

3. Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved or deferred for further consideration by the Working Group at its first five sessions (A/CN.9/100, annex II)*

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INTRODUCTION

1. The Working Group on the International Sale of Goods, at its fifth session (Geneva, 21 January to 1 February 1974), invited representatives of Member States and the observers who attended that session, to submit to the Secretariat their comments and proposals on the text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions.**

2. At the time of issuing this note, comments and proposals had been received from the representatives of Austria, Bulgaria, Mexico, Norway, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland. The text of these comments and proposals is set forth in the annexes to this note.

I. COMMENTS BY THE REPRESENTATIVE OF AUSTRIA CONCERNING THE PRELIMINARY DRAFT OF THE NEW ULIS

[*Original: French*]

A. GENERAL COMMENTS

The following observations seek to be brief and not to touch on too many points on which consensus has already been reached within the Working Group.

At the present stage it seems appropriate to abandon the concept of a uniform law annexed to a convention and purely and simply to envisage a convention which would itself contain the basic provisions, as in the case of the Convention on the Limitation Period of 14 June 1974. It would then be necessary to draft a short preamble and final clauses.

* 18 February 1975.

** Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (A/CN.9/87), paragraph 245 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The revised text of the Uniform Law is set forth in annex I of the progress report (reproduced in UNCITRAL Yearbook, vol. V: 1974, part two, I, 2).

B. COMMENTS ON VARIOUS ARTICLES

Article 1

The restriction of the sphere of application to relations between Contracting States (para. 1 (a)) is regrettable. It would, however, be preferable to delete paragraph 1 (b) which introduces an element that is foreign to the unification of substantive law and whose merits can be contested. Paragraph 2 should be retained.

Article 2

It would be useful to retain the part of the sentence within square brackets in paragraph 1 (a). Paragraph 2 (a) should state clearly whether or not documents controlling disposition of the goods, such as bills of lading are also excluded. Article 59 *bis*, paragraph 2, seems to indicate that they are not.

Article 4

The wording of subparagraph (a) should be reviewed in the light of the parallel provision in the Convention on the Limitation Period. In the event that it is decided to opt for the form of a simple convention (see section A, second paragraph above), subparagraph (d) could be omitted while subparagraph (e) would have to be expanded.

Article 8

There does not seem any point in including this article. Its inclusion in the 1964 ULIS can be explained by the fact that that Law provided that all matters which were not expressly settled therein were to be settled in conformity with its spirit.

Article 9

Paragraph 2 could be simplified.

Article 11

The expression "promptly" or "prompt" seems now to be used only in article 38, paragraph 1, and article 42, paragraph 2. Elsewhere, mention is made of a reasonable time. Either the definition of promptly could be deleted or the content of the article could be trans-

ferred to article 38, paragraph 1. For article 42, paragraph 2, see below.

Article 15

It would be preferable to retain this provision.

Article 16

This article is incorrectly worded for it cites the 1964 ULIS. If the draft uniform law becomes a draft convention (see section A, second paragraph above), this article would become superfluous as article 42, paragraph 1, would be sufficient by itself.

Article 17

The Austrian delegation has always been of the opinion that this declaration of principle could be dispensed with.

Article 39

The last sentence in paragraph 1 should be retained. It should end with the words "a longer period".

Article 42

The end of paragraph 1 could be retained. The combination of "prompt" at the end of paragraph 2 and "reasonable time" in article 39, paragraph 1, would create a system which would be difficult to understand; it would be better to delete any reference to the giving of notice in article 42, paragraph 2.

Article 43 bis

The end of paragraph 1 could be retained.

Article 44

The words "by notice to the seller" in paragraph 1 duplicate the more precise formulation in the introductory sentence of paragraph 2; they should therefore be deleted.

Article 67

The article should be retained where it is. The remedy mentioned in the words in square brackets in paragraph 1 seems to go too far; it is sufficient that the right of specification should pass to the seller. These words should therefore be deleted.

Article 72 bis

It would seem appropriate to take alternative A as a basis for further discussion of this very complicated article.

Article 76

Paragraphs 1, 3 and 4 of alternative A are consistent with paragraphs 1, 2 and 3 of alternative B in so far as the content is concerned. However, both paragraph 2 of alternative A and paragraph 4 of alternative B seem to merit inclusion. Alternative A could be improved by the addition of paragraph 4 of alternative B which would become paragraph 5 of that text.

Article 79

Paragraph 2 (a) is already covered by paragraph 2 (d) and is therefore superfluous. The French text of paragraph 2 (d) should refer to "le fait de l'acheteur" instead of "son fait". Paragraph 2 (e) should be dropped for the same considerations which led to the deletion of article 33, paragraph 2, of the 1964 ULIS.

Article 84

The words "on which the contract is avoided" at the end of paragraph 1 should be replaced by the words "on which delivery was or should have been effected".

Article 89

As one delegation proposed, it should be added that, in case of fraud, the damages can in no case be less than those to be allocated under the uniform law (or convention, see section A, second paragraph above) where there is no fraud.

Article 98

The sentence in square brackets in paragraph 2 should be retained.

Article 98 bis

The article should be retained. However, it seems that the wording of paragraph 2 could be improved and might, for instance, read as follows:

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

II. COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF BULGARIA

[Original: French]

1. Article 1, paragraph 3, should be discussed with a view to incorporating in the Law the principle set forth in the last part of article 4 of 1964 ULIS, namely, that the application of the Uniform Law by virtue of the choice and will of the parties shall not affect the application of any mandatory provisions of law in the State in whose territory one of the parties has his place of business which would have been applicable if the parties had not chosen the Uniform Law as the law of the contract.

The rationale for such a provision is the principle that the will of the parties cannot override mandatory rules, which have binding force.

2. With regard to article 3, paragraph 1, it is felt that the proposed formulation may give rise to doubts as to whether the Law covers deliveries (contracts of sale) of industrial complexes and plant, that is to say, entire factories. The text seems to mean that they are excluded from the sphere of application of the Law, but it would be desirable to clarify this question by adding to the text a reference to such deliveries, by way of example.

3. With regard to article 9 of ULIS and of the revised text concerning the priority of commercial usages over the Law, we consider that the opposite course should be adopted, in other words, that, in the event of conflict between the Law and usages, the Law should prevail and should apply unless the parties have agreed otherwise. The arguments in favour of this course are the variety of existing usages that are unknown to parties in international trade and the fact that the other course might adversely affect the security of their relations. The purpose of the Law, after all, is exactly the opposite: to establish uniformity and

security. Moreover, both the Uniform Law and newer and more modern laws include provisions that reproduce current usages and commercial practice.

4. The wording of article 10 is too complicated, although the substance is satisfactory. Simpler wording would be advisable, for example: "A breach of contract shall be fundamental wherever a reasonable person (normally a merchant) would not have concluded the contract if he had supposed at the time of its conclusion that the party in breach would commit that breach."

5. It would be better to keep articles 12 and 13 of ULIS rather than to delete them, as is done in the draft revised text.

6. With regard to article 15, on the form of the contract, we consider reasonable and acceptable the proposed amendment that "the contract . . . shall be in writing if so required by the laws of at least one of the countries in the territories whereof the parties have their place of business" (A/CN.9/52, 5 January 1971, para. 115).^{*} This amendment would make the Law more acceptable to a greater number of States, including those whose legislation stipulates that international commercial transactions shall be in writing.

7. We support the proposed amendment to article 17 to the effect that private international law shall apply to questions which are not settled by the Uniform Law (A/CN.9/52, para. 133).^{*} The Uniform Law must provide a rule on how to decide matters which are not regulated by that Law, i.e., in the event of omissions. One such matter might be, for example, a claim for compensation or damages over and above the amount stipulated in the penalty clause.

8. Article 20 might be amended by providing for and regulating the case of delivery of the goods to the buyer by handing them over for storage or bond warehousing to a third party who would hold and take possession of them on behalf of the buyer.

Similarly, provision should be made here for effecting delivery by handing over the goods to the buyer (or to his representative). This is the most common and priority case, and gives rise to all others. By so doing, the controversial and difficult problems raised by the definition of "delivery" would not have to be gone into. The same procedure was used with regard to delivery to the carrier. The concept of "handing over" was used. The use of that concept and its definition are two different matters. The question of defining delivery which led to argument and difficult controversies, does not come up.

Provision should also be made for effecting delivery of the goods by handing over the documents giving title to possession and disposal of the goods.

9. Article 33, paragraph 2, should be amended so as to state that the seller shall not be liable when the buyer knew or could not have been unaware of defects of the goods, not only at the time of contracting but also "at the time of delivery of the goods, in the case of the goods concerned".

10. It is proposed that article 38, paragraph 2, should be amended by adding the words "and at the

place where the buyer first has the opportunity to examine the goods".

It would be well to delete from paragraph 3 the words "and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach". If, nevertheless, the seller did not know of the possibility, the responsibility of the seller should be maintained in cases in which it is not possible for the goods to be examined at the place of destination, for example, at the port or station itself.

