## 5. Report of the Secretary-General: issues presented by chapters IV to VI of the Uniform Law on the International Sale of Goods (A/CN.9/87, Annex IV)

CONTENTS



### INTRODUCTION

1. This is a sequel to the report presented to the Working Group at its fourth session.[1] That report examined unresolved problems presented by the Uniform Law on the International Sales of Goods (ULIS)[2] in chapter III, "Obligations of the seller"; in response to a request by the Working Group, the report set forth proposed legislative texts dealing with these problems.

2. The proposals included the consolidation and unification of the separate sets of remedial systems contained in chapter III of ULIS. Part I of the present report includes a comparable proposal with respect to the separate sets of remedial provisions in chapter IV, "Obligations of the buyer". Subsequent parts of the present report consider possible solutions to problems presented by chapters V and VI of ULIS, as revealed by the comments and proposals by Governments,[3] and adjustments that may be advisable for conformity with decisions taken at prior sessions of the Working Group.[4]

[1] "Obligations of the seller in an international sale of goods: consolidation of work done by the Working Group and suggested solutions for unresolved problems: report of the Secretary-General" (A/CN.9/WG.2/WP.16; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2), herein cited as "Report of the Secretary-General on obligations of the seller". This report was reproduced as annex II to the progress report of the Working Group on the International Sales of Goods on the work of its fourth session (A/CN.9/75), herein cited as "Report on fourth session" (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3).

[2] The Uniform Law (ULIS) is annexed to the Convention Relating to a Uniform Law on the International Sale of Goods which was signed at The Hague on 1 July 1964. The Convention and Uniform Law appear in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I, at chap. I, 1 (United Nations publication, Sales No. E.71.V.3), herein cited as "Register of Texts".

[3] See "Analysis of comments and proposals by Governments relating to articles 71 to 101 of ULIS" (A/CN.9/WG.2/WP.17), herein sited as "Analysis".

[4] Earlier reports of the Working Group: report on first session (January 1970) (A/CN.9/35), UNCITRAL Yearbook, Vol. I: 1968-1970 part three, I, A, 2; report on second session (December 1970) (A/CN.9/52), UNCITRAL Yearbook, Vol. II: 1971, part two, I A, 2; report on third session (January 1972) (A/CN.9/62), UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5.

## I. CHAPTER IV. OBLIGATIONS OF THE BUYER

### A. SUBSTANTIVE OBLIGATIONS OF THE BUYER WITH RESPECT TO PERFORMANCE OF THE CONTRACT

#### 1. *Action taken at fourth session*

3. The Working Group at its fourth session considered four articles (56-59) in chapter IV of ULIS dealing with the substantive obligations of the buyer. Article 56 of ULIS (a general introductory provision) was approved without modification. The Working Group approved a revised version of article 57 (fixing the price), and deferred action on article 58 (net weight) until the current (fifth) session. With respect to article 59 (place of payment), the Working Group approved paragraphs 1 and 2; consideration of a proposed third paragraph (compliance with national law to permit the seller to receive the price) was deferred until the current session.[5]

#### 2. *Place and date of payment: articles 59 and 60*

4. Articles 59 and 60 of ULIS comprise a subsection entitled: "B. Place and date of payment". Analysis of these two sections discloses that they are incomplete with respect to the *date* for payment of the price, and most particularly with respect to the important practical question of the relationship between the time for payment and for the handing over or dispatch of the goods. The omission seriously impairs the clarity and workability of the law. Merchants need a clear, unified picture as to both *where* and *when* payment is to occur; and the vital aspect of payment needs to be placed in relationship to step-by-step performance of the sales contract by both parties.

5. To analyse the rules of ULIS that bear on the subject of section 1B, "Place and date of payment", it will be necessary to examine the interrelationship among several articles of ULIS. Following this analysis, an attempt will be made to unify and simplify the rules in question.

6. At first glance it would be assumed that article 59 (1) of ULIS attempts to deal with the relationship between payment by buyer and seller's performance. Article 59 (1) states that "where the payment is to be made against handing over of the goods or documents, [the buyer shall pay] at the place where the handing over of documents takes place." However, examination of this provision shows that it is a tautology. The "rule" only applies "where the payment *is to be against* the handing over of the goods or of documents". This premise for the rule on the place of payment necessarily assumes that the place for handing over the goods (or documents) and the place for payment of the price must be the same; articulating the conclusion that the payment shall be made at the place of the handing over of the goods merely restates the premise in different words and adds nothing to the general rule of ULIS that the parties shall perform the agreements they undertake. Such a circular statement is presumably harmless. But it must be borne in mind that article 59 fails to set forth a norm which (in the absence of contractual provision) deals with the question as to *when* the buyer is obliged to pay for the goods in relation to the time for the handing over of the goods or documents.

7. To find an answer to this basic question it is necessary to piece together other widely separated and complex provisions of ULIS. Over 10 articles later, it is possible to find in article 71 the following sentence: "Except as otherwise provided in article 72, delivery of the goods and payment of the price are *concurrent conditions*". "Concurrent conditions" is a legalistic concept not readily understandable by merchants, or even by lawyers from different legal systems; this provision is, however, presumably intended to express two important norms: (1) the buyer is not obliged to pay before he receives the goods; (2) the seller is not obliged to surrender the goods before he is paid. Both of these norms implement a common principle: reliance on the credit of another party, in spite of its frequency, calls for an assessment of the facts at hand and consequently is not required unless the parties have specifically so agreed.

8. One difficulty is that under the above provision in article 71 of ULIS, the price is to be paid concurrently with "delivery" (in the French text, *délivrance*). In ULIS, "delivery" (*délivrance*)—unlike "handing over" (*remise*)—does not refer to the surrender of possession or control of the goods. Instead, "delivery" is a complex and artificial concept the implications of which must be gathered from widely separate and complex provisions. To implement article 71 it is necessary in ULIS to look first at article 19, which sets forth rules on "delivery"; the Working Group at its third session found that article 19 was unsatisfactory, and at the fourth session decided that this article should be deleted.[6] In place of the attempt to define the concept of "delivery" the Working Group at the fourth session approved rules in article 20 on the steps to be taken by the seller to carry out his obligation to effect delivery.[7]

9. Under article 71 the rule that delivery and payment are "concurrent conditions" is applicable "except as otherwise provided in article 72". Article 72 applies only "where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of article 19, effected by handing over the goods to the carrier". In this setting, article 72 provides rules designed to reinforce the general proposition of article 71 to the effect that the seller is not required to either dispatch the goods or surrender control over the goods to the buyer until the buyer has

[5] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 150-177. The Working Group also deferred consideration of articles 60-70 of chapter IV (*ibid.*, para. 178). See also: "Compilation of legislative texts approved by the Working Group at its first four sessions" (A/CN.9/WG.2/WP.18) herein cited as "Compilation", reproduced in this volume, part two, I, 2, above.

[6] Report on third session (January 1972) (A CN.9/62/Add.1) (UNCITRAL Yearbook, Vol. III: 1972, part two: I, A, 5), paras. 15-21; Report on fourth session (1973) (A/CN.9/75), paras. 16-21 (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3). See also 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), paras. 37-40 and annex III.

[7] Report on fourth session, paras. 22-29; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

paid for the goods. However, the intended result is obscured by the reference to "delivery" of the goods.[8]

10. To sum up, section IB, "Place and date of payment" (articles 59 and 60), fails to deal with the most important problems under this heading; widely scattered provisions in articles 19, 71 and 72 touch on these basic questions but the answers are unclear and, on occasion, unfortunate. It would seem advisable to set forth a more complete presentation under the above heading in section IB, "Place and date of payment".

11. Such a presentation, which draws on the rules of articles 71 and 72, is set forth below as a redraft of article 60. It will be noted that paragraph 2 of the redraft takes account of the role played by documentary letters of credit in facilitating the exchange of goods for the price. The operative provisions on payment in ULIS virtually ignore this basic commercial arrangement.[9] The detailed operations of the documentary letter of credit must, in the interest of flexibility, be left to commercial usage; however, a direct reference to the documentary credit seems essential in a modern commercial law. Further questions can best be considered after examination of the draft provision, which follows:

(a) *Proposed redraft of article 60* [bis]

1. The buyer shall pay the price when the seller, in accordance with the contract and the present law, hands over the goods or a document controlling possession of the goods.

2. Where the contract involves carriage of the goods, the seller may either:

(*a*) By appropriate notice require that, prior to dispatch of the goods, the buyer at his election shall in the seller's country either pay the price in exchange for documents controlling disposition of the goods, or procure the establishment of an irrevocable letter of credit, in accordance with current commercial practice, assuring such payment; or

(*b*) Dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity.

