4. Texts of comments and proposals by representatives on articles 71 to 101 (A/CN.9/87, Annex III) *

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I

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE OF THE UNITED KINGDOM, INCORPORATING OBSERVATIONS BY THE REPRESENTATIVE OF GHANA

Article 74 of ULIS

1. This article presents difficulties at two levels, at the level of form and at that of substance. At the level of form, the language used does not always clearly express what was presumably the legislative intention, and at the level of substance the legislative intention may, it is suggested, produce unsatisfactory results in some circumstances. Since the question of substance may be controversial the question of form is discussed first, though the two questions cannot be kept entirely separate.

FORM

Paragraph 1

2. (*a*) "He shall not be liable...." It appears from paragraph 3 that this is intended to refer only to liability in damages (or possible in some cases liability to specific performance, since the article includes situations in which performance is not impossible but is nevertheless excused; see below). But in the terminology of ULIS (e.g. art. 35(2), 36), and still more clearly in that of the new draft (e.g. art. 33(2), 35), the word "liable" embraces subjection to any remedy, including avoidance. The text should therefore be:

> "He shall neither be required to perform nor be liable for his non-performance...."

(*b*) "If he can prove that it was due to...." The phrase "due to" is not very felicitous. The non-performing party is, in effect, being afforded an opportunity to excuse his non-performance, and in the absence of a clear understanding as to what is meant by "due to" (the French text is equally open), two difficulties arise. (i) Even before the matter comes before a tribunal, it will be possible for the non-performing party, by relying on a generally long chain of causation, to argue that his non-performance was "due to" a wide range of factors. Thus, Professor Tunc's commentary envisages the possibility that a seller might claim exemption on the ground of an unforeseen rise in prices. In such a case the non-performance would presumably be "due to" the rise in prices in the sense that the rise in prices is the reason why the seller has not performed (i.e. the seller has found it uneconomic to do so). Admittedly, in such case the seller would have to prove that "according to the intention of the parties or of reasonable persons in the same situation", he was not bound to take into account or overcome the rise, but nevertheless the scope for dispute seems dangerously wide. (ii) If the dispute in brought before a tribunal, the acceptable limits of cause and effect cannot be settled on any easily identifiable principles. The resulting doubt and divergence between national jurisdictions ought to be avoided if possible. But since the wide scope of the phrase was apparently the legislative intention, the question of revision is considered under the heading of "Substance", below.

(*c*) "Regard shall be had to what reasonable persons in the same situation would have intended". This formulation appears to have been a compromise, and it may be the best that can be achieved, but if it is taken to mean what it says it will create difficulty, since a reasonable seller and a reasonable buyer might well have intended quite different things. It will presumably in fact be construed as requiring the court to decide whether the party could reasonably have been expected to "take into account" etc. the circumstances. It would be better to say this, e.g.:

> "Regard shall be had to what the party in question could reasonably have been expected to take into account or to avoid or to overcome".

Paragraph 2

3. This presents three difficulties: (i) it does not state the primary rule, i.e. that if the delay is not inordinate, the obligation is only suspended; (ii) it expresses the exemption in terms of suspension of the obligation, whereas paragraph 1 has expressed it in terms of exemption from liability; this duplication of concepts, seems to serve no practical purpose, and might possibly give rise to doubt as to what was intended; (iii) from the Common Law point of view at least, the phrase "the party in default" is confusing, since it suggests that the party is in some way at fault, whereas paragraph 1 assumes that he has proved that he is not. These difficulties could be met by the following text:

> "Where the circumstances which gave rise to the non-performance constitute only a temporary impediment to performance, the exemption provided by this article shall cease to be available to the non-performing party when the impediment is removed, save that if performance would then, by reason of the delay, be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract, the exemption shall be permanent."

Paragraph 3

4. This appears to envisage two possibilities: (i) that the party who has not performed may nevertheless want to avoid the contract on some other ground; (ii) that the other party, though he cannot claim damages (because of the exemption provided by paragraph 1), may wish to avoid or (if he is the buyer) reduce the price. Subject to the question of substance (below), it is not unreasonable to provide for (ii) expressly, since the pattern of remedies adopted in this article is foreign to, for example, Common Law systems; but it is less clear why (i) is included. It seems to be illogical and superfluous. There can of course be circumstances in which the party who is exempted from liability in damages by paragraph 1 may nevertheless reasonably wish to avoid the contract on some other ground (for example, a seller who is exempted from liability for late delivery, may wish to avoid the contract because of the seller's subsequent refusal to pay the price) but there is in any event nothing in paragraph 1 to suggest that he may not do so. To exempt a party from liability to damages does not logically exclude him from avoiding the contract on some other ground. Since therefore the inclusion of (i) seems to serve no useful purpose and may give rise to doubts

as to what was intended, it seems best to redraft the clause to deal only with (ii), as follows:

"The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present law to declare the contract avoided or to reduce the price, unless the circumstances which gave rise to the exemption of the first party were caused by the act of the other party or of some person for whose conduct he was responsible."

(The present paragraph 3 speaks of "relief" and not of "exemption", but this seems, once again, to multiply concepts unnecessarily.)

SUBSTANCE

5. At the level of substance the article is open to several criticisms.

(i) It deals both with the situation where the contract has, in Common Law terms, been frustrated (i.e. performance has become impossible or illegal, or in the words of paragraph 2, has so radically changed as to be performance of an obligation quite different from that contemplated by the contract), and also with the situation where non-performance is excused for some less fundamental reason. (See the remarks above on paragraph 1: "If he can prove it was due to. . .".) To allow a party to claim exemption because some unforeseen turn of events has made performance unexpectedly onerous, is out of place in the context of sale of goods for the reasons which are set out at greater length by the representative of Ghana below. Excuses for non-performance falling short of frustration should be either expressly provided for in the contract or ignored. This approach could be expressed by redrafting paragraph 1 as follows:

"Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either that performance has become impossible owing to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome, or that, owing to such circumstances, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract; if the intention of the parties in these respects at the time of the conclusion of the contract was not expressed regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome."

(ii) The article allows the contract to be avoided (subject to the usual conditions) where performance is excused. Where avoidance takes place, the position of the parties is governed by ULIS article 78. This is primarily concerned with avoidance on breach, and it may not be well suited to the dealing with the consequences of frustration. In particular the party from whom restitution is claimed may have incurred expense in performance of the contract; if this expense has resulted in a benefit to the other party, this benefit may presumably be set off against the restitution claimed; but if the expense has not resulted in any benefit, no set-off seems to be allowed.

6. Revision of article 78 is not of course within the scope of this study, but the problem is mentioned because it is an aspect of the larger question whether avoidance on frustration should be covered by the same rules as avoidance on breach. Avoidance, if coupled with the effects laid down in article 78, may be too drastic a remedy where the non-performance is not due to any fault. For example, if an f.o.b. buyer were unable, owing to circumstances within article 74 (1), to give effective shipping instructions, the buyer would be exempted from damages for this non-performance, and it is obviously right that the seller should be relieved of his obligation to deliver; but it is not so obvious that he should be allowed to avoid the contract. For this would entitle him to obtain restitution of any part-performance he might have rendered, on condition of restoring the price (art. 78 (2)). This could cause injustice to the blameless buyer where the market is rising. Similar cases of injustice to the seller could arise on a falling market. If problems such as this are to be dealt with, a special scheme of remedies for the situation envisaged in art. 74 will be necessary.

