

2. *Report of the Secretary-General: obligations of the seller in an international sale of goods; consolidation of work done by the Working Group on the International Sale of Goods and suggested solutions for unresolved problems (A/CN.9/WG.2/WP.16) \**

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\* 7 December 1972.

## INTRODUCTION

1. The UNCITRAL Working Group on the International Sale of Goods at its third session (Geneva, January 1972) reviewed the provisions of chapter III of the Uniform Law on the International Sale of Goods (ULIS);<sup>1</sup> chapter III (articles 18-55) sets forth the obligations of the seller. The Working Group approved some

of the articles of this chapter, revised others (in some cases subject to further review) and, with respect to certain articles, considered alternative solutions to the problems raised by provisions of ULIS but deferred action until its next session. (Progress report of the Working Group on the work of its third session, A/CN.9/62 and Add.1 and 2;<sup>2</sup> this progress report will be referred to herein as "report on third session" or as "report".)

<sup>1</sup> The Uniform Law (ULIS) is annexed to the Convention Relating to a Uniform Law on the International Sale of Goods which was signed at The Hague on 1 July 1964, reproduced in the *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, Vol. I, ch. I, 1 (United Nations publication, Sales No. E.71.V.3). (The Convention will be referred to as the "1964 Hague Convention on Sales".)

<sup>2</sup> The conclusions of the Working Group on specific articles are set forth in annex I to document A/CN.9/62. The reasons for these conclusions (including the general trends of opinion with respect thereto) are reported in annex II (A/CN.9/62/Add.1). The text of articles 1-55, as adopted or as deferred for further consideration, appears in annex III (A/CN.9/62/Add.2, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

2. The Working Group at the conclusion of the third session "requested the Secretariat to submit to the next session of the Working Group a working paper that would consolidate the work done at the present session and suggest alternative solutions for the problems raised during that session". (Report, para. 16.) The present report by the Secretariat is presented in response to this request.

3. The following presentation considers, article by article, the draft provisions prepared or approved by the Working Group for chapter III (obligations of the seller). The text of each article is followed by comments explaining the action taken by the Working Group and setting forth proposed solution for unsolved problems presented by these provisions.

4. Certain symbols used in this report call for explanation. Where the Working Group recommended that the text of ULIS be retained unchanged or that revision should be deferred, the original text of ULIS is reproduced; this fact is indicated in the heading as follows: "Article 18 (ULIS)". Where an article was revised by the Working Group, this is indicated as follows: "Article 19 (WG.III)". For ease in reference, the original numbering of the articles of ULIS is retained even though the consolidation effected by the Working Group produced gaps in the numbering and changes in the order of presentation. As a step towards the final arranging and numbering of the articles, the suggested order of the articles on the seller's substantive obligations (as contrasted with articles dealing with remedies) is indicated by "(S.1)", "(S.2)", etc.

### CHAPTER III : OBLIGATIONS OF THE SELLER

#### Article 18 (ULIS) (S.1)

"[The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law.]"

#### Comments

5. The Working Group decided that since article 18 serves as an introduction to all of chapter III, final action on this article should be deferred until the revision of the chapter is completed. (Report, annex II, para. 16.)

6. It will be noted that this article introduces the reader to the structure of chapter III. It seems likely that the decisions made by the Working Group at its third session, and those suggested in this working paper, would not compel revision of the above language. In any event, it seems advisable, as the Working Group decided, to defer a decision on this question until completion of the work on this chapter.

### SECTION I. DELIVERY OF THE GOODS

#### Article 19 (WG.III) (S.2)

"[Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods.]"

#### Comments

7. The above revised version of ULIS 19 was prepared by the Working Group at its third session. This draft was accepted as a working hypothesis (report, annex II, para. 21); to indicate the need for further consideration, this language was placed in square brackets.

8. The Working Group found that the treatment of "delivery" in ULIS, and the definition of that term in ULIS, were unsatisfactory. One of the basic reasons seems to be the failure clearly to differentiate between two objectives: (1) the attempt to define the *act* that constitutes delivery; and (2) the specifications of what the seller is *obliged to do* in performance of his contract. This confusion is exemplified in the first paragraph of ULIS 19 which states: "Delivery consists in the handing over of goods which conform with the contract." This language ("Delivery consists in") purports to be a definition of the act of delivery. However, the second half of the sentence shifts to the seller's *contractual obligation* (set forth in ULIS 33) *to deliver* goods which conform with the contract. This shift in focus gives article 19 of ULIS surprising and unnatural consequences as a definition of the *act* of delivery, since this provision seems to say that if the goods are non-conforming (for which the buyer will of course have a claim against the seller) the goods are never "delivered" to the buyer even though he keeps possession of the goods and uses (or even consumes) them. The Working Group concluded that such difficulties made it impractical to include the question of conformity of the goods in a definition of the act of "delivery" (Report, annex II, para. 19.)

9. The report by the Secretary-General on "Delivery" in ULIS (A/CN.9/WG.2/WP.8),\* presented to the Working Group at its third session, pointed to further difficulties that result from the fact that ULIS attempts to use the concept of "delivery" to solve a variety of distinct practical problems, such as risk of loss and the time for paying the price. The results of this attempt were explored in the setting of typical commercial situations; it was found that in significant situations the results were unintended and unfortunate. In addition, the attempt to solve so many problems by a single concept produced a definition of "delivery" that was unnatural and, in some languages, was virtually untranslatable (report on "delivery" in ULIS, A/CN.9/WG.2/WP.8, paras. 6 *et seq.*\*). This report recommended and the Working Group decided that, in view of these difficulties, problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery" (report, annex II, para. 17).

10. As has been noted, "delivery" in ULIS is often used in defining what the seller is obliged to do. Under article 18, the seller "*shall effect delivery*". Under article 19, "delivery" consists in the "handing over" of goods. Members of the Working Group pointed out that in many situations the act of "handing over" calls for the co-operation of the buyer in *taking* delivery. Hence, the Working Group concluded that the "delivery" that the seller was

\* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1.

required to perform should be stated in terms of those acts that are necessary "in order to enable the buyer to take over the goods". The Working Group noted that this language paralleled the corresponding provision of article 65 of ULIS on the buyer's duty to "take delivery" (report, annex II, para. 21). The Working Group also noted that paragraphs 2 and 3 of ULIS 19 dealt with certain obligations of the seller when the contract involves carriage of goods. Consequently, the Working Group consolidated these provisions with articles 20 and 21 which also deal with these problems. (ULIS 19 (2) on handing goods over to the carrier is transferred to paragraph 1 (a) of article 20, which deals with the place at which delivery shall be effected. ULIS 19 (3), on the obligation to notify the buyer that the goods have been despatched and to specify which goods are covered by the carriage, is transferred to paragraph 1 of article 21, which deals with various aspects of despatch of the goods by carrier.) (See articles 20 and 21, *infra*.)

11. The Working Group may wish to consider a minor drafting change in article 19, as prepared at the third session. It appears that the intended function of the provision is to lead into the use of the term "delivery" in chapter III, which is entitled "Obligations of the seller". In other words, the chapter states what the seller *shall do* to fulfill these obligations.

12. The provision tentatively adopted by the Working Group, if understood as an attempt to define the act of "delivery" ["Delivery consists in . . ."], would lead to unnatural results in some situations. One example is a contract calling for delivery "ex works"; the buyer is obliged to come to seller's works to take the goods. In making the goods available, the seller has done all the acts necessary "in order to enable the buyer to take over the goods". Thus, the seller has performed his obligations with respect to delivery—the only question that is of significance under the law. Difficulty, however, arises if the section is drafted as a *definition* of delivery. If the buyer never comes for the goods, it would be difficult to conclude that "delivery" to the buyer has occurred, or that the goods were *delivered*. It will be recalled that in the discussion of this subject various representatives have stressed that, in normal usage, "delivery" requires the concurrence of *both* parties in the transfer of possession—an element that is lacking if the draft of article 19 is considered as a definition of the concept of "delivery".

13. Such difficulties are avoided if the provision speaks in terms of the seller's *obligations* to deliver—and it seems likely that the Working Group intended the provision to have this meaning. The following draft is designed to express this intent more clearly.

#### Article 19 (WG.III, as modified)

"The seller performs his obligation to deliver by doing all the acts that are required by the contract and the present Law to enable the buyer to take over the goods."

14. It will be noted that the above draft is built on the substantive test established for this article by the Working Group: the seller shall do those acts required

"in order to enable the buyer to take over the goods". In addition, the redraft adds a reference to those acts "required by the contract and the present Law".<sup>3</sup>

#### Article 20 (WG.III) (S.3)

"1. [Delivery shall be effected:

"(a) Where the contract of sale involves the carriage of goods and no other place for delivery has been agreed upon, by handing the goods over to the carrier for transmission to the buyer;

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

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

#### Comments:

15. The above provision, drafted by the Working Group at its third session, was designed to present a complete and unified answer to this question: At what point (more specifically, at what *place*) does the seller complete his obligations as to delivery of the goods? Paragraph 1 (a) is drawn from ULIS article 19 (2); paragraph 1 (b) from article 23 (2) (first sentence); paragraph 1 (c) from article 23 (1).

16. Certain comments and suggestions were addressed to the above draft (report, annex II, paras. 25-27). Further consideration of this provision in the setting of the other articles in this chapter tends to support the view that the organization and drafting of the new article 20 have produced a more coherent and clearer statement than in the original provisions of ULIS.

#### Article 21 (WG.III) (S.4)

"1. [If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the goods are not clearly marked with an address or otherwise

<sup>3</sup> At the third session of the Working Group one representative suggested that the definition should read: "Delivery consists in the seller's accomplishing the final act necessary in order to enable the buyer to take control of the goods". Report, annex II, para. 27.

It is not now clear that there is any provision of ULIS that needs to be implemented by a definition of the act of "delivery", in the narrow sense, as contrasted with a statement of the seller's obligation to deliver. If such a need develops, the following definition might be considered:

"Delivery of goods occurs when goods are taken over by the buyer or by a person acting on his behalf, including a carrier to whom the goods are handed over pursuant to article 20 (a) of the present Law."

appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.]

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

*Comments:*

17. The above article, prepared by the Working Group at its third session, brings together provisions, placed at widely-separated places in ULIS, that deal with a single question: What steps must the seller take when the contract calls for carriage of the goods from the seller to the buyer? The first sentence of paragraph 1 is drawn from ULIS 54 (1); the second sentence from ULIS 19 (3). Paragraph 2 is drawn from ULIS 54 (2) (report, annex I, para. 4; annex II, paras. 22-27).

18. Certain comments and suggestions were addressed to the above text (annex II, paras. 25-27). On review, the Working Group's unified handling of these provisions appears to present a much clearer and more satisfactory presentation than that of ULIS.

*Article 22 (WG.III) (S.5)*

"[The seller shall [hand the goods over, or place them at the buyer's disposal]:

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

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

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

*Comments:*

19. This article, prepared by the Working Group at its third session, consolidates into one article the rules on the *time* for performance by the seller that appear in articles 20, 21 and 22 of ULIS. The result is a shorter and more unified statement. There is no record of objection to this revision.

20. The Working Group placed brackets around the words "[hand the goods over, or place them at the buyer's disposal]". The phrase "hand the goods over" relates to contracts calling for carriage of the goods (article 20(1)(a)); in such contracts, the seller has the duty to effect a transfer of possession to a carrier who will take over the goods.<sup>4</sup>

<sup>4</sup> Arranging for a carrier to take possession of goods does not present the practical difficulties that are presented by arranging for the buyer to take over the goods: The buyer may reject the goods for breach of contract; carriers normally accept goods for carriage without difficulty and in any event in shipment contracts it is normally the seller's duty to effect the transfer of possession to the carrier. It will be noted that seller's duty under article 20 (1) (a) arises only where "no other place for delivery has been agreed upon...".

The second phrase, "place them at the buyer's disposal" relates to contracts that do not call for carriage of the goods (article 20 (1)(b) and (c)); in such contracts the seller's contractual obligation is performed by placing the goods at the buyer's disposal at the appropriate place. It might be thought that the bracketed expression, in articulating these two obligations, is unnecessarily awkward and detailed. On the other hand, the two expressions remind the reader of the two types of acts that, depending on the nature of the contract, are required of the seller under article 20. On balance, in view of the clarification and simplification which the Working Group brought to this group of sections, it probably would be sufficiently clear, and somewhat simpler, to use the words "deliver the goods" in place of the bracketed language.

*Article 23*

(ULIS 50, with revisions proposed by Japan) (S.6)

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

*Comments:*

21. The Working Group at the third session considered various alternatives with respect to the provisions concerning documents appearing in articles 50 and 51 of ULIS. These included: deleting these provisions as unnecessary; revising these provisions; and transferring the provisions to the articles dealing with the seller's obligations as to delivery of the goods (report, annex II, paras. 122-127). The Working Group deferred final action to permit further study of the issues, and requested the representative of Japan, in consultation with the representatives of Australia, India and the United Kingdom, to submit a study on these articles. The representative of Japan submitted a proposed revision of article 50; the substantive provision of this proposal, as set forth in paragraph 1 of the redraft, appears above (the full text of this study appears in annex II to the present report (document A/CN.9/WG.2/WP.16/Add.1)).

22. ULIS devoted a separate section (section II) to the question of documents. However, the only substantive provision in this section is the one sentence in ULIS 50; the balance of the section consists of the incorporation by reference of remedial provisions of other articles of ULIS. Creating a separate section (with separate provisions on remedies for breach which duplicate other remedial provisions) for one short substantive sentence, complicates the structure of the Law and needlessly extends its length.

