

I. INTERNATIONAL SALE OF GOODS

1. Report of the Working Group on the International Sale of Goods on the work of its sixth session (New York, 27 January-7 February 1975) (A/CN.9/100)*

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* Annexes to this report are reproduced in the present volume as Sections 2 to 5 of this chapter.

INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session held in 1969. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the United Nations Commission on International Trade Law on its second session.¹

3. The Working Group held its sixth session at the Headquarters of the United Nations in New York from 27 January to 7 February 1975. All members of the Working Group were represented except Sierra Leone.

4. The session was also attended by observers from the following members of the Commission: Bulgaria, Federal Republic of Germany, Norway and Philippines, and by observers for the following international organizations: Hague Conference on Private International Law and International Chamber of Commerce.

5. The following documents were placed before the Working Group:

(a) Provisional agenda and notes (A/CN.9/WG.2/L.2);

(b) Revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the UNCITRAL Working Group on the International Sale of Goods at its first five sessions (A/CN.9/87, annex I),[†]

¹ Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

[†] UNCITRAL Yearbook, vol. V: 1974, part two, I, 2.

(c) Comments and proposals of representatives on the revised text of the Uniform Law on the International Sale of Goods as approved or deferred for further consideration by the Working Group at its first five sessions: note by the Secretariat (A/CN.9/WG.2/WP.20).[‡]

(d) Pending questions with respect to the revised text of a uniform law on the international sale of goods: report of the Secretary-General (A/CN.9/WG.2/WP.21 and Add.1 and 2).[§]

6. The session of the Working Group was opened by the representative of the Secretary-General.

7. At its first meeting, held on 27 January 1975, the Working Group elected the following officers:

Acting Chairman: Mr. Gyula Eörsi (Hungary)

Rapporteur: Mr. Roland Loewe (Austria).

8. The Working Group adopted the following agenda:

(1) Election of officers

(2) Adoption of the agenda

(3) Provisions of the Uniform Law on the International Sale of Goods deferred by the Working Group for further consideration

(4) Second reading of the revised Uniform Law on the International Sale of Goods

(5) Future work

(6) Adoption of the report of the session.

9. In the discussion on the adoption of the agenda it was decided to proceed article by article through the revised text of the Uniform Law on the International Sale of Goods (ULIS) as it appears in annex I to document A/CN.9/87|| but to discuss matters not in square brackets only if there was substantial support for doing so.

[‡] Reproduced in this volume, part two, I, 4.

[§] *Ibid.*, part two, I, 3.

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

10. In the course of its deliberations, the Working Group set up drafting parties to which various articles were assigned for redrafting.

11. Before proceeding to a discussion of the articles of the revised text of ULIS, the Working Group considered two general questions: (1) whether the articles should be in the form of a uniform law annexed to a convention or whether they should form part of an "integrated" convention, and (2) whether the revised text should include provisions in respect of formation of contracts.

12. As to the first question, the Working Group noted that the rules on the limitation period were cast in the form of an integrated convention. It was also noted that the same content could appear in either a uniform law or in an integrated convention.

13. The Working Group decided to draft the revised text in the form of an integrated convention and set up Drafting Party I, consisting of the representatives of Austria and the United Kingdom and the observer from the Hague Conference on Private International Law, to report to the Working Group on the changes in ULIS which would be necessary to create an integrated convention.

14. The Working Group adopted the recommendation of Drafting Party I that the title be changed to "Convention on the International Sale of Goods". The title of chapter I was changed to "Sphere of application". The present text of article 1, paragraph 3, which provides that "the present Law shall also apply where it has been chosen as the law of the contract by parties" was moved to a new article 3 *bis* and article 5, which provides that "the parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions" was moved to a new article 3 *ter*. Paragraphs (d) and (e) of article 4 were deleted and they will be considered when the clauses in respect of implementation, and declarations and reservations and the final clauses are considered. The only other changes considered necessary in the substantive part of the Convention were to replace all references to "the present Law", "the Uniform Law" and similar phrases by "this Convention".

15. As to the second question, the Working Group was of the opinion that there should be no attempt to incorporate the provisions on formation of contracts in the Convention.

16. The Working Group also agreed that the formulations in the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15)[¶] should be followed to the largest extent possible whenever there was a similar text in the Sales Convention. It was pointed out, however, that the issues arising in limitation and sale of goods are different and that it would not be desirable to adopt the text of the Limitation Convention in the Sales Convention where that would lead to an inappropriate result.

PENDING QUESTIONS

Article 1

"1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States:

[¶] *Ibid.*, part three, I, B.

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

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

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

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

Subparagraph 1 (b)

17. It was suggested that subparagraph 1 (b) be deleted on the grounds that:

(i) The rules of private international law in some States could lead to the application of the law of one State to the obligations of the buyer and of a different law to the obligations of the seller. It would be difficult in such a situation to know whether under paragraph 1 (b) all of the provisions of the Convention would be applicable to any dispute between the parties or only those provisions relating to the buyer or the seller, as the case may be.

(ii) Subparagraph 1 (b) created the possibility of applying any one of three legal régimes to a contract of sale: the domestic law of the forum, the domestic law of the State of the other party to the contract and the Convention, rather than only two as before.

