

4. Report of the Secretary-General: pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex III)*

INTRODUCTION

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

2. The Working Group at the fifth session, in planning its further work, requested the Secretariat to prepare a study of the pending questions presented by the revised text, indicating possible solutions therefor, and taking into consideration the comments and proposals of representatives submitted before 31 August 1974.³ The present report has been prepared in response to this request.

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

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

CHAPTER I. SPHERE OF APPLICATION OF THE LAW

Article 1: basic rule on sphere of application

A. Introduction: basic rules on application

4. Article 1 sets forth the basic rules on the Law's sphere of application. These rules deal with two ques-

tions: (1) The required internationality of the transaction (e.g., when is a sale "international"); (2) The required contact between the transaction and a Contracting State (Problems of private international law).

(1) *Internationality of the transaction*

(a) *Introduction*

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

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

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

8. The above clarification would broaden the scope of the Law. To avoid excessive breadth, and to preserve various types of regulatory laws enacted for the

* 18 February 1975.

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

² Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, herein cited as Working Group, report on fifth session. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

³ Working Group, report on fifth session, para. 245 (c). The comments and proposals so submitted by representatives are reproduced in a note by the Secretary-General, contained in annex II to that document, which will be cited as "Comments by representatives" (UNCITRAL Yearbook, vol. V: 1974, part two, I, 3).

⁴ Progress report of the Working Group on the work of its second session (cited as "Working Group, report on second session"), A/CN.9/52, para. 17, (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

⁵ Working Group, report on second session, para. 19 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

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

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

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

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

(2) *Contact between the transaction and a Contracting State*

(a) *Introduction*

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

⁷ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 69 (UNCITRAL Yearbook, vol. II: 1971, part one, II, A) (cited as "UNCITRAL, report on fourth session").

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

⁹ Working Group, report on second session, para. 25. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

¹⁰ Working Group, report on third session, annex II (A/CN.9/62/Add.1, paras. 6-10, UNCITRAL Yearbook, vol. 3: 1972, part two, I, A, 5).

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

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

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

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

12. UNCITRAL at its third session (1970) approved the approach reflected in the present text¹³ and the above-quoted provision was drafted and approved at the third session of the Working Group.¹⁴

13. The observations submitted by the representative of Austria suggested that it was unfortunate that paragraph (a) was restricted to sales between parties both of whom are in Contracting States. It was further suggested that, in any event, it would be advisable to delete paragraph (b) on the ground that this reference to the rules of private international law was alien to unification of substantive law, and was inadvisable.¹⁵

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

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

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

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

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

¹² The Working Group, report on first session, paras. 10-25. (UNCITRAL Yearbook, vol. 1, 1968-1970, part three, I, A, 2). The initial text, at para. 19, was subject to stylistic modifications to produce the current text quoted above.

¹³ UNCITRAL, report on third session, paras. 22-31. (UNCITRAL Yearbook, vol. 1: 1968-1970, part two, III, A). Commission considered possible reservations as to sphere of application.

¹⁴ Working Group, report on third session, annex I; annex II (A/CN.9/62/Add.1; UNCITRAL Yearbook, vol. 3: 1972, part two, I, A, 5), paras. 1-14.

¹⁵ The United Nations Convention on the Limitation Period in the International Sale of Goods employed the approach in article 1(1) (a) of the present sales draft as the sole basis for applicability of the Convention (article 3(1)); in that Convention, recourse to the rules of private international law is rejected (article 3(2)). In the field of limitation (prescription) the rules on private international law vary so widely, even in basic approach, that recourse to such rules was considered inappropriate. See Commentary on the draft convention, A/CN.9/73, introduction, para. 4, commentary on article 3, paras. 3-5 (UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

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

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

Article 2: Exemptions

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

A. Consumer sales: paragraph 1 (a)

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

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

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

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

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

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

“(a) Of stocks, shares, investment securities, *negotiable instruments* or money”.

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

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

“. . . money or negotiable instruments calling for the payment of money”.

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

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

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

Article 3: “mixed” contracts

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

29. Paragraph 2 of article 3 is identical with article 6 of ULIS which is directed to the case where the party who orders goods “undertakes to supply an essential and substantial part of the materials” necessary for the manufacture or production of the goods in question.

¹⁷ Working Group, report on second session, para. 55. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

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

¹⁶ Working Group, report on second session, paras. 38-41 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

The Working Group concluded that this provision of ULIS, while satisfactory in itself, was an incomplete and unsatisfactory approach to the problem of "mixed" contracts, since this problem could also arise where the principal obligation relates (e.g.) to the supply of services, or land, or other matters other than the delivery of and payment of goods. It was recognized that such contracts could arise in an infinite variety of combinations, so that detailed provisions would not be practicable. However, a general rule was considered necessary; to fill this gap in the law, paragraph 1 was prepared by the Working Group at its second session.¹⁹ The report on that session does not indicate any objection of substance or any specific problem of drafting. The representative of Mexico, in his observations, examines this provision and finds it satisfactory; the other observations submitted by representatives do not comment on this provision.

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

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

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

31. The Working Group concluded that it was necessary to include a rule dealing with this question, and at the second session prepared the provision that now appears as paragraph (a) of article 4.²¹ At that session, this provision was the subject of considerable discussion, and was placed in square brackets to permit later reconsideration.

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

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

"(c) where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance,

having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;"

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

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

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

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

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

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

Paragraph (d)

Paragraph (d) of article 4 states:

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

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

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

40. Article V was included in the 1964 Convention because several States were dissatisfied with certain

¹⁹ Working Group, report on second session, paras. 61-67. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

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

²¹ Working Group, report on second session, paras. 13, 23-25. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2). The provision then appeared as article 2 (a), but was moved to its present position at the third session.

²² Working Group, report on second session, para. 34. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2). The provision then appeared as article 2 (e).

basic provisions of ULIS. The Working Group may now wish to consider whether the current revision has sufficiently removed such objections so that a provision like article V need not be included in the current convention.

Paragraph (e)

Paragraph (e) of article 4 states:

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

41. The reference to a declaration under article [II], relates to a declaration by two or more States, having closely related legal rules, that transactions among their area would not be governed by the Convention. Such a provision was included in the Convention on Limitation in part III: declarations and reservations (article 34). In the Convention on Limitation, the substantive articles on sphere of application (articles 1-7) do not include a reference to the above provision in part III providing for a reservation restricting the scope of application.* From the foregoing, it will be noted that if the approach of the Convention on Limitation is followed, the reference to declarations in paragraph (e) of article 4 would be deleted, and a provision permitting declarations, comparable to article II of the 1964 Hague Convention, would be included in a later part of the Convention on Declarations and Reservations. (Compare part III of the Convention on Limitation.)

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

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

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

* The text of the Convention is reproduced in UNCITRAL Yearbook, vol. V: 1974, part three, I, B.

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

Article 5: effect of agreement of the parties

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

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

Articles 6 and 7

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

Article 8: subjects excluded from the law

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

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

²³ Working Group, report on second session, para. 46. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

²⁴ *Ibid.*, para. 71.

regard should be had to its international character and to the need to promote uniformity.²⁵

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

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

CHAPTER II. GENERAL PROVISIONS (ARTICLES 9-17)

Article 9: usages and practices

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

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

B. *Implied applicability of usages: paragraph 2*

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

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

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

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

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

57. In previous consideration of this topic, some members of the Working Group have expressed concern over the breadth of the recourse to usage per-

²⁷ Working Group, report on first session, paras. 73-90 (UNCITRAL Yearbook, vol. 1: 1968-1970, part three, I, A, 2); report on second session, paras. 72-82 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2); UNCITRAL, report on third session, paras. 35-42 (UNCITRAL Yearbook, vol. 1: 1968-1970, part two, III, A).

²⁸ Comments: observations by Mexico, paras. 29 to 38. The proposed redraft appears at para. 36 (reproduced in this volume, part two, I, 3).

²⁹ The reasons for this approach are explained at para. 35 of the observations by Mexico, *supra* (reproduced in this volume, part two, I, 3).

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

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

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

Draft proposal for paragraph 2

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

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

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

59. Paragraph 3 states:

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

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

60. It will be noted that the proposed deletion is made possible since paragraph 2 of the redraft (unlike article 9(2) of ULIS) makes it clear that the ground

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

D. Interpretation of commercial terms: paragraph 4

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

Article 10: definition of "fundamental breach of contract"

A. Introduction

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

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

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

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

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

³¹ Working Group, report on second session, paras. 83-88. (UNCITRAL Yearbook, vol. II: 1971, part 2, I, A, 2).

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

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

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

67. Studies and comments submitted by States and organizations prior to the second session, and observations made at the second session of the Working Group, criticized article 10 on the ground that it was too complex, and also on the ground that the article included subjective standards that would be difficult to apply.³⁴ The observations submitted to the present session by Mexico thoroughly analyse the criticisms of this article, and propose a revision which is designed to overcome these difficulties.³⁵ It will be noted that this proposal eliminates the subjective test (i.e. what a party "*knew* or ought to have *known*"), and also the related speculative element as to whether a "*reasonable person*" would have "entered into the contract if he had foreseen the breach and its effects". Instead, this proposal employs a single objective criterion: whether the breach *substantially* alters the scope or contents of the rights of the other party.