Addendum to (i) above by the representative of Ghana

7. Whether, apart from frustrating events, a sale law should recognize and give legal effect to other circumstances to which the parties did not advert their attention at the time of making their contract, and if so, what such effect should be, seems primarily to be a question of legislative policy. The considerations against giving legal recognition to such circumstances are many, and among them the following seem to be important:

(*a*) Such circumstances are very difficult to define with sufficient precision to make for certainty and uniformity of application. This is particularly important in a law intended for application in legal systems of several nations with differing traditions of jurisprudence;

(*b*) In the nature of things, they are very difficult to bring together into a single class by means of a definition, because of their possible diversity. It is, therefore, impossible in principle to make a single rule, applicable to all of them, without introducing a rather questionable element of arbitrariness. The alternative to a single definition, would be to envisage and to set out expressly a series of non-frustrating situations which may for some reason or another be thought to be of sufficiently important effect to warrant their being regarded as factors affording some sort of relief (not necessarily of the same kind) to one of the contracting parties. This alternative promises to result in inelegance without any guarantees of comprehensiveness. It is doubtful if the possible practical results of such a legislative effort would justify the effort involved;

(*c*) Such cases have traditionally been best left to the contracting parties themselves to stipulate for;

(*d*) The very wording of the present paragraph 1 shows how difficult it is to provide for such situations

in a general legislative text. The paragraph speaks of "... circumstances which, according to the intention of the parties *at the time of the conclusion of the contract,* [one of the parties] was not bound to take into account or overcome". The italicized words do not necessarily confine an inquiry about the intention of the parties to the terms of the contract as they are written or proved by oral evidence, and "what reasonable persons in the same situation *would have* intended" is not an easy standard to apply after the event;

(*e*) The traditional jurisprudence of sale law, both in Civil Law and Common Law, has generally ignored this matter, probably because of problems such as those set out above, and neither system appears to be any the worse for this omission.

II

COMMENTS AND PROPOSALS BY THE REPRESENTATIVE OF THE UNITED STATES AND OBSERVATIONS OF THE REPRESENTATIVES OF FRANCE AND HUNGARY

Articles 75-77 of ULIS

1. A draft report on articles 75 to 77 of ULIS was prepared by the representative of the United States and circulated to the representatives of France, Hungary, Iran and Japan for their comments. Such exceptions as they took have been set out in the appendix to this final report; otherwise it is assumed that they are in agreement.

Scope

2. Articles 75 to 77 purport to contain "Supplementary grounds for avoidance" of the contract. Article 75 is limited to contracts for delivery in instalments while article 76 applies to contracts for sale generally. Article 77 states one effect of avoidance under the preceding two articles.

Article 75

3. Article 75 (1) provides that when either party's failure to perform as to one instalment, under a contract for delivery in instalments, gives the other "good reason to fear failure of performance in respect to future instalments", he may avoid the contract for the future. In order to bring this article into conformity with the provisions on fundamental breach, it would be desirable to change the quoted language to read: "good reason to fear *a fundamental breach* in respect to future instalments".

4. Article 75 (2) goes on to allow avoidance by the buyer as to deliveries already made as well, "if by reason of their interdependence such deliveries would be worthless to him". (No need was seen to give the seller such a right.) The requirement that past deliveries be made "worthless" seems too strong. It would be desirable to substitute for the quoted language: "if by reason of their interdependence *the value of such deliveries to him would be substantially impaired*".

Article 76

5. Article 76 allows a party to avoid when prior to the "date fixed" for performance "it is clear that one of the parties will commit a fundamental breach of contract". A minor improvement would be to delete the word "fixed" which might be read as limiting the application of the article to contracts in which a date is expressly stated. There is, however, a more basic difficulty with this section which attempts to incorporate into ULIS common law notions of "anticipatory breach".

6. The original language of article 76 (then article 87 of the 1956 draft) was: "when ... either party so conducts himself as to disclose an intention to commit a fundamental breach of contract". Although this language was broadened at the Hague, to go beyond the conduct of a party, Professor Tunc's commentary on article 76 justified it in terms of the original narrower language:

> It is not right that one party should remain bound by the contract when the other has, for instance, *deliberately declared* that he will not carry out one of his fundamental obligations or when he *conducts himself* in such a way that it is clear that he will commit a fundamental breach of the contract [emphasis supplied].

It would be desirable to revert to the original narrower language. The common law doctrine of "anticipatory breach", on which article 76 is presumably based, is limited to the conduct of the party. Furthermore, the broader language of article 76 may lead to an unjust result.

7. Suppose that as a result of events other than the conduct of, say, the seller, it becomes clear to the buyer that the seller will not be able to perform (and has no legal excuse). Notwithstanding the seller's insistence that he will be able to perform in spite of these events, the buyer avoids under article 76. To everyone's surprise, when the time for performance comes, the seller *is* able to perform and is willing to do so. But under article 76, not only is the contract avoided, but, under article 77, the seller is liable for damages—even though no *conduct* on his part justified the buyer in thinking that there would be a breach. It would therefore be preferable to revert to the language of the earlier draft (quoted above), and to leave the hypothetical case just stated to be dealt with under article 73 (allowing suspension of performance when "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"). It may be desirable to broaden article 73 for this purpose and to allow the "other party" to remedy the situation by providing assurances, but this question goes beyond the scope of this draft study. It should be noted that article 48, which is also beyond the scope of this draft study, would have to be brought into line with article 76 if the change suggested here is made.

Article 77

8. Article 77 states one effect of avoidance under article 75 or 76—the party avoiding may claim damages. Since article 78 (1) says that avoidance on any ground leaves the parties "subject to any damages which may be due", article 77 seems unnecessary. Furthermore, it is misleading to include it under the heading "Supplementary grounds for avoidance" rather than "Effects of avoidance". It should be omitted.

COMMENTS OF THE REPRESENTATIVE OF FRANCE

Articles 75-77

9. (*a*) Your drafting proposal designed to bring this provision into conformity with the provisions on fundamental breach merits approval.

(*b*) While the aforementioned amendment tends to limit more precisely the circumstances in which the parties may request avoidance of the contract, the amendment that you are proposing to paragraph 2 has the opposite effect.

10. It is difficult to determine whether the deliveries would be worthless to the buyer because this would require a subjective judgement.

11. Your proposal would have the effect of replacing the words "pas d'intérêt" by the words "peu d'intérêt", which would considerably heighten the uncertainty and would increase the risk of litigation. I would therefore prefer not to change the paragraph which already favours the buyer to the detriment of the seller, since it applies only to the former.