This article should include as a basic provision the rule that the examination of the goods shall be performed at the time and place and in the manner specified in the contract.

11. We hold that the wording of article 41 of the 1964 ULIS is preferable to the new text, as it gives an exhaustive list of the rights and penalties applicable in the event of the seller failing to perform his obligations.

12. We feel the same way about article 48, which should not be deleted. The same applies to articles 50 and 51, because they deal with the sale of goods through documents conferring title to and the right to dispose of the goods, the handing over or transmission of the documents constituting delivery of the goods.

13. With respect to article 57, we believe that a contract of sale must not be considered valid if the price is not or cannot be determined. For that reason, we do not share the view that the price generally prevailing should be made payable, as that would lead to difficulties and instability.

14. We find the wording of article 65 of the 1964 ULIS more felicitous and acceptable. The phrase "all such acts which could reasonably be expected" is more subjective than the phrase "all such acts as are necessary" used in the original version.

15. It would be desirable to amend article 59 *bis* by adding to it the substance of article 72, paragraph 2, of the 1964 ULIS which states that "when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods". That provision gives a decisive rule for this case (sale against documents) whereas the text of article 59 *bis*, paragraph 3, is a general provision for such cases to be governed by the provisions of the contract.

16. With regard to article 76 of the revised text, dealing with relief from liability, we feel that alternative B is more acceptable. The article should state that in the event that performance of the obligations is impossible, the obligations of the parties to the contract are extinguished.

17. We would prefer to keep article 90 of the 1964 ULIS because it contains a rule which is in conformity with the relevant provisions of most legislations and is consistent with practice.

^{*} *Ibid.*

III. COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF MEXICO ON ARTICLES 1 TO 17 OF THE REVISED TEXT OF ULIS

[Original: Spanish]

Article 1, paragraph 2

1. The text of this paragraph, which is awaiting approval, reads as follows:

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

2. The new text approved by the Working Group responds to the need for simplification as advocated by the delegation of Norway during the first session (January 1970), as stated in document A/CN.9/35, paragraph 42 and annex V.* The idea of simplification was taken up by the delegations of the USSR¹ and the United Kingdom.² However, the criteria proposed by Norway—which retained the inter-State transport criterion (alternative I), or the criterion that the offer and the acceptance have not been effected in the same State (alternative II)—were not those that prevailed in the text approved; instead, taking the simplification principle further, the approved text retains only the requirement common to all the proposals, namely, that the parties must have their places of business in different States.³ This also agrees with one of the alternatives (No. III) that the Working Group took into account at its first session concerning the contents of a uniform law; furthermore, that alternative corresponds in substance to article III of the 1964 Hague Convention.⁴

3. Nevertheless, as was noted as early as the second session of the Working Group (A/CN.9/52, para. 22), the simplification of article 1, considered alone, would broaden the scope of the Law's applicability; consequently, the so-called "consumer sales" were excluded,⁵ and it was also indicated that the parties would be considered not to have their places of business in different States—and therefore ULIS would not apply—if at the time of the conclusion of the contract one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State.⁶

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

¹ Observations and proposals by Mr. G. S. Burguchev, contained in a letter dated 3 August 1970 from the Secretariat addressed to the members of the Working Group (reproduced in UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2, annex C to the report of Working Party II).

² Uniform Law of International Sales, Revision of Article 1.

³ This was the criterion adopted by the Working Group. See document A/CN.9/35, p. 8 *et seq.*, and annex III (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2) as well as the report on the second session (A/CN.9/52), p. 8 *et seq.* (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁴ A/CN.9/35, para. 11 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2). However, the new text of article 1 of ULIS omits the reference to habitual residence where a party does not have a place of business, as indicated in the said article III.

⁵ For the text of article 5, para. 1 (a), as approved by the Working Group, see document A/CN.9/52, paras. 51-57 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁶ A/CN.9/52, paras. 13 and 25 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

4. Later, at the third session of the Working Group (January 1972), the first modification of article 5 was transferred to article 2, paragraph 1 (a), and the second, with drafting changes, remained as article 1, paragraph 2, but was not approved by the Working Group (A/CN.9/62, annex I).*

5. This part of the paper by the Mexican delegation is confined to the above-mentioned article 1, paragraph 2, since it is the only paragraph of article 1 that the Working Group left pending.

6. In our view, this paragraph should be interpreted as a severe restriction on the scope of the application of ULIS because in the event of the parties' having their places of business in different States, which is stated in article 1, paragraph 1, as a condition for the application of the Uniform Law, the requirement is that that circumstance should be known by the parties, for one of the following reasons: first, that it was stipulated in the contract; second, that it flows from other operations or dealings between them; or, third, that the fact may be inferred from information disclosed by the parties either before or at the conclusion of the contract.

If none of the three conditions stated in paragraph 2 applies, the parties should be considered not to have their places of business in different States, and therefore ULIS would not be deemed to apply under the conditions laid down in article 1, paragraphs 1 (a) and (b).⁷ On the other hand, ULIS would apply in the case of paragraph 3, concerning which it is immaterial whether the parties have their places of business in the same State or in different States.

7. In connexion with this restriction imposed on the scope of the application of ULIS, the first question that arises is whether the restriction is justified: on the assumption that it is so justified, the second question is whether the criteria proposed in paragraph 2 are the most convenient and appropriate.

(a) As to the first question, we do consider it justified for ULIS to apply only when the parties know that their places of business are in different States, and we believe that therefore ULIS should not apply when the said places of business are in the same State (except in the case of article 1, paragraph 3), or when the parties are not aware of the fact that their places of business are in different States, either because that fact was not stipulated in the contract itself or in other agreements or because no information was given.

This restriction is certainly wider than that established in article 1, paragraphs 1 (a), (b) and (c), of the current text of ULIS, which provide for the application of the Law in each of the three cases indicated therein, whether or not the parties know or have reason to know that their places of business are in different States.

We prefer the solution provided in the version of paragraph 2 that we are now considering, as proposed by the Working Group, since it is based on concrete, objective and explicit information, such as a stipulation in a contract or in other dealings, or the information disclosed by the parties.

⁷ It is not clear, however, that in paragraph 1 (b) ULIS ceases to apply in the case we are now considering.

(b) Furthermore, the solution we are now analysing seems preferable not only to the current text of ULIS but also to the previous proposal by the Working Group (see para. 3 above), under which the parties would be considered not to have their places of business in different States if they neither knew nor had reason to know at the time of the conclusion of the contract that the contrary was the case. This formula, which has been justly criticized for introducing a subjective element—namely, the knowledge of one of the parties that the place of business of the other is in a State different from that of his own—is also unacceptable because it appears to place the burden of proof on the demonstration of a negative fact, namely, that the party neither knew nor had reason to know that circumstance.

8. Consequently, we support the contents of article 1, paragraph 2, as proposed by the Working Group; however, we wish to propose an addition because the text approved appears to be insufficiently clear. To say “The fact that the parties have their places of business in different States shall be disregarded” does not necessarily imply that in such cases ULIS would not apply; the fact is that, however strange the opposite conclusion might appear to be, such an expression could be interpreted as implying that, in the cases to which the provision refers, the parties are presumed to have their places of business in different States and that, consequently, ULIS is indeed applicable.

We therefore propose that this text should read:

“The fact that the parties have their places of business in different States shall be disregarded, and consequently the present Law shall not apply, whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.”

Article 2, paragraph 1 (a)

9. In paragraph 1 (a), the following formula was left unresolved and kept in square brackets by the Working Group at its third session (Geneva, January 1972):

[or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.]

10. We support this text, not so much for the purpose of symmetry and analogy with article 1, paragraph 2, but rather because this wording limits the scope of the restriction introduced into ULIS for the case of the so-called “consumer sales”.

It is justifiable to exclude from the application of a law governing international trade goods ordinarily bought for personal, family or household use; but when they are bought for a different use and that fact arises from the contract, ULIS should apply.

11. In order to nullify the effect of the fact that the goods are ordinarily intended for consumption, either of two conditions should suffice: an express stipulation in the contract of sale or in any other dealings between the parties (indicating, of course the buyer’s intention to acquire for “different use” the goods which are the

subject of the contract) or information disclosed to the seller.

Article 2, paragraph 2 (b)

12. The Working Group, during its second session,⁸ left pending the question of the inclusion in this paragraph, which exempts from the application of ULIS “any ship, vessel or aircraft”, of the words:

[which is registered or is required to be registered].

13. These words seem unacceptable to us. If the exemption of the transaction from ULIS were made subject to the registration of the ships, vessels or aircraft, the legal regulations would depend on a fact independent of the buyer and possibly unknown to him; an element of uncertainty absent from the other conditions of paragraph 2 [2 (a) and (c)], which refer to easily identifiable goods without laying down any additional requirement, would also be introduced.

14. *A fortiori*, the stipulation that the goods “are required to be registered” should be rejected, because it makes reference to provisions of the different internal laws of the parties, and there are no grounds for supposing that they will be known to parties under the jurisdiction of different States.

