## 2. "Ipso facto *avoidance*" *in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary-General (A/CN.9/WG.2/WP.9)**

CONTENTS



### INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its third session held in 1970 decided to request "the Secretary-General to prepare a study of the concept of '*ipso facto* avoidance'" to be considered "at a subsequent session of the Working Group on the International Sale of Goods".[1] The Working Group at its informal meeting held on 15 April 1971 requested the Secretariat to prepare and circulate that study in time for consideration at its third session. The present study is submitted in response to this request.

2. At its third session the Commission also decided to request "States members of the Commission to submit their proposals with respect to the concept of '*ipso facto* avoidance' to the Secretariat for consideration in the study" referred to above.[2] The Secretary-General, in a note verbale dated 17 June 1970, communicated this request to the States concerned. The following States have submitted substantive proposals: Hungary, Italy, Norway, Spain, Tunisia and USSR. These proposals are reproduced in Annexes I-VI to this report.

3. In addition to the proposals referred to in paragraph 2 above, comments and proposals on articles of ULIS relating to *ipso facto* avoidance were reported in the following documents: (*a*) *A/CN.9/11* and *Addenda 1, 2 and 3* reproducing studies and comments by Governments on The Hague Conventions of 1964; (*b*) *A/CN.9/17*, analysis by the Secretary-General of

[1] Report of the United Nations Commission on International Trade Law on the work of its third session, *General Assembly Official Records, Twenty-fifth Session, Supplement No. 17* (A/8017) (hereinafter referred to as UNCITRAL Report on Third Session (1970)), para. 46, UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

[2] *Ibid.*

* 9 December 1971.

the studies and comments contained in the documents referred to under sub-paragraph (*a*) above; (*c*) Annex I to the Commission's report on its second session[3] summarizing comments and proposals by representatives of States Members of the Commission and observers on The Hague Conventions of 1964 at the second session; (*d*) *A/8017*, report of the Commission on the work of its third session; (*e*) *A/CN.9/31*, report by the Secretary-General analysing the studies and comments by Governments on The Hague Conventions of 1964 (this analysis includes all comments and proposals which were made prior to its preparation); and (*f*) *A/CN.9/35*, report of the Working Group on the International Sale of Goods on its first session.

4. In compliance with the request of the Commission referred to in paragraph 1 above, the present report is devoted to the study of the concept of "*ipso facto* avoidance" as used in ULIS. The study first describes the use in ULIS of the concept of "*ipso facto* avoidance", then it gives a short summary of the comments made on the above concept and its use in the Law, and reviews briefly the use of the same or similar concepts in national laws and in general conditions of sale used in international trade. The second part of the study then analyses in detail the concept of fundamental breach as defined in Article 10 of the Law followed by an examination of the use of the concept of *ipso facto* avoidance in specific articles of ULIS. Finally, the report summarizes the conclusions which may be derived from the study and the proposals made as a result thereof.

## I. Provisions of ULIS providing for "*ipso facto* avoidance" of the contract and the effects of such avoidance

5. Under the provisions of the Uniform Law, avoidance of the contract is a remedy for certain breaches of contract. The Law provides, *inter alia*, for this remedy in cases where the seller fails to perform his obligations as regards the date and place of delivery (arts. 25, 26, 28, 30 and 31) and where the buyer fails to pay the price in accordance with the contract (arts. 61 and 62). These articles are reproduced in the second part of this study in the context of the analysis of the use of the concept of "*ipso facto* avoidance" in specific articles of ULIS.[4]

6. The Law, in article 78, defines the term "avoidance" by determining its effects. The article reads:

> "1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due.
>
> "2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently."

7. Accordingly, avoidance of the contract, irrespective of whether it is declared by one of the parties of it occurs *ipso facto* (cf. para. 8 below), has the following legal consequences: (*a*) Neither party may be compelled to perform his obligations thereunder (i.e., specific performance of the contract will not be required); (*b*) The defaulting party has to pay the damages resulting from his breach that led to the termination of the contract;[5] (*c*) Each party may require the other party to return whatever he has supplied or paid prior to the avoidance of the contract (*restitutio in integrum*); and (*d*) The buyer has to account for the benefits derived from the goods and the seller has to pay interest on the price.[6] It may be noted, however, that avoidance of the contract does not always entail *restitutio in integrum* since the contract may also be avoided in cases where it is impossible for either of the parties to return what he has obtained.[7]

8. The Uniform Law differentiates between (*a*) avoidance based on the declaration by a party[8] and (*b*) *ipso facto* avoidance.[9]

(*a*) Avoidance by declaration is one of the remedies which the injured party may choose when the other party fails to perform certain of its obligations under the contract; thus, the application of this kind of avoidance depends on the will of the injured party.

(*b*) Under ULIS, *ipso facto* avoidance does not depend on the will of any of the parties but occurs automatically by virtue of the Law.[10] In most instances, *ipso facto* avoidance, as used in ULIS, is a subsidiary remedy for fundamental breach of the contract in cases where the injured party fails to exercise his right to choose from the remedies available to him within a reasonable time or does not inform the other party of his decision promptly if he is requested to do so. Under articles 25 and 28, *ipso facto* avoidance is even more completely divorced from the will of the parties. Thus, under article 25 of the Law[11] *ipso facto*

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

[4] The text of articles 25, 26, 28, 30, 61 and 62 of the Law appears in the following paragraphs and foot-notes, respectively, of this study:
Article 25—para. 42
Article 26—para. 49
Article 28—foot-note 48
Article 30—para. 50
Article 61—foot-note 56
Article 62—para. 57

[5] The damages which may be claimed in cases where the contract is avoided are set out in articles 84 to 87 of ULIS.

[6] Article 81 of ULIS.

[7] Under the provisions of art. 79, para. 1, the buyer is deprived of his right to declare the contract avoided where it is impossible for him to return the goods in the conditions in which he received them. However, this rule only applies in exceptional cases as a result of the many exceptions thereto established in art. 79, para. 2. It is noted further that even in cases where under the above rule the buyer loses his right to declare the contract avoided the seller is not deprived of such right; nor does the fact that it is impossible for the buyer to return the goods affect the application of the rules of the law providing for *ipso facto* avoidance of the contract. Similarly, under a literal reading the avoidability of the contract is not affected where it is impossible for the seller to make *restitutio in integrum* (e.g., where as a result of restrictive foreign exchange regulations it is impossible for him to return the price he received).

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

[9] Articles 25, 26, 30, 61 and 62.

[10] Note of the Special Commission on the observations presented by various Governments and by the ICC relating to the 1956 Draft of a Uniform Law on the International Sale of Goods, Diplomatic Conference on the Unification of Law governing the International Sale of Goods, Records and Documents of the Conference, volume II, p. 186 at art. 30.