23. In addition, there is strong basis for the suggestion, made at the third session of the Working Group, that delivery of documents relating to the goods is, in substance, closely connected with delivery of the goods and that these issues should be dealt with together (report, annex II, para. 125). Indeed, in some situations, the only delivery under the contract may be a delivery of documents. This would be true, for example, when the contract relates to goods that are known to be in storage or in the course of shipment, controlled by a document such as

a warehouse receipt or bill of lading, and when the only act of delivery contemplated by the parties is the surrender of the document that controls possession over the goods.

24. The present consolidation sets forth the one substantive provision on documents (as redrafted by the representative of Japan) as article 23. (The Working Group incorporated article 23 of ULIS into article 20.)

25. Alternative places for this provision might be considered. Article 19 might be expanded to include a reference to the seller's obligation to provide documents. This, however, would detract from the simplicity and clarity of this article as envisaged by the Working Group. Another alternative would be to add the above provision as a second paragraph of article 20. However, article 20, as presently drafted, concentrates on the *place* for delivery; adding a paragraph on documents would depart from that theme. Article 21 would provide a more suitable setting, since both paragraphs deal with documents relating to the goods; the general provision on documents could be added as a third paragraph. However, article 21 seems addressed to contracts requiring carriage; documents may be necessary where the seller is not required to despatch the goods by carrier. Hence, adding the above provision to article 21 would, to some extent, detract from its unity. Article 22 is confined to the question of *time*, and hence is not suitable.

26. Consequently, on balance, the most suitable place would appear to be a new article 23. (It will be noted that the above draft on documents deals with both "time and place" and thus may appropriately follow a group of articles some of which deal with "time" and the others with "place".)

## SECTION II. REMEDIES FOR FAILURE OF SELLER TO PERFORM HIS OBLIGATIONS AS REGARDS THE DATE AND PLACE OF DELIVERY

### *Introductory note:*

#### *merger of remedy provisions as to date and place*

27. The Working Group at its third session decided that the articles of ULIS specifying the buyer's remedies as regards the *date* of delivery (ULIS 26-29) and the articles specifying the buyer's remedies as regards the *place* of delivery (ULIS 30-32) should be consolidated (report, annex II, para. 32).

28. The reasons for this decision included the view that issues concerning the date and the place of delivery were closely related: if goods are delivered at the wrong *place*, the practical problem is to get them to the right place and this will ordinarily present a problem of delay (i.e., the *date*). If goods are still in transit on the agreed date, it is possible to state either that (a) on the right *date* the goods are at the wrong *place* (i.e., in transit) or (b) at the later *date* of arrival, the goods are at the right *place* but at the wrong *time*. The differences between (a) and (b), above, seem to reflect differences in expression rather than differences of substance.

For these reasons, the Working Group drafted articles 24, 25, 26 and 27 to state consolidated rules on the buyer's remedies when the breach by the seller relates to *either* the date *or* the place of delivery. As a result, five articles of ULIS (28-32) become unnecessary.

29. The added unity and clarity resulting from consolidating the provisions on the buyer's remedies with respect to the date and place of delivery by the seller may indicate that attention should be given to consolidating the provisions which deal separately with the buyer's remedies regarding other aspects of the seller's performance of the sales contract. Two such proposals will be set forth herein. One proposal would retain two sets of remedial provisions. (See paras. 27-57 and 111-156, *infra*.) The second would provide a unified remedial structure applicable to breach of contract by the seller. (See paras. 158-176, *infra*.)

### *Article 24 (WG.III)*

"1. [Where the seller fails to perform his obligations as regards the date or place of delivery, the buyer may exercise the rights provided in articles 25 to 27.]

"2. [The buyer may also claim damages as provided in articles 82 or in articles 84 to 85.]

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

### *Comments*

30. The principal function of this article, like that of article 24 of ULIS, is to help the reader find the provisions on remedies that appear in various parts of the Law. Thus, paragraphs 1 and 2 of this article serve as indices, and do not have independent operative effect. Paragraph 1 refers to articles 25-27, which deal with the question of whether breach of contract by the seller with respect to the time or place for delivery authorizes the buyer to refuse to take the goods ("avoid the contract"). Paragraph 2 refers to articles which set forth the damages that may be recovered when the contract is *not* avoided (82) and when the contract *is* avoided (84-87). Thus, to ascertain the remedies of the buyer in any case it is necessary to consult the provisions of articles 24-27 and also those of articles 82 and 84-87.

31. The manner of presentation parallels that developed by the Working Group for article 41, which serves as an index for the provisions on the buyer's remedies for failure of the goods to conform with the contract.

32. The action taken by the Working Group reflected in article 21, *supra*, includes obligations other than those of the date and place of delivery; i.e., the terms of the contract of carriage and action with respect to insurance. Thus, the phrase in paragraph 1 in article 24 "as regards the date and place of delivery" may be too narrow. Consideration might be given to supplanting this phrase by "under articles 20-23".

33. Paragraph 3 of the redrafted article 24 is the same as ULIS 24 (3). This provision emphasizes that the remedial provisions of this Law, which do not provide for

applications to courts or arbitral tribunals for periods of grace, are not to be modified by provisions of some national laws that do contain such provisions.

#### Article 25 (WG.III)

"1. [Where the failure to deliver the goods at the date or place fixed amounts to a fundamental breach of the contract, the buyer may either retain the right to performance of the contract by the seller or by notice to the seller declare the contract [avoided].]

"[2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the seller may effect delivery of the goods within a reasonable time, unless the request indicates otherwise.]

"[2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the seller may effect delivery of the goods before the expiration of any time indicated in the requests, or if no time is indicated, before the expiration of a reasonable time.]

"3. [If, before he has made known to the seller his decision under paragraph 1 of this article, the buyer is informed that the seller has effected delivery and he does not exercise promptly his right to declare the contract [avoided] the contract cannot be [avoided].]

"4. [If after the date fixed for delivery the buyer requests the seller to perform the contract, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, before the expiration of a reasonable time, unless the seller refuses to deliver within that time.]"

#### Comments

34. As has been noted in the comments to article 24, article 25 defines the circumstance in which the buyer may refuse to take delivery of the goods when the seller fails to deliver the goods on the date or at the place fixed in the contract. The article amalgamates provisions on this subject found in ULIS in article 26 (date) and in article 30 (place).

35. In redrafting these provisions, the Working Group made one important change of substance. ULIS had stated that in several different circumstances the sales contract would be *ipso facto* avoided: that is, the right to continue performance under the contract would come to an end without a declaration by a party that he was "avoiding" the contract. E.g., ULIS arts. 25, 26 (1) and (2), 30 (1) and (2). A study by the Secretary-General of *ipso facto* avoidance in ULIS (A/CN.9/WG.2/WP.9)\* was considered by the Working Group at its third session. The Working Group decided that *ipso facto* avoidance should be eliminated from the remedial system of the Law on the ground that it led to uncertainty as regards the rights and obligations of the parties (report, annex II, para. 29). Instead, avoidance of the contract should be made dependent on notice by the injured party to the party in breach; if the injured party did not declare the contract avoided the contract continued in force. (*Ibid.*, para. 31.)

36. The change of substance decided by the Working Group can be illustrated by the following example: the seller is late in shipping the goods to the buyer. On their arrival at the port in the buyer's city, the buyer rightfully decided that the delay was so serious that he was justified in refusing to take the goods. (In the language of ULIS, the breach was "fundamental" justifying "avoidance" of the contract.) Under ULIS, the buyer need not inform the seller that he refused to accept the goods. Under the decision and redraft by the Working Group, if the buyer refuses to take the goods he must "by notice to the seller declare the contract avoided". Among the reasons favouring this change in policy is the seller's need to know that he must reship or resell the goods or take other action to prevent their wastage or spoilage.

37. The basic rule implementing this policy is stated in the above redrafted article 26 in paragraph 1: where failure to deliver the goods at the date or place fixed amounts to a fundamental breach of contract, the buyer may either retain the right to performance by the seller "or by notice to the seller declare the contract [avoided]."

38. Square brackets were placed around the word ["avoided"] since the Working Group wished to give further consideration to whether the appropriate word in English might be "terminated" or "cancelled" (report, annex II, para. 38). It is perhaps more common to speak of "avoiding" a contract for grounds (such as fraud) relating to the *making* of the contract; the word "cancel" seems more customary in connexion with actions based on *breach* of the contract.

39. The Working Group's redraft of article 25 includes alternative provisions for the second paragraph. Both are based on ULIS 26 (2) (date) and 30 (2) (place). However, these provisions of ULIS provided for *ipso facto* avoidance; instead, the Working Group's draft provides that when the buyer does not respond to the seller's request seeking information as to whether the buyer will refuse to take the goods, the seller may effect delivery of the goods. The two alternative versions of paragraph 2 were considered by the Working Group.

The Working Group requested the representative of Hungary to prepare a study, for use at its next session, on these two alternatives (report, annex I, para. 8; annex II, paras. 40-41). The study submitted by the representative of Hungary appears as addendum 2 to this report.<sup>5</sup>

40. Paragraph 3 of the Working Group's redraft is based closely on the provisions of ULIS 26 (3) (date) and 30 (3) (place). Under ULIS, as under the redraft, when the goods are delivered to the buyer, the buyer's right to declare the contract avoided must be exercised "promptly". As has been noted (para. *supra*) the seller needs to act to prevent wastage, loss or expense to the goods when the buyer refuses to accept them on delivery;

<sup>5</sup> This study was received subsequent to the preparation of the present report. Consequently, it has not been possible to discuss the study in the present report.

\* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 2.



for these reasons the buyer's decision must be communicated "promptly". (See article 11.)<sup>6</sup>

41. It will be noted that the time for the buyer to make a declaration of avoidance begins to run when "the buyer is informed that" the seller has effected delivery. The quoted phrase did not appear in ULIS 26 (3) or 30 (3), but seemed to be appropriate since the buyer's short period for decision should not begin to run until he had the relevant facts on which a decision could be based.

42. Paragraph 4 is derived from ULIS 26 (4) but has been rewritten to describe more fully and accurately the various situations to which this article is addressed: a request to perform the contract followed either by (a) performance or (b) non-performance or (c) a refusal to perform.

*Requiring performance; co-ordination with provisions on non-conformity of the goods*

43. It will be noted that in para. 1 of article 25, as drafted by the Working Group, when the seller's failure to deliver the goods at the agreed date or place amounts to a fundamental breach of contract, the buyer "may either retain the right to performance of the contract by the seller or by notice to the seller declare the contract [avoided]". A similar provision appears in ULIS 26 (1) (place) and 30 (1) (time). However, the Working Group modified the language of ULIS as follows: "the buyer may either [require] retain the right to performance by the seller . . .". The Drafting Group reported that it deleted the word "require" and substituted the phrase "retain the right to" on the ground that the language of ULIS "(a) had overtones of specific performance which would depend on the rules of individual legal systems and (b) could be understood in such a way that the buyer had to state expressly his wish that the contract should be performed" (report, annex II, para. 39).

44. The Working Group has taken steps to make the buyer's remedies for non-delivery (articles 24 *et seq.*) consistent with the buyer's remedies for non-conformity of the goods. Such consistency is important to make the structure of the Law intelligible.

45. In addition, consistency between the two sets of remedial provisions is important since the two areas, —non-delivery and non-conformity—overlap. For instance, failure to ship part of the goods could either be regarded as a delay in their delivery or as a non-conforming shipment of "part only of the goods" (ULIS 33 (1) (a)). Furthermore, in terms of the issues at

stake and the remedial needs of the parties, it is difficult to distinguish between (a) shipment of nothing; (b) shipment of empty boxes and (c) shipment of boxes containing goods that are worthless or entirely different from those agreed in the contract. If different remedial provisions may be invoked in the same factual situation, grounds are created for uncertainty and litigation. Consequently, the Working Group may wish to consider establishing a single set of remedies for breach by the seller of the contract of sale. (See paras. 158 *et seq.*, *infra*.) It may be advisable to postpone action on this question until decisions have been taken on the substance of the rules; none the less, at this stage it seems advisable to pay close attention to the compatibility of the two sets of remedial provisions.

46. A step towards further compatibility between the two sets of remedial provisions may be considered in connexion with article 25. As we have seen, this article deals primarily with the circumstances in which the buyer may refuse to take the goods ("declare the contract avoided"); the same issue, in the setting of non-conforming delivery, is dealt with in ULIS 43 and 44. These latter articles (in ULIS and in the Working Group's redrafts) do not attempt to deal with the buyer's right to require performance (i.e., to invoke the remedy of specific performance). Confining these articles to the single issue of avoidance of the contract has been important to reduce the complexity of the law.

47. If the Working Group would decide that the remedial provisions for non-delivery should more closely parallel those for non-conforming delivery, consideration might be given to the following redraft of article 25. The minor modifications in the earlier redraft will be explained immediately following the suggested text.

*Article 25*

*(Alternative A)*

"1. Where the failure by the seller to perform his obligations under articles 20-23 amounts to a fundamental breach of the contract, the buyer may be notice to the seller declare the contract avoided.

"2. If the seller requests the buyer to make known his decision as to whether he will take delivery of the goods and the buyer does not comply promptly, the seller may effect delivery. [Finalizing the remaining language on the period within which the buyer may deliver would await consideration of the study by Hungary.]

"3. If, before he has made known to the seller his decision as to whether he will take delivery of the goods, the buyer is informed that the seller has effected delivery and he does not exercise promptly his right to declare the contract [avoided] the contract cannot be [avoided].

"4. (No change.)"

48. Two changes made by alternative A, above, should be noted: (a) in paragraph 1, the phrase "either retain the right to performance by the seller or" is deleted; (b) in paragraphs 2 and 3, the phrase "his decision as to whether he will take delivery of the goods" is used in place of "his decision under paragraph 1 of this article".