15. In any case, if the intention is to limit the scope of this exemption to exclude—and consequently to leave subject to ULIS regulations—sales of smaller boats or aircraft, reference should be made to ships, vessels or aircraft which, as set forth in the report of the Working Group,⁹ are under internal laws, normally subject to national registration, and not to local or municipal registration.

16. We therefore advocate that this exclusion of ships, vessels or aircraft should be restricted to those for which national registration is normally required.

Article 3, paragraph 1

17. Approval of paragraph 1 of this article is still awaiting approval, although the report of the Working Group on its second session gives the impression that it has been approved.

The text of the paragraph is the following:

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

18. The paragraph in question constitutes an addition to article 6 of ULIS, which becomes article 3, paragraph 2 of the Working Group draft under consideration. However, the two paragraphs of article 3 have opposite effects: whereas the first excludes the contracts referred to from ULIS, the second places in the same category as sales, and therefore includes within the scope of ULIS, “contracts for the supply of goods to be manufactured or produced”.

19. We support the criteria adopted in the new text by the Working Group, namely, that article 2, which excludes specific sales of goods from the scope of ULIS, should be supplemented by another exclusion, not of contracts for the sale of goods but of other contracts

⁸ A/CN.9/52, paragraph 55 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁹ *Ibid.*

under which the obligations of the parties are other than those characterizing contracts for the sale of goods, and that article 3 itself should embody the rule which assimilates to contracts for the sale of goods covered by ULIS those other contracts under which the seller assumes the obligation of producing the goods that are to be the object of the future sale.

20. Moreover, in our view it is clear that when the obligations of the parties are *substantially* other than the delivery of and payment for the goods, the contract is not one for the sale of goods, and accordingly, there is no reason for applying ULIS. This aspect of the obligations will inevitably have to be determined and precisely stipulated in each concrete case, whether the rule under consideration is retained or rejected; however, as indicated in paragraph 67 of the report of the Working Group (A/CN.9/52),* this will not prevent the parties to the complex transactions involved in such mixed contracts from specifically providing for the applicability of ULIS, in accordance with the principle of autonomy of will embodied in article 1, paragraph 3.¹⁰

21. For the reasons stated above, we propose that the Working Group should give final approval to the text of article 3, paragraph 1.

Article 4 (a)

22. The text of this subparagraph refers to the case in which one or both of the parties have several places of business, in which case article 1, paragraph 4, requires that, in order for ULIS to apply, one place of business of one party and one of the other party should be situated in different States. The text, which is awaiting approval, reads as follows:

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

23. This rule, which introduces the concepts of *principal place of business* and *place of business having a closer relationship to the contract*, seeks to fill a gap in the current text of article, paragraph 1, of ULIS, which does not provide for cases in which one of the parties to the contract has two or more places of business. The text was approved by the Working Group, as shown by the reports on its second session (A/CN.9/52, paras. 23-31)* and its third session (A/CN.9/62, annex I).**

24. The solution under consideration has been criticized for introducing subjective elements; however, we do not think such a criticism is valid, since the method of determining the location of a particular place of business would depend not on any decision or specification by the parties but on an objective fact that existed prior to the contract, such as that the place of business was the buyer's or seller's principal

place of business, or that in view of the circumstances *known to or contemplated by* the parties at the time of the conclusion of the contract, there existed a place of business having a closer relationship to the contract.

25. The determination of the place of business in accordance with the criteria laid down in the text under consideration may give rise to litigation and problems of proof. It must be recognized, however, that litigation and uncertainties would not be avoided if ULIS failed to make provision for this case; for if one of the parties, for example the buyer, has a place of business, possibly even the one with the closest relationship to the contract, in the State in which the seller is domiciled, and another, which may be his principal place of business, in another contracting State, what criterion would be applied to resolve the conflict?

Moreover, there would be difficulties of proof in any event; under the text in question, which imposes the burden of proof on whoever seeks to specify the location of the principal place of business or that having a closer relationship to the contract, they might be less severe than under one which places the burden on whoever has to prove that the places of business of the two parties are in different States, although, as previously mentioned, one or both of the parties have or may have several places of business in the same State or in different countries.

26. It might be thought that in order to prevent litigation and problems of proof, an alternative solution could be that ULIS should embody an absolute presumption of the international nature of the sale of goods *whenever* the parties have their places of business (whatever they might be) in different contracting States. However, such a solution would very greatly widen the scope of the application of ULIS, so as to exclude only the sales listed in article 2 (and those expressly excluded by the parties under the terms of article 5).

27. Moreover, another principle mentioned above (whose final approval we have advocated (see paragraph 9 above)), namely, that embodied in article 2, paragraph 1, is of relevance to the problem of the existence of places of business in different States. According to that principle, the fact that the parties have places of business in different States is not sufficient; that fact must also appear from the contract of sale or other dealings between the parties, or from previous information received by one of them.

In supporting this principle and proposing the addition indicated in paragraph 9 above, we rejected the inclusion in ULIS of the concept of absolute presumption (to which we referred in paragraph 26 above). On the contrary, we hold that the existence in different countries of the places of business of the parties should be known to the latter, through any of the means set forth in article 1, paragraph 2. Do we, then, need to include not only article 1, paragraph 2, but article 4 (a) as well?

We think so, because article 1, paragraph 2, requires knowledge by one of the parties that the other party has his place of business in a different country, whereas the conditions of article 4 (a) are fulfilled when one or both parties have places of business in more than

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

** UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

¹⁰ Which corresponds in essence to the present article 4 of ULIS.

one State. In other words, the former rule results in either the application or the non-application of ULIS; that of article 4, on the other hand, presupposes the application of ULIS but defines and specifies the place of execution of the contract (the principal place of business, or the one with a closer relationship to the contract) for the purpose of delivery of the goods, inspection of their quality, payment, etc.

28. For all of the above reasons, we advocate the retention of article 4 (a).

Article 9

29. At its second session, the Working Group submitted the following text (A/CN.9/52, para. 73)* to UNCITRAL for consideration:

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

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

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

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

30. In the above text, paragraph 1 is identical to article 9, paragraph 1 of ULIS; paragraph 3 is substantially the same as the second version of article 9, paragraph 2 of ULIS (but instead of reading: "usages shall prevail", as now provided for by ULIS, it reads "*such usages shall prevail*"), and paragraph 4 is similar to article 9, paragraph 3 of ULIS, with the two following changes: (a) the wording in ULIS, "they shall be interpreted according to the meaning given to them in the trade concerned" has been replaced by the following: "they shall be interpreted according to the meaning *widely accepted and regularly given to them in the trade concerned*". (b) it is proposed that the following be added to paragraph 4, "*unless otherwise agreed by the parties*".

31. More substantial amendments have been made to the first part of article 9, paragraph 2 of ULIS. It is proposed that the reference to "usage which reasonable persons in the same situation as the parties usually consider to be applicable to their contract", be deleted, since this expression neither defines nor distinguishes objectively and clearly the usage to be applied to the contract, and because the concept of "*reasonable persons*", besides being vague, would give rise to inexactitude and confusion, since "two reasonable men from

different parts of the world might consider different usages as regularly applied to their contracts."¹¹

32. Instead of the first version of paragraph 2, the Group recommends a new paragraph 2, in which the usages which would be impliedly applicable should be stipulated, i.e. those of which the parties are or should be aware because they are widely known in international trade and regularly observed under contracts of the type involved.

33. It should be first stated that in our opinion the following principles established by article 9 both under the existing Law and in the text recommended by the Working Group should be observed and maintained: (a) that the parties to a contract of international sale of goods should be bound by usages and practices of international trade; (b) that such usages should prevail over ULIS in the case of a conflict between them and it, and (c) that also in this respect the autonomy of the parties, now established as a general principle in article 3 of ULIS (article 5 of the new text) should be recognized.

34. The amendments proposed by the Working Group are in general acceptable to us. However, there are some differences concerning paragraphs 2, 3 and 4; these are discussed below and subsequently changes are proposed (paras. 36-38).

35. With reference to paragraph 2, we do not think that the implied application of the usages requires the two qualifications included in paragraph 32 above. Either of the two qualifications would be sufficient for the respective usage to be considered applicable. In other words, any usage would be applied of which the parties are or should be aware because it is widely known in international trade, regardless of whether "it is regularly observed by parties to contracts of the type involved".

In the case of a local usage (which is none the less applied and known in international law) that does not have this latter characteristic, but of which the parties are or should have been aware, it will be applicable to the contract. Clearly, the burden of proof for these facts, one subjective (that the party is or should be aware of it) and the other objective (that it is known, i.e., is applied in international law), would be incumbent on whoever invokes the application of the usage, as it is also clear that the parties may provide in their contracts that the usages should not apply (or that these should not prevail over ULIS).

