch-all" section for any obligation of the buyer that might fall outside the first two sections. This problem is avoided by a unified presentation of (a) the buyer's substantive duties and (b) the remedies applicable to the breach of any of his substantive duties.

33. Since article 69 has no independent effect it could be omitted; by the same token its retention probably would not be harmful. However, provisions on payment (including assuring payment by establishing a documentary credit) were included in the proposed redraft of article 60 [*bis*] (paragraph 11 above). If an article along the lines of that proposal is adopted by the Working Group, there would be some gain in clarity and simplicity from omitting article 69 of ULIS.

34. Article 70, the last article in chapter IV, "Obligations of the buyer", provides a set of remedies for section III, "Other obligations of the buyer". Such separate sets of remedies would, of course, be unnecessary

if the Working Group established a consolidated set of remedies for chapter IV.

(a) *Approach to drafting consolidated remedial provisions*

35. For reasons noted above (paragraphs 22-23), it seems probable that the Working Group would wish to establish consolidated remedies for chapter IV, based on the consolidated remedies which it approved for chapter III.²² As we shall see, the consolidated remedies for chapter III, "Obligations of the seller", can readily be adapted for chapter IV, "Obligations of the buyer". The principal adaptations result from the fact that performance by a buyer is less complex than performance by the seller; as a result, some of the remedial provisions in chapter III need not be retained for chapter IV.

(b) *Draft provisions for Section II: remedies for breach of contract by the buyer*

36. Following is a draft set of remedial provisions for chapter IV based on the provisions (articles 41 *et seq.*) approved for chapter III. This system presupposes that the first part of chapter IV will set forth the substantive obligations of the buyer; these provisions could be grouped under a heading such as: "Section 1. Performance of the contract by the buyer".²³ The consolidated remedial provisions could then be grouped under a heading such as "Section II. Remedies for breach of contract by the buyer".²⁴

Proposed provisions

SECTION II: REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Article 70

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

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

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

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

Article 71

The seller has the right to require the buyer to perform the contract to the extent that specific per-

²⁰ In many provisions of ULIS, and in the remedial system approved by the Working Group at the fourth session (arts. 43 and 44 (1) (b)) the innocent party may establish a basis for avoidance of the contract by a notice to perform within a fixed time of reasonable length (*Nachfrist*). Article 67 (1) of ULIS provides for a notice by the seller to the buyer, but the seller may avoid the contract for any delay in providing specifications without regard to whether such a notice has been given.

²¹ The proposed structure for chapter IV is set out in paragraph 45 below. That presentation shows the proposed location of article 67 in the chapter.

²² Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3); paras. 83-130 (articles 41-47) and annex I. See report of the Secretary-General, *ibid.*, annex II (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2), paras. 111-177, especially paras. 158-176.

²³ This section would include the original or redrafted versions of articles 56, 57, 58, 59, 60, 65 and 67. See paras. 3, 11 and 28 above. The proposed structure for chapter IV is set out in para. 45 below.

²⁴ This section would take the place of articles 61, 62, 63, 64, 66, part of 67 (1), 68, and 70 of ULIS. To avoid confusion with the numbering in ULIS, the draft remedial provisions start with article 70, which in ULIS provides remedies for breach by the buyer of any "Other obligations". Articles 71 and 72 of ULIS have been incorporated in the draft article 60 [*bis*] which appears at para. 11 above.

formance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the seller has acted inconsistently with that right by avoiding the contract under article 72 *bis*.

Article 72

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

Article 72 *bis*

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

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

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

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

(c) *Discussion of draft provisions for section II: remedies for breach of contract by the buyer*

37. Article 70 is modelled closely on the initial article (article 41) in the consolidated remedial provisions for chapter III, as approved by the Working Group at its fourth session. In paragraph 1 (b) of article 70, it was necessary to add a reference to article 83, which is applicable to "delay in the payment of the price". Compare ULIS 63 (2).

38. Paragraph 1 of article 70 is an introductory index section. The word "and" has been inserted at the end of paragraph 1 (a) to preserve the principle of articles 41 (2), 55 (1), 63 (1) and 68 (1) of ULIS that a party may both avoid the contract and claim damages for breach.²⁵

39. Paragraph 2, providing that the buyer may not apply to a court or arbitral tribunal to grant him a period of grace, incorporates the rule of article 64 of ULIS, which appears in section I, "Payment of the price" of chapter IV. Section II, "Taking delivery", and section III, "Other obligations of the buyer", do not contain this provision. Because of this omission, it might be argued that ULIS does not prohibit applications for periods of grace with respect to the obligations em-

braced within sections II and III. Such contention, presumably inconsistent with the intent of the draftsmen, illustrates the inconsistencies and gaps that result from the fragmentation of the remedial provisions applicable to various aspects of performance of the contract of sale.²⁶

40. Article 71 is based on article 42 as approved by the Working Group at the fourth session. The only material modifications are: (a) the omission, at the end of paragraph 1 of article 42, of references to reduction of the price and cure of a lack of conformity of the goods, and (b) the omission of paragraph 2, which deals with the seller's delivery of substitute goods. These provisions are inappropriate to performance by the buyer and no corollary provisions applicable to performance by the buyer appear in chapter IV of ULIS.²⁷

41. Article 72 is modelled closely on article 43 as approved by the Working Group. (Article 43 *bis*, approved by the Working Group for chapter III, deals with cure by the seller of any failure to perform his obligations. For reasons mentioned in the preceding paragraph, it is not included in the draft remedial provisions for chapter IV.)²⁸

42. Article 72 *bis* is based on article 44 as prepared by the Working Group. The only significant modification is the omission of subparagraph 2 (a) of article 44, which relates to the provisions on seller's "cure" of defective performance.