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

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

Proposed revision of article 10

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

Article 11: definition of "promptly"

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

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

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

³⁴ Analysis of comments and proposals (A/CN.9/WG.2/WP.6, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 1). Working Group, report on second session, paras. 83-88 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

³⁵ Comments, observations of Mexico, paras. 39-46; the proposed redraft appears at para. 46 (reproduced in this volume, part two, I, 3).

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

³⁷ Comments, observations by Austria (article 11) (reproduced in this volume, part two, I, 3).

Proposed new article 12: act or knowledge of agent

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

Article 13

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

Article 14: communications

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

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

Article 15: requirements as to form of contract

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

77. It may also be noted that the Law does not attempt to codify or supersede national rules on the authority of an agent to bind his principal. To illustrate this point, we may suppose that at the beginning of a negotiation, the principal notifies the other party as

³⁸ Working Group, report on second session, paras. 113-123. UNCITRAL, report on fourth session (1971), paras. 70-80 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

³⁹ Comments: observations by Mexico (paras. 47-51) and by Austria (article 15) (reproduced in this volume, part two, I, 3).

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

Article 16: limitation on right of specified performance

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

Article 17: general rule of interpretation

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

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

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

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

A. GENERAL INTRODUCTION

81. The Working Group gave preliminary consideration to chapter III of ULIS at the third session, and

⁴⁰ Comments, observations by Austria (art. 16) and by Norway (redraft of art. 16) (reproduced in this volume, part two, I, 3).

took final action at the fourth session.⁴¹ The Working Group based its work on comments and proposals by members of the Group,⁴² and on reports by the Secretary-General on "Delivery" in ULIS,⁴³ *ipso facto* avoidance⁴⁴ and the obligations of the seller in chapter III of ULIS.⁴⁵

(1) THE CONCEPT OF "DELIVERY"

82. One of the troublesome problems presented by chapter III resulted from the use by ULIS of a single concept—"delivery"—as a solvent for a number of different issues, such as the time for the payment of the price and the transfer of risk of loss.⁴⁶ This effort to make a single concept provide the solution for different practical problems led to a definition of "delivery" which was artificial and which was so complex that it led to unintended consequences. For example, article 19(1) of ULIS provides that "Delivery consists in the handing over of goods which conform with the contract". No difficulty would have arisen from a provision that a seller has a *duty to deliver* goods which conform to the contract, but the above definition of "delivery" led to the surprising conclusion that if the buyer accepts non-conforming goods (subject, of course, to a price adjustment or damage claim) and uses (or even consumes) them, the goods are never "delivered" to the buyer. More important, the attempt to use this concept in allocating risk of loss meant that it was necessary to piece together widely separated provisions of the Law (e.g. arts. 19 and 97), with results in some circumstances that seemed to have been unintended by the draftsmen. In the light of these considerations, the Working Group at the third session decided that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery", and at the fourth session decided to delete article 19.⁴⁷ As a further consequence, articles 20-23 could deal directly with the steps required of the seller to perform his contractual *duty to deliver* the goods, without attempting to compress into one article a definition of the concept of "delivery".

(2) CONSOLIDATION OF SEPARATE SETS OF REMEDIAL PROVISIONS

83. Chapter III of 1964 ULIS contained six separate sets of remedial provisions applicable to breach by

⁴¹ Working Group, report on third session (A/CN.9/62, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); Working Group, report on fourth session (A/CN.9/75), UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁴² See Analysis of comments and proposals relating to articles 18-55 of ULIS (A/CN.9/WG.2/WP.10, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3) and documents cited in the reports on third session (para. 7). UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5) and on the fourth session (para. 6) (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁴³ A/CN.9/WG.2/WP.8 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1).

⁴⁴ *Ibid.*, p. 41.

⁴⁵ A/CN.9/WG.2/WP.16, reproduced in annex II to the Working Group's report on its fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

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

⁴⁷ Working Group, report on third session, A/CN.9/62/Add.1, para. 17; (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3) para. 21.

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

84. These separate remedial systems differed from each other in ways that appeared to be accidental; some of the separate systems, without apparent reason, omitted provisions that were included in the other systems. In addition, the boundary-lines between the various systems were not clear. Thus, with respect to the separate remedies as to (1) date of delivery and (2) place of delivery, it was noted that if the goods were late in arriving one could state either that the goods (1) were at the right place but at a late date or (2) at the specified date were at the wrong place. It was also difficult to distinguish between (1) non-delivery of part of the goods and (2) non-conformity, where boxes were empty or part of the goods were worthless. The difficulty of ascertaining which remedial system would be applicable created possibilities for confusion and litigation. Finally, it was noted that these six remedial systems contributed to the length and complexity of ULIS—characteristics which had been one of the grounds for serious criticism of ULIS and a barrier to its widespread adoption.⁴⁸

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

(3) AUTOMATIC (IPSO FACTO) AVOIDANCE OF THE CONTRACT

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

⁴⁸ The problems presented by the separate sets of remedial provisions and draft provisions consolidating the remedial provisions into a single unified system are set forth in the report of the Secretary-General on the obligations of the seller (chapter III of ULIS). This report (A/CN.9/WG.2/WP.16, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2) was reproduced as annex II to the report of the Working Group on its fourth session.

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

⁵⁰ Articles 25, 26, 30, 61 and 62.

⁵¹ Working Group, report on third session, annex II (A/CN.9/62/Add.1), para. 29 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5). The reasons underlying this decision are explained more fully in the report of the Secretary-General on *ipso facto* avoidance in ULIS, A/CN.9/WG.2/WP.10 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3).

of remedies, discussed above, which was approved by the Working Group at its fourth session.

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER III.
OBLIGATIONS OF THE SELLER

Article 18: general obligations of the seller

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

SECTION I. DELIVERY OF THE GOODS

Article 19 (deleted)

88. This article of ULIS, which set forth a definition of the concept of "delivery", was deleted by the Working Group⁵² for reasons that have been summarized.

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

Article 20: manner of effecting delivery

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

Article 21: delivery to a carrier

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

Articles 22-23

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

Articles 24-32 (deleted)

92. These nine articles of ULIS set forth separate remedial systems regarding the failure of the seller to perform his obligation, with respect to (1) the date of delivery and (2) the place of delivery. These articles

⁵² Working Group, report on fourth session, para. 21 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁵³ *Ibid.*, paras. 22-29.

⁵⁴ Reasons for the use of "identified" in place of "ascertained" or "appropriated" are set forth in the Report of the Secretary-General, Issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19), also reproduced as annex IV to the Working Groups report on its fifth session, para. 84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁵⁵ Working Group, report on fourth session, paras. 31-35 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

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

SUBSECTION 2. OBLIGATIONS OF THE SELLER AS REGARDS
THE CONFORMITY OF THE GOODS

Article 33: basic rules on conformity

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

Article 34 (deleted)

Article 35: time for determining conformity

94. Article 35(1) of 1964 ULIS states the basic rule as follows: "whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes". The report of the Secretary-General on the Obligations of the Seller⁵⁷ observed that while such a rule is not always stated expressly in codifications of the law of sales, it is a necessary implication of rules on risk of loss, and may be illustrated by the following situation: A contract calls for the sale of "No. 1 quality cane sugar, F.O.B. Seller's city" (under this contract, the risk of loss in transit falls on the buyer). The seller ships No. 1 cane sugar, but during transit the sugar is damaged by water and on arrival the quality is No. 3 rather than No. 1. In this situation, of course, the buyer has no claim against the seller for non-conformity of the goods, since the goods did conform to the contract at the point when risk of loss passed to the buyer; the buyer's responsibility for deterioration after that point is a necessary consequence of the provisions of the contract (or of the Law) as to risk of loss. Although it might seem that such a principle is so self-evident that it need not be stated, it was concluded that it might be useful in the interest of clarity to state the principle explicitly.⁵⁸ The Working Group retained this principle as the first sentence of article 35(1), subject to redrafting, and the addition of a concluding phrase designed to show that the rule is applicable even if the lack of conformity is latent.⁵⁹

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

1. The seller shall be liable in accordance with the contract and the present Law for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

⁵⁶ *Ibid.*, paras. 37-44.

⁵⁷ Report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to the Working Group's report on its fourth session), paras. 65-72 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

⁵⁸ *Ibid.*, para. 65.

⁵⁹ Working Group, report on fourth session, paras. 46-52 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

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

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

Article 36

(Incorporated into article 33)

Article 37: early delivery

98. There are no pending questions with respect to this article.

Article 38: time and place for inspection of the goods

99. There are no pending questions with respect to this article. However, the close relationship between this article and article 39 (notice of lack of conformity) makes it advisable to recall the decisions taken by the Working Group with respect to article 38.

100. The Working Group considered article 38 at its first session.⁶⁴ Under article 38 of 1964 ULIS (paras. 1 and 2), the buyer was required to examine the goods "promptly" at "the place of destination"; the only exception was that provided under paragraph 3 where, under limited circumstances, "the goods are re-dispatched by the buyer *without transshipment*". The Working Group noted that these rules governing the time and place for inspection were linked to the important rules of article 39 under which the buyer "shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof *promptly* after he has discovered the lack of conformity or *ought to have discovered it*". Thus the time for giving "prompt" notice began to run at destination; delay in the case of redispach of the goods was per-

⁶⁰ *Ibid.*, para. 48.