Article 76

12. The replacement of the word "fixed" by a more general, less exact term appears to me to be a desirable improvement.

13. On the other hand, the advantage of reverting to the language of article 87 of the 1956 draft is questionable.

14. I agree that the evidence of a future or contingent situation is very often unsatisfactory.

15. That is why the claimant or court is reassured when the defendant himself has revealed his intention not to perform the contract without actually committing a fundamental breach.

16. You would like to rule out avoidance in cases where the defendant did not state his intentions.

17. However, a rule of this kind might involve the contracting party in excessive risk. Let us take the case of a shipowner who orders a very special type of vessel from a shipyard. Later it becomes "clear" that the economic position of the buyer has substantially deteriorated and that bankruptcy proceedings are deemed inevitable. In such a case it would seem preferable to allow the seller to avoid the contract even if the shipowner, attempting to regain the confidence of his creditors, were to confirm his wish to purchase the vessel in question.

18. Admittedly, after the manner of French criminal law where confession is considered to be the most conclusive of evidence, it would be preferable in such a case for the two parties to agree to avoid their contract when one of the parties has acknowledged that he is either unable or unwilling to perform his obligations.

19. However, the present wording leaves wider discretion to the court, although the adjective "manifeste"—which, to my mind, is closer in meaning to "obvious" than to "clear"—leaves very little room for uncertainty. Besides, subsequent events would resolve any uncertainty.

COMMENTS OF THE REPRESENTATIVE OF HUNGARY

20. (*a*) Article 76 and article 48 are overlapping. Article 76 is broader than article 48 because it deals with all cases of fundamental breach and not only with non-conformity on the one hand and is narrower than article 48 on the other because it deals only with fundamental breach whereas article 48 covers both fundamental an non-fundamental breach in the restricted domain of non-conformity. The first question is whether two separate and overlapping articles are needed for the purposes of anticipatory breach. One article might suffice. The next question is what its substance should be.

(*b*) Many good reasons speak for the proposal made by Professor Farnsworth which would restrict the field of anticipatory breach and create greater certainty of law than the present text. On the other hand there might be some arguments in favour of the present solution. It might be justified to ask: why does the buyer have to wait till the date fixed for performance has elapsed when it is already clear that the seller will commit a fundamental breach? More precisely, why does he not have to wait if the breach is due to a conduct of the seller and why does he have to wait if the breach is a result of some other cause?

21. The answers given by Professor Farnsworth to these questions are twofold:

(*a*) "Suppose that as a result of events other than the conduct of, say, the seller, it becomes clear to the buyer that the seller will not be able to perform (and has no legal excuse). In spite of the seller's insistence that he will be able to perform in spite of these events, the buyer avoids under article 76. To everyone's surprise, when the time for performance comes, the seller *is* able to perform and willing to do so." In this case, in my opinion, the avoidance is void as it has become clear from the results that at the time of the avoidance it could not have been clear that the seller would commit a fundamental breach. The buyer avoids the contract at his own risk in cases of anticipatory breach except express repudiation by the seller. A conduct short of repudiation might also re-create uncertainties.

(*b*) "Under article 76, not only is the contract avoided, but, under article 77, the seller is liable for damages—even though no *conduct* on his part justified the buyer in thinking that there would be a breach." It is suggested that in this case the seller will have a good defence under article 74.

22. Thus it is submitted that we delete both article 48 and article 76 and draft an article on the following lines:

> Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a breach, the other party shall be entitled from this time on to exercise the rights provided in this Law for that particular breach.

It is not easy to find a place for this (or a similar) text in the Uniform Law, because it goes beyond "supplementary grounds for avoidance". Perhaps it could constitute a separate section entitled "anticipatory breach" in chapter V.

III

OBSERVATIONS AND PROPOSALS BY THE REPRESENTATIVE OF FRANCE

Articles 78-81 of ULIS

1. In accordance with the decision taken by the UNCITRAL Working Group, the French rapporteur, in collaboration with the Hungarian, Tunisian and United States rapporteurs, considered articles 78-81 of ULIS. This gave rise to the following observations:

(*a*) *Article 79, paragraph 2* (d)

2. It seems to the French rapporteur that the effect of article 79, paragraph 2 (*d*), which provides that the seller must bear the risk attaching to the goods if the impossibility of returning them is not due to the act of the buyer or of some other person for whose conduct he is responsible, is not in conformity with the intention of the drafters (cf. Professor Tunc's commentary, which indicates that the idea was to relieve the buyer from his obligation to return the goods where the impossibility of his doing so was due to the act of the seller or to some chance happening).

3. Moreover, such a wording would hardly be compatible with article 97, paragraph 1, which provides that normally the risk shall pass to the buyer when delivery of the goods is effected.

4. Again, this provision allows for the return of the goods in a condition other than that in which they were received by the buyer.

5. It would therefore be preferable to specify that the possibility of returning the goods shall be subject to their having retained their substantial qualities.

6. The French rapporteur accordingly proposes the following wording for article 79, paragraph 2 (*d*):

> "If the impossibility of returning the goods with their substantial qualities intact or in the condition in which they were received is due to the fact of the seller."

7. The Hungarian rapporteur agrees in principle with the French proposal.

8. He suggests the addition of the following words: "or of some other person for whose conduct he is responsible".

9. The Hungarian rapporteur also believes that subparagraph (*a*), which is simply one case to which subparagraph (*d*) applies, should be deleted.

10. The numbering would then have to be changed, with subparagraph (*d*) becoming subparagraph (*a*).

11. The Hungarian rapporteur also favours an addition to article 79, paragraph 2 (*c*), so it would read: "if part of the goods have been *sold,* consumed or transformed by the buyer . . . ".

12. The United States rapporteur also agrees in principle to the French proposal, provided that return of the goods is still possible where the deterioration is due to the defect in the goods.

13. However, the Tunisian rapporteur considers that it would be better to retain the ULIS wording.

14. He maintains that article 79, paragraph 2 (*d*), as it stands in compatible with article 96. The passing of the risk is always subject to prior performance of the obligations of the seller. If the seller has failed to perform his obligations, the buyer must be able to declare the contract avoided in the manner provided for in ULIS.

(*b*) *Article 79, paragraph 2* (e)

15. The French rapporteur questions the desirability of this subparagraph, the inevitably vague wording of which may cause many disputes.

16. Does the deterioration have to be unimportant in the eyes of the seller or the buyer, or of both parties?

17. The United States rapporteur endorses this comment. In the view of the Hungarian Government, however, the answer to this question depends on the wording eventually adopted for article 33, paragraph 2. The Tunisian Government would like the subparagraph to be reformulated in order to obviate the difficulties that have been noted but believes that the idea, which by and large does protect the interests of the buyer, should be retained.

(*c*) *Article 80*

18. The French rapporteur considers that this article is superfluous and indeed may lead to some errors of interpretation, since it was decided that the Law would have only supplementary effect and, where that point is concerned, this provision may appear ambiguous.

19. The Tunisian rapporteur agrees with that view, but would like the deletion of the article to be negotiated in exchange for provisions which would become mandatory or would be matters of public policy.