43. Other remedial provisions applicable to performance by the seller (chapter III) do not appear appropriate to the relatively simpler performance by the buyer (chapter IV) and have not been included in the above draft. (Chapter IV of ULIS did not contain such provisions.) These remaining provisions of chapter III which have not been employed in the above draft proposed for chapter IV (paragraph 36) are as follows: article 45 (reduction of the price); article 46 (delivery of only part of the goods); article 47 (early tender of delivery; tender of a greater quantity of goods); article 48 (early recourse to remedies when it is clear the goods will not conform).

44. The above consolidated set of remedies, applicable whenever "the buyer fails to perform any of his obligations under the contract of sale and the pres-

²⁵ Similar gaps and inconsistencies that appeared in the separate sets of remedial systems in chapter III are discussed in the report of the Secretary-General presented to the Working Group at its fourth session (A/CN.9/75, annex II; UNCITRAL Yearbook, Vol. IV: part two, I, A, 2) at paragraphs 164, 170, 171, 172, 174 and 176.

²⁷ Draft article 71 deals with the right to require the buyer to perform the contract. In chapter IV of ULIS, such a provision appears in section I (article 61) and in section III (article 70 (2)), but not in section II. This latter omission appears to be another accidental gap that resulted from fragmentation of the remedial provisions of ULIS. See para. 39, above.

²⁸ It would be possible to devise a provision on "cure" by a buyer of defective initial performance with respect to payment (i.e. correcting the terms of a letter of credit). However, the provisions on cure in article 44 of ULIS and in article 43 *bis* of the Working Group redraft seem to be occasioned by the special complications involved in the repair or replacement of defective goods. As has been noted, ULIS does not set forth a provision in chapter IV comparable to the cure provisions of article 44 included in chapter III. There seems no necessity for such provisions since such issues can be handled in terms of whether the initial failure of performance, or the delay in correcting such a failure, constituted a fundamental breach.

²⁵ Articles 84-87 make clear that damages may be recovered on avoidance of the contract, but it may be advisable not to leave a reader in doubt on this point while examining the earlier portions of the law.

ent Law", deals with the substance of the issues dealt with in the three sets of remedial provisions in chapter IV of ULIS (subsec. I, C: articles 61, 62, 63 and 64; sec. II: articles 66, 67 (1) and 68; sec. III: art. 70).²⁹ It is believed that such a unification of the remedies available to the seller implements the policies that led the Working Group to take similar action with respect to chapter III. (See paragraph 22 above.)

C. PROPOSED STRUCTURE FOR CHAPTER IV

45. The following indicates in skeletal form the structure for chapter IV that would result from decisions by the Working Group and the draft provisions set forth herein:

CHAPTER IV. OBLIGATIONS OF THE BUYER

SECTION I: PERFORMANCE OF THE CONTRACT BY THE BUYER

Articles 56-59

(See annex I to A/CN.9/75* and the compilation (A/CN.9/WG.2/WP.18**))

Article 60 [bis]

(See draft provision at paragraph 11 above)

Article 65

(Same as ULIS; see paragraph 26 above)

Article 67

(See provision at paragraph 28 above, based on ULIS 67 except that the italicized remedial provision would be deleted.)

SECTION II: REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Articles 70-72 bis

(See draft provisions at paragraph 36 above)

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

A. REVISION AND RELOCATION OF PROVISIONS ON PAYMENT BY BUYER IN ARTICLES 71 AND 72

46. It was proposed above (paragraphs 7-11) that the substance of articles 71 and 72 be incorporated in chapter IV in order to achieve a more complete and intelligible presentation of the buyer's obligations with respect to payment (e.g., time and place for payment

and right to inspection prior to payment). Such a consolidation was proposed in the draft article 60 [*bis*] that was set forth above at paragraph 11; this provision also dealt with drafting problems that are presented by articles 71 and 72. If the Working Group approves a provision along the lines of the above draft, articles 71 and 72 should be deleted from chapter V.

47. As has been noted, the matters dealt with in articles 71 and 72 are an integral part of the basic obligations of the buyer with respect to payment, which is dealt with in chapter IV, in subsection I, B, "Place and date of payment". Article 73 deals with a distinct problem: a privilege to suspend performance because of a supervening circumstance—i.e., "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". Problems presented by such supervening circumstances are closely related to the problems dealt with in chapter V, section II, "Exemptions" (article 74). Consequently, article 73 should remain in chapter V.³⁰ On the other hand, moving the provisions on the basic obligation of the buyer to pay the price in articles 71 and 72 to chapter IV would clarify the structure of the uniform law.

B. SUSPENSION OF PERFORMANCE: ARTICLE 73

48. The provisions of article 73 deal with two subjects: (1) paragraph 1 establishes a general rule on suspension of performance; (2) paragraphs 2 and 3 apply the general rule to a specific situation: preventing of the delivery of goods in transit to the buyer.

1. *The general rule on suspension of performance*

49. Paragraph 1 of article 73 provides:

"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."

50. One question, presented in 1969 in the reply by Egypt to an inquiry by the Secretary-General, emphasized that the above provision "leaves it to the party concerned to evaluate both the economic situation of the other party and the extent of the obligations which will not be performed".³¹ The same issue was discussed at the Commission's second session (1969); other representatives expressed the view that under this provision a party is not given the right unilaterally to suspend performance, and that if a party acts inconsistently with the standard set forth in paragraph 1 he would be liable for damages for breach of contract.³² Thus, one question that the Working Group may wish to consider is whether the statement in article 73 of the circum-

* UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

** Reproduced in this volume, part two, I, 2, above.

²⁹ Article 66 (1) provides that where the buyer's failure to take delivery "gives the seller good grounds for fearing that the buyer will not pay the price", the seller may declare the contract avoided, even if such failure does not constitute a fundamental breach. No such provision appears in section I, "Payment of the price", or section III, "Other obligations", of chapter IV, and it is difficult to see why a failure (or delay) in taking delivery calls for more extreme remedies than a failure (or delay) with respect to payment of this price. Compare the discussion of article 67 on failure to supply specifications (para. 30, above). See also ULIS 73 (suspension of performance based on fear of non-performance).

