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

Report of the Secretary-General

INTRODUCTION

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

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

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

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

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

2/ Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87 (herein cited as Working Group, report on fifth session).

3/ Working Group, report on fifth session, para. 245 (c). The comments and proposals so submitted by representatives are reproduced in a note by the Secretary-General, A/CN.9/WG.2/WP.20. This document will be cited as "Comments by Representatives".

revisions by the Working Group, necessarily leads to gaps in the numbering where articles of the 1964 ULIS have been deleted or consolidated with other articles.

CHAPTER I. SPHERE OF APPLICATION OF THE LAW

Article 1: basic rule on sphere of application

A. Introduction: basic rules on application

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

(1) Internationality of the transaction

(a) Introduction

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

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

^{4/} Progress report of the Working Group on the work of its second session (cited as "Working Group, report on second session"), A/CN.9/52, para. 17. This report is reproduced in the UNCITRAL Yearbook (cited as "Yearbook"), vol. II: 1971, p. 50.

^{5/} Working Group, report on second session, para. 19.

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

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

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

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

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

7/ Report of the United Nations Commission on International Trade Law on the work of its fourth session (cited as "UNCITRAL, report on fourth session"), para. 69.

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

9/ Working Group, report on second session, para. 25. This problem, of course, could arise under 1964 ULIS; but ULIS did not contain any provision to deal with the matter.

10/ Working Group, report on third session, annex II (A/CN.9/62/Add.1, paras. 6-10).

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

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The Working Group will also wish to note that the present language of paragraph 2 of the revised text was adopted in the United Nations Convention on the Limitation Period in the International Sale of Goods (article 2 (b)).

(2) Contact between the transaction and a Contracting State

(a) Introduction

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

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

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

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

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

13. The observations submitted by the representative of Austria suggested that it was unfortunate that paragraph (a) was restricted to sales between parties both of whom are in Contracting States. It was further suggested that, in any event, it would be advisable to delete paragraph (b) on the ground that this

12/ The Working Group, report on first session, paras. 10-25. The initial text, at para. 19, was subject to stylistic modifications to produce the current text quoted above.

13/ UNICTRAL, report on third session, paras. 22-31. At para. 32 the Commission considered possible reservations as to sphere of application.

14/ Working Group, report on third session, annex I; annex II (A/CN.9/62/Add.1), paras. 1-14.

reference to the rules of private international law was alien to unification of substantive law, and was inadvisable. 15/

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

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

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

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

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

16. The commentary accompanying the above suggestion draws attention to articles 4 and 8 of ULIS. Article 4 of ULIS also deals with the effect of a contract that the uniform law shall apply, and at the end of article 4 includes the language proposed by the representative of Norway. Article 8 of ULIS has been retained without change in the present draft.

17. The inclusion of the language proposed above was considered by the Working Group at its second session. The Working Group concluded that the effect of mandatory rules should be dealt with in a general provision, since this problem could also arise when the Law is automatically applicable - as contrasted with applicability resulting from the agreement of the parties. 16/ In the latter regard, it should be noted that the omission from the Law of "consumer" sales (article 2(1)) avoids many, if not most, of the situations in which there are mandatory rules of law; under most legal régimes in commercial transactions full effect is given to the agreement of the parties.

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

16/ Working Group, report on second session, paras. 38-41.

Article 2: Exemptions

18. Article 2 provides for two types of exemptions from the law. The first paragraph exempts certain types of transactions - e.g., consumer sales as defined in subparagraph (a). The second paragraph excludes certain types of commodities.

A. Consumer sales: paragraph 1 (a)

19. As has been mentioned, paragraph 1 (a) excludes consumer sales - an exclusion not found in 1964 ULIS. The reasons for this exclusion appear in the report of the Working Group's second session (paras. 22, 57); the language of the current text was adopted at the third session.

20. The current text states the basic rule for exclusion in objective terms - "goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use"; under this language the purpose of the particular buyer is irrelevant. However, the provision adds an exception based on the purpose of the buyer in the instant transaction: the sale would be covered by the Law if the buyer did not in fact purchase the goods for personal, family, household or similar use, and that fact is made evident in specified ways. Thus, the Law would govern the sale if the above-mentioned purpose of the buyer appeared "from the contract". Following these last words, the current text includes in brackets: "/or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract/".

21. The principal reason for including the bracketed language was that a buyer's proposed use for goods would not normally be stated or otherwise appear in the "contract" but the seller might know from communications or information apart from the contract that the buyer bought the goods for a commercial purpose, as contrasted for personal or household use.

22. The only comments directed to this provision (Austria and Mexico) state that the bracketed language should be retained.

B. Negotiable documents representing goods: paragraph 2 (a)

23. The comments by Austria suggest that a problem of interpretation may arise under paragraph 2 (a), which excludes sales

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

24. The question is raised as to whether the exclusion of sales of "negotiable instruments" might be construed to exclude sales of goods effected by the transfer of negotiable documents of title, such as negotiable bills of lading or warehouse receipts.

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25. Certainly such a construction would be inconsistent with the intent of the draftsmen of ULIS (where the same provision is employed) and of the Working Group. The reference to "negotiable instruments" was clearly intended to exclude only such instruments calling for the payment of money - such as negotiable notes, bills of exchange or cheques. Any ambiguity on this point would be serious, for the transfer of goods is often effected by the delivery of negotiable documents of title controlling delivery of the goods. The Working Group might consider rewording the end of paragraph 2 (a) to read:

"... money or negotiable instruments calling for the payment of money".