(iii) If the forum was not in a Contracting State but the rules of private international law of the forum referred the dispute to the substantive law of another State which was a Contracting State, the question would arise whether the forum would feel bound by this subparagraph to apply the Convention rather than the domestic law of the other State.

(iv) Subparagraph 1 (b) had no counterpart in the Limitation Convention.

18. In support of retaining subparagraph 1 (b) it was pointed out that the reason why it had no counterpart in the Limitation Convention was because rules of private international law in matters of the period of limitation were too unsettled and that the current text of article 1 was a compromise reached after long discussion on the earlier text of article 1 of the 1964 ULIS.

19. The Working Group decided to retain subparagraph 1 (b).

Paragraph 2

20. A proposal was made to add the words "and consequently the present Law shall not apply" following the word "disregarded" in paragraph 2. The Working Group was of the opinion that the proposal would make the meaning of the text clearer but that it was nevertheless desirable to keep to the text of the Convention on the Limitation Period (article 2 (b)). Therefore, no changes were made by the Working Group to article 1 and the square brackets were deleted.

Article 2

"The present Law shall not apply to sales:

"1. (a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless it appears from the contract [or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract] that they are bought for a different use;

"(b) By auction;

"(c) On execution or otherwise by authority of Law.

"2. Neither shall the present Law apply to sales:

"(a) Of stocks, shares, investment securities, negotiable instruments or money;

"(b) Of any ship, vessel or aircraft [which is registered or is required to be registered];

"(c) Of electricity."

Subparagraph 1 (a)

21. The Working Group considered subparagraph 1 (a) which excludes consumer transactions from the scope of the Convention. Three approaches to drafting this subparagraph were suggested: the present text with the bracketed words, the present text with the bracketed words deleted and the text of article 4 (a) of the Limitation Convention.

22. It was observed that the main advantages of adopting the text of the Limitation Convention were its simplicity and the desirability of keeping the two Conventions in harmony. However, it was objected that this was not appropriate to the more complex problems of the law of sales. Moreover, the use of the subjective test in the Limitation Convention was feasible because the determination whether the transaction was an excluded consumer transaction did not need to be made until after a dispute had arisen whereas in the law of sales generally it was important to know from the outset what law applied. The Working Group decided to adopt a text based on the Limitation Convention and set up Drafting Party II consisting of the representatives of France, Hungary and the United States to draft a text.

23. One representative stated that the wording of subparagraph 1 (a) should be as close as possible to the Convention on the Limitation Period.

24. The Working Group considered two texts: the text proposed by Drafting Party II which excluded from the application of the Convention the sale "of goods bought for personal, family or household use if the seller knows or ought to know of the intended use", and a text proposed by an observer which excluded from the Convention the sale "of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not realize and had no reason to realize that the goods were bought for any such use".

25. In the ensuing discussion it was urged that it was important to state that the knowledge of the seller should be at the time of the conclusion of the contract. It was also observed that in some legal systems the use

of the word "if" as used in the text proposed by Working Party II would require the party relying on the "if" clause to prove that which was in the clause. In contrast, the use of the word "unless", as in the text presented by the observer, would put the burden on the seller to prove his knowledge or lack of knowledge of the intended use of the goods.

26. The Working Group adopted the text proposed by the observer. However, several representatives expressed themselves in favour of the text proposed by the Drafting Party subject to certain amendments to meet the points raised in the discussion.

Subparagraph 2 (a)

27. The question was raised whether, by the effect of subparagraph 2 (a), documentary sales of goods were excluded from the convention. The Working Group agreed that they were not intended to be excluded, since documentary sales of goods were a major form of the international commercial sales of goods which the Convention was intended to govern. It was pointed out that there was an ambiguity in the French and Spanish texts which could be read to mean that sales of documents, and therefore documentary sales, were excluded. Nevertheless, the Working Group decided to retain the text in the various languages as it was in order to establish harmony with the Limitation Convention, but with the clear understanding that documentary sales of goods are governed by the Convention.

Subparagraph 2 (b)

28. The Working Group decided to delete the bracketed words in subparagraph 2 (b) in order to use the same language as the Limitation Convention. The discussion focused on the difficulty of distinguishing between registration of ocean vessels and the "administrative" registration of all boats, as is required in some countries. It was finally decided that the exclusion from the Convention of commercial sales of small pleasure craft, which is one of the results of deleting the bracketed words, was necessary in view of the precedent established by the Limitation Convention and the different registration régimes in different countries.

29. The Working Group decided that the structure of article 2 should conform to the structure of the corresponding provisions in article 4 of the Limitations Convention. Therefore, the new text of article 2 contains only one major paragraph listing six categories of sales not governed by the Convention.

Article 3

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

30. The Working Group decided to replace paragraph 1 of article 3 by paragraph 1 of article 6 of the Convention on the Limitation Period in the International Sale of Goods, which reads as follows:

"1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services."

Article 4

"For the purpose of the present Law:

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

31. It was agreed to use the language of article 2 (c) of the Limitation Convention in substitution for the above text of subparagraph (a). This article differs from the present text in only minor editorial ways. It reads as follows:

"For the purposes of this Convention: . . .