[11] See para. 42 below.

avoidance applies in all cases where "it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates" and under article 61[12] *ipso facto* avoidance applies where "it is in conformity with usage and reasonably possible for the seller to resell the goods". Under these two articles, *ipso facto* avoidance is operative immediately upon the breach of the contract and thereby denies the injured party the opportunity to choose the remedy himself. It may also be noted that *ipso facto* avoidance under articles 25 and 61 is a remedy not only for fundamental but also non-fundamental breach of the contract—a feature that is peculiar to these two articles.

## II. Comments by Governments on the concept of "*ipso facto* avoidance"

9. In the course of the examination of ULIS by the Commission, several comments were made with respect to the concept of "*ipso facto* avoidance". These comments relate basically to the following three issues: (*a*) the desirability of the maintenance of *ipso facto* avoidance, i.e. automatic avoidance not based on a declaration; (*b*) the appropriateness of the term "ipso facto"; (*c*) the appropriateness of the definition of fundamental breach in article 10 of the Law. Other comments relate to specific articles of ULIS. Of all these comments those relating to the above issues ((*a*) and (*b*)) are summarized in paragraphs 10 to 18 below, while those relating to issue (*c*) are dealt with in parts of the present study dealing with the articles of the Law to which these comments are directed.

### (a) *Desirability of maintenance of* "ipso facto *avoidance*"

10. The basic question raised by the comments is whether the concept of "*ipso facto* avoidance" should be maintained in the Uniform Law, i.e. whether in cases where the Law provides for avoidance as a remedy for certain breaches of contract, the avoidance of the contract should occur *ipso facto* or it should depend on an express declaration by one of the parties to that effect.

11. The reasons which led to the inclusion in specific articles of the Law of the concept of *ipso facto* avoidance as a remedy for certain kinds of breach of contract are indicated in the commentary by Professor André Tunc.[13] In respect of article 26, the commentary noted that the Law provides for *ipso facto* avoidance because it may legitimately be presumed that when the buyer is confronted with a fundamental breach it is to be concluded that he has no further interest in the contract.[14] With respect to article 25 the Commentary observes that *ipso facto* avoidance "is in fact the rule to be derived from usages".[15] Similar comments appear in the report of the Special Commission which prepared the draft of ULIS. The Commission held that it was important not to allow the buyer to remain waiting, while he watched price fluctuations before making his election known.[16]

12. Several comments proposed the elimination of the concept of *ipso facto* avoidance. One reason was that the legal tests in the articles providing for *ipso facto* avoidance produce considerable uncertainty and, therefore, a declaration as to avoidance should be required.[17] It was also observed that the acceptance of this abstract concept in the form of a general rule might lead, in many cases, to confusion and vagueness in the relationships of the parties to a transaction.[18] It was noted that while *ipso facto* avoidance would seem fair for commodities where the price fluctuated rapidly, the same might not be true in the case of industrial products where the price tended to be more stable.[19]

13. Several comments suggested that *ipso facto* (automatic) avoidance would prejudice the injured party. It was pointed out that the present text, under which silence by the injured party entails automatic avoidance of the contract, may put that party in such a position that the contract becomes avoided in spite of his express intention, e.g. if his letter requiring specific performance goes astray.[20] In connexion with article 62, providing for *ipso facto* avoidance when payment is not made on time, the view was expressed that such avoidance of the contract may be inconsistent with the real wishes and specific interests of the seller.[21]

14. It was also suggested that whenever the injured party, whose interests were aggrieved by the other party's misconduct, did not expressly declare his decision to avoid the contract it would be more justifiable to presume the injured party's will to retain the contract.[22] The same idea is reflected in a proposal suggesting that articles 26, 30 and 62 of ULIS be amended to provide that in case of a fundamental breach of contract the injured party has the right to declare the contractual obligation dissolved; if, however, such a declaration is not made expressly, the

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[12] See foot-note 56 below.

[13] Commentary by Mr. André Tunc, Professor on the Faculty of Law and Economic Science at Paris, on The Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale, p. 50 (art. 25).

[14] *Ibid.*, part one, chapter IV, p. 28.

[15] *Ibid.*, part two, section I, sub-section 1 C at p. 50. It may be noted in this connexion that, at variance with this commentary, the opinion was also voiced in the literature that *ipso facto* avoidance of the contract was a method that seemed to be diametrically opposed to the tendency evident in the ECE standard contracts and general terms of delivery. See B. Godenhielm, *Some Views on the System of Remedies in the Uniform Law on International Sales*, Scandinavian Studies in Law, edited by Folke Schmidt, 1966, vol. 10, p. 27.

[16] Report of the Special Commission, *op. cit.* (see above, note 10), part one, § 3 I B (I), volume II, p. 34.

[17] A/CN.9/35, para. 94, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2. See also annex IV (Spain), third para.

[18] Annex VI, third para. (USSR).

[19] A/CN.9/31, para. 108, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1.

[20] Annex I (Hungary), first paragraph.

[21] Annex II (Italy), part II, eighth paragraph.

[22] Annex VI (USSR), fifth paragraph.

contractual obligation remains in force.[23] A further proposal directed to article 26 suggests deletion of the second sentence of article 26, paragraph 1;[24] the acceptance of this proposal would substantially reduce the applicability of *ipso facto* avoidance.

15. Some comments defended *ipso facto* avoidance and expressed the view that this kind of avoidance was, in certain sales, consistent with commercial practice. It was held that to require notice in every case would deprive one party of his rights if he had not complied with a formality that would be completely unnecessary in certain circumstances. Finally, the party who had to give notice would be obliged to retain proof of it; thus relying on a simple clarification of the situation by telephone would be rendered impossible.[25]

16. The representative of one member of the Commission noted in connexion with article 26 that if the buyer did not exercise his choice to either claim performance or declare the contract avoided, it was to the buyer's advantage to lose the right to claim performance but not the right to claim damages. He, therefore, thought that the present solution of ULIS was satisfactory.[26] The representative of another member of the Commission suggested that if the injured party did not waive avoidance and did not require performance or payment of the price. The failure both to deliver the goods at the date fixed and to pay the price at the date fixed should entail immediate *ipso facto* avoidance of the contract.[27]

(b) *Appropriateness of the term* "ipso facto"

17. It has been suggested that the term *ipso facto* is abstract and confusing. The difficulty of translating this expression was also noted.[28] Mention was made of the circumstance that in certain national laws this expression does not mean avoidance without declaration but that avoidance of the contract results from a declaration rather than court action.[29]

18. Several proposals were made for the substitution of the term "*ipso facto*" by a more suitable one. The use of the following expressions was suggested: "shall be considered as cancelled,[30] "*ipso jure* avoidance", "automatic cancellation" and "automatic avoidance".[31]

## II. The use of the concept of "*ipso facto* avoidance" in national laws and in general conditions relating to international trade

19. In order to ascertain whether "*ipso facto* avoidance" as used in ULIS is also used in existing laws and regulations governing the international sale of goods, this chapter endeavours to give a short review of provisions of (*a*) national laws and (*b*) general conditions relating to contracts of international sale.