C. Ships, vessels and aircraft: the question of registration; paragraph 2 (b)

26. A pending question is presented by paragraph 2 (b) whereby the Law shall not apply to sales "(b) of any ship, vessel or aircraft /which is registered or is required to be registered/". The bracketed language was drafted to take the place in article 5(1) (b) of ULIS of the similar phrase "which is or will be subject to registration". The Working Group inserted the square brackets to indicate that these words present a problem for further drafting. 17/ The exclusion was not meant to depend on whether the vessel was registered, or was required to be registered, at the time of sale; instead, the intent was to exclude the type of vessels which, in normal course, would become subject to national legislation.

27. This problem is considered in the observations submitted by the representative of Mexico who has proposed a draft provision to effectuate the intent of the Working Group. 18/

Article 3: "mixed" contracts

28. Article 3 deals with the applicability of the law to "mixed" contracts - i.e., contracts which combine the sale of goods (article 1(1)) with other obligations which, standing alone, would not fall within the Law.

29. Paragraph 2 of article 3 is identical with article 6 of ULIS which is directed to the case where the party who orders goods "undertakes to supply an essential and substantial part of the materials" necessary for the manufacture or production of the goods in question. The Working Group concluded that this provision of ULIS, while satisfactory in itself, was an incomplete and unsatisfactory approach to the problem of "mixed" contracts, since this problem could also arise where the principal obligation relates (e.g.) to the supply of services, or land, or other matters other than the delivery of and payment of goods. It was recognized

17/ Working Group, report on second session, para. 55.

18/ Comments by Representatives (A/CN.9/WG.2/WP.20), observations of Mexico, paras. 11-16.

that such contracts could arise in an infinite variety of combinations, so that detailed provisions would not be practicable. However, a general rule was considered necessary; to fill this gap in the law, paragraph 1 was prepared by the Working Group at its second session. ^{19/} The report on that session does not indicate any objection of substance or any specific problem of drafting. The representative of Mexico, in his observations, examines this provision and finds it satisfactory; the other observations submitted by representatives do not comment on this provision.

Article 4: definitions and other provisions
related to sphere of application

A. Rule on applicability when a party has more than one place of business:
paragraph (a)

30. Paragraph (a) was drafted by the Working Group to supply a serious omission in 1964 ULIS. Under ULIS (and the current draft) the Law is applicable only when the seller and the buyer have their places of business in different States. However, parties often have places of business in two or more States: one of those places of business may be in a State where the other party has a place of business. ^{20/} In these situations, problems as to the applicability of the Law arise for which 1964 ULIS provides no solution.

31. The Working Group concluded that it was necessary to include a rule dealing with this question, and at the second session prepared the provision that now appears as paragraph (a) of article 4. ^{21/} At that session, this provision was the subject of considerable discussion, and was placed in square brackets to permit later reconsideration.

32. The observations submitted by Mexico for the present session analyse article 4 (a) and concludes that it is satisfactory.

33. On the other hand, the observations submitted by Austria suggest that article 4 (a) should be reviewed in the light of the comparable provision embodied in the United Nations Convention on the Limitation Period in the International Sale of Goods. Article 2 (c) of that Convention provides:

^{19/} Working Group, report on second session, paras. 61-67.

^{20/} Under 1964 ULIS, the question whether the place of business is in a Contracting State could be decisive under the reservations permitted in article III of the Convention. Under the rules on sphere of application, prepared by the Working Group, this issue has wider significance.

^{21/} Working Group, report on second session, paras. 13, 23-25. The provision then appeared as article 2 (a), but was moved to its present position at the third session.

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

34. A provision identical with that prepared by the Sales Working Group was submitted to the Conference on the Limitation Period; at the Conference it was suggested that the drafting of the provision could be simplified. The above-quoted article 2 (c) resulted from that suggestion.

35. The Working Group may wish to conform article 4 (a) of the Uniform Law on Sales to the provision approved by the Conference on Prescription.

B. References to reservations; uniform law or convention: article 4 (d) and (e)

36. The observations of Austria note that the current draft (like 1964 ULIS) is in the form of a uniform law annexed to a convention, whereas the Convention on the Limitation Period embodies the uniform rules in the Convention. It is suggested that the manner of presentation should conform to that of the Convention on the Limitation Period.

In considering this suggestion it should be recalled that the Convention on Limitation opens with a short preamble and sets forth the uniform rules in part I, substantive provisions. These uniform substantive rules are followed by part II, implementation; part III, declarations and reservations and by part IV, final clauses.

37. It is further suggested that if the "integrated" approach of the Convention on Limitation is adopted, paragraph (d) of article 4 could be omitted, while paragraph (e) (which refers to the possibility of a declaration under article /I1/ of the Convention) should be drafted in greater detail.

Paragraph (d)

Paragraph (d) of article 4 states:

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

38. The Working Group at its second session noted that the foregoing provision "takes account of the possibility that a new convention might provide for reservations such as those permitted under article V of the 1964 Sales Convention whereby the law is applicable only when it is chosen as the applicable law by the parties". 22/

22/ Working Group, report on second session, para. 34. The provision then appeared as article 2 (e). /...

39. The Working Group and the Commission have not yet taken a position on the inclusion of a provision on reservations like that of article V of the 1964 Hague Convention. It would simplify the problem of presentation with respect to article 4 (d) if the Working Group could take a decision on whether the current sales convention should include a provision on reservations like article V of the 1964 Convention.

40. Article V was included in the 1964 Convention because several States were dissatisfied with certain basic provisions of ULIS. The Working Group may now wish to consider whether the current revision has sufficiently removed such objections so that a provision like article V need not be included in the current convention.

Paragraph (e)

Paragraph (e) of article 4 states:

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

41. The reference to a declaration under article II, relates to a declaration by two or more States, having closely related legal rules, that transactions among their area would not be governed by the Convention.