(b) *Discussion of draft provision*

12. Paragraph 1 serves two basic functions. The first is to define the time when payment of the price is due. The time is specified in terms of the seller's performance in handing over the goods (or documents controlling them). This approach is appropriate in terms of the nature of performance of a sales contract. The seller's performance, in procuring or manufacturing the goods and, in the normal case, readying them for shipment involves more complex processes than the payment of the price. Often, under the contract or applicable usage, there is some leeway in time for the seller to complete these processes and to tender the goods to buyer or dispatch them by carrier. (See ULIS, article 21.) Before the seller is ready to perform the contract the price is not due; when the point is reached, the price is due—unless, of course, the parties have agreed on delivery on credit. The draft in paragraph 1 thus establishes a norm for the time of payment—an essential feature that is lacking from the section of ULIS entitled "Place and date of payment".

13. The second function of the draft is to articulate the accepted commercial premise that, in the absence of specific agreement, neither party is obliged to extend credit to the other; i.e., the buyer is not obliged to pay the seller until he has control over the goods, and the seller is not required to relinquish control until he receives the price.

14. The draft in paragraph 1 takes account of the fact that control over the goods may be effected by possession of a document that controls possession of the goods. The phrase "document controlling possession of the goods" would be understood to refer to documents such as negotiable bills of lading or similar documents of title under which the carrier requires surrender of the document in exchange for delivery of the goods.[10]

15. Paragraph 2 applies the basic principles of paragraph 1 to the circumstances that arise when the contract calls for carriage of the goods.

16. Paragraph 2 (*a*) affords the seller the opportunity to require that the price be paid before he dispatches the goods. In the sales governed by this law, the goods normally will be shipped to another country; the carriage will often be to a distant point and subject to substantial freight expense. Paragraph 2 (*a*) affords the seller the opportunity to avoid two hazards: (*a*) if the price is paid at destination, exchange control restrictions may make it impossible for the seller to receive the benefit of the sale; (*b*) if the buyer rejects the goods at a distant point the seller may incur serious expenses in reshipping or redisposal of the goods—expenses

[8] It will be noted that the quoted rule of article 72 permitting the seller to require payment at destination against surrender of documents applies when two conditions are met: (1) the contract involves carriage of the goods and (2) "delivery" under article 19 (2) is effected *by* handing over goods to the carrier. In view of the role which "delivery" in ULIS plays in connexion with risk of loss (see article 97 of ULIS) the above rule of article 72 would seem to be inapplicable when the contract provided that risk in transit would remain with the seller. In such shipments the seller would have as much or more justification for surrendering the goods at destination only when the buyer pays, but the use of the "delivery" concept in ULIS makes it difficult to reach this necessary result.

[9] Article 69 of ULIS refers to various payment devices, including the documentary credit, but the provision is without independent effect for it is expressly dependent on provisions in the contract or the applicability of usages or laws or regulations in force. This article consequently adds little or nothing to other provisions of ULIS. See articles 3 and 9, as approved by the Working Group; these articles are reproduced in the Compliation (A/CN.9/WG.2/WP.18; reproduced in this volume, part two, I, 2).,

[10] Whether a document controls possession of the goods depends on the provisions of the document in question and on applicable law. The reference in paragraph 1 to the effect of the document seems preferable to referring to the designations of such documents, such as "negotiable bill of lading" or "document of title", since such designations lack a uniform meaning.

which, in view of the uncertainties inherent in litigation and the buyer's credit, the seller may never be able to recover. Such considerations seem to underlie provisions in articles 59 and 72 of ULIS, but it is hoped that the statement of such rules as part of a unified presentation on the date and place of payment will be clearer and less subject to gaps and technicalities.

17. Under paragraph 2 (*a*), it will be noted that if the seller requires payment before dispatch of the goods, the buyer may elect to follow the customary and efficient procedures for handling such payment by establishing an irrevocable letter of credit in the seller's country.[11] Pursuant to the general rule in paragraph 1 and "current commercial practice" (paragraph 2), payment under the letter of credit would be due only on the presentation of documents that control possession of the goods.[12]

18. Paragraph 3 brings together, in the setting of the exchange of goods for the price, rules on the right to inspect before payment which appear in articles 71, 72 (1) and 72 (2) of ULIS. These three provisions of ULIS seek to express the general rule that the buyer may inspect the goods before he pays for them unless the arrangements for payment on which the parties have agreed are inconsistent with such inspection. Paragraph 3 of the draft states this as a single, uniform rule which is designed to avoid problems of interpretation that could arise under ULIS from the necessity to reconcile paragraph 1 and paragraph 2 of article 72. Under 72 (1) of ULIS (last sentence) the handing over of goods at destination would normally be arranged by sending the documents (including a negotiable bill of lading) to a collecting bank in the buyer's city, which would surrender the documents in exchange for payment of the price.[13] In such a payment article 72 (1) states that "the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods". On the other hand, paragraph (2) states:

> "Nevertheless, when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had an opportunity to examine the goods."

19. The difficulty of reconciling these provisions of paragraphs 1 and 2 of article 72 of ULIS can be illustrated by the following cases:

(*a*) *Case No. 1.* The contract calls for payment of the price on presentation of a negotiable bill of lading at the point of arrival of the goods and only after arrival of the goods.

(*b*) *Case No. 2.* The contract calls for such payment against documents prior to the time when arrival of the goods could be expected, or at a place remote from the place of arrival.

20. In case No. 1, inspection would be feasible, and the seller may be expected to provide therefor by an appropriate instruction on the bill of lading or by appropriate instruction to the carrier. In case No. 2, the terms of the contract show that inspection before payment was inconsistent with the procedures for delivery and payment to which the parties have agreed. Under the proposed draft, an effective tender of delivery by the seller would require that an opportunity for inspection be provided in case No. 1, but not in case No. 2. It seems difficult to work out satisfactory solutions for these standard situations under paragraphs 1 and 2 of article 72 of ULIS.

21. It will be noted that the above draft provision is designated as "Article 60 [*bis*]". This designation reflects the fact that questions have been raised as to the need for article 60 of ULIS.[14] If the Working Group decides to delete this article, the above draft provision could take its place. If the Working Group retains article 60 of ULIS, the above draft provision could appropriately follow this article.

### B. Remedies for breach of contract

#### 1. *Consolidation of separate sets of remedial provisions applicable to breach of the sales contract by the buyer*

22. Chapter IV of ULIS, entitled "Obligations of the buyer", sets forth only a few substantive rules as to the buyer's obligations but intersperses among these provisions three separate sets of remedial provisions that apply when the buyer fails to perform one or another of his substantive obligations. Thus, in chapter IV, separate remedial provisions appear in: (*a*) articles 61-64 (remedies for non-payment), (*b*) articles 66-68 (remedies for failure to take delivery), and (*c*) article 70 (remedies for failure to perform "any other" obligation). This fragmentation of remedial provisions parallels the approach of chapter III of ULIS, "Obligations of the seller". The Working Group at its fourth session decided that the separate sets of remedial provisions in chapter III should be consolidated.[15] The reasons for consolidating the remedial provisions in chapter III appear also applicable to chapter IV. The report of the Secretary-General presented to the Working Group at its fourth session analysed in detail the problems resulting from the creation of separate sets of remedial provisions for various aspects of the performance of a sales contract. As the report noted, unifying such provisions has the following advantages:[16]

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[11] It seems adequately clear that the letter of credit has been "established" if it has either been issued or confirmed in the seller's country.

[12] Under "current commercial practice" the letter of credit may also require the presentation of other documents related to the shipment. See ICC, Uniform Customs and Practice for Documentary Credits, *Register of Texts*, Vol. I, chap. II, B. However, specifying such details in an international convention would probably result in excessive rigidity.

[13] The collecting bank, acting for the seller, would normally hold both the bill of lading and a sight draft, drawn by the seller, calling for payment of the price. On payment of the draft, the collecting bank would surrender the bill of lading.

[14] See the analysis of comments and proposals presented to the Working Group at its fourth session (A/CN.9/WG.2/WP.15, UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 1), paras. 25-26. The need for article 60 of ULIS may be further diminished by adoption of the provisions on time for payment set forth in the above draft proposal.

[15] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 79-137.

[16] The report of the Secretary-General (A/CN.9/WG.2/WP.6) is reproduced as annex II to the report on fourth session (A/CN.9/75; reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2). Consolidating the remedial provisions is discussed at paras. 27-57, 111-155, and 158-162. The reasons for such consolidating are summarized at para. 177.