(a) *The use of the concept in national laws*

20. As we have seen (para. 8), the concept of "*ipso facto* avoidance" is used in articles 25 and 61 of ULIS as a remedy which terminates the contract automatically with immediate effect without regard to the will of the parties; such approach is not known in any national law reviewed in the preparation of this study. The concept of the said term is used in other articles of ULIS (arts. 26, 30 and 62) as a subsidiary remedy to terminate the contract automatically but only when the injured party did not declare within a certain period that he wanted performance of the obligation. Such approach can be found in several national laws; these national laws, however, do not apply the concept as widely as does ULIS.

21. In this comparison of the rules of various legal systems with the rules of ULIS, it is important to note that the concept of *ipso facto* avoidance and somewhat similar concepts used in various national legal systems may relate to a number of specific legal issues. These include the following: (*a*) whether a party *who is in breach* of contract may continue with the performance of the contract (in other words, whether the innocent party may refuse to accept—i.e., reject—performance tendered by the party in breach); (*b*) whether an *innocent* party has lost the right to continue with performance of the contract following breach by the other party; (*c*) whether the innocent party may require performance (i.e., have a legal remedy for specific performance) from the party in breach; (*d*) whether an innocent party who has the right to refuse to accept performance by a party in breach make a "declaration" informing the other party of his action. It will be noted that these specific issues involve sharply disinct policies and consequences. For this reason, and because of the varying connotations under national law of the general legal concepts that are applicable in this area, it is not always clear whether these concepts provide answers to all, or only to some, of the specific issues stated above. However, in spite of the caution that is necessary in comparing the meaning and effect of the varying general rules of national law with the rules of ULIS, the following examination of national rules may be useful.

22. A national law which contains provisions on automatic avoidance of the contract that are similar to those of ULIS is the Swiss Code of Obligations.

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[23] Annex IV (Spain), last paragraph. The Czechoslovak International Trade Code (Act No. 101 of 4 December 1963), in section 235, provides for a similar solution. The Code in the preparation of which due account was taken of the 1956 draft of the Uniform Law does not use the concept of *ipso facto* avoidance in any of its provisions although that concept was already used in the 1956 draft.

[24] Annex I (Hungary), third paragraph.

[25] A/CN.9/35, para. 96, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

[26] Annex III (Norway), para. 1. It is noted, however, that Norway has later submitted an amended text of chapter III of ULIS to the Working Group on the International Sale of Goods for consideration (A/CN.9/WG.2/WP.10/Add.1, annex XVIII) in which *ipso facto* avoidance had been removed.

[27] Annex V (Tunisia), para. 2.

[28] A/CN.9/35, para. 95, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

[29] Annex II (Italy), part I. It is noted in this connexion that some of the General Conditions prepared under the auspices of the Economic Commission of Europe give the same meaning to the said expression, e.g. General Conditions No. 410 (item 14.2) and No. 420 (item 14.2).

[30] A/CN.9/35, para. 95, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

[31] Op. cit. (see above note 15), vol. 10, p. 27.

Article 190 of the Code provides that in cases where the contract relating to commercial matters fixes a term for delivery and the seller is in default it is presumed that the buyer renounces the goods; if the buyer requires delivery he has to inform the seller of this request immediately after the expiry of the term fixed for delivery. The Italian Civil Code provides in article 1457 that in cases where performance by one of the parties within the term fixed is to be considered as essential for the interests of other party, within three days from the expiry of this term, the latter party has to give notice to the other informing him that he requires performance of the obligation; if he does not do so the contract is considered as avoided. A somewhat analogous provision is contained in section 525 of the Japanese Commercial Code providing that in cases where the object for which the contract was made cannot be attained unless it is performed at a fixed time or within a fixed period, and one of the parties allows the time to elapse without performance on his part, the other party shall be deemed to have rescinded the contract unless he immediately demands performance.

23. On the other hand, several national laws do not recognize automatic termination of the contract even in cases where the term of delivery is essential, e.g. in case of a so-called fixed-term contract where the contract provides expressly or impliedly that delivery has to take place at or before a certain date and not later. Thus, § 361 of the German Civil Code (BGB) provides that in case of such a contract "it is to be assumed, when in doubt, that the other party has the right to declare the contract avoided . . .". The same remedy is provided for, *inter alia*, in article 300 of the Hungarian Civil Code and in sections 235 and 287 of the Czechoslovak International Trade Code.

24. The British Sale of Goods Act of 1893 and related laws distinguish between a stipulation in a contract that is a "condition, the breach of which may give rise to a right to treat the contract as repudiated" and a stipulation that is a "warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated". Under the Sale of Goods Act and related laws, when goods are tendered or delivered to the buyer, it seems that the buyer may exercise his right to refuse the goods only if he informs the seller of his action.[32]

25. The laws of another group of countries only recognize automatic avoidance of the contract if the parties have agreed to such avoidance in their contract. Thus, e.g., section 290 of the Czechoslovak international Trade Code[33] stipulates that "if the contract provides for the extinction of an obligation arising from it, or for its repudiation by the buyer should the seller fail to perform his obligation within the time fixed in the contract, the obligation or the contract shall be extinguished as of the beginning of the seller's delay unless the buyer notifies the seller immediately after his delay has begun that he insists upon the performance of the contract". A similar provision is contained in article 173 of the Law No. 2 of 1961 of Kuwait.

(b) *The use of the concept in general conditions of sale*

26. To test the conformity of *ipso facto* avoidance with commercial practice, the present study examines the use of this concept in general conditions of sale and standard contract forms. Paragraphs 27 to 29 below, give a short review of provisions of general conditions providing for termination of the contract. Paragraph 27 deals with the ECE general conditions and standard contract forms; paragraphs 28 and 29 examine formulations prepared by trade associations and similar organizations.