Such a provision was included in the Convention on Limitation in part III: declarations and reservations (article 34). In the Convention on Limitation, the substantive articles on sphere of application (articles 1-7) do not include a reference to the above provision in part III providing for a reservation restricting the scope of application. From the foregoing, it will be noted that if the approach of the Convention on Limitation is followed, the reference to declarations in paragraph (e) of article 4 would be deleted, and a provision permitting declarations, comparable to article II of the 1964 Hague Convention, would be included in a later part of the Convention on Declarations and Reservations. (Compare part III of the Convention on Limitation.)

42. The Working Group may conclude that, in some settings, substantive provisions that are subject to modification by reservation should include references to the possibility of such reservations. Such references may be useful to direct attention to reservations which otherwise might be overlooked. These considerations have some weight even where the uniform rules are in one part of a convention and provisions on reservations are included in another part. (e.g., the "integrated" approach employed in the Convention on Limitation.) However, such a reference may not be important with respect to the type of reservation referred to in article 4 (e), since most lawyers in States (or regions) with similar or uniform laws may be aware of the possibility that international conventions would include provisions for reservations preserving such laws.

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The choice between an "integrated" convention and a uniform law annexed to the convention

43. If the Working Group should decide to delete paragraphs (d) and (e) of article 4, it would not be necessary to decide at this time whether the revised sales convention should follow the approach of 1964 ULIS (which annexes a Uniform Law to the Convention) or of the Convention on Limitation (which incorporates the substantive uniform rules in part I of the Convention). On the other hand, the Working Group may find it useful to consider and decide the matter at this time.

44. As has been noted, the Convention on Limitation provides a precedent for an "integrated" approach. This approach seems to have certain technical advantages in relation to constitutional and legislative practices of some States. On the other hand, the Working Group may wish to consider the following considerations: (1) a uniform law on the international sale of goods is of basic importance and is of substantial size; these facts may incline some States, in implementing the convention, to enact its substantive provisions as a separate uniform law; (2) perhaps more important, some States have adopted the 1964 Hague Convention, which annexes the substantive provisions as a Uniform Law. Such States will wish to consider replacing the 1964 ULIS with the revised law prepared by UNCITRAL. This step, which would contribute significantly to international unification, may be facilitated if the UNCITRAL convention does not deviate on this point from the approach of the 1964 Hague Convention.

Article 5: effect of agreement of the parties

45. This article is based on article 3 of 1964 ULIS, but has been redrafted in the interest of simplicity and clarity. As was noted by the Working Group at its second session, "article 3 of ULIS and of the proposed revision both emphasize that the provisions of the Uniform Law are supplementary and yield to the agreement of the parties". ^{23/} However, the revision by the Working Group brings out more clearly than 1964 ULIS that the parties may either (1) totally exclude the law or (2) "derogate from or vary the effect of any of its provisions".

46. No comments or proposals in the studies submitted to the present session have been directed to this article.

Articles 6 and 7

47. These articles of ULIS have been integrated into other articles of the current draft. Article 6 of ULIS appears in article 3(2) and article 7 appears in article 4 (c).

^{23/} Working Group, report on second session, para. 46.

Article 8: subjects excluded from the law

48. This article, which is the same as in 1964 ULIS, was adopted by the Working Group at its second session; the report noted that no comments or proposals had been made in connexion with the article. ^{24/} The article is designed to make clear that certain questions are excluded from the scope of the law, e.g. formation, title to property, validity.

49. The observations submitted by the representative of Austria to the present session suggest that the article is unnecessary and should be deleted. It is suggested that article 8 had been included in 1964 ULIS because that Law included a provision (article 17) which provided that questions concerning matters governed by that law "which are not expressly settled therein shall be settled in conformity with the general principles" on which the law is based. The Working Group has deleted this language and replaced it with a provision emphasizing that in interpreting the Law regard should be had to its international character and to the need to promote uniformity. ^{25/}

50. The need for article 8 has been diminished by the deletion of the above language in article 17 of 1964 ULIS. Moreover, in the absence of article 8 there seems little likelihood that a reader would suppose that the law dealt with the formation of the contract, or the effect of the contract on the property in the goods sold. But there may be utility in preserving at least the provision of article 8 that the present Law does not deal with the validity of the contract or of usages. Substantive provisions of the uniform law state that the seller shall deliver the goods and the buyer shall pay for them in accordance with the contract, and article 9 gives general effect to usages. Without a provision like article 8, some courts may conclude that the convention setting forth these rules would override national rules concerning validity of the contract or of usages. Moreover, deletion of this provision contained in ULIS might give rise to the incorrect inference that such deletion implied that the rule of ULIS is rejected.

51. The representative of Norway, in his observations, suggests that the words "in particular", which open the second sentence, are misleading and should be deleted.

^{24/} Ibid., para. 71.

^{25/} The observations submitted by Mexico (paras. 52-56) propose that the substance of article 17 of 1964 ULIS be added as a second paragraph of the present redraft. See para. 79, below.

CHAPTER II. GENERAL PROVISIONS (ARTICLES 9-17)

Article 9: usages and practices

A. Basic rule as to usages and practices: paragraph 1

52. Paragraph 1 is the same as article 9(1) of ULIS. Under this provision, the parties are bound (1) "by any usage which they have expressly or impliedly made applicable to their contract" and (2) "by any practices which they have established between themselves". The two parts of the paragraph are distinct, in that the first part relates to patterns established generally in a trade or line of commerce, while the second part relates to practices that have been followed by these parties in relation to each other - i.e. their own "course of dealing". Both parts of this paragraph proceed on the theory that such usages and practices are part of the contractual undertaking of the parties, either by express agreement or by an implied expectation that performance will follow such established patterns. 26/

B. Implied applicability of usages: paragraph 2

53. The principal difficulty with article 9 has arisen from paragraph 2 of 1964 ULIS. As has been noted, under paragraph 1, the parties are bound by any usage which they "have expressly or impliedly made applicable to their contract". To this, paragraph 2 of 1964 ULIS adds:

"2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract ...".

