

acquired under such conditions. In this case the buyer should make known to the seller the right, claim or restriction, unless the seller already knows thereof, and request that, within a reasonable time, the goods should be freed therefrom or that other goods free from all rights and claims of third persons or restrictions imposed by public authority be delivered to him by the seller.⁸¹

"2. [No change.]⁸²

"3. [No change.]⁸²

"4. Include the expression 'or the restriction imposed by public authority' after the words 'the right or claim of the third person'.⁸³

Article 53

Add at the end of the article:

(a) The words "or restrictions imposed by public authority"⁸⁴ and

(b) The expression "except those provided for by agreement between the parties or by any usage".⁸⁵

J. Articles 54 and 55

77. Articles 54 and 55 of ULIS read as follows:

"Article 54

"1. If the seller is bound to despatch the goods to the buyer, 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.

"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 55

"1. If the seller fails to perform any obligation other than those referred to in articles 20 to 53, the buyer 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 buyer may also require performance by the seller of his obligation, unless the contract is avoided."

78. The Government of Austria held that articles 54 and 55 were at odds with each other. Whereas article 55 attached penalties to non-performance by the seller of any obligations not mentioned in articles 20 to 53, article 54 arbitrarily singled out two of those obligations which were not otherwise dealt with.⁸⁶ A similar comment was made by the representative of Czechoslovakia. He suggested that it would be useful more completely to specify the obligation of the creditor to co-operate in the fulfilment of the transaction.⁸⁷

79. The representative of India pointed out that the provisions of articles 54 and 55 were not as appropriate and clear as the corresponding rules in common law countries. In his opinion, the requirement under common law to make a "reasonable" contract with the carrier, having regard to the nature of the goods and circumstances of the case, was to be preferred to the requirement under ULIS to make such contracts as are "necessary" for the carriage of the goods. Moreover, it was not clear whether under article 54 (1) the seller was required to conclude a contract with the carrier "on behalf of the buyer" as provided for in common law systems.⁸⁸ He also noted that the remedies provided in article 55 entitling the buyer to require performance of the obligation and damages seemed to be stronger than those provided for in common law countries for breach of similar obligations by the seller, where the buyer could normally sue the seller only for damages.⁸⁹

80. On the basis of the considerations referred to in paragraph 79 above, the representative of India suggested that the Working Group should consider whether the provisions in articles 54 and 55 could be improved.⁹⁰

⁸¹ *Ibid.*, para. 13.

⁸² *Ibid.*, para. 14.

⁸³ *Ibid.*, para. 15.

⁸⁴ *Ibid.*, para. 16.

⁸⁵ Annex XV, para. 2.

⁸⁶ A/CN.9/11, p. 8 and A/CN.9/31, para. 123.

⁸⁷ A/7618, annex I, para. 41 and A/CN.9/31, para. 124.

⁸⁸ Annex XVI, para. 5.

⁸⁹ *Ibid.*, para. 9.

⁹⁰ *Ibid.*, para. 10.

4. Analysis of comments and proposals relating to articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary-General (A/CN.9/WG.2/WP.11)*

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- V. Delegation of Ghana: memorandum to the Working Group on the International Sale of Goods*

* Not reproduced in the present volume.

INTRODUCTION

1. The Working Group on the International Sale of Goods at its meeting held during the fourth session of the United Nations Commission on International Trade Law decided that at its third session it would consider the following articles of ULIS:

"(a) Articles 18-55, on the basis of the reports to be submitted by representatives of the Commission on these articles;

"(b) Articles 1-17, in the light of the comments and suggestions of members of the Commission made at the fourth session of the Commission."

2. An analysis of the comments and proposals contained in the reports submitted by representatives of members of the Commission on articles 18-55 of ULIS appears in document A/CN.9/WG.2/WP.10. The text of these reports is contained in document A/CN.9/WG.2/WP.10/Add.1.

3. This report summarizes the comments and proposals on articles 1 to 17, made at the fourth session of the Commission and in the course of the consideration by the Sixth Committee of the Commission's report on its fourth session. The proposals and comments that deal with a single issue or article are considered together in this report. In the foot-notes reference is made to the summary records in which the proposals and comments are contained. (The symbols of the summary records of the fourth session of the Commission begin with A/CN.9.) The text of articles 1 to 17 as recommended by the Working Group at its second session is annexed to this report as annex I.* Also annexed are the comments which Governments submitted in writing to the fourth session of the Commission except those which are reproduced *in extenso* in this report.

I. GENERAL COMMENTS

4. Most representatives who spoke on the subject expressed their appreciation for the work done by the Working Group in respect of articles 1 to 17 of ULIS.

