F. ANALYSIS OF COMMENTS AND PROPOSALS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, AND ON DRAFT PROVISIONS CONCERNING IMPLEMENTATION, RESERVATIONS AND OTHER FINAL CLAUSES

Prepared by the Secretary-General

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I. Introduction

1. This document analyses the comments and proposals of Governments and interested international organizations on the draft Convention on Contracts for the International Sale of Goods and is submitted to the Conference in response to a decision of the General Assembly.[1]

2. All comments and proposals received as at 8 February 1980 are analysed. As of that date comments and proposals had been received from the following Governments and international organizations:[2]

Governments

Australia (Add.1), Austria (Add.4), Byelorussian Soviet Socialist Republic (Add.1), Canada, Czechoslovakia (Add.4), Finland (Add.2), France (Add.4), Germany, Federal Republic of, Ireland (Add.2), Israel (Add.1), Netherlands (Add.3), Norway, Portugal (Add.3), Sweden (Add.1), Switzerland (Add.2), United Kingdom of Great Britain and Northern Ireland (Add.3), United States of America and Yugoslavia (Add.3).

International organizations

World Intellectual Property Organization (WIPO) (Add.2), Central Office of International Railway Transport, Berne (OCTI) and International Chamber of Commerce (ICC) (Add.2).

3. Since the analysis is complementary to document A/CONF.97/8 and the addenda thereto (which reproduce the comments and proposals in full), the analysis only sets forth the substance of the comment or proposal and the principal arguments adduced in support thereof.

II. Analysis of comments and proposals

A. COMMENTS AND PROPOSALS ON THE DRAFT CONVENTION AS A WHOLE

1. The following respondents, in commenting on the draft Convention as a whole, are of the view that its provisions are, in general, acceptable and that the draft Convention would be a suitable basis for the discussions at the United Nations Conference on Contracts for the International Sale of Goods: Australia, Austria, Czechoslovakia, Finland, Germany, Federal Republic of, Norway, Portugal, Sweden, United States, Yugoslavia, ICC.

2. The respondents mentioned in paragraph 1 above give the following reasons for their general approval of the draft Convention:

(a) The draft Convention was the result of a thorough preparatory process (Austria, Finland) and takes account of the principles of the different legal systems in the world (Portugal, Yugoslavia).

(b) The draft Convention is a substantial improvement over the Uniform Law on the International Sale of Goods (ULIS)[3] and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)[4] (Czechoslovakia, Finland, Norway, ICC) and is, as a result, more likely to receive widespread acceptance around the world than have ULIS and ULF (Sweden, United States).

(c) The draft Convention constitutes a significant achievement in the unification of international commercial law (Portugal, Yugoslavia). As a result, it will serve to facilitate international trade and diminish the risk of conflict between the parties to a sales contract (Sweden).

(d) The practical application of the draft Convention by practitioners will be made easy by the fact that it has been drafted in a flexible manner (Portugal) and the solutions chosen to a great extent comply with the need for simplification and clarity (Sweden).

(e) The Convention will be of major international importance and have a great prestige, particularly in the developing countries, since they participated in its elaboration and since it can reasonably by expected to play a significant role in the modification of the existing rules of the international sale of goods, which do not protect sufficiently the interests of the weaker contracting party (Yugoslavia).

3. All the respondents who find the draft Convention as a whole generally acceptable and suitable for consideration by the United Nations Conference on Contracts for the International Sale of Goods (listed in para. 1 above) note, however, that particular difficulties

[1] The draft Convention is reproduced in document A/CONF.97/5. Draft provisions concerning implementation, reservations and other final clauses, prepared by the Secretary-General are reproduced in document A/CONF.97/6. However, this document was not published at the time comments and proposals were requested.

[2] The comments and proposals received as at 14 December 1979 are reproduced in document A/CONF.97/8, and comments and proposals received thereafter are reproduced in addenda to that document. Unless otherwise indicated, the comments and proposals are reproduced in A/CONF.97/8.

[3] Annexed to the Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

[4] Annexed to the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1 July 1964.

still exist with the present text and suggest methods to resolve these difficulties. These comments are noted below in the discussion of the respective articles of the draft Convention to which they pertain.

4. Yugoslavia states that at the final drafting still greater consideration should be given to equal protection of the interests of both exporting and importing countries, i.e. to the interests of the buyer and seller, a result which would constitute a contribution to the establishment of the new international economic order. Yugoslavia goes on to state that the interests of the developing countries and the need for the establishment of the new international economic order should be taken into consideration at the adoption of the final text of the Convention.

5. ICC stressed the importance of the fact that a number of States have ratified ULIS and ULF already, and, therefore, that the new text ought not, without compelling reasons, differ from these uniform laws. Furthermore, due consideration should be given to the transitional provisions for those States which have ratified those conventions.

6. ICC states its regret that the new text is presented in the form of a convention and not, as were ULIS and ULF, as uniform laws annexed to a convention.

7. Portugal states that certain provisions of the draft Convention are too detailed.

B. Comments and proposals on provisions of the draft Convention

Part I. Sphere of application and general provisions

Sphere of application as a whole

1. The United States notes that these provisions have been the subject of lengthy discussions. Although it acknowledges that some variants to be found in the Convention on Limitation in the International Sale of Goods and in the UNIDROIT draft Convention on agency may have some slight advantage, it states that it is not desirable to devote much time to these problems at the Conference.

2. Austria states that it is particularly important not to permit reservations to the rules on sphere of application of the type permitted to ULIS. Doing so would probably lead to the failure of the work of UNCITRAL in this extremely important field.