<sup>6</sup> In article 39, a less rigorous standard—"a reasonable time"—is applicable to notice of the lack of conformity of the goods. Failure to give this notice has drastic consequences: "the buyer shall lose the right to rely on a lack of conformity . . .". Thus, the buyer would not be able to use his claim that the goods were defective to diminish his liability to pay the price. In contrast, under article 25, if the buyer fails promptly to "declare the contract avoided" the only consequence is that the buyer is obliged to take over the goods: he still may recover from the seller for any breach of contract related to the goods—either from the delay in delivery or from the failure of the goods to conform to the contract.

49. The first of these changes is to simplify the text; if this is done, separate provision would be made for the buyer's right to compel performance. The substance of such a provision would presumably parallel the action taken by the Working Group in connexion with article 42, *infra*, which deals with the same question in the setting of non-conforming deliveries. (See the comments to article 42 at para. 117 *et seq.*)

50. The second change in article 25—referring to the buyer's "decision as to whether he will take delivery of the goods"—seems more consistent with the normal communications of merchants who face a delay in delivery than does a reference to the buyer's "decision under paragraph 1". That decision is whether to "retain the right to performance by the seller or by notice to declare the contract avoided".

51. Indeed, this latter language from paragraph 1 does not describe accurately the buyer's choice, for even if he "declares the contract avoided" he retains the right to recover damages for breach of contract. (As has been noted, the Working Group did not intend to grant the right to require performance (i.e., specific performance), by stating that the buyer retains "the right to performance".)

#### Article 26 (WG.III)

"1. [Where the failure to deliver the goods at the date or place fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to performance of the contract by the seller.]

"2. [The buyer may however grant the seller an additional period of time of reasonable length. If the seller fails to perform his obligations within this period, the buyer may by notice to the seller declare the contract [avoided].]"

#### Comments

52. This article is based closely on the provisions of ULIS 27 (date) and 31 (place), with the parallel provisions on date and place consolidated into one article.

53. With respect to the concluding phrase of paragraph 1, the corresponding language of ULIS 27 and 31 is that the buyer shall "retain the right to *require* performance by the seller". The Working Group deleted the word "require" for reasons that were set forth in comments to Article 25.

54. The first sentence of paragraph 2 is identical with the first sentence of ULIS 27 (2) and 31 (2). The second sentence makes the necessary stylistic changes involved in merging rules on date and place, and in addition expresses the result of the ULIS provision in a more direct fashion. Under ULIS 27 (2) and 31 (2), if the seller failed to deliver within a reasonable period of time set by the buyer, this failure "shall amount to a fundamental breach of contract". The Working Group draft provides that on such failure "the buyer may by notice to the seller declare the contract [avoided]". The provision thus states what the buyer may do—an approach that seems a more

helpful guide to the parties than speaking, as does ULIS, of a legal conclusion—the "fundamental breach of contract".<sup>7</sup>

#### Article 27 (WG.III)

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

#### Comments

55. The above provision is based on the first part of ULIS 29, subject to the following stylistic adjustments: "the buyer may [accept] *take delivery* or [reject] *refuse to take delivery*". The use of the phrases "take delivery" and "refuse to take" delivery are consistent with the decision to conform the provisions on delivery to article 56 of ULIS, which provides that the buyer shall "*take delivery*" of the goods.

56. The Working Group decided not to preserve the closing phrase of ULIS 29 which states that if the buyer "accepts, he may reserve the right to claim damages in accordance with article 82". The phrase "he may reserve" the right to claim damages might be construed to require some formal statement of reservation at the time he takes delivery of the goods; merchants might not be aware that such a formality was required, and thus might lose their rights. It is not necessary to provide that the buyer may recover damages he suffers when the time of delivery is in breach of contract; this is made clear by redrafted article 24 (2), which states: "The buyer may *also* claim damages . . .".

[Articles 28-32 of ULIS: deleted by Working Group]

57. As has been noted in the introductory note that precedes article 24, paras. 27-29, *supra*, the consolidation by the Working Group of the separate remedial provisions concerning date of delivery and place for delivery effected a saving of five articles of ULIS. Consequently, in this redraft, there are no articles numbered 28 through 32.

### SECTION III. CONFORMITY OF THE GOODS [AND RELATED OBLIGATIONS OF THE SELLER]

#### Article 33 (WG.III) (S.7)

"1. [The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract.]

"1 *bis*. [Unless the terms of circumstances or the contract indicate otherwise, the seller shall deliver goods:

"(a) Which are fit for the purposes for which goods

<sup>7</sup> This more direct manner of expression was facilitated by the deletion of the concept of *ipso facto* avoidance. See comments to article 25, *supra*, at paras. 35-37.



of the same contract description would ordinarily be used;

"(b) Which are fit for any particular purpose expressly or impliedly made known to the seller; \*

"(c) Which possess the qualities of a sample or model which the seller has handed over or sent to the buyer;

"(d) Which are contained or packaged in the manner usual for such goods.]

"2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is clearly insignificant."

#### Comments

58. The above version of article 33 is the result of redrafting in order to reduce the complexity of article 33 of ULIS and also to bring out more clearly the basic principle that the seller's obligation as to quantity and quality is to be ascertained from the contract between the seller and the buyer. Article 33 of ULIS, in paragraphs (a) to (f), sets forth six specific propositions with respect to conformity of the goods without clearly stating the above basic principle.

59. In the revision prepared by the Working Group, this principle is established in the first paragraph. The style of expression is also designed to express more directly the nature of the seller's legal obligation: "The seller shall deliver goods which are of the quantity and quality and description required by the contract...". (In addition, "shall deliver" was preferred to the wording of article 33 of ULIS ("shall not have fulfilled his obligation to deliver") in order to avoid the possible argument that if the goods do not conform with the contract, no goods have ever been delivered.)

60. The redraft prepared by the Working Group accepts the proposition that the basic question is the obligation established by the contract, either expressly or by implication. Implied expectations are of importance, since it is not normal or feasible for a contract to specify all of the various flaws from which goods shall be free. (E.g., it would not be normal for a contract involving steel beams to state that the beams shall be free of cracks even though that would be a basic expectation of the parties.) However, the draft prepared by the Working Group is designed to express, more clearly than does ULIS 33, the basic idea that quality implied from the contract is to be ascertained in the light of the normal expectations of persons buying goods of *this contract description*. This thought is clearly articulated in subparagraph (a) of the second paragraph (paragraph 1 *bis*) of the Working Group's redraft. It will be noted that subparagraphs (a), (b), and (c) express the central ideas contained in the six subparagraphs of ULIS 33 (1). The fourth subparagraph adds a further obligation which had not been expressed in ULIS—that the goods must be

"contained or packaged in the manner usual for such goods".

61. The third paragraph of the Working Group's draft is the same as ULIS 33 (2) with the exception of a stylistic change in the English version: the expression "clearly insignificant" was substituted for "not material" in the interests of clarity and conformity with the French version (*sans importance*).<sup>8</sup>

#### Deletion of article 34 of ULIS

62. The Working Group decided that article 34 of ULIS should be deleted (report, annexe I, para. 12, and annexe II, paras. 56-61).

63. This decision did not indicate disagreement with the objective of this article. That objective presumably was to protect the uniformity of the Law by prohibiting recourse to other remedies provided under some national rules that would be different than those established by the present Law for failure to perform the contract of sale. The Working Group found, however, that this objective had not been clearly expressed. The expression "exclude all other remedies based on lack of conformity of the goods" seemed so broad as to exclude remedies to which the parties had agreed in the contract.

64. It is also doubtful whether a provision like article 34 was needed. There will be varying national rules on most of the provisions covered by the Uniform Law; these, of course, are displaced by virtue of the general obligation to give effect to the Uniform Law. In addition, this obligation has been reinforced by the Working Group's revision of article 17 which specifically directs attention to the international character of the law and the need to promote uniformity in its interpretation and application. It is, of course, impractical to repeat that inconsistent national laws are displaced in connexion with each of the rules of the Uniform Law; inserting such a statement in isolated instances could lead to misunderstanding.

<sup>8</sup> The question has been raised as to the purpose of a provision like ULIS 33 (2). If the seller's performance deviates in a very slight, but measurable, degree from the performance required under the contract, would this provision deny the buyer the right to make a claim (or reduce the price) for a corresponding small amount? One possible explanation of the provision is to prevent the buyer from refusing to take the goods ("avoid the contract") when a breach is trivial. Refusal to take the goods can entail substantial expenses in reshipping and redispensing of goods—and thus may not be justified when the breach is insignificant, although a small reduction of the price would be justified. Under ULIS, the definition of seller's duty is linked with the buyer's right to refuse to take the goods ("avoid the contract"). Under ULIS 44 (2), if the buyer fixes an additional period of time of reasonable length for the delivery of conforming goods, and the seller does not comply, the buyer may declare the contract avoided: the failure of conformity apparently need not be a "fundamental" breach. Thus, in the absence of a provision like ULIS 33 (2), refusal to take the goods ("avoidance of the contract") might theoretically be based on a trivial breach of contract. If ULIS 44 (2) should be modified to restrict the right to avoid the contract where the non-conformity is "not material" or "without significance" it might be possible to delete paragraph 2 of article 33. See the further discussion to this effect in the comments to articles 43 and 44 at para. 138-140, *infra*.

\* The report of the third session erroneously used the word "buyer" instead of "seller".

## Article 35 (WG.III) (S.8)

"1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

"2. [The seller shall be liable for the consequences of any lack of conformity even though they occur after the time fixed in paragraph 1 of this article.]"

## Comments

65. The first sentence of article 35 (1), as prepared by the Working Group, is the same as in ULIS. The purpose of the provision is to avoid confusion in dealing with the following common situation: let us assume that under the sales contract (or under the rules in chapter VI of ULIS) the buyer bears the risk of loss during transit. (E.g., the sale is "f.o.b. Seller's City".) The seller dispatches goods that comply with the contract: i.e., "No. 1 cane sugar". However, during transit the goods are damaged by water so that they no longer meet the contract specification as "No. 1"; in addition, we may assume that the goods, on arrival, would fail to meet various requirements of article 33 regarding conformity of the goods. Does the condition of the sugar on arrival give the buyer a claim for lack of conformity with the contract? The answer, of course, is no. The goods did comply with the contract at the time that the risk of loss passed to the buyer; the buyer's responsibility for deterioration after that point is the necessary consequence of the provisions of the contract (or of the law) as to risk of loss. Although the above principle may appear self-evident, it has seemed useful in the interest of clarity to state the principle explicitly.

66. The second sentence of ULIS article 35 (1) was occasioned by complex provisions of chapter VI of ULIS (articles 96-101) concerning the effect of non-conformity of the goods on the transfer of risk. See especially ULIS 97 (2). The Working Group concluded that the substance of this provision of article 35 (1) could not be considered until the rules on risk of loss had finalized (report, annex I, para. 13; annex II, para. 63).

67. ULIS 35 (2) carves an exception from the basic principle of the first paragraph that conformity of the goods is to be determined by their condition when risk passes. The Working Group, however, concluded that the provision was drawn too narrowly to take account of express contractual provisions that are widely used: i.e., contractual guarantees that the goods shall remain fit or shall perform for a specified period *after* delivery (e.g., for three years, 10,000 miles, or the like). The language of ULIS 35 (2) used very restrictive language in dealing with this problem: the seller would be liable only if the consequence of the lack of conformity "was due to an *act* of the seller or of a person for whose conduct he is responsible". This language is, of course, too narrow to cover the case of a machine, guaranteed for three years,

that breaks down at the end of one year. Theoretically, one might argue that in such cases where the seller is liable, there must have been a flaw latent in the machine at the time of delivery. But the existence of such a latent flaw is difficult to prove, and need not be proved under a contract that guarantees performance for a period of time. For such reasons the Working Group proposed deletion of the concluding language of paragraph narrowing the seller's liability to "*acts*" done by the seller or his agents.

68. It has been suggested that the redrafted language of paragraph 2 still does not give full effect to contractual guarantees of continued performance, since this provision (following ULIS) speaks only of the "*consequences* of any lack of conformity": this language might still require that the defect of flaw be shown to exist at the time of *delivery*. A member of the Working Group has submitted a study on various aspects of the problem of guarantees. See addendum 1 to this report at annex I. For reasons set forth therein, it was proposed that paragraph 2 of article 35 should read as follows:

"The seller shall be liable for any lack of conformity occurring after the time fixed in paragraph 1 of this Article, if it constitutes a breach of an express undertaking of the seller whereby the goods have been guaranteed to remain fit for ordinary or particular purpose or to retain its specified qualities or characteristics for a certain period of time whether expressed in terms of a specific period of time or otherwise."

69. One might ask why it is necessary to include a special statutory provision stating (in effect) that the seller shall be liable for breach of a specific and defined type of promise in the sales agreement. All of the various promises made in sales contracts cannot be identified and implemented in separate and specific provisions of the Law. Would it not be enough to rely on a basic rule that the parties shall perform all the promises they make as part of an international sales contract? Such a rule might be a sufficient basis for enforcement of guarantees of performance, even though the breach relates to conditions that develop after risk passes. See ULIS 35 (1).

70. The problem is that, surprisingly, it is difficult to find in ULIS such a general rule giving effect to the agreement of the parties. Various provisions approach such a principle, but a general rule requiring performance of all the promises of the sales agreement is not explicitly stated in ULIS. For example, the rules of ULIS on conformity (quality) of the goods are stated in terms of "*delivery*" of the goods—the feature that raises the question as to guarantees of performance *subsequent* to delivery. The general provision of Article 18 is similarly limited: "The seller shall effect *delivery* . . . as required by the contract and the present Law."