20. The Hungarian and United States rapporteurs prefer the retention of this provision.

(*d*) *Article 81*

21. The French rapporteur noted that implementation of this provision might prove very difficult and somewhat inequitable.

22. The appraisal of any benefits derived from the goods by the buyer would appear to be a subjective and arduous operation. Since it is generally the buyer who has the contract avoided, he will surely grudge having to compute the amount of this claim against him by the seller. One might add that the problem will be even worse where he purchased the goods in dispute for his personal use.

23. This means that the seller will have great difficulty in producing proof. On the other hand, he is required to refund to the buyer the sums of money which have been paid to him, an amount of interest being automatically added.

24. It is therefore suggested that the buyer should also be allowed to use this apparently simple method of computation, so that one may envisage two cash claims being easily set off against each other.

25. This will not mean, of course, that the seller cannot claim the payment of interest for his exclusive benefit on the ground that the goods were unusable or practically worthless for his purposes. However, unless he proves his claims, the buyer will be considered to have derived the same benefits from the goods as the seller himself has derived from the price of the goods.

26. The United States rapporteur does not consider this discussion to be of great importance, since

it seems likely to him that the burden of proof will rest on the plaintiff.

27. The Tunisian rapporteur agrees that computation of the indemnity payable by the buyer will be complicated, and he proposes that consideration should be given to finding an improved wording for this provision.

IV

Comments and proposals by the representative of Mexico incorporating observations by the representative of Austria

Articles 82-90 of ULIS

1. The title of section IV: Supplementary rules concerning damages (*Règles complémentaires en matière de dommages-intérêts*) must be simplified, in order that it only refer to damages, whereby, this title would correspond with the wording of other titles of the same ULIS (for example: sections V and VI under the same chapter V, as well as chapter VI). Furthermore, this section contains the fundamental rules on damages, not the supplementary or complementary rules thereto.

2. I believe that subsections A and B should be reduced to one article, given the fact that the general rule contained under article 82 does not only apply to damage when the contract is not avoided, but also when same is avoided, pursuant to the stipulations in article 87. Moreover, the rules under articles 83 through 87 should be considered as special cases for the determination of damages. Consequently, this first subsection A must refer to the determination of damages, inasmuch as all the articles thereunder (articles 82 through 87) make reference to the same problem.

3. *Article 82*: This article is substantially maintained in its present form; the modifications I propose are:

(*a*) In the first paragraph add the adverb "actually" so as to require that payment for damages correspond to those really suffered. This change is in accord with the comment made by Professor Tunc (Commentary on the Hague Convention of 1 July 1964).

(*b*) Article 89 expressly excluded from the rule established in article 82 since its application within the different internal legislations, may result in a higher indemnity for damages.

(*c*) Instead of the phrase "ought to have foreseen" in the first part of the second sentence, I propose that similar verbal expressions be used and perhaps clearer than those contained in ULIS such as "had foreseen, or ought to have foreseen"; and, in lieu of the phrases "then were known or ought to have been known", in the second part of the same sentence, "then knew or ought to have known" be used.

Note: The representative of Austria has indicated that the French version of this article should maintain the reference as to *perte subie* and *gain manqué*, I am not certain whether the French text does require such provision, as I believe that reference to *dommages-intérêts* at the beginning of the article is sufficient to understand both concepts, *perte subie* and *gain manqué*. It seems to me that such is the scope of article 1149 of the French Code. There is no doubt whatsoever that the Civil Code of Mexico, upon referring to the concept which is equivalent to *dommages-intérêts* (*daños y perjuicios*) includes both the losses suffered as well as the profits which were not earned. The text of article 2108 and 2109 of the Code is the following:

Artículo 2108. Se entiende por daño la pérdida o menoscabo sufrido en el patrimonio por la falta de cumplimiento de una obligación.

Artículo 2109. Se reputa perjuicio la privación de cualquiera ganancia lícita, que debiera haberse obtenido con el cumplimiento de la obligación.

Article 2180. By damage shall be understood the lose of or deterioration caused to property by failure to fulfil an obligation.

Article 2109. By impairment shall be understood the loss of any licit profit which should have been derived from the fulfilment of the obligation.

However, if experts of law and French language, should judge that it is not sufficient to talk about *dommages-intérêts*, the expression *perte subie* and *gain manqué* should, of course, remain within the text.

4. *Article 83*. The text is maintained, our proposal merely omitting the additional 1 per cent assessment with respect to interests on such sum as is in arrear —which I do not believe is justified. The expression (in any event) remains in parenthesis, inasmuch as I believe same is superfluous.

5. *Article 84*. The representative of Austria has proposed that the reference under this article to the *jour où le contrat est résolu* be replaced by the expression *jour où la délivrance a eu lieu ou aurait dû avoir lieu*, which would avoid doubts and problems to the party exercising the right to avoid the contract. I believe that this suggestion is wise and advisable and consequently, the text should be changed accordingly.

6. *Article 85*. No changes.

7. *Article 86*. No changes.

8. *Article 87*. This article is omitted since it seems unnecessary given the new text proposed for article 82.

9. Subsection C (General provisions concerning damages). I propose that it be changed to:

B. *General provisions*

10. *Article 88*. No changes.

11. *Article 89*. The addition of a second paragraph is proposed, which would reflect, in a very express form, what Professor Tunc, upon commenting ULIS indicates as being implicit in the rule, namely that the damages as referred to therein shall never be less than those which may result from applying the rules of articles 82 through 88.

12. Section V. Expenses. No changes.

13. *Article 90*. We suggest that this article commence by using the phrase "except as otherwise agreed" since the parties may reach an agreement as to different rules other than those established under this article.

14. The text of articles 82-90 as suggested appears in the appendix hereto.

Appendix

DAMAGES

A. *Determination of their amount*

Article 82

Damages for a breach of contract by one party shall consist (whether the contract is avoided or not) of a sum equal to the loss actually suffered by the other party.

Except as provided for by article 89, such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he knew then or ought to have been known to him as a possible consequence of the breach of the contract.

Article 83

Where the breach of contract consists of a delay in the payment of the price which does not cause the avoidance of the contract, the seller shall (in any event) be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business, or, if he has no place of business, his habitual residence.

Article 84

1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the delivery took place or ought to have taken place.

2. (No changes.)

Article 85

(No changes.)

Article 86

(No changes.)

Article 87

(Omitted.)

B. *General provisions*

Article 88

(No changes.)

Article 89

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present law. However, such damages shall never be less than those which may result from applying the rules of articles 82 through 88.

SECTION V. EXPENSES

Article 90

(No changes.)

V

OBSERVATIONS AND PROPOSALS BY THE REPRESENTATIVE OF AUSTRIA PREPARED IN CO-OPERATION WITH THE REPRESENTATIVE OF MEXICO

Articles 91-101 of ULIS

1. Articles 91-95, relating to preservation of the goods, call for little comment. At the very most, it might be helpful to the interpretation of the end of paragraph 1 of article 94 if the words *en temps utile* were inserted between the words *pourvu qu'elle lui ait donné* and *un avis* in the French text.

2. On the other hand, articles 96-101, concerning passing of the risk, should be fairly substantially redrafted and simplified.