3. Czechoslovakia in respect of article 1 also comments on the question of reservations to the sphere of application.

Article 1. [Sphere of application]

1. Switzerland and ICC state that the rules in respect of sphere of application are an improvement over those in ULIS.

2. Czechoslovakia states that the final provisions of the Convention should contain a provision enabling a reservation in respect of the sphere of application only in respect of contracts for the sale of goods where the parties have their places of business in different contracting States.

3. ICC finds that paragraph (1) *(b)* when combined with paragraph (1) *(a)* represents a useful compromise in contrast to the provision in article 2 of ULIS which excludes the rules of private international law for the purpose of application of the uniform law.

4. The Federal Republic of Germany recommends the deletion of paragraph (1) *(b)* since the rules of private international law apply differently to the formation of contracts than they do to the substantive rules. Alternatively it recommends an amendment to paragraph (1) *(b)* which would make it apply only to the contractual rights and duties of the parties.

Article 2. [Exclusions from Convention]

1. Switzerland finds the exclusions from the application of the Convention as set out in article 2 to be justified.

2. ICC believes that the exclusion of consumer sales in paragraph (1) *(a)* may make the Convention acceptable to a larger number of States.

Article 3. [Contracts for services or for goods to be manufactured]

1. Norway suggests that the order of paragraphs (1) and (2) be reversed.

2. Switzerland states that the exclusion of the sales mentioned in paragraph (1) is justified. It notes, on the other hand, that under paragraph (2) a contract for the supply of goods to be manufactured or produced is assimilated to a sale.

3. Czechoslovakia suggests the deletion of paragraph (1) and that paragraph (2) be reworded in such a way that the applicability of the proposed Convention be excluded in all cases where the buyer of goods is expected to supply all or any part of the materials needed for the production of the goods.

4. The United Kingdom suggests that the words "preponderant part" in paragraph (1) will cause uncertainty and are likely to be interpreted in different ways by the courts. It suggests a new text for the paragraph.

5. Norway suggests a new text for paragraph (2) which states when the supply of goods to be manufactured or produced is to be considered a sale rather than when it is not to be considered a sale as in the present text.

Article 4. [Substantive coverage of Convention]

1. Finland, France and the United States propose new provisions which would exclude from the coverage of the Convention claims for damages due to personal injury. France would also exclude claims due to death.

Finland would also exclude liability of the seller for damage caused by the goods sold to other goods, unless the goods sold were used in the production of the damaged goods.

2. Norway suggests a new paragraph which would exclude from the Convention the effect between the parties of a retention of title clause.

Article 5. [Exclusion, variation or derogation by the parties]

1. Switzerland notes that the fact that article 5 permits the parties to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions should reassure the practitioners in that the Convention does not impose rules on them to which they are not accustomed.

2. Canada recommends that the Convention apply only if the parties to the contract "opt-in" rather than the rule in article 5 that the Convention applies only if the parties "opt-out".

3. The United Kingdom suggests that article 5 should be amended so that it would state specifically that the parties could exclude the application of the Convention or derogate from or vary any of its provisions by implication as well as expressly.

Article 6. [Interpretation of Convention]

1. The United States regards the present text as an acceptable compromise with respect to "good faith". In particular, it finds it preferable to a separate article imposing an obligation of "good faith". It proposes a minor redrafting to improve clarity.

2. Yugoslavia considers the present wording of article 6 unsatisfactory and feels that the provision on good faith and fair conduct should be formulated as a separate article of the Convention.

3. ICC does not see the need for a reference in this context to "the observance of good faith in international trade" and prefers its deletion. If it is to be retained, it recommends that the wording be improved so as to exclude a construction of the concept that would be derogatory to the terms of the contract.

Article 7. [Interpretation of conduct of a party]

1. The United States states that it is important to have such a provision on interpretation in the Convention and supports the present wording of the article.

2. ICC recommends the deletion of article 7 on the grounds that a general rule on interpretation, applying to the formation of contracts as well as to the contract itself, should not have its place in a uniform law on sales. If such a rule was to be included, a more objective standard of interpretation should be set up.

3. The United Kingdom is of the view that the two conditions in paragraph (1) are tautologous since, if a party "could not have been unaware" of the other party's intent, then he must have known what that intent was. Therefore, it is suggested that the second condition be deleted.

Article 8. [Usages and established practices]

1. The United States proposes that it be made clear that the article applies to the formation of a contract by adding the words "or its formation" to paragraph (2).

2. Switzerland notes that practitioners should be reassured by the fact that the draft Convention recognizes the existence of an important network of clauses, model contracts and general conditions of sale in that under this article the parties to a contract of sale are bound by the usages to which they have consented and the practices they have established between themselves.

3. Czechoslovakia suggests that paragraph (2) should be supplemented in such a way that the usages applicable in accordance with this provision are applicable only to the extent they would not be in contradiction with the contents of the Convention. If this is not acceptable, it may be preferable to delete article 8 and rely upon article 4 *(a)*, i.e. that the Convention is not concerned with the validity of usages.

4. Sweden, Yugoslavia and ICC state that there should be a specific reference to the interpretation of trade terms, either by an amendment of paragraph (2) (Sweden) or by reintroducing article 9, paragraph 3 of ULIS (Sweden, Yugoslavia, ICC).

5. The United Kingdom asks whether, if two merchants in different common law States contract on c.i.f. or other trade terms, the Convention's rules on, for instance, risk of loss would prevail over the common law rules governing contracts entered into on the basis of those terms.