³⁰ It would seem appropriate for article 73 to appear in section I of chapter V under a heading such as "Suspension of performance".

³¹ A/CN.9/11/Add.3, p. 24.

³² UNCITRAL, Report on second session (1969); *Official Records of the General Assembly, twenty-fourth session, Supplement No. 18 (A/7618)*, annex I, paras. 95-96.

stances authorizing suspension of performance is sufficiently definite and objective.³³

51. A second question is the consequence of the suspension of performance. This problem can usefully be considered in the setting of the following concrete case, which is probably the most typical situation for which article 73 was intended.

52. *Case No. 1.* A sales contract made in January calls for delivery in June. In January an investigation by the seller's credit department indicates that the buyer's financial position is strong, so the seller agrees that the buyer may defer payment until 60 days after the June delivery.³⁴ However, in May the seller receives information that the buyer's financial position has been impaired so that it would be hazardous to deliver the goods prior to payment: in the language of article 73 (1), "there is good reason to fear" that the buyer will not perform a material part of his obligation.

53. In the above situation, article 73 (1) simply provides that the seller "may suspend the performance of his obligations". This brief statement raises several questions: Is the seller obliged to notify the buyer that he is "suspending performance", or may the buyer receive his first intimation of difficulty when the goods fail to arrive in June? If the buyer's financial position remains doubtful, is the seller entitled to do *nothing* further in performance of the contract? (Note that the only feature that should cause concern to the seller was the initial provision for delivery on credit.) What is the effect of the seller's "suspension of performance" on the buyer's duty to perform? (i.e., if the buyer does nothing to remedy the situation, is he liable to the seller for breach of contract, or does the deterioration of the buyer's financial position relieve him of responsibility under the contract?) Thus, under the present text of article 73 the situation seems suspended in mid-air.

54. In practice, the situation would be handled as follows: the seller would notify the buyer that, because of concern over a current financial report, the arrangement for delivery on credit will be suspended, and the goods will be shipped only if the buyer first assures that the price will be paid—typically by establishing an irrevocable letter of credit. The article would be more helpful if it gave somewhat clearer guidance to the parties based on normal commercial practice.

55. The operation of article 73 may also be examined in the setting of the following situation:

56. *Case No. 2.* A contract made in January calls for the seller to manufacture goods to buyer's specifications and deliver them in June in exchange for cash payment. In February the seller receives a discouraging report on the buyer's financial status so that there is "good reason to fear" that the goods manufactured to buyer's specifications would be left on seller's hands. (In this setting the seller cannot, of course, rely on a theoretical legal obligation by the buyer to compensate the seller for his loss.)

³³ This question is related to that presented by the provision in article 76 that a party may declare the contract avoided where "it is clear that one of the parties will commit a fundamental breach of contract".

³⁴ In practice, the sales contract would normally permit the seller to modify or withdraw such arrangements for credit until the time for delivery.

57. In this situation, as in Case No. 1, there is need for a careful reconciliation of the interests of both parties: (a) the seller needs protection against a practical hazard; (b) the buyer needs to know of the seller's concern; (c) the seller's performance should be subject to suspension only until the buyer provides assurance of payment on delivery—typically by procuring the issuance of a documentary letter of credit.

58. It seems advisable to supplement paragraph 1 of article 73 so as to deal with the foregoing problems. Consideration might be given to the following:

Draft paragraph 1 bis for article 73

A party suspending performance shall promptly notify the other party thereof and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract.

2. Preventing delivery of goods in transit to the buyer

59. The provisions on stoppage in transit in paragraphs 2 and 3 of article 73, in actual practice, become applicable only under a rather rare combination of circumstances: (1) the seller dispatches the goods to the buyer without receiving payment or assurance of payment (as by documentary letter of credit) and without retaining control over the goods;³⁵ and (2) the seller receives new information as to the buyer's financial position while the goods are still in transit, and in adequate time to take the steps required to prevent the carrier from handing over the goods to the buyer. Provisions on stoppage in transit appear, in various forms, in national legislation and have led to intriguing theoretical speculation, but it is doubtful whether they have a significance in practice that is commensurate with their difficulty.

60. A basic question of interpretation arises under the ULIS provisions on stoppage in transit: Do these provisions impose legal obligations on carriers or third persons, or is article 73 confined to rights in the goods as between the seller and buyer? Article 8 of ULIS, as approved unchanged by the Working Group, provides: "The present Law shall govern *only the obligations of the seller and the buyer* arising from a contract of sale." On the other hand, a wider scope for article 73 seems to be implied from the provision in paragraph 2 that the seller "may prevent the handing over of the goods" by the carrier and, more particularly from the provision in paragraph 3 protecting a third person claiming the goods "who is a lawful holder of a document which entitles him to obtain the goods" unless the seller proves that the third person, when he obtained the document, "knowingly acted to the detriment of the seller". The 1969 reply of Austria to the Secretary-General's inquiry expressed concern over the liability which these provisions may inflict on carriers,

³⁵ Such control could be handled by consigning the goods to the order of the seller, and by transmitting this negotiable bill of lading, with a sight draft, through banking channels.

in conflict with provisions of municipal and international law concerning the carriage of goods.³⁶

61. It would be difficult, within the scope of a uniform law on sales, to deal adequately with the rights of carriers and third persons. Therefore, it seems advisable to make it clear that any provisions on stoppage in transit in article 73 are limited to rights as between the seller and buyer, and thus are compatible with the scope of the law as defined in article 3. This could be accomplished by an addition to paragraph 2 of article 73. (In the following draft, it is doubtful whether the bracketed language (a) is surplusage, or (b) is helpful in the interest of clarity.)