27. The general conditions and contract forms prepared under the auspices of the Economic Commission for Europe provide as follows:

*Contract forms for the sale of cereals* (Nos. 1-8): if either party refuses to fulfil his obligations within the time allowed by the contract, or fails to do so even within two further days after having received notice from the other party to fulfil the contract within those additional days, the injured party has no other remedy but to claim the difference between the contractual price and the actual price or value of the goods;

*General conditions for timber* (Nos. 410 and 420): in case of delay in delivery the buyer, *inter alia*, may terminate the contract "*ipso jure*"; in these forms, however, the term "*ipso jure*" has the meaning as terminating the contract by giving notice in writing to the seller "indicating the date when he [the buyer] will consider the contract as discharged;

*General conditions for the supply of plant and machinery* (Nos. 188 and 574): in case of delay in delivery the buyer may claim reduction of the price and if the goods remain undelivered even within an extended time-limit, he may terminate the contract by notice in writing to the seller;

*General conditions for durable consumer goods and other engineering stock articles* (No. 730): the buyer has similar rights as under the general conditions for the supply of plant and machinery;

*General conditions for solid fuels* (August 1958): the seller has the right to rescind the contract if the buyer does not remove the goods within an additional period agreed upon by the parties or allowed unilaterally by the seller; a similar right is granted to the buyer when the seller does not deliver the goods;

*General conditions for citrus fruit* (No. 312): the buyer is empowered to rescind the contract if the seller fails to deliver the goods within the contractual time-limit, or within an additional period of time established by the parties.

28. Of the general conditions of sale and standard contract forms prepared by trade associations, which were available to the Secretary-General in the preparation of the present study, only a few could be found which provided, as a remedy, for some kind of automatic termination of the contract. One of these is the London Jute Association's contract No. 3 of 1960 of the sale of fibres of origin other than Pakistan and India. This contract form may imply automatic termination of the contract by the stipulation in paragraph 12/B that "in the event of default in shipment or tender of documents" the seller shall pay, *inter alia*, a certain amount as liquidated damages. The only other

[32] See sections 11(*b*), 35 and 36 of the 1893 Sale of Goods Act and similar provisions in the Indian Sales of Goods Act of 1930; in the Law of Australia (W. F. Clemens-A. Bonnici, *Rogers and Voumard's Mercantile Law in Australia*, 1967, p. 113) and the Ghanaian Sale of Goods Act of 1961.

[33] Act No. 101 of 4 December 1963.

forms found which provide for automatic termination of the contract are the standard contract forms Nos. 2, 3 and 4 of the Cereals Trade Association of the Hamburg Exchange, These forms stipulate that in case of delay, if neither of the parties informs the other of his insistence on specific performance, the obligations of the parties as regards delivery and acceptance cease to be valid after the expiration of a month from the last day of the agreed delivery period. (It is noted, however, that contract forms Nos. 7 and 7/a of the same association do not contain such provisions.) It should also be noted that these provisions seem to assume that performance is never tendered by the party in breach.

29. Many of the general conditions and standard contract forms which are available in the preparation of this report recognize automatic termination of the contract, but only in case of *force majeure* or other impossibility of performance. In other circumstances, termination of the contract is always subject to some kind of declaration or notice to this effect by the non-defaulting party. Such declaration or notice is required, *inter alia*, in the following formulations:

Cattle Food Trade Association, London: contract forms Nos. 1, 4, 6, 8, 9, 10, 15, 19, 22, 100, 101, 102, 103, 104.

The Incorporated Oil Seed Association, London: contract forms 67A, 71A and 76A (Nigerian goods); 22 and 23 (Manchurian soya beans); 28 and 29 (North American and Canadian linseed); 50, 65, 67, 68, 69, 70, 71, 73 (specific seeds);

Vereiniging voor den Coprahandel, Amsterdam: contract form No. 1, approved by the Philippine Copra Exporters Association;

Assoziazione Granaria, Milano: Italian contract for rice and broken rice No. 15;

Fédération Internationale du Commerce des Semences (FIS): Rules and usages for the international trade in agricultural seeds of 1968;

Federation of Oils, Seeds and Fats Associations, Ltd., London: all contract forms;

International Wool Textile Organization: International trade agreement applicable to contracts in woolen-spun yarns of 1959; International contract for woolcloth of 1960;

The International Association of Rolling Stock Builders and the European Builders of Internal Combustion Engine Locomotives: General conditions for the supply for export of railway rolling stock and combustion engine locomotives of 1958.

30. From the above short spot review of national laws and general conditions it may be concluded that while some national laws provide for certain aspects of automatic avoidance of the contract, general conditions of sale and standard contract forms which are used in international trade do not, as a rule, recognize that kind of termination of the contract. The very few exceptions which can be found relate to the sale of certain agricultural goods. It appears, therefore, that *ipso facto* avoidance of the contract is an approach that is inconsistent with the tendency evident not only in the ECE standard contracts and general terms of delivery (cf. foot-note 15 above) but, with a few exceptions, also in other general conditions of sale and standard contracts used in international trade. From these facts and from the circumstance that all formulations examined in the preparation of the present study were drawn up by organizations active in the promotion and facilitation of international trade, it could be concluded that, although the concept of *ipso facto* avoidance is known in some form by a number of national laws, this device has not been accepted in the practice of international trade and, with a few exceptions, does not correspond to international usages.

## IV. Analysis of the use of the concept of "*ipso facto* avoidance" in specific articles of ULIS

31. It may also be helpful to examine the use of *ipso facto* avoidance in specific articles of ULIS to analyse whether it protects adequately the interests of both parties in case of breach of the contract. Many of the objections made in the course of the Commission's proceedings stressed that the use of the concept in ULIS is vague and causes confusion and uncertainty as to the parties' rights and obligations; consequently, the following examination will also be concerned with this aspect of the question.

### (a) *Article 10 of ULIS: the concept of fundamental breach*

32. As has been noted in paragraph 8 above, except for cases governed by articles 25 and 61, *ipso facto* avoidance is a remedy for "fundamental breach" of the contract with respect to time and place for delivery and payment of the price. Such *ipso facto* avoidance occurs automatically if the injured party fails to exercise his right to choose from the remedies available to him within a reasonable time or does not inform the other party of his decision promptly if he is requested to do so. In cases where the breach of the contract is a non-fundamental one, silence of the parties does not entail avoidance of the contract. The occurrence of *ipso facto* avoidance, therefore, depends on the fact whether the breach of contract in question is a fundamental or an non-fundamental one. Thus, automatic avoidance can operate effectively only if the definition in the Law of the concept of "fundamental breach" is clear and unambiguous. Without a clear definition the parties to a contract would not know what, under the Law, their rights and obligations are. Thus, the injured party could be in doubt as to whether: (*a*) he may choose between requiring performance or declaring the contract avoided because the breach of the contract was a fundamental one, or (*b*) he does not have such a choice because the breach of the contract was not a fundamental one and thus, notwithstanding his preference, the contract would remain in force. Similarly, if the injured party does not inform the defaulting party of the remedy he has chosen, the defaulting party could be in doubt as to whether (*a*) the contract has been *ipso facto* avoided on the ground that his breach of contract was a fundamental one or (*b*) the contract is still in force and he has to perform it because the breach of contract was not a fundamental one.

33. The definition of "fundamental breach" appears in article 10 of ULIS which provides as follows:

> "For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever 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."