6. Yugoslavia states that paragraph (2) should not refer to a usage "in international trade widely known" because this is contained to a considerable extent in the preceding sentence according to which the parties "knew or ought to have known" a usage.

7. Yugoslavia goes on to say that if the formulation remains in the text, the word "international" should be dropped. ICC desires the same result in that it states that sometimes local usages must be taken into consideration, e.g. usages of a certain port from which the goods are to be shipped.

Article 9. [Place of business]

1. ICC states that it should be made clear in article 9 that for a place to be a place of business, a permanent business organization including a physical location and employees for the sale of goods or services should be maintained.

2. Finland and ICC state that the expression "closest relationship" is vague. Finland proposes a text which relies on the place from which the first offer or reply was

made which led to the conclusion of the contract. ICC states that only if the contract was concluded in the name of a branch (as distinguished from a subsidiary) should such place of business be relevant for the application of the Convention.

3. The Federal Republic of Germany, considering article 9 to be an article giving definitions, recommends a new subparagraph defining a "writing" as including a telegram and telex.

Article 10. [Form of contract]

1. ICC stresses the importance of this provision since a considerable part of world trade relies upon arrangements other than written contracts.

2. Czechoslovakia suggests that it should be made clear in article 10 that a contract must be in writing to be valid if either party so requires or, alternatively, to supplement article 16 to provide that an offer can be accepted only in a written form if the offer so requires.

3. Portugal states that once it is agreed that the contract can be proved by any means, it does not see why there should be special mention of witnesses.

Article 11. [Effect of declarations relating to form]

Article (X)

1. The United Kingdom and ICC express their concern over the consequences of articles 11 and (X).

2. Norway sees particular practical difficulties in applying the requirement of written form to all minor subsequent modifications of the contract.

3. Austria states that it would be preferable to return to the principle that a contract of sale is not subject to any requirements as to form. If that is not possible, Austria recommends that articles 11 and (X) be combined into a single provision which would permit a State whose law poses requirements as to form not to apply article 10 when one of the parties has its place of business in that State.

4. Netherlands suggests that article (X) may be too broad in that it allows a reservation if the legislation of a contracting State "requires *a* contract of sale to be concluded . . . in writing" (emphasis supplied).* This would allow a reservation if even a single specific type of contract of sale must be in writing. Therefore, it suggests an amendment to article (X) that a reservation be allowed if the legislation of the State requires "contracts of sale" to be in writing.

PART II. FORMATION OF THE CONTRACT

In general

1. Switzerland, the United States and Yugoslavia approve of the decision to include the rules on formation of contracts in the same text with the rules on the substantive rights and obligations of the parties.

2. Norway doubts that the benefits of a single text will outweigh the problems that some States might encounter in implementing into their national law only parts of an entire text or in implementing the different parts in different national statutes and it would, therefore, favour two separate conventions or one convention on the international sale of goods with a protocol or an appendix on the formation of contracts for the international sale of goods.

3. Finland, Portugal and Norway (as an alternative to its position in para. 2 above) support the possibility for a State to ratify only the part dealing with formation of contracts or only the part dealing with the sale of goods.

4. Switzerland states that it would be regrettable if States could adhere to only the part on formation of contracts or only the part on sale of goods.

5. Finland and Norway (as an alternative to its position in para. 2 above) would have the provisions of each part of the Convention numbered separately so that references to the provisions of the Convention can be made in the same way irrespective of what part of the Convention a State has acceded to.

6. Finland suggests that articles 10, 11 and 27 deal with the formation of contracts and that they should therefore be in part II of the Convention.

Article 12. [Offer]

1. Austria, the Byelorussian SSR, Finland, the Netherlands, Norway, Sweden, the United Kingdom, the United States and ICC express their disagreement with the second sentence of paragraph (1).

2. The United States notes that the offeror is not clearly permitted to leave a choice among terms to the offeree, as where the offeree may within limits choose the quantity or specify selection of the goods.

3. Finland, Norway and Sweden state that the second sentence should be understood to give only an example of what is a definite offer but that it should not be understood to be a definition. Sweden points out that in some cases the time and place of performance seem to be a *sine qua non* for a proposal to be sufficiently definite. Norway states that whether a proposal constitutes an offer should depend upon the intention of the offeror to be bound, and the question as to whether the offer is sufficiently definite should be only a factor in deciding whether there is such an intention.

4. Austria, the Netherlands, Sweden, the United Kingdom, the United States and ICC state that the provision is too strict in requiring the proposal to expressly or implicitly fix or make provisions for determining the price. They would leave questions relating to the price to be decided by article 51.

5. The Byelorussian SSR states that articles 12 and 51

* Note by the Secretariat: There seems to be some difference between the various language versions on this point.

are too permissive in respect of the price. If the price is neither determined nor determinable, it is not possible to speak of a contract.

6. Austria, the Netherlands, Norway, Sweden, the United Kingdom and the United States propose the deletion of the second sentence of paragraph (1). Finland as a primary proposal, and Austria, Norway and Sweden as alternative proposals, suggest redrafted versions of the second sentence.

7. The Byelorussian SSR proposes the deletion of the words "expressly or implicitly" in the second sentence of paragraph (1) as well as the deletion of article 51 in its entirety.

Article 13. [Time of effect of offer; withdrawal of offer]

1. ICC accepts the compromise in articles 13 to 15 between the legal systems in which an offer is irrevocable, at least for a reasonable time, and those in which an offer can always be revoked until it has been accepted. It states, however, that the distinction between withdrawal of an offer and revocation of an offer is puzzling and suggests that they be combined.