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

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

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

⁶⁴ Working Group, report on first session, paras. 105-111 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2).

mitted only in certain cases where there was no "transshipment", and the concept of "transshipment" was undefined and unclear. The Working Group concluded that the rules of ULIS on the required time and place for inspection by the buyer were impractical as applied to "chain" contracts and to containerized shipments. The Working Group noted that failure to give "prompt" notice after that specified time and place for inspection led to the drastic consequences that the buyer would "lose the right to rely on a lack of conformity of the goods"—i.e., he would be required to pay the full price for defective goods.⁶⁵ Consequently, the Working Group approved more flexible rules in paragraph 3 of article 38; this redraft, *inter alia*, deleted the "transshipment" restriction. The rules of paragraphs 1-3 were reviewed and approved by the Working Group at its third session.⁶⁶

101. Paragraph 4 of article 38 provided that, in the absence of agreement by the parties, the methods of examination would be governed "by the law or usage of the place where the examination is to be effected". It will be noted that the phrase "is to be" (in French, "doit être") assumes that the inspection must be made at a predetermined place, whereas in international practice the place for inspection may be determined by circumstances that arise subsequent to the sale; as already stated the revision of paragraph 3 reflected the need for such flexibility. In addition, the emphasis in paragraph 4 on the law or usage "of the place" of examination could lead to the application of local rules or usages which would be inconsistent with the principle that international transactions should be governed by *international* practices and usages. See article 9 (2). Consequently, the Working Group deleted paragraph 4 of article 38.⁶⁷

Article 39: notice of lack of conformity

102. In discussing article 38, above, attention was directed to the close relationship between its rules on the time and place for inspection and the rules of article 39 on notice of lack of conformity. It will be observed that failure to give such notice as required by this article has drastic consequences: the buyer "shall lose the right to rely on" the failure of the goods to conform with the contract, i.e. he must pay the full price for defective goods and has no claim for damages.

103. The rigors of this requirement of article 39 have been somewhat mitigated by making the rules of article 38 on the time and place of inspection somewhat more flexible (see paras. 100-101 above). In addition, the Working Group concluded that the requirement of article 39 (1) that the buyer shall notify the seller "promptly" (as defined in article 11), should be modified to permit the buyer to notify the seller "within a reasonable time" after the buyer has discovered the lack of conformity or ought to have discovered it.

104. The principal pending question under the present article relates to the retention of a two-year outside limit on the time for giving notice. At the end of

⁶⁵ *Ibid.*, paras. 106, 107.

⁶⁶ Working Group, report on third session, para. 109 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

⁶⁷ Working Group, report on fourth session, paras. 57-63 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

paragraph 1 the following sentence appears in square brackets:

[In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a [longer] [different] period.]

105. This provision is the same as in article 39 (1) of 1964 ULIS, except that the Working Group inserted the word "different" as a possible substitute for the word "longer".⁶⁸

106. Such a cut-off period presents a significant issue of policy, which received considerable attention at the Working Group's fourth session.⁶⁹

107. Several representatives considered that such a cut-off period was important: claims notified to the seller more than two years after delivery of the goods would be of doubtful merit and when the seller received his first notice of such a contention at such a late period it would be difficult to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture. These representatives emphasized that the retention of such a cut-off period was essential for the acceptability of the Law.

108. Several other representatives were of the view that the seller received adequate protection from the requirement that the buyer give notice of the lack of conformity "within a reasonable time after he has discovered the lack of conformity or ought to have discovered it". In the rare case where the application of this standard would permit the giving of notice after the expiration of two years, to preclude the buyer from relying on the non-conformity would be unjust.

109. In the course of its discussion at the fourth session, the Working Group gave attention to the relationship between a two-year cut-off period for notice and the UNCITRAL uniform rules on the limitation period in the international sale of goods.⁷⁰ Subsequent to that discussion the Convention on the Limitation Period has been finalized and opened for signature.⁷¹ Under that Convention, claims arising from a contract of international sale of goods are subject to a general limitation period of four years (article 8). A claim aris-

⁶⁸ For prior discussion see: Working Group, report on third session, paras. 21 and 22, and annex II to the report, paras. 74-80 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5); Working Group, report on fourth Session, paras. 64-77 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁶⁹ Working Group, report on fourth session, paras. 66-70 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁷⁰ *Ibid.*, paras. 66 and 68. In this discussion it was recognized that distinct legal issues were presented by a cut-off period for notice and a limitation period for action. However, it was suggested that both related to the extent to which an action could be maintained when latent defects came to light a substantial period of time after delivery. In the preparation of the uniform rules on the limitation period, it was proposed by several delegates that a special limitation period of two years should be applicable to claims based on non-conformity of the goods, and that this period should not be subject to extension where the defect was discovered after the expiration of the period.

⁷¹ A/CONF.63/15.

ing from a defect or other lack of conformity in the goods accrues on the date on which the goods are *actually handed over* to, or their tender refused by, the buyer (article 10 (2)); the limitation period is not extended where a latent defect is discovered subsequent to the receipt of the goods.⁷²

110. Various (and conflicting) inferences could be drawn concerning the significance of the Convention on the Limitation Period with respect to the current problem. On the one hand it might be suggested that the Limitation Convention makes no special provision for late discovery of latent defects. On the other hand it could be suggested that the limitation period of four years following the handing over of the goods adequately protects the seller with respect to the late discovery of latent defects; the defect would need to be discovered (and notice given) in advance of the four-year period to permit legal proceedings to be brought within that period.

111. It has been generally agreed that if a cut-off period is specified in the law, some provision should be made for claims arising under an express guarantee covering a longer period. The problem is illustrated by a guarantee that a complex machine or an industrial plant will maintain a specified level of soundness and performance for a period of three years. It might be supposed that a two-year cut-off period would be so inconsistent with such a guarantee that the contract would override the statutory provision by virtue of article 5 (article 3 of 1964 ULIS). On the other hand, it has been generally considered that the matter is sufficiently doubtful (and important) to require a specific qualification of the two-year cut-off provision.

112. The two-year cut-off provision in 1964 ULIS attempted to deal with the problem by the following clause: "unless the lack of conformity constituted a breach of a guarantee covering a longer period". As a matter of drafting, the above provision seems inadequate, since the provision fails to specify the period for notice applicable to a breach of such a guarantee. Under one view, the above language would seem to make the cut-off period completely inapplicable; under another reading, the two-year period would be extended to the end of the guarantee period—a construction that would allow little or no time for notice when the breach occurs near or at the end of the guarantee period.⁷³ These same ambiguities would also be present if the bracketed word "different" replaced the word "longer". In addition, a reference to a "guarantee covering a *different* period" than two years could be construed to extend to a wide variety of so-called "guarantees" which really are limitations on the seller's obligations: i.e. a "guarantee" providing that the seller's obligation is limited to replacing any defective part if the buyer notifies the seller within 30 days after he receives the goods.

113. The observations submitted by the representative of Norway recommend that the two-year cut-off

⁷² The effect of an express guarantee stated to have effect for a certain period of time dealt with in article 11 of the Convention on the Limitation Period) considered at paras. 111-113, below.

⁷³ See report of the Secretary-General, obligations of the seller (A/CN.9/WG.2/WP.16; annex II to Working Group report on fourth session, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

period be maintained. On this assumption, provisions are proposed to deal with express guarantees; these provisions seem to meet the drafting difficulties that have been outlined above.

114. There are no pending questions concerning paragraph 2, as revised by the Working Group.⁷⁴

Delayed communication: paragraph 3

115. Attention is directed to the proposal under article 14 (paras. 74-75, above), that a second paragraph be added to article 14 which would set forth a general rule based on article 39 (3). If that proposal is adopted, paragraph 3 of article 39 would, of course, be deleted.

Article 40: knowledge by the seller

116. There are no pending questions with respect to this article.

SUBSECTION 3. OBLIGATIONS OF THE SELLER AS REGARDS TRANSFER OF PROPERTY

Article 40 bis (relocating article 52, below)

117. The remedial provisions of articles 41-47, below, were designed to be applicable to all of the obligations of the seller, including his obligation to transfer property in the goods. That obligation is now set forth in article 52. In connexion with the revision of the remedial provisions, it was contemplated that the substance of article 52 should precede articles 41-47 which provide remedies for breach. As is noted in the observations of the representative of Norway, it would be appropriate to relocate that provision among the substantive obligations of the seller, as article 40 *bis*.

SECTION II. REMEDIES FOR BREACH OF CONTRACT BY SELLER (ARTICLES 41-47)

118. This section sets forth consolidated remedial provisions which are applicable to any breach of contract by the seller. The background for the provisions has been summarized at paragraphs 83 to 85 above, and is set forth more fully in the report on the Working Group's fourth session and in the report of the Secretary-General that was considered at the session.⁷⁵

Article 41: buyer's remedies in general

119. The representative of Norway notes that paragraph 1 (*b*) should read "as provided in articles 82 to 89". The representative of Bulgaria suggests that it would be preferable to follow the style of 1964 ULIS, and refer more exhaustively to the types of remedies which are available to the buyer.⁷⁶

⁷⁴ The reasons for the revision of this provision of 1964 ULIS are summarized in report of the Secretary-General on obligations of the seller, para. 91.