(*a*) A unified structure avoids gaps, complex cross-references and inconsistencies which result from such separate sets of remedial provisions. As a result, unified provisions can be drafted with greater simplicity and clarity;

(*b*) All of the substantive provisions on what the party *shall do* can be placed together and need not be interrupted by complex and technical rules on remedies for non-performance. Such a unified presentation of substantive duties makes it easier for merchants to understand, and perform, their obligations;

(*c*) Repetitive and overlapping provisions can be omitted, thereby simplifying and shortening the law. As the Secretary-General's report pointed out, the length and complexity of ULIS has been the subject of widespread comment; meeting these criticisms should be of assistance in facilitating the more widespread adoption of the Uniform Law.

23. In view of the action by the Working Group consolidating the separate sets of remedial provisions in chapter III, "Obligations of the seller", it seems likely that the Working Group would wish to consider a comparable consolidation in chapter IV, "Obligations of the buyer". Consequently, this report will consider first the provisions on the substantive obligations of the buyer. Examination of chapter IV discloses that it contains very few substantive provisions on performance by the buyer. This fact, reflecting the relatively narrow scope of the buyer's performance (payment of the agreed price), enhances the desirability and feasibility of consolidating (*a*) the substantive provisions and (*b*) the remedial provisions of chapter IV.

24. The first four of the substantive provisions in chapter IV, articles 56 to 59, were considered by the Working Group at its fourth session.[17] Article 60, and a proposed article 60 *bis*, were considered above (paragraph 11).

25. Articles 61-64 of ULIS comprise a subsection entitled "C. Remedies for non-payment". For reasons mentioned above (paragraphs 22-23), these remedial provisions will be considered later in connexion with a consolidation of the remedies of the seller.

26. Section II of ULIS, entitled "Taking delivery" (articles 65-68) is primarily composed of remedial provisions that duplicate those of subsection C of section I of ULIS. One of the relatively few substantive provisions in this section is article 65. This article constitutes merely a definition of "taking delivery". (The buyer is required to "take delivery" by article 56.) Retention of article 65 in its present form seems to present no problems.[18]

27. Article 66 sets forth remedial provisions for failure of the buyer to take delivery. (This article parallels article 62, which sets forth remedial provision for failure of the buyer to pay the price.) For reasons stated above (paragraphs 22-23), a consolidated set of remedial provisions will be set forth later (paragraph 36 below) following a unified presentation of the buyer's substantive duties.

28. Article 67 of ULIS is primarily concerned with the substantive rights and duties of the seller and the buyer when the contract gives the buyer the right to make certain specifications with respect to the "form, measurement or other features of the goods". In addition, this article includes in paragraph 1 a brief clause providing a remedy for failure of the buyer to make such a specification. The text of article 67 (with remedial provision in italics) is as follows:

*Article 67*

1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may *declare the contract avoided, provided that he does so promptly*, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

2. If the seller makes the specification himself, he shall inform the buyer of the details thereof and shall fix a reasonable period of time within which the buyer may submit a different specification. If the buyer fails to do so the specification made by the seller shall be binding.

29. It will be noted that the italicized remedial provision is so brief that it could be retained in this article without significantly impairing the advantages (discussed at paragraphs 22-23 above) of establishing a single, consolidated set of remedies applicable to breach of contract by the buyer. However, this remedial provision presents certain issues of policy that the Working Group may wish to consider.

30. Under article 67 (1) of ULIS, if the buyer fails to make a specification "*on the date* expressly or impliedly agreed upon", the seller may "*declare the contract avoided*, provided that he does so promptly". Under this provision, the seller may promptly declare the contract avoided without regard to the extent of the delay in making the specification and without regard to whether the delay constitutes a fundamental breach of contract. In this respect, the above provision is inconsistent with articles 26 (1), 30 (1), 32 (1), 43, 45 (2), 52 (3), 55 (1) (a), 62 (1), 66 (1) and 70 (1) (a) of ULIS and with the remedial provisions applicable to breach by the seller established by the Working Group at its fourth session.[19] Under all of these provisions, the severe remedy of avoidance of the contract is avail-

[17] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 150-177. It will be noted that article 58 (computation by net weight) was placed in square brackets with final action deferred until the present session (*ibid.*, para. 171). Action on a proposed third paragraph for article 59 was similarly deferred (*ibid.*, paras. 173-177).

[18] The analysis of comments and proposals presented to the Working Group at its fourth session stated that no comments had been made on this article (A/CN.9/WG.2/WP.15; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 1, paras. 33-34).

[19] Report on fourth session (A/CN.9/75); UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3, para. 108 (article 44 (1) (a)); see also Compilation (A/CN.9 WG.2/WP.18, reproduced in this volume, part two, I, 2 above.

able only for a fundamental breach of contract.[20] It is not evident that a brief delay by the buyer in supplying specifications to the seller would always be more serious than a delay by the seller in supplying the goods or a delay by the buyer in paying for them. Hence, in the interest of consistency and of sound policy, it would seem desirable to delete the italicized remedial provisions from article 67, so that delay or failure of the buyer to supply specifications would be subject to the general remedial provisions applicable to a breach of contract by the buyer.[21]

31. Article 68 sets forth remedies for failure of the buyer "to accept delivery of the goods or to make a specification". For reasons indicated above (paragraphs 22-23) the substance of this provision will be included in a consolidated remedial provision for chapter IV. (See paragraph 36 below.)

32. Article 69 sets forth, in one brief sentence, the only substantive provision in subsection III, "Other obligations of the buyer". Even this article is without independent effect, for the buyer's obligation is confined to taking those steps with respect to guaranteeing payment of the price that are "provided for in the contract, by usage or by laws and regulations in force". It seems unnecessary to repeat that the buyer shall perform his contract; ULIS in article 9 gives effect to usages; and it seems that "applicable" laws and regulations would continue to be "applicable" without such a vague (and circular) provision. Setting up this separate section on "Other obligations of the buyer" probably resulted from the creation of separate categories for the buyers' duties ("Section I. Payment of the price"; "Section II. Taking delivery"), each with its own remedial system. This attempt to categorize the buyer's duties created the need for a residuary "catch-all" section for any obligation of the buyer that might fall outside the first two sections. This problem is avoided by a unified presentation of (*a*) the buyer's substantive duties and (*b*) the remedies applicable to the breach of any of his substantive duties.

33. Since article 69 has no independent effect it could be omitted; by the same token its retention probably would not be harmful. However, provisions on payment (including assuring payment by establishing a documentary credit) were included in the proposed redraft of article 60 [*bis*] (paragraph 11 above). If an article along the lines of that proposal is adopted by the Working Group, there would be some gain in clarity and simplicity from omitting article 69 of ULIS.

34. Article 70, the last article in chapter IV, "Obligations of the buyer", provides a set of remedies for section III, "Other obligations of the buyer". Such separate sets of remedies would, of course, be unnecessary if the Working Group established a consolidated set of remedies for chapter IV.

### (a) *Approach to drafting consolidated remedial provisions*

35. For reasons noted above (paragraphs 22-23), it seems probable that the Working Group would wish to establish consolidated remedies for chapter IV, based on the consolidated remedies which it approved for chapter III.[22] As we shall see, the consolidated remedies for chapter III, "Obligations of the seller", can readily be adapted for chapter IV, "Obligations of the buyer". The principal adaptations result from the fact that performance by a buyer is less complex than performance by the seller; as a result, some of the remedial provisions in chapter III need not be retained for chapter IV.

### (b) *Draft provisions for Section II: remedies for breach of contract by the buyer*

36. Following is a draft set of remedial provisions for chapter IV based on the provisions (articles 41 *et seq.*) approved for chapter III. This system presupposes that the first part of chapter IV will set forth the substantive obligations of the buyer; these provisions could be grouped under a heading such as: "Section 1. Performance of the contract by the buyer".[23] The consolidated remedial provisions could then be grouped under a heading such as "Section II. Remedies for breach of contract by the buyer".[24]

### Proposed provisions

SECTION II: REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

*Article 70*

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

(*a*) Exercise the rights provided in articles 71 to 72 *bis*; and

(*b*) Claim damages as provided in articles 82 to 83 or articles 84 to 87.

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

*Article 71*

The seller has the right to require the buyer to perform the contract to the extent that specific per-

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[20] In many provisions of ULIS, and in the remedial system approved by the Working Group at the fourth session (arts. 43 and 44 (1) (*b*)) the innocent party may establish a basis for avoidance of the contract by a notice to perform within a fixed time of reasonable length (*Nachfrist*). Article 67 (1) of ULIS provides for a notice by the seller to the buyer, but the seller may avoid the contract for any delay in providing specifications without regard to whether such a notice has been given.