34. This definition gave rise to many objections. Thus, it was held that the articles left to the subjective judgement of the parties the determination of whether a fundamental breach occurred.[34] It was also noted that the acceptance of this abstract concept in the form of a general rule might lead, in many cases, to confusion and vagueness rather than to unambiguity in the relationships of the parties to a transaction.[35] The opinion was also held that the definition contained in article 10 of the Law was too complex for effective application.[36] Several other comments relating to this article were against the use in the definition of the expression "reasonable person" and suggested the deletion of this term or the replacement thereof by a less vague term.[37] One representative suggested the substitution of the word "fundamental" by the word "major".[38]

35. The above definition contains both subjective and objective elements: the breach is fundamental if

(*a*) A reasonable person in the same situation as the other [injured] party

(*b*) Would not have entered into the contract if he had foreseen the breach and its effects, provided that

(*c*) The foregoing was known or ought to have been known by the party in breach at the time of the conclusion of the contract. Let us examine each of these elements in turn.

36. It will be noted that the definition refers to the possible reaction of "a reasonable person in the same situation as the other party", and that the word "situation" covers both the character of the person and the factual situation in which he is placed;[39] these elements of the definition seem to be intended to render the character of the breach more objective. The injured party is always an existing person who, therefore, may act in a subjective manner, while a "reasonable man" is a fictive person who is considered to act always in a reasonable, i.e. in an objective manner. It must be remembered, however, that when a breach occurs in the course of a sales transaction the above test must be applied by the parties to guide their conduct. A party may be expected to think in a subjective manner influenced by his own point of view; he will not be fully aware of the exact situation of the other party at the conclusion of the contract. Thus, it is doubtful whether both parties would come to the same conclusion as to whether a reasonable person would have entered into the contract if he had foreseen the breach and its effects. While the test might help the judge to reach a fair decision, it hardly seems sufficiently precise to enable the parties to decide whether they should (and may) continue with performance of the contract.

37. As was noted in paragraph 34 above, many comments suggested that "reasonable person" be replaced by a more precise term. Expressions such as "a merchant engaged in international commerce", "most persons engaged in international trade", etc. were suggested.[40] In response, it was noted that the Uniform Law does not apply only to transactions concluded by merchants or by persons engaged in international trade. It would seem therefore that unless the scope of the law is restricted to commercial transactions, the present expression "a reasonable person in the same situation as the other party", is more appropriate than those suggested for its replacement.

38. The third and last criterion contained in the present definition of fundamental breach is that "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 concluded the contract. With respect to this criterion Tunc notes in his commentary[41] that there are cases where because of the nature of the goods or because of other circumstances, the seller should know that punctual delivery is essential for the buyer; reference was made to a restaurateur who orders turkeys to be delivered on the morning of 24 December. In other situations, says the commentary, the seller may be entitled to think that the date provided in the contract has no fundamental importance for the buyer; consequently, if a buyer, for exceptional reasons, wishes to insist on observance of the precise date he should make this known to the seller at the time of the conclusion of the contract.

39. Under ULIS, delay in delivery is not the only kind of breach of contract that may amount to a fundamental breach of contract. Under the Law, breach of the contract may amount to a fundamental breach in any one, *inter alia*, of the following cases: (*a*) if delivery is to be effected by handing over the goods to a carrier and the goods had been handed over at a place other than that fixed (art. 32); (*b*) if the seller fails to effect delivery completely and in confirmity with the contract (art. 45, para. 2); (*c*) if the seller fails to hand over documents at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over (art. 51); (*d*) if the seller fails on request, within a reasonable time, to free the goods from all rights and claims of third persons (art. 52, para. 3); and (*e*) if the buyer fails to pay the price at the date fixed (art. 62). While in some of these cases the party in breach could be expected to know at the conclusion of the contract what the reaction of a reasonable person would be if he had foreseen the breach of its effects, in other cases (e.g. where the buyer pays the price with some delay) it might prove difficult to know exactly what that reaction would be and, consequently, whether the breach of contract is to be considered as "fundamental".

40. Several comments of Governments (para. 32 above) came to the conclusion that the definition of fundamental breach in article 62 of ULIS is not suf-

[34] A/7618, annex I, para. 83.
[35] Annex VI (USSR), third para.
[36] A/CN.9/52, para. 87, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.
[37] *Ibid.*, paras. 85 and 86; A/CN.9/WG.2/WP.6, paras. 65-69.
[38] A/CN.9/WG.2/WP.6, para. 70.
[39] Op. cit. (see above, note 13), p. 26, foot-note 2.
[40] For these and other proposals see A/CN.9/52, para. 86, UNCITRAL Yearbook, vol. II: part two, I, A, 2.
[41] Op. cit. (see above, note 13), p. 26.

ficiently exact. It was noted that under ULIS the failure to pay the price at the date fixed was not a fundamental breach in all cases. Therefore, the judge must decide whether, in various factual situations, a fundamental breach had taken place. This, it was concluded, would inevitably lead to differences in interpretation as to what constituted a fundamental breach so that a fact constituting fundamental breach in one country (with a possible consequence of an *ipso facto* avoidance of the contract) in another country would have the opposite result.[42] To avoid this uncertainty, it was suggested that the Law should provide that (unless the contract stipulates otherwise) non-payment would always constitute a fundamental breach.[43] Others suggested that this approach was too harsh; reference was made to the ECE general conditions under which non-payment on the due date was not considered to be a fundamental breach since an extension of one month was always granted.[44]

41. From the considerations in paragraphs 33-39 above it may be concluded that because of the vagueness of the tests in the definition of the concept of fundamental breach as contained in article 10 of ULIS the definition as a whole lacks the precision necessary to enable one party to know whether the other party will continue with performance. Of course, this difficulty would not cause doubt on *ipso facto* avoidance if the definition of "fundamental breach" can be clarified so that the parties can know when such breach occurs. However, a wide variety of proposals submitted to improve the present definition have been found by other members of the Commission to be inadequate. It is doubtful that the definition can be rendered sufficiently clear so that a party will know whether the other party will refuse to perform the contract, in the absence of a declaration to that effect.

### (b) *Limitation on remedy of specific performance: article 25 of the Uniform Law*

42. Article 25 of ULIS reads as follows:

> "The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected".

43. The Special Commission that prepared the draft submitted at The Hague made the following comment:[45]

> "The draft at once rejects the *ipso facto* avoidance which allows the seller to recover his freedom automatically, perhaps contrary to the intent of the innocent buyer, subject to paying damages—and judicial avoidance which is in conformity with the traditions of certain countries but is contrary to business practice; . . . so the draft has adopted as the general rule avoidance by simple declaration on the part of the buyer, but it allows avoidance *ipso facto* in certain exceptional cases where it cannot be prejudicial to him."