3. First of all, one may wonder whether article 96, which, in a roundabout way, contains nothing other than a perhaps questionable definition of the term "risk", serves any purpose. Although I have no strong feelings on the matter, I should be inclined to delete that article.

4. In article 97, paragraph 2, the words "handing over" which occur twice should be replaced by the word "delivery".

5. Paragraphs 2 and 3 of article 98 no longer conform to article 20 (*b*) and (*c*). Those provisions state clearly when delivery occurs. Paragraphs 2 and 3 of article 98 do not add very much but tend rather to confuse matters. It will be better to delete them.

6. *Comments by the representative of Mexico.* I agree with all your points of view. The only small change I would suggest is that in the first paragraph of article 98 the expression "handing over" in the English version and *remise* in the French version be replaced by "delivery" and *délivrance*, respectively. Obviously, the foregoing is a consequence of your proposal to modify the second paragraph of article 97 to this effect.

7. Article 99 apparently follows an old rule of maritime law. However, I am not convinced that the mode of transport should affect the relations between seller and buyer (even though the sale of a bill of lading seems to fall outside the scope of ULIS) and that the buyer can be obliged to pay the price for goods which no longer existed at the time of the conclusion of the contract, whether or not that fact was known by the seller. It therefore seems to me that we must avoid any possibility of a passing of the risk prior to the conclusion of the contract of sale. A provision to that effect would be better inserted in article 97.

8. *Comments by the representative of Mexico.* I also share your criticism with respect to article 99; however, inasmuch as said rule reproduces "an old rule of maritime law", I believe your suggestion to add another paragraph to article 97 (which may be the second paragraph in order that the one which currently appears as the second becomes the third paragraph), which would say what you indicate, namely, that the risks shall never be transferred prior to the conclusion of the sales contract, is wise and advisable. Strictly speaking, and in consideration of the rule provided for in article 97, such principle would be unnecessary. However, I insist that inasmuch as a tradi-

tional rule of maritime law is involved—which perhaps has already been included in some international convention—problems of interpretation would be prevented if the Law established the opposite principle in an express manner.

9. There is no longer any reason for article 100, since the former paragraph 3 of article 19 has been deleted and those parts of it to which article 100 refers have not been incorporated in article 20. The points raised concerning article 99 also apply to article 100, which could therefore he deleted.

10. With respect to article 101, Professor Tunc's commentary states that it is intended to avoid misunderstandings. I feel that on the contrary it creates misunderstandings, and I would favour its deletion also.

11. The text that I would propose, with the agreement of the representative of Mexico, would therefore read as follows:

Article 96

(Deleted.)

Article 97

(1) (Unchanged.)

(2) In the case of delivery of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when delivery 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.

(3) Where the sale is of goods 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.

Article 98

[(1)] Where delivery of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, delivery could have been made in accordance with the contract.

(2) (Deleted.)

(3) (Deleted.)

Article 99

(Deleted.)

Article 100

(Deleted.)

Article 101

(Deleted.)

VI

Proposals by the representative of Norway for the revision of articles 71 to 101 of ULIS

Article 48

The buyer may exercise the rights [as] provided in articles 43 to 46 [and claim damages as provided in Article 82 or articles 84 to 87], even before the time fixed for delivery, if it is clear that *the seller will fail to perform* [*any of*] *his obligations.*

Chapter IV. Obligations of the buyer

Article 56

Section I. Payment of the price

Articles 57 to 60

Section II. Other obligations

Article 61

Same as ULIS article 69.

Article 62

Same as ULIS article 65.

Section III. Remedies for the buyer's failure to perform

Article 63

Cf. ULIS art. 70 and rev. art. 41

1. Where the buyer fails to perform any of his obligations [his obligations relating to payment of the price, taking delivery of the goods or any other obligation] under the contract of sale or the present Law, the seller may

(*a*) Exercise the rights [as] provided in articles 64 to 67;

ULIS arts. 63, 68 and 70

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

ULIS art. 64

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 64

ULIS art. 61. Cf. rev. art. 42

The seller has the right to require the buyer to perform the contract [his obligations] to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law [according to article 17], unless the seller has acted inconsistently with that right by avoiding the contract under article 66.

Article 65

ULIS art. 62, para. 2, art. 66, para. 2, Cf. rev. art. 43

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for performance of the contract [obligations]. 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 66

ULIS arts. 62, 66 and 70. Cf. rev. art. 44

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

(*a*) Where the failure by the buyer to perform his obligations under the contract and the present Law amount to a fundamental breach of contract, or

(*b*) Where the buyer has not performed within an additional period of time fixed by the seller in accordance with article 65, or

ULIS art. 66, para. 1

(*c*) Where the buyer's failure to perform his obligation to take delivery of the goods gives the seller good grounds for fearing that the buyer will not pay the price.

New

2. Where the goods have been taken over by the buyer, the seller cannot declare the contract avoided according to the preceding paragraph and *claim the return* of the goods unless the contract provides that the seller shall retain the property or a security right in the goods until the price has been paid, and such provision is not invalid as against the buyer's creditors according to the law of the State where the buyer has his place of business. [The provisions of article 4 subparagraphs (*a*) and (*b*) shall apply correspondingly.]

Cf. rev. art. 44, para. 2

3. 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:

(*a*) Where the buyer has not performed his obligations on time, after the seller has been informed that the price has been paid late or has been requested by the buyer to make his decisions as regards performance or avoidance of the contract;

(*b*) In all other cases, 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 65.

Article 67

Same as ULIS article 67.

Article 68

Cf. ULIS arts. 76-77 and art. 48

The seller may exercise the rights [as] provided in articles 65 and 66 [and claim damages as provided in article 82 or articles 84 to 87], even before the time fixed for performance, if it is clear that the buyer will fail to perform [any of] his obligations.

Comments

1. The draft *arts. 61 to 67* shall replace ULIS arts. 61 to 70. The drafting is based on the revised arts. 41 to 44 as adopted during the last meeting of the Working Group.

2. *Art. 61* is the same as ULIS art. 69, and *art. 62* the same as ULIS art. 65.

3. *Art. 63* replaces ULIS arts. 63, 64, 68 and 70 (cf. rev. art. 41).

4. The matters dealt with in ULIS Arts. 61, 62 and 66 are dealt with in the draft *arts. 64 to 66*, which have been drafted in accordance with the text of arts. 42 to 44 as adopted at the last meeting of the Working Group.

5. As regards ULIS art. 61 para. 2, see proposed new art. 82 *infra*.

6. The draft *art. 65 para. 2*, which is new, is based on the Uniform Scandinavian Sales Act, section 28 para. 2.

7. *Art. 68* deals with anticipatory mora and corresponds to ULIS arts. 76-77 and 48. ULIS arts. 76-77 are proposed to be deleted (and art. 48 to be correspondingly extended to cover also damages).

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

Article 69

Same as ULIS article 90.