⁷⁵ Working Group report on fourth session, paras. 79-82 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report of the Secretary-General on obligations of the seller (A/CN.9/WG.2/WP.16, reproduced as annex II to Working Group report on fourth session, UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2), paras. 27-29, 93-101, 158-162, 177.

⁷⁶ Comments, observations of Bulgaria and Norway (reproduced in this volume, part two, I, 3). As to the insertion of "and" after para. 1 (*a*), see article 70, and para. 133 foot-note 84 below.

Article 42: specific performance of the contract

120. The right to require specific performance, as set forth in article 42 of 1964 ULIS, was subject to important exceptions set forth in article VII of the 1964 Sales Convention. This separation of the rule from the exceptions was confusing.⁷⁷ Consequently, the Working Group consolidated the two provisions.⁷⁸

121. The representative of Austria suggests that paragraph 1 be maintained, including the final phrase which the Working Group placed in square brackets. This representative also suggests a drafting change in paragraph 2.

122. The representative of Norway proposes a re-draft of article 41, paragraph 1, which omits any reference to "specific performance". The commentary to this proposal states that the right to specific performance is subject to a general limiting rule in article 16 and adds that the buyer should "have the right to require performance, even if specific performance can not be enforced under article 16".

123. One problem presented by this approach is the need to maintain the distinction between (1) the substantive obligations of the parties as derived from the contract and the Law and (2) remedies for breach of those obligations.

124. The substantive obligations of the seller appear in section I—articles 18-40; the remedies for breach of these obligations are set forth in section II—articles 41-47. Article 44, of course, is in this latter category.

125. The basic substantive obligation of the seller is to perform the contract of sale; this obligation is clearly set forth in section I—articles 18-40. When, in addition, in the section II on remedies the Law states that the buyer "has the right to require the seller to perform the contract", many readers would assume this established a legal *remedy* to compel performance (a remedy sometimes called the remedy of "specific performance").

126. Under article 16, any provision of the Law that a party is "entitled to require performance" would lead to a remedy of specific performance only to the extent that specific performance could be required under the law of the *forum*. Article 16 consequently serves as an exception to article 42, and to the comparable provision in article 71. The problem of drafting thus seems to be whether readers of articles 42 and 71 will be aware of this exception set forth in article 16, or whether some specific reference to this exception should be included in those articles.

127. Prior reports have suggested that the scope of the remedy of specific performance is not of great practical significance. Even in domestic trade, in areas where a remedy to compel performance is theoretically available, that remedy is seldom invoked since the buyer usually must supply his needs before the goods can be provided by means of litigation;⁷⁹ these practical

⁷⁷ See report of the Secretary-General on obligations of the seller (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2), paras. 117-124.

⁷⁸ Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3), paras. 87-97.

⁷⁹ Report of the Secretary-General on obligations of the seller (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

limitations have added significance in international trade. The only significant interest is to avoid confusion in the drafting; the more explicit text prepared by the Working Group was designed to minimize the possibility that the rule of article 16 might be overlooked.

Article 43: buyer's notice fixing additional period

128. There are no pending questions with respect to this article. The significance of this article, and of the parallel provision in article 72 (the *Nachfrist* notice) have been discussed in connexion with the definition in article 10 of "fundamental breach" (para. 66 above).

Article 43 bis: cure by seller

129. The only pending question indicated by the Working Group is the retention of the concluding language in brackets: "[or has notified the seller that he will himself cure the lack of conformity]". The observations of the representative of Austria conclude that this language should be retained.⁸⁰

130. The observations by Norway propose alternative drafting changes for paragraph 1 designed to broaden the scope of the provision. A clarifying amendment is also proposed for paragraph 2.⁸¹

Article 44: avoidance of the contract

A. Introduction

131. Where the seller has failed to perform his obligations under the circumstances described in paragraphs 1 (a) and (b) the buyer may "declare the contract avoided". The most significant consequence is that the buyer is no longer obligated to receive and accept the goods.⁸²

132. As was noted in the general introduction to this chapter (para. 86 above), two types of avoidance were provided in 1964 ULIS: (1) avoidance by a declaration by the innocent party to the party in breach; (2) automatic (*ipso facto*) avoidance. The Working Group concluded that automatic (*ipso facto*) avoidance left the parties in doubt as to their obligations under the contract. Consequently, in the revised text avoidance is effected only by a declaration transmitted to the other party.

133. The very concept of "avoidance" of the contract, which was employed in 1964 ULIS and retained by the Working Group, is subject to misinterpretation, since "avoidance" of the contract could imply that all rights and duties under the contract thereby come to an end. On the contrary, it is intended that a party who "avoids" the "contract" because of breach by the other party will retain the right to recover damages that resulted from the breach. Since the concept of "avoidance of the contract" could be understood as wiping out a claim for damages for breach of contract, 1964 ULIS inserted several provisions that were designed to prevent such a misinterpretation.⁸³ The re-

⁸⁰ Comments, observations by Austria (reproduced in this volume, part two, I, 3).

⁸¹ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

⁸² Article 72 *bis* similarly empowers the seller to declare the contract avoided, with the consequence that the seller is no longer obligated to supply the goods to the buyer.

⁸³ 1964 ULIS, art. 24 (2) ("may also claim damages"); art. 41 (2) (same); art. 52 (3); art. 55 (1) (a); art. 63 (1) and 78.

vised text prepared by the Working Group meets the problem in article 78 (1): "Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due".⁸⁴

B. Pending questions

134. In paragraph 2 (a), at two points, after the words "the goods" the words "[or documents]" were provisionally added.⁸⁵ The issue is whether specific references to "documents" are needed at this point in the Law. The seller's obligation to supply necessary documents is dealt with in general provisions in articles 18 and 23. If specific references were to be made to documents wherever documents would be required in performance of the contract, a substantial number of such references would be required and there would be a danger that such references might be incomplete. The Working Group might conclude that it would be better to rely on the general rules on the obligation to supply documents.⁸⁶

135. The representative of Norway proposes the restructuring of the subparagraphs in paragraph 2.⁸⁷ The Working Group may conclude that this would add to the clarity of the provision.

Article 45: reduction of the price

136. There are no pending questions with respect to this article.

Article 46: Non-conformity as to part of delivery

137. There are no pending questions with respect to this article.

Article 47: early tender; excess quantity

138. The first paragraph, based on article 29 of 1964 ULIS, seems to say that the buyer may reject an early delivery even if the advance arrival of the goods causes the buyer no inconvenience or expense. Such a rule would be inconsistent with other provisions of the law.

139. The representative of Norway proposes a re-draft that would meet the above problem.⁸⁸ Another approach would be to conclude that this paragraph does not deal with a sufficiently significant problem to require a separate provision.

Articles 48-51 (deleted)

140. The matter dealt with in article 48 of 1964 ULIS is covered in chapter V, section I, anticipatory breach, at article 75 below.

141. Article 49 of 1964 ULIS establishes a rule of limitation (prescription) which is applicable to one of the various types of claim that may arise from a sales

⁸⁴ This intent is reinforced, in the corresponding provision in article 70, by the word "and" at the end of paragraph 1 (a); the Working Group may wish to make articles 41 and 70 consistent on this point. It should be borne in mind that article 78 has been bracketed by the Working Group. If paragraph 1 of article 78 should be deleted, the effect of "avoidance" would be subject to serious doubt.

⁸⁵ Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

⁸⁶ The bracketed cross-reference at the end of paragraph 2 (a) will need to be reviewed in the light of the decision on the final phrase of article 43 *bis*, para. 1.

⁸⁷ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

⁸⁸ *Ibid.*

contract; this provision is inadequate for the further reason that it fails to deal with various problems that are presented by a rule of limitation (prescription). The Commission at its third session decided that this provision should be deleted from the present law, and that the matter would be governed by the Convention on Limitation.⁸⁹

142. In 1964 ULIS, articles 50 and 51 comprised a separate section entitled "Handing over of documents". Article 50, the only substantive provision in the section, now appears among the consolidated substantive obligations of the seller as article 23.⁹⁰ Article 51 has become unnecessary in view of the establishment of consolidated provisions on remedies (articles 41-47).

Article 52: transfer of property

143. As has been noted under proposed article 40 *bis* (para. 117 above), article 52 should be moved to a position among the substantive obligations of the seller, in advance of the consolidated remedial provisions.

Articles 53-55 (deleted)

144. The Working Group concluded that article 53 of ULIS (like article 34) was unnecessary and should be deleted.⁹¹ Article 54 was placed among the other substantive obligations of the seller as article 21. Article 55 constituted one of the six separate remedial provisions provided by 1964 ULIS and became unnecessary in view of the consolidated set of remedies.

CHAPTER IV. OBLIGATIONS OF THE BUYER
(ARTICLES 56-70)

A. GENERAL INTRODUCTION

(1) CONSOLIDATION OF SEPARATE SETS OF
REMEDIAL PROVISIONS

145. Chapter IV of 1964 ULIS follows the system of organization employed in chapter III of that law: performance of the sales contract is subdivided into categories and separate remedial provisions are established for each category. (See the general introduction to chapter III at paras. 83-85, above.) The performance by a buyer that is of practical importance to the seller is simply the payment of the price at the appropriate time and place. None the less, performance by the buyer is divided into three categories, and separate remedial provisions are provided for each.⁹² As in chapter III of 1964 ULIS, the attempt to subdivide an essentially unitary contractual duty results in ambiguities as to which set of remedial provisions is applicable.