"(c) Where a party to a contract of sale of goods has places of business in more than one State, the place of business shall be that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract; . . ."

Article 8

"The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage."

32. It was suggested that article 8 be deleted on the ground that it was not necessary and that, since what was covered by the Convention was obvious, it was not necessary to say what was not covered. However, the Working Group decided that article 8 served a useful purpose in that it made clear that provisions such as article 57 of the Convention in respect of the determination of a price which is not fixed or determinable are not intended to make valid a contract which would not otherwise be valid under the domestic legislation of one of the Contracting States.

33. It was suggested that the words "in particular" should be deleted as being misleading. However, there was no consensus for deletion and the words were retained.

Article 9

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

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

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

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

Paragraph 1

34. The Working Group agreed that the parties should be bound by any usage to which they have expressly or impliedly agreed and by any practices which they have established between themselves as provided in paragraph 1.

Paragraph 2

35. However, the question was raised as to what criteria should decide whether the parties had impliedly agreed to a usage, in particular whether the parties had to know specifically of the usage or whether they could be held to a usage of which they were unaware, if it was widely applied. The question was also raised whether, if the parties could be held to a usage of which they were unaware, the usage had to be in the particular trade or whether it was sufficient that the usage was used in international trade generally. Part of the discussion centred on the point at which the will of the parties to incorporate the usage could be implied and at what point it became hypothetical.

36. A different point of view considered usages as a means of imposing the will of the stronger party on the weaker. In this connexion reference was made to the interests of developing States whose merchants had not participated in the development of usages and who might not be aware of them.

Paragraph 3

37. Representatives who opposed a broad definition of implied usages were also opposed to paragraph 3 which provides that in case of conflict between a provision of the uniform law and usages applicable to the contract under paragraph 2, the latter shall prevail. In addition some representatives stated that as a constitutional matter or as a matter of public policy it was unacceptable that usages would take precedence over a statute or a convention.

Paragraph 4

38. The Working Group deleted paragraph 4. Some representatives were of the opinion that it was often difficult to find any meaning which was widely accepted and regularly given to various expressions, provisions and forms of contract which are used in international trade. Other representatives were of the view that the difficulties could be resolved by analogy to the provisions on usages. However, one observer doubted that this solution was adequate and regretted the deletion of this paragraph.

Drafting Party III

39. The Working Group set up Drafting Party III composed of the representatives of the Federal Republic of Germany, Japan and the United States of America to redraft paragraph 2 in the light of the discussion and to

make such changes in paragraph 1 as might be considered necessary.

40. Drafting Party III recommended the following text in replacement of the above text of article 9:

"1. The parties shall be bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. The contract shall be considered, unless otherwise agreed, to include a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

41. The Drafting Party recommended the deletion of paragraph 3 of the present text of article 9 on the ground that it was unnecessary. Those usages which were incorporated into the contract under paragraphs 1 and 2 automatically took precedence over the provisions of this Convention by virtue of article 5² which embodies the principle of party autonomy.

42. There was considerable support in the Working Group for deleting all of article 9. There was also support for deleting paragraph 2 only. The Working Group, after deliberation, adopted the text of paragraph 1 as recommended by the Drafting Party and of paragraph 2 amended as below:

"2. The parties shall be considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or had reason to know and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Article 10

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

43. The Working Group agreed that the definition of "fundamental breach" was important because the remedy of avoidance of the contract rested upon it. After a number of drafting suggestions were considered, Drafting Party IV, consisting of the representatives of India and Mexico and the observer from the International Chamber of Commerce, was set up to draft a new text.

44. Drafting Party IV proposed the following text:

"For the purposes of this Convention, a breach of contract shall be regarded as fundamental whenever the failure of a party to perform the contract results in substantial detriment to the other party and the party in breach had reason to be aware thereof."

In explanation of this text it was stated that the Drafting Party was of the view that it was unsatisfactory to

² Article 5 was moved to article 3 *rer.* As approved by the Working Group at this session it reads as follows: "The parties may exclude the application of this Convention or derogate from or vary the effects of any of its provisions."

rely on a test under which the party not in breach would not have entered the contract or would not have had any interest in concluding the contract if he had anticipated the breach.

45. The Working Group accepted the recommendation of the Drafting Party, subject to minor drafting changes that were necessary for the purpose of establishing concordant texts in English and French. The text adopted by the Working Group is as follows:

"A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result."

Article 11

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as is practicable in the circumstances."

46. This article was deleted when the word "promptly" was dropped from the three places it appeared in the Convention, articles 38, 42 and 73.

Proposed new article 12

47. Consideration was given to a proposal submitted by an observer to create a new article 12 which would govern the obligation of a party in respect of the acts of those for whom he is responsible.³ There was opposition to a special article on agency relationships in a convention on sales and no consensus was reached on the adoption of this proposal. At the same time it was agreed to delete any reference to agency relationship in other articles of the Convention, notably articles 76, 79 and 96.