71. The provision of ULIS that has the most general significance in giving effect to the sales agreement is article 3. However, in ULIS (as contrasted with the Working Group draft) this article speaks only of freedom "to *exclude* the application" of the Law either entirely or partially. This falls short of giving positive enforcement

to the promises made in the contract.<sup>9</sup> The revision of this language effected in December 1970 at the second session of the Working Group alleviates this difficulty (see report on second session, A/CN.9/52, paras. 44-46 \*). The language of ULIS 3 was redrafted (as article 5) to provide that the parties may not only "exclude" the application of the Law, but may also "derogate from or vary the effect of any of its provisions". This language seems more clearly to express the probable intent of ULIS—that the agreement of the parties is to be given full effect as a source of affirmative legal obligations; the rules of the Law are supplementary and yield to the agreement.

72. The need for specific statutory provisions giving effect to contractual guarantees of performance (and to various other types of promises that may be part of the agreement) has been diminished by the Working Group's revision of ULIS 3. However, in view of the importance of contractual guarantees, and the explicit provision in article 35 (1) that conformity of the goods is to be determined as of the time when risk passes, it may be helpful to have an explicit provision along the lines of the proposed substitute for paragraph 2 of article 35, quoted in paragraph 68, *supra*.

#### Article 36 (ULIS) (S.9)

"[The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in subparagraphs (d), (e) or (f) of paragraph 1 of article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity.]"

#### Comments

73. The above provision is the same as ULIS 36. It will be noted that this provision is closely linked to article 33, and operates as an exception or supplement to three subparagraphs ((d), (e) and (f)) of ULIS 33 (1). Consequently, the Working Group concluded that the drafting of this article could not be finalized until a final decision is taken concerning article 33 (report, annex II, para. 67).

74. It may be helpful to consider why this article of ULIS applies to subparagraphs (d), (e) and (f) of ULIS 33 (1), and does not apply to subparagraphs (a), (b) and (c). The theory may be as follows: the buyer's knowledge of defects in the goods may modify the implied obligations, based on normal expectations, but not the promises on undertakings by the seller that relate to this specific transaction.

75. It will be recalled that the redraft of article 33, as prepared by the Working Group, established in paragraph 1 a general rule giving effect to the "quantity and description required by the contract". A

second paragraph (designated 1 *bis*) was designed to articulate the expectations that are normal, but which may not be expressly stated in the contract (see comments to article 33, *supra*).

76. Subparagraphs (d) and (e) of ULIS 33 (1) correspond, in substance, to subparagraphs (a) and (b) of paragraph 1 *bis* as redrafted by the Working Group. Subparagraph (f) of ULIS 33 (1) does not appear in the redraft. Consequently, if the redraft of article 33 is finally adopted by the Working Group, the corresponding references in article 36 would be to "subparagraphs (a) and (b) of paragraph [1 *bis*] of article 33".

77. Article 36 states that the seller "shall not be liable for the consequences of any lack of conformity" under specified provisions of article 33. The quoted language may present problems of interpretation. This article probably intends to provide that characteristics of the goods of which the buyer was aware would not constitute a lack of conformity. However, the quoted language of article 36 might be construed to mean that the buyer has a claim for lack of conformity, but not for the "consequences" thereof—such as damage which these goods might cause to other goods, or to the business relations of the buyer. If the Working Group wishes to clarify this aspect of the drafting of article 36, it might consider language such as the following:

"Facts regarding the goods which, at the time of the conclusion of the contract; the buyer knew or could not have been unaware of, shall not constitute a lack of conformity under subparagraphs . . ."

#### Article 37 (WG.III) (S.10)

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

#### Comments

78. The above article, as approved by the Working Group, is the same as ULIS 37, except for the following two modifications:

(a) ULIS 37, in the opening phrase, referred to "the date fixed for delivery". The word "fixed" was deleted since it might be construed to limit the provision to contracts in which the delivery date is specifically stated in the contract.

(b) The second sentence was added to make it clear that if early delivery, in violation of the contract, causes the buyer any damages, the buyer can recover these damages from the seller, although damages may not be so "unreasonable" as to justify the buyer in refusing to take the goods.

\* UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

<sup>9</sup> The problem is not solved by ULIS 55 (1), since this provision in section IV may be construed to implement the obligations established by that section. It is the lack of a clear substantive obligation to perform the contract that presents the difficulty.

## Article 38 (WG.III) (S.11)

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

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

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

"4. [The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.]

## Comments

79. Article 38, in specifying the time when the buyer shall examine the goods, is prefatory to article 39, which requires a buyer to notify the seller of a lack of conformity within a reasonable time after he has discovered, or *ought to have discovered* the lack of conformity. Under article 39, if the buyer fails to notify the seller within the required time, the consequences are severe: the buyer shall "lose the right to rely on" the lack of conformity. The rules of article 38, on the time for inspection, start the running of the notice period, and are of considerable importance.

80. The Working Group at its first session concluded that paragraphs 2 and 3 of ULIS 38 required the buyer to inspect the goods under circumstances in which examination often might be impractical or inconvenient. The problems were particularly serious when the buyer redispaches goods to his customer, and the goods are packed in a manner that would make it impractical to open the containers before they reach their final destination. The Working Group consequently redrafted the article to make the rules on inspection more flexible (report on first session, A/CN.9/35, paras. 109-111 \*). The Working Group at its third session reiterated its approval of this redraft of paragraphs 1, 2 and 3 of Article 38 (report on third session, annex I, para. 19; annex II, paras. 70-71).

81. Paragraph 4 states that, in the absence of agreement, the methods of examination shall be governed "by the law on usage of the place where the examination is to be effected". One representative suggested that the methods of examination should be governed "by the law and usages of the seller". The Working Group at its third session decided to defer action on the fourth paragraph until its next session (report, annex II, paras. 72-73).

82. In considering paragraph 4, attention may be drawn to The Hague Convention of 1955 on the Law Applicable to International Sales of Goods.<sup>10</sup> Article 3 establishes, in paragraph 1, a general rule pointing to

"the domestic law of the country in which the *vendor* has his habitual residence at the time he receives the order"; paragraph 2, in certain cases, points to "the domestic law of the country in which the *purchaser* has his habitual residence . . .". However, article 4 states more specific rules governing, *inter alia*, "the form in which . . . the inspection of the goods . . . is to take place . . .". It will be noted that this rule is somewhat similar to that of ULIS 38 (4).

83. As has been noted in comment 2, above, the Working Group found that the rules on the place of examination needed to be flexible to take account of the fact that, in many situations, the buyer needs promptly to reship the goods in their original containers. The place where it would be feasible to open the goods for inspection may not be known at the time of the making of the contract and may depend on the circumstances that develop in the course of the buyer's handling and resale of the goods. Except where the goods present a threat to safety or to health, the Government of the place where the inspection takes place has little concern with the method of examination; in many places there probably are no established rules governing "the methods of examination" for most commodities. In such circumstances, the methods of inspection would be determined by the expectations of the parties in the light of the practicalities of the transaction in question and the usages of trade for such goods—rather than the usages of the *place* of inspection (see ULIS 9). It is doubtful whether any general provision pointing to the place of inspection as determinative of the methods of inspection would be consistent in all cases with the expectations of the parties or with commercial practices. It might not be necessary or advisable to attempt to lay down a general rule on which law (or usage) governs the methods of inspection. If the Working Group agrees with this line of thought, paragraph 4 could be deleted.

## Article 39 (WG.III) (S.12)

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

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

"3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon."

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

<sup>10</sup> See *Register of Texts of Conventions and Other Instruments Concerning International Trade Law, Volume I*, chap. I, 1 (United Nations publication, Sales No. E.71.V.3).

### Comments

84. Under this article, the buyer will lose the right to rely on a lack of conformity of the goods if he fails to give the seller the required notice of the lack of conformity. This provision is distinct from rules on prescription (limitation). Rules on prescription set outer limits for instituting a legal proceeding before a tribunal. The present article requires a notice to the other party; on failure to give a required notice the buyer loses the right to rely on the lack of conformity. The notices required under this article may serve various purposes: (i) When the seller learns that the buyer is dissatisfied with the goods, the seller is afforded the opportunity to substitute conforming goods or otherwise to "cure" the defect (cf. ULIS 37, 43 and 44 (1)); (ii) On receiving such a notice the seller has the opportunity to preserve evidence of the quality of the goods.

85. Paragraph 1 of the above article, as approved by the Working Group at its third session, is the same as ULIS, with one exception: in paragraph 1, "within a reasonable time" was substituted for "promptly". Failure to give the notice required by this article is serious: the buyer may not rely on the non-conformity and must pay the full price for goods he considers to be defective. The term "promptly" was thought to set too rigorous a standard (see ULIS 9, redrafted by the Working Group as article 11). On the other hand, the Working Group concluded that the expression "within a reasonable time" was sufficiently flexible to adapt to the varying circumstances in which inspection might be required (see report, annex II, paras. 74-78).

86. ULIS 39 (1) closes with a sentence that sets an outer limit of two years for the giving of notice; if the defect is discovered more than two years after delivery, the buyer cannot rely on the lack of conformity. However, the two-year requirement is subject to an exception: "... unless the lack of conformity constituted a breach of a guarantee covering a longer period". To illustrate: the seller guarantees that a machine will perform for four years, and a defect is discovered during the fourth year. Under the quoted provision, the two-year cut-off period would not apply, and the buyer would be required to give notice to the seller "within a reasonable time after he discovered the lack of conformity or ought to have discovered it".<sup>11</sup>

87. A study submitted by a member of the Working Group (A/CN.9/WG.2/WP.16/Add.1, annex I) proposes that the "unless" clause at the end of paragraph 1 be replaced the following sentence:

<sup>11</sup> The "unless" clause of ULIS 39 (1) might be read as follows: if the contract guarantees performance for four years, the notice must be given within the four-year period. However, this reading does not seem to be required by the language of ULIS 39 (1) and could produce unreasonable results if the defect comes to light at the very end of the guarantee period. Of course in practical operation the exact provisions of the contractual guarantee would be important. E.g., does the guarantee in the contract (a) simply guarantee performance throughout the guarantee period, or (b) does it also specify that the guarantee is effective only if notice is given during the period? In the latter case, the decisive issue might be the power of the parties by agreement to modify the notice period set forth in the Law.

"If a lack of conformity of the goods constituted a breach of a guarantee referred to in paragraph 2 of article 35, the buyer shall lose the right to rely on such lack of conformity if he has not given notice thereof to the seller within [30] days upon expiration of the period of guarantee [provided the lack of conformity was discovered during that period]."

If the approach of the foregoing language is employed, consideration might be given to its application in the following situation: the contract guarantees that a machine will perform for four years. A defect appears as soon as the machine is delivered. Is the period for notice: (a) a reasonable time after discovery of the lack of conformity or (b) four years and thirty days after delivery? Result (a) seems reasonable and probably was intended. If so, it may be appropriate to make sure that this intent is clearly expressed.<sup>12</sup>

88. It will be noted that the outer limit of two years on giving notice established by ULIS 39 (1) creates complex problems of drafting to accommodate the provisions of guarantees of performance. This cut-off period of two years may also conflict with the policy of article 10 of the Draft Convention on Prescription (Limitation) in the International Sale of Goods, as adopted by UNCITRAL at its fifth session. Article 10 (2) states:

"The limitation period in respect of a claim arising from a defect or lack of conformity which could not be discovered when the goods are handed over to the buyer shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, provided that the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer."<sup>13</sup>

It will be noted that the policy underlying this article is to assure that the buyer will have an opportunity to exercise his claim from the date on which "the defect or lack of conformity is or could reasonably be discovered"—subject to a cut-off period of *eight* years from the time when the goods are handed over to the buyer.

89. ULIS 39 specifies the time for giving notice to the seller while the Convention on Prescription deals essentially with the time allowed for asserting a claim before a tribunal. The issues presented by these laws are technically distinct, but it is difficult to reconcile the policies underlying these provisions. For example, let us

<sup>12</sup> Compare the language of article 10 (3) of the draft convention on prescription (limitation) in the international sale of goods: the limitation period "... shall commence on the date on which the buyer discovers or ought to discover the fact on which the claim is based, but not later than the date of the expiration of the period of the undertaking". (UNCITRAL, report on fifth session (1972) (A/8717), para. 21; UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

<sup>13</sup> *Ibid.* Article 10 reflects changes made by the Commission in the draft prepared by the Working Group on Time-Limits and Limitations (Prescription) (see A/CN.9/70, annex I, art. 9; UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 2) and commentary on this draft in A/CN.9/70/Add.1 (commentary on art. 9 at paras. 6-7). The commentary on the draft convention approved by the Commission appears as document A/CN.9/73 (UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

assume that defects in a machine come to light for the first time three years after delivery. Article 10 of the Convention on Prescription expresses the policy that the buyer should have an opportunity to exercise his claim. However, pursuant to ULIS 39 (1) the buyer's opportunity to exercise his claim would be illusory, since he cannot give the required notice to the seller and consequently may not rely on the lack of conformity.

90. If the Working Group decides that the law on sales should not conflict with the policies established by the Commission in preparing the convention on prescription, the following approaches may be considered: (a) redrafting the last sentence of ULIS 39 (1) to conform to the approach of article 10 of the Convention on Prescription (e.g. by changing "two years" to "eight years"); (b) deletion of the last sentence of ULIS 39 (1). There may be merit in leaving cut-off periods, expressed in fixed periods of years, to the Convention on Prescription; indeed, the insertion of a two-year cut-off period in ULIS 39 (1) may have been influenced by the lack of uniform rules on prescription<sup>14</sup>—a lack that has been remedied by the Commission's approval of a draft Convention on this subject. Deletion of the last sentence of article 39 (1) of ULIS would, of course, leave unimpaired the requirement that the buyer must give the seller notice of a lack of conformity "within a reasonable time after he has discovered the lack of conformity or ought to have discovered it".