Article 70

1. Same as ULIS article 75 para. 1.

Cf. ULIS art. 77

2. Same as ULIS article 75 para. 2.

3. The party exercising the right to declare the contract avoided, in whole or in part, as provided in the preceding paragraphs of this article, may claim damages in accordance with articles [84 to 87].

SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

Article 71

Same as ULIS article 71.

Article 72

ULIS art. 72

1. Where delivery is effected by handing over the goods to the carrier *in accordance with subparagraph 1 (a) of article 20*, the seller *may despatch the goods* on terms that reserve to himself the right of disposal of the goods during the transit. *The seller* may require that the goods shall not be handed over to the buyer at the place of destination except

against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.

2. Same as ULIS article 72 para. 2.

Comments

In the third and fourth line of the present paragraph 1 the words "either postpone despatch of the goods until he receives payment or" are a bit misleading since in most cases there will be an agreement or a usage to the contrary. It seems better to delete this passage, so that any right to postpone despatch would depend on agreement or usage.

Article 73

1. Same as ULIS article 73 para. 1.

2. Same as ULIS article 73 para. 2.

3. Same as ULIS article 73 para. 3.

New

4. A party may not exercise the rights provided in paragraphs 1 and 2 of this article if the other party provides a guarantee for or other adequate assurance of his performance of the contract.

[Transfer present art. 74 to new art. 87.]

SECTION II. SUPPLEMENTARY RULES CONCERNING EFFECTS OF AVOIDANCE AND DELIVERY OF SUBSTITUTE GOODS

[Transfer present article 75 to new article 70 and delete present articles 76-77 (cf. Article 48, new article 68 and new para. 3 of new article 70).]

Article 74

Same as ULIS article 78.

Article 75

ULIS art. 79. Cf. ULIS art. 97, para. 2 (which is proposed to be deleted)

1. The buyer shall lose his right to declare the contract avoided *or to require the seller to deliver substitute goods* where it is impossible for him to return the goods delivered in the condition in which he received them.

2. Nevertheless, the *preceding paragraph shall not apply*:

(*a*)

(*b*) As in ULIS art. 79 para. 2.

(*c*) If part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered *or ought to have been discovered*;

(*d*)

(*e*) As in ULIS art. 79 para. 2.

Article 76

ULIS art. 80

The buyer who has lost the right to declare the contract avoided *or to require the seller to deliver substitute goods* by virtue of *article 75*, shall retain all other rights conferred on him by the present Law.

Article 77

ULIS art. 81

1. Same as ULIS article 81 para. 1.

2. Same as ULIS article 81 para. 2, except. *subpara.* (b) which shall read:

(*b*) Where it is impossible for him to return the goods or part of them, but *he has* nevertheless *exercised his right to declare* the contract avoided *or to require the seller to deliver substitute goods.*

SECTION III. SUPPLEMENTARY RULES CONCERNING DAMAGES

Article 78

Same as ULIS article 82.

Article 79

ULIS art. 83

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate *of 6 per cent, but at least at a rate of 1 per cent more than* the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence [article 4 (*a*) and (*b*) apply].

Comments

The official discount rates are in many countries fixed rather arbitrarily, based on monetary and other financial considerations, and are often much lower than the rates to be paid in private business. It is therefore proposed to fix a minimum rate of 6 per cent corresponding to the rate established in the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes (article 49).

Article 80

Same as ULIS article 84.

Article 81

Same as ULIS article 85.

Article 82

New

The damages referred to in articles 80 and 81 shall not, however, exceed the difference between the price fixed by the contract and the current price at the time when it would be in conformity with usage and reasonably possible for the buyer to purchase goods to replace, or for the seller to resell, the goods to which the contract relates.

Comments

The provisions contained in ULIS art. 25, art. 42 paragraph 1 (*c*) and art. 61 paragraph 2 exclude the right to performance of the contract in cases where it is in conformity with usage and reasonably possible

to purchase goods to replace, or to resell, the goods to which the contract relates. These provisions have important consequences for the calculation of damages according to art. 84 paragraph 1 and art. 85 [new arts. 80-81], because they mean that in the cases in question the damages will be calculated on the basis of the current price at the time when it is in conformity with usage and reasonably possible for the buyer to purchase goods in replacement, or for the seller to resell the goods. The majority of the Working Group has been in favour of deleting the provisions contained in *ULIS arts. 25, 42 paragraph 1 (c) and 61 paragraph 2*. In view of this it seems to be desirable to add a provision to ensure that the deletion of the said provisions in ULIS does not affect the substance of the provisions in arts. 84 and 85 [new 80-81] as they now appear in the ULIS context. It should also be kept in mind that the abolishment of the concept of *ipso facto* avoidance will influence the content of the rule in present article 84 paragraph 1, since the time of avoidance may be shifted and delayed, especially in the case of non-delivery. This will be mitigated by the proposed provision in new article 82.

Articles 83 to 86

Same as ULIS articles 86 to 89. [In the renumbered article 83 the references should be corrected to articles 80 to 82.]

SECTION IV. EXEMPTIONS

Article 87

Same as ULIS article 74.

SECTION V. PRESERVATION OF THE GOODS

Articles 88 to 92

Same as ULIS articles 91 to 95.

CHAPTER VI. PASSING OF THE RISK

Article 93

Same as ULIS article 96.

Article 94

ULIS art. 97

1. The risk shall pass to the buyer when delivery of the goods is effected.

2. Same as ULIS article 101.

Comments

Paragraph 1 should be formulated so as not to make the passing of the risk dependent on a (faultless) delivery on time.

The *present paragraph 2* is deleted as superfluous on the background of the revised article 20; cf. present article 79 paragraph 2 (new art. 75 para. 2).

Articles 95 to 97

Same as ULIS articles 98-100. [In the new art. 97 the reference in the first line should be corrected to the second period of revised article 21, paragraph 1.]

VII

OBSERVATIONS BY THE REPRESENTATIVE OF AUSTRIA

Articles 74-101 of ULIS

1. Since I have a very limited time at my disposal to consider the various proposals, I can give below only a brief expression of opinion without elaborating on the reasons for adopting the various attitudes. I must also reserve the right to modify, if necessary, one or other of the views expressed below if in the course of the discussion at the next meeting of the Working Group convincing arguments are put forward.

Article 74

2. The suggestions of the United Kingdom representative appear to be generally acceptable.

Articles 75 to 77

3. With regard to paragraph 1 of article 75, I can accept the amendments proposed by the United States representative. I should however prefer to retain in paragraph 2 the phrase "would be worthless to him".

4. With regard to article 76, I would prefer, like the French representative, to retain the text (with the exception of the word "fixed"), although I have doubts regarding the Hungarian representative's interpretation according to which the avoidance of the contract would appear to be conditional.

5. I support the proposed deletion of article 77.

Articles 78 to 81

6. I am in favour of deleting subparagraph (*a*) of article 79, paragraph 2, but I do not agree with the Hungarian representative's wish to add in subparagraph (*c*) (which would become subparagraph (*b*)), the word "sold". That appears to me to be going too far. Similarly, I cannot support the French representative's proposal to amend subparagraph (*d*) (which would become subparagraph (*c*)), which may perhaps arise from a misunderstanding. The first part of the wording proposed is uneecessary. It would suffice to use the same language as in paragraph 1 and state: "if the impossibility of returning the goods 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".