54. Members of the Working Group and of the Commission have raised questions concerning the extent to which paragraph 2 extended beyond paragraph 1, and concerning the justification for such extension. 27/ It will be noted that article 9(1) of ULIS gave effect to any usage which the parties have "expressly or impliedly made applicable to their contract", and that paragraph 2 provided that the parties shall "also" be bound to certain further usages, this wording suggested that paragraph 2 was not based on the presumed expectation of the parties but upon some other principle which was unstated, possibly some normative obligation independent of the implied contractual undertaking by the parties. It was also noted that the references to what "reasonable persons" in the same situation as the parties "usually consider" to be applicable to their contract"

26/ Article 9(1) needs to be considered in relation to article 5 (a clarification of ULIS 3), which gives effect to the agreement of the parties, by which they "may exclude the application of the present law or derogate from or vary the effect of any of its provisions".

27/ Working Group, report on first session, paras. 73-90; report on second session, paras. 72-82; UNCITRAL, report on third session, paras. 35-42.

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injected elusive factors into the formula and would be difficult to apply in practice.

55. To meet these difficulties paragraph 2 of article 9 of ULIS, was redrafted by the Working Group to set forth a definition of those usages which under paragraph 1, the parties had "impliedly made applicable to their contract". Under this redraft, the usages which the parties "shall be considered as having impliedly made applicable to their contract" are determined under two tests: (1) whether the parties are (or should be) aware of the usage and (2) whether the usage "in international trade is widely known to, and regularly observed by parties to contracts of the type involved".

56. Under this revision, the second of these tests is stated twice - once in connexion with usages of which the parties are aware, and once in connexion with usages of which the parties should be aware. This repetition seems to be the reason for comments that the provision is complex and should be simplified. The observations submitted by Mexico include a redraft of this provision which simplifies the text by avoiding this repetition. 28/ It will also be noted that this proposed redraft would somewhat broaden the applicability of usage, and facilitate proof by a party relying on usage, since, under this redraft, the conclusion that the parties are or should be aware of a usage could be based on either (1) the fact that the usage is widely known in international trade or (2) the fact that the usage has been regularly observed in contracts of the type involved. 29/

57. In previous consideration of this topic, some members of the Working Group have expressed concern over the breadth of the recourse to usage permitted under paragraph 2 of article 9. This scope has been clarified and narrowed under the text prepared by the Working Group at its second session and under the simplified redraft proposed by Mexico. However, if members would still be concerned about the breadth of this provision, consideration might be given to making more explicit the justification for recourse to custom: the expectation that the other party will perform in the manner that is customary in the trade. The draft text prepared by the Working Group and the redraft by Mexico are much more helpful in this regard than was ULIS, for these drafts tie paragraph 2 to the basic rule of paragraph 1 by the phrase "The usages which shall be considered as having impliedly made applicable to their contract ...": the emphasized language indicates that the basic test is the expectation of the parties in making the contract. However, the justification and scope of the provision might be made even more explicit by language along the following lines, which is based on the redraft proposed by Mexico.

28/ Comments: observations by Mexico, paras. 29 to 38. The proposed redraft appears at para. 36.

29/ The reasons for this approach are explained at para. 35 of the observations by Mexico, supra.

Draft proposal for paragraph 2

"2. The parties shall be considered to have impliedly made applicable to their contract a usage which is so widely known in international trade or /and/ so regularly observed in contracts of the type involved as to justify an expectation that it will be observed with respect to the transaction in question."

58. It will be noted that the underscored language at the end of the above redraft takes the place, in the current draft, of the tests that the parties "are aware" or "should be aware" of a certain usage. Substituting this objective test for the subjective tests in article 9(2) of ULIS is suggested because the proof of the state of mind of the other party is inherently difficult: the only practicable approach is through the second phrase "should be aware". But it is doubtful that "awareness" (or the obligation to be "aware") of a usage is the most appropriate ultimate test. The ingredient of a usage that would justify its inclusion as part of the contract is that degree of knowledge of the usage in international trade or its regular observance in international trade which would justify an expectation that it would be observed in the transaction in question. Perhaps this essential idea is implicit in the current draft of article 9(2) but the provision might be easier to apply if this ultimate test were made explicit.

C. Rules of the present Law and agreement of the parties: paragraph 3

59. Paragraph 3 states:

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

The observations by Mexico suggest (para. 37) that the final phrase "unless otherwise agreed by the parties" should be deleted. Attention is drawn to the general rule of article 5 (ULIS article 3) giving effect to the agreement of the parties; it is also noted that misunderstanding could result if only some of the provisions of the Law state that the agreement shall prevail.

60. It will be noted that the proposed deletion is made possible since paragraph 2 of the redraft (unlike article 9(2) of ULIS) makes it clear that the ground for the applicability of usages is an implied agreement by the parties. It might also be suggested that, in view of this approach, all of paragraph 3 is redundant. Article 9(1) refers to both (1) usages and (2) practices which the parties have established between themselves. Paragraph 9(3) refers only to usages - perhaps on the ground that article 9(2) of ULIS made certain usages effective independently from an implied contractual undertaking. Under the Working Group redraft, usages and practices are given parallel treatment. Hence, it would seem advisable either (a) to delete paragraph 3 or (b) to modify paragraph 3 by adding after "such usages" the words "and practices".

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D. Interpretation of commercial terms: paragraph 4

61. The observations by Mexico suggest (para. 38) that paragraph 4 be revised to conform to a proposal set forth in the report on the second session of the Working Group (para. 82). It will be noted that this proposal is designed to make the rules on interpretation of commercial terms conform to the rules in paragraphs 1 and 2 of this article. In addition, this proposal would delete, as unnecessary, the concluding phrase "unless otherwise agreed by the parties".