Similarly, if a usage in international trade is regularly observed in contracts of the type involved, it will be applicable to the case in point, even if the parties were not aware of it. On this assumption, the usage would be normative, with the same compulsory nature as the Law and, therefore, should be known to the parties; for it not to be applicable, it would have to be expressly excluded by the provisions of the contract, in application of the principle of the autonomy of the parties.

Secondly, (still with reference to para. 2) the wording "shall include" used in the first part of this para-

¹¹ According to the objection raised by the Hungarian delegation which proposed to the Working Group the text under consideration.

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

graph is inappropriate, since, assuming that this paragraph provides for the implied—not express—application of the usages, the only usages applicable should be those to which the paragraph itself refers and no other.

Finally, article 9, paragraph 2 should be redrafted and simplified in order to avoid repetition and ambiguous or confusing expressions such as the word “parties” (in contracts of the type involved).

36. The text we propose, in the light of the objections raised in the above three paragraphs, is as follows:

[2. *It shall be considered that the usages that the parties have impliedly made applicable to their contract shall be those of which they are or should be aware because such usages are widely known in international trade, or those which are regularly observed in contracts of the type involved.*]

37. In article 9, paragraph 3, the clause “unless otherwise agreed by the parties” is superfluous and inappropriate. It is superfluous, because the principle of autonomy provided for in article 5 of the text recommended by the Working Group (article 3 of ULIS) makes this wording unnecessary. It is inappropriate, because it might be considered, on interpreting ULIS, that when this wording or something similar is not used in its other provisions, the principle in article 5 is not applicable. This same objection can be made to article 9, paragraph 4.

Therefore, we propose that paragraph 3 should read as follows:

[3. *In the event of conflict with the present Law, such usages shall prevail.*]

38. In paragraph 4, besides omitting the expression “unless otherwise agreed by the parties”, for the reasons given in the preceding paragraph, we share the criticisms which some representatives in the Working Group made concerning this provision, and agree with the text proposed at that time (see A/CN.9/52, para. 82).^{*} which reads as follows:

[4. *Where expressions, provisions or forms of contracts commonly used in commercial practice are employed, the meaning usually given to them in the trade concerned shall be used in their interpretation in accordance with the provisions of paragraphs 1 and 2.*]

Article 10

39. At its second session, the Working Group decided to defer discussion of article 10 of ULIS until the substantive rules of the Uniform Law were discussed (A/CN.9/52, para. 84). The text of article 10 is as follows:

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

40. A problem arose in the discussions of this text concerning the expression “reasonable person”; sugges-

tions were made to delete it or replace it (paras. 85 and 86 *ibid.*). Clearly, the basic criticisms that may be levelled against this term are similar to those made concerning article 9, paragraph 2 (see para. 31 above), with the added objection that this term “would lead to different interpretation by the courts in different countries” (end of para. 86, *ibid.*).

41. However, there is no reason to postpone discussion of the problem of fundamental breach since the Working Group, in its five sessions, has considered the principles of ULIS and has, at least provisionally, adopted the articles dealing with the concept of fundamental breach.

42. The articles of ULIS approved by the Working Group which refer explicitly to a fundamental breach of contract are the following:

(a) *With regard to non-performance by the seller:* Articles 42, paragraph 2; 43, paragraph 1; 44, paragraph 1 (a);¹² 46, paragraph 2;¹³ and 52, paragraph 2.¹⁴

(b) *With regard to non-performance by the buyer:* Article 72 *bis*, paragraph 1 (b).

(c) *With regard to non-performance by either party:* Article 74, paragraph 1;¹⁵ and article 75.

(d) *In the case of passing on of risks:* Article 98 *bis*, paragraphs 1 and 2.

43. The problems of the definition of fundamental breach, as given in article 10, are essentially still present in the Working Group’s new version of ULIS, since although it is true that the notion of fundamental breach is resorted to in some cases where no provision for it is made in the present ULIS (articles 42, para. 2; 75, para. 1; and 98 *bis*), in the other articles the previous system is retained.

Similarly, the present version is still open to the same objections and criticisms which were directed at a definition based on a subjective datum (that the party knew, or ought to have known) and on so many hypothetical assumptions: (i) that a reasonable person (ii) in the same situation as the party damaged by the non-performance (iii) would not have entered into the contract (iv) if he had foreseen the breach and its effects.

44. Such a concept and such a definition cannot be satisfactory, since it defines nothing and leaves the solution of any problem up to a difficult analysis of the intentions of the parties, and ultimately to the discretion of the interpreters or the judge. A simpler and

¹² This rule, together with article 72 *bis*, grants the right to declare the contract avoided by reason of non-performance by the other party.

¹³ This is equivalent to article 74, which provides for the consequences of non-performance by the buyer in the case of sales by instalments.

¹⁴ This rule corresponds to article 52, paragraph 3, of ULIS; however, the latter provision presupposes the existence of a fundamental breach, as defined in article 10, if the buyer is to have the right to declare the contract avoided and to damages, whereas the rule cited in the text inverts the solution and considers a fundamental breach to exist when the seller fails “to take appropriate action in response to the request” of the buyer, independently of the definition contained in article 10.

¹⁵ This rule is equivalent to article 75, paragraph 1, of ULIS; however, the latter does not require the existence of a fundamental breach but merely requires fear of future non-performance.

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

clearer objective criterion should be striven for. In our opinion, such a criterion would be that *the non-performance alters substantially*¹⁶ (to a significant extent) *the scope or content of the rights of the affected party*. We believe that this criterion, applied to each and all of the articles we have enumerated in paragraph 42 above, would yield a simpler and fairer solution in the various hypothetical situations.

45. This criterion would, in fact, apply more naturally in the case of article 42, paragraph 2, in which the definition of article 10, on the other hand, seems to be improper, for it is based on the idea that the party damaged by the non-performance may declare the contract avoided, whereas article 42 has as its purpose the maintenance of the contract.

It would also apply more satisfactorily in the cases provided for in articles 44, paragraph 1 (a); 74, paragraph 1;¹⁷ 46, paragraph 2; 75; and 98, paragraphs 1 and 2.

In the case of article 43 *bis*, paragraph 1, i.e. the case of delay, the new criterion would be more in keeping with the other two principles of "unreasonable inconvenience" and "unreasonable expense".

Lastly, in the case of article 52, paragraph 2, the criterion we propose and the definition given in article 10 would be equally applicable, since that article defines and states a concept proper to a fundamental breach for the cases of rights or claims of third parties; nevertheless, we believe that it would be easier to prove that the rights or claims affect or alter substantially the rights of the innocent party than it would be to test the extremes of article 10.

46. We therefore propose the following definition for article 10:

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental whenever non-performance of any obligation by either of the parties alters substantially (or to a significant extent) the scope or content of the rights which are possessed by the other party and which are derived from the contract or from this Law."

Article 15

47. The text of this article, which is awaiting approval, is the following:

[Article 15. A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.]

48. In its consideration of this text, the Working Group failed to reach unanimous agreement at its second session, owing to one delegation's position that the contract should be concluded in writing if the national law of either party so required.¹⁸ Accordingly, it was agreed to refer the article to the Commission for final consideration.¹⁹

¹⁶ In favour of the expression "substantially" we may cite two articles of ULIS in which it is used, namely, article 3, paragraph 1 (see above, para. 17) and article 73, paragraph 1.

¹⁷ Paragraph 2 in each of these articles would limit the scope of the principle.

¹⁸ See A/CN.9/52, para. 115. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

¹⁹ *Ibid.*, para. 123.

49. We support the text proposed by the Working Group, which is substantially the same as that of ULIS. We believe, in fact, that the above-mentioned requirement of municipal law should not be applied to international sales governed by ULIS if it is desired to give the latter the uniform character it should have, if it is desired to avoid any uncertainty or surprise in the mind of the party opposed to the omission of the written form and if, in addition, it is desired to eliminate serious problems concerning the application and interpretation of its provisions.

50. Indeed, the considerations indicated in report A/CN.9/52, paragraph 117, of the Working Group²⁰ are persuasive both with regard to retaining the above-mentioned text, even though it refers to an element of form which would be more proper to the Uniform Law on the Formation of Contracts and is already contained therein (article 3), and with regard to the difficulties that would result from the adoption of any of the modifications or intermediate solutions which were analysed by the Working Group and which are referred to in paragraphs 118-122 of the said report.²¹

51. It should be borne in mind, in support of the text under examination, that the principle of autonomy of will which is indicated in the article of the very text of ULIS permits either of the parties to the contract of sale to require a written form without necessitating or justifying a special reservation in article 15;²² obviously in countries in which foreign trade constitutes a monopoly reserved to the States, *this requirement* by one of the parties would be facilitated.

Article 17

52. The Working Group at its second session proposed the following text to replace the present text of article 17 of ULIS:

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

53. This text was not adopted unanimously by the Working Group but referred to UNCITRAL for decision, together with other proposals that were made.²³

54. We think that the text submitted by the Working Group is unsatisfactory because, in our view, it is incomplete. We are not opposed to retaining it since it indicates the two features or principal characteristics of ULIS, namely, its international character and the need to promote uniformity in the international sale of goods; however, we believe that it should be supplemented by a second paragraph as was proposed at the aforementioned second session,²⁴ which would provide

²⁰ As well as the study and the comments by the United Kingdom delegation at the second session.