Proposed addition to article 73 (2)

The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers or other persons].

62. If the Working Group decides that article 73 (2) is limited to rights as between the seller and buyer, paragraph 3 becomes unnecessary and could be deleted.

C. PROPOSED STRUCTURE FOR CHAPTER V, SECTION 1

63. The foregoing proposals would lead to the following structure for chapter V, section 1 (the first two articles of this section in ULIS—articles 71 and 72—would be incorporated into chapter IV; see paragraphs 7-10, and proposed article 60 *bis* at paragraph 11 above:

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

SECTION I: SUSPENSION OF PERFORMANCE

Article 73

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. (Same as ULIS 73 (1).)

1 *bis*. A party suspending performance shall promptly notify the other party thereof, and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract. (See paragraph 58 above.)

2. If the seller has already dispatched 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. The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers or other persons]. (ULIS 73 (2), with addition proposed at paragraph 61, above.)

(Paragraph 3 of ULIS 73 is omitted. See paragraph 62 above.)

III. CHAPTER VI. PASSING OF THE RISK

A. INTRODUCTION; RELATED DECISIONS BY WORKING GROUP

64. An important problem, for which a uniform law on sales should supply clear and practical answers, is whether the seller or the buyer bears the risk of loss to the goods. This problem usually is presented by damage or loss occurring after the goods have been handed over by the seller to a carrier or other intermediary and before they are received by the buyer. In normal practice, all or most of this loss will be covered by insurance.³⁷ But even in such cases rules on risk of loss are relevant to allocate the burden of pressing a claim against the insurer and of salvaging damaged goods; where insurance coverage is inadequate or lacking, rules on risk of loss have even greater impact.³⁸

65. Significant decisions with respect to the approach to risk of loss were taken by the Working Group at its third session (January 1972). At that session the Working Group considered article 19 of ULIS, which sets forth a complex definition of "delivery" (*délivrance*).³⁹ The question of rules on risk of loss arose at that time, since the basic rule on risk of loss, contained in article 97 (1) of ULIS, states:

"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."

Consequently, it was necessary to consider whether the definition of "delivery" in article 19 served well to determine where risk of loss would fall, as well as to determine the other issues which, under ULIS, turned on whether there had been delivery of the goods.

66. In response to an earlier request by the Working Group, the Secretary-General prepared a study addressed to the above question, which the Working Group considered at its third session.⁴⁰ At that session the Working Group took two important decisions that are relevant to the approach to chapter VI on passing of the risk.

67. First, the Working Group concluded that the concept of "delivery" was an unsatisfactory way to approach the practical problem of the risk of loss, and "that in approaching the problem of the definition of

³⁷ In some settings the responsibility of the carrier for goods lost or damaged while in his charge is analogous to the protection provided by a policy of insurance.

³⁸ See also article 35 (1) (conformity of goods determined by condition when risk passes) and the discussion of this provision in the report of the Secretary-General on obligations of the seller (A/CN.9/75, annex II, paras. 65-67). Well drafted contracts, and general conditions of sale, make specific provision as to risk of loss, either by an explicit statement as to risk or by the use of a defined trade term such as "FOB" or "CIF". Cf. INCOTERMS (ICC Brochure 166), *Register of Texts*, vol. I, chap. I, 2.

³⁹ Report on third session (A/CN.9/62, annex II, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), paras. 17-19.

⁴⁰ Report of the Secretary-General on "delivery" in ULIS (A/CN.9/WG.2/WP.8), UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 1.

³⁶ Analysis (A/CN.9/WG.2/WP.17), para. 13; A/CN.9/11, p. 9.

'delivery' it would be assumed that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of 'delivery'.⁴¹

68. Secondly, the Working Group concluded that it was necessary to adopt a different approach to "delivery" from that employed in ULIS. This culminated in decisions at the fourth session to delete the definition of delivery in article 19 of ULIS and to state the seller's duties as to delivery in article 20. As had been noted in the report of the Secretary-General, ULIS had vacillated between two approaches to delivery: one is to define the physical *act of delivery*; the second is to specify the seller's legal *duty to deliver*: i.e., the contractual duty to perform the contract.⁴² Article 19 of ULIS, which the Working Group deleted, follows the first approach. Article 20, as drafted and approved by the Working Group at its fourth session, follows the second. Thus, article 20 is not a definition of the concept of "delivery" but states what the seller *shall do* to perform his obligation under the contract. Thus, under article 20 (a) delivery "shall be" effected in certain cases by "handing the goods over to the carrier" and under article 20 (b) and (c) (where the buyer is to come for the goods) "by placing the goods at the buyer's disposal"—usually at the seller's place of business.

69. For example, in the above situations covered by articles 20 (b) and (c) (i.e., where the buyer is to come for the goods), when the seller holds the goods at the buyer's disposal at the seller's place of business, the seller has performed his contractual duty with respect to delivery. But such performance by the seller does not constitute the *act* of "delivery", which, as the Working Group has observed, requires the co-operation of both parties in effecting a transfer of possession and control from one party to the other. Indeed, the buyer usually is unable, and is not required, to come and take possession of the goods as soon as they are placed at his disposition, and in some situations he may never come and take over the goods. In most such cases, on expiration of the period allowed for taking possession the buyer will be in breach of contract and will be responsible to the seller for loss resulting therefrom; however, in some cases the buyer's delay or total failure to come and get the goods may be subject to an "exemption" or excuse (article 74). Consequently, to conclude that a unilateral act by the seller under article 20 (b) or (c) constitutes an act of "delivery" which transfers risk of loss to the buyer could raise significant practical problems which call for further attention. See paragraphs 73-74 below.