44. Article 25 applies wherever "it is in conformity with usage and reasonably possible for the buyer to purchase goods to which the contract relates." Under modern commercial practice such transactions are scarcely "exceptional cases"; *ipso facto* avoidance thus may have a much wider scope than was intended.

45. It is important to bear in mind that two different questions are at stake: (1) May the buyer force the seller to deliver goods which the buyer can readily acquire on the market? (2) If the buyer remains silent until the seller tenders the goods, may the buyer rightfully refuse to accept? Article 25 seems to have been designed to deal with the first of these questions, and answers it in the negative. When this result, as in article 25, also leads to *ipso facto* avoidance, a positive answer, perhaps inadvertently, is also given to the second question. As a consequence, a buyer need not inform the seller when he refuses to accept the goods. Without this information the seller may not receive important information concerning the need to redespatch or resell goods which the buyer has refused to accept.

46. In analysing the rules of ULIS providing for *ipso facto* avoidance, it is also important to bear in mind that most contracts of international sale require the carriage of goods from the seller to the buyer. Often the goods must be transported for a substantial distance and the carriage will involve substantial time and expense. If the goods are shipped to the buyer when the parties have differing, but undeclared, views as to whether the contract has been avoided, unnecessary transportation costs may result; in some situations there may be misunderstanding as to whether the goods are accepted, with resulting deterioration of the goods and needless wharfage, demurrage or storage expenses.[46] These problems become acute when avoidance may occur *ipso facto*—i.e., without a declaration giving the other party this important information.

### (c) *Breach as to date and place for delivery: articles 26 and 30 of ULIS*

47. Article 26, paragraphs 1 and 2, of ULIS[47] reads as follows:

> "1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He

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[42] A/7618, Annex I, paras. 63 and 64, UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

[43] A/CN.9/C.1/SR.7, p. 70.

[44] *Ibid.*, p. 71.

[45] Op. cit. (see above, note 10), vol. II, chapter I B, § 3, pp. 34-35.

[46] Article 92 (2) in some circumstances requires the buyer to take possession [of the goods] on behalf of the seller. But this requirement is applicable only where this may be done "without payment of the price". And, even where article 92 (2) is applicable, there is no requirement that the buyer notify the seller.

The notice requirements of article 39 of ULIS are inapplicable for two reasons: (1) These requirements are confined to seller's breach with respect to "conformity of the goods"; (2) Notice of lack of conformity does not necessarily provide information concerning the action that will be taken as a result of the breach (i.e., a claim for damages versus refusal to accept).

[47] Article 26 of ULIS consists of four paragraphs. Paragraphs 3 and 4 are not reproduced here because their provisions do not affect directly the concept of *ipso facto* avoidance.

shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

"2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided."

48. Article 30, paragraphs 1 and 2, of ULIS[48] reads as follows:

"1. Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. The buyer shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided."

"2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided."

Article 26 provides for remedies as regards the date of delivery, while article 30 provides for remedies as regards the place of delivery. Paragraphs 1 and 2 of these two articles are parallel provisions. Under both articles the buyer has the right either to require performance by the seller or to declare the contract avoided; if he does not inform the seller of his decision within a reasonable time, the contract shall be *ipso facto* avoided. In respect of these articles, the Special Commission noted that it was important "not to allow the buyer to remain waiting, whilst he watches price fluctuations before making his election known".[49]

49. One of the notes from Governments submitted on this topic[50] pointed out that the remedial system laid down in the Law confused two issues: (1) the right to require performance of the contract and (2) fundamental breach of contract. It was observed that the right to require performance derived from the contract. This note recommended that ULIS be amended so that in case of a fundamental breach the contractual obligation should remain in force unless the injured party declares the contract avoided. This recommendation, in effect, would remove *ipso facto* avoidance from the Law.

50. It may be advisable to consider whether acceptance of this recommendation would make it possible for the buyer to delay a decision while he "watches price fluctuations"—the reason given by the Special Commission (para. 47, above), for *ipso facto* avoidance.

51. In this connexion it should be noted that under ULIS, as it now stands, the seller can prevent the buyer from waiting by requesting him, under articles 26(2) or 30(2) to make known his decision promptly. If this remedy for delay in reaching a decision were deemed insufficient, a more direct approach to the problem could be found through a provision addressed specifically to this problem. Such a provision could (1) deny buyer the remedy of specific performance if the buyer invokes this remedy following a delay during a period of fluctuating prices[51] and (2) if damages are eventually requested, denying the benefit of added damages resulting from a change in the price while the buyer delayed his decision.[52] Such a direct approach to the problem (if a problem exists) seems clearer and less likely to produce unintended consequences than the use of the doctrine of *ipso facto* avoidance.

52. Under articles 26 and 30 *ipso facto* avoidance occurs if: (*a*) the breach of contract was "fundamental" *and* (*b*) the buyer failed within "a reasonable time" to inform the seller of his decision regarding the remedy he had chosen. Both these conditions are subjective ones. As has been noted, one of the basic problems with respect to "*ipso facto*" avoidance is whether each party to the sales transaction is given sufficient guidance (in the absence of a declaration) as to the performance he may expect from the other party. The doubts that may arise in the application of the concept of "fundamental breach" in article 10 of ULIS have already been discussed (paras. 32 to 41, above). A further dimension of this problem arises from the fact that the operation of *ipso facto* avoidance also depends on whether a "reasonable time" has elapsed.

53. The Law does not define the expression "reasonable time" after the lapse of which the contract becomes *ipso facto* avoided, and indeed this concept may not be susceptible of precise definition. As a consequence, one of the parties may hold that the reasonable time within which the buyer was expected to make known his decision has already elapsed and thus the contract is to be considered as *ipso facto* avoided, while the other party may be of an opposite opinion. The various possibilities that may arise are outlined in the following paragraph.

54. Several possibilities may arise in the following common situation: The seller has delayed delivery of the goods for three weeks later than the date envisaged in the contract. (To simplify the analysis, it is assumed that the breach of the contract amounts to a "fundamental breach".) On these facts,[53] the following situations may arise:

(1) The seller may consider the contract *ipso facto* avoided because he did not get any request from the buyer to perform the contract and, in his opinion, three weeks are more than a "reasonable time" within which a request for performance should have been made. These possibilities arise:

(*a*) The buyer may be of the same opinion as the seller. On this set of facts there is no misunderstanding as to whether performance will occur.

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[48] Article 30 of ULIS consists of three paragraphs. Paragraph 3 is not reproduced here because its provisions do not affect directly the concept of *ipso facto* avoidance.

[49] Op. cit. (see above, note 10), vol. II, p. 34.

[50] Annex IV (Spain).

[51] There is danger for abuse only when there has been a substantial *rise* in price during a delay by the buyer prior to invoking the remedy of specific performance.