Article 10: definition of "fundamental breach of contract"

A. Introduction

62. Article 10 of ULIS sets forth a definition of "fundamental breach of contract", a concept employed in numerous articles of 1964 ULIS. 30/

63. The Working Group at its second session gave preliminary consideration to article 10 of ULIS, but concluded that a decision on this provision should be deferred until after consideration of the substantive provisions that employ the concept of "fundamental breach of contract". 31/

64. In its review of the substantive provisions of ULIS, the Working Group has retained the concept of "fundamental breach", although the consolidation of the various sets of remedial provisions in ULIS has sharply reduced the number of occasions in which it has been necessary to use this concept.

65. The most important of these provisions are (a) article 44(1)(a), under which the buyer may declare the contract avoided where the seller has committed a "fundamental breach of contract", and (b) the parallel provision of article 72 bis governing avoidance of the contract by the buyer. 32/

30/ Articles 26(1), 27, 28, 30, 32, 43, 52(3), 55(1)(a), 62, 66, 70(1)(a) and 76.

31/ Working Group, report on second session, paras. 83-88.

32/ The basic provisions of ULIS are written in terms of the right (e.g.) of the buyer to "declare the contract avoided" rather than in terms of his right to reject (or duty to accept) defective goods. This approach could give rise to some doubt as to the legal situation that arises when the seller's tender of performance in some respect fails to conform to his contractual performance but does not amount to a "fundamental breach". It is clear that in this circumstance the buyer may not "declare the contract avoided", but the drafting approach of ULIS does not clearly state that the buyer has a duty to receive and accept the tender - subject, of course, to a right to be compensated by damages. It is assumed that such a duty may be implied from the general structure of the remedial provisions of ULIS: this construction is aided by article 98 bis (para. 1) as redrafted by the Working Group.

66. The definition of "fundamental breach of contract" thus plays an important role in connexion with the right to avoid a contract. However, the right of avoidance may be established without using the test of "fundamental breach". This is true by virtue of provisions authorizing the buyer (art. 43) and the seller (art. 72) to request the other party to perform within a specified additional period of time of reasonable length (the "Nachfrist" notice); failure to comply with this request is an independent ground for avoidance without recourse to the concept of "fundamental breach" (article 44(1)(b) and 72 bis (1)(b)). 33/

B. Criticisms of the definition of "fundamental breach" in article 10; proposals

67. Studies and comments submitted by States and organizations prior to the second session, and observations made at the second session of the Working Group, criticized article 10 on the ground that it was too complex, and also on the ground that the article included subjective standards that would be difficult to apply. 34/ The observations submitted to the present session by Mexico thoroughly

33/ There may be a problem of construction with respect to the buyer's request under article 43 (and the consequent automatic right to avoidance under article 44(1)(b) as applied to minor non-conformity in the seller's tender of delivery. Thus, under article 43, the buyer may fix an additional period not only "for delivery" (as in cases where the seller has delivered no goods) but also "for curing of the defect or other breach". This problem would occur when the seller tenders a slightly smaller quantity than that specified in the contract (98 bags instead of 100) or where a small part of the goods (e.g. 2 bags) are deficient in quality, and where these deficiencies do not constitute a "fundamental breach of contract". If the buyer refuses to accept the goods and requests a perfect tender within a specified time, and the seller (perhaps because of remoteness from the buyer) is unable to make a perfect tender, may the buyer declare the avoidance of the contract? The controlling provision is article 44(1)(b), under which the buyer may declare the contract avoided "(b) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 43". The question is whether the emphasized phrase "delivered the goods" refers only to a delivery in perfect conformity with the contract, or whether this phrase extends to a delivery that is non-conforming but where the breach is not "fundamental". Under the latter construction, the Nachfrist notice under article 43 would set a limit to the period of time within which the seller may tender delivery that substantially conforms to the contract, and the time within which the seller may cure a defective tender (article 43 bis) but would not provide a basis for avoidance of the contract where the breach is not fundamental. The same questions could arise under articles 72 and 72 bis of the redraft and under the corresponding sections of 1964 ULIS.

34/ Analysis of comments and proposals (A/CN.9/WG.2/WP.6), Yearbook, vol. II: 1971, p. 37, paras. 64-70; Working Group, report on second session, paras. 83-88.

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analyse the criticisms of this article, and propose a revision which is designed to overcome these difficulties. 35/ It will be noted that this proposal eliminates the subjective test (i.e. what a party "knew or ought to have known"), and also the the related speculative element as to whether a "reasonable person" would have "entered into the contract if he had foreseen the breach and its effects". Instead, this proposal employs a single objective criterion: whether the breach substantially alters the scope or contents of the rights of the other party.

68. The Working Group will wish to give careful consideration to such an approach which would simplify and clarify article 10. In considering the basic approach to this question, it may be relevant to note that deviations from perfect performance occur in a virtually infinite number of settings and degrees, so that it will be impossible in this law (as it has been impossible in national legal systems) to prescribe detailed rules; the most that can be done is to point to the basic issue: whether the breach has substantially impaired the value of performance required under the contract. 36/

69. If the Working Group decides to simplify article 10 along the lines of the above proposal, consideration might be given to a possible clarification of the phrase which refers to the alteration of "the scope and contents of the rights" of the other party. From one point of view (at least in the English version) it may be difficult to conclude that a breach has altered the rights of the other party; his rights have been established by the Law and have not been altered by the breach: it might be more appropriate to refer to the extent to which the breach has impaired the value of the performance required by the contract. A proposed revision of article 10, based on the proposal of Mexico, that would take account of the above drafting point, is as follows:

Proposed revision of article 10

For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever such breach substantially /to a significant extent/ impairs the value of the performance required by the contract and the present Law.