[21] The proposed structure for chapter IV is set out in paragraph 45 below. That presentation shows the proposed location of article 67 in the chapter.

[22] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3); paras. 83-130 (articles 41-47) and annex I. See report of the Secretary-General, *ibid.*, annex II (UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 2), paras. 111-177, especially paras. 158-176.

[23] This section would include the original or redrafted versions of articles 56, 57, 58, 59, 60, 65 and 67. See paras. 3, 11 and 28 above. The proposed structure for chapter IV is set out in para. 45 below.

[24] This section would take the place of articles 61, 62, 63, 64, 66, part of 67 (1), 68, and 70 of ULIS. To avoid confusion with the numbering in ULIS, the draft remedial provisions start with article 70, which in ULIS provides remedies for breach by the buyer of any "Other obligations". Articles 71 and 72 of ULIS have been incorporated in the draft article 60 [*bis*] which appears at para. 11 above.

formance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the seller has acted inconsistently with that right by avoiding the contract under article 72 *bis*.

*Article 72*

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for such performance. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present law.

*Article 72* bis

1. The seller may by notice to the buyer declare the contract avoided:

(*a*) Where the failure by the buyer to perform any of his obligations under the contract of sale and the present law amounts to a fundamental breach of contract, or

(*b*) Where the buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article 72.

2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or, where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72.

(c) *Discussion of draft provisions for section II: remedies for breach of contract by the buyer*

37. Article 70 is modelled closely on the initial article (article 41) in the consolidated remedial provisions for chapter III, as approved by the Working Group at its fourth session. In paragraph 1 (*b*) of article 70, it was necessary to add a reference to article 83, which is applicable to "delay in the payment of the price". Compare ULIS 63 (2).

38. Paragraph 1 of article 70 is an introductory index section. The word "and" has been inserted at the end of paragraph 1 (*a*) to preserve the principle of articles 41 (2), 55 (1), 63 (1) and 68 (1) of ULIS that a party may both avoid the contract *and* claim damages for breach.[25]

39. Paragraph 2, providing that the buyer may not apply to a court or arbitral tribunal to grant him a period of grace, incorporates the rule of article 64 of ULIS, which appears in section I, "Payment of the price" of chapter IV. Section II, "Taking delivery", and section III, "Other obligations of the buyer", do not contain this provision. Because of this omission, it might be argued that ULIS does not prohibit applications for periods of grace with respect to the obligations embraced within sections II and III. Such contention, presumably inconsistent with the intent of the draftsmen, illustrates the inconsistencies and gaps that result from the fragmentation of the remedial provisions applicable to various aspects of performance of the contract of sale.[26]

40. Article 71 is based on article 42 as approved by the Working Group at the fourth session. The only material modifications are: (*a*) the omission, at the end of paragraph 1 of article 42, of references to reduction of the price and cure of a lack of conformity of the goods, and (*b*) the omission of paragraph 2, which deals with the seller's delivery of substitute goods. These provisions are inappropriate to performance by the buyer and no corollary provisions applicable to performance by the buyer appear in chapter IV of ULIS.[27]

41. Article 72 is modelled closely on article 43 as approved by the Working Group. (Article 43 *bis*, approved by the Working Group for chapter III, deals with cure by the seller of any failure to perform his obligations. For reasons mentioned in the preceding paragraph, it is not included in the draft remedial provisions for chapter IV.)[28]

42. Article 72 *bis* is based on article 44 as prepared by the Working Group. The only significant modification is the omission of subparagraph 2 (*a*) of article 44, which relates to the provisions on seller's "cure" of defective performance.

43. Other remedial provisions applicable to performance by the seller (chapter III) do not appear appropriate to the relatively simpler performance by the buyer (chapter IV) and have not been included in the above draft. (Chapter IV of ULIS did not contain such provisions.) These remaining provisions of chapter III which have not been employed in the above draft proposed for chapter IV (paragraph 36) are as follows: article 45 (reduction of the price); article 46 (delivery of only part of the goods); article 47 (early tender of delivery; tender of a greater quantity of goods); article 48 (early recourse to remedies when it is clear the goods will not conform).

44. The above consolidated set of remedies, applicable whenever "the buyer fails to perform any of his obligations under the contract of sale and the pres-

[25] Articles 84-87 make clear that damages may be recovered on avoidance of the contract, but it may be advisable not to leave a reader in doubt on this point while examining the earlier portions of the law.

[26] Similar gaps and inconsistencies that appeared in the separate sets of remedial systems in chapter III are discussed in the report of the Secretary-General presented to the Working Group at its fourth session (A/CN.9/75, annex II; UNCITRAL Yearbook, Vol. IV: part two, I, A, 2) at paragraphs 164, 170, 171, 172, 174 and 176.

[27] Draft article 71 deals with the right to require the buyer to perform the contract. In chapter IV of ULIS, such a provision appears in section I (article 61) and in section III (article 70 (2)), but not in section II. This latter omission appears to be another accidental gap that resulted from fragmentation of the remedial provisions of ULIS. See para. 39, above.

[28] It would be possible to devise a provision on "cure" by a buyer of defective initial performance with respect to payment (i.e. correcting the terms of a letter of credit). However, the provisions on cure in article 44 of ULIS and in article 43 *bis* of the Working Group redraft seem to be occasioned by the special complications involved in the repair or replacement of defective goods. As has been noted, ULIS does not set forth a provision in chapter IV comparable to the cure provisions of article 44 included in chapter III. There seems no necessity for such provisions since such issues can be handled in terms of whether the initial failure of performance, or the delay in correcting such a failure, constituted a fundamental breach.

ent Law", deals with the substance of the issues dealt with in the three sets of remedial provisions in chapter IV of ULIS (subsec. I, C: articles 61, 62, 63 and 64; sec. II: articles 66, 67 (1) and 68; sec. III: art. 70).[29] It is believed that such a unification of the remedies available to the seller implements the policies that led the Working Group to take similar action with respect to chapter III. (See paragraph 22 above.)

### C. Proposed structure for chapter IV

45. The following indicates in skeletal form the structure for chapter IV that would result from decisions by the Working Group and the draft provisions set forth herein:

CHAPTER IV. OBLIGATIONS OF THE BUYER

SECTION I: PERFORMANCE OF THE CONTRACT BY THE BUYER

*Articles 56-59*

(See annex I to A/CN.9/75* and the compilation (A/CN.9/WG.2/WP.18**))

*Article 60* [bis]

(See draft provision at paragraph 11 above)

*Article 65*

(Same as ULIS; see paragraph 26 above)

*Article 67*

(See provision at paragraph 28 above, based on ULIS 67 except that the italicized remedial provision would be deleted.)

SECTION II: REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

*Articles 70-72* bis

( See draft provisions at paragraph 36 above)

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

### A. Revision and relocation of provisions on payment by buyer in articles 71 and 72

46. It was proposed above (paragraphs 7-11) that the substance of articles 71 and 72 be incorporated in chapter IV in order to achieve a more complete and intelligible presentation of the buyer's obligations with respect to payment (e.g., time and place for payment and right to inspection prior to payment). Such a consolidation was proposed in the draft article 60 [*bis*] that was set forth above at paragraph 11; this provision also dealt with drafting problems that are presented by articles 71 and 72. If the Working Group approves a provision along the lines of the above draft, articles 71 and 72 should be deleted from chapter V.

47. As has been noted, the matters dealt with in articles 71 and 72 are an integral part of the basic obligations of the buyer with respect to payment, which is dealt with in chapter IV, in subsection I, B, "Place and date of payment". Article 73 deals with a distinct problem: a privilege to suspend performance because of a supervening circumstance—i.e., "whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations". Problems presented by such supervening circumstances are closely related to the problems dealt with in chapter V, section II, "Exemptions" (article 74). Consequently, article 73 should remain in chapter V.[30] On the other hand, moving the provisions on the basic obligation of the buyer to pay the price in articles 71 and 72 to chapter IV would clarify the structure of the uniform law.

### B. Suspension of performance: article 73

48. The provisions of article 73 deal with two subjects: (1) paragraph 1 establishes a general rule on suspension of performance; (2) paragraphs 2 and 3 apply the general rule to a specific situation: preventing of the delivery of goods in transit to the buyer.

#### 1. *The general rule on suspension of performance*

49. Paragraph 1 of article 73 provides:

> "Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations."