[52] Delay by the buyer postponing the date as of which damages are measured prejudices the other party if the price has fallen during that period.

[53] Similar problems may arise in cases where the seller delivers (or despatches) the goods at another place than that fixed in the contract.

(*b*) However, the buyer may think that under the circumstances a "reasonable time" would be more than three weeks: let us assume that after four weeks the buyer requests the seller to perform the contract. On receiving this request the seller (i) may comply with the request; or (ii) may find it inconvenient or impractical to comply with the request because of redisposition of the goods on the basis of his assumption that the contract was *ipso facto* avoided.[54]

(2) The seller may consider that the contract is still in force since he has received no complaint from the buyer concerning the delay nor a declaration of avoidance. If he is aware of the Law's rules on *ipso facto* avoidance (a knowledge that may not always be assumed in connexion with the day-to-day conduct of business transactions) he may believe that a "reasonable time" for the buyer's declaration has not expired. In such a case, the seller may "deliver" the goods: in the usual international transaction this would be accomplished by despatching the goods to the buyer by carrier. In such a case:

(*a*) If the buyer wishes to have the goods or if (on the basis of an analysis of the Law's rules on *ipso facto* avoidance) he concludes that under the rules of the Law he cannot declare the contract avoided because a "reasonable time" has not expired, he will accept the goods;

(*b*) If the buyer does not wish to accept the goods (a view that may be influenced by a drop in price during the initial three weeks or during the period required for shipment) or if he believes that a "reasonable time" has expired, he may refuse to accept the goods, even at the point of receipt after an extended international shipment. Under such circumstances substantial time may expire (and attendant expense and waste accrue) before the seller learns that the goods have not been accepted at the point of destination.[55]

55. From the above analysis it can be concluded that because of the vagueness of the expression "reasonable time" used in articles 26 and 30 of the Law, the parties in common commercial situations cannot be sure of their rights and obligations under these articles. It will be recalled that, in the above situation, doubt is enhanced by the possibility of differing interpretations concerning whether a breach is "fundamental". It seems unlikely that drafting changes in the definitions of "reasonable time" and "fundamental breach" can render these terms sufficiently precise for each party to be able to assess his legal rights in the setting of *ipso facto* avoidance.

56. The structure of the remedial provisions of ULIS is such that similar provisions reappear in various parts of the structure. Consequently, provisions similar to those already discussed reappear in articles 61 and 62, which provide for *ipso facto* avoidance, under some circumstances, when the buyer delays making a payment of the price. The analysis presented with respect to articles 25 and 26 is applicable to the parallel provisions in articles 61[56] and 62, and need not be repeated here.

57. These articles do present one special problem that has not yet been discussed. Under these articles remarkable (and probably unintended) consequences occur since, under a literal reading of these articles, avoidance can occur *ipso facto* (without the choice or any declaration by the seller) even after goods have been delivered to the buyer. This result may be illustrated in the setting of article 62, which provides:

> "1. Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.
>
> "2. Where the failure to pay the price at the date fixed does not amount to a fundamental breach of the contract. the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or, provided that he does so promptly, declare the contract avoided."

58. It will be observed that, under article 62, the failure of the buyer to pay the price may lead to *ipso facto* avoidance of the contract even when the seller does not choose this remedy by a declaration. Comments and replies have called attention to possible surprising consequences of such *ipso facto* avoidance, with respect to delivered goods, which may redound to the benefit of the party in breach (the buyer) and to the detriment of the innocent party (the seller). Thus, it has been suggested that the buyer, because of his own breach, would destroy the seller's right to recover the price and would gain the right to return the goods to the seller,[57] and possibly to recover from the seller any payments the buyer has made.[58] Although these results are consistent with a literal reading of ULIS, it is difficult to suppose that they were deliberately chosen by the draftsmen; it is more likely that the above difficulties provide further examples of the hazards inherent in drafting a law in terms as general and abstract as "*ipso facto* avoidance".

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[54] This alternative will seldom arise since businessmen will normally communicate with each other concerning steps in performance and difficulties that arise. However, *ipso facto* avoidance under ULIS assumes that such communication may not occur; hence this alternative is listed as a theoretical, if not probable, outcome.

[55] The circumstances in which a declaration may be dispensed with after shipment are not free of doubt in view of complications concerning (*a*) the relationship between articles 25 and 26 (3), and (*b*) the rules on whether "delivery" may occur when the shipment of the goods does not comply with the contract.

[56] Article 61 of the Law reads as follows:

"1. If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation.

"2. The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected."

[57] Annex II (Italy), p. 5. Similarly Sweden, A/CN.9/11/Add.5, p. 4 and A/CN.9/31, pp. 44-45.

[58] A/7618, annex I, p. 82, UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

## CONCLUSION

59. The one basic question that calls for a decision by the Working Group is whether avoidance of the contract should occur *ipso facto*, i.e., in the absence of a declaration by the injured party. Such a decision would then provide a basis for the review and revision of the various articles of ULIS that employ this approach. It is believed that a decision to delete *ipso facto* avoidance from the Law can be effectively implemented, but presenting a proposed redraft on this basis seems premature until the Working Group has (*a*) taken a decision on the desirability of retaining *ipso facto* avoidance and (*b*) acted on pending proposals for the consolidation and rationalization of the remedial structure of ULIS.

## ANNEX I

### Comments by Hungary

In our opinion the present regulation of *ipso facto* avoidance as provided for in article 26 of the ULIS may put even the buyer abiding by the contract in such a position that the contract becomes avoided in spite of his intention (e.g., his letter goes astray).

In order to avoid or reduce this risk, we suggest to modify the first sentence of paragraph 1 of article 26 of the ULIS to read as follows:

> "1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may, *within a reasonable time*, either require performance by the seller or declare the contract avoided."

Furthermore we suggest to delete the second sentence of paragraph 1 of article 26 of the ULIS. Under such a regulation, according to the first sentence of paragraph 1 of article 26 of ULIS, the buyer has the right to choose between requiring the performance of the contract or declaring it avoided. Should the buyer not exercise his right within a reasonable time, or his letter is not received by the seller, then the seller shall act in accordance with paragraph 2 of article 26 of the Uniform Law.

## ANNEX II

### Comments by Italy

#### I

The *ipso facto* avoidance referred to in various articles of ULIS (for example, articles 25, 26, 30, 61 and 62) is contrasted with avoidance declared by one of the parties. In other words, the Uniform Law, setting aside recourse to judicial avoidance as a penalty for non-performance, makes provision for two forms of extra-judicial avoidance: one which requires the intervention of the interested party, who must inform the other party of his decision to avoid the contract, and the other which operates automatically when a determined factual situation provided for in the law comes to pass.