91. Paragraph 2 of the draft approved by the Working Group is the same as ULIS 39 (2), except that the Working Group deleted the concluding phrase "and invite the seller to examine the goods or to cause them to be examined by his agent". Such an "invitation" was required in every case of non-conformity. Apparently, if this part of the notice should be omitted, the buyer would lose his right to rely on the lack of conformity. The Working Group concluded that such an "invitation", as a necessary and invariable part of a notice of non-conformity, was not supported by commercial practice (report on third session, annex II, para. 79). Notices of non-conformity are often sent by merchants in an informal manner and without legal advice concerning applicable formalities. Consequently, requiring an "invitation" in each notice could serve as a technical trap leading to the loss of substantial rights.

#### Article 40 (ULIS) (S.13)

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

#### Comment

92. The above language is the same as in ULIS, and was adopted by the Working Group without change.

This article relaxes the notice requirements of articles 38 and 39 where the lack of conformity relates to facts which the seller knew (or of which he could not have been unaware) and which he did not disclose. The seller has no reasonable basis for requiring the buyer to notify him of these facts.

*Note: location of substantive provision on transfer of property; possible further consolidation of the remedial provisions of ULIS*

93. ULIS sets forth six separate sets of remedial provisions. Thus, separate remedial provisions are provided for the following substantive obligations: (1) date of delivery (arts. 26-29); (2) place of delivery (arts. 30-32); (3) lack of conformity (arts. 41-49); (4) handing over documents (art. 51); (5) transfer of property (arts. 52-53); (6) other obligations of the seller (art. 55).

94. The Working Group, at its third session, merged the first two of the above sets or provisions: (1) date of delivery and (2) place of delivery. (The reasons were summarized in the introductory note that precedes article 24, at paras. 27-29 *supra*.) This step seems to have produced considerable gains in clarity and unity, as well as brevity (five articles, 28-32, become unnecessary). There remains this question: can this consolidation be carried further?

95. The Working Group may wish to consider consolidating all six of the above sets of remedial provisions. However, it seems premature to present this issue for decision until the substantive provisions on the obligations of the seller, and the various remedial provisions, can be viewed as a whole. Consequently, this study has reproduced, above, the remedial provisions (articles 24-27) for breach by the seller of his obligations as to date and place of delivery. These separate provisions could either be retained by the Working Group or consolidated into a single unified set of remedial provisions, as will be suggested below at paras. 158-176 *infra*.

96. However, it does not seem feasible to postpone the question of consolidation of the remaining remedial provisions for breach by the seller. As was noted in para. 93, *supra*, these remedial provisions are: (3) lack of conformity (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).

97. The issue has, in part, been foreshadowed by the suggestion, referred to above in paragraph 21, that the substantive provision on delivery of documents relating to goods (article 50), as submitted by a member of the Working Group, should be placed with the articles on delivery of goods as article 23. See the comments to article 23 at paras. 21-26. This location for a single substantive provision of one sentence would make unnecessary an entire section of the law (section II) and the separate remedial provisions in group (4), *supra*.

98. Such consolidation seems also foreshadowed by the decision of the Working Group at the third session that all of the substantive provisions to which the remedial provisions in group (6), *supra*, are attached should also be transferred to an integrated group of sections on

<sup>14</sup> Under some national rules, the period of prescription may be very long; periods of 10, 20, and even 30 years have been encountered.



delivery of the goods. Under this decision, the provisions of article 54, on the contractual arrangements the seller should make when he despatches goods to the buyer, will appear as article 21. See the comments to article 21, *supra*, at paras. 17-18.

99. There remains for consideration only the remedial provisions in group (5), *supra*; transfer of property (arts. 52-53). Comments made by members of the Working Group support the view that there is a close relationship between the seller's obligation to deliver conforming goods and his obligations that the buyer will be able to keep and enjoy the goods. Indeed, it is difficult to find grounds for separate and different treatment of remedies for (i) the delivery of empty boxes—or of goods that are worthless and (ii) the delivery of goods that the buyer cannot keep because they are owned by a third person.

100. For these reasons, articles 41-48, on remedies for non-conformity of the goods, do not appear at this point in the Study, and are deferred until after the provisions on the seller's substantive obligations have been presented. Actually, these remaining substantive provisions prove to be only one article: article 52 on transfer of property.

101. The structure of ULIS, which has been widely criticized as complex and repetitive, would thereby be simplified. An important group of substantive provisions would be brought together. These rules on what the seller *shall do* are the provisions which are of prime interest to merchants; freeing these rules of the complexities of repetitive remedial provisions makes the Law more comprehensible to those who most need clear guidance. Such consolidation of repetitive provisions will also shorten the Law—a result to which the Working Group has already contributed by its consolidation of the provisions on remedies concerning date and place of delivery. See the introductory note that precedes article 24 at paras. 27-29, *supra*.

102. The following will explain the gap in numbering between articles 40 and 52:

(a) *Articles 41-48*: follow article 52, for reasons set forth in preceding comments at paras. 93-101.

(b) *Article 49*: deleted by the Working Group in response to a decision by UNCITRAL (report of the Commission on its third session). A/8017, para. 34 (UNCITRAL, Yearbook, vol. I: 1968-1970, part two, III, A); report on third session, annex I, para. 31.

(c) *Article 50*: revised and transferred to article 23. See paragraphs 21-26 and 97.

(d) *Article 51*: separate provisions on remedies for failure to hand over documents would no longer be necessary if the substantive provisions of article 50 become part of rules of section I: Delivery of goods. See paragraph 97, *supra*.

*Article 52 (Revised to state affirmatively the seller's substantive obligation) (S.14)*

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

[2. "(For the text of a second paragraph that might be added, see para. 108, *infra*.)"]"

#### Comments

103. Article 52 of ULIS has been subject to substantial criticism (Working Group, report on third session, annex II, paras. 128-138; A/CN.9/WG.2/WP.10, paras. 71-76,\* and Add.1 and annex XIV). The Working Group at the third session deferred action on these articles.

104. A problem which calls for attention at the outset is the failure of article 52 to state a general rule or principle with respect to the obligation of the seller to deliver goods that are free of rights or claims of third persons. Instead of stating the seller's obligation, article 52 commences by stating an obligation by the *buyer* (the wronged person) to *notify* the seller and to make specified requests. The rules of article 52 of ULIS are addressed to either (a) compliance with a request (para. 2) and (b) failure to comply with a request (para. 3). This approach, in spite of its complexity, proves to be incomplete, since in some circumstances no request need be made. Thus, under article 52 (1), the request need not be made if "the seller already knows" of the right or claim of the third person—a circumstance that would seem to be common when the goods are subject to such a right or claim. ULIS provides no explicit rule (or remedy) for such cases, and it is difficult to imply a rule since the Law does not lay down a general rule or principle that the goods shall be free of rights or claims of third persons. It seems clear that this gap in the Law should be corrected.<sup>15</sup> Paragraph 1 of the above redraft is designed to set forth a general principle that is consistent with what the drafters of ULIS probably meant to express.

105. The next problem that requires attention is that of the purpose and effect of the request procedures in article 52. Analysis of the language exposes the following puzzling feature. Although the buyer's rights seem to depend on his making a specified request, such a request (unlike the notice of non-conformity of the goods under articles 28-39) need not be made "promptly", with a "reasonable time", or within any time requirement. There probably are good reasons for not imposing a time requirement for such a request.<sup>16</sup> However, without such a time requirement it is difficult to grasp the substance of the requirement that the buyer "shall notify" the seller. If the buyer sues for damages because of a right or claim of a third person, and the seller states that the claim is

\* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3.

<sup>15</sup> A draft provision that seems to have been addressed to this problem is introduced at the third session of the Working Group. See report, annex II, para. 137.

<sup>16</sup> It will be recalled that under ULIS 39 the "buyer shall lose his right to rely on" the defect in the seller's performance unless he has notified the seller of the defect "within a reasonable time". Some of the important reasons requiring notice of defects in goods (such as preserving samples of the goods for future litigation) do not apply to an outstanding right or claim. To deprive the buyer of all rights based on this section—so he would be compelled to pay for goods which he could not retain because of a third person's right—would seem harsh in relation to the seller's need for notice.



defective since no request was made, the buyer could thereupon make the required "request" and (under modern procedural arrangements) could amend the pleadings to allege the missing fact.

106. In searching for the function of the notice and request by the buyer to the seller described in article 52, one might suppose that such a notice and request would put the seller on notice that he must remedy the defect or else be subject to avoidance of the contract. This *Nachfrist* principle is used in other parts of ULIS to provide definiteness for the ambiguous test of "fundamental breach"—a test that generally must be satisfied if the contract is to be avoided. Thus, failure by the seller to comply with a reasonable period of time set by the buyer gives the buyer the right to avoid the contract—where the seller is in default as regards date (ULIS 27 (2)), place (ULIS 31 (2)) or conformity of the goods (ULIS 44 (2)). However, the request specified in ULIS 52 does not perform this clarifying function. Under paragraph 3, the buyer may declare the contract avoided if "the seller fails to comply with a request made under paragraph 1 of this article *and a fundamental breach of the contract results thereby* . . .". Unlike the above-cited provisions of articles 27 (2), 21 (2) and 44 (2), the failure of the seller to comply with the request specified in the statute *does not* establish the buyer's right to declare the contract avoided, and rights of the parties would depend on the application of the general definition of "fundamental breach" (article 10).]

107. The complex rules of article 52, on analysis, seem to boil down to little substance, although they present large opportunities for confusion and litigation. It seems preferable to state the seller's obligation to deliver goods that are free from rights or claims in general and positive terms, and to have recourse to the general remedial provisions when this obligation is broken. Under the remedy provisions which follow, the failure of seller to perform his obligation under article 51 would (under article 41) give the buyer the right to recover damages. If the buyer fixes a reasonable time within which the seller is requested to free the goods of the outstanding right or claim, failure by the seller to cure this default would amount to a fundamental breach of contract empowering the buyer to declare that contract avoided (articles 43-44 (R.3)).

108. The above discussion suggests advantages in confining the rules on the subject to a short, general statement of the seller's obligation—an obligation which would be implemented by consolidated and unified provisions on remedies. However, it might be thought that "request" provisions comparable to those appearing in ULIS article 52 should be retained. (For reasons indicated at para. 104, above, it seems essential to recast article 52 to state a general obligation by the seller that the goods shall be free from the rights or claims of third persons, and thereby close the gap which now exists in article 52 for situations where no "request" is required since the seller already knows of the third party's right or claim.) The substance of the "request" provisions of article 52 would be preserved by a second paragraph which might read as follows:

*Possible addition to redraft of article 52 (S.14)*

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

109. It is not easy to recast the "request" provision of article 52 into acceptable form. The first sentence, based on the present language of article 52, preserves the difficulties that underly that language: what is the operative effect of the request provision? (In other words, what happens of there is no request? See para. 105 *supra*.) The second sentence of the redrafted second paragraph, above, would specify a significant consequence of the making, and failure to respond, to a request for "cure" of the defect: the failure constitutes a fundamental breach and this would empower the buyer to avoid the contract.

110. The following points need to be noted: (1) the suggested second sentence would modify the rule as it now stands in article 52 (see para. 106, *supra*); (2) making this change would bring the article into conformity with other parts of ULIS (articles 27 (2), 31 (2) and 44 (2)—the *Nachfrist* principle) whereby failure to comply with such a request constitutes fundamental breach of contract; (3) the rule of ULIS 52 that the buyer must, even in cases of fundamental breach, specifically offer the seller the opportunity to cure the defect, before avoiding the contract, is preserved in the above redraft; this rule, however, is inconsistent with the protection given the buyer where the goods are non-conforming.

SECTION IV. REMEDIES FOR FAILURE OF SELLER TO PERFORM HIS OBLIGATIONS AS REGARDS CONFORMITY OF THE GOODS, PROPERTY AND RELATED MATTERS

*Introductory note*

111. The Working Group at its third session considered, and redrafted portions of, articles 41-49 of ULIS. This group of articles appeared in ULIS as section 1-2-C: *Remedies for lack of conformity*. For reasons that have already been set forth (paras. 27-29, 44, *supra*), it appears that the Working Group would wish to consider applying this set of remedial provisions to the substantive obligations of the seller that have not seen transferred to section 1 on delivery of the goods. As a result of rearrangements by the Working Group at its third session, and related rearrangements, the remedial provisions of article 41 *et seq.* need take account of only one additional substantive provision—that of ULIS 52 on transfer of property.

112. This step involves placing articles 41 *et seq.* after article 52. To facilitate comparison with the original provisions of ULIS, the articles have not been renumbered. However, following the number of the article based on ULIS, these remedial provisions are given a second identifying number: (R.1), (R.2), etc.

### Article 41 (WG.III) (R.1)

"Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may:

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

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

#### Comments

113. The above provision was drafted at the third session of the Working Group (report on third session, annex I, para. 24; annex II, paras. 82-85). Like ULIS 41, this provision serves as an "index" to other articles and shows the relationship between the different type of remedies.

114. The redrafted provision closely parallels the redrafted version of article 24, which indexes the remedies with respect to the date and place of delivery. (See the comments to article 24, *supra*.)

115. If the Working Group decides to include the provision on seller's obligation to deliver goods that are free of the rights and claims of third persons (article 52) with the provisions on delivery of goods that conform as to quality, it would seem advisable to broaden the language of the opening phrase. Consideration might be given to the following:

"[1] Where the seller fails to perform his obligations under articles 33 (S.7) to ... (S.14),<sup>17</sup> the buyer may ...".