5. A few comments also contained suggestions with respect to working methods. Thus, Poland suggested that the Commission should give further consideration to its methods of work with a view to increasing its

efficiency;¹ Hungary expressed the view that the Commission's work could be improved by its paying more attention to current trade usages and, in drafting legislation, by giving due weight to generally accepted usages in addition to, or instead of, purely legal considerations.²

II. COMMENTS ON THE SPHERE OF APPLICATION OF THE LAW (ARTICLES 1 TO 6 OF ULIS)

A. *Comments in general on the sphere of application*

6. Japan held that in view of the close relationship between the substance of the uniform rules on international sale of goods and the uniform rules on time-limits and limitations, it was desirable that the two sets of rules should have the same sphere of application.³ A similar proposal was made by Iraq.⁴ Chile also spoke on the question and suggested that the two drafts should be harmonized.⁵ It should be noted in this connexion that the Working Group on Time-limits and Limitations came to the conclusion that the sphere of application of the draft convention on prescription (limitation) prepared by the Working Group need not be the same as that of the Uniform Law on the International Sale of Goods. The text of the draft convention on prescription (limitation) appears in document A/CN.9/70.

7. Pakistan called for unification of the rules relating to conflict of laws in order to help to eliminate uncertainty in the application of laws to international commercial transactions.⁶ Nigeria, on the other hand, suggested that the Working Group should give special attention to the question of definitions so as to eliminate ambiguity in the provisions on the application of the Law.⁷

B. *Comments on article 1 (Sphere of application)*

8. Many countries expressed their agreement with the text of article 1 as suggested by the Working Group at its second session (see annex I). Thus,

¹ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1249th meeting, para. 6.*

² *Ibid.*, 1251st meeting, para. 11.

³ *Ibid.*, 1249th meeting, para. 11.

⁴ *Ibid.*, 1252nd meeting, para. 6.

⁵ *Ibid.*, 1253rd meeting, para. 88.

⁶ *Ibid.*, 1251st meeting, para. 21.

⁷ A/CN.9/SR.72, p. 2.

* For this text, not reproduced in the present volume, see UNCITRAL Yearbook, volume II: 1971, part two, A, 2, annex II.

Poland considered that the new text was simpler and provided a better indication of the limits of the sphere of application of the Law than the 1964 text.⁸ Japan,⁹ Argentina,¹⁰ Mexico,¹¹ Bulgaria,¹² Hungary¹³ and Norway¹⁴ also held that the new text was an improvement on the earlier one. The USSR noted that it endorsed, in general, the text proposed by the Working Group and held that it was a sound basis for further work.¹⁵ A similar comment was made by the United Kingdom.¹⁶ The United States also held that the recommended text was a distinct improvement on the former version although the new text did not provide for all situations in a proper way; e.g., under the new text the retail purchase of a microscope by a foreigner would be governed by the Uniform Law. Yet, it was thought that even if the new text had certain imperfections, its clarity was preferable to the difficulties which had arisen from the application of the original text.¹⁷

9. Several countries agreed, in general, with the text recommended by the Working Group but suggested certain changes in the language of the article.

10. Australia, while expressing its willingness, in general, to accept the recommended text, suggested that the clarity of the provision could be improved.¹⁸

11. Romania held that subparagraph 1 (a) was a truism and should therefore not be set out as a condition of application but should be deleted. Instead Romania suggested to insert the word "contracting" in the introductory part of paragraph 1, before the word "States". With respect to subparagraph 1 (b) it noted that this subparagraph had no *raison d'être* except with regard to the rules of private international law of non-contracting States. The subparagraph should therefore be amended to make this clear.¹⁹ Spain proposed that in subparagraph 1 (b) the expression "rules of private international law" should be replaced by "rules of conflicts" since the former also include material rules, rules of immediate application, etc.²⁰

12. Jamaica and Haiti disagreed with the text recommended by the Working Group, without specifying the text that they would prefer. In the view of Jamaica the retention of only one basic test could lend itself to abuse.²¹ Haiti held that the deletion of the tests contained in subparagraphs 1 (a), (b) and (c) of article 1 of ULIS resulted in oversimplification of the text.²²

⁸ *Ibid.*, p. 3 and A/CN.9/SR.74, p. 15.

⁹ A/CN.9/SR.72, p. 11.

¹⁰ A/CN.9/SR.74, p. 8.

¹¹ *Ibid.*, p. 12.

¹² *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1252nd meeting, para. 28.

¹³ A/CN.9/SR.74, p. 8.

¹⁴ *Ibid.*, p. 15.

¹⁵ *Ibid.*, p. 13.

¹⁶ *Ibid.*, p. 11.

¹⁷ A/CN.9/SR.72, p. 9. See also A/CN.9/SR.74, p. 13.

¹⁸ *Ibid.*, p. 5 and A/CN.9/SR.74, p. 7.

¹⁹ A/CN.9/SR.71, p. 13. See also A/CN.9/SR.72, p. 12 and A/CN.9/SR.74, p. 14.

²⁰ Annex II (A/CN.9/IV/CRP.8), text on articles 1 and 2, section B.

²¹ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1251st meeting, para. 28.

²² *Ibid.*, para. 80.