Article 14

48. Consideration was given to a proposal submitted by an observer to add a new paragraph 2 to article 14 providing that if a notice has been sent properly and in time, the sender can rely upon it even if the notice does not arrive or arrives late.⁴ This would be a generalization of the rule in article 39, paragraph 3 of the present text. It was observed that this was contrary to the rule throughout much of the world which places the risk of transmission on the party who chooses the means of communication. The proposal was withdrawn.

Article 15

"[A contract of sale need not be evidenced by writing and shall not be subject to any other require-

³ *Alternative A:* "Where the present Law refers to the act of (actual or presumed) knowledge of a party, such reference shall include the act or knowledge of his agent or of any person for whose conduct such party is responsible [provided that such agent or person is acting within the scope of an employment for the purpose of the contract]."

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

⁴ "2. Where any notice referred to in the present Law has been sent in due time by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the party giving such notice the right to rely thereon."

ments as to form. In particular, it may be proved by means of witnesses.]”

49. The Working Group considered two points: first, whether article 15 was properly in a law of sales or whether it belonged in a law on formation and validity of contracts and second, whether the rule should be that contracts of sale need not be in writing or that they must be in writing.

50. Several attempts at formulating compromises were attempted which would preserve the freedom to create contracts not in writing for those States for whom this is a standard way in which business is done but at the same time to preserve the requirement of writing for the States which presently require it. All such attempts failed.

51. Similarly, certain representatives were in favour of deleting article 15 altogether. Other representatives expressed themselves in favour of the present text, which they considered essential for the Convention. Still other representatives considered that this article was partially formation, partially validity and partially proof. In view of the foregoing the Working Group decided to leave the article in brackets as an article in respect of which no agreement had been reached.

Article 16

“Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except in accordance with the provisions of article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods.”

52. After a discussion of the relationship between article 16, article 42, paragraph 1 and article 71, paragraph 2, the Working Group adopted the following new text of article 16:

“Where, in accordance with article 42, paragraph 1, or article 71 paragraph 2, one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.”

53. The current text was considered a more appropriate form for an integrated Convention. In addition, it does not speak of the enforcement of a judgement for specific performance, a subject thought not to be appropriate for a Convention on the law of sales.

Article 17

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

54. Some representatives were in favour of the retention of this article as it was. The Working Group, nevertheless, decided to use the text of article 7 of the Convention on the Limitation Period. Consequently, the

present text was adopted without the words “in its interpretation and application”.

Title of section I

Delivery of the goods [and documents]

55. It was decided to delete the square brackets and keep the words “and documents” in the title.

Article 20

“Delivery shall be effected:

“(a) Where the contract of sale involves the carriage of goods, by handing the goods over to the carrier for transmission to the buyer;

“(b) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unascertained goods to be drawn from a specific stock or to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer’s disposal at that place;

“(c) In all other cases by placing the goods at the buyer’s disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence.”

56. The Working Group agreed with the suggestion of an observer that article 20 may not always give the results intended. The introduction to paragraph (c), i.e. “In all other cases”, caused many fact situations to be assigned to paragraph (c) which obviously did not fit. Drafting Party V, consisting of the representative of the United Kingdom and the observers for Bulgaria and Norway, was set up to consider article 20. It reported a text which listed several means by which delivery could be made other than those covered by article 20 of the present text. However, after discussion, the Working Group decided to retain article 20 as it was except for the deletion of the word “all” in paragraph (c). This change makes it clear that paragraph (c) does not exclude an agreement of the parties that delivery should be made in another manner.

57. A number of minor drafting changes were accepted by the Working Group. The article is to begin “Delivery of the goods is effected:” to make it clear that article 20 does not govern the delivery of documents. In paragraph (a) the word “first” was inserted before the word “carrier”. The words “or, in the absence of a place of business, at his habitual residence” were deleted from paragraph (c) because the matter is covered by article 4 (b).

Article 35

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

at the time when risk would have passed had they been in conformity with the contract.]

"2. The seller shall also be liable for any lack of conformity which occurs after the time indicated in paragraph 1 of this article and is due to a breach of any of the obligations of the seller, including a breach of an express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period."

58. The consideration of article 35 was deferred until the discussion on passing of the risk at the next session of the Working Group.

Article 38

Paragraph 1

"1. The buyer shall examine the goods, or cause them to be examined, promptly."

59. The Working Group decided to delete the word "promptly" and to substitute "within as short a period as is practicable in the circumstances". At the same time article 11, which contained the definition of "promptly", was deleted.

Article 39

"1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in article 38 is found later, the buyer may none the less rely on that defect, provided that he gives the seller notice thereof within a reasonable time after its discovery. [In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a [longer] [different] period.]

"2. In giving notice to the seller of any lack of conformity the buyer shall specify its nature.

"3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon."

Paragraph 1

60. The bracketed language in the present text raised two problems: the maximum time-limit for giving notice of a lack of conformity of the goods if there is no contractual guarantee, and the effect of a contractual guarantee on that time-limit. One representative mentioned that a so-called "guarantee" that at the time of delivery the goods had the quality stipulated in the contract was not a guarantee which would affect the time-limit for giving notice.

61. The Working Group decided to retain the two-year limit in paragraph 1. However, several representatives were in favour of shortening the period to one year.