116. It will be noted that the above language does not refer to the notice requirement prescribed by article 39. The language which the Working Group borrowed from ULIS 41 seems to imply that notice must be given in every case, whereas article 40 specifies circumstances in which notice is dispensed with. It may be doubted whether the general rules on remedies need to (or can) refer to all the rules that control the buyer's right of recovery. However, if it should be concluded that special reference to the provisions on notice should be made, a second paragraph could be added:

"2. The exercise of such rights and claims is subject to the requirements of articles 39 to 40<sup>18</sup> with respect to the giving of notice to the seller."

### Article 42 (WG.III) (R.2)

"The buyer shall retain the right to performance of the contract, unless he has declared the contract avoided under this Law."

#### Comments

117. ULIS 42 (1) (a) (b) and (c) specified three situations in which the "buyer may *require* the seller to *perform* the contract". This provision of ULIS deals with this question: shall a court *compel* specific performance by the seller—as contrasted with prescribing damages to compensate the buyer for non-performance.

118. At the third session of the Working Group, several representatives expressed the view that article 42 of ULIS unnecessarily limited the right of specific performance; it was also suggested that this article was unnecessarily complex (report on third session, annex II, para. 88).

119. It should also be noted that ULIS 42, as well as the other provisions of ULIS on the right "to *require*" performance (e.g., ULIS 26, 27, 30, 34, 61 and 62), is subject to an important qualification. ULIS 16 draws attention to Article VII of the Convention of 1964 to which the Uniform Law is attached. Article VII of the Convention provides that where, under the Uniform Law, one party "is entitled to require performance" by the other:

"... a court shall *not be bound* to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of *similar contracts of sale not governed by the Uniform Law*."

120. As a result, several complex provisions of ULIS that purport to grant the right to require performance (articles 26, 27, 30, 31, 42, 61 and 62) and also to limit that right (article 25) all come to little more than this: the "right" to require performance under ULIS is subject to the rules of the *forum* to which the action is brought.<sup>19</sup>

121. The complexity of the detailed rules of ULIS on the "right to require" performance led the Working Group to delete such provisions from the articles 24-27 on the date and place for delivery. Instead, as has been noted in the comments to article 25, the drafts prepared at the Working Group's third session use the expression "retain the right to performance of the contract". This same language is employed in the above simplified version of article 42. This revised language was not intended by the Drafting Party to deal with the question whether the court should compel specific performance. (Report on third session, annex II, para. 39.)

122. The statement in revised article 42 that the "buyer shall retain the right to performance of the contract" may present problems of interpretation, particularly in relation to the further statement: "*unless* he has declared the contract avoided under this Law". Under

<sup>17</sup> If the Working Group should decide to further broaden the scope of the provisions on remedies, the references to specific articles could be replaced by "in accordance with the contract and the present Law".

<sup>18</sup> It is assumed that the right to claim damages for failure to provide good title (article 52) is not cut off by failure to give notice. See para. 105, above, and foot-note thereto.

<sup>19</sup> Technically, the rule is more complex: The uniform Law provides a "right" to require performance, but a court "shall not be bound to enter or enforce" such a judgement except in accordance with its domestic rules. In practical result this means that the *right* of specific performance is not greater than that provided under national law. In some circumstances ULIS may restrict the right of specific performance available under the rules of the forum: i.e., where the national rules provide for specific performance and ULIS does not.

ULIS (and under the revision by the Working Group) a declaration of avoidance does not prevent the recovery of damages. See ULIS 41 (2). Hence, the reference in the redraft to a "right to performance" that ends on a declaration of avoidance cannot refer to a right that is enforceable by damages. As we have seen, this language was not intended to refer to a right that is enforceable specifically—i.e., a right "to require performance". Finding a third alternative meaning for these words is difficult.

123. The articles outlining the buyer's remedies probably should make some reference to the remedy of specific performance, in the sense intended in ULIS 42 by the phrase "require the seller to perform". The absence of any reference to this remedy in a group of articles devoted to the buyer's remedies would suggest that the remedy of specific performance was abolished by the Uniform Law a result that was not intended.

124. One basic question is whether the Working Group wishes to adhere to the general policy of ULIS 16 and article VII of the Convention that procedural rules of the *forum* set an outer limit on the right to specific performance. If so, consideration might be given to redrafting article 42 along the following lines:

*Article 42*  
(Alternative A)

"(1) The buyer may require the seller to perform the contract if specific performance would be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law. [See ULIS 16 and Art. VII of 1964 Convention.]

"(2) The buyer shall not, however, be entitled to require performance of the contract by the seller if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. [See ULIS 25, 42 (1) (c).]"

125. Alternative A, above, would reach results, in practice, that are closely comparable to those that could be derived from the interplay of several articles of ULIS and article VII of the underlying Convention. The redrafted provision is, however, more flexible and more simple than the original version of ULIS which required the reader to work through several detailed provisions only to find that rights based on these provisions might be nullified under the provision of the underlying convention.

126. If the Working Group feels that it is not necessary to defer to the rules of the *forum* on specific performance, as does ULIS, the following simplified draft might be considered:

*Article 42*  
(Alternative B)

"The buyer may require the seller to perform the contract unless it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. (See ULIS 25, 42 (1) (c).)"

127. Finding a generally acceptable provision on the right to require performance has been difficult. However,

it would be easy to exaggerate the practical importance of this "right". Enforcing this right is subject to the delays of litigation. Since a seller who is resisting performance will usually claim some justification, such as a dispute over required quality or breach by buyer in providing for payment, the buyer can seldom anticipate a final decision by the trial and appellate courts—and eventual coerced performance—within the period required by his business needs. Instead, he will supply his needs elsewhere; if damage results he can pursue this claim without interrupting his business activity.<sup>20</sup> Hence, even in legal systems where specific performance is theoretically available in the normal case, this remedy is seldom invoked in legal proceedings. In practical operation, the threat of a damage claim (and the loss of confidence by the buyer and others in the trade) seem to be more effective sanctions than the threat of an action compelling specific performance.

*Article 43 (WG.III, Alternative C, as revised, merging ULIS 43 and 44) (R.3)*

"1. Where the failure by the seller to perform his obligations under articles 33 (S.7)-52 (S.14) amounts to a fundamental breach of contract, the buyer, by prompt notice to the seller, may declare the contract [avoided].

"2. After the date for the delivery of the goods, the seller may deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any other failure to perform his obligations under articles 33 (S.7)-52 (S.14), but only if the delay in taking such action does not constitute a fundamental breach of contract [and such action does not cause the buyer either unreasonable inconvenience or unreasonable expense].

"3. Although the failure by the seller to perform his obligations under articles 33 (S.7)-52 (S.17) does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for the performance of such obligation. If at the expiration of the additional period the seller has not performed such obligations, the buyer, by prompt notice to the seller, may declare the contract avoided."

*Comments*

128. Articles 43 and 44 of ULIS are concerned with this question: under what circumstances does the buyer have the right to refuse to take (or to keep) goods because of their non-conformity with the contract? The right to refuse the goods has important legal and practical consequences: (1) the buyer has no obligation to pay the agreed price;<sup>21</sup> (2) the costs and risks of redispal of the goods fall on the seller; (3) the loss resulting from a decline in the market price, which under the contract

<sup>20</sup> Compelling a seller in a foreign country to perform presents even greater practical difficulties than when the parties are in the same country.

<sup>21</sup> A claim for damages which might be applied to reduce or extinguish the obligation to pay the price, does not, of course, depend on the right to refuse to take (or keep) the goods.

would normally fall on the buyer, must be borne by the seller.<sup>22</sup> Under ULIS, such rights may be derived from the right "to declare the contract avoided".<sup>23</sup>

129. The Working Group at its third session gave extended consideration to articles 43 and 44 of ULIS. Several representatives were of the view that these rules on when the buyer may refuse to take the goods were complex and difficult to follow, and that some of the provisions appeared to be redundant and unnecessary (report on third session, annex II, paras. 99-100). A drafting party prepared three alternative revisions of the substance of these articles. The Working Group deferred further consideration of these articles until its next session (*ibid.*, para. 105). These three alternative drafts (designated A, B and C) may be found in the Working Group's report (annex I, para. 26).

130. A significant issue of policy, which was discussed by the Working Group, can be analysed in the context of the following illustration: a large and expensive machine is delivered to the buyer on the delivery date stated in the contract. On installation, the machine fails to operate because of a defect in one of its constituent parts. The seller proposes to replace the defective part within one week. Without replacement of the defective part (which only the seller is in a position to provide) the machine is worthless to the buyer. But the delay of one week is of relatively slight importance to the buyer. On such facts, where the defect (in the absence of repair) is so serious as to constitute a "fundamental breach" but where the delay in making the repair would not constitute a "fundamental breach", may the buyer declare the contract avoided?

131. Under article 43 of ULIS the answer to the question is no. ULIS 43 (1) states that the buyer may declare the contract avoided "if the failure of the goods to conform to the contract *and also the failure to deliver on the date fixed* amounts to fundamental breach of contract". In the above case, the delay of a week in providing a machine that was in conformity with the contract did not amount to a fundamental breach, and hence one

of the essential elements for avoidance of the contract was lacking.

132. It will be noted that the above quoted provision of ULIS 43 is based on the premise that in assessing the seriousness of a breach by the seller it is necessary to view the situation as a whole, and that it is not feasible to isolate non-conformity of the goods from the date of performance. This same principle is illustrated in ULIS 44 (1) which states that "in cases not provided for in article 43" (i.e., cases where either the non-conformity of the goods or the delay does *not* constitute a fundamental breach) the seller "shall retain, *after* the date fixed for the delivery of the goods" the right to "cure" the defect in the goods. (This may be done by delivering missing goods, by substituting conforming goods or by remedying defects—provided that this does not cause the buyer "unreasonable inconvenience or unreasonable expense".)

133. It will be observed that articles 43 and 44 (1) of ULIS provide for a unified appraisal of the seriousness of the seller's breach, in the light of both non-conformity of the goods and delay in performance. This unified approach may be strongly supported. It is true that, as representatives have pointed out, the drafting is complex (report on third session, annex II, paras. 93-94). However, the complexity results from the fact that ULIS deals in one place with remedies for delay in performance (articles 24 *et seq.*) and in another place with remedies for non-conformity of the goods (articles 41 *et seq.*). The overlapping and detail in articles 43 and 44 in part result from the necessity to build bridges between these two parts of ULIS's remedial system. So long as separate remedial structures are provided for delay in performance and non-conformity of the goods, such bridging is necessary. As the example illustrates, a realistic decision as to avoidance of the contract calls for the unified consideration of the two parts of the total situation: the seriousness of the non-conformity and the time required for its cure. This approach is reflected in the alternative drafts prepared by the Drafting Party,<sup>24</sup> and in the slightly revised version of alternative C that was reproduced above.

134. This redraft consolidates the provisions of articles 43 and 44 of ULIS. As has been noted, these two articles deal with a single issue: under what circumstances may the buyer refuse to take (or keep) the goods because of their lack of conformity (i.e. may he "declare the contract avoided"). The attempt in ULIS to divide the treatment between two articles required internal cross-referencing and produced a text which members of the Working Group concluded was too complex.

135. The first paragraph of the above text seeks to enunciate the basic rule in simple and general terms.

<sup>22</sup> It will be observed that consequences (2) and (3) flow from the conclusion that the buyer has no obligation to pay the agreed price.

<sup>23</sup> *Ipsa facto* avoidance (i.e., avoidance that occurs without a declaration) is not provided in ULIS in the setting of non-conformity of the goods. On the deletion of *ipso facto* avoidance elsewhere in the Law, see comments to article 25. The Working Group placed the brackets around [avoided] to indicate that some other term (such as "cancelled") might be preferable. See comments to article 25, para. 38.

In some meetings, ULIS refers to the buyer's right to "reject" delivery. See ULIS 29 (early delivery); 92 (preservation of goods). One of the problems presented by ULIS is whether the buyer may both (a) reject defective goods and (b) require the seller to supply conforming goods. Various provisions of ULIS contrast "avoidance" of the contract with "requiring performance" of the contract. See ULIS 24 (1) (a) and (b); 25; 30 (1); 41 (1) (a) and (b); 42 (2); 44 (2). Such a contrast is attractive from the literary point of view, but gives rise to difficulties in practical application, particularly since a decision as to rejection may need to be taken promptly and long before the buyer can ascertain whether he will succeed in compelling performance by the seller through the delivery of substitute goods. Most, if not all, of these practical problems have been solved by revisions tentatively adopted by the Working Group.

<sup>24</sup> See report of third session, annex I, para. 26. Consideration of both time and non-conformity is explicitly provided for in alternative B (art. 43 (1) and art. 44 (2) (a)) and in alternative C (art. 43 (2)). The same unified approach seems implicit in alternative A, in providing that the buyer may declare the contract avoided "if the *delivery*" of goods which do not conform to the contract amounts to a fundamental breach. The general reference to "the delivery" might be broadly construed as including all aspects of the delivery (i.e., both time and quality), or as referring only to the defective quality of the goods.

The reference to the failure to perform obligations under specified articles (rather than referring to non-conformity of the goods) meets two difficulties: (a) the complex references in ULIS 43 to interrelated problems of time and non-conformity; (b) the consolidation of the provision on transfer of property (article 52) with articles on defects in the goods.<sup>25</sup>

136. The second paragraph is based on ULIS 44 (1). Similar language is also employed in alternative B (art. 43 (1)) and in alternative C (art. 43 (2)).<sup>26</sup> The end of the paragraph sets forth two circumstances when the buyer may not "cure" a defective delivery after the date for the delivery of the goods. The first is when the delay constitutes a fundamental breach of contract—a requirement that is specified in article 43 of ULIS. The second is when the late "cure" causes the buyer unreasonable inconvenience or expense—a requirement specified in article 44 (1) of ULIS.<sup>27</sup> This second requirement probably duplicates the first: if the late performance causes the buyer "unreasonable inconvenience or unreasonable expense", the delay would presumably constitute a "fundamental breach of contract".<sup>28</sup> Consequently, the concluding language of proposed article 43 (2) is placed within square brackets. On the other hand, the Working Group may conclude that this second requirement should be retained to give added emphasis to the limited scope of "cure" by the buyer—especially in situations calling for replacement or repair of goods that have been delivered to the buyer.<sup>29</sup> But even if this second requirement is retained, it is believed that paragraph (2) of the proposal provides a clearer statement of the rules governing the "cure" of defective performance than in that provided by the provisions scattered between article 43 and article 44 (1) of ULIS.