13. Spain²³ and Belgium voiced their concern at the abandonment of the principle of universality. However, Belgium indicated that she could accept as a working basis the text proposed by the Working Group.²⁴

14. Comments were made on the basic test recommended by the Working Group, according to which the Law would apply if the places of business of the parties to a contract of sale of goods were in different States. Several representatives suggested that this test should be supplemented by one or more objective tests.

15. Guyana,²⁵ Ghana,²⁶ India,²⁷ and Pakistan²⁸ suggested that the above basic test should be supplemented by a test relating to the international carriage of the goods; to this end, the new text should be supplemented by subparagraph 1 (a) of article 1 of the original text of ULIS. In the view of India this proposal was warranted by the fact that for businessmen and business lawyers it was a very common concept to regard an international sale as characterized not merely by the circumstance that the parties to a contract had their places of business in different countries but also by the circumstance that the goods were carried from the territory of one State to the territory of another.²⁹ The reasons advanced by Ghana for the support of this proposal are contained in annex V to this report.

16. In opposition to the proposal set out in paragraph 15 above, the United Kingdom expressed the view that the text proposed by the Working Group was a sound basis for further work,³⁰ rather than to recommence work on a new basis as international carriage.³¹ At the same time, however, the United Kingdom expressed the opinion that the text in its present form was oversimplified. If, e.g., a foreigner went to New York and sold goods to a local buyer, and the offer, acceptance and delivery took place in New York, the operation would be considered, according to the new criterion, as an international sale; that was not the case under the original text.³²

17. The observer for UNIDROIT suggested the insertion of another objective test than that set out in paragraph 15 above. According to his suggestion the law would apply to contracts of sale of goods entered into by parties whose places of business were in different contracting States, unless all the acts constituting the offer and the acceptance had been effected in the same State.³³

²³ A/CN.9/SR.72, p. 4, *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1252nd meeting, para. 43, and annex II, text on articles 1 and 2, para. A(2).

²⁴ A/CN.9/SR.74, p. 10.

²⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1248th meeting, para. 16.

²⁶ Annex V, para. (a) (ii); A/CN.9/SR.72, p. 10 and *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1251st meeting, para. 72.

²⁷ A/CN.9/SR.71, p. 7.

²⁸ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1251st meeting, para. 22.

²⁹ A/CN.9/SR.71, p. 7.

³⁰ A/CN.9/SR.74, p. 11.

³¹ A/CN.9/SR.72, p. 12.

³² A/CN.9/SR.72, p. 8.

³³ A/CN.9/SR.73, pp. 2-3.

18. Several countries held that the original text of article 1 was better than the revised one and suggested that the tests contained in subparagraphs 1 (a), (b) and (c) of article 1 of ULIS should be re-inserted in the new text either in their original or in a revised form.

19. In France's opinion the former text was more satisfactory.³⁴ Austria held that the new text might cause even greater difficulties than the original.³⁵ Also, in the opinion of Belgium the new text was too summary and might give rise to disputes in cases where it was not clear whether the sale was national or international.³⁶ The Arab Republic of Egypt also emphasized its preference for the 1964 text.³⁷

20. Austria, Belgium, France and the Arab Republic of Egypt submitted a revised draft of article 1 of the Law.³⁸ Austria stated that the proposal was intended to combine the advantages of the old and new texts by reinstating the three objective criteria of the old text and by adding a fourth case, where the goods have been transported to the place of delivery prior to the conclusion of the contract.³⁹ Belgium also noted that there was a need for the insertion of a provision on sales of goods held in stock in the country of the buyer.⁴⁰ It should be noted that Austria expressed its agreement with subparagraphs 1 (a) and (b) of the text recommended by the Working Group, if this text could avoid the maintenance of reservations such as those set out in articles III, IV, and V of the 1964 Hague Convention.⁴¹

21. The text proposed by Austria, Belgium, France and the Arab Republic of Egypt reads as follows:

"Article 1

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

"[(a) when the States are both Contracting States; or

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

"2. A contract shall be considered to be an international contract of sale:

"(a) where it involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another; or

"(b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;

³⁴ A/CN.9/SR.72, p. 11.

³⁵ *Ibid.*, p. 10.

³⁶ *Ibid.*, p. 9.

³⁷ A/CN.9/SR.73, p. 4.

³⁸ A/CN.9/IV/CRP.8. The text of this proposal is reproduced in paragraph 21 of the present report.

³⁹ A/CN.9/SR.74, p. 2.

⁴⁰ *Ibid.*, p. 9.

⁴¹ *Ibid.*, p. 8.

"(c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance of the contract have been effected.

"3. A contract shall also be considered to be an international contract of sale of goods if the seller has caused the goods to be carried into the territory of a State other than that in which he has a place of business, unless:

"(a) the buyer had no reason to know that the seller had his place of business in a different State and that the goods had been carried from the territory of a different State to the place of delivery; or

"(b) the goods to which the contract refers are, by their nature and number, normally purchased by an individual for personal, family or domestic use;

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

*Not yet discussed.

"Delete article 2, subparagraph (a) and article 5, subparagraph 1 (a) of the new draft."