35/ Comments, observations of Mexico, paras. 39-46; the proposed redraft appears at para. 46.

36/ One study, based on standard contracting practices, indicated that it may be inadequate to consider only the degree of the breach, and indicated that a relevant consideration is whether compensation for the breach can be clearly and adequately assured. For instance, in the case discussed above, where the contract calls for 100 units and the seller tenders only 98, or where 2 of the units are defective, there is a decisive difference between cases (a) where the seller in tendering the goods demands cash payment for all 100 units and (b) where the seller voluntarily makes a full adjustment in the price for the missing or defective units. In case (a) the buyer is asked to take a substantial burden and risk in pressing the seller for a cash refund, while in case (b) such burdens of litigation and of possible deterioration of the seller's financial position are avoided. Thus, cases (a) and (b) could lead to different results as to avoidance although from a narrow viewpoint the degree of breach is the same. See 97 U. Pa. L. Rev. 457.

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Article 11: definition of "promptly"

70. The observations of Austria note that the term "promptly" is used only in articles 38(1) and 42(2) ^{37/} and also, in discussing article 42, suggest that paragraph 2 be revised in a manner that would omit a reference to prompt notice. It is suggested that if this change is made the definition of "promptly" be transferred to article 38 or, in the alternative, omitted.

71. It would appear desirable to postpone action on this suggestion until after the consideration of article 42, and possibly until after the consideration of all the substantive rules in which the term "promptly" is or might be employed.

Proposed new article 12: act or knowledge of agent

72. The observations of Norway, in setting forth proposed amendments to the current revised text, note that some of the articles (e.g. 76(4) and 96) state that a party is bound by the acts of another person for whose conduct the party is responsible. On the ground that such a principle should be effective throughout the Law, it is proposed that such a general principle be included in the law as a new article 12. It is further proposed that this new article should also state that references to knowledge of a party (e.g. arts. 33(2), 38(3)) shall include the knowledge of an agent or of any person for whose conduct the party is responsible.

Article 13

73. This article of ULIS was deleted by the Working Group.

Article 14: communications

74. The observations by Norway propose adding a second paragraph to this article which would state a general rule dealing with notices which are sent by appropriate means but which are delayed or fail to arrive. The commentary cites several articles which refer to notices; only one of these (39(3)) deals with the above problem. The proposed new paragraph of article 14 would set forth a general rule based on article 39(3).

75. Examination of the various articles which deal with notices reveal that some (e.g. 21(1) require that a party "send" a notice while others (e.g. 39(1), 94) require a party to "give" notice; still others use neutral expressions like "notice" or "notify" (cf. art. 74 ("declare")). Under most of these articles, litigation could arise concerning the effect of delay or miscarriage of communications. Hence, a general rule on the question would seem to be useful.

^{37/} Comments, observations by Austria (article 11).

Article 15: requirements as to form of contract

76. This article has been thoroughly discussed by the Working Group and by the Commission. ^{38/} Two sets of observations submitted for the current session refer to article 15; both conclude that the article should be retained. ^{39/} The observations by Mexico draw attention to the complexities and divergencies among rules of national law on this question, as summarized in the Report on the Working Group's Second Session (para. 117). It is also noted that the fact that the parties may make a contract without the formality of a writing does not imply that they will make such informal contracts or that the parties are without means to protect themselves from a false claim that an informal contract has been made.

77. It may also be noted that the Law does not attempt to codify or supersede national rules on the authority of an agent to bind his principal. To illustrate this point, we may suppose that at the beginning of a negotiation, the principal notifies the other party as follows: "The agent negotiating with you has no authority to conclude an agreement; any contract will be authorized only when it has been approved in writing by our Vice-President in charge of Sales". Unless this notice is withdrawn or modified, there would be a presumption that, unless the contract is concluded in the prescribed manner, (1) there was no intent to conclude a contract and (2) any attempt by the subordinate negotiator to conclude a contract would be unauthorized and would not bind the principal. It will be noted that both of the above issues (which in practical application are closely intertwined) lie outside the scope of the present Law, and would not be controlled by the rule of article 15. Article 15, in stating that there is no general legal requirement of a writing, does not affect the inference in some settings that a contract has not been made in the absence of a writing and does not overturn applicable rules as to whether an agent has authority to bind his principal. The latter point would seem to be particularly significant where a Government, by rule of law, defines the circumstances in which a subordinate official has the authority to bind the Government or a State trading organization.

Article 16: limitation on right of specified performance

78. The observations by Austria note that this article erroneously refers to the 1964 Convention. (The provision was designed to refer to any provision on reservations as to specific performance comparable to that in article VII of the 1964 Convention.) A redraft of this article that, inter alia, would correct this matter, has been submitted by Norway. ^{40/}

^{38/} Working Group, report on second session, paras. 113-123. UNCITRAL, report on fourth session (1971), paras. 70-80.

^{39/} Comments: observations by Mexico (paras. 47-51) and by Austria (article 15).

^{40/} Comments, observations by Austria (art. 16) and by Norway (redraft of art. 16).

Article 17: general rule of interpretation

79. The observations of Austria express the view that this general rule could be omitted. The observations of Mexico propose that this provision be maintained, and that a second paragraph be added preserving the rule of article 17 of 1964 ULIS whereby matters governed by the present law which are not expressly settled therein "shall be settled in conformity with the general principles on which the present law is based".