50. One question, presented in 1969 in the reply by Egypt to an inquiry by the Secretary-General, emphasized that the above provision "leaves it to the party concerned to evaluate both the economic situation of the other party and the extent of the obligations which will not be performed".[31] The same issue was discussed at the Commission's second session (1969); other representatives expressed the view that under this provision a party is not given the right unilaterally to suspend performance, and that if a party acts inconsistently with the standard set forth in paragraph 1 he would be liable for damages for breach of contract.[32] Thus, one question that the Working Group may wish to consider is whether the statement in article 73 of the circum-

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* UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

** Reproduced in this volume, part two, I, 2, above.

[29] Article 66 (1) provides that where the buyer's failure to take delivery "gives the seller good grounds for fearing that the buyer will not pay the price", the seller may declare the contract avoided, even if such failure does not constitute a fundamental breach. No such provision appears in section I, "Payment of the price", or section III, "Other obligations", of chapter IV, and it is difficult to see why a failure (or delay) in taking delivery calls for more extreme remedies than a failure (or delay) with respect to payment of this price. Compare the discussion of article 67 on failure to supply specifications (para. 30, above). See also ULIS 73 (suspension of performance based on fear of non-performance).

[30] It would seem appropriate for article 73 to appear in section I of chapter V under a heading such as "Suspension of performance".

[31] A/CN.9/11/Add.3, p. 24.

[32] UNCITRAL, Report on second session (1969); *Official Records of the General Assembly, twenty-fourth session, Supplement No. 18* (A/7618), annex I, paras. 95-96.

stances authorizing suspension of performance is sufficiently definite and objective.[33]

51. A second question is the consequence of the suspension of performance. This problem can usefully be considered in the setting of the following concrete case, which is probably the most typical situation for which article 73 was intended.

52. *Case No. 1.* A sales contract made in January calls for delivery in June. In January an investigation by the seller's credit department indicates that the buyer's financial position is strong, so the seller agrees that the buyer may defer payment until 60 days after the June delivery.[34] However, in May the seller receives information that the buyer's financial position has been impaired so that it would be hazardous to deliver the goods prior to payment: in the language of article 73 (1), "there is good reason to fear" that the buyer will not perform a material part of his obligation.

53. In the above situation, article 73 (1) simply provides that the seller "may suspend the performance of his obligations". This brief statement raises several questions: Is the seller obliged to notify the buyer that he is "suspending performance", or may the buyer receive his first intimation of difficulty when the goods fail to arrive in June? If the buyer's financial position remains doubtful, is the seller entitled to do *nothing* further in performance of the contract? (Note that the only feature that should cause concern to the seller was the initial provision for delivery on credit.) What is the effect of the seller's "suspension of performance" on the buyer's duty to perform? (i.e., if the buyer does nothing to remedy the situation, is he liable to the seller for breach of contract, or does the deterioration of the buyer's financial position relieve him of responsibility under the contract?) Thus, under the present text of article 73 the situation seems suspended in mid-air.

54. In practice, the situation would be handled as follows: the seller would notify the buyer that, because of concern over a current financial report, the arrangement for delivery on credit will be suspended, and the goods will be shipped only if the buyer first assures that the price will be paid—typically by establishing an irrevocable letter of credit. The article would be more helpful if it gave somewhat clearer guidance to the parties based on normal commercial practice.

55. The operation of article 73 may also be examined in the setting of the following situation:

56. *Case No. 2.* A contract made in January calls for the seller to manufacture goods to buyer's specifications and deliver them in June in exchange for cash payment. In February the seller receives a discouraging report on the buyer's financial status so that there is "good reason to fear" that the goods manufactured to buyer's specifications would be left on seller's hands. (In this setting the seller cannot, of course, rely on a theoretical legal obligation by the buyer to compensate the seller for his loss.)

57. In this situation, as in Case No. 1, there is need for a careful reconciliation of the interests of both parties: (*a*) the seller needs protection against a practical hazard; (*b*) the buyer needs to know of the seller's concern; (*c*) the seller's performance should be subject to suspension only until the buyer provides assurance of payment on delivery—typically by procuring the issuance of a documentary letter of credit.

58. It seems advisable to supplement paragraph 1 of article 73 so as to deal with the foregoing problems. Consideration might be given to the following:

*Draft paragraph 1* bis *for article 73*

A party suspending performance shall promptly notify the other party thereof and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract.

2. *Preventing delivery of goods in transit to the buyer*

59. The provisions on stoppage in transit in paragraphs 2 and 3 of article 73, in actual practice, become applicable only under a rather rare combination of circumstances: (1) the seller dispatches the goods to the buyer without receiving payment or assurance of payment (as by documentary letter of credit) and without retaining control over the goods;[35] and (2) the seller receives new information as to the buyer's financial position while the goods are still in transit, and in adequate time to take the steps required to prevent the carrier from handing over the goods to the buyer. Provisions on stoppage in transit appear, in various forms, in national legislation and have led to intriguing theoretical speculation, but it is doubtful whether they have a significance in practice that is commensurate with their difficulty.

60. A basic question of interpretation arises under the ULIS provisions on stoppage in transit: Do these provisions impose legal obligations on carriers or third persons, or is article 73 confined to rights in the goods as between the seller and buyer? Article 8 of ULIS, as approved unchanged by the Working Group, provides: "The present Law shall govern *only the obligations of the seller and the buyer* arising from a contract of sale." On the other hand, a wider scope for article 73 seems to be implied from the provision in paragraph 2 that the seller "may prevent the handing over of the goods" by the carrier and, more particularly from the provision in paragraph 3 protecting a third person claiming the goods "who is a lawful holder of a document which entitles him to obtain the goods" unless the seller proves that the third person, when he obtained the document, "knowingly acted to the detriment of the seller". The 1969 reply of Austria to the Secretary-General's inquiry expressed concern over the liability which these provisions may inflict on carriers,

[33] This question is related to that presented by the provision in article 76 that a party may declare the contract avoided where "it is clear that one of the parties will commit a fundamental breach of contract".

[34] In practice, the sales contract would normally permit the seller to modify or withdraw such arrangements for credit until the time for delivery.

[35] Such control could be handled by consigning the goods to the order of the seller, and by transmitting this negotiable bill of lading, with a sight draft, through banking channels.

in conflict with provisions of municipal and international law concerning the carriage of goods.[36]

61. It would be difficult, within the scope of a uniform law on sales, to deal adequately with the rights of carriers and third persons. Therefore, it seems advisable to make it clear that any provisions on stoppage in transit in article 73 are limited to rights as between the seller and buyer, and thus are compatible with the scope of the law as defined in article 3. This could be accomplished by an addition to paragraph 2 of article 73. (In the following draft, it is doubtful whether the bracketed language (*a*) is surplusage, or (*b*) is helpful in the interest of clarity.)

*Proposed addition to article 73 (2)*

The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers or other persons].

62. If the Working Group decides that article 73 (2) is limited to rights as between the seller and buyer, paragraph 3 becomes unnecessary and could be deleted.

C. PROPOSED STRUCTURE FOR CHAPTER V, SECTION 1

63. The foregoing proposals would lead to the following structure for chapter V, section 1 (the first two articles of this section in ULIS—articles 71 and 72—would be incorporated into chapter IV; see paragraphs 7-10, and proposed article 60 *bis* at paragraph 11 above:

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

SECTION I: SUSPENSION OF PERFORMANCE

*Article 73*

1. Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations. (Same as ULIS 73 (1).)

1 *bis*. A party suspending performance shall promptly notify the other party thereof, and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract. (See paragraph 58 above.)

2. If the seller has already dispatched the goods before the economic situation of the buyer described in paragraph 1 of this article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them. The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers or other persons]. (ULIS 73 (2), with addition proposed at paragraph 61, above.)

(Paragraph 3 of ULIS 73 is omitted. See paragraph 62 above.)

III. CHAPTER VI. PASSING OF THE RISK

A. INTRODUCTION; RELATED DECISIONS BY WORKING GROUP

64. An important problem, for which a uniform law on sales should supply clear and practical answers, is whether the seller or the buyer bears the risk of loss to the goods. This problem usually is presented by damage or loss occurring after the goods have been handed over by the seller to a carrier or other intermediary and before they are received by the buyer. In normal practice, all or most of this loss will be covered by insurance.[37] But even in such cases rules on risk of loss are relevant to allocate the burden of pressing a claim against the insurer and of salvaging damaged goods; where insurance coverage is inadequate or lacking, rules on risk of loss have even greater impact.[38]

65. Significant decisions with respect to the approach to risk of loss were taken by the Working Group at its third session (January 1972). At that session the Working Group considered article 19 of ULIS, which sets forth a complex definition of "delivery" (*délivrance*).[39] The question of rules on risk of loss arose at that time, since the basic rule on risk of loss, contained in article 97 (1) of ULIS, states:

> "1. The risk shall pass to the buyer when *delivery* of the goods is effected in accordance with the provisions of the contract and the present Law."