22. India expressed its agreement with the above proposal but held that a negative form setting out the transactions which did not fall within the scope of the Law would be preferable.⁴² Ghana supported this position of India.⁴³ Brazil, while agreeing with the above text, proposed minor drafting changes.⁴⁴ Hungary expressed misgivings regarding the system embodied in the proposal and pointed to imperfections in the text.⁴⁵

23. A drafting suggestion was made by Belgium in respect of subparagraph 1(b) of the text recommended by the Working Group, which was also embodied, although only in brackets, in the proposal set out in paragraph 21 above. This suggestion was based on the view that in Belgium, e.g., the *Cour de cassation* could not give an interpretation of a foreign law and other countries may also experience the same difficulties; Belgium stressed therefore the need to specify whether the Uniform Law involved was to be applied as the law of the contracting State in question or as the law of the State in which it was invoked.⁴⁶

24. With respect to paragraph 2 of article 1 of the text recommended by the Working Group, which is basically the reproduction of article 4 of ULIS, the United States noted that this paragraph might create difficulties because it allowed two inhabitants of the same State to choose to apply the Law to their contract.⁴⁷ Haiti also opposed the paragraph in its present form because parties to a local contract of sale might evade the application of their national law by choosing the uniform law as applicable to the contract.⁴⁸

⁴² A/CN.9/SR.75, p. 7.

⁴³ *Ibid.*, p. 9.

⁴⁴ *Ibid.*, p. 8.

⁴⁵ *Ibid.*, pp. 7-8.

⁴⁶ A/CN.9/SR.74, p. 16.

⁴⁷ *Ibid.*, p. 13.

⁴⁸ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1251st meeting, para. 80.*

25. Some comments on paragraph 2 of article 1 related to the language of the paragraph. Romania noted that it was not clear whether the words "the parties" included non-contracting or referred only to contracting States.⁴⁹ Spain held that the text lacked precision as to whether the choice of law might be "express or implied".⁵⁰

26. Spain also objected to the omission from the text of any reference to mandatory provisions of national laws, such as that which appeared in the closing phrase of article 4 of ULIS.⁵¹ Norway noted that the provision in article 1, paragraph 2, of the recommended text did not mean that the parties could free themselves from the peremptory norms of national law and pointed out that the Working Group, at its second session, thought that the question of mandatory norms was a universal problem and decided that it would examine it in depth at a later stage.⁵²

C. Comments on article 2 (Definitions relating to the sphere of application of the Law)

27. The majority of the States which commented on paragraph (a) of article 2, were opposed to the provision contained therein. Thus, Argentina held that it introduced in the Law a subjective element which could lead to difficulties with respect to proof.⁵³ Romania proposed the replacement of the subjective text by an objective one.⁵⁴ This proposal was supported by Belgium in case the paragraph would be maintained.⁵⁵ The elimination of the subjective elements from the article was also proposed by India,⁵⁶ Austria,⁵⁷ Hungary,⁵⁸ Belgium⁵⁹ and the representative of UNIDROIT⁶⁰ suggested that article 2, paragraph (a) should be deleted. On the other hand, Norway opposed the deletion of this paragraph⁶¹ and stated that in its opinion the criterion contained in this provision would not reduce the scope of law since it would nearly always be possible to verify the place of business of the other party.⁶² The United Kingdom held that the criterion laid down in paragraph (a) was sound, and noted that in the United Kingdom a large number of international transactions were effected through the medium of brokers who seldom specified the name or nationality of their principals.⁶³ Mexico also favoured retaining paragraph (a), but suggested that it should be drafted in the affirmative.⁶⁴

⁴⁹ A/CN.9/SR.71, p. 13.

⁵⁰ Annex II, text on articles 1 and 2, paragraph C(a).

⁵¹ *Ibid.*, para. C(b) and A/CN.9/SR.72, p. 4.

⁵² A/CN.9/SR.72, p. 7. See also A/CN.9/52, para. 48.

⁵³ A/CN.9/SR.74, p. 8.

⁵⁴ *Ibid.*, p. 14.

⁵⁵ *Ibid.*, p. 16.

⁵⁶ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1253rd meeting, para. 94.*

⁵⁷ A/CN.9/SR.72, p. 13.

⁵⁸ A/CN.9/SR.74, p. 8.

⁵⁹ *Ibid.*, p. 10.

⁶⁰ A/CN.9/SR.73, p. 3.

⁶¹ A/CN.9/SR.74, p. 15.

⁶² A/CN.9/SR.72, p. 7.

⁶³ A/CN.9/SR.74, p. 11.

⁶⁴ *Ibid.*, p. 12.