80. It should be noted that this subject was discussed at the United Nations Conference on the Limitation Period in the International Sale of Goods. The Conference included in the Convention on Limitation, as article 7, a provision which (except for stylistic adjustments) follows article 17 as approved by the present Working Group. The provision adopted by the Conference on limitation is as follows:

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

CHAPTER III. OBLIGATIONS OF THE SELLER (ARTICLES 18-55)

A. General introduction

81. The Working Group gave preliminary consideration to chapter III of ULIS at the third session, and took final action at the fourth session. 41/ The Working Group based its work on comments and proposals by members of the Group, 42/ and on reports by the Secretary-General on "Delivery" in ULIS, 43/ inso facto avoidance 44/ and the obligations of the seller in chapter III of ULIS. 45/

(1) The concept of "delivery"

82. One of the troublesome problems presented by chapter III resulted from the use by ULIS of a single concept - "delivery" - as a solvent for a number of different issues, such as the time for the payment of the price and the transfer of risk of

41/ Working Group, report on third session (A/CN.9/62), Yearbook, vol. III: 1972, p. 77; Working Group, report on fourth session (A/CN.9/75), Yearbook, vol. IV: 1973, p. 61.

42/ See Analysis of comments and proposals relating to Articles 18-55 of ULIS (A/CN.9/WG.2/WP.10), Yearbook, vol. III: 1972, p. 54 and documents cited in the reports on third session (para. 7) and on the fourth session (para. 6).

43/ A/CN.9/WG.2/WP.8, Yearbook, vol. III: 1972, p. 31.

44/ Ibid., p. 41.

45/ A/CN.9/WG.2/WP.16, reproduced in annex II to the Working Group's report of its fourth session.

loss. ^{46/} This effort to make a single concept provide the solution for different practical problems led to a definition of "delivery" which was artificial and which was so complex that it led to unintended consequences. For example, article 19(1) of ULIS provides that "Delivery consists in the handing over of goods which conform with the contract". No difficulty would have arisen from a provision that a seller has a duty to deliver goods which conform to the contract, but the above definition of "delivery" led to the surprising conclusion that if the buyer accepts non-conforming goods (subject, of course, to a price adjustment or damage claim) and uses (or even consumes) them, the goods are never "delivered" to the buyer. More important, the attempt to use this concept in allocating risk of loss meant that it was necessary to piece together widely separated provisions of the Law (e.g. arts. 19 and 97), with results in some circumstances that seemed to have been unintended by the draftsmen. In the light of these considerations, the Working Group at the third session decided that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery", and at the fourth session decided to delete article 19. ^{47/} As a further consequence, articles 20-23 could deal directly with the steps required of the seller to perform his contractual duty to deliver the goods, without attempting to compress into one article a definition of the concept of "delivery".

(2) Consolidation of separate sets of remedial provisions

83. Chapter III of 1964 ULIS contained six separate sets of remedial provisions applicable to breach by the seller. Thus separate remedial provisions were provided for the following substantive obligations: (1) date of delivery (arts. 26-29); (2) place of delivery (arts. 30-32); (3) conformity of the goods (arts. 41-49); (4) handing over documents (art. 51); (5) transfer of property (arts. 52-53) and (6) other obligations of the seller (art. 55).

84. These separate remedial systems differed from each other in ways that appeared to be accidental; some of the separate systems, without apparent reason, omitted provisions that were included in the other systems. In addition, the boundary-lines between the various systems were not clear. Thus, with respect to the separate remedies as to (1) date of delivery and (2) place of delivery, it was noted that if the goods were late in arriving one could state either that the goods (1) were at the right place but at a late date or (2) at the specified date were at the wrong place. It was also difficult to distinguish between (1) non-delivery of part of the goods and (2) non-conformity, where boxes were empty or part of the goods were worthless. The difficulty of ascertaining which remedial system would be applicable created possibilities for confusion and litigation. Finally, it was noted that these six remedial systems contributed to the length and complexity of

^{46/} See the report of the Secretary-General on "delivery" in ULIS, cited above at note 3.

^{47/} Working Group, report on third session, A/CN.9/62/Add.1, para. 17; report on fourth session, para. 21.

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ULIS - characteristics which had been one of the grounds for serious criticism of ULIS and a barrier to its widespread adoption. 48/

85. For these reasons, the Working Group at its fourth session, approved a single consolidated set of remedial provisions applicable to chapter III; these provisions appear in the revised text as articles 41-47. As a result of this consolidation, it was possible to delete the remedial provisions appearing in articles 24-32, 48, 51, 52(2) and (3), 53 and 55. This consolidation simplified the structure of article III and reduced its length by over one third.

(3) Automatic (ipso facto) avoidance of the contract

86. Two types of avoidance of the sales contract were provided in 1964 ULIS: (1) avoidance by a declaration or notice from the innocent party to the party in breach; 49/ and (2) automatic (ipso facto) avoidance for which no notification need be given. 50/ The Working Group at its third session concluded that ipso facto avoidance created uncertainty as regards the rights and obligations of the parties and should be eliminated from the remedial system of the Law. 51/ This decision has been preserved in the consolidated system of remedies, discussed above, which was approved by the Working Group at its fourth session.

B. Pending questions with respect to chapter III. Obligations of the seller

Article 18: general obligations of the seller

87. This article is in substance the same as in ULIS. The article serves to introduce the reader to the structure of chapter III; in addition, the closing phrase is useful in making explicit that the seller shall carry out the various aspects of his performance "as required by the contract and the present Law". Article 5 of the revised text (based on article 3 of ULIS) provides that the parties may derogate from or vary the effect of any of the provisions of the Law, but an obligation of the seller to perform the sales contract in accordance with the provisions of the contract is made explicit by the present article.

48/ The problems presented by the separate sets of remedial provisions and draft provisions consolidating the remedial provisions into a single unified system are set forth in the report of the Secretary-General on the obligations of the seller (chapter III of ULIS). This report (A/CN.9/WG.2/WP.16) was reproduced as annex II to the report of the Working Group on its fourth session.