137. The third paragraph of the proposed redraft, based on ULIS 44 (2), preserves the substance of one of the most important and successful provisions of ULIS: the opportunity, given to a party facing breach of contract, to define the circumstances in which later perform-

ance will be acceptable. (This *Nachfrist* principle was also employed in ULIS 27 (2) (date) and 31 (2) (place); these provisions were consolidated by the Working Group in redrafted article 26 (2), *supra*.) This principle is set forth in each of the three alternative drafts of articles 43 and 44 and seemed to have the approval of the Working Group. The proposed redraft follows closely the wording of ULIS 44 (2), subject to adjustment to clarify the relationship between this provision and those that precede, and to reflect other decisions by the Working Group.<sup>30</sup>

138. One further adjustment of paragraph 3 might be considered. It will be recalled that article 33, after setting forth tests for conformity of the goods to the contract, states in paragraph 2: "No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is clearly insignificant." In the comments to article 33 it was noted that this provision is of questionable value where the buyer presents a monetary claim (or reduces the price) for a very small sum that corresponds to a slight deviation from the contract. (E.g., the seller promised to deliver 1,000 bushels of wheat but delivered only 999.) See note 8 at para. 61 *supra*. On the other hand, the provision may be useful to preclude the buyer from avoiding the contract (a harsh and sometimes wasteful remedy) where the breach is trivial.

139. Under ULIS 44 (2), and the corresponding provision of paragraph 3 of the above consolidated redraft, if the buyer gives a *Nachfrist* notice, apparently the seller must provide *perfect* performance within the specified reasonable time; if the performance then deviates in any respect from the contract, it would seem that the buyer may "declare the contract avoided".

140. There are strong reasons in support of the procedure established by ULIS 44 (2) (and para. 3 of the consolidated redraft) whereby the buyer may supplant the flexible rules on "fundamental breach" by a notice giving a further reasonable time for performance. However, the rule that only *perfect* performance after such a notice can prevent avoidance of the contract may be a bit too strict. Some slight leeway is now provided by the above-quoted provision of ULIS 33 (2). However, as has been noted, it is difficult to understand why this provision should be applicable to damage claims (or reduction of the price). For these reasons, it might be advisable to transfer the substance of ULIS 33 (2) to the end of paragraph 3 of the above consolidation of articles 43 and 44. If this should be deemed desirable, the following might be added at the end of paragraph 3:

<sup>25</sup> See paras. 93-110, above. In the interest of simplicity, the redraft states that the notice must be given "promptly" without adding that the notice must be given promptly "after the buyer discovers or ought to have discovered" the facts constituting the seller's breach. The substance of this requirement seems to be supplied by the definition of "promptly" in ULIS 11 which, under the Working Group redraft requires action "within as short a period as is practicable in the circumstances". See also article 38 on the time for examination.

<sup>26</sup> For reasons indicated above at note 24, a similar result may be implicit in alternative A.

<sup>27</sup> The fact that ULIS divided the provisions, bearing on this single problem, between two separate articles is one of the reasons that have led to the criticism that these provisions are too complex for practical application.

<sup>28</sup> The Working Group has not completed action on the definition of "fundamental breach" in ULIS 10. However, it seems likely that under any conceivable definition delay in performance that causes unreasonable inconvenience or expense would be a fundamental breach.

<sup>29</sup> Stylistically, it would be simpler to express those restrictions as follows "... unless the delay in taking such action constitutes ..." etc. The "but only if" wording, however, may be preferable to emphasize the importance of these restrictions on "cure".

<sup>30</sup> The redraft omits the reference to "requiring the performance of the contract". For action by the Working Group, see the comments to articles 25 and 42, *supra*. For difficulty with the concept of reduction of the price—as a remedy separate from a claim for damages—see report on third session, annex II, paras. 109-115 and comments to article 46, *infra*. Alternative A presented to the Working Group at the third session (at art. 44 (1)) states the *Nachfrist* principle in a somewhat more direct and clear manner than in ULIS. However, it may be doubtful whether the stylistic advantage is sufficient to justify abandonment of the language of ULIS. (It will be noted that alternative A, like the above proposal, omits the references to "requiring" performance and to reduction of the price.)

"Such declaration may not be based on a difference in quality, lack of part of the goods or any quality or characteristic which is clearly insignificant."

If this is done, ULIS 33 (2) should, of course, be deleted.

141. A member of the Working Group has submitted a study directed to the need for provisions dealing explicitly with guarantees of performance (A/CN.9/WG.2/WP.16/Add.1, annex I). Proposals made in this study have been considered, above, in connexion with articles 35 and 39. (See paras. 68 and 87 *supra*.) This study also proposes that article 43 be supplemented by the following paragraph:

"In case of the replacement or remedying of defective goods, or defective parts of the goods, pursuant to the guarantee referred to in paragraph 2 of article 35, the period of the guarantee shall be extended for the time during which the goods have not been used due to the discovered defect."

142. In the above proposal, the phrase "pursuant to the guarantee referred to in paragraph 2 of article 35" refers to a new paragraph which the above study suggested as an addition to article 35. This proposal is quoted and discussed in the comments to article 35 at paragraphs 68 to 72. In considering the proposed addition to article 43, consideration might be given to the question whether the proposal, as presently drafted, is directly related to the buyer's right to declare the contract avoided—the issue which seems to be central to articles 43 and 44. Instead, the proposed language seems to be directed to the length of "the period of the guarantee", a period that would be stated in the sales contract.

#### Article 45 (ULIS) (R.4)

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

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

#### Comments

143. The Working Group decided that this article of ULIS should be adopted without change (report on third session, annex II, paras. 107-108).

144. This article deals with two problems of considerable practical importance on which national rules are in conflict. The first problem is whether the buyer may refuse to take or keep less than all of the goods required under the contract. In the language of ULIS, the issue is whether the buyer may "avoid the contract" as to only part of the contract.<sup>31</sup> This question is answered in the

affirmative in paragraph 1 of article 44. The most significant application of this paragraph occurs where "part only of the goods handed over is in conformity with the contract". By virtue of this provision the buyer may refuse to take (or keep) the non-conforming goods while retaining the rest; his right to avoid the contract as to the non-conforming goods is governed by the general rules on avoidance in articles 43 and 44. (If the Working Group decides to consolidate these two articles, the cross-reference in article 45 (1) would be modified.)

145. The second paragraph of article 45 is addressed to the question whether the delivery of only part of the goods justifies the buyer in declaring that he will not receive the missing part.<sup>32</sup> Paragraph 2 indicates that the buyer may "declare the contract avoided in its entirety", subject to the general rules on fundamental breach of contract.<sup>33</sup>

#### Article 46 (ULIS) (R.5)

"[Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.]"

#### Comments

146. At the third session, members of the Working Group noted several difficulties with ULIS 46, with respect to both substance and form (report, annex II, paras. 109-114). The Working Group concluded that action on article 46 should be deferred, and requested the Secretariat to submit a study on this article at the current session. (*Ibid.*, para. 115.)

147. The first problem encountered in examining article 46 is the relationship between this article and the general rules of ULIS on the recovery of damages for breach of contract. ULIS 41 states that even though the buyer "reduces the price" he "may also claim damages as provided in article 82...".<sup>34</sup> The relationship between these provisions is hardly clear.

148. One preliminary question is whether article 46 provides a basis for an affirmative claim against the seller. Under this article "the buyer may reduce the price". The wording suggests that the article is limited to a

as "avoidance of the contract". This approach has sometimes led to the view that logic forbids "avoidance" of "the contract" for only a part of the goods. Of course, "avoidance" of the contract for breach does not really "avoid" the contract in the full sense of the word, for the seller remains liable for breach of the contract. See articles 24 and 41.

<sup>32</sup> Avoidance with respect to future instalments is governed by ULIS 75.

<sup>33</sup> See ULIS 10.

<sup>34</sup> ULIS 41 (2) also refers to damages recoverable under articles 84 to 87. These articles relate to the recovery of damages when the contract is avoided and hence are not relevant at this point; article 46 expressly states that reduction of the price is not available when the buyer has "declared the contract avoided".

<sup>31</sup> In ULIS, as in certain other legal systems, the question is confused by the fact that the familiar commercial act of refusing to take or keep defective goods is described in conceptual terms



deduction by the buyer to reduce his obligation for the price *which he has not yet paid*. Buyers often pay the price before they receive the goods. (A common contractual arrangement requires the buyer to establish a letter of credit before the seller ships; the seller receives payment under the letter of credit on the presentation of specified documents including a bill of lading.) If the buyer has paid for the goods, will he have the benefit of article 46 when he sues the seller to recover damages resulting from non-conformity of the goods? As we have seen, the language of article 46 ("the buyer may *reduce the price*") implies that the article is not applicable to affirmative claims. This restriction would be appropriate if the article employed the same standard for measurement as is employed for recovery of damages after payment of the price. However, as we shall see, this is not the case, with the result that significant differences in the parties' rights depend on whether or not the buyer has paid before he learns of the defect.

149. The standard of ULIS 46 for measuring the buyer's loss is as follows: the price is reduced "in the same proportion as the value of the goods at the time of the contract has been diminished because of their lack of conformity with the contract". This standard has special significance when the price-level changes between the time when the contract has been made and the time the goods are delivered. For example, suppose that in January the parties make a sales contract for 1,000 bushels of No. 1 corn at \$1.00 per bushel; the corn is to be delivered in June. By the time of delivery, the market price of No. 1 corn has risen to \$2.00 per bushel. The corn delivered by the seller does not conform to the contract since its quality is only No. 3. At the high price level of June, the No. 3 corn will sell for \$1.50, which is 25 per cent less than the value of No. 1 corn. Under article 46 the buyer may reduce the price "in the same *proportion*" as the value of the goods has been diminished because of the lack of conformity; consequently, it would seem that the reduction in price would be 25 per cent of \$1.00, or \$0.25 per bushel.<sup>35</sup>

150. Are the results that emerge from the rather complex formula set forth in article 46 consistent with acceptable principles for measuring damages for breach of contract? One such principle is that, to the extent practicable, the injured party should be placed in the same position as would have resulted from performance of the contract. Presumably this principle would be applied with respect to damage claims under article 82. Article 46 may not be wholly consistent with that principle. In the above example, if No. 1 corn had been delivered, the buyer would have received corn worth

\$2.00 per bushel.<sup>36</sup> Instead, he received corn worth \$1.50 per bushel and a claim (or price reduction) of \$0.25. This would be \$0.25 less than the value that would have resulted from full performance of the contract. The more significant problem, however, is the establishment of conflicting tests for measuring the buyer's claim.

151. The results that emerge from the formula embodied in article 46 also seem inconsistent with other parts of ULIS. On the facts of the example (assuming that delivering corn of only No. 3 quality constitutes a fundamental breach of contract) the buyer could refuse to take the corn—i.e., "avoid the contract". In that event, under ULIS 84 (1), he could recover damages "equal to the difference between the price fixed by the contract and the current price on the date on which the contract was avoided". Since avoidance of the contract would normally occur after arrival of the goods (and after the rise in price to \$2.00 per bushel), the buyer could recover the "current price" of \$2.00 less the contract price of \$1.00. This would give the buyer the full benefit of the rise in price, whereas the formula of ULIS 46 would not. Consequently, buyers in situations like that of the illustration would be well advised to "avoid the contract" rather than to accept the goods and reduce the price (or make a claim). "Avoidance" of the contract is usually wasteful because of the costs of reshipment and redispotion of the goods. Consequently, it seems unwise to establish a system of remedies that encourages such "avoidance".

152. The foregoing analysis suggests that separate standards for measuring the buyer's claim should not be set forth in articles 46 and 82. If the "proportion of the value" standard of article 46 is deemed to be correct, it should be incorporated in article 82, so that the value of the claim would not depend on the irrelevant question of whether the buyer had paid the price.<sup>37</sup> On the assumption that there will be only one standard for measuring the buyer's claim because of non-conformity of the goods (e.g. article 82 as in ULIS or as revised), article 46 might be rewritten as follows:

#### *Article 46 (alternative A)*

"The buyer [on notifying the seller of his intention to do so] may deduct all or any part of the damages resulting from any breach of the contract from any part of the price due under the same contract."

<sup>35</sup> Article 46 speaks of the proportion whereby "the value of the goods at the time of the conclusion of the contract has been diminished" by the non-conformity. This formula may be somewhat difficult to apply in practice. Normally, the non-conformity will be unknown to both parties at the time of the conclusion of the contract, and will be ascertained (as in the example) only on arrival of the goods. The example is based on an assumption of fact (which, of course, would be subject to proof in specific cases) that if No. 3 corn sells at 25 per cent less than the price of No. 1 corn at a \$2.00 price level, the same percentage discount would also apply at a \$1.00 price level.

<sup>36</sup> The buyer, of course, profits from the rise in price, but that is intrinsic in fixed-price contracts; the chance of gain from a rise in price is matched by a chance of loss from a price decline. Where sharp price changes are likely, merchants sometimes cancel such chances of gain or loss by "hedging" contracts. Responsibility under the "hedging" contract makes it all the more important to receive offsetting protection for price changes from the other party to the sales contract.