Consequently, it was necessary to consider whether the definition of "delivery" in article 19 served well to determine where risk of loss would fall, as well as to determine the other issues which, under ULIS, turned on whether there had been delivery of the goods.

66. In response to an earlier request by the Working Group, the Secretary-General prepared a study addressed to the above question, which the Working Group considered at its third session.[40] At that session the Working Group took two important decisions that are relevant to the approach to chapter VI on passing of the risk.

67. First, the Working Group concluded that the concept of "delivery" was an unsatisfactory way to approach the practical problem of the risk of loss, and "that in approaching the problem of the definition of

[36] Analysis (A/CN.9/WG.2/WP.17), para. 13; A/CN.9/11, p. 9.

[37] In some settings the responsibility of the carrier for goods lost or damaged while in his charge is analogous to the protection provided by a policy of insurance.

[38] See also article 35 (1) (conformity of goods determined by condition when risk passes) and the discussion of this provision in the report of the Secretary-General on obligations of the seller (A/CN.9/75, annex II, paras. 65-67). Well drafted contracts, and general conditions of sale, make specific provision as to risk of loss, either by an explicit statement as to risk or by the use of a defined trade term such as "FOB" or "CIF". Cf. INCOTERMS (ICC Brochure 166), *Register of Texts*, vol. I, chap. I, 2.

[39] Report on third session (A/CN.9/62, annex II, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), paras. 17-19.

[40] 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.

'delivery' it would be assumed that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of 'delivery' ".[41]

68. Secondly, the Working Group concluded that it was necessary to adopt a different approach to "delivery" from that employed in ULIS. This culminated in decisions at the fourth session to delete the definition of delivery in article 19 of ULIS and to state the seller's *duties* as to delivery in article 20. As had been noted in the report of the Secretary-General, ULIS had vacillated between two approaches to delivery: one is to define the physical *act of delivery*; the second is to specify the seller's legal *duty to deliver*: i.e., the contractual duty *to perform* the contract.[42] Article 19 of ULIS, which the Working Group deleted, follows the first approach. Article 20, as drafted and approved by the Working Group at its fourth session, follows the second. Thus, article 20 is not a definition of the concept of "delivery" but states what the seller *shall do* to perform his obligation under the contract. Thus, under article 20 (*a*) delivery "shall be" effected in certain cases by "handing the goods over to the carrier" and under article 20 (*b*) and (*c*) (where the buyer is to come for the goods) "by placing the goods at the buyer's disposal"—usually at the seller's place of business.

69. For example, in the above situations covered by articles 20 (*b*) and (*c*) (i.e., where the buyer is to come for the goods), when the seller holds the goods at the buyer's disposal at the seller's place of business, the seller has performed his contractual *duty* with respect to delivery. But such performance by the seller does not constitute the *act* of "delivery", which, as the Working Group has observed, requires the co-operation of both parties in effecting a transfer of possession and control from one party to the other. Indeed, the buyer usually is unable, and is not required, to come and take possession of the goods as soon as they are placed at his disposition, and in some situations he may never come and take over the goods. In most such cases, on expiration of the period allowed for taking possession the buyer will be in breach of contract and will be responsible to the seller for loss resulting therefrom; however, in some cases the buyer's delay or total failure to come and get the goods may be subject to an "exemption" or excuse (article 74). Consequently, to conclude that a unilateral act by the seller under article 20 (*b*) or (*c*) constitutes an act of "delivery" which transfers risk of loss to the buyer could raise significant practical problems which call for further attention. See paragraphs 73-74 below.

### B. Issues presented by the risk provisions of ULIS, and suggested solutions

70. The approach chosen by the Working Group at the fourth session, in drafting article 20 as a statement of the seller's duty with respect to performance of the contract rather than as a definition of the act or concept of delivery, reinforces the decision taken at the third session—that rules on risk of loss would not be controlled by the concept of "delivery".[43] The underlying issues may be illustrated by reference to the following situation.

71. *Case No. 1.* The parties agree on the sale to the buyer of goods, which are to be made available to the buyer at the seller's place of business during the month of May, and which the buyer will come and take away by his own transport at any time during that month. (Compare a sale *ex works*.) On 1 May the goods are ready and available for delivery, but on 2 May the goods are destroyed by fire while they remain on the premises of the seller.

72. On the above facts, the seller has performed his contractual duty as defined in article 20 (*b*) and (*c*), as approved by the Working Group at its fourth session.[44] However, under the rules on risk of loss in ULIS, risk would remain on the seller. Under article 97 (1) risk passes to the buyer on "delivery"; under article 19 (1), (which is applicable in cases that do not involve carriage of the goods), "delivery" consists in "handing over" the goods—an event which, in the above case, has not occurred. Only when the buyer fails to perform his obligation with respect to removal of the goods (i.e., if he fails to come for them during May), would risk pass to the buyer by virtue of article 98 of ULIS.

73. The approach taken by ULIS with respect to risk of loss while the goods are in the seller's possession seems to be supported by practical considerations. In the absence of breach of contract by one party which prolongs possession (and risk) by the other party, there are practical reasons to allocate risk of loss to the party (*a*) who is in possession and control of the goods and (*b*) who, under normal commercial practice, is most likely to have effective insurance coverage for the goods. Each of these two considerations calls for brief comment.

(*a*) A buyer who is asked to pay for goods which he never received because they were destroyed while in the seller's possession will naturally consider the possibility that negligence of the seller or his agents caused or contributed to the loss. The relevant facts (e.g., the circumstances that led to a fire on seller's premises) present difficult problems as to proof (and disproof) and can lead to expensive litigation—as well as to disappointment of the buyer's expectation that he will receive from the seller the goods which the seller promised to hand over to him.

(*b*) Goods in the seller's possession awaiting delivery to the buyer are more likely to be covered by the seller's insurance than by the buyer's. One of the most efficient and common forms of insurance is the policy covering "Building and contents", which is carried by the businessman in possession and control of the

[41] Report on third session (A/CN.9/62, UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5) annex II, para. 17. The reasons supporting this conclusion had been developed, in the setting of concrete situations, in the above-mentioned report of the Secretary-General on "delivery" in ULIS (UNCITRAL Yearbook, Vol. III, 1972, part two, I, A, 1).

[42] 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), paras. 5, 41, 56-61.

[43] Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), annex II, para. 17 discussed above at para. 67.

[44] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), para. 29. See also the Compilation (A/CN.9/WG.2/WP.18), reproduced in this volume, part two, I, 2 above.

building. Such a policy is efficient and common because the insurer can calculate the conditions, and risk experience, with respect to losses in such a building (e.g., fire resistance of construction, storage of flammable materials, security measures against theft, and the like). The buyer who has just signed a contract for the purchase of goods is not likely to take out a special policy of insurance covering such goods, and such special coverage is relatively expensive because of administrative costs and the difficulty of rating risks under unknown conditions.

74. In addition, allocating to the seller the risk of loss of goods held by the seller on his own premises (as in the facts stated in case No. 1 at paragraph 71 above) minimizes complex problems of "appropriation" (identification) of goods and of notice to the buyer with respect to "appropriation" to which members of the Working Group have referred in connexion with ULIS 98 (2) and (3).[45]

75. For these reasons, suggested draft provisions, which appear below, follow the approach of ULIS as to allocation of risk of loss in the situation described above, rather than an allocation of risk based on the seller's performance of his contractual duty based on revised article 20. On the other hand, the proposed draft provisions integrate provisions which under ULIS are divided between article 19 and articles 96-101 (chapter VI), and also avoid the problems which the Working Group concluded were the result of the use in ULIS of the definition of "delivery" (*délivrance*).[46] Other aspects of the draft provisions will be explained below (paragraphs 77 to 86).

1. *Draft provisions for chapter VI: passing of the risk*

76. Consideration may be given to the following provisions for chapter VI:

CHAPTER VI. PASSING OF THE RISK

[*Article 96:* omitted]

*Article 97* (See ULIS 97 (1), 19 (2), 99)

(1) The risk shall pass to the buyer when the goods are handed over to him. (See ULIS 97 (1).)

(2) Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer. (See ULIS 19 (2).)

(3) Where the [sale is of] *contract relates to* goods *then* in transit [by sea] the risk shall be borne by the buyer as from the time of the handing over of the goods to the carrier. However, where the seller knew or ought to have known, at the time of the conclusion of the contract, that the goods had been lost or had deteriorated, the risk shall remain with him [until the time of the conclusion of the contract] *unless he disclosed such fact to the buyer* [*and the buyer agreed to assume such risk*]. (See ULIS 99.)