28. In order clearly to separate the subjective and the objective texts identified in article 2, paragraph (a), of the recommended draft, Guyana suggested that the text of the paragraph should be revised as follows:

"For the purpose of the present Law:

"(a) the parties shall be considered not to have their places of business in different States if, at the time of the conclusion of the contract one of the parties

"(i) neither knew that the place of business of the other party was in a different State,

"(ii) nor had reason to know that the place of business of the other party was in a different State."⁶⁵

29. Comments were also made in respect of paragraph (b) of article 2. The United States held that the meaning of the phrase "place of business" needed further clarification.⁶⁶ India suggested that the text of this paragraph should indicate which of the States, in which the party has places of business, had a closer relationship to the contract and its performance.⁶⁷ Hungary submitted for consideration the idea that paragraph (b) should provide that if one of the places of business of a party was in a contracting State, his principal place of business should be deemed to be in a contracting State.⁶⁸ The USSR held that this proposal merited consideration;⁶⁹ the United Kingdom objected to the idea.⁷⁰

30. Spain suggested that paragraph (c) of article 2 should be deleted because it would allow the reservations now contained in article V of the 1964 Convention.⁷¹ Spain suggested further that articles 1 and 2 of the Law should be rearranged in the form of a single article. The proposed text appears in document A/CN.9/R.8 and Corr.1 which is reproduced in annex II.

D. Comments on article 3 (Exclusion of the application of the Law by contract)

31. Spain proposed the deletion of this article on the ground that it would permit the stronger party to impose on the other party rules that reduce his own liability and increase his rights.⁷²

E. Comments on article 5 (Exclusion of consumer and other goods from the sphere of the Law)

32. Several States suggested that paragraph 1(a) of article 5 should be deleted. Austria proposed the deletion on the basis that the reinsertion in the text of subparagraphs 1(a), (b) and (c) of article 1 of ULIS, as suggested by a number of countries (see paras. 18-22 above), would make the exemption of consumer goods unnecessary.⁷³ UNIDROIT held that by acceptance of its proposal in respect of article 1

⁶⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1248th meeting, para. 17.*

⁶⁶ *Ibid.*, 1251st meeting, para. 32.

⁶⁷ A/CN.9/SR.74, p. 6.

⁶⁸ A/CN.9/SR.74, p. 9.

⁶⁹ *Ibid.*, p. 13.

⁷⁰ *Ibid.*, p. 14.

⁷¹ Annex II, text on articles 1 and 2, paragraph A(c).

⁷² Annex II, text on article 3.

⁷³ A/CN.9/SR.72, p. 13.

(para. 17 above), sales of consumer goods would be excluded automatically.⁷⁴ Spain's reason for the deletion of paragraph 1(a) was that this paragraph placed a restriction on the scope of the law which was not rational and which, in addition, was based on tests that were difficult to apply.⁷⁵

33. The Arab Republic of Egypt agreed, in principle, with subparagraph 1(a) but suggested that the language of the paragraph should be revised in order to eliminate practical difficulties caused by the ambiguity of such terms as "individual" and "personal".⁷⁶

34. Comments were also made as regards subparagraph 2(b). Poland wondered whether it was necessary to exclude from the Law ships and aircrafts in which there was substantial trade.⁷⁷ Spain held that any reference in this paragraph to registration should be deleted and replaced by technical data based on the economic importance of the goods sold (minimum tonnage or power). It suggested the following language:

"(b) of any ship or inland navigation vessel of [specified] tonnage or any aircraft of [specified] powers."⁷⁸

F. Comments on article 6 (Mixed contracts)

35. Spain suggested that the provision in article 6 should be transferred into article 1; in addition, the provision should be formulated in a positive way by stating that there shall be deemed to be a contract of sale whenever the substantive obligations of the parties consist in the delivery of and payment for goods.⁷⁹

36. In view of the manifold comments and proposals relating to the sphere of application of the Law, Spain suggested that the Working Group should defer consideration of this question until a final draft on substantive rules has been completed.⁸⁰ In connexion with this proposal the Working Group might also wish to consider whether the problems connected with the sphere of application of the Law could not be more easily resolved on the basis of a study. Such study would compare the original text of ULIS with the different proposals relating to the sphere of application of the Law in order to demonstrate which factual situations are covered by the existing text and which by the different suggested texts and solutions.

III. COMMENTS ON ARTICLES 7 TO 17

A. Comments on article 8 (Questions not regulated in the Law)

37. Spain expressed the view that although the retention of this article would not create any problem, it served no purpose since the scope of the Law was in itself determined by the content of its provisions.

At the same time, however, Spain also noted that it would be desirable to formulate a uniform law that would govern all aspects of contracts of sale and would accordingly include the questions of formation and validity of the contract as well as provisions on limitation (prescription).⁸¹

B. Comments on article 9 (Usages)

38. The USSR held it necessary that this article should be reviewed because members of the Working Group had divergent views thereon.⁸²

39. Spain deemed it necessary to make a distinction in the text of this article between normative usages, i.e., usages which had achieved, in a particular type of contract, a degree of observance such that any agreement of the same class was considered to be subject to that usage, and contractual or interpretative usages, i.e., usages which derived their binding force from the interest of the parties.⁸³ On the basis of this distinction, Spain suggested the following language for article 9:

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

"2. The parties shall also, unless otherwise expressly agreed, be bound by any usages of international trade, whether or not known to the parties, which are generally observed in contracts of the type involved. In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.