62. The Working Group was in agreement that if a guarantee was for a period longer than two years, the buyer should have at least as long as the guarantee period to give notice, subject to the rule in the first two sentences that he must give notice within a reasonable time after he has discovered the defect or ought to have discovered it. There was no consensus as to whether the buyer need only discover the defect within the guarantee period and give notice within some prescribed time thereafter or whether he also had to give notice within the guarantee period. The other problem on which there was no consensus was whether a guarantee period of less than two years should shorten the two-year time-limit during which notice could be given. Certain representatives stated that it was a question of the interpretation of the guarantee and that any rule of interpretation in the Convention in this connexion would be likely to be inappropriate.

63. The Working Group set up Drafting Party VI consisting of the representatives of Czechoslovakia, Japan and the United States and the observer of Norway. The following text was recommended by the Drafting Party for the completion of paragraph 1.

"However, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller at the latest within a period of two years from the date on which the goods were actually handed over except to the extent that such time-limit is inconsistent with a guarantee covering a different period."

The word "actually" was inserted before "handed over" in order to make it clear that the two-year time-limit begins at the time the buyer is in a position to examine the goods.

New paragraph 2

64. Drafting Party VI recommended the adoption of a new paragraph 2 which would have governed the relationship between a guarantee and the obligation to give notice of lack of conformity. This text was as follows:

"2. In case of breach of an express guarantee by the seller referred to in article 35, paragraph 2, the buyer shall lose the right to rely on such breach if he has not given the seller notice of the lack of conformity within a reasonable time after he has discovered it, but at the latest within a period of three months from the date of the expiration of the period of guarantee."

65. The Working Group accepted the first portion of the proposed amendment to paragraph 1 up to and including the words "were actually handed over". It rejected the remainder of the proposed paragraph 1 and of the entire text of the proposed paragraph 2 in favour of a new text of paragraph 2 based on the principle of party autonomy. A Drafting Party consisting of the representatives of Austria and the United Kingdom was set up to effect this mandate. The text of paragraph 2 as recommended by this Drafting Party and as adopted by the Working Group is as follows:

"2. The parties may, in accordance with article 5, derogate from the provisions of the preceding paragraph by providing for a period of guarantee."

Paragraphs 2 and 3

66. Paragraphs 2 and 3 of this article were re-numbered paragraphs 3 and 4.

Article 41

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

"...

"(b) Claim damages as provided in article 82 or articles 84 to 87."

Paragraph 1

67. The references in subparagraph 1 (b) were changed from "article 82 or articles 84 to 87" to "articles 82 to 89".

Article 42

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

"2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after prompt notice."

Paragraph 1

68. There was general agreement that the buyer's right to require the seller to perform the contract should not be linked to his right to have a court order specific performance of the contract. After discussion, and having redrafted article 16 (see para. 52 above), the Working Group decided to open the paragraph with the words "subject to article 16" and follow with a new text suggested by an observer.

69. A second problem in paragraph 1 was whether the words in brackets in the original text should be retained. Two representatives were in favour of retaining these words so as to emphasize the right of the buyer to cure the goods himself, even though the seller may be prepared to do so. However, the Working Group decided to delete the words in brackets.

Paragraph 2

70. In paragraph 2 the Working Group decided to delete the words "and after prompt notice" and substitute "and after request made within a reasonable time". One observer felt that the right of the buyer to require the seller to deliver substitute goods should be more clearly defined.

71. The new text of article 42 as adopted by the Working Group is thus as follows:

Article 42

"1. Subject to article 16, the buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in

particular by avoiding the contract under article 44 or by reducing the price under article 45.

"2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after request made within a reasonable time."

Article [43 bis]

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

"2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision."

Paragraph 1

72. An observer proposed adding the words "on account of delay" following the words "unless the buyer". The effect would have been that the buyer could have avoided the contract and thereby cut off the seller's right to cure a defect in the goods only if there was late delivery. The Working Group rejected the proposal.

73. The Working Group decided to delete the words in brackets in conformity with its decision in respect of article 42. The Working Group also amended the end of paragraph 1 to read:

"or has declared the price to be reduced in accordance with article 45."

Paragraph 2

74. The Working Group considered a proposal of an observer to amend the opening phrase of paragraph 2 as follows:

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

There was no consensus for adopting this amendment.

Article 44

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

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

"(b) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 43.

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

"(a) Where the seller has not delivered the goods [or documents] on time, after the buyer has been informed that the goods [or documents] have been delivered late or has been requested by the seller to make his decision under article [43 *bis*, para. 2];

"(b) In all other cases, after the buyer has discovered the failure by the seller to perform or ought to have discovered it, or, where the buyer has requested the seller to perform, after the expiration of the period of time referred to in article 43."

75. The Working Group considered the relationship between paragraph 2 and paragraph 1 of this article and the similar relationship between paragraph 2 and paragraph 1 of article 72 *bis*. In both articles, paragraph 1 states the buyer's (art. 44) or the seller's (art. 72 *bis*) right to avoid the contract. Paragraph 2 states that the party not in breach would lose that right if he does not give notice of the avoidance within a reasonable time. The point in time from which the reasonable time was to be measured varied depending on the circumstances.