*Article 98* (See ULIS 98 (1) and (2))

(2) Where the contract relates to *unidentified* [a sale of unascertained] goods, delay on the part of the buyer shall cause the risk to pass only where the seller has [set aside goods] manifestly *identified goods* [appropriated] to the contract and has notified the buyer that this has been done. (ULIS 98 (2), with indicated drafting changes.)

[Paragraph (3) of ULIS 98 is omitted.]

[*Article 99*: Omitted: see article 97 (3) of above draft]

[*Article 100*: omitted]

[*Article 101*: omitted]

2. *Discussion of draft provisions for chapter VI: risk of loss*

77. Article 96 of ULIS, under the above draft provisions, would be omitted.[47] The provision that where the risk has passed to the buyer "he shall pay the price notwithstanding the loss or deterioration of the goods" from one point of view merely articulates an obvious implication of passage of the risk and duplicates the substance of article 35 (1) (first sentence), which has been approved by the Working Group.[48] Under this reading, the provision would probably be unnecessary but harmless. On the other hand, the provision that the buyer "shall pay the price" might be read (incorrectly) as a remedial provision which would give the seller the right to recover the full price (as contrasted with damages) whenever the risk of loss has passed to the buyer—an approach that would be inconsistent with the system of remedies approved by the Working Group at its fourth session.[49] The choice does not appear to be of major importance, and article 96 probably would not cause serious inconvenience in practice. However, in the interest of simplicity and clarity, the article is omitted from the above draft provisions.

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[45] See analysis (A/CN.9/WG.2/WP.17), para. 90 and annex V, paras. 5 and 11.

[46] Report on third session (A/CN.9/62; UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5), annex II, paras. 17-19; report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3), paras. 16-21. One of the difficulties resulting from the definition of "delivery" in article 19 of ULIS was that, under some circumstances, goods which were not in conformity with the contract would never be "delivered" to the buyer even if they were used or consumed by him. This led to both practical difficulties and difficulties of translation.

[47] See the divergent views on this question summarized in the Analysis (A/CN.9/WG.2/WP.17), para. 84. See *ibid.*, annex V, paras. 3, 6 and 11; annex VIII, paras. 6-7; annex IX, para. 16; reproduced in this volume, part two, I, 4 above.

[48] See Compilation (A/CN.9/WG.2/WP.18; reproduced in this volume, part two, I, 2), and discussion of article 35 in the report of the Secretary-General on obligations of the seller (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: part two, I, A, 2), annex II, paras. 65-66.

[49] See article 42 (1) (right to require seller to perform the contract), Report on fourth session (A/CN.9/75); UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3) para. 97. Compare the proposed draft article 71 (based on article 42) set forth above at paragraph 36. Recovery by the seller of the full price (as contrasted with damages) as a practical matter requires the buyer to take over the goods; where the seller is still in possession of the goods, this is equivalent to requiring specific performance of the contract, a remedy which, under ULIS and under the text approved by the Working Group, is not automatically available. However, this inconsistency would probably be insignificant if the Working Group approved the approach, recommended herein, whereby the risk of loss would not normally be transferred to the buyer until the goods are "handed over" to him.

78. Article 97 of the draft states in paragraph 1 a general rule on passage of risk which is applicable to the minority of cases where the contract does not involve carriage of the goods—i.e., where the buyer is obliged to come or send for the goods, as in a contract *ex works*. Cases where the contract involves carriage of the goods would be governed by paragraphs 2 and 3.

79. Paragraph 1 preserves the substance of the rule on risk of loss of ULIS which results from combining articles 19 (1) and 97 (1), but in a simpler and unified form. The reasons of policy that support the approach of ULIS on this point have been discussed in paragraphs 73 to 74 above.

80. Paragraph 2 preserves the substance of the rule that would result under ULIS under articles 19 (2) and 97 (1)—but again in a simplified and unified form. This draft does not retain the exception in article 19 (2) where another "place for delivery has been agreed upon". The purpose of that exception is to give effect to a contractual provision specifying the point at which risk shall pass to the buyer.[50] However, under article 8, the provisions of the uniform law yield to the agreement of the parties; repeating this rule in certain parts of the law seems unnecessary.

81. Paragraph 3 is based on article 99 of ULIS, which provides in limited circumstances for transfer to the buyer of loss that had occurred prior to the making of the contract. The provision is placed in conjunction with the rule of paragraph 2 (risk where the contract involves carriage) in conformity with suggestions made in studies prepared for the present session.[51] Certain possible drafting changes are indicated by brackets and italics. The most significant of these relates to the language of ULIS 99 (2), which states that even if the seller knew that "the goods had been lost or had deteriorated" and fails to inform the buyer of this fact, risk shall remain on the seller "*until* the time of the conclusion of the contract". It will be noted that under this article, the goods are in transit at the time of the making of the contract; if, after the contract is made, the goods suffer further transit damage this provision would make it necessary to ascertain the points during the transit at which various types of damage occurred—an inquiry that is subject to practical difficulties, particularly in the setting of modern containerized transport. In the interest of simplicity and fairness, the modification indicated at the end of article 97 (3) of the above draft (paragraph 76) would slightly restrict the benefits which this difficult and controversial provision confers on the seller.

82. Article 98 deals with the significant problem of the effect of breach by the buyer on risk of loss. This article could be applicable either at the end of transit under a contract calling for delivery *ex ship* (or the like), or at the seller's factory under a contract calling for the buyer to come for the goods. The above draft retains the substance of paragraphs 1 and 2 of ULIS 98, but omits paragraph 3. A study submitted for this session suggests that paragraph 1 of article 98 be retained (in substance) but that both paragraphs 2 and 3 of ULIS 98 be omitted.[52]

83. Paragraph 2 of article 98 responds to the fact that specific goods are usually not identified ("ascertained") when the contract is made, and that such identification normally occurs only when the goods are packed and labelled for shipment or for handing over to the buyer. It is a basic principle of sales law that risk of loss cannot pass until the goods in question are identified ("ascertained").[53] Indeed, it is difficult to think of passage of risk in goods unless one can identify the goods in question. This principle may be so fundamental that it need not be stated. On the other hand, the deletion of a statement of this principle, now embodied in ULIS 98 (2), may lead to misunderstanding. In addition, ULIS 98 (2) requires not only that the goods have been "manifestly appropriated to the contract" but also that the seller "has notified the buyer that this has been done". Where the seller seeks to hold the buyer for the loss of goods destroyed on the seller's premises, this notice requirement may be useful to prevent a false claim, following a fire or theft from the seller's place of business, that the goods lost had been "set aside" and "appropriated to the buyer".

84. Paragraph 2 of ULIS 98 employs the concepts "unascertained" and "appropriated". These concepts have complex connotations in national law which present problems of translation and could lead to misunderstanding in an international statute. "Identification" of goods seems to be a clearer concept, and has been suggested in italicized portions of the draft proposal.

85. Paragraph 3 of ULIS 98 is much less helpful. Indeed, this provision is difficult to apply in practice since it seems to contemplate that risk passes in unidentified ("unascertained") goods—an approach which, for reasons just mentioned, would present problems of application and dangers of abuse. For these reasons, paragraph 3 is omitted from the draft proposal.

86. Article 99 of ULIS, for reasons indicated above (paragraph 81) has been included in a slightly modified form, as paragraph 3 of draft article 97.

87. Article 100 of ULIS states a modification of article 19 (3) of ULIS, which the Working Group decided to delete.[54] ULIS 19 (3) deals with the possibility that goods might be handed over to the carrier without being clearly "appropriated" to the contract; ULIS 100 deals with the possibility that when the seller, after dispatching "unappropriated" goods, might send a notice to the buyer at a time when he knew (or ought to have known) that the goods had been lost or damaged in transit. Under article 97 (2) of the above draft proposal, risk passes to the buyer when the goods have been "handed over to the carrier *for transmission*

[50] This agreement may be expressed by a trade term (such as *ex ship*) which is understood to fix the point for passage of risk.

[51] Analysis, para. 92.

[52] See the analysis, para. 90 and annex V (reproduced in this volume, part two, I, 4, above), paras. 5, 6 and 11. On the other hand, the outline of provisions in annex VI (*ibid.*) calls for the retention of article 98. See also annex IX (*ibid.*), para. 18.