B. ISSUES PRESENTED BY THE RISK PROVISIONS OF ULIS, AND SUGGESTED SOLUTIONS

70. The approach chosen by the Working Group at the fourth session, in drafting article 20 as a statement

of the seller's duty with respect to performance of the contract rather than as a definition of the act or concept of delivery, reinforces the decision taken at the third session—that rules on risk of loss would not be controlled by the concept of "delivery".⁴³ The underlying issues may be illustrated by reference to the following situation.

71. *Case No. 1.* The parties agree on the sale to the buyer of goods, which are to be made available to the buyer at the seller's place of business during the month of May, and which the buyer will come and take away by his own transport at any time during that month. (Compare a sale *ex works*.) On 1 May the goods are ready and available for delivery, but on 2 May the goods are destroyed by fire while they remain on the premises of the seller.

72. On the above facts, the seller has performed his contractual duty as defined in article 20 (b) and (c), as approved by the Working Group at its fourth session.⁴⁴ However, under the rules on risk of loss in ULIS, risk would remain on the seller. Under article 97 (1) risk passes to the buyer on "delivery"; under article 19 (1), (which is applicable in cases that do not involve carriage of the goods), "delivery" consists in "handing over" the goods—an event which, in the above case, has not occurred. Only when the buyer fails to perform his obligation with respect to removal of the goods (i.e., if he fails to come for them during May), would risk pass to the buyer by virtue of article 98 of ULIS.

73. The approach taken by ULIS with respect to risk of loss while the goods are in the seller's possession seems to be supported by practical considerations. In the absence of breach of contract by one party which prolongs possession (and risk) by the other party, there are practical reasons to allocate risk of loss to the party (a) who is in possession and control of the goods and (b) who, under normal commercial practice, is most likely to have effective insurance coverage for the goods. Each of these two considerations calls for brief comment.

(a) A buyer who is asked to pay for goods which he never received because they were destroyed while in the seller's possession will naturally consider the possibility that negligence of the seller or his agents caused or contributed to the loss. The relevant facts (e.g., the circumstances that led to a fire on seller's premises) present difficult problems as to proof (and disproof) and can lead to expensive litigation—as well as to disappointment of the buyer's expectation that he will receive from the seller the goods which the seller promised to hand over to him.

(b) Goods in the seller's possession awaiting delivery to the buyer are more likely to be covered by the seller's insurance than by the buyer's. One of the most efficient and common forms of insurance is the policy covering "Building and contents", which is carried by the businessman in possession and control of the

⁴¹ Report on third session (A/CN.9/62, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5) annex II, para. 17. The reasons supporting this conclusion had been developed, in the setting of concrete situations, in the above-mentioned report of the Secretary-General on "delivery" in ULIS (UNCITRAL Yearbook, Vol. III, 1972, part two, I, A, 1).

⁴² Report of the Secretary-General on "delivery" in ULIS (A/CN.9/WG.2/WP.8, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 1), paras. 5, 41, 56-61.

⁴³ Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), annex II, para. 17 discussed above at para. 67.

⁴⁴ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), para. 29. See also the Compilation (A/CN.9/WG.2/WP.18), reproduced in this volume, part two, I, 2 above.

building. Such a policy is efficient and common because the insurer can calculate the conditions, and risk experience, with respect to losses in such a building (e.g., fire resistance of construction, storage of flammable materials, security measures against theft, and the like). The buyer who has just signed a contract for the purchase of goods is not likely to take out a special policy of insurance covering such goods, and such special coverage is relatively expensive because of administrative costs and the difficulty of rating risks under unknown conditions.

74. In addition, allocating to the seller the risk of loss of goods held by the seller on his own premises (as in the facts stated in case No. 1 at paragraph 71 above) minimizes complex problems of "appropriation" (identification) of goods and of notice to the buyer with respect to "appropriation" to which members of the Working Group have referred in connexion with ULIS 98 (2) and (3).⁴⁵

75. For these reasons, suggested draft provisions, which appear below, follow the approach of ULIS as to allocation of risk of loss in the situation described above, rather than an allocation of risk based on the seller's performance of his contractual duty based on revised article 20. On the other hand, the proposed draft provisions integrate provisions which under ULIS are divided between article 19 and articles 96-101 (chapter VI), and also avoid the problems which the Working Group concluded were the result of the use in ULIS of the definition of "delivery" (*délivrance*).⁴⁶ Other aspects of the draft provisions will be explained below (paragraphs 77 to 86).

1. Draft provisions for chapter VI: passing of the risk

76. Consideration may be given to the following provisions for chapter VI:

CHAPTER VI. PASSING OF THE RISK

[Article 96: omitted]

Article 97 (See ULIS 97 (1), 19 (2), 99)

(1) The risk shall pass to the buyer when the goods are handed over to him. (See ULIS 97 (1).)

(2) Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer. (See ULIS 19 (2).)

(3) Where the [sale is of] *contract relates to goods then 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] *unless he disclosed such fact to the buyer [and the buyer agreed to assume such risk]*. (See ULIS 99.)

Article 98 (See ULIS 98 (1) and (2))

(2) Where the contract relates to *unidentified* [a sale of unascertained] goods, delay on the part of the buyer shall cause the risk to pass only where the seller has [set aside goods] manifestly *identified goods* [appropriated] to the contract and has notified the buyer that this has been done. (ULIS 98 (2), with indicated drafting changes.)