⁸⁹ UNCITRAL, report on third session (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A), para. 34. See also the Convention on Limitation (A/CONF.63/15); Working Group report on fourth session (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3), para. 135.

⁹⁰ See Working Group report on fourth session (UNCITRAL Yearbook, vol. IV, 1973, part two, I, A, 2), paras. 21-26.

⁹¹ Working Group report on fourth session, para. 146; (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); Report of the Secretary-General, obligations of the seller, para. 157 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 2).

⁹² Remedial provisions for section I (payment of the price) are in articles 61-64, for section II (taking delivery) are in articles 66-68 and for section III ("other obligations") are in article 70.

In addition, the three sets of remedial provisions differ in ways that appear to be accidental.⁹³ Consequently, the Working Group at its fifth session decided that chapter IV (like chapter III) should be reorganized by consolidating the rules on the substantive obligations of the buyer and, similarly, by establishing a consolidated set of remedial provisions applicable to any breach by the buyer of his obligations under the sales contract.⁹⁴

(2) CONSOLIDATION OF RULES ON PLACE AND DATE OF
PAYMENT

146. A second problem of organization under 1964 ULIS was presented by subsection I B, "place and date of payment" (articles 59-60). The report of the Secretary-General submitted to the Working Group at its fifth session noted that the foregoing provisions fail to deal with the one issue that is of greatest practical importance: the time for buyer's payment in relation to performance by the seller. To deal with this question it is necessary to read articles 59 and 60 in connexion with widely scattered articles in various other parts of the law: article 69 in section III, articles 71 and 72 in chapter V and article 19 in chapter III. Then, after a reader has assembled these various provisions, it is difficult to work out a clear solution for the most important problems that arise in international trade.⁹⁵ For these reasons, the Working Group decided to establish consolidated provisions in chapter IV on the payment of the price.⁹⁶

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER IV.
OBLIGATIONS OF THE BUYER

Article 56: general obligations of the buyer

147. This article (like article 18 in chapter III) introduces the reader to the structure of the chapter, and also makes explicit the duty of the buyer to perform the contract of sale "as required by the contract and the present Law". This article, as approved by the Working Group, is the same as article 56 in 1964 ULIS.⁹⁷

SECTION I. PAYMENT OF THE PRICE

Article 56 bis: assuring payment of the price

148. As has been noted (para. 146 above), one aspect of the fragmentation in 1964 ULIS of the various aspects of the buyer's performance is the separate treatment, in articles 57-60, 69 and 71-72, of related aspects of the buyer's obligation to pay the price. As a

⁹³ For example, article 67 of 1964 ULIS seems to provide that any delay by the buyer in providing specifications empowers the seller to avoid the contract, even if that delay is of little or no significance—an approach that is inconsistent with articles 26(1), 30(1), 32(1), 43, 45(2), 52(3), 55(1)(a), 62(1), 66(1) and 71(1)(a).

⁹⁴ Working Group report on fifth session, paras. 36-59, 71-72, 86-87 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁹⁵ Report of Secretary-General, issues presented by chapters IV-VI, paras. 4-21.

⁹⁶ In the revised draft, these provisions appear as articles 56, 56 *bis*, 57, 58, 59, 59 *bis* and 60. Article 59 *bis* replaces 71 and 72, which appear in chapter V of 1964 ULIS. See Working Group report on fifth session, paras. 26-35 (UNCITRAL Yearbook, vol. V: 1974, two, I, 1).

⁹⁷ Working Group report on fourth session, para. 150. (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

result of the decision to consolidate these substantive provisions, a revision of article 69 of 1964 ULIS has been placed in section I (payment of the price) as article 56 *bis*.⁹⁸ There are no pending questions with respect to this article as revised by the Working Group.

A. FIXING THE PRICE

Article 57: price not stated in contract

149. This article reflects revisions in article 57 of 1964 ULIS, as made by the Working Group at its fourth session.⁹⁹ The most significant modification was to make provision for the case where the seller at the time of contracting had not generally established a price for the goods in question.¹⁰⁰

Article 58: net weight

150. There are no pending questions.¹⁰¹

B. PLACE AND DATE OF PAYMENT

Article 59: place of payment

151. There are no pending questions.¹⁰²

Article 59 bis: time of payment

152. As has been noted (para. 146, above), section 1B of 1964 ULIS ("place and date of payment") failed to deal with the basic question of the time when the buyer must pay in relation to performance by the seller.¹⁰³ The present position, approved by the Working Group at its fifth session, supplies this omission.¹⁰⁴

153. The only pending question is presented by a proposal, in the observations submitted by the representative of Norway, that a reference to "payment against documents", which appears in article 72(2) of 1964 ULIS, be incorporated in paragraph 3 of article 59 *bis*.¹⁰⁵ The observations of the representative of

⁹⁸ Working Group report on fifth session, paras. 35 (a), 84-85. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁹⁹ Working Group report on fourth session, paras. 151-164 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

¹⁰⁰ The observations submitted by the representative of Bulgaria oppose the inclusion of such an article. This issue would appear to have been considered by the Working Group and resolved at its fourth session. See Working Group report on fourth session, paras. 152-153 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3).

¹⁰¹ Article 58 is the same as in 1964 ULIS. See Working Group report on fourth session, paras. 165-171 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report on fifth session, paras. 12-16 (UNCITRAL Yearbook, vol. V: 1974, part three, I, 1).

¹⁰² Article 59 is the same as in 1964 ULIS. See Working Group report on fourth session, paras. 172-177 (UNCITRAL Yearbook, vol. IV: 1973, part two, I, A, 3); report on fifth session, paras. 17-21 (UNCITRAL Yearbook, vol. V: 1974, part three, I, 1).

¹⁰³ Report of the Secretary-General on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19, annex IV to Working Group report on fifth session), paras. 4-21 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁰⁴ Working Group report on fifth session, paras. 26-35 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). This provision leads to the deletion of articles 71 and 72 of ULIS.

¹⁰⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3). The report of the Secretary-General on issues presented by chapters IV-VI, at paras. 18-20, considered the advisability of retaining the "payment against documents" language in article 72(2) of 1964 ULIS and concluded that the more general language, approved by the Working Group, would be preferable. It would appear that the more specific language "payment against documents" would produce unintended results in case No. 1 as discussed at paras. 19-20

Bulgaria are to similar effect.¹⁰⁶

Article 60: no formalities required before payment

154. There are no pending questions.¹⁰⁷

Articles 61-64 (deleted)

155. These four articles in 1964 ULIS established a remedial system for those aspects of the buyer's obligation which were set forth in articles 57-60. With the establishment of a consolidated and unitary system of remedies for chapter IV (articles 67-72 *bis*, below), articles 61-64 became unnecessary.¹⁰⁸

SECTION II. TAKING DELIVERY

Article 65: in general

156. This article embodies certain clarifying amendments to the corresponding provision of 1964 ULIS. The most significant of these is that the article now is addressed to the buyer's *obligation* to take delivery, instead of attempting to define the concept of "taking delivery".¹⁰⁹

157. The observations submitted by the representative of Bulgaria suggest that the word "necessary", as used in 1964 ULIS, would be preferable to the phrase "could reasonably be expected of him".¹¹⁰

Article 66 (deleted)

158. Article 66 in 1964 ULIS is one of the separate remedial provisions which has been incorporated in the consolidated system of remedies. (Articles 70-72 *bis*, below).

SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Article 67: specification by buyer

159. The present article of the revised text is based closely on article 67 of 1964 ULIS. The one significant change is the omission of the provision that the seller may avoid the contract for any delay in providing specifications, even though that delay is slight and

of the above report. In addition, the phrase, "when the contract requires payment against documents" in article 72(2) of ULIS is subject to at least two interpretations: (1) The contract provides (or implies) that the buyer may not receive the bill of lading until he pays; this provision may not always be intended to preclude inspection before payment—as in cases where the contract also provides that payment is not due until after arrival of the goods. (2) The contract may use the phrase "payment against documents" in a setting where course of dealing or usage that imply that the buyer may not inspect before he pays. Of course, on this second hypothesis, no statutory provision is needed since the correct result is produced by virtue of the agreement of the parties. See articles 5 and 9 of the revised text.

¹⁰⁶ Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

¹⁰⁷ Article 60 is the same as in 1964 ULIS; see Working Group report on fifth session, paras. 22-25 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁰⁸ Working Group report on fifth session, paras. 36-59 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). See also the general introduction to chapter IV, at para. 145, above.

¹⁰⁹ Working Group report on fifth session, paras. 60-70 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). See also the general introduction to chapter III at para. 82, above, with respect to the problems presented in 1964 ULIS by the concept of "delivery".