49/ Articles 24, 26, 30, 32, 41, 44, 55, 62, 67, 70, 75 and 76.

50/ Articles 25, 26, 30, 61 and 62.

51/ Working Group, report on third session, annex II (A/CN.9/62/Add.1), para. 29, Yearbook, vol. III, p. 85. The reasons underlying this decision are explained more fully in the report of the Secretary-General on ipso facto avoidance in ULIS, A/CN.9/WG.2/WP.10; Yearbook, vol. III: 1972, pp. 41-53.

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Section I. Delivery of the goods

Article 19 (deleted)

88. This article of ULIS, which set forth a definition of the concept of "delivery", was deleted by the Working Group 52/ for reasons that have been summarized.

Subsection 1. Obligations of the seller as regards the date and place of delivery

Article 20: manner of effecting delivery

89. The Working Group reached consensus on this article. 53/ The only pending proposals are the following drafting suggestions by Norway: (1) In paragraph (b), to replace the word "unascertained" by "unidentified", to conform with the drafting of article 98(2). 54/ (2) In paragraph (c), to delete the final phrase "or, in the absence of a place of business, at his habitual residence", since the effect of the absence of a place of business is dealt with by a general provision in article 4(d).

Article 21: delivery to a carrier

90. The observations submitted by Norway suggest that the word "appropriated" should be replaced by "identified"; the reason, as was noted above under article 20, is to conform with the drafting of article 98(2).

Articles 22-23

91. There are no pending proposals with respect to these articles. 55/

Articles 24-32 (deleted)

92. These nine articles of ULIS set forth separate remedial systems regarding the failure of the seller to perform his obligation, with respect to (1) the date of

52/ Working Group, report on fourth session, para. 21.

53/ Ibid., paras. 22-29.

54/ Reasons for the use of "identified" in place of "ascertained" or "appropriated" are set forth in the Report of the Secretary-General, Issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19), also reproduced as annex IV to the Working Group's report on fifth session, para. 84.

55/ Working Group, report on fourth session, paras. 31-35.

delivery and (2) the place of delivery. These articles have been deleted in view of the approval of a consolidated set of remedies for chapter III, which appear in articles 41-47 of the revised text. The reasons for this revision have been summarized above.

Subsection 2. Obligations of the Seller as regards the conformity of the goods

Article 33: basic rules on conformity

93. The Working Group reached consensus on this article. 56/ Certain stylistic modifications are set forth in the revised provisions submitted by Norway.

Article 34 (deleted)

Article 35: time for determining conformity

94. Article 35(1) of 1964 ULIS states the basic rule as follows: "whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes". The report of the Secretary-General on the Obligations of the Seller 57/ observed that while such a rule is not always stated expressly in codifications of the law of sales, it is a necessary implication of rules on risk of loss, and may be illustrated by the following situation: A contract calls for the sale of "No. 1 quality cane sugar, F.O.B. Seller's city" (under this contract, the risk of loss in transit falls on the buyer). The seller ships No. 1 cane sugar, but during transit the sugar is damaged by water and on arrival the quality is No. 3 rather than No. 1. In this situation, of course, the buyer has no claim against the seller for non-conformity of the goods, since the goods did conform to the contract at the point when risk of loss passed to the buyer; the buyer's responsibility for deterioration after that point is a necessary consequence of the provisions of the contract (or of the Law) as to risk of loss. Although it might seem that such a principle is so self-evident that it need not be stated, it was concluded that it might be useful in the interest of clarity to state the principle explicitly. 58/ The Working Group retained this principle as the first sentence of article 35(1), subject to redrafting, and the addition of a concluding phrase designed to show that the rule is applicable even if the lack of conformity is latent. 59/

56/ Ibid., paras. 37-44.

57/ Report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to the Working Group's report on fourth session), paras. 65-72.

58/ Ibid., para. 65.

59/ Working Group, report on fourth session, paras. 46-52.

95. The first paragraph of article 35, consisting of the basic rule as approved by the Working Group, and a second sentence which has not yet been considered by the Working Group, is as follows:

1. The seller shall be liable in accordance with the contract and the present Law for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. 7 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.7

96. The Working Group concluded that it was not feasible to consider the second sentence until after the rules on passing of the risk had been formulated. 60/ Indeed, this complex provision is one of the consequences of the attempt in ULIS to use the concept of "delivery" as a means of solving problems of risk of loss. 61/ With the simpler formulation of the rules on risk adopted by the Working Group, this and other complex provisions are no longer needed. This view is reflected in the observations by Norway, which also propose certain drafting changes in the article as approved by the Working Group. 62/

97. Under the redraft proposed by Norway, the second paragraph of article 35, dealing with express guarantees, would be omitted, and in lieu thereof a special provision on the time for giving notice under a guarantee would be added to article 39. Such a change in emphasis and arrangement would appear to be helpful. The second paragraph of article 35, as it now stands, may not be necessary, for the provisions of an express guarantee would be given effect under the general principle that the parties are legally bound by the provisions of their contract. 63/

Article 36

(Incorporated into article 33)

60/ Ibid., para. 48.

61/ Both article 35(1) (second sentence) and article 97(2) of ULIS are complex provisions necessitated by the rule that goods are not "delivered" when they are not in conformity with the contract.

62/ Comments, observations by Norway (redraft of art. 35).

63/ E.g., articles 5 and 18 of the revised draft. See also report of the Secretary-General on obligations of the seller, para. 69. There could be little doubt under the revised text that the parties are legally obligated to perform the provisions of their contract of sale. If there should be doubt on this score, the most appropriate approach would be to include an explicit general provision to this effect.