[53] It may be suggested that risks can pass when the buyer purchases a part or fraction of an identified larger mass or "bulk". However, this is not an exception to the general rule, for in such cases the larger mass must be identified; risk then passes with respect to a share in the larger mass or "bulk".

[54] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV :1973, part two, I, A, 3), para. 21.

*to the buyer*". In such a case, it seems that problems of lack of "appropriation" could scarcely arise. The combination of articles 19 (3) and 100 of ULIS produce a complex set of rules which seem unnecessary and difficult of practical application. Consequently, ULIS 100 is omitted from the draft provision—a result that is consistent with the study on this topic submitted for the present session.[55]

88. Article 101 of ULIS provides that the passing of risk "shall *not necessarily* be determined by the provisions of the contract concerning expenses". This cryptic statement was unhelpful in the setting of ULIS and would be quite unnecessary under the above draft provisions which avoid the complex concept of "delivery". The above draft omits article 101—a recommendation which conforms to that in the above-mentioned study.[56]

### 3. *Non-conformity of the goods: effect on risk and the right to avoid the contract*

89. Article 97 (2) of ULIS provides:

> 2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement.

90. This provision is addressed to the following situation: The goods which the seller hands over to the buyer (or to a carrier) do not fully conform to the contract. However, as often is the case when the non-conformity can readily be dealt with by an allowance or deduction from the price, the buyer does not "avoid the contract" or require the seller to replace the goods. In these circumstances, when does the risk of loss pass to the buyer?

91. The complex rules embodied in ULIS 97 (2) were designed to cope with consequences produced by the interaction of two other provisions of ULIS: (1) article 19 (1) of ULIS defines "delivery" as the "handing over of goods *which conform with the contract*"; (2) under article 97 (1), risk passes "when *delivery* is effected in accordance with the provisions of the contract and the present Law". These two provisions would produce the following surprising result: If the seller hands over goods which do not conform with the contract, "delivery" will never occur and risk will never pass to the buyer—even though the buyer chooses to retain the goods, and uses (or even consumes) them.

92. To avoid the above result produced by ULIS 19 (1) and 97 (1), it was necessary to add article 97 (2), which was quoted at paragraph 89. This provision is not easy to read, but it seems designed to say that if the buyer retains the goods (i.e., if he does not avoid the contract or require goods in replacement), the risk of loss shall be deemed to have passed retroactively to the buyer when the goods were handed over to him or to a carrier.

93. In short, the source of the difficulty that led to this provision was the rule of ULIS 19 (1) that "delivery" does not occur when goods are handed over which do not "conform with the contract". This difficulty has been removed by the Working Group's decision to delete article 19.[57] It would seem to follow that article 97 (2), at least in its present form, would be inappropriate. The question that remains is whether there is need for some other provision in chapter VI dealing with the effect of seller's breach of contract on the transfer of risk to the buyer.

94. This question can be analysed in the setting of the two following cases.

95. *Case No. 1.* The seller hands over to the buyer (or to a carrier) goods which fail to conform to the contract in a manner which, although requiring a reduction of the price, would not justify avoidance of the contract. These goods then suffer damage while in the possession of the buyer (or of the carrier).

96. *Case No. 2.* The facts are the same as in case No. 1, except that the non-conformity of the goods constitutes a "fundamental breach" which would justify avoidance of the contract. As in case No. 1, the goods suffer damage after they have been handed over to the buyer or to a carrier.

97. Case No. 1 presents the following issue: Should the minor non-conformity of the goods prevent the transfer of risk, which normally would have occurred when the goods were handed over? If so, minor breaches of contract could have serious consequences: (*a*) transit risks would often fall on the seller, even though the damage would normally be disclosed at destination, under circumstances in which the buyer (in accordance with the contract) could more efficiently assess the minor damage and file a claim against the insurer or carrier; (*b*) if the seller is made responsible for the damage to the goods, the breach would often be sufficiently serious to justify avoidance of the contract.[58] Both of the above consequences seem unfortunate: a minor non-conformity of the goods probably should not reverse the basic rules on risk of loss. If this conclusion is correct, no provision to deal with the situation described in case No. 1 need be added to chapter VI (risk of loss).

98. Case No. 2 involved a shipment in which the seller's breach was sufficiently material to entitle the buyer to avoid the contract. Should the fact that the goods were damaged in transit (after the risk passed to the buyer) bar the buyer from avoiding the contract on the ground that he could not "return the goods in the condition in which he received them", as required by article 79 (1).

99. If, as seems probable, the buyer should retain his right to avoid the contract in spite of the damage to the goods, it would be necessary to examine the five exceptions to the rule of article 79 (1) that appear in article 79 (2) to ascertain whether they adequately deal with this question. It seems that the problem may be

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[55] Analysis, para. 94 and annex V (reproduced in this volume, part two, I, 4, above) paras. 9 and 11. But compare annex IX (*ibid.*) in which article 100 is retained.

[56] *Ibid.*

[57] Report on fourth session (A/CN.9/75; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3) para. 21.

[58] Article 35 (1) provides that conformity of the goods with the contract shall be determined by their condition at the time when risk passes.

met by the fourth exception (article 79 (2) (d)). Under this provision:

"2. Nevertheless, the buyer may declare the contract avoided:

"...

"(*d*) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;"

However, it seems advisable to give final consideration to any problems of draftsmanship or clarity that may be presented by this provision in connexion with the Working Group's examination of the rules on avoidance in article 79 of ULIS.

100. The situation described in case No. 2 presents one further issue—the effect of a fundamental breach of contract by the seller on the passage of risk to the buyer. (It will be recalled that this problem arises only when the goods are seriously defective and also have been damaged—usually in transit.) If the buyer exercises his right to avoid the contract, or requires other goods in replacement, the answer is clear: the seller must take over and suffer any loss with respect to the goods that are both defective and damaged.

101. It might be suggested that where there has been a fundamental breach of contract, the buyer will normally exercise his right to avoid the contract (or require goods in replacement), so that no further problem need be considered. However, it is conceivable that the buyer's need for the goods might, in some cases, lead him to retain the goods. On this hypothesis, should the buyer be entitled to claim against the seller for (1) the defect, and (2) the damage to the goods that occurred after the seller handed them over?

102. Examination of ULIS 97 (2) (quoted at paragraph 89 above) shows that, under ULIS, if the buyer does not declare the contract avoided or require goods in replacement, the risk of loss remains with the buyer. Consequently, under ULIS: (1) the buyer may recover for the defect resulting from the seller's breach of contract; but (2) he may not recover for the damage to the goods that occurred after they were handed over. Under the simplified approach to delivery that has been adopted by the Working Group, and under the above draft provisions for chapter VI (paragraph 76), this same result is achieved without the addition of a provision like that of ULIS 97 (2). (As has been noted at paragraphs 90-93, above, the complex rule of ULIS 97 (2) was made necessary only by the provision in ULIS 19 (1) that goods are not "delivered" unless they "conform with the contract"; this problem has been removed by the Working Group by the deletion of article 19.)

103. The above approach has the merit of simplicity and probably would not encounter serious difficulty in practice. On the other hand, it might be suggested that the above approach is subject to the following criticism: The buyer may transfer the risk of loss to the seller if he avoids the contract but not if he retains the goods. As a consequence, this rule may encourage avoidance of the contract. However, the problem can arise only under a relatively rare combination of circumstances: the conjunction of (1) fundamental breach *and* (2) damage *and* (3) the lack of adequate insurance coverage *and* (4) a situation in which the buyer might be willing to retain the goods in spite of a fundamental breach.

104. If it is thought desirable to reverse the result achieved under ULIS and the above draft provisions for chapter IV, consideration might be given to adding the following as article 99. (It will be noted that article 98 deals with the effect of breach by the buyer; this would be followed by the following draft provision dealing with the effect of breach by the seller.)

*Draft article 99*

Where the failure of the seller to perform any of his obligations under the contract of sale and the present law constitutes a fundamental breach of contract, the risk with respect to goods affected by such failure of performance shall remain on the seller so long as the buyer may declare the contract avoided.

105. The attempt to devise a statutory text to deal with the above problem unfortunately requires recourse to the concept of "fundamental breach of contract"—a test that is inherently subject to doubt and dispute.[59] It may be doubted whether the situation is of sufficient practical importance (see paragraph 103 above) to justify complicating the rules on risk of loss. For these reasons, the above draft article 99 is not included in the draft provisions proposed for chapter VI.

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[59] It may be assumed that minor contractual deviations would not justify reversal of the rules on risk of loss resulting from the provisions of the uniform law or from the contract. See annex VI (reproduced in this volume, part two, I, 4) to the Analysis (comment to proposed article 94), and paragraph 97 above.