¹¹⁰ Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

of no importance to the seller.¹¹¹ Instead, the revised text makes applicable the general provisions on the remedies of the seller. The Working Group approved the revised text in principle, but deferred final action until a later session.¹¹²

160. The observations by the representative of Norway suggest that this article should be removed from section III (remedies for breach of contract by the buyer); the end of the preceding section is suggested. (Stated differently, the heading for section III would be placed immediately after the article rather than immediately before the article.) The observations by the representative of Austria suggest that the article should remain in its present position. These observations also suggest that the reference in brackets to recourse to remedies should be deleted; authorizing the seller to make the specification, under this view, would be adequate.¹¹³

Article 70: seller's remedies in general

161. This is the first of four articles setting forth a consolidated set of remedies afforded to the buyer in the event of breach by the seller. Article 70 is closely patterned on article 41 which is the initial article on remedies afforded to the seller.¹¹⁴

162. The only pending questions are certain amendments for stylistic conformity proposed by the representative of Norway.¹¹⁵

Article 71: requiring the buyer to pay the price or take delivery

163. The present article is parallel to article 42, which deals with the right of the buyer to compel the seller to deliver the goods ("specific performance"). The representative of Norway proposes drafting changes in this article comparable to those proposed for article 42. See the discussion under article 42 at paragraphs 120-127 above. Account should also be taken of article 16, which contains a general rule limiting the right of specific performance.

Article 72: seller's notice fixing additional period

164. This article provides that the seller may request performance, and fix a time therefor (the *Nachfrist* notice); failure to comply with this request provides a basis for avoidance of the contract without establishing a "fundamental breach". This article corresponds to article 43 and presents no pending questions.¹¹⁶

Article 72 bis: avoidance of the contract by the seller

165. This article, dealing with avoidance of the contract by the seller, is comparable to article 44, which deals with avoidance by the buyer. As was noted in connexion with article 44 (para. 132, above) and

in the general introduction to chapter III (para. 89, above), the Working Group at its third session decided to eliminate the concept of automatic (*ipso facto*) avoidance of the contract; instead, avoidance of the contract must be based on a declaration by one party to the other.

166. At the fifth session, the Working Group was not able to reach a final decision as to the drafting of this article and concluded that it would give further consideration to three proposals (alternatives A, B and C) which are set forth in the revised text that appears as annex I to the report on the fifth session.¹¹⁷

167. One typical situation with which this article must deal may be illustrated by the following case (case No. 1): a contract of sale provided that the buyer would establish an irrevocable letter of credit for the price on 1 June, and that the seller would ship the goods on 1 July. On 1 June the buyer had not yet established the letter of credit.

168. The problem presented by the foregoing facts is whether the seller may immediately declare the avoidance of the contract, with the consequence that he need not perform even if the buyer establishes the letter of credit on 2 June, and without regard to whether the delay constituted a fundamental breach of contract. (The same problem would arise from any delay by the buyer in providing shipping instructions or specifications for the goods, or in performing any other aspect of his obligations under the contract.)

169. Alternative A approaches the above problem in the same manner as article 44: the seller may declare the avoidance of the contract either if (para. 1(a)) the delay constitutes a fundamental breach or if (para. 1(b)) the buyer fails to comply with a *Nachfrist* notice under article 72.

170. Alternative B provides rules that, in part, depend on whether the goods have been handed over to the buyer. Where the goods have been handed over, this proposal (para. 1(a)) seems to permit avoidance only on the buyer's failure to comply with a *Nachfrist* notice under article 72. Where the goods have not been handed over (para. 1(b)), avoidance depends on the existence of a fundamental breach; apparently the *Nachfrist* device is unavailable.

171. Alternative C deviates from alternative A only with respect to paragraph 2, which deals with the circumstances under which the seller may lose the right to declare the contract avoided.

172. The emphasis which alternative B places on the question whether the goods have been handed over suggests that this alternative was not directed to problems like those illustrated by case No. 1, above, but instead reflected concern lest a seller, who has delivered goods on credit, might attempt to use "avoidance" of the contract as a basis for recapture of the goods. It may be doubted whether such attempts would be

¹¹¹ Report of the Secretary-General on issues presented by chapters IV-VI, para. 30 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹¹² Working Group, report on fifth session, paras. 73-81 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹¹³ Comments, observations by Norway and Austria (reproduced in this volume, part two, I, 3).

¹¹⁴ Working Group report on fifth session, paras. 40-41 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹¹⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹¹⁶ Working Group report on fifth session, paras. 50-52 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹¹⁷ Working Group report on fifth session, paras. 53-59. (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). In the revised text in annex I to this report, a draft provision set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at para. 36, is designated alternative A; alternative B reproduces proposal A introduced at the fifth session, and alternative C reproduces proposal B introduced at that session.

frequent under the conditions of international trade; indeed, under some legal systems "avoidance" of the contract does not establish a ground for recovery of goods that have been delivered to the buyer unless the parties have expressly agreed that the seller retains title (or other "security" interest) in the goods which he may enforce if the buyer fails to pay.¹¹⁸ In any event, such consequences of avoidance of the contract are more closely related to the provisions of article 78 (2).¹¹⁹

173. The observations submitted by the representative of Austria support the approach of alternative A; the observations submitted by the representative of Norway suggest drafting modifications in paragraph 1 of alternative A, and, with respect to paragraph 2, prefer the approach of alternative C.¹²⁰

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

SECTION I. ANTICIPATORY BREACH

Article 73: suspension of performance; stoppage of goods in transit

174. Article 73 of 1964 ULIS provided that one party could suspend performance because of the deterioration of the economic situation of the other party. These rules were substantially revised by the Working Group at its fifth session.¹²¹ The principal revisions are as follows: (1) The principal ground for suspension has been made narrower: there must be a "serious deterioration" in the economic situation of the other party; (2) A second ground has been added: conduct by the other party "in preparing to perform or in actually performing the contract"; (3) The provisions on stoppage in transit are made expressly applicable only as between the seller and the buyer; (4) Under 1964 ULIS, the party suspending performance need not notify the other party, and the consequences following suspension are not stated;¹²² a new paragraph 3 included in article 73 provides that a party suspending performance shall give the other party prompt notice thereof, and shall continue with performance if the other party provides adequate assurance for performance. (Typically, such assurance would be provided by an irrevocable letter of credit or, in some areas, by a bank guarantee.)

175. Although at the fifth session some representatives reserved their position with respect to the redraft, the only observation submitted for consideration at the present session is a drafting suggestion by the repre-

¹¹⁸ Working Group report on fifth session, para. 56 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1), refers to a proposal that would limit the right to reclaim goods to those circumstances described above.

¹¹⁹ See Working Group report on fifth session, paras. 138-144 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹²⁰ Comments, observations by Austria and Norway (reproduced in this volume, part two, I, 3).

¹²¹ Working Group, report on fifth session, paras. 90-106 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). Article 73 of ULIS was analysed, and draft proposals for revision were set forth in report of the Secretary-General on issues presented by articles IV-VI of ULIS, paras. 48-63 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹²² Report of the Secretary-General on issues presented by chaps. IV-VI of ULIS, paras. 51-58 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

sentative of Norway that the words "the appearance of" be inserted prior to the word "a serious deterioration".

Article 74: delivery by instalments

176. This article is based on article 75 of 1964 ULIS, subject to drafting changes made by the Working Group.¹²³ The observations submitted by the representative of Norway include a proposed redraft of the second paragraph.¹²⁴

Article 75: avoidance prior to date for performance

177. This article is the same as article 76 of 1964 ULIS, except for a minor drafting change made by the Working Group at the fifth session.¹²⁵ There are no pending questions with respect to this article.

SECTION II. EXEMPTIONS

Article 76: excuse for non-performance

178. This article (article 74 in 1964 ULIS) deals with the circumstances in which a party will be relieved of liability even though he fails to perform the contract: the underlying legal issue is referred to in various ways which include the terms *force majeure*, impossibility and supervening disability. This problem was discussed by the Working Group at its fifth session, and was the subject of intensive work by a drafting party established during that session.¹²⁶ At the end of the session, the Drafting Party reported that it had not been able to agree on a final draft, but had provisionally adopted a text, which, together with an alternative proposal submitted by an observer, should be included in the report to facilitate later consideration of the article. (These two texts are referred to as alternative A and alternative B, respectively.)

179. At the end of the fifth session, the representative of the United Kingdom (who also had served as Chairman of the Drafting Party) agreed to prepare a study of the unresolved questions presented by this article, and has submitted a detailed study on this subject.¹²⁷ It would not be feasible to summarize this study; it will be sufficient to note that the study, in addition to analysing the problem, sets forth draft provisions for three articles which deal with distinct aspects of the problem.¹²⁸

180. Draft provisions are also proposed in the observations submitted by the representative of Norway, and comments on the topic are included in the observations by the representatives of Austria and of Bulgaria.¹²⁹

¹²³ Working Group report on fifth session, paras. 116-127 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹²⁴ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹²⁵ Working Group report on fifth session, paras. 128-134 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹²⁶ *Ibid.*

¹²⁷ Comments, study by the representative of the United Kingdom of problems arising out of article 74 of ULIS (reproduced in this volume, part two, I, 3).

¹²⁸ The study, at paragraph 9, presents a revision of article 76; this draft, labelled alternative C, is concerned only with exemption from liability in damages. At paragraph 12, the study proposes a second article [76 *bis*] which is addressed to the circumstances in which the contract may be avoided. At paragraph 17, the study proposes a third article [76 *ter*] which deals with the consequences of avoidance.

¹²⁹ Comments, observations by Austria, Bulgaria and Norway (reproduced in this volume, part two, I, 3).