76. There was no agreement in the Working Group on the question whether paragraph 2 (a) of the revised text was drafted in such a manner as to make it clear that it covered cases of both late delivery and non-delivery. In order to draft a text which would clearly govern cases of non-delivery, the Working Group set up Drafting Group VIII consisting of the representative of the United States and the observers from the Federal Republic of Germany and Norway. The Drafting Group was also requested to consider the similar problem in article 72 *bis*.

77. Drafting Group VIII recommended transferring paragraph 2 of article 44 to a new article 44 *bis* worded as follows:

"1. Where delivery is not effected, the buyer may give notice of avoidance at any time, subject to the provisions of articles 43, 43 *bis* and 44.

"2. In other cases the buyer shall lose his right to declare the contract avoided, if he does not give notice thereof to the seller within a reasonable time:

"(a) In respect of late delivery and subject to the provisions of articles 43 and 43 *bis*, after the buyer has become aware that delivery has been effected;

"(b) In respect of lack of conformity or any other breach not covered by subparagraph (a), after the buyer has discovered or ought to have discovered such breach, or where avoidance is based on the seller's failure to cure such breach in accordance with articles 43 or 43 *bis*, after the expiration of the applicable period of time referred to therein."

78. The text proposed by the Drafting Group was rejected by the Working Group on the grounds that it was hard on the seller because, in certain circumstances, it required two notices, one notice of his intention to avoid and a second notice of his actual avoidance. As a result of this decision of principle against the requirement of two notices, paragraph 2 of article 44 was

deleted, as were the words "by notice to the seller" in the opening line of paragraph 1.

79. Two representatives stated that they reserved the right to return to this matter, which is reflected in article 72 *bis* as well as in this article, at a later time because there had not been sufficient time to reflect on the proposals during this session of the Working Group. One observer was of the view that the decision taken by the Working Group was not correct, and suggested that it should be reconsidered in the plenary session of UNCITRAL. Another observer remarked that, as a result of the decision to delete article 44 *bis* and 72 *ter* as they had been proposed by the Drafting Group, the right of a party to declare the contract avoided seems to subsist for an unlimited period of time and therefore he expressed his doubts as to the deletion of those provisions or of any other provision to a similar effect.

Article 46

80. Article 45 was added to the list of articles to which this article makes a cross-reference.

Article 52

81. The Working Group moved article 52 on the transfer of property to a new article 40 *bis*.

Article 57

"Where a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time."

82. Several representatives recommended deletion of article 57 on the ground that the problems of contracts of sale in which the price is not determined or determinable relate to the validity of the contract and should not be dealt with by the Convention. It was also observed that such contracts were and should be invalid and that nothing in this Convention should appear to give them validity.

83. Other representatives were of the view that article 57 did not make a contract valid if it was otherwise invalid under the appropriate law. They suggested that article 57 served the useful function of specifying how to determine the price if the price was not determined or determinable from the contract itself. In their opinion article 57 could take effect only if the contract was valid under the appropriate law.

84. Since there was no consensus to delete article 57, the Working Group decided to retain it in its present form.

Article 59

"1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place."

Paragraph 1

85. The Working Group decided to delete the words "or if he does not have a place of business, at his

habitual residence" since the matter is covered by article 4.

Article 59 bis

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

Paragraph 3

86. The Working Group discussed the proposal of an observer that paragraph 3 should read as follows:

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

87. There was no consensus to amend paragraph 3 as proposed by the observer. Some representatives stated that since a contractual requirement for payment against documents was inconsistent with a right of inspection prior to payment, the fact situation envisaged by the proposal was already covered by the "unless" clause in paragraph 3.

Article 67

"[1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may [have recourse to the remedies specified in articles 70 to 72 bis, or] make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

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

88. A proposal was made to delete this article on the grounds that it was superfluous. However, several representatives stated that the article could be useful in certain situations. The representatives who proposed the deletion stated that there was no opposition in principle to the article and the Working Group decided to retain it.

Paragraph 1

89. In order to make it clear that under the contract the buyer may have an obligation to specify the form, measurement or other features of the goods as well as a right to do so, paragraph 1 was amended to begin as follows:

"If the contract envisages that the buyer will subsequently determine . . ."

90. The Working Group adopted two amendments to make it clear that the seller has a right to specify if buyer does not, but has no duty to do so. In the first amendment the words "may have recourse to the reme-

dies specified in articles 70 to 72 bis, or make the specification" were deleted in favour of "may, without prejudice to any other rights he may have under the contract and the present Convention, specify". In the second amendment the words "in accordance with the requirements of the buyer in so far as these are known to him" were deleted in favour of "in accordance with any requirement of the buyer that may be known to him".

91. The text of paragraph 1 of article 67 as amended by the Working Group is as follows:

"1. If the contract envisages that the buyer will subsequently determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have under the contract and this Convention, make the specification himself in accordance with any requirement of the buyer that may be known to him."

92. The Working Group was of the view that the extensive discussions in respect to article 67 demonstrated that it was properly a provision on remedies. Therefore, the Working Group decided to move the provision to a new article 72 ter.

Article 70

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

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

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

Paragraph 1

93. The Working Group made only minor amendments. In subparagraph 1 (a) the references were changed to "articles 71 to 72 ter". At the end of subparagraph 1 (a) the word "and" was deleted. In subparagraph 1 (b) the references were changed to "articles 82 to 89".