7. I agree with the Hungarian representative that the action to be taken on subparagraph (*e*) (which would become subparagraph (*d*)) should depend on the decision concerning article 33, paragraph 2.

8. In view of the wish to delete article 77, the retention at least of article 80 is in my view desirable.

9. I am not entirely convinced by the criticism of article 81 (particularly paragraph 2). In particular, the example of purchase for personal use does not appear to me relevant, since it has been decided to exclude retail sales from the scope of application of the Uniform Law. It is clear that the calculation called for by paragraph 2 will often be more difficult than that which is required for the application of paragraph 1. That does not seem to me to be an adequate reason for making the buyer liable to pay an almost fixed sum which will hardly ever correspond to the real benefits (or lack of benefits).

Articles 82 to 90

10. The Mexican representative took account of my views in drafting his comments; I have therefore nothing further to add.

Articles 91 to 101

11. I have nothing to add to the proposals which the Mexican representative and I have already submitted with regard to this group of articles.

12. The amendments to all the articles from 61 to 101 submitted by the observer for Norway, depart to such an extent from the text of the 1964 Uniform Law on the International Sale of Goods, particularly with regard to presentation, that it would require considerably more time to examine them than the period allocated to members of the Working Group. I cannot therefore for the time being make any comments about the document which will no doubt be carefully examined in the course of the next session.

VIII

Observations by the representative of Hungary for the revision of articles 82-90

Article 82 (1)

1. "Loss actually suffered" might create the impression that only *damnum emergens* is due, particularly if the reader asks the question why did the UNCITRAL modify the ULIS text. This impression seems to be strengthened by using the word "actually".

Article 82 (2)

2. I wonder whether "had foreseen" should appear in the text. If the party actually foresees losses on the part of his partner in case of his breach, does he not act in bad faith?

Article 84

3. In substance I agree with the idea expressed in this article. A problem, however, might arise in connexion thereof in cases where the goods were delivered with a delay.

	(*a*)	(*b*)	(*c*)
(i) the price fixed by the contract:	100	100	100
(ii) price at the date of delivery:	150	100	80
(iii) at the *actual* date of delivery:	130	80	100

(*a*): The buyer has no damage if the prices under (ii) and (iii) are contrasted with the price fixed by the contract. If, however, the seller had delivered in time the buyer could have sold the goods for 150 and at the time of actual delivery he can sell them only for 130. If he receives only 30—which seems to be the proposed solution—he will have a loss of 20.

(*b*): The buyer would have had no damage if the seller had delivered at the time fixed by the contract. At the time of actual delivery he has a loss of 20 and it is fair that he obtains 20 in damages.

(*c*): The buyer would have had a loss of 20 if the seller had delivered in time. At the date of actual delivery he has no damage, the rule is correct, subject to 2.

4. It is not quite clear from the proposed text whether the victim of the breach or the judge is given a right of option between the price on which the delivery took place and on which it was due, or whether in cases where delivery actually took place later than the time of performance, the price on that later date is binding for the purposes of assessing the damages. If the buyer has an option in this field, case under (*c*) might lead to an unwarranted result: the buyer would be entitled to claim 20, and if the buyer had no option, he would lose 20 in the case under (*a*).

Article 90

5. The term "delivery" in the ULIS means only delivery of goods which conform to the contract, and in the UNCITRAL draft it covers also delivery of non-conform goods (see e.g. art. 97 and the comments of the representative of Austria thereto). Having regard to this fact ought art. 90 not be amended or supplemented? Are these rules applicable also in cases of delivery of goods which are not in conformity with the contract? In such cases the seller will most probably have further expenses.

Articles 96-101 of ULIS

6. The simplifications proposed by the representative of Austria and the representative of Mexico are very well-founded. The only remark I should like to make is that perhaps article 96 could be retained, although it seems to be sufficiently clear that most if not all legal systems are rather unanimous in leading to the same result and thus the article might be quite unnecessary. My concern is rather related to drafting techniques and the niceties thereof. I do not see in article 96 an endeavour to define risk, but rather a disposition in case the risk passes and I feel somewhat uneasy to describe facts without providing for the legal consequences.

7. If this is correct then the legal consequences should follow the statement of facts to which they are related. Therefore, if the Working Party would decide to retain article 96 of the ULIS, then it should appear as article 99.

IX

Observations by the representative of Norway on the reports on the revision of articles 74-101

Article 74 of ULIS

1. I have no objections to the proposals made by the United Kingdom, but would prefer the following language in paragraphs 1 and 2:

> "1. Where one of the parties has not performed one of his obligations, he shall neither be required to perform nor be liable for his non-performance if he can prove either (*a*) that performance has become impossible owing to circumstances *of such nature* which it was not *contemplated by the contract that he should be* bound to take into account or to avoid or to overcome, or (*b*) that, owing to such circumstances, performance would be so radically changed as to amount to the performance of a

quite other obligation than that contemplated by the contract; if the intention of the parties in these respects at the time of the conclusion of the contract was not expressed, regard shall be had to what the party who has not performed could reasonably have been expected to take into account or to avoid or to overcome.

"2. Where the circumstances which gave rise to the non-performance, constitute only a temporary impediment to performance, the *relief* provided by this article shall cease to be available to the non-performing party when the impediment is removed, *provided that* performance would then, by reason of the delay, not be so radically changed as to amount to the performance of a *quite other* obligation than that contemplated by the contract."

2. In the revised ULIS Norway has proposed to transfer this article to a new article 87.

Articles 75-77 of ULIS

3. I support the United States proposal regarding *article 75 (1)* and have no objection to their proposals concerning article 75 (2) and article 77. Norway has proposed to transfer these provisions to a new article 70 in the revised ULIS.

4. As regards the United States proposal to narrow the language of *article 76* I share the doubts expressed by the French and Hungarian representatives. Like the representative of Hungary I think that article 76 should be harmonized with article 48, but I would not amalgamate them into one single article. I refer to the Norwegian proposal to transfer article 76 to a new article 68, cf. also the proposed revised article 48.

Articles 78-81 of ULIS

5. Norway has proposed to transfer *article 79* to a new article 75 and to extend the scope to cover also the buyer's right to require the seller to deliver substitute goods (cf. ULIS article 97 (2)). Further, in *paragraph 2* c, it is proposed to add as an alternative after the word "discovered" the following: "or ought to have been discovered".

6. As regards article 79 *paragraph 2* d I am not in favour of the French proposal, even with the amendment proposed by Hungary. In my opinion it is important that the exceptions in paragraph 2 cover, among others, perishment, deterioration or transformation as a result of the very *nature of the goods* (e.g. perishable goods), regardless of whether the perishment etc. is caused by their non-conformity. Such cases are not covered by other subparagraphs than subparagraph 2 *d*. Subparagraph 2 *d* should therefore include these cases as well as fortuitous (accidental) events and the conduct of the seller or a person for whose conduct he is responsible. I have no objection to amalgamating subparagraphs 2 *a* and 2 *d*, provided that perishment as a result of the defect is still mentioned.