²¹ The requirements of written form would in fact, as the United Kingdom report stated, pose such serious additional problems as those of defining what should be meant by "writing" (telex, teletype, etc.), whether the formality should be one *ad substantiam* or *ad probationem*, whether the consequence of non-compliance with such a formality should entail declaring the contract avoided or simply denying execution of it, and the like.

²² See our position in paragraph 37 above with regard to a similar problem.

²³ See A/CN.9/52, paras. 126-137 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

²⁴ *Ibid.*, p. 131.

for the application of the general principles on which the Law is based in the case of questions concerning matters governed by the Law which are not expressly settled therein or, in other words, cases involving gaps not covered by ULIS.

55. It is inevitable that gaps will be encountered in the interpretation and application of ULIS; such gaps might occur because of the omission of express provisions concerning questions covered by the Law (excluding, of course, questions relating to matters beyond the scope of ULIS, as set forth in articles 5 and 8 of the present text) or because some provisions, despite the best efforts of those contributing to and preparing the final text of the Law, might be vague and inadequate. Accordingly, we believe that the text proposed by the Working Group (see para. 52 above) would not be adequate to fill these gaps and to assist interpreters of the Law without giving them undue powers of discretion which could lead to interpretations contrary to the spirit and history of ULIS. It would be necessary to adopt one of two solutions: to include either a reference to the general principles of the Law²⁵ or a reference to the rules governing conflicts of laws in the various national legal systems. The latter solution would be prejudicial to the uniformity and the international character of the Law.

56. Consequently, we support the following formulation of article 17, which has as its first paragraph the text proposed by the Working Group (see para. 52 above) and as its second paragraph the present text of article 17 of ULIS;

Article 17

1. *In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity.*

2. *Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.*

IV. AMENDMENTS PROPOSED BY THE REPRESENTATIVE OF NORWAY TO THE REVISED TEXT OF ULIS

[Original: English]

Article 1

Paragraph 3 shall read:

"3. The present Law shall also apply where it has been chosen as the law of the contract by the parties, *to the extent that this does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the present Law.*"

Comment

Cp. ULIS arts. 4 and 8.

Article 8

In the *second sentence* the two words "in particular" are misleading and should be deleted.

²⁵ Which all legal systems and most national legal orders expressly recognize, as was noted in the study on article 17 prepared by Prof. Tunc for the Working Group's second session.

Article 12 (new)

Alternative A:

Where the present Law refers to the act or (actual or presumed) knowledge of a party, such reference shall include the act or knowledge of his agent or of any person for whose conduct such party is responsible [provided that such agent or person is acting within the scope of an employment for the purpose of the contract].

Alternative B:

For the purposes of the present Law the seller or the buyer shall be responsible for the act or the [actual or presumed] knowledge of his agent or of any person for whose conduct he is responsible, as if such act or knowledge were his own [, provided that such agent or person is acting within the scope of an employment for the purpose of the contract].

Comment

See articles 76, 79 (d), 96, cp. arts. 9 (2), 10, 33 (2), 38 (3), 40, 42, 76, 82, 89, 97.

Article 14

Add the following as a new *paragraph 2*:

"2. Where any notice referred to in the present Law has been sent in due time 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 party giving such notice the right to rely thereon."

Comment

See ULIS article 39 (3); cp. arts. 21 (1), 39 (1), 43 bis (2), 44, 72 bis, 73 (3), 74, 76 (3), 94.

Article 16

This article should be retained but redrafted as follows (cp. articles 42 and 71 subpara. 3):

"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except *to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the present Law.*"

Article 20

In subparagraph (b) replace the word "unascertained" by "unidentified".

In subparagraph (c) delete the reference to "habitual residence", cp. article 4 (b).

Article 21

In *paragraph 1* substitute "appropriated" by "identified."

Article 33

Paragraph 1 shall read:

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

required by the contract [and which,]. *Where not inconsistent with the contract, the goods shall:*

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

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

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

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

Comment

The meaning will be clearer by omitting the words “and which” in the initial passage. (Subparas. (a) and (b) are not necessarily cumulative with the first sentence.)

In *paragraph 2* the word “liable” is used in a broader sense than liability for damages, cp. “tenu” in the French text. Should this be reflected by using “responsible” in the English text? The same applies to article 35.

Article 35

Paragraph 1 should read:

“1. The seller shall be *responsible* in accordance with the contract and the present Law for any lack of conformity which exists at the time when, *according to the provisions of articles 97 and 98*, the risk passes to the buyer, even though such lack of conformity becomes apparent only after that time.”

Comment

The present passage in brackets should be deleted and substituted by a reference to the pertinent articles in chapter VI on passing of the risk, i.e. present articles 97 and 98, but not present 98 *bis* (in the Norwegian proposals *infra* the pertinent articles will be 97, 98 and 98 *bis* but not 98 *ter*).

As regards *paragraph 2*, see comments to article 39.

Article 39

In *paragraph 1* the second full stop sentence seems superfluous and may perhaps be deleted.

The last full stop sentence of *paragraph 1* should be transferred to a new *paragraph 2* and read as follows:

“2. *Notwithstanding the provisions of the preceding paragraph*, 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, [except to the extent that such time-limit is inconsistent with a guarantee [undertaking] by the seller covering a different period].”

Add the following as a further *new paragraph 3*:

“3. In case of breach of a guarantee [or other undertaking] by the seller referred to in article 35, *paragraph 2*, the buyer shall lose the right to rely on

such breach if he has not given the seller notice of the lack of conformity within a reasonable time after he has discovered or ought to have discovered it. The buyer shall, however, lose his right to rely on such a guarantee [undertaking] if he has not given notice to the seller within a period of [1 year] from the date of the expiration of the period of guarantee.”

The present *paragraph 2* will be new *paragraph 4*.

The present *paragraph 3* should be transferred to article 14 as a new *paragraph 2*.

Comment

Dealing with the problem of guarantee one should consider three possible categories of guarantees or undertakings:

(1) A guarantee that the goods are without any lack of conformity existing at the time of delivery (original lack of conformity), eventually combined with an agreement on the period within which complaints may be advanced. Any reference in the text to this type of guarantee or agreement is superfluous (see article 5).

(2) A guarantee or an undertaking by the seller that the goods will remain fit with certain qualities for a specified period, see article 35, *paragraph 2*. This type of guarantee gives rise to special problems which should be dealt with separately in article 39; see proposed *paragraph 3 supra*. Such a guarantee may have certain impacts on the two years period presented in the present *paragraph 1*, but not necessarily. If the period of such guarantee is longer, it seems to be reasonable to presume that it covers also an original lack of conformity which the buyer ought not to have discovered before the expiration of the two years period. If the period is shorter, there seems to be no justification for a corresponding presumption, unless the guarantee is combined with an agreement (express or implied) that any complaint should be advanced within the shorter period, cp. under (1) *supra*.

(3) An undertaking by the seller to remedy any defect which may appear (arise, be discovered) within a specified period. Such an undertaking is usually implied in a guarantee referred to in article 35, *paragraph 2* (and under (2) *supra*).

If the problem of a guarantee or undertaking as mentioned under (2) and (3) is dealt with in a separate *paragraph 3* as proposed *supra*; it would presumably not be necessary to refer to any guarantee in the proposed *paragraph 2*. If this nevertheless is deemed desirable, the language in brackets should be used in order to make it clear that the two years period may be inconsistent with a guarantee covering a different period, a question which will depend on the contract.

The proposed distinction between an original lack of conformity (new *paragraph 2*) and a guarantee against later defects (new *paragraph 3*) will make it clear that the buyer has a choice between basing his claim on the one or the other category, and that the pertinent period may be different in the two cases.

Article 41

Subparagraph (b) should read:

“(b) Claim damages as provided in articles 82 to 89.”

Article 42

Paragraph 1 should read:

"1. The buyer has the right to require the seller to perform the *contract*, unless the buyer has acted inconsistently with that right, *in particular* by avoiding the contract under article 44 or by reducing the price under article 45 [or by notifying the seller that he will himself *provide for the cure of the lack of conformity*]."

Comment

The condition for requiring *specific* performance is proposed to be incorporated into article 16. The buyer should otherwise have the right to require performance, even if specific performance can not be enforced under article 16. The present text adopted by the Working Group is difficult to apply as long as the parties do not know which court will ultimately be seized with the case.

In *paragraph 2* substitute at the end for the words "and after prompt notice" the following: "*and provided that he gives notice thereof within a reasonable time as provided in article 44.*"

Article 43 bis

In *paragraph 1*, delete the passage (exception) starting with "unless". This passage seems inconsistent with the right given to the seller in the preceding passage. It is also (or might be construed to be) contrary to the corresponding provisions in ULIS (articles 43 and 44). If the exception should be retained, it would have to be redrafted, e.g. as follows:

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

Paragraph 2 has a somewhat wider scope than the buyer's decision under paragraph 1 and should commence as follows:

"2. If the seller requests the buyer to make known his decision *as to whether he will accept performance*, and . . ."