Article 71

"2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present law, the seller may require the buyer to perform to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the present law."

Paragraph 2

94. In a decision similar to that made in article 42, the Working Group decided to begin this paragraph with the words "subject to the provisions of article 16 . . ." and to delete the portion of the paragraph which begins with "to the extent . . .".

The Working Group also decided to add the words "his obligation" to the new end of paragraph 2.

95. The new text of paragraph 2 is as follows:

"2. Subject to the provisions of article 16, if the buyer fails to take delivery or to perform any other obligation in accordance with the contract and this Convention, the seller may require the buyer to perform his obligation."

Article 72 bis

Alternative A

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

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

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

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

Alternative B

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

"(a) Where the buyer has not paid the price or otherwise has not performed the contract within an additional period of time fixed by the seller in accordance with article 72; or

"(b) Where the goods have not yet been handed over, the failure by the buyer to pay the price or to perform any other of his obligations under the contract of sale and the present law amounts to a fundamental breach.

"2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly the seller shall where the goods have not yet been handed over, be deemed to have avoided the contract.

"3. The seller shall lose his right to declare the contract avoided if he does not give notice to the buyer before the price was paid or, where the goods have been handed over, promptly after the expiration of the period of time fixed by the seller in accordance with article 72.]"

Alternative C

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

"(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 decision as regards performance or avoidance of the contract;

"(b) Where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article 72;

"(c) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of six months [one year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right, in the goods.]"

96. The Working Group adopted paragraph 1 of alternative A.

97. Drafting Group VIII recommended parallel action in article 72 *bis* to that which it recommended in article 44. In its proposal, paragraph 2 would have been transferred to a new article 72 *ter*, and what is now article 72 *ter* would have become article 72 *cuater*. The proposed article 72 *ter* would have been worded as follows:

"1. Where delivery is not taken or the price is not paid, the seller may give notice of avoidance at any time, subject to the provisions of articles 72 and 72 *bis*.

"2. In other cases 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) In respect of late performance of the buyer's obligations and subject to the provisions of article 72, after the seller has become aware that performance has been rendered;

"(b) In respect of any other breach not covered by subparagraph (a), after the seller has discovered or ought to have discovered such breach, or where avoidance is based on the buyer's failure to perform within an additional period of time under article 72, after the expiration of the period of time referred to therein."

98. The proposed article 72 *ter* and, thereby, paragraph 2, alternative A, was rejected by the Working Group at the same time, and for the same reasons that paragraph 2 of article 44 was deleted (paras. 75 to 78 *supra*). As a result article 72 *bis* as approved by the Working Group consists of paragraph 1 of alternative A, with the words "by notice to the buyer" in the first line deleted.

Article 73

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the economic situation of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligation."

Paragraph 1

99. The Working Group discussed the criteria by which it would be determined that a party may suspend his performance. Some representatives stated that "a serious deterioration in the economic situation of the other party" was too vague a test to be employed without difficulty.

100. The Working Group decided to replace those words by "a serious deterioration in the capacity to perform or creditworthiness of the other party . . .".

101. The Working Group decided to replace the word "promptly" in paragraph 3 by the word "immediately".

Article 76

Alternative A

"[1. Where a party has not performed one of his obligations in accordance with the contract and the present law, he shall not be liable in damages for such non-performance if he proves that, owing to circumstances which have occurred without fault on his part, performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account, or to avoid or to overcome the circumstances.

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

"3. Where the impossibility of performance within the provisions of paragraph 1 of this article is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impossibility is removed, unless the performance required has then so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract.

"4. The non-performing party shall notify the other party of the existence of the circumstances which affect his performance within the provisions of the preceding paragraphs and the extent to which they affect it. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the circumstances, he shall be liable for the damage resulting from such failure.]"

Alternative B

"[1. Where a party has not performed one of his obligations [in accordance with the contract and the present Law], he shall not be liable [in damages] for such non-performance if he proves that it was due to an impediment [which has occurred without any fault on his side and being] of a kind which could not reasonably be expected to be taken into account at the time of the conclusion of the contract or to be avoided or overcome thereafter.

"2. Where the circumstances which gave rise to the non-performance constitute only a temporary impediment, the exemption shall apply only to the necessary delay in performance. Nevertheless, the party concerned shall be permanently relieved of his obligation if, when the impediment is removed, performance would, 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.

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

"4. 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 impediment which gave rise to the exemption of the first party was caused by the act of the other party [or of some person for whose conduct he was responsible].]"

Alternative C

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

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

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

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

102. The Working Group had three proposals before it: alternatives A and B which had been proposed at the fifth session of the Working Group (A/CN.9/87, annex I)** and alternative C which had been proposed by a representative (A/CN.9/WG.2/WP.20, annex VI).††

103. The Working Group was of the opinion that alternative C contained an appropriate combination of the two main positions which had been advanced at earlier sessions of the Working Group, i.e. (a) that the non-performing party should be excused from the consequences of his non-performance if he was impeded from performing by objective conditions, and (b) that

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

†† *Ibid.*, part two, I, 4.

a non-performing party can be excused only if there was no fault on his part.