2. ICC also states that the rule that an offer cannot be withdrawn after it has "reached" the addressee seems too narrow to be applied to letters or telex communications.

3. Israel states that the possibility of withdrawal of an irrevocable offer may cause misunderstanding and suggests, therefore, the deletion of the second sentence of paragraph (1). Alternatively a redrafted text is proposed.

Article 14. [Revocability of offer]

1. Yugoslavia states that the general principle should be that of the irrevocability of an offer.

2. Australia notes that the words "dispatched an acceptance" are inadequate to cover th case of an acceptance by conduct and proposes an amendment to paragraph (1).

3. Israel proposes a redraft of paragraph (1) so that it provides merely for the commencement of the time when an offer may be revoked without referring to the conclusion of a contract.

4. The United Kingdom proposes an addition to paragraph (1) dealing with the revocation of public offers.

5. The United States supports the present text and notes, in particular, that paragraph (2) *(a)* permits the distinction to be made between the revocation of an offer (by countermand of the offeror) and the lapse of an offer (by passage of time). It notes that it is commonly accepted that an offeror may specify a time within which his offer will lapse without making it irrevocable for that period.

6. Norway and the United Kingdom state that paragraph (2) *(a)* adopts the general rule that, if the offer has stated a fixed time for acceptance, it is irrevocable for that time. Norway supports this interpretation. The United Kingdom proposes an amendment to provide that the stating of a fixed time for acceptance would not of itself indicate that an offer was irrevocable.

7. Yugoslavia states that paragraph (2) *(b)* is too subjective and may cause difficulties in practice.

Article 15. [Termination of offer by rejection]

Israel suggests that other circumstances in which an offer is terminated besides rejection be considered such as death, bankrupty or legal incapacity of the offeror or offeree.

Article 16. [Acceptance; Time of effect of acceptance]

1. ICC suggests that paragraph (3) may be too narrow and that it may be preferable to return to article 6 (2) of ULF.

2. The United States proposes an amendment to paragraph (3) so that an offeror who was not notified of the acceptance could treat the offer as having lapsed before acceptance.

Article 17. [Additions or modifications to the offer]

1. The United States supports the article as it is now drafted as it embodies an important compromise.

2. The United Kingdom suggests the deletion of paragraphs (2) and (3) so that the rule would be as stated in paragraph (1).

3. ICC states that the rule in paragraph (1) that a reply purporting to be an acceptance but being a counter-offer terminates the first offer may in some cases be too strict.

4. The Netherlands proposes to replace in paragraph (2) the words "without undue delay" by the word "promptly", which should be inserted between "offeror" and "objects".

5. The Netherlands suggest a new sentence to be added to paragraph (2) to permit the offeree to retract the additional or different terms to which the offeror has objected so that the terms of the contract would be those of the offer.

6. ICC finds that paragraph (3), which was intended to clarify and make more precise the words "not materially alter the terms of the offer", in fact extends it and will give rise to questions of interpretation. Therefore, it suggests deleting paragraph (3) and making paragraph (2), if possible, more precise by another wording.

Article 18. [Time fixed for acceptance]

1. Portugal states that it does not see any reason for the Convention to govern the matters covered by this article. However, if the article is retained, it would prefer that in respect of letters preference be given to the date on the envelope.

2. Israel suggests that in order to simplify matters the period of time for acceptance fixed by an offeror should in every case commence from the time the offer reaches the offeree, irrespective of the means of communication.

3. The United Kingdom suggests that both sentences in paragraph (1) should be qualified by the expression "Unless otherwise stated by the offeree" so that it would be clear that the offeror can state a point of time different from that laid down in the article.

Article 19. [Late acceptance]

1. Israel suggests that for the sake of clarity the last part of paragraph (1) should read ". . . the offeror so informs the offeree, without delay, orally or in writing."

2. Australia states that the rules as to late acceptance work well where the offeror has stated a specific time for acceptance but not where no time for acceptance has been stated and the offer must, therefore, be accepted within a reasonable time. In such a case it suggests that the best solution would be that a late acceptance is effective unless the offeror notifies the acceptor orally or in writing to the contrary, without delay after receiving the notice of acceptance.

PART III. SALES OF GOODS

Article 23. [Fundamental breach]

1. ICC states that the present definition is a considerable improvement compared to the definition in ULIS.

2. The Federal Republic of Germany, Portugal and ICC suggest amended versions of the text so that the test as to whether a breach is fundamental will depend more on the content of the contract.

3. Portugal and the United Kingdom state that the article should prescribe the point in time at which the party in breach should have foreseen the detriment if the breach is to be treated as a fundamental one and that the appropriate point should be the time when the parties enter into contractual relations.

4. Ireland states that it is difficult to accept the principle that simply because the party in breach did not foresee or had no reason to foresee the substantial detriment that this would stop the breach from being a fundamental one.

Article 24. [Notice of avoidance]

1. ICC approves of the doing away of the principle of *ipso facto* avoidance and its replacement by avoidance by notice to the other party.

2. Portugal proposes to add that this notice is not subject to any conditions as to form.

Article 25. [Delay or error in communication]

1. The Netherlands notes that part II of the Convention follows a receipt rule whereas, under article 25, part III generally favours a dispatch rule. It suggests that this matter be reconsidered and that a general rule in favour of the concept of receipt is preferable to the rule now contained in article 25.