Article 44

Paragraph 2 shall read:

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

(a) with respect to avoidance based on non-delivery or later delivery [and subject to the provisions of article 43 *bis*], within a reasonable time after the buyer has been informed that the goods [or documents] have been delivered late;

(b) with respect to avoidance based on lack of conformity or any other breach not covered by the preceding subparagraph, within a reasonable time after the buyer has discovered or ought to have discovered such breach, or, where avoidance is based

on the seller's failure to cure such breach in accordance with articles 43 or 43 *bis*, after the expiration of the applicable period of time referred to therein."

Article 47

Paragraph 1 should read:

"1. Where the seller tenders delivery of the goods before the date fixed, the buyer *may refuse to take such delivery if it will cause him unreasonable inconvenience or unreasonable expense.*"

Article 52

This article 52 and section III of chapter III should be transferred forward to section I of the same chapter as a *new article 40 bis* under a new *subsection 3*: Obligations of the seller as regards transfer of property. (The subsections 1, 2 and 3 might better be designated as subsections A, B and C.)

Article 59 bis

For the sake of clarity the provisions of ULIS article 72, paragraph 2 should be added to or incorporated into *paragraph 3* of article 59 *bis*. This paragraph could then read:

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the *contract requires payment against documents or the parties have agreed upon other procedures for delivery or payment, that are inconsistent with such opportunity.*"

SECTION III

The placement of article 67 in relation to section III may be questioned. Article 67 should perhaps be transferred forward to a place before section III, for instance as the last article under section II.

Article 70

In *paragraph 1* delete the word "and" between subparas. (a) and (b); cp. article 41.

Subparagraph (b) should read:

"(b) Claim damages as provided in articles 82 to 89."

Article 71

Paragraph 2 should read (cp. articles 16 and 42 (1)):

"2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present Law, the seller may require the buyer to perform *his obligation.*"

Article 72 bis

In *paragraph 1* the provision of *subparagraph (b)* seems to have been given too wide a scope. Cp. ULIS articles 62 (2) and 66 (2) and revised article 44, paragraph 1, subparagraph (b). It is proposed to draft the present subparagraph (b) as follows:

"(b) Where the buyer has not *paid the price [or taken delivery]* within an additional period of time fixed by the seller in accordance with article 72."

In *paragraph 2* Norway prefers *alternative C*. This would be the case even if the Working Group decides to delete the last sentence (starting with "In any event . . .").

Article 73

Paragraph 1 should commence as follows:

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, the appearance of a serious deterioration . . ."

Article 74

Paragraph 2 should read:

"2. A buyer, avoiding the contract in respect of any given delivery or of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of previous deliveries, if by reason of the interdependence of the deliveries, the goods already delivered could not [neither] be used for the purpose contemplated by the contract [nor serve any other useful purpose for the buyer?]."

Article 76

Norway prefers *alternative B*. We can also support support paragraph 2 under *alternative A*. The article would then read:

"1. Where a party has not performed one of his obligations, he shall *neither be required to perform nor be liable in damages for such non-performance* if he proves that *it was due to an impediment* [which has occurred without fault on his side and being] *of a kind which a party in his situation could not reasonably be expected either to take into account at the time of the conclusion of the contract or to avoid or overcome.*

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

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

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

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

Article 78

Add the following as a *new paragraph 3*:

"3. If the contract has been avoided in part, the provisions of this article shall apply to such part only."

Article 79

In *paragraph 2* transfer the present *subparagraph (d)* forward to the front as a new *subparagraph (a)* and shift the other *subparagraphs* accordingly. The reference to some other person should be deleted; see proposed article 12 *supra*.

Article 82

Add after the word "which" in the third line, the following text omitted by error in annex I: "the party in breach had foreseen or ought to have foreseen at the time of".

Transfer the provision of article 85 to the present article 82 as a *new paragraph 2* reading:

"2. If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, as *part of the damages referred to in the preceding paragraph*, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

Article 83

The reference to "habitual residence" may be deleted, see article 4, *subparagraph (b)*.

Article 84

Add after the word "price" in the fourth line of *paragraph 1*, the words "on the date" omitted by error in annex I.

Article 85

See above the proposal of transfer of article 85 to article 82 as a *new paragraph 2*.

Article 88

Substitute the words "as may be reasonable" by: "as are reasonable". The fourth line should read: "may claim a reduction in the damages *equal to the amount by which the loss should have been mitigated.*"

Add the following at the end as a *new paragraph 2*:

"2. *Where it is reasonably possible for the buyer to buy goods in replacement of the goods to which the contract relates, or for the seller to resell the goods, and he nevertheless neglects to do so within a reasonable time after the breach of the contract by the other party the damages shall not include any loss which could have been avoided or mitigated thereby.*"

CHAPTER VI. PASSING OF THE RISK

Article 96

Same as ULIS (adopted by the Working Group), but substitute "damage to" for "deterioration of" and delete the reference to some other person; see proposed article 12 *supra*.

Article 97

"1. Where the contract of sale involves carriage of the goods *and the seller is not required to deliver*

them at a particular destination, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer. (If, however, the seller is required to deliver the goods at a particular destination, the risk shall not pass to the buyer until the goods either are taken over by him or are placed at his disposal at such place when time for delivery has come.] (cp. U.S. Uniform Com. Code Section 2-509)

"2. The provisions of paragraph 1 shall also apply if at the time of the conclusion of the contract the goods are already in transit. If, however, the seller at that time knew or ought to have known that the goods or part thereof had been lost or damaged, the risk of such loss or damage shall remain with him, unless he discloses such fact to the buyer.

"3. Nevertheless, if the goods are not marked with an address or otherwise clearly identified for delivery to the buyer, the risk shall not pass until the seller has given the buyer notice of the consignment and, if necessary, sent some document specifying the goods."

Comment

To meet practical situations paragraph 1 should be made more elaborate than the provision adopted by the Working Group at the fifth session CP. U.S. Uniform Com. Code, Section 2-509.

The new paragraph 3 corresponds to ULIS article 100; cp. revised article 21, paragraph 1, second sentence.

Article 98

1. In cases not within article 97 the risk shall pass to the buyer [from the moment] when the goods are taken over by him.

2. If, however, the seller is authorized or required to deliver the goods by placing them at the buyer's disposal at a place other than any place of the seller [at a place of the buyer or of a third person], the risk shall pass when time for delivery has come and the goods are so delivered.

Comment

Paragraph 2 is new and takes care of situations where delivery is effected in accordance with article 20, subparagraph (b). Cp. ULIS article 97 (1). See also the report of the Working Group from its fifth session (A/CN.9/87)* under paragraphs 236-238.

Article 98 bis

1. In all cases where the buyer has failed to take delivery in due time, the risk shall pass to the buyer at the latest from the moment when the goods are placed at his disposal and he has committed a breach of contract by failing to take delivery.

2. Where the contract, in cases outside article 97, relates to sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been marked with an address, separated or otherwise clearly identified to the contract and the buyer has been notified of such identification, if necessary, specifying the goods.

Comment

Paragraph 1 corresponds to present article 98, paragraph 2, first sentence. Paragraph 2 corresponds to the second sentence of the same paragraph (in brackets).

Article 98 ter

Alternative I:

If the seller has committed a fundamental breach of contract, the provisions of articles 97-98 bis shall not impair the remedies afforded the buyer on account of said breach.

Alternative II:

If the buyer avoids the contract or requires substitute goods in the case of fundamental breach of contract by the seller, the seller shall bear the risk of loss of or damage to the goods occurring even after the moment when the risk would otherwise, according to the provisions of articles 97-98 bis, have passed to the buyer.

Alternative III:

Delete the whole article 98 ter; cp. article 79, subparagraph 2 (d).

Comment

Alternative II corresponds quite closely to the present article 98 bis. Alternative I treats the same problem in a different way, which is principally recommended. However, the whole provision of this article could well be deleted since the problem virtually is solved by the provisions of article 79, paragraph 2, in particular subparagraph (d).

V. OBSERVATIONS OF THE REPRESENTATIVE OF THE UNION OF SOVIET SOCIALIST REPUBLICS

[Original: Russian]

1. It would be advisable in formulating the articles contained in the draft law under consideration which are similar to articles in the Convention on Prescription (Limitation) in the International Sale of Goods to bring them into line with those articles. In particular, the bracketed portions of article 1, paragraph 2, article 2, paragraph 1 (a), article 3, paragraph 1, article 4, paragraph (a) and article 17 relate to articles in that Convention.

2. Paragraph 4 of article 9 should be omitted for the reasons set out in paragraph 82 of the report of the second session of the Working Group (A/CN.9/52).*

3. The law should not regulate questions relating to the form of contracts and the consequences of the non-observance thereof, and therefore article 15 should be deleted from the text of the law.