104. Certain minor amendments to the wording of alternative C were adopted by the Working Group and, in order to provide a text which could more easily be rendered into French, a slightly different paragraph 3 was adopted.

105. The text of article 76 as adopted by the Working Group is as follows:

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

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

"3. The exemption provided by this article shall have effect only for the period before the impediment is removed.

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

106. The Working Group considered a new article 76 *bis* which had been proposed in connexion with alternative C of article 76 and which read as follows:

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

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

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

107. Although this proposal was supported by some representatives, other representatives thought it gave too much relief to the non-performing party. Still another view was that it was too complicated. The Working Group decided that it would not attempt to govern the consequences of non-performance beyond the relief given in article 76.

Article 78

"[1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due.]"

Paragraph 1

108. The Working Group recognized that the revised text of this article might lead to the conclusion that all provisions in a contract of sale are annulled when a contract is avoided. This was not the effect intended. For instance, an arbitration clause in the contract may be invoked to permit the arbitration tribunal to decide whether the avoidance was valid. After attempting several formulations to state which contract clauses are not annulled by avoidance, the Working Group decided to add a new sentence to paragraph 1 as follows:

"The avoidance shall not affect provisions for the settlement of disputes."

Article 79

"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 in the condition in which he received them.

"2. Nevertheless the preceding paragraph shall not apply:

"(a) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

"(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

"(c) If part of the goods have been sold in the normal course of business or have been consumed or transferred 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) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

"(e) If the deterioration or transformation of the goods is unimportant."

109. The Working Group decided to delete paragraph 2 (a) on the grounds that it was subsumed under paragraph 2 (d). Paragraph 2 (d) was moved to paragraph 2 (a) because it is the most important subparagraph of paragraph 2.

110. The Working Group decided to amend paragraph 1 by adding "substantially" before the words "in the condition". With the addition of the word "substantially" to paragraph 1, the Working Group decided that paragraph 2 (e) was no longer necessary and it was deleted.

111. In the original paragraph 2 (d) the words "or of returning them in the condition in which they were received" and "or of some other person for whose conduct he is responsible" were deleted.

112. The text of paragraph 2 (d), which will become paragraph 2 (a) in the new numbering, is thus as follows:

“(d) If the impossibility of returning the goods is not due to the act of the buyer.”

Article 81

“1. . . .

“2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

“(a) Where he is under an obligation to return the goods or part of them, or

“(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.”

113. One representative stated that he believed it to be incorrect that paragraph 2 (b) applied only to the situation in which the buyer had exercised his right to have the contract avoided. In the view of that representative, the obligation to account must apply whether it is the buyer or the seller who has avoided the contract. Another representative took the view that the situation in which the seller had avoided the contract was covered by subparagraph 2 (a).

Article 82

“Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. 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 then were known or ought to have been known to him, as a possible consequence of the breach of contract.”

114. Several representatives stated that the second sentence of this article should be deleted because it is a limitation on the right of full damages. The Working Group decided to retain the sentence. A reservation was expressed by one representative.

Article 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 arrears 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, plus 1 per cent.”

115. The Working Group decided to delete the words “or, if he has no place of business, his habitual residence”. The Working Group also decided to add to the end of the article the following words:

“but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller’s country”.

It was observed that since the rate of interest for commercial credits was often considerably more than 1 per cent higher than the official discount rate, the rule in the text was an invitation to the debtor to delay payment.

Article 84 (1)

“1. In case of avoidance of the contract, the party claiming damages may rely upon the provision of article 82 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.”

116. The Working Group considered whether to replace the words “on which the contract is avoided” by the words “on which delivery was or should have been effected”. The Working Group did not reach a decision as to which text was preferable and decided to include both phrases in square brackets in the text for consideration at the seventh session.

FUTURE WORK

117. The Working Group decided to recommend to the Commission that its seventh session should be held in Geneva for two weeks early in 1976, preferably between 5 and 16 January. At its seventh session the Working Group will complete its examination of pending questions in the Convention on the International Sale of Goods and will approve the text of the Convention.

118. The Working Group noted that the Commission at its seventh session requested it to consider, upon the completion of its present work, the establishment of uniform rules governing the validity of contracts for the international sale of goods, on the basis of the draft of the International Institute for the Unification of Private Law (UNIDROIT), in connexion with its work on uniform rules governing the formation of contracts for the international sale of goods. The Working Group expects to be able to hold at its next session a preliminary discussion on the formation and validity of such contracts so as to give the Secretariat, if appropriate, directions as to the studies which the Working Group may wish it to undertake in that field.

119. The question was raised whether it was desirable to have the Convention accompanied by a commentary. Several representatives expressed themselves in favour of such a commentary on the ground that it would make the preparatory work more readily available. The Working Group was of the view that such a commentary would be useful but that it should have an unofficial character. The Working Group requested the Secretariat to draw up a commentary based on the reports on the work of its sessions and the various studies made and to transmit a draft commentary to representatives for unofficial comments. The Working Group also requested the Secretariat to structure the draft provisions adopted by it in the form of a convention and to submit the text to it at its next session.