2. The Federal Republic of Germany suggests that article 25 be made applicable to the entire Convention by inserting it in part I and by referring to "This Convention" rather than to "part III".

3. Norway recommends that article 25 be made applicable to article 65 (4) by appropriate amendment to that article.

Article 26. [Judgement for specific performance]

The United States and the United Kingdom recommend amending the article so that a court would be bound to order specific performance of a contract under the Convention only if the court "would" do so in relation to similar contracts under its own law, rather than whether it "could" do so as is provided in the current text.

Article 27. [Modification or abrogation of the contract]

1. The United States states that this article on modification is of considerable practical utility and that paragraph (1) is of special importance for common law countries.

2. ICC expresses disagreement with the article since a failure to use a written form when the contract itself requires a written form for modifications may make the oral modification null and avoid.

3. Finland, Norway, Sweden and ICC recommend moving the article from part III to part II of the Convention.

4. Portugal suggests a rewording of paragraph (1) which would emphasize that the modification or abrogation of the contract by only one of the parties is admitted only under unusual circumstances.

Article 29. [Absence of specified place for delivery]

1. The Netherlands states that subparagraph *(a)* as well as the equivalent provision in article 79, should be restricted to cases where the contract of sale involves carriage of goods by sea since it is doubtful whether the rule contained in these articles fits all modes of transportation.

2. ICC recommends the amendment of article 29 to make it clear that when a delivery term, such as FOB, has been agreed upon, such cases fall outside the scope of article 29.

Article 30. [Obligations in respect of carriage of goods]

Yugoslavia states that as regards paragraph (3), which provides for certain duties of the seller in cases when he "is not bound to effect insurance in respect of the carriage of the goods", it is not clear whether this applies to his contract obligations only or to those arising from

usages. If the usages are not taken into account in this formulation, it would be useful to point that out explicitly.

Article 31. [Time of delivery]

1. ICC states that subparagraphs *(b)* and *(c)* should be amended by a provision that the seller has to give the buyer notice of the seller's choice in order to prevent the seller from merely leaving the goods somewhere before the buyer takes them over.

2. Portugal states that subparagraph *(b)* should be rewritten to anticipate the case where the buyer and seller together are to choose a date.

Article 32. [Handing over of documents]

1. Portugal expresses its doubts as to the utility of this article. It suggests that there might be a provision stating the content of the obligation where there is an obligation to hand over documents but the contract does not indicate the time or the place or the form in which the documents are to be handed over.

2. Israel and Yugoslavia state that the obligation under this article can arise not only be contract but by usage, and that this should be expressed.

Article 33. [Conformity of the goods]

1. Australia suggests including a clause in this article providing that any non-conformity under the article which is clearly insignificant not be taken into consideration.

2. Yugoslavia states that it is not clear whether the introductory sentence of paragraph (1) covers conformity of the goods with regard to the larger or smaller quantity as well as to the delivery of other goods.

3. Portugal suggests the deletion of the words "Except where otherwise agreed" in the second sentence of paragraph (1).

4. The Federal Republic of Germany recommends that paragraph (1) *(b)* be amended to read "are fit for any particular purpose expressly or impliedly made part of the contract".

5. ICC states that it should be understood that the seller's responsibility is engaged under paragraph (1) *(b)* only when the particular purpose for which the goods have been purchased has been made clear to him. If that is not understood, the text should be clarified.

6. ICC states that the seller cannot be responsible for the conformity of the goods with administrative regulations in the buyer's country. Such non-conformity would not touch on the purpose for which they are ordinarily used and the question whether they would be fit for the particular purpose of being used in the buyer's country would have to be answered by application of paragraph (1) *(b)*.

7. WIPO suggests that at the end of paragraph (1) *(c)* be added the words "or of goods bearing the brand name where the buyer has selected the goods by that brand name".

8. The United Kingdom suggests deleting the words "or could not have been unaware". Israel suggests replacing them by "or ought to have known of".

Article 36. [Examination of the goods]

1. The Netherlands suggests reintroducing into paragraph (3) the reference to an intervening transshipment of the goods as contained in article 38 (3) of ULIS.

2. Israel suggests reintroducing article 38 (4) of ULIS dealing with methods of examination.

Article 37. [Notice of lack of conformity]

1. Czechoslovakia suggests that the effect of a failure to give notice should be only the unenforceability of the rights or legal effects similar to prescription rather than the loss of rights.

2. Czechoslovakia, Portugal, Yugoslavia and ICC recommend that the two-year period be shortened to one year.

3. The Netherlands suggests that the time limit should not apply to claims for personal injuries arising out of the non-conformity of the goods or to damage caused to other goods intended for private use or consumption.

Article 38. [Seller's knowledge of lack of conformity]

The United Kingdom suggests that the words "or could not have been unaware" should be deleted.

Article 39. [Third party claims in general]

1. As to the use of the terminology "industrial or intellectual property", see the comment of the World Intellectual Property Organization to article 40.

2. Portugal suggests deleting the last phrase of paragraph (1), which it says is already embodied in the principle of autonomy of the will, and replacing it by a new phrase which would limit the buyer's rights where he knew or could not have been unaware of the right or claim of the third party.

3. Portugal suggests deleting the reference to industrial or intellectual property as unnecessary in the light of the following article. Yugoslavia also suggests deletion because the reference can lead to a wrong interpretation.

4. The Federal Republic of Germany recommends a new article 40 *bis* which would deny to the seller the right to rely on the provisions of article 39 (2), as well as article 40 (3), if he already knew of the right or claim of the third party.