Article 77 (deleted)

181. This article of 1964 ULIS is one of several provisions which are designed to make clear that a party who "avoided" the contract for breach does not lose the right to claim damages (see para. 133, above). The Working Group concluded that this point already resulted from other articles and, consequently, that this article should be deleted.¹³⁰

SECTION III. EFFECTS OF AVOIDANCE

Article 78: damages; return of goods or payments

182. This article of the revised text is the same as in 1964 ULIS. However, in view of proposals for revision made at the fifth session, the Working Group deferred final action on the article.¹³¹

183. The text of one proposal, set forth in the report on the fifth session, would differentiate between the effect of avoidance as to the innocent party (the "avoiding" party) and the party in breach, and also would distinguish between total and partial avoidance.¹³² No proposals have been submitted subsequent to the session with respect to this article.

Article 79: necessity for return of goods

184. This article, as adopted at the fifth session, is similar to article 79 of 1964 ULIS.¹³³

185. The observations submitted by the representatives of Austria suggest that in paragraph 2, subparagraph (a) is covered by paragraph (d) and therefore may be deleted; it is further suggested that subparagraph (e) may be deleted. The representative of Norway suggests that subparagraph (d) should be placed first. In addition, the reference in paragraph (d) to acts of other persons should be deleted in view of a general provision on this point to be added as article 12. (See para. 72, above).

Articles 80 and 81

186. No pending questions or proposals have been presented with respect to these articles.¹³⁴

SECTION IV. SUPPLEMENTARY RULES
CONCERNING DAMAGES*Article 82: basic rule on measure of damages*

187. This article, which includes minor modifications by the Working Group of article 82 in 1964 ULIS, appears at paragraph 165 of the report on the fifth session. (In annex I, through a typing error in the second sentence after "the loss which" there is an omission of the phrase "the party in breach had foreseen or ought to have foreseen at the time of . . .").*

188. The observations submitted by the representative of Norway propose that article 85 (with a draft-

ing adjustment) be moved to article 82 as paragraph 2.¹³⁵

Article 83: interest on sums in arrear

189. The Working Group approved this article in the same form as in 1964 ULIS.¹³⁶ The only current proposal is the suggestion of the representative of Norway that the reference to "habitual residence" is unnecessary in view of the general provision in article 4 (b).¹³⁷

Article 84: calculation of damages

190. This article, as approved by the Working Group, appears at paragraph 176 of the report on the fifth session. (In reproducing this article in annex I, in paragraph 1 the words "on the date" were omitted before the concluding phrase "on which the contract is avoided".)*

191. The revised text differs from the corresponding article of 1964 ULIS in two significant respects: (1) the party claiming damages may, if he chooses, rely instead on the general rule of article 82; 1964 ULIS seemed to restrict a buyer who has avoided the contract to article 84; (2) article 84 of ULIS had referred, in paragraph 2, to "the market in which the transaction took place"—a test which in international sales would be difficult of application. In place of this language, the revised text refers to "the place where delivery of the goods is to be effected". (In the revised text, the place for such delivery is specified in article 20.)

192. The only pending question is the suggestion by the representative of Austria that the test for measuring damages in paragraph 1 should refer to the date on which the goods were (or should have been) delivered, rather than to the date on which the contract was avoided.¹³⁸

Article 85: goods resold or bought in replacement

193. The revised text is based closely on 1964 ULIS, but requires that the resale or repurchase be made not only in a reasonable "manner" but also "within a reasonable time after avoidance".¹³⁹

194. As has been mentioned under article 82 (para. 191, above), the representative of Norway suggests that the rule of article 85 should appear as a second paragraph of article 82; a drafting change to show the relationship between the two paragraphs is included in the proposal.¹⁴⁰

Articles 86 and 87 (deleted)

195. The Working Group at its fifth session concluded that, in view of the revision of other articles in

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

¹³⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹³⁶ Working Group, report on fifth session, paras. 166-167 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹³⁷ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹³⁸ Comments, observations by Austria. This proposal was made at the fifth session and was considered by the Working Group: report on fifth session, para. 170 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹³⁹ Working Group, report on fifth session, paras. 177-182 (reproduced in this volume, part two, I, 3).

¹⁴⁰ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

* UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

¹³⁰ Working group report on fifth session, paras. 135-137 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹³¹ *Ibid.*

¹³² *Ibid.*, para. 143. Partial avoidance is provided for in articles 46 and 74 of revised text.

¹³³ *Ibid.*, paras. 145-156. The text of a proposal appears at para. 151.

¹³⁴ *Ibid.*, paras. 152-154 (art. 80); 155-156 (art. 81).

this section, articles 86 and 87 of 1964 ULIS became unnecessary.¹⁴¹

Article 88: mitigation of loss

196. This article requires the innocent party to take steps to mitigate the damages resulting from breach by the other party. The Working Group at its fifth session slightly relaxed the obligation imposed under 1964 ULIS; instead of "all reasonable measures", the innocent party is required to adopt "such measures as may be reasonable in the circumstances"; certain clarifying revisions also were made.¹⁴²

197. The representative of Norway proposes stylistic modifications in this provision, and proposes that it be supplemented by a second paragraph which would deal with the obligation of the buyer to buy goods in replacement and with the obligation of the seller to resell.¹⁴³ It would appear that this new paragraph would provide illustrations of the most important applications of the general principle stated in the article.

Article 89: damages in cases of fraud

198. This article, which permits recourse to applicable national rules to determine damages in cases of fraud, is the same as in 1964 ULIS. The representative of Austria proposes an amendment designed to make clear that proof of fraud would *not reduce* the damages recoverable under the uniform law.¹⁴⁴

Article 90 (deleted)

199. The Working Group decided at the fifth session that this article was unnecessary and was of doubtful value in relation to the usages of international trade. The observations submitted by the representative of Bulgaria suggest that the article should be retained.¹⁴⁵

SECTION V. PRESERVATION OF THE GOODS

Articles 91 to 95

200. These five articles of 1964 ULIS deal clearly and usefully with a practical problem: the need to preserve goods when the buyer delays in taking delivery or when the goods are rejected after their receipt by the buyer. The Working Group decided to approve these articles without change, and there are no pending questions with respect to them.¹⁴⁶

CHAPTER VI. PASSING OF THE RISK

A. GENERAL INTRODUCTION

201. In 1964 ULIS, the basic rule on passing of the risk is the provision in article 97 (1) that risk shall pass to the buyer "when *delivery* of the goods is effected . . .". As a result, consequences of great practical significance turn on the concept of "delivery". This

¹⁴¹ Working Group, report on fifth session, paras. 183-187 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁴² *Ibid.*, paras. 188-194.

¹⁴³ Comments, observations by Norway (reproduced in this Yearbook, part two, I, 3).

¹⁴⁴ Comments, observations by Austria (reproduced in this volume, part two, I, 3).

¹⁴⁵ Working Group, report on fifth session, paras. 200-201 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). Comments, observations by Bulgaria (reproduced in this volume, part two, I, 3).

¹⁴⁶ Working Group, report on fifth session, paras. 202-205 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

concept was the subject of an elaborate definition in article 19.

202. The Working Group, at its third session (January 1972), gave intensive consideration to the use in ULIS of "delivery" and concluded that its approach was unsatisfactory.¹⁴⁷ Part of the difficulty arose from the fact that this single concept governed too many distinct problems: e.g. the definition of the parties' contractual obligations; the time for payment of the price; passing of the risk of loss.¹⁴⁸ As a result, the definition became very complex. In addition, parts of the definition which had been developed to deal with one of these problems produced unintended consequences with respect to other problems to which it was applied. For example, in an attempt to deal with the problem of risk of loss when goods were non-conforming, the definition of "delivery" in article 19 provided that "delivery" consists in the handing over of goods "which conform with the contract"—with the result that non-conforming goods were accepted and used by the buyer were never "delivered" to him. Such a definition of "delivery" was not only artificial, but it would lead to the unintended result that the risk of loss indefinitely remained with the seller while the goods were used (or even consumed) by the buyer. To compensate for this problem, article 97 (2) set forth a complex provision providing (in effect) for the retroactive passing of risk where the buyer has neither declared the contract avoided nor required goods in replacement.¹⁴⁹

203. Another example of the complication that resulted from the attempt to deal with problems of risk of loss by way of a general definition of "delivery" is provided by articles 19 (3) and 100. Article 19 (3) included in the definition of "delivery" one of the aspects of performance by transmission by carrier. This provision was found to be inadequate as applied to problems of risk, with the result that an exception to article 19 (3) had to be set forth in article 100, which opens: "If, in a case to which paragraph 3 of article 19 applies . . .". The necessity to refer back and forth between the definition of "delivery" in article 19 and the special rules on risk in chapter VI made it difficult to read and understand the law; in addition, this approach so complicated the drafting process that unintended and unfortunate consequences were produced by a literal application of these various provisions.¹⁵⁰

204. In the light of these considerations, the Working Group at its third and fourth sessions took two basic decisions. The first was to delete the definition of "delivery" in article 19, and formulate the rules at the outset of chapter III (e.g. article 20) in terms of

¹⁴⁷ Working Group, report on third session (annex I), paras. 17-19 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

¹⁴⁸ The problem is discussed more fully in the report of the Secretary-General on delivery in ULIS (A/CN.9/WG.2/WP.8, UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1).