[Paragraph (3) of ULIS 98 is omitted.]

[Article 99: Omitted: see article 97 (3) of above draft]

[Article 100: omitted]

[Article 101: omitted]

2. Discussion of draft provisions for chapter VI: risk of loss

77. Article 96 of ULIS, under the above draft provisions, would be omitted.⁴⁷ The provision that where the risk has passed to the buyer "he shall pay the price notwithstanding the loss or deterioration of the goods" from one point of view merely articulates an obvious implication of passage of the risk and duplicates the substance of article 35 (1) (first sentence), which has been approved by the Working Group.⁴⁸ Under this reading, the provision would probably be unnecessary but harmless. On the other hand, the provision that the buyer "shall pay the price" might be read (incorrectly) as a remedial provision which would give the seller the right to recover the full price (as contrasted with damages) whenever the risk of loss has passed to the buyer—an approach that would be inconsistent with the system of remedies approved by the Working Group at its fourth session.⁴⁹ The choice does not appear to be of major importance, and article 96 probably would not cause serious inconvenience in practice. However, in the interest of simplicity and clarity, the article is omitted from the above draft provisions.

⁴⁷ See the divergent views on this question summarized in the Analysis (A/CN.9/WG.2/WP.17), para. 84. See *ibid.*, annex V, paras. 3, 6 and 11; annex VIII, paras. 6-7; annex IX, para. 16; reproduced in this volume, part two, I, 4 above.

⁴⁸ See Compilation (A/CN.9/WG.2/WP.18; reproduced in this volume, part two, I, 2), and discussion of article 35 in the report of the Secretary-General on obligations of the seller (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: part two, I, A, 2), annex II, paras. 65-66.

⁴⁹ See article 42 (1) (right to require seller to perform the contract), Report on fourth session (A/CN.9/75); UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3) para. 97. Compare the proposed draft article 71 (based on article 42) set forth above at paragraph 36. Recovery by the seller of the full price (as contrasted with damages) as a practical matter requires the buyer to take over the goods; where the seller is still in possession of the goods, this is equivalent to requiring specific performance of the contract, a remedy which, under ULIS and under the text approved by the Working Group, is not automatically available. However, this inconsistency would probably be insignificant if the Working Group approved the approach, recommended herein, whereby the risk of loss would not normally be transferred to the buyer until the goods are "handed over" to him.

⁴⁵ See analysis (A/CN.9/WG.2/WP.17), para. 90 and annex V, paras. 5 and 11.

⁴⁶ Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), annex II, paras. 17-19; report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 16-21. One of the difficulties resulting from the definition of "delivery" in article 19 of ULIS was that, under some circumstances, goods which were not in conformity with the contract would never be "delivered" to the buyer even if they were used or consumed by him. This led to both practical difficulties and difficulties of translation.

78. Article 97 of the draft states in paragraph 1 a general rule on passage of risk which is applicable to the minority of cases where the contract does not involve carriage of the goods—i.e., where the buyer is obliged to come or send for the goods, as in a contract *ex works*. Cases where the contract involves carriage of the goods would be governed by paragraphs 2 and 3.

79. Paragraph 1 preserves the substance of the rule on risk of loss of ULIS which results from combining articles 19 (1) and 97 (1), but in a simpler and unified form. The reasons of policy that support the approach of ULIS on this point have been discussed in paragraphs 73 to 74 above.

80. Paragraph 2 preserves the substance of the rule that would result under ULIS under articles 19 (2) and 97 (1)—but again in a simplified and unified form. This draft does not retain the exception in article 19 (2) where another “place for delivery has been agreed upon”. The purpose of that exception is to give effect to a contractual provision specifying the point at which risk shall pass to the buyer.⁵⁰ However, under article 8, the provisions of the uniform law yield to the agreement of the parties; repeating this rule in certain parts of the law seems unnecessary.

81. Paragraph 3 is based on article 99 of ULIS, which provides in limited circumstances for transfer to the buyer of loss that had occurred prior to the making of the contract. The provision is placed in conjunction with the rule of paragraph 2 (risk where the contract involves carriage) in conformity with suggestions made in studies prepared for the present session.⁵¹ Certain possible drafting changes are indicated by brackets and italics. The most significant of these relates to the language of ULIS 99 (2), which states that even if the seller knew that “the goods had been lost or had deteriorated” and fails to inform the buyer of this fact, risk shall remain on the seller “until the time of the conclusion of the contract”. It will be noted that under this article, the goods are in transit at the time of the making of the contract; if, after the contract is made, the goods suffer further transit damage this provision would make it necessary to ascertain the points during the transit at which various types of damage occurred—an inquiry that is subject to practical difficulties, particularly in the setting of modern containerized transport. In the interest of simplicity and fairness, the modification indicated at the end of article 97 (3) of the above draft (paragraph 76) would slightly restrict the benefits which this difficult and controversial provision confers on the seller.

82. Article 98 deals with the significant problem of the effect of breach by the buyer on risk of loss. This article could be applicable either at the end of transit under a contract calling for delivery *ex ship* (or the like), or at the seller's factory under a contract calling for the buyer to come for the goods. The above draft retains the substance of paragraphs 1 and 2 of ULIS 98, but omits paragraph 3. A study submitted for this session suggests that paragraph 1 of article 98 be retained

(in substance) but that both paragraphs 2 and 3 of ULIS 98 be omitted.⁵²

83. Paragraph 2 of article 98 responds to the fact that specific goods are usually not identified (“ascertained”) when the contract is made, and that such identification normally occurs only when the goods are packed and labelled for shipment or for handing over to the buyer. It is a basic principle of sales law that risk of loss cannot pass until the goods in question are identified (“ascertained”).⁵³ Indeed, it is difficult to think of passage of risk in goods unless one can identify the goods in question. This principle may be so fundamental that it need not be stated. On the other hand, the deletion of a statement of this principle, now embodied in ULIS 98 (2), may lead to misunderstanding. In addition, ULIS 98 (2) requires not only that the goods have been “manifestly appropriated to the contract” but also that the seller “has notified the buyer that this has been done”. Where the seller seeks to hold the buyer for the loss of goods destroyed on the seller's premises, this notice requirement may be useful to prevent a false claim, following a fire or theft from the seller's place of business, that the goods lost had been “set aside” and “appropriated to the buyer”.