<sup>37</sup> It is also difficult to understand why, under ULIS 46, the buyer should have no right to deduct damages for non-conformity of the goods when the buyer has "obtained performance of the contract by the seller". "Performance" cannot, of course, mean performance in accordance with the contract, for this reading would make the reference to "lack of conformity" meaningless. If "performance" is read as delivery of goods, the section is also rendered meaningless.



*Article 47 (ULIS) (R.6)*

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

*Comments*

153. The above provision is the same as article 47 of ULIS, which the Working Group adopted without change (report on third session, annex I, para. 29).

154. The reference to "unascertained goods" refers to transactions in which specific goods were not identified at the time of the making of the contract. (See the distinction between sales of "specific" and "unascertained" goods in ULIS 42 (1) (b) and (c). Cf. ULIS 23 (2) and 98.) Thus, article 47 would seem to be applicable although the seller, subsequent to the contract, has appropriated specific goods to the contract (ULIS 19 (3) and 98 (2)); to make the article inapplicable in such situations would deprive the provision of much of its significance. If this interpretation is correct, the article would have substantially the same meaning, and would be relieved of a troublesome problem of interpretation, if the word of "unascertained" goods were deleted.

155. Article 47 deals with the right of the buyer to reject "the excess quantity". It is often not feasible to reject only the excess—as where the seller tenders single bill of lading covering the total shipment in exchange for payment of the entire shipment. In such cases, the issue presumably would be whether the tender constitutes a fundamental breach which would justify rejection ("avoidance of the contract") as to the entire delivery. (See article 43, *supra*.)

*Article 48 (ULIS) (R.7)*

"[The buyer may exercise the rights provided in articles 43 to 46, even before the time fixed for delivery if it is clear that goods which would be handed over would not be in conformity with the contract.]"

*Comments*

156. The Working Group at the third session noted that ULIS 48 is closely related to the provisions on anticipatory breach set forth in ULIS 75-77. Consequently, it was decided to defer action on article 48 until the Working Group takes up articles 75 to 77 (report on third session, annex II, paras. 117-120).

*Action on articles 49 to 55*

157. The following will sum up action taken or proposed with respect to the remaining articles of chapter III:

(a) *Article 49*: this provision on limitation of actions was deleted by the Working Group in response to a decision by UNCITRAL; see para. 102 (b), *supra*.

(b) *Article 50*: this provision on delivery of documents is revised and transferred to article 23; see paras. 21-26 and 97, *supra*.

(c) *Article 51*: these separate remedial provisions on delivery of documents would presumably be deleted if article 50 is transferred to article 23.

(d) *Article 52*: this provision on the seller's obligation to transfer property (S.14) is revised and placed prior to the remedial provisions of articles 41 *et seq.*; see paras. 93-101, *supra*.

(e) *Article 53*: this article parallels article 34, which the Working Group decided should be deleted; see report on third session, annex II, paras. 56-61, and comments *supra* at paras. 62-64. Presumably the Working Group's decision with respect to article 34 would also apply to article 53.

(f) *Article 54*: the substance of article 54 was transferred to article 21 as drafted at the third session of the Working Group (ULIS 54 (1) became article 21 (1) (first sentence); ULIS 54 (2) became article 21 (2)).

(g) *Article 55*: these remedial provisions applicable to article 54 would become unnecessary as a result of the above action with respect to article 54.

*Consolidated remedial provisions available to the buyer for all types of breaches of contract by the seller*

158. The foregoing examination of specific articles has required preliminary analysis of the six sets of remedial provisions contained in chapter III of ULIS. (See *supra* at paras 93-101.) As has been noted, the Working Group at its third session merged the separate remedial provisions on date of performance and place of performance (paras. 27-29, *supra*). The Working Group's action transferring provisions on contracts of carriage to related provisions on delivery (paras. 17-18 *supra*), and closely related rearrangements suggested herein (paras. 21-23, 93-101, *supra*), eliminate the need for three additional sets of remedial provisions. As a result, there remain two sets of remedial provisions: (1) remedies for failure of the seller to perform certain obligations with respect to delivery (articles 24-27 at paras. 27-56, *supra*); (2) remedies for failure to deliver conforming goods and to transfer title to the goods (articles 41-46 at paras. 111-152, *supra*).

159. These consolidations have led to a more nearly unified and a much less complex structure than in ULIS. However, problems persist because of the remaining dichotomy between (1) non-delivery (including delay) and (2) non-conformity.

160. As has been mentioned in the analysis of specific articles, these two areas overlap. Thus, if the seller delivers only part of the goods, the non-arrival of the balance might either be regarded as (1) non-delivery (or delay) with respect to those goods (articles 20 *et seq.*, subject to remedies under articles 24 *et seq.*) or (2) a non-conforming delivery (article 33: "part only"; "lesser quantity", subject to remedies under articles 41 *et seq.*). The Working Group has taken steps to reduce the divergencies between the two sets of remedial provisions and further measures have been suggested herein (paras. 44-51, *supra*). However, not all of the divergencies have been removed; as

a result, there is still opportunity for litigation resulting from problems of classification. In addition, analysis of articles 43 and 44 showed that problems of both non-conformity of the goods and delay in performance (in making repairs or in supplying substitute goods) must be approached on a unified basis in the light of the total situation facing the parties (see paras. 132-133 *supra*).

161. For these reasons, the Working Group may wish to consider establishing a single set of remedial provisions applicable to breach of the sales contract by the seller. If this were done, all of the substantive obligations of the seller (designated herein as S.1-S.14) would be set forth consecutively followed by a single set of remedial provisions.

162. To facilitate consideration of this possibility, following is a tentative draft. The draft follows closely the substance and form of the two sets of remedial provisions as considered by the Working Group at its third session. For ease of reference, the articles of the consolidated draft bear the same numbers as the provisions on breach for non-conformity (articles 41 *et seq.*). The relationship between the new consolidation and the provisions on breach for non-delivery (articles 24 *et seq.*) is indicated by references following the provisions.

*Tentative draft of consolidated remedial provisions applicable generally to breach of the sales contract by the seller*

#### Article 41 (R.1)

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

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

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

#### Comments

163. This draft embodies the parallel provisions of articles 24 and 41. The underscored language is employed so that none of the seller's obligations would fall outside this unified set of provisions.

164. ULIS 24 (3) provided that the seller may not apply to a court or arbitral tribunal to grant him a period of grace. No such provision appears in connexion with the remedies for non-conformity (articles 41 *et seq.*) although problems of delay arise when the seller seeks to "cure" a non-conforming delivery (ULIS 44 (1)). The failure to give general applicability to article 24 (3) may be an oversight. This provision could either be included as a second paragraph of the above article 41 (R.1), or added to article 43. In this tentative draft the latter alternative is suggested.

#### Article 42 (R.2)

"(1) The buyer may require the seller to perform the contract if specific performance would be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law. [See ULIS 16 and art. VII of the 1964 Convention.]

"(2) The buyer shall not, however, be entitled to require performance of the contract by the seller if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. [See ULIS 25, 42 (1) (c).]"

#### Comments

165. The present report considers alternative formulations with respect to the buyer's right to require performance ("specific performance"). (See paras. 117-127, *supra*.) In the interest of simplicity only one of these alternatives is set forth here, but the other alternatives would be equally suitable for a consolidated set of remedies. Certainly, one rule on this subject should apply to (a) refusal to deliver any goods; (b) indefinite delay in delivering goods; (c) delivery of a shipment which is worthless (i) in whole or (ii) in part; (d) delivery of a machine which includes a vital part which is inoperative and therefore required replacement or repair.

#### Article 43 (R.3)

"1. Where the failure by the seller to perform any of his obligations under the contract of sale and the present Law amounts to a fundamental breach of contract, the buyer, by prompt notice to the seller, may declare the contract avoided.

"2. After the date for the delivery of the goods, the seller may deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any other failure to perform his obligations, but only of the delay in taking such action does not constitute a fundamental breach of contract [and such action does not cause the buyer either unreasonable inconvenience or unreasonable expense].

"3. Although the failure by the seller to perform his obligations under the contract of sale and the present Law does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for such performance. If at the expiration of the additional period the seller has not performed such obligation, the buyer, by prompt notice to the seller, may declare the contract avoided.

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

#### Comments

166. The first three paragraphs of the above provision are based on the redraft of ULIS 43 and 44 which was discussed above at paras. 128-142.

167. The first paragraph, on avoidance of the contract for fundamental breach, carries forward the substance of paragraph 1 of the above redraft of ULIS 43 and 44 and the comparable provision in article 25 (1) on failure to deliver. (See paras. 34-35, *supra*.) Cf. ULIS 26 (1) (date); 30 (1) (place); 43 (date and non-conformity); 52 (3) (title); 55 (1) (a) (general).

168. As has been noted in connexion with the redraft of ULIS 43 and 44 (paras. 130-136, *supra*), the second

paragraph is based on ULIS 43. This provision of ULIS illustrates the inescapable interplay of problems of time of delivery and non-conformity of the goods, and provides an example of the value of consolidating the remedial provisions applicable to such problems.

169. The third paragraph consolidates the important *Nachfrist* principle, which reduces uncertainty as to the buyer's right to avoid the contract and which appears in ULIS at articles 27 (2) (date), 32 (2) (place) and 44 (2) (cure of defective delivery). (See para. 137, *supra*.)

170. The fourth paragraph is the same as ULIS 24 (3) (date and place). As has been noted above at paragraph 162, ULIS probably was intended generally to bar applications to tribunals for periods of grace; the more limited scope of ULIS 24 (3) seems to have been an accidental by-product of the fragmentation of the remedial provisions of ULIS.

#### Article 44 (R.4)

"If the seller fails to perform any of his obligations under the contract of sale and the present Law and the buyer requests the seller to perform such obligation, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, within a reasonable time, unless the seller refuses to perform his obligation within that time."

#### Comments

171. The above provision follows closely article 25 (4) as drafted by the Working Group at its third session. (See paras. 34-42, *supra*.) This redraft clarified similar provisions in ULIS 26 (4). Under the existing structure, the provision would apply only to breaches by the seller with respect to date and place of performance; however, the provision would seem to have equal or greater value as applied to requests by the buyer to supply a missing quantity of a non-conforming shipment or to repair or replace defective goods. Cf. ULIS 42 (2). The above general provision would avoid such a gap in the remedial structure.

#### Article 45 (R.5)

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

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

#### Comments

172. The above article is the same as the important provision of ULIS 45 which the Working Group decided should be adopted without change. (See paras. 143-145, *supra*.) Placing this provision in a unified set of remedial

provisions avoids the danger of a gap which would result if an indefinite delay with respect to delivery of part of the goods would be treated as a problem governed by the remedial provisions on date and place (articles 24 *et seq.*), since these articles lack any provision like that of article 45.

173. The cross-references in ULIS 45 to articles 43 and 44 related to provisions now consolidated as article 43. However, it may not be necessary to change this cross-reference, since article 44, above (based on article 25 (4) of the Working Group redraft), would also need to be taken into account in connexion with article 45.

#### Article 46 (R.6)

"The buyer [on notifying the seller of his intention to do so] may deduct all or any part of the damages resulting from any breach of the contract from any part of the price due under the same contract."

#### Comments

174. The reasons for this revision of ULIS 46 have been set forth at paras. 146-152, *supra*. No such provision appears among the remedies applicable to breach as to date and place (articles 24 *et seq.*). This appears to be another accidental consequence of establishing separate remedial provisions: if delay in delivery has damaged the buyer it would not be realistic to expect the buyer to remit the full price, and then sue for damages for the delay.

#### Article 47 (R.7)

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

#### Comments

175. As has been noted (para. 152, *supra*) the above provision is the same as ULIS 47, which was approved by the Working Group. No problem seems to arise from its inclusion in a consolidated set of remedial provisions.

#### Article 48

[176. As has been noted, the Working Group postponed action on ULIS 48 until it considers the related provisions on anticipatory breach in ULIS 75-77. If it is decided to retain a separate provision like ULIS 48, its inclusion in a consolidated set of remedies would avoid a gap in the law. No comparable provision appears in the remedies for breach as to date or place; advance knowledge of a serious delay in delivery could present a problem for the buyer that would be comparable to advance knowledge that some or all of the goods would be missing or would not conform to the contract.]

*Summary of reasons for unifying  
the remedial provisions of ULIS*

177. The reasons for establishing a single, unified set of remedial provisions may be briefly summarized as follows:

(a) A unified structure closes several accidental gaps in the buyer's remedies for breach of contract by the seller (see e.g., paras. 164, 170, 171, 172, 174 and 176 *supra*.)

(b) Unifying the remedial provisions avoids the need for complex statutory cross-references where (e.g.) there is an inescapable interplay between problems of time for performance and quality of performance. (See, e.g., paras. 132-133 and 160, *supra*.) As a result, the unified provisions can be written with greater simplicity and clarity.

(c) All the substantive provisions on what the seller *shall do* can be placed together. (These comprise 14 articles: S.1-S.14.) In ULIS, five complex and unnecessary sets of remedial provisions interrupt the presentation of the seller's duties. A unified presentation of these substantive duties makes it easier for merchants to understand—and to follow—their obligations.

(d) Five sets of remedial provisions become unnecessary. As a result, chapter III is not only made simpler but is reduced in length by over one fifth. The length and complexity of ULIS have been the subject of widespread comment. Meeting these criticisms should be of assistance in facilitating the more widespread adoption of the Uniform Law.

**3. Progress report of the Working Group on the International Sale of Goods on the work of its fourth session  
(New York, 22 January-2 February 1973) (A/CN.9/75) \***

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\* 20 February 1973.

INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session, held in 1969. The Working Group consists of the following 14 members of the Commission: Austria, Brazil, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the Commission on its second session.<sup>1</sup>

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