If, however, it is decided to retain in the law the provision on the form of contracts, then it should be indicated that contracts must be drawn up in writing if that is required by the national legislation of one or more of the parties. With regard to the consequences of disregarding the requirement for a written contract, the law could provide either that such a contract would be considered invalid or that the laws of the state requiring a written contract should be applied.

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

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

As has already been observed, depending on what decision is taken about this article, it may prove necessary to revise article 14 and to widen the concept of "communications."

4. The brackets should be removed in article 35, paragraph 1, article 39, paragraph 1 (except for the word "longer"), and in articles 42, 43 *bis* and 98.

5. The wording of article 57 is unacceptable. The price should be determined or determinable.

6. In order to simplify the text of the law article 67 could be omitted.

7. In article 72 *bis* the most acceptable alternative is Alternative A.

8. In preparing the final wording of article 76 of the draft law it would be advisable to work on the basis of Alternative A.

9. In article 82 it would be preferable to include the possibility of full damages for proven losses.

10. The Working Group in drafting the law worked on the assumption that references to actions of the seller or the buyer always cover the actions of the persons for whom they are responsible as well. Therefore for the sake of clarity a special article containing that principle could be included in the law, and the words "or of some other person for whose conduct the seller is responsible" could be omitted from article 96.

VI. STUDY BY THE REPRESENTATIVE OF THE UNITED KINGDOM ON PROBLEMS ARISING OUT OF ARTICLE 74 OF THE REVISED TEXT OF ULIS

[Original: English]

1. I undertook at the end of the fifth session of the Working Group to prepare a study of the unresolved questions presented by article 74 of ULIS, in the light of what was said at plenary meetings of the Working Group and of discussions of Drafting Party V (see progress report on the fifth session, A/CN.9/87,* paras. 107-115).

2. The revised text contained in annex 1 of the progress report sets out two versions of article 74 of ULIS (now renumbered 76), alternative A, provisionally adopted by the Drafting Party, and alternative B, proposed by the Observer for Norway. The two alternatives differ, I think, in two principal respects. They differ in their definitions of the circumstances in which exemption from liability in damages shall be available (para. 1). And they differ in that alternative A does not deal with the availability of any other remedies (because the Drafting Party considered that this needed further examination), whereas alternative B does make provision for reduction of the price and avoidance of the contract (paras. 2 and 4). Three main questions arise out of these differences. (a) In what circumstances is a non-performing party exempt from liability in damages? (b) In what circumstances may either party declare the contract avoided? (The remedy of reduction of the price presents no serious problem.) (c) What are the consequences of avoidance of the contract?

(A) WHEN IS A NON-PERFORMING PARTY EXEMPT FROM LIABILITY IN DAMAGES?

3. Before the differences between alternatives A and B are considered, there is a preliminary point which needs to be established. The non-performing party may be exempt from liability in damages without having the right to declare the contract avoided. This is obvious in the case of temporary delay (the possibility of which is envisaged in paragraph 3 of alternative A and paragraph 2 of alternative B). If for example, the seller is prevented from delivering by a temporary suspension of export licences, he may be exempt from liability in damages, but he will not normally be able to avoid the contract. But this is not the only possible instance. The impediment to performance may concern some other obligation. For example, the seller may have undertaken to pack the goods in plastic containers, and the export of such containers may be prohibited. The seller may be exempt from liability in damages for not providing these containers, but it obviously does not follow from this exemption that either he or the buyer can declare the contract avoided. This difference between the circumstances in which a party is exempt from liability in damages and those in which he (or the other party) may avoid the contract, is half hidden in a shift of meaning in the word "obligation" between paragraph 1 and paragraph 2 of alternative B (and similarly in the ULIS version). Paragraph 1 speaks of "non-performance of one of his obligations" (which may, for example, be the obligation to deliver by a certain day, or to pack in plastic containers), but paragraph 2 speaks of relief from an obligation which has become "quite different from that contemplated by the contract". This must refer to the totality of obligations created by the contract (or, perhaps better, the central or essential obligations) and not to the particular obligation mentioned in paragraph 1. This is not to say, of course, that the two may not coincide, as for example, where export licences have been permanently suspended and the obligation affected by paragraph 1 is therefore the obligation to deliver at all. In this case, if the seller is exempt from liability in damages, he or the other party should obviously be able to avoid the contract. (See part (b) of this study.)

4. In the light of this distinction between non-performance of an obligation and non-performance of the contract (a distinction which, though not easy to define, is implicit in ULIS and in alternative B), the difference between the formulation of paragraph 1 in alternative A and in alternative B becomes more significant. Alternative A sets up two tests for the availability of exemption from liability in damages. Performance of the obligation in question must either have become impossible or have "so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract". Of these two tests, that of impossibility can be applied either to a particular obligation (such as the obligation to deliver by a certain day, or the obligation to pack in plastic containers) or to the contract as a whole, but the test of radical change will usually be appropriate only to the performance of the contract as a whole. It might therefore be suggested that only the test of impossibility should be retained. But to this suggestion

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 1.

the objection is that "impossibility" has different meanings in different systems. (It was to meet this objection that the concept of radical change was introduced into paragraph 1.) Since therefore the test of impossibility by itself leads to ambiguity, and since the addition of the test of radical change may lead to confusion between the particular obligation and the contract as a whole, it seems better to adopt in this respect the looser approach of alternative B (or something like it), and to leave the concept of radical change to the provisions dealing with the avoidance of the contract as a whole, where it is appropriate (see part (b) of this study). The text of alternative C (see para. 9, below) offers alternative formulations in terms either of "circumstances" (as in ULIS) or of "impediment" (as in alternative B).

5. On the other hand, it seemed from the discussion in the Drafting Party that the form of words relating to fault in paragraph 1 of alternative A was more likely to receive general approval than that in alternative B (though it may well be that the difference is ultimately one of words rather than of substance). It is therefore adopted in alternative C.

6. Alternative B has nothing to correspond to paragraph 2 of alternative A, which is self-explanatory. The need for this provision was, I think, generally accepted in the Drafting Party, and it is included in alternative C.

7. The first part of paragraph 3 of alternative A (corresponding to the first sentence of paragraph 2 of alternative B) is obviously necessary, but the second part (and the second sentence of alternative B) introduces the concept of radical change and is more appropriate to the provision on the availability of the remedy of avoidance (see part (b) of this study). It is therefore omitted in alternative C.

8. Paragraph 4 of alternative B is concerned with remedies other than exemption from liability in damages and is therefore left for consideration in part (b) of this study.

9. If these proposals are accepted, the revised version of article 76 (previously article 74) will be concerned only with the availability of exemption from liability in damages and will run as follows:

Article [76]

Alternative C:

1. Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that it was due to an impediment which has (or to circumstances which have) occurred without fault on his part. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment (the circumstances).

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

if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

3. Where the impediment to the performance of an obligation is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed.

4. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform [of the circumstances which affect his performance and the extent to which they affect it]. If he fails to do so within a reasonable time after he knows of the impediment [circumstances], he shall be liable for the damage resulting from this failure.

(B) WHEN MAY THE CONTRACT BE DECLARED AVOIDED?

10. As has been said in paragraph 2 of this study, alternative A does not deal with this question, but alternative B does make some provision. Under paragraph 4 of alternative B (which approximately follows ULIS in this respect), the other party may reduce the price (where this is applicable) or avoid the contract, and the right to avoid the contract is subject to the normal rules governing breach, i.e., the non-performance must amount to a fundamental breach.²⁶ Under paragraph 2 the non-performing party may avoid the contract, but only when a radical change of circumstances has followed a temporary impediment. When the radical change is not preceded by a temporary impediment, or where the performance is not merely changed but is impossible, the non-performing party can do nothing. This is plainly not what is intended, but it seems to be the effect of the paragraph as drafted. What is required is a provision that the non-performing party may avoid the contract when performance of it has, by reason of the circumstances referred to in paragraph 1, become impossible or has radically changed.

11. The test for the existence of a right to avoid is therefore different for the two parties. For the non-performing party the test is that of impossibility or radical change; for the other party the test is that of fundamental breach. That the test should be different seems right. For example, a temporary suspension of export licences may not have any great effect on the character of the performance required of the seller, but it may well make the goods worthless for the purpose for which the buyer intended them. And conversely, if the authorities in the seller's country impose an export tax of 1,000 per cent, this will no doubt effect a radical change in the character of the performance required of the seller, but it should not be ground for the buyer to avoid the contract (if for some reason of his own he wishes to do so). But though the test of fundamental breach seems right in substance, there is some inelegance and a risk of confusion in using the language of breach when there has been, because of

²⁶ The text actually speaks of "any right which he has to declare the contract avoided", but presumably the "Nachfrist" provisions would not apply in this situation, and nor presumably would articles [74] and [75]. But the uncertainty in this respect is an additional argument in favour of providing for the consequences of avoidance for non-performance under article [76] separately from those of avoidance for non-performance or breach. See below.

the circumstances provided for in paragraph 1 of article [76], not a breach but a justifiable failure to perform. It seems better, even though more prolix, to incorporate here an adapted form of the definition of fundamental breach given in article 10. This accords with the wider proposal, which is made in part (c) of this study, that the consequences of avoidance for non-performance under article [76] should be independent of those of avoidance on breach.