5. Norway proposes a redrafting of paragraph (2): "The buyer loses the right . . .".

6. Ireland questions how paragraph (2) would work in an actual trade transaction in that it might be late for

the buyer to advise the seller after the buyer received a consignment of goods that there was a third party claim over them.

7. Norway proposes a new paragraph (3) so that the buyer would have the remedies which follow from the delivery of goods which do not conform with the contract, except for article 45 (1) *(b)*.

8. ICC proposes a new provision, which it labels article 48 *bis*, which would allow the buyer to require the seller to cause the goods to be freed from any right or claim of a third party. If this were not achieved within a reasonable time, the buyer could avoid the contract and claim damages.

9. See the comments of Finland and Norway to article 46.

Article 40. [Third party claims based on industrial or intellectual property]

1. Yugoslavia states that the article may be useful for an uninformed buyer by warning him of the various implications of industrial property when selling goods.

2. WIPO recommends changing the reference to "industrial or other intellectual property" since industrial property is a form of intellectual property.

3. See the comments of the Federal Republic of Germany to article 39.

4. The United Kingdom proposes the deletion of "could not have been unaware" in both paragraphs (1) and (2).

5. ICC states that the Commentary is incorrect where it says that the seller "could not have been unaware" of a claim if that claim was based on a patent application or grant which had been published in the country in question.

6. See the ICC proposal in respect of remedies set out in article 39.

Article 41. [Buyer's remedies in general; claim for damages; no period of grace]

1. ICC does not object to the consolidated system of remedies provided that the remedies for different kinds of breaches, such as non-delivery of goods, delivery of defective goods and non-payment, are differentiated sufficiently.

2. The Netherlands also approves the consolidated system of remedies. It suggests, however, that the Convention should provide, as did articles 34 and 53 of ULIS, that the buyer has no contractual remedies other than those conferred on him by the Convention. Another possibility would be to extend the two year notice provision in article 37 (2) to such actions as those based on error or on a claim that the sale was void because the goods sold did not belong to the seller.

3. Yugoslavia states that the provisions relating to sanctions in case of breach of contract are concise and simplified, but that this is to the detriment of the clarity and general layout of the text.

4. Portugal doubts that paragraph (2) has any utility. It also suggests as a drafting matter the addition of "and" between subparagraphs *(a)* and *(b)* in paragraph (1).

Article 42. [Buyer's right to require performance]

1. Norway sets out its understanding that the buyer's right to require performance is limited by article 65 and, by reason of article 26, any limitation or conditions in national domestic law. It gives an example in respect of limitation on the right to require repair of the goods.

2. Finland, the Federal Republic of Germany, the Netherlands, Norway, Portugal, Sweden and ICC propose that the right to require repair be made specific in the text. All but the Netherlands and Portugal propose specific texts.

3. The United States proposes that the buyer not have the right to require performance if he could purchase substitute goods without [unreasonable] [substantial] additional expense or inconvenience.

4. The United States also proposes a text to restrict the right of specific performance with regard to time.

5. The Federal Republic of Germany states that if the goods do not conform with the contract, the buyer should always be entitled to require delivery of substitute goods, unless the seller could not reasonably be expected to deliver substitute goods.

Article 43. [Fixing of additional period for performance]

1. The United States proposes to reword paragraph (1) so that it would apply only where the seller has failed to deliver some or all of the goods, thereby bringing it into conformity with article 45 (1) *(b)*.

2. See the comment of the Netherlands to article 45.

3. The United Kingdom proposes to reword paragraph (1) so that the fixing would be by notice to the seller.

4. The Netherlands recommends that paragraph (2) be amended so that the buyer may not resort to any remedy for breach of contract which is *inconsistent* with the fixing of an additional period of time for performance by the seller.

5. Portugal recommends the deletion of the second sentence of paragraph (2), since it already follows from article 41.

Article 44. [Seller's right to remedy failure to perform]

1. ICC proposes a rewording of paragraph (1) which would make it clear that there would be no fundamental breach of contract if the defect, although serious in itself, could be cured easily.

2. The Federal Republic of Germany suggests that the words "unless the buyer has declared the contract

avoided in accordance with article 45" be deleted from paragraph (1). If this proposal were accepted, paragraphs (2) and (3) could also be deleted.

3. Portugal recommends the deletion of the second sentence of paragraph (1) since it already follows from article 41.

4. ICC approves of paragraph (2).

5. The Federal Republic of Germany states that if paragraph (2) is not deleted as suggested above, it should at any rate be supplemented so that the seller may not make the request if the buyer has already fixed a period for performance under article 43.

6. Finland and Norway propose to add at the end of the first sentence in paragraph (2) the words "or, if no time is indicated, within a reasonable time after the buyer had given notice under article 37".

Article 45. [Buyer's right to avoid contract]

1. ICC comments on the effect of paragraph (1) *(b)* where the goods in their entirety have not been delivered.

2. The Netherlands proposes a rewording of paragraph (1) *(b)* so that it would not be limited to a failure to deliver but would apply to all cases where notice had been given under article 43. See also its comment to article 60.

3. See the comment of the United States to article 43.

4. Norway proposes an amendment to paragraph (1) *(b)* so that it would not apply where the buyer has fixed an additional period for repair or delivery of substitute goods.

5. The Federal Republic of Germany and Norway propose amendments to paragraph (2) *(b)* so that it would also refer to a period of time fixed under article 44.