¹⁴⁹ This special provision on risk of loss did not, however, remove the basic difficulty in other settings that resulted from the fact that ULIS seemed to say that the goods were never "delivered" to the buyer even though he used (or consumed) them.

¹⁵⁰ Examples of such unintended consequences are given in the report of the Secretary-General on delivery in ULIS, at paras. 6-25 (risk of loss); 37-40 (time and place for payment of the price).

the specific steps that sellers shall take to fulfil their contractual obligations to supply or deliver goods (see para. 82, above).¹⁵¹ The second decision was that problems of risk of loss (the subject of chapter VI) would not be controlled by the concept of "delivery".¹⁵²

205. This second decision was implemented, at the fifth session, by redrafting provisions of chapter VI so that risk of loss passes to the buyer when the seller performs designated acts of performance of the contract —e.g. (article 97 (1)) when "the goods are handed over to the carrier for transmission to the buyer".¹⁵³ The problem of the effect of non-conformity of the goods (which, under 1964 ULIS was dealt with, in part, by an artificial definition of "delivery") is handled by an article (98 *bis*) addressed directly to the effect of non-conformity on risk of loss. The result is a presentation of the rules on risk of loss more unified and clearer than in 1964 ULIS. The presentation is also somewhat briefer, since the Working Group concluded that articles 99, 100 and 101 had become unnecessary.

B. PENDING QUESTIONS WITH RESPECT TO CHAPTER VI

Article 96: in general

206. This general introductory article makes explicit the rule (which is necessarily implicit in rules on passing of the risk) that loss or deterioration (damage) which occurs after the risk of loss has passed to the buyer does not excuse the buyer from paying for the goods. (Compare article 35 at para. 97 above.) This article, as approved by the Working Group, is the same as in 1964 ULIS. However, a decision was deferred as to whether the article should retain the reference to acts of a third person "for whose conduct the seller is responsible".¹⁵⁴ The representative of Norway proposes that such specific references be deleted in favour of a general provision (proposed article 12, para. 72, above).¹⁵⁵

Article 97: risk where the contract involves carriage

207. Paragraph 1 of this article states the basic rule which (in the absence of agreement or usage) would apply to the most typical international sale: where the contract involves carriage of the goods, risk shall pass "when the goods are handed over to the carrier for transmission to the buyer". The result is the

same as that reached under 1964 ULIS through a combination of article 19 (2) and article 97 (1).

208. The observations of the representative of Norway suggest that the text approved by the Working Group be made explicitly inapplicable where "the seller is not required to deliver [the goods] at a particular destination".¹⁵⁶ A similar exception ("and no other place for delivery has been agreed upon") appears in article 19 (2) of 1964 ULIS; the above observations note that the proposed language is also found in one of the modern formulations of commercial law.¹⁵⁷

209. The Working Group may wish to consider whether such an exception is necessary, and whether it might lead to misunderstanding. Presumably the contractual requirement "To deliver" at a particular destination should be given effect in the present article only in cases where such a requirement is expressed in a manner (like "ex ship") which implies that transit risk remains on the seller. On this assumption, the proposed language may be unnecessary, since all of the provisions of the law yield to agreement by the parties (articles 8, 9 (4); specific provision) to this effect need not be made in individual articles.¹⁵⁸ In addition, a reference to a requirement "to deliver" at a particular destination could lead to misunderstanding in connexion with rules on risk of loss. Since the seller usually makes the arrangements for carriage, the contract or shipping instructions often specify the place to which the seller is to dispatch the goods. In addition, some of the most common forms of price quotations ("C. I. F." and "C. & F.") imply that transit risks fall on the buyer even though the seller must bear the cost of freight to the named destination. In these, and in other types of quotations ("freight prepaid: freight allowed", and the like), framing the issue in terms of whether the seller is required "to deliver" has been a source of confusion;¹⁵⁹ the problems can be solved more readily in terms of the narrower and more specific issue as to whether the provision in question implies an exception to the general rule that transit risks pass to the buyer when the seller delivers the goods to the carrier. As has been noted, such an implication from the contract is given effect by article 8 and 9 (4) of the revised text.

210. Omitting such a special reference to a requirement "to deliver" would also make unnecessary the further provision, proposed in the observations by the representative of Norway, dealing with the passing of risk at "destination". Under the simpler text approved by the Working Group, if the contract states (article 8), or uses a trade term which implies (article 9 (4)), that transit risks remain on the seller, the point at the desti-

¹⁵¹ Preliminary discussions at the third session culminated in decisions at the fourth session. Working Group, report on third session (annex II) paras. 18-27; report on fourth session, paras. 16-29 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

¹⁵² Working Group report on third session (annex II) para. 17 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

¹⁵³ Draft proposals for such a reformulation of chapter VI were set forth and analysed in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, paras. 64-105 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁵⁴ Working Group report on fifth session, paras. 207-212 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁵⁵ Comments, observations by Norway (reproduced in this volume, part two, I, 3). It is further suggested that the words "deterioration of" be replaced by "damage to". This change seems useful since "deterioration" might imply natural spoilage or evaporation, whereas the article is concerned with casualties in transit.

¹⁵⁶ Comments, observations by Norway (reproduced in this volume, part two, I, 3).

¹⁵⁷ The observations by Norway refer to the United States Uniform Commercial Code, section 2-509 (subparagraph (1) (a)).

¹⁵⁸ The question whether the exception should be retained was discussed in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at para. 80 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁵⁹ It would appear that the "delivery" concept in article 19 (2) of ULIS which the current proposal would in substance restore, made it necessary for ULIS to add article 101, which provides: "The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses". The Working Group deleted this cryptic and unhelpful provision.

nation at which risk passes would, of course, be governed by any applicable provision of the contract or by usage implied by trade term. In the absence of such a provision, the transfer of risk would be governed by article 98 of the revised text. Under that article, risk would pass to the buyer when he takes over the goods; when the buyer is late in taking over the goods, risk passes to him from the moment when such a delay constitutes a breach of contract.¹⁶⁰

211. The observations by the representative of Norway propose clarifying amendments for paragraph 2 of article 97, and also propose the addition of a third paragraph based on ULIS article 100, which the Working Group decided to delete.¹⁶¹

Article 98: risk where the contract does not involve carriage

212. The comments of the representative of Norway propose clarifying amendments for paragraph 1, and a revision of paragraph 2, based on a text placed before the Working Group at the fifth session.¹⁶² The

¹⁶⁰ In the proposed addition to deal with transfer of risk at "destination", the concluding phrase "when time for delivery has come" may be less clear than is article 98 (2) in dealing with casualties that occur during a period allowed to the buyer for taking the goods.

¹⁶¹ Working Group report on fifth session, para. 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The report of the Secretary-General on issues presented by chapters IV-VI of ULIS, para. 87, discussed the question whether art. 100 of 1964 ULIS was needed in the setting of the revised rules on risk (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁶² Comments, observations by Norway (reproduced in this volume, part two, I, 3); Working Group report on fifth session, paras. 233-238 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

considerations with respect to the need for such a special provision would seem to be similar to those applicable to the proposal for a special provision as to delivery at "destination" (see para. 210, above). (One aspect of this proposal is to subdivide article 98, as approved by the Working Group, into two articles which would be numbered 98 and 98 *bis*.)

213. In paragraph 2 of this article, the second sentence, dealing with identification of the goods, was placed within brackets. The observations by the representative of Austria conclude that this sentence should be retained.¹⁶³

Article 98 bis: effect of non-conformity on passing of the risk

214. The above article has been considered by the Working Group, but final action was deferred until the present session.¹⁶⁴ The significance of this article has been discussed in paragraph 205, above. The representative of Austria concludes that the article is needed, but proposes a redraft of paragraph 2. Amendments for the article are also proposed by the representative of Norway.¹⁶⁵

¹⁶³ Comments, observations by Norway (reproduced in this volume, part two, I, 3). Reasons for retention of this provision are set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at paras. 83-84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁶⁴ Working Group report on fifth session, paras. 239-240, 241 (c) (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁶⁵ Comments, observations by Austria, Norway (reproduced in this volume, part two, I, 3). The latter proposal is in an article numbered 98 *ter*.

5. Report of the Secretary-General (addendum): pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex IV) *

1. This annex completes the analysis of the observations submitted by representatives of the Working Group on the International Sale of Goods with respect to pending questions. At the time documents A/CN.9/WG.2/WP.21 and Add.1 were prepared, some of these observations, in particular those submitted by the representative of the Union of Soviet Socialist Republics, had either not yet been received or were not available in English. For the sake of completeness those comments of other representatives which were not mentioned in the report of the Secretary-General are noted herein.

Article 1

2. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 2 in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

3. The representative of Mexico suggested that the language of paragraph 2 did not make it sufficiently clear that the Uniform Law would not apply if the fact that the parties had their places of business in differ-

ent States did not appear in the contract or from the dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Therefore, he suggested the addition of the words "and consequently the present Law shall not apply" following the word "disregard".

4. The representative of Bulgaria suggested the insertion of a provision indicating that if parties who are not otherwise governed by the Uniform Law choose it as the law of the contract, that will not affect the application of any mandatory provisions of law which would otherwise have been applicable. This matter is discussed in the report at paragraphs 14-17.

Article 2

5. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 3

6. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 in order to make the provision the same as the

* 18 February 1975.