12. The provision for these remedies would best be made in a separate article, draft of which is set out below. A small change has been made in the formulation of the test of radical change to take account of what has been said in paragraph 3 of this study. It should be noted that if any change is made in the final version of article 10, the formulation in (b) (ii) of the text below should be reconsidered.

Article [76 bis]

Where the non-performing party has notified the other party, in accordance with article [76], of an impediment to [circumstances which affect] the performance of one of his obligations, the rights of the parties shall be as follows.

(a) The non-performing party may declare the contract avoided if by reason of the impediment [circumstances] above-mentioned, the performance required of him by the contract has become impossible or has so radically changed as to amount to performance of a quite different contract.

(b) The other party may either (i) if he is the buyer, reduce the price in the proportion which the value of any goods delivered bears to the total value of the goods which the seller contracted to deliver, or (ii) declare the contract avoided if a reasonable person in his situation would not have entered into the contract if he had foreseen the non-performance and its consequences.

(c) THE CONSEQUENCES OF AVOIDANCE

13. Assuming that the contract has been avoided, alternative B leaves the consequences of that avoidance to be settled by articles 78-81 (and so does ULIS). But those articles are drafted with breach in mind and are not necessarily suitable to the situation where non-performance is not due to the fault of either party. This is obvious in the case of article 79, but some of the other provisions are of doubtful suitability.²⁷ On the other hand, it is not easy to say with confidence what provisions ought to be put in their place.

14. Three hypothetical cases may help to show where the difficulties lie. It is assumed that the question whether a party may avoid or not has been settled in accordance with the preceding paragraphs of this study.

Case (1). The contract provides for the goods to be delivered by instalments and for the price to be paid on completion of all deliveries. After half the deliveries have been made, the authorities in the seller's country prohibit further export of the goods in question. The

buyer is unable to return the goods. The market value of the goods has risen, but the actual benefit to the buyer is less than either the market value or the proportionate part of the price (because, for example, the purpose for which he needed the goods can only be met by a complete delivery, and there will be long delay in obtaining substitute goods from any alternative source).

Case (2). Contract for delivery by instalments, followed by prohibition on further exports, as in case (1). The buyer is unable to return the goods because he has resold at a price considerably higher than the contract price and higher also than the current market price; or he cannot return them because he has incorporated them in a building, and the cost of obtaining substitute goods is higher than the contract price.

Case (3). The seller has contracted to make and supply goods to the buyer's specification, the price to be paid on delivery. Before the goods have been delivered, but after the seller has incurred considerable expense in preparatory work (such as design or the acquisition of machine tools), export of the goods is prohibited, or some impediment within the meaning of article [76] prevents the buyer from taking delivery.²⁸

In all these cases the seller has incurred expenditure, but has received no benefit. In case (1) the benefit to the buyer is less than the value of the goods, however computed. In case (2) the benefit to the buyer is higher than the value of the goods. In case (3) there is no benefit to the buyer at all.

15. There seem to be in principle five possible solutions.

(a) The solution adopted by alternative B and by ULIS, which requires the buyer to return the goods, or, if that is impossible, to account for the benefits which he has derived from the goods. This means that in case (1) the seller will get less than the market value of the goods and less than a proportionate part of the price; that in case (2) he will get the benefit of the buyer's advantageous resale or of the rise in the market price; and that in case (3) he will get nothing.

(b) To allow the seller to claim the amount of the benefit to the buyer, provided that this does not exceed the expenditure incurred by the seller. This is the solution commonly applied by those systems which have a general doctrine of unjustified enrichment. The practical result will be the same as in solution (a) for case (1) and case (3), but in case (2) the seller will be limited to the amount of his expenditure (which may possibly be higher than the contract price if he made a bad bargain in the first place).

(c) To allow the seller to claim the amount of the benefit to the buyer, provided that this does not exceed the proportionate part of the contract price. The practical result will be the same as in solutions (a) and (b) for cases (1) and (3), but the limit on the seller's recovery in case (2) will be different. This is the solution of the American Restatement—Contracts.

²⁷ It should be noted that the revised article 81, para. 2 (b), in any case needs correction, in so far as it applies only to the case where it is the buyer who has exercised his right to declare the contract avoided. It must apply whether it is the buyer or the seller (as in the original ULIS version).

²⁸ It cannot make any difference from whose "side" the impediment comes, unless that party is at fault, an eventuality which is provided for in para. 1 of article (76), alternative C.

(d) To allow the seller to claim the amount of the benefit to the buyer, provided that this is not less than the proportionate part of the contract price. The result will be the same as in solution (a) for case (2), and the same as in solutions (a) (b) and (c) for case (3), but in case (1) the buyer will bear the loss caused by the termination of the contract.

(e) To adopt a system of discretionary apportionment of benefits and losses. This can, of course, be adapted to produce any of the results already considered for cases (1) and (2), but it alone can provide a solution to case (3) which does not simply leave the loss on the seller. A system on these lines is adopted in England and in some other Common Law jurisdictions.

16. Solution (e), though perhaps the best in terms of ideal justice, involves a considerable exercise of judicial discretion and a corresponding amount of uncertainty, and is probably inappropriate in the context of the Uniform Law. Solution (b) presents considerable difficulties in determining what part of the total expenditure of the seller is to be attributed to the performance of this particular contract. (The same difficulty would of course affect solution (e)). Solution (d) is objectionable because it treats a contract for delivery by instalments for a price payable on completion as amounting necessarily to a series of separate contracts for a proportionate part of the price, whereas solution (e) treats it as only presumptively so amounting, and allows the buyer to rebut the presumption by showing that the actual benefit is less than the proportionate part of the price. (Solution (a) ignores the question.) The choice, therefore, lies between solution (a) and solution (c). In regard to solution (a) there seems no merit in requiring the buyer to return the goods, if he can, since this will in some cases make the amount which the seller recovers depend on the chance of whether the goods can be returned or not.

17. The draft which follows expresses solution (c), but an alternative is given to express solution (a), but without any provision for the return of the goods.

Article [76 ter]

1. If either party declares the contract avoided under the provisions of article [76 bis], both parties shall be released from further performance of their obligations under the contract.

2. (a) If the seller has received any part of the price *he shall account to* the buyer for it, together with interest at the rate fixed by article 83 as from the date of payment.

(b) If the buyer has received any part of the goods he shall account to the seller either for the benefit which he has derived from them or for such proportion of the price as the value of the goods delivered bears to the total value of the goods which the seller contracted to deliver, whichever is the less.

Alternative draft of paragraph 2 (b) to express solution (a)

(b) If the buyer has received any part of the goods he shall account to the seller either for their market value or for the benefit which he has derived from them, whichever is the less.

(D) CONSEQUENTIAL AMENDMENTS

18. If the proposals made above for articles [76], [76 bis], and [76 ter] are accepted, the following consequential amendments will be necessary. The heading of section II of chapter V should be altered to "Relief in case of supervening impediment". The heading of section III of chapter V should be altered to "Effects of avoidance for breach of contract". It would probably be wise to move section II to a position after section V (and renumber the sections). This would make the distinction between non-performance on breach and non-performance because of supervening impediment clearer.

(E) APPLICATION OF ARTICLE [76], ETC. TO LIABILITY FOR DEFECTS

19. The question was raised in discussion (see para. 112 of the progress report) whether article 74 of ULIS, or its eventual replacement, could apply to liability for latent defects in the thing sold (i.e., to non-performance of one or more of the seller's obligations as to conformity). The answer seems to be that article 74 of ULIS and all the drafts considered might be so interpreted as to do so in some circumstances. For example, if the seller could show that the defect was due to a human error which could not be foreseen or guarded against (and it would be admittedly very difficult to show this), he could argue that this was an "impediment" or a "circumstance" within paragraph 1 of article [76]. More realistically perhaps, if he could show that the defect was not one which could have been foreseen or guarded against in the light of the technical knowledge available at the time, he could argue that he was exempt. Of course, he would be exempt only from damages; the buyer could still avoid the contract or reduce the price. But the exemption could be very important in excluding liability for consequential damage (as where the defect has involved the buyer in liability to third parties). The buyer would be unable to recover these damages (unless he had made express provision in the contract). It is true that this is the normal result in some systems, unless the seller was aware of the defect, but it does not seem to have been the intended effect of ULIS. I have not, however, yet found a formula which would certainly exclude liability for latent defects from the exemption set up by paragraph 1 of article [76]. To exclude from the ambit of paragraph 1 all obligations as to the conformity of the goods would be much too wide; and no variation on "impediment" or "circumstances" seems capable of certainly achieving the intended result. To do so would probably involve a more extensive remodelling of the Uniform Law.