Article 46. [Reduction of the price]

1. The United Kingdom proposes a reworded text which would confer a substantive right on the buyer to reduce the price instead of merely enabling him to declare that the price is reduced.

2. The United States urges that consideration be given to the possibility that article 46, when read together with article 70, may give to the buyer a choice that can lead to irrational differences when prices change between the making of the contract and the time for delivery.

3. Finland and Norway propose a reworded text which would establish the relationship at the time delivery was made between the value of goods conforming with the contract and the goods actually delivered.

4. The United States proposes a revised text which would reduce the price to the value that such non-conforming goods would have had at the conclusion of the contract.

5. Ireland states that in regard to the final sentence, the remedy might not equal the loss of value that would occur.

6. Finland and Norway suggest that price reduction should be a remedy for a breach arising under article 39.

7. The Federal Republic of Germany suggests that the second sentence should be made to cover the case of article 35 as well as article 44.

Article 47. [Partial non-performance]

Ireland states that the remedy may be inadequate, especially where only the total delivery has value and partial delivery has no value at all, no matter how adequate or satisfactory the partially supplied goods were.

Article 51. [Calculation of the price]

The Byelorussian SSR suggests the deletion of article 51 since, if the price is not determined or determinable, no contract can be said to have been concluded. This suggestion is based on article 12 (1) which makes a provision for determining the price one of the principal elements of the offer.

Article 53. [Place of payment]

1. Ireland states that it may be pertinent to clarify if paragraph (1) could include exchange rate variation of price.

2. The Federal Republic of Germany proposes a new paragraph (3) which denies the inference that the buyer's obligation to pay the price at the seller's place of business gives rise to the jurisdiction of the courts at that place to deal with an action against the buyer.

Article 57. [Seller's remedies in general; claim for damages; no period of grace]

Portugal makes the same proposal in respect of article 57 that it did for article 41.

Article 58. [Seller's right to require performance]

1. The United States proposes that the seller not have the right to require payment of the price if the buyer has not taken delivery of the goods and the seller can resell the goods without [unreasonable] [substantial] additional expense or inconvenience.

2. The United States also proposes a text to restrict the right to require payment of the price with regard to time.

Article 59. [Fixing of additional period for performance]

Portugal suggests the deletion of the second sentence of paragraph (2) because it already follows from other provisions in the Convention.

Article 60. [Seller's right to avoid contract]

1. ICC proposes amendments to paragraphs (1) *(a)* and (2) which would distinguish between those cases in which the buyer has taken delivery of the goods and those in which he has not.

2. The Netherlands proposes a rewording of paragraph (1) *(b)* so that it would not be limited to a failure to pay the price or take delivery of goods but would apply to all cases where notice had been given under article 59. See also its comments to article 45.

3. Czechoslovakia states that paragraph (2) should apply to the violation of other obligations of the buyer aimed at securing payment of the price, such as opening of a letter of credit.

4. Finland and Norway propose amended texts of paragraph (2) which would restrict the effect of paragraph (2) *(a)* to late payment of the price (alternative solution for Norway) and set the cut-off time at the moment the seller has become aware payment has been made.

5. Czechoslovakia states that a buyer who does not pay the price at the time of its maturity should be obliged to pay interest on overdue payments in principle at a rate one per cent higher than the official discount rate valid in the country of the debtor.

Article 62. [Suspension of performance]

1. The Federal Republic of Germany and the Netherlands suggest that paragraph (1) be revised to make it clear that the deterioration may have occurred prior to the conclusion of the contract but the knowledge of it must have come to the other party after the conclusion of the contract.

2. ICC suggests replacing the words "gives good grounds to conclude" in paragraph (1) by the words "makes clear".

3. OCTI wonders whether it would not be useful to include in the first sentence of paragraph (2) an express reservation regarding the application of transport law and to complete the second sentence with the text of paragraph 11 of the commentary.

4. The Federal Republic of Germany recommends that in paragraph (3) several examples be given as to what would be assurances, such as "by guarantee, documentary credit or otherwise".

Article 65. [Exemptions]

1. Norway recommends adding to paragraph (1) the following underlined words: ". . . beyond his control *and of a kind* . . .".

2. ICC proposes a revision of paragraph (1).

3. Norway queries whether paragraph (2) covers a supplier to the seller. ICC states that it should. Finland proposes a text which would make it clear that a supplier is included.

4. Finland, Netherlands and Norway propose amended versions of paragraph (3) to deal with the problem of impediments which last for a long duration.

5. Australia proposes an amended version of paragraph (3) to deal with the effect on the non-performing party's obligation after the impediment has ceased.

6. ICC proposes an amendment to paragraph (3) which would exclude from exemption under this article "damages to persons or property caused by any lack of conformity of the goods".

7. Finland and Norway propose to place the risk of transmission of the notice under paragraph (4) on the recipient.

8. Australia, Austria, the Federal Republic of Germany, the Netherlands and Norway propose that paragraph (5) be amended so that the right of the other party to require performance could also be exempted under the condition of this article. The United Kingdom expresses its concern about this problem. Australia would also exempt a reduction of the price.

9. ICC proposes that paragraph (5) be amended to assure that an exemption would not preclude the injured party from claiming interest or compensation due to any change in currency rates.

10. The United Kingdom suggests that in some cases covered by this article preservation of the right to avoid the contract with the consequence of restitution under article 66 might be too inflexible and extreme a remedy.

11. Australia proposes that in all cases of unvoidable loss under this article, the loss should be shared equally by the parties.