"3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning generally accepted and regularly given to them in the trade concerned unless otherwise expressly agreed by the parties."⁸⁴

C. Comments on article 13 (Definition of the expression "a party knew or ought to have known")

40. Guyana observed that deletion of article 13 on the ground that the term "reasonable person" was undefinable and therefore difficult to apply in an international sales transaction, was inconsistent with the inclusion of a similar test in article 2(a). Accordingly, either the test in article 2(a) should be abandoned or article 13 should be retained.⁸⁵

D. Comments on article 15 (Form of the contract)

41. Several States suggested the deletion of this article. India made this proposal on the basis that an identical text was contained in article 3 of the Uniform Law on Formation. Moreover, article 8 of ULIS pro-

⁷⁴ A/CN.9/SR.73, p. 3.

⁷⁵ Annex II, text on article 5, section A.

⁷⁶ A/CN.9/SR.73, p. 4.

⁷⁷ A/CN.9/SR.72, p. 3.

⁷⁸ Annex II, text on article 5, section B.

⁷⁹ *Ibid.*, text on article 6.

⁸⁰ Annex II, text on articles 1 and 2, paragraph A(1).

⁸¹ *Ibid.*, text on article 8.

⁸² A/CN.9/SR.71, p. 10.

⁸³ See annex II, text on article 9 for detailed analysis of the different types of usages.

⁸⁴ *Ibid.*, pp.13-14.

⁸⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1248th meeting, para. 18.*

vided that the Law was not concerned with the formation of the contract, nor with its validity. The question of form, therefore, could be handled when the Commission came to consider the Uniform Law on Formation.⁸⁶ Iran,⁸⁷ Spain,⁸⁸ Tanzania,⁸⁹ Poland,⁹⁰ France⁹¹ and Austria⁹² were also of the opinion that the question of form belonged in the Uniform Law on Formation. In Byelorussia's opinion formation of the contract should not be dealt with in the Uniform Law; in any event, countries should be permitted to require that contracts must be in writing.⁹³ This position was also supported by Bulgaria.⁹⁴ On the other hand, Singapore,⁹⁵ the United States,⁹⁶ Mexico⁹⁷ and the United Kingdom⁹⁸ were of the opinion that article 15 should be maintained.

42. The United States⁹⁹ and the United Kingdom suggested that article 15 should be retained in its present form. The United Kingdom pointed out that this was desirable because under the conditions of modern trade, formation, variation and cancellation of the contract were often effected orally by telephone.¹⁰⁰

43. There were many proposals that the contract should be in writing if this was required by the law of the country of either party.

44. The USSR suggested that the present text of article 15 should be supplemented with a provision set forth in paragraph 115 of the report of the Working Group on its second session.¹⁰¹ This provision reads: "The contract, however, shall be in writing if so required by the laws of at least one of the countries in the territories whereof the parties have their place of business".¹⁰² The United States opposed this proposal.¹⁰³ Ghana supported the inclusion of the above provision¹⁰⁴ but supplemented by a further provision: that it was the duty of the party whose place of business was in the territory of a country the law of which required written form, to inform the other party of this requirement.¹⁰⁵ If written form should be required an obligation to inform the other party of the requirement was supported by the United Kingdom. However, the United Kingdom maintained its view that sellers and buyers should be allowed to conclude contracts orally if they wished; in addition the Law should not oblige countries to amend the rules of their national legislation concerning the form of contracts.¹⁰⁶

45. Argentina suggested that the words "and shall not be subject to any other requirements as to form" should be deleted from the first sentence of article 15; this change and interpreting article 15, in the light of articles 8 and 5, would achieve the objective stated in paragraph 43 above. At the same time the suggested deletion from article 15 would eliminate the contradiction now existing between this article and article 8.¹⁰⁷ Ghana agreed with the deletion of the above words and suggested that the second sentence of the article should also be deleted and that, as already reported, the article should be supplemented by a text on the lines of that quoted in paragraph 44 above.¹⁰⁸

46. Ethiopia¹⁰⁹ and India¹¹⁰ suggested that the present text of the article should be preceded by the words "unless otherwise agreed by the parties or provided by a mandatory rule of the national law of any of the parties" as proposed by Brazil at the fourth session of the Commission.¹¹¹

47. The observer for UNIDROIT noted that written form was required in many countries with respect to contracts entered into by Government agencies. He suggested therefore that the text of article 15 be supplemented by the words "without prejudice to contracts entered into by Government agencies".¹¹² The USSR pointed out that such a solution would not be satisfactory since in the USSR international trade was not carried out by the Government but by foreign trade organizations which were independent legal bodies.¹¹³ France proposed that a distinction be made between contracts concluded between private persons and contracts between public bodies.¹¹⁴

48. Norway suggested that a clause should be included in the Convention to the effect that any State could make a declaration that it required the written form for contracts of sale to which one of its State enterprises or agencies was a party. The clause would read as follows:

"Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Secretary-General of the United Nations that, notwithstanding article 15 of the Uniform Law, the form of writing is required according to its law for the enforcement in its territory of contracts of sale to which the State or governmental agency is a party."¹¹⁵

49. Brazil disagreed with the above solution on the ground that businessmen would not know which States had made such a reservation.¹¹⁶

50. Ghana pointed out that the solution to be adopted depended on the approach of the national

⁸⁶ A/CN.9/SR.71, p. 8.