7. I have no objection to the present *subparagraph 2* e of article 79.

8. *Article 80* should be kept and extended to cover the buyer's right to require the seller to deliver substitute goods (cf. the new article 76 proposed by Norway).

9. As regards *article 81* I refer to the new article 77 proposed by Norway, in particular the proposed extension of subparagraph 2 b. I have no comment on the French suggestion.

Articles 82-90 of ULIS

10. I refer to the new (renumbered) articles 78-86, cf. 69, proposed by Norway.

11. I have no objection to the title etc. of sections proposed by Mexico. As regards the draft text of *article 82* proposed by Mexico, I miss an express reference to loss of profit (cf. article 86).

12. Concerning *article 83* Norway has proposed (in a new article 79) to fix an interest rate of a minimum 6 per cent, so as not to depend entirely on official discount rates, which in many countries may be fixed rather arbitrarily.

13. Regarding *article 84* it should be kept in mind that the abolishment of the concept of *ipso facto* avoidance will influence the content of the rule in present paragraph 1, since the time of avoidance may be shifted and delayed, especially in the case of non-delivery (resp. non-payment of the price). I therefore agree with the representative of Austria that one should reconsider whether the best rule is to rely on the current price on the date of actual avoidance. The date of actual delivery (resp. time for delivery) is proposed by Austria and Mexico. This date seems, however, to be less satisfactory in cases of transport and delivery to a carrier (in which case the buyer may not yet have knowledge of the breach) as well as in cases of non-delivery (in which case the buyer may not yet have had sufficient reason or even the right to avoid the contract until some further time has passed). It should therefore be considered to rely on the date on which the goods are handed over to the buyer or placed at his disposal at the place of destination, unless the buyer has declared the contract avoided on an earlier date, in which case that date should be the basis. In the case of non-delivery (or non-payment) one should rely either on the date of actual avoidance or on the earliest date on which the contract could have been avoided. Further it should be considered to make it clear in the text whether damages always may be increased if *any additional* damage is proved (cf. article 86).

14. Norway has proposed to insert a *new article* after present *article 85* (a new article 82) for cases where it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace, or for the seller to resell, the goods to which the contract relates. Cf. present ULIS articles 25, 42 (1) *c* and 61 (2).

15. Norway has proposed to transfer present *article 90* on expenses to the beginning of chapter V, as an initial article 69 (without separate section and title).

Articles 91-101 of ULIS

16. I would prefer to keep *article 96*.

17. As regards *article 97* I refer to the new article 94 proposed by Norway. The present paragraph 2

is proposed to be deleted as superfluous on the background of the rev. article 20, cf. present article 79, paragraph 2.

18. I have no serious objections to the present *articles 98-100*. In article 100 the reference in the first line should be corrected to the second period of rev. article 21, paragraph 1. I think there may still be room for article 100.

19. Norway has proposed to transfer *article 101* to article 97 (new article 94) as a new paragraph 2.

X

Comments of the representative of Hungary on article 74 of ULIS

1. *On the comments and proposals of the United Kingdom, "Form", paragraph 1* (a):* It is indeed clear from article 35.2 and 36 ULIS that the word "liable" embraces subjection to any remedy. In this case, however, it might be superfluous or even misleading to use other words in article 74. This might create the impression that articles 35.2 and 36 do not cover the same field covered by the proposed text of paragraph 1 in comment (*a*). It might be asked why do articles 35.2 and 36 not use the same words. The extensive meaning of the word "liable" can also be deduced from paragraph 3, article 74.

2. Ibid., *paragraph 1* (b): I wonder whether the proposed text under the heading "Substance" eliminates the evils which the proposal strives to eliminate.

(*a*) An "absence of clear understanding" is also present in respect of "radically changed" or "an obligation quite different", not to speak of the fact that the proposed text also contains the incriminated expressions (*in fine*).

(*b*) "Impossibility" is also subject to "doubt and divergence between national jurisdictions".

(*c*) The difficult problem of cause and effect is not eliminated by the proposed text, only transferred to another level ("impossibility owing to such circumstances").

(*d*) The proposed text is much more complicated than the original. As it is one of the aims of the Working Group to simplify the ULIS. I wonder whether it brings such improvements as to warrant such a result.

3. Ibid., *paragraph 2*:

(*a*) The original rule in ULIS applies also while the temporary impediment has not yet come to an end, the proposed rule does not. Under this latter rule a radical change becomes relevant only when the temporary impediment has ceased to exist. I believe that a "radical change" should be relevant also before the temporary impediment has been removed.

(*b*) This indicates a shortcoming of ULIS. Why should the "radical change" be relevant only where there is a *temporary* impediment? Moreover: what is the reason for concentrating in paragraph 1 on the *causes* of breach and in paragraph 2 on the *results* thereof? From this point of view the text of paragraph 1 as suggested by the representative of the United Kingdom is far better than that of the ULIS, provided that it would apply to paragraph 2 as well because it combines the cause and the result of the breach and provided that the word "impossibility" is omitted (see under 5 below). But if such a distinction should nevertheless be maintained for different sets of breach, the division line should not run between temporary impediment and other cases of breach but perhaps between delay and other cases of breach. This needs further consideration. Consequently *we should either have the "either . . . or" construction of the text suggested by the representative of the United Kingdom or use "due to" (or any other expression) in paragraph 1 and "radical change" in paragraph 2 for all cases of delay.*

4. Ibid., *paragraph 3*: I wonder whether "the contract avoided" should be inserted. This would, to a great extent, reduce the meaning of "liability" in paragraph 1 to damages. Exemption would then mean only exemption from paying damages and from requiring specific performance which is anyway heavily restricted (see article 41, ULIS).

5. *"Restriction" to frustration*: Both the representative of the United Kingdom and the representative of Ghana advocate the "restriction" of the field of application of article 74 to frustration. I have the impression that the provisions of ULIS do not provide for a broader scope for exemptions than it would provide for if based on frustration. Frustration is after all a common law term and concept and ULIS tries to find words equally workable under many civil law systems as well.

As it seems, the two distinguished delegates feel uneasy in respect of the very Continental brevity of the expression "was due to". Perhaps their doubts and misgivings might be reduced by supplementing the expressions in paragraph 1: "he was not bound to take into account or avoid or overcome" by the following words (subject to linguistic improvement): *"or did not fall within his sphere of risk"*. This might be about as vague as any wording we can find in this field but would at least cover the case of an unforeseen rise in prices mentioned under the heading: Form, paragraph 1 (*b*) by the representative of the United Kingdom. In that case the word "impossibility" might not appear in the text. This concept is namely much narrower in many civil law systems than the "impossibility" of frustration. It usually covers only physical and legal impossibility, although the Germans frequently used the term "economic impossibility" also (particularly before the doctrine of "*Wegfall der Geschäftsgrundlage*" was generally accepted) in which case impossibility would by and large cover the "impossibility" of frustration.

* See above in this annex, section I.