84. Paragraph 2 of ULIS 98 employs the concepts “unascertained” and “appropriated”. These concepts have complex connotations in national law which present problems of translation and could lead to misunderstanding in an international statute. “Identification” of goods seems to be a clearer concept, and has been suggested in italicized portions of the draft proposal.

85. Paragraph 3 of ULIS 98 is much less helpful. Indeed, this provision is difficult to apply in practice since it seems to contemplate that risk passes in unidentified (“unascertained”) goods—an approach which, for reasons just mentioned, would present problems of application and dangers of abuse. For these reasons, paragraph 3 is omitted from the draft proposal.

86. Article 99 of ULIS, for reasons indicated above (paragraph 81) has been included in a slightly modified form, as paragraph 3 of draft article 97.

87. Article 100 of ULIS states a modification of article 19 (3) of ULIS, which the Working Group decided to delete.⁵⁴ ULIS 19 (3) deals with the possibility that goods might be handed over to the carrier without being clearly “appropriated” to the contract; ULIS 100 deals with the possibility that when the seller, after dispatching “unappropriated” goods, might send a notice to the buyer at a time when he knew (or ought to have known) that the goods had been lost or damaged in transit. Under article 97 (2) of the above draft proposal, risk passes to the buyer when the goods have been “handed over to the carrier for transmission

⁵² See the analysis, para. 90 and annex V (reproduced in this volume, part two, I, 4, above), paras. 5, 6 and 11. On the other hand, the outline of provisions in annex VI (*ibid.*) calls for the retention of article 98. See also annex IX (*ibid.*), para. 18.

⁵³ It may be suggested that risks can pass when the buyer purchases a part or fraction of an identified larger mass or “bulk”. However, this is not an exception to the general rule, for in such cases the larger mass must be identified; risk then passes with respect to a share in the larger mass or “bulk”.

⁵⁴ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV : 1973, part two, I, A, 3), para. 21.

⁵⁰ This agreement may be expressed by a trade term (such as *ex ship*) which is understood to fix the point for passage of risk.

⁵¹ Analysis, para. 92.

to the buyer". In such a case, it seems that problems of lack of "appropriation" could scarcely arise. The combination of articles 19 (3) and 100 of ULIS produce a complex set of rules which seem unnecessary and difficult of practical application. Consequently, ULIS 100 is omitted from the draft provision—a result that is consistent with the study on this topic submitted for the present session.⁵⁵

88. Article 101 of ULIS provides that the passing of risk "shall not necessarily be determined by the provisions of the contract concerning expenses". This cryptic statement was unhelpful in the setting of ULIS and would be quite unnecessary under the above draft provisions which avoid the complex concept of "delivery". The above draft omits article 101—a recommendation which conforms to that in the above-mentioned study.⁵⁶

3. *Non-conformity of the goods: effect on risk and the right to avoid the contract*

89. Article 97 (2) of ULIS provides:

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 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.

90. This provision is addressed to the following situation: The goods which the seller hands over to the buyer (or to a carrier) do not fully conform to the contract. However, as often is the case when the non-conformity can readily be dealt with by an allowance or deduction from the price, the buyer does not "avoid the contract" or require the seller to replace the goods. In these circumstances, when does the risk of loss pass to the buyer?

91. The complex rules embodied in ULIS 97 (2) were designed to cope with consequences produced by the interaction of two other provisions of ULIS: (1) article 19 (1) of ULIS defines "delivery" as the "handing over of goods which conform with the contract"; (2) under article 97 (1), risk passes "when delivery is effected in accordance with the provisions of the contract and the present Law". These two provisions would produce the following surprising result: If the seller hands over goods which do not conform with the contract, "delivery" will never occur and risk will never pass to the buyer—even though the buyer chooses to retain the goods, and uses (or even consumes) them.

92. To avoid the above result produced by ULIS 19 (1) and 97 (1), it was necessary to add article 97 (2), which was quoted at paragraph 89. This provision is not easy to read, but it seems designed to say that if the buyer retains the goods (i.e., if he does not avoid the contract or require goods in replacement), the risk of loss shall be deemed to have passed retroactively to the buyer when the goods were handed over to him or to a carrier.

⁵⁵ Analysis, para. 94 and annex V (reproduced in this volume, part two, I, 4, above) paras. 9 and 11. But compare annex IX (*ibid.*) in which article 100 is retained.

⁵⁶ *Ibid.*

93. In short, the source of the difficulty that led to this provision was the rule of ULIS 19 (1) that "delivery" does not occur when goods are handed over which do not "conform with the contract". This difficulty has been removed by the Working Group's decision to delete article 19.⁵⁷ It would seem to follow that article 97 (2), at least in its present form, would be inappropriate. The question that remains is whether there is need for some other provision in chapter VI dealing with the effect of seller's breach of contract on the transfer of risk to the buyer.

94. This question can be analysed in the setting of the two following cases.

95. *Case No. 1.* The seller hands over to the buyer (or to a carrier) goods which fail to conform to the contract in a manner which, although requiring a reduction of the price, would not justify avoidance of the contract. These goods then suffer damage while in the possession of the buyer (or of the carrier).