⁸⁷ A/CN.9/SR.77, p. 5.

⁸⁸ A/CN.9/SR.75, p. 13 and annex II, text on article 15.

⁸⁹ *Ibid.*, p. 15.

⁹⁰ A/CN.9/SR.77, p. 3.

⁹¹ *Ibid.*, p. 6.

⁹² A/CN.9/SR.75, p. 16.

⁹³ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1249th meeting, para. 19.

⁹⁴ *Ibid.*, 1252nd meeting, para. 28.

⁹⁵ A/CN.9/SR.77, p. 7.

⁹⁶ A/CN.9/SR.75, p. 14.

⁹⁷ A/CN.9/SR.76, p. 13.

⁹⁸ A/CN.9/SR.75, p. 10.

⁹⁹ *Ibid.*, p. 14 and A/CN.9/SR.77, p. 6.

¹⁰⁰ A/CN.9/SR.75, p. 10.

¹⁰¹ A/CN.9/SR.75, p. 12.

¹⁰² A/CN.9/52.

¹⁰³ A/CN.9/SR.75, p. 14.

¹⁰⁴ A/CN.9/SR.76, p. 6.

¹⁰⁵ A/CN.9/SR.75, p. 13.

¹⁰⁶ A/CN.9/SR.77, p. 7.

¹⁰⁷ A/CN.9/SR.76, p. 5.

¹⁰⁸ *Ibid.*, p. 6.

¹⁰⁹ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1253rd meeting, para. 39.

¹¹⁰ *Ibid.*, para. 94.

¹¹¹ A/CN.9/SR.77, p. 3; A/8417, para. 73.

¹¹² A/CN.9/SR.75, p. 15.

¹¹³ A/CN.9/SR.76, p. 4.

¹¹⁴ A/CN.9/SR.77, p. 6.

¹¹⁵ A/CN.9/IV/CRP.11.

¹¹⁶ A/CN.9/SR.77, p. 3.

laws of the countries which required the contract to be in writing: In the absence of a writing, was the contract void or merely unenforceable? The position of Ghana in respect of both cases appears in annex III to this report.

E. Comments on article 17 (Interpretation)

51. Argentina¹¹⁷ and India supported the text of article 17 as recommended by the Working Group; India held that the alternative texts proposed during the second session of the Working Group in some cases were uncertain as the original text of ULIS and in other cases would encourage the judge to apply national law instead of ULIS.¹¹⁸

52. Several proposals were submitted with a view to improve the text recommended by the Working Group. Hungary¹¹⁹ and the United States¹²⁰ suggested that the words now in brackets should be deleted. Egypt also proposed the deletion of these words with the further suggestion that the last part of the proposal should be reworded to read: "... and to the need to promote the uniformity of rules governing the international sale of goods".¹²¹ Spain proposed that the text recommended by the Working Group should be supplemented by reference to the principle of good faith.¹²² Iran suggested rewording of the text to read: "In interpreting and applying the provisions of this Law, regard shall be had to its general purpose of promoting uniformity in international trade".¹²³

53. Tanzania held that neither the original nor the Working Group's texts were appropriate; instead, a provision was needed that would govern interpretation not merely by explanation of the purpose of the Law. It held further that the interpretation clause of the Law should make it clear that no recourse to national law should be admitted in interpretation.¹²⁴

54. Many comments were concerned with the problem of gaps in the Law. The United Kingdom,¹²⁵ Australia¹²⁶ and Hungary were of the opinion that there was no need to adopt any provision on the question of gaps; in Hungary's view, gaps would be covered either by the terms of the contract or by trade practices and usages.¹²⁷

55. Other States, however, held that the recommended text of article 17 should be supplemented by a provision dealing with gaps. Brazil was of the opinion that, while there was no need for a provision on interpretation, it was essential to have a provision on gaps.¹²⁸ Brazil supported the inclusion in the text of the provision on gaps contained in paragraph 131 of the

Working Group's report on its second session.¹²⁹ It was suggested, however, that the words "governed by the present Law" should be deleted and the following expression should be added in brackets to the end of the proposed provision: "[such as its international character and promotion of the uniformity of the Law]".¹³⁰ Argentina also expressed its willingness to accept the text suggested in paragraph 131 of the report.¹³¹