Article 66. [Release from obligations; contract provisions for settlement of disputes; restitution]

1. Norway proposes a new paragraph (3) to govern the buyer's obligation to make restitution when he requires delivery of substitute goods.

2. In this connection Norway also proposes to change the title of section III to "Effects of avoidance or request for substitute goods".

Articles 67, 68, 69

1. Portugal states that all three articles should be transferred to article 42 (2).

2. Czechoslovakia proposes that an obligation to pay interest should be stipulated in article 69 similar to its proposal in regard to article 60 but without the additional one per cent.

Article 70. [General rule for calculation of damages]

1. Czechoslovakia (in comments to article 60), Finland, the Netherlands, Sweden (article 73 *bis*) and ICC (article 73 *bis*) propose that the right to receive interest be made specific.

2. ICC suggests the deletion of the second sentence and would rely on a limitation of damages of a more general nature.

3. Israel suggests that section IV include a provision making a rate of damages agreed in the contract binding, unless reduced by the court for being excessive.

Article 72. [Damages in case of avoidance and no substitute transaction]

1. Finland and Norway propose that the time at which the current price is to be determined be the time of delivery or the time of avoidance, whichever is the earlier.

2. ICC proposes that the time should be the time of avoidance.

3. The Netherlands and ICC suggest that the place at which the current price is measured should be the market where the contract has been concluded.

Article 73. [Mitigation of damages]

1. The United States, as an alternative to its proposal in respect of article 58, proposes that the mitigation principle be extended to a corresponding modification or adjustment of other remedies than damages.

2. The United Kingdom disagrees with the Commentary that the principle of mitigation applies to anticipatory breach.

3. Israel suggests that provision be made for indemnification of the injured party for expenses incurred in mitigating the loss.

Article 74. [Seller's obligation to preserve]

The Federal Republic of Germany states that in addition to the case where the buyer is in delay in taking delivery of the goods article 74 should likewise be applicable if the payment of the price and the delivery of the goods are concurrent conditions and the buyer is in delay in paying the price.

Article 76. [Deposit with third person]

Portugal suggests the deletion of this article since the right conferred in it follows from the general obligation to preserve the goods.

Article 77. [Sale of the preserved goods]

1. Portugal proposes redrafting this article to make it clear that the goods can be sold only as a last resort and only if keeping the goods places an excessive burden on the person charged with preserving them.

2. Ireland asks the extent to which the party who had the right or the obligation to sell the goods would be liable for the damages arising out of an unforeseen or unknown condition of those goods to the parties who bought them.

Articles 78 to 82

1. Finland and Norway recommend that the articles on passages of risk be moved to follow chapter II, Obligations of the seller or, in the case of Norway, immediately after chapter III, Obligations of the buyer.

Article 79. [Passage of risk when sale involves carriage]

1. The Netherlands proposes that article 81 as the general rule should precede articles 79 and 80.

2. ICC recommends the amendment of article 79 to make it clear that when a delivery term, such as f.o.b., has been agreed upon, such cases fall outside the scope of article 79.

3. The United States proposes to delete the second sentence of paragraph (1) since the situation seems to be adequately covered by the first sentence.

4. Yugoslavia states that it is not clear who is the first carrier. It suggests adding "in accordance with the contract" after mentioning the first carrier.

5. The United Kingdom suggests that in the first sentence of paragraph (1) reference be made to delivery at a particular place rather than at a particular destination.

6. The United States proposes an amendment to paragraph (2) indicating other ways by which the goods can be identified to the contract.

Article 80. [Passage of risk when goods sold in transit]

1. Finland and Norway propose to add a new sentence after the present first sentence to cover the case where no document controlling disposition of the goods has been issued.

2. The United States proposes substituting the words "embodying the contract of carriage" for "controlling their disposition" in the first sentence.

Article 81. [Passage of risk in other cases]

The Federal Republic of Germany proposes a new article 81 *bis* to cover breaches of contract by the buyer other than where the buyer has not taken delivery of the goods placed at his disposal, which is covered by article 81 (1).

Article 82. [Effect of fundamental breach on passage of risk]

1. Australia recommends that article 82 be deleted since it does not appear to add anything to the rights the buyer would have in its absence.

2. The United States proposes a redrafting of the article.

3. The United Kingdom states that it assumes that the buyer's right to damages for fundamental breach subsists notwithstanding the fact that the risk has passed to him.

C. Comments and proposals in respect of implementation, declarations, reservations and other final clauses

Even though document A/CONF.97/6 containing the draft provisions concerning implementation, declarations, reservations and other final clauses as prepared by the Secretary-General had not been published at the time comments and proposals were requested, comments were received from several States. These comments are analysed in the order in which the relevant draft provisions appear in document A/CONF.97/6.

Article B. Federal State clause

Canada expresses its strong preference for the provision that appears in article 31 of the Convention on the Limitation Period in the International Sale of Goods.

Article (X). Declarations relating to contracts in writing

The comments of Austria, the Netherlands, the United Kingdom and ICC are analysed under article 11.

Article G. Partial ratification, acceptance, approval or accession

The comments of Finland, Norway, Portugal and Switzerland are analysed under part II of the draft Convention.

Article H. Declarations

The comments of Austria are analysed under part I of the Convention, while those of Czechoslovakia are analysed under article 1.

Article J. Entry into force

ICC states that it is important that in the elaboration of the transitional provisions due consideration be given to the situation of States which have already ratified ULIS and ULF and other conventions and to the difficulties for these States of replacing the said conventions by the new one.