96. *Case No. 2.* The facts are the same as in case No. 1, except that the non-conformity of the goods constitutes a "fundamental breach" which would justify avoidance of the contract. As in case No. 1, the goods suffer damage after they have been handed over to the buyer or to a carrier.

97. Case No. 1 presents the following issue: Should the minor non-conformity of the goods prevent the transfer of risk, which normally would have occurred when the goods were handed over? If so, minor breaches of contract could have serious consequences: (a) transit risks would often fall on the seller, even though the damage would normally be disclosed at destination, under circumstances in which the buyer (in accordance with the contract) could more efficiently assess the minor damage and file a claim against the insurer or carrier; (b) if the seller is made responsible for the damage to the goods, the breach would often be sufficiently serious to justify avoidance of the contract.⁵⁸ Both of the above consequences seem unfortunate: a minor non-conformity of the goods probably should not reverse the basic rules on risk of loss. If this conclusion is correct, no provision to deal with the situation described in case No. 1 need be added to chapter VI (risk of loss).

98. Case No. 2 involved a shipment in which the seller's breach was sufficiently material to entitle the buyer to avoid the contract. Should the fact that the goods were damaged in transit (after the risk passed to the buyer) bar the buyer from avoiding the contract on the ground that he could not "return the goods in the condition in which he received them", as required by article 79 (1).

99. If, as seems probable, the buyer should retain his right to avoid the contract in spite of the damage to the goods, it would be necessary to examine the five exceptions to the rule of article 79 (1) that appear in article 79 (2) to ascertain whether they adequately deal with this question. It seems that the problem may be

⁵⁷ Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3) para. 21.

⁵⁸ Article 35 (1) provides that conformity of the goods with the contract shall be determined by their condition at the time when risk passes.

met by the fourth exception (article 79 (2) (d)). Under this provision:

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

"...

"(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;"

However, it seems advisable to give final consideration to any problems of draftsmanship or clarity that may be presented by this provision in connexion with the Working Group's examination of the rules on avoidance in article 79 of ULIS.

100. The situation described in case No. 2 presents one further issue—the effect of a fundamental breach of contract by the seller on the passage of risk to the buyer. (It will be recalled that this problem arises only when the goods are seriously defective and also have been damaged—usually in transit.) If the buyer exercises his right to avoid the contract, or requires other goods in replacement, the answer is clear: the seller must take over and suffer any loss with respect to the goods that are both defective and damaged.

101. It might be suggested that where there has been a fundamental breach of contract, the buyer will normally exercise his right to avoid the contract (or require goods in replacement), so that no further problem need be considered. However, it is conceivable that the buyer's need for the goods might, in some cases, lead him to retain the goods. On this hypothesis, should the buyer be entitled to claim against the seller for (1) the defect, and (2) the damage to the goods that occurred after the seller handed them over?

102. Examination of ULIS 97 (2) (quoted at paragraph 89 above) shows that, under ULIS, if the buyer does not declare the contract avoided or require goods in replacement, the risk of loss remains with the buyer. Consequently, under ULIS: (1) the buyer may recover for the defect resulting from the seller's breach of contract; but (2) he may not recover for the damage to the goods that occurred after they were handed over. Under the simplified approach to delivery that has been adopted by the Working Group, and under the above draft provisions for chapter VI (paragraph 76), this same result is achieved without the addition of a provision like that of ULIS 97 (2). (As has been noted at paragraphs 90-93, above, the complex rule of ULIS

97 (2) was made necessary only by the provision in ULIS 19 (1) that goods are not "delivered" unless they "conform with the contract"; this problem has been removed by the Working Group by the deletion of article 19.)

103. The above approach has the merit of simplicity and probably would not encounter serious difficulty in practice. On the other hand, it might be suggested that the above approach is subject to the following criticism: The buyer may transfer the risk of loss to the seller if he avoids the contract but not if he retains the goods. As a consequence, this rule may encourage avoidance of the contract. However, the problem can arise only under a relatively rare combination of circumstances: the conjunction of (1) fundamental breach and (2) damage and (3) the lack of adequate insurance coverage and (4) a situation in which the buyer might be willing to retain the goods in spite of a fundamental breach.

104. If it is thought desirable to reverse the result achieved under ULIS and the above draft provisions for chapter IV, consideration might be given to adding the following as article 99. (It will be noted that article 98 deals with the effect of breach by the buyer; this would be followed by the following draft provision dealing with the effect of breach by the seller.)

Draft article 99

Where the failure of the seller to perform any of his obligations under the contract of sale and the present law constitutes a fundamental breach of contract, the risk with respect to goods affected by such failure of performance shall remain on the seller so long as the buyer may declare the contract avoided.

105. The attempt to devise a statutory text to deal with the above problem unfortunately requires recourse to the concept of "fundamental breach of contract"—a test that is inherently subject to doubt and dispute.⁵⁹ It may be doubted whether the situation is of sufficient practical importance (see paragraph 103 above) to justify complicating the rules on risk of loss. For these reasons, the above draft article 99 is not included in the draft provisions proposed for chapter VI.

⁵⁹ It may be assumed that minor contractual deviations would not justify reversal of the rules on risk of loss resulting from the provisions of the uniform law or from the contract. See annex VI (reproduced in this volume, part two, I, 4) to the Analysis (comment to proposed article 94), and paragraph 97 above.

6. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
<i>Working Group on the International Sale of Goods, fifth session</i>	
Analysis of comments and proposals by representatives of States members of the Working Group relating to articles 56 to 70 of ULIS: note by the Secretary-General	A/CN.9/WG.2/WP.15*

* Reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, I. 1.