56. Ghana expressed the view that, in order to settle the question of gaps, recourse should be had to the rules of private international law. Alternatively the Working Group should draw up a descending scale of norms which would indicate what rules should be looked at to find the residual law.¹³² The USSR noted that, if no other solution could be found, the question of gaps could be settled by including a passage in the Commission's report recording the consensus that private international law should apply to questions not settled by ULIS.¹³³ The Arab Republic of Egypt objected to any reference to private international law unless the Law contained some uniform rule concerning conflict of laws.¹³⁴ Bulgaria suggested that any reference to domestic law should be avoided.¹³⁵ Pakistan held that it would be useful to include in article 17 a residual rule of conflict of laws on the lines of article 110, paragraph 1, of the CMEA General Conditions of Delivery of 1968.¹³⁶

57. Spain proposed the following text:

"Questions concerning matters governed by the present Law which are not expressly settled therein and which cannot be settled by means of the analogous application of its own rules shall be subject to the system indicated by the *lex fori* for the case of gaps in the Law."¹³⁷

58. Poland proposed the following text:

"(2) If in the case of a contract governed by this Law it is not possible to solve a certain question by means of interpretation and application of this Law, the following laws would apply:

"(a) in case of a question concerning ... the law of ... (here a unified rule on conflict of laws should be inserted, to be agreed by the Commission).

¹²⁹ A/CN.9/52. The text reads: "Questions concerning matters governed by the present Law which are not expressly settled by it shall be settled in conformity with its underlying principles and purposes".

¹³⁰ A/CN.9/SR.77, p. 14.

¹³¹ A/CN.9/SR.78, p. 2.

¹³² *Ibid.*, p. 12 and *Official Records of the General Assembly, Twenty-sixth session, Sixth Committee, 1251st meeting, para. 72.*

¹³³ A/CN.9/SR.78, p. 7.

¹³⁴ *Ibid.*, p. 12.

¹³⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1252nd meeting, para. 28.*

¹³⁶ *Ibid.*, 1251st meeting, para. 23. The text of article 110, paragraph 1, of the CMEA General Conditions reads:

"1. Relations of the parties concerning delivery of goods, in so far as they are not regulated or not fully regulated by contracts or by the present General Conditions of Delivery, shall be governed by the substantive law of the seller's country."

¹³⁷ A/CN.9/SR.78, p. 11. See also *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1252nd meeting, para. 43.*

¹¹⁷ A/CN.9/SR.78, p. 2.

¹¹⁸ A/CN.9/SR.71, p. 9.

¹¹⁹ A/CN.9/SR.77, p. 15.

¹²⁰ *Ibid.*, p. 13.

¹²¹ *Ibid.*, p. 11.

¹²² *Ibid.*, p. 12.

¹²³ A/CN.9/SR.78, p. 13.

¹²⁴ *Ibid.*, p. 5.

¹²⁵ A/CN.9/SR.77, p. 11.

¹²⁶ *Ibid.*, p. 15.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, p. 14.

"(b) in case of a question concerning . . . the law of . . . (*idem*.)"

"(c) *idem*."¹³⁸

59. Austria suggested that article 17 should be deleted from the text of the Uniform Law; the text adopted by the Working Group would be better placed in a preamble, a protocol of signature or any other instrument not forming an integral part of the text.¹³⁹

¹³⁸ Annex IV.

¹³⁹ A/CN.9/SR.77, p. 14.

60. France recommended that in order to promote uniformity in interpretation, the Commission should set up a standing working group with the task to publish commentaries every five years, setting out and criticizing judgements involving interpretation of the Uniform Law.¹⁴⁰ Belgium¹⁴¹ and Poland¹⁴² supported the proposal.

¹⁴⁰ A/CN.9/SR.78, p. 4.

¹⁴¹ *Ibid*.

¹⁴² *Ibid.*, p. 6.

5. Progress report of the Working Group on the International Sale of Goods on the work of its third session, held in Geneva from 17 to 28 January 1972 (A/CN.9/62*, Add.1** and Add.2***)

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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 March 1969. The Working Group consists of the following 14 members of the Commission: Austria,* Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Under paragraph 3 of the resolution adopted by the Commission at its second session,¹ the Working Group shall:

"(a) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-General . . . in order to ascertain which modifications of the existing texts [the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULIS)] might render them capable of wider acceptance by countries of dif-

ferent legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(b) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;"

2. The Working Group held its first session at the United Nations Headquarters in New York from 5 January to 26 January 1970, and its second session at the United Nations Office at Geneva from 7 December to 18 December 1970. Reports of the Working Group on its first and second sessions² were submitted, respectively, to the third and fourth sessions of the Commission.

3. The Commission, at its fourth session, decided, "1. . . . :

"(a) The Working Group on the International Sale of Goods should continue its work under the terms of reference set forth in paragraph 3 (a) of the resolution adopted by the Commission at its second session;

"(b) The Working Group should determine and improve where necessary its own working methods and programme of work;

² A/CN.9/35 and A/CN.9/52; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2, and UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

* Appointed by the Commission at its fourth session following the relinquishment by Norway of its membership in the Working Group in order to accommodate the inclusion of a new member of the Commission.

¹ Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618) (hereafter referred to as UNCITRAL, report on second session (1969)), para. 38; UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

* 24 February 1972.

** 21 March 1972.

*** 3 March 1972.