The question asked by the United Nations Commission on International Trade Law concerns precisely the concept of "*ipso facto* avoidance" in the context of the Uniform Law. In particular, the Commission wishes to know whether it would be appropriate to amend the English text by replacing the term "*ipso facto* avoidance" by the term "automatic cancellation" or "automatic avoidance".

In Italian law the term *risoluzione di diritto* (there is no such expression as *risoluzione di pieno diritto*) has a much broader meaning than the equivalent term in the Uniform Law. It is used to describe the avoidance which operates *without the need for judicial intervention*, in cases where avoidance occurs automatically (for example, fundamental breach of one of the terms of the contract; article 1457 of the Civil Code) or in cases where intervention by the interested party is necessary (for example, when there is an express avoidance clause and the interested party declares that he wishes to make use of it; art. 1456, 2nd para. Civil Code).

In other words, while in Italian law the term *risoluzione di diritto* means extra-judicial avoidance, in the Uniform Law the term is used to define a subdivision of this concept, namely, avoidance which operates automatically, without the need for a communication from the interested party to the other party.

Hence the use of the term *résolution de plein droit* presents no difficulty of interpretation for the Italian legislator. On the one hand, we are in fact dealing with a *risoluzione di diritto* according to our own terminology; on the other hand, the narrower interpretation given to that term in the Uniform Law is quite clear from the distinction drawn between the declaration of the avoidance and the *ipso facto* avoidance. Consequently, there seems to be no need to change the wording, at least from the standpoint of the application of this provision to works of Italian jurists.

Of course, this does not exclude the possibility of using other terminology in amendments made necessary by the adoption of different wording in the English text. In my opinion, that should not change the meaning of the provisions quoted from the Uniform Law, where the term "*ipso facto* avoidance" is replaced by "automatic avoidance" or by any other phrase which makes it clear that such avoidance operates without the need for intervention by the interested party.

However, in the French text the word "*résolution*" should be maintained in any case because of its specific meaning in the Italian translation.

The foregoing concerns of course only the problem of the meaning of the term "*résolution de plein droit*", clarification of which was sought by the Commission; it does not deal with the subsequent problems of considering whether and within what limits it may be desirable to provide for automatic avoidance in the international sale of goods.

#### II

Article 62 of the Uniform Law on the International Sale of Goods annexed to The Hague Convention of 1964 states:

> "Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided."

Here, we must stress that the first part of the above provision appears to be substantially in line with the principles of the Italian Civil Code on the avoidance of the contract through non-performance according to which (article 1453) the other party "has the option of requiring performance or avoiding the contract".

In fact, while the Italian Civil Code states that the avoidance follows the warning to perform the contract (art. 1454), the ULIS provision gives the seller the power to declare *sic et simpliciter* the contract avoided; however, a similar mechanism is also used in our law when there is an express avoidance clause (art. 1456 of the Civil Code) and hence its application should not cause any special difficulties in our system.

Similarly, it seems unnecessary to share the perplexity over the excessive generality of the concept of "fundamental breach of the contract". Indeed, no less general is the complementary

concept of "non-performance"—of minor importance considering the interests of the other party—adopted in article 1455 of the Italian Civil Code. Furthermore, scholars are becoming increasingly convinced that in the preparation of international conventions we must make greater use of elastic clauses, likely to be accepted by a greater number of countries because they can more easily be adapted to the normative and conceptual categories which exist already in individual legal systems.

The second part of this provision causes greater perplexity, not so much because of the vagueness of the term "reasonable time"—here we can use the same arguments as those applied to the use of the words "fundamental breach"—as because of the unfair situation to which the term might give rise in practice.

Supposing, for example, that the seller, having delivered the goods to the buyer and not having been paid within the period stipulated in the contract, allows a subsequent period of time to elapse out of sheer tolerance; in this case, the application of the principle of "*ipso facto* avoidance" would mean that the seller cannot require the buyer to perform the obligation of paying the price but only to hand back the goods (apart from the payment of damages which, under article 84 of the Convention, are limited to "the difference between the price fixed by the contract and the current price on the date on which the contract is avoided" and hence may amount to nothing).

We must also point out that "*ipso facto* avoidance" does not always have the natural sequel of allowing the seller to take back the goods. Often in international transactions raw materials are sold for subsequent processing and transformation. The seller can no longer re-possess them when they have already been used by the buyer in the production cycle. This case is covered in article 1519 of the Italian Civil Code which stipulates that "the seller, upon failure to pay, may repossess the goods sold so long as they are still held by the buyer and provided they are in the state in which they were at the time of delivery".

To sum up, therefore, the second part of the first paragraph of article 62, establishing "*ipso facto* avoidance" of the contract whenever the seller does not inform the buyer within a reasonable time of his choice between performance and avoidance, involves a "value judgement" of the omissive behaviour of the seller himself; but such a value judgement (or absolute legal presumption) which should be based on correspondence with *id quod plerumque accidit* would actually seem too rigid because in some cases it may prove to be against the real wishes and specific interests of the seller.

In the light of the foregoing, we would draw attention to the undesirable consequences to which the present formulation of that part of article 62 dealing with "*ipso facto* avoidance" might give rise and we suggest as a useful alternative the solution of this problem which may be found in article 1519 of the Italian Civil Code.

## ANNEX III

### Comments by Norway

In the opinion of the Norwegian Government the matter is one which cannot be discussed thoroughly without going deeply into the law of sales. However, the following suggestions are made:

1. According to article 26 of the ULIS, a number of remedies are available to the buyer when the seller does not deliver in time. Since it is desirable that the buyer exercises a choice between his remedies as soon as possible, particularly with regard to unaccepted goods, he is required to do so—even if not specially requested by the seller (as stated in para. 2)—within "a reasonable time", as stated in paragraph 1. The notification must come from the buyer, who is the aggrieved party, as the choice between remedies cannot well be left to the seller, who is the defaulting party.

If the buyer does not exercise his choice within a reasonable time, the legislator must do it for him, as one should not leave the seller in the awkward position of not knowing whether he should deliver or not. Otherwise the seller would have the risk, if he delivers, of being met with "avoidance" by the buyer, and, if he does not deliver, of encountering a claim for delivery long after the original time for delivery. It is generally to the advantage of the buyer that if he does not exercise his choice, he loses, not the right to claim damages, but the right to claim performance. This is the solution which is expressed in article 26 (1).

Although details can of course be discussed, the present solution seems satisfactory in the main. It should be stressed that the remedy "*ipso facto* avoidance" does not mean that the "contract is killed", since the buyer retains his right to claim damages (cf. art. 78, para. 1).

2. The same considerations apply largely to article 62 which concerns the position when the seller is the aggrieved party. However, the rules should not be exactly parallel to those in article 26, since there is a considerable practical difference between delivery of goods and payment of money. Movement of goods is expensive and often takes a long time, payment of money involves small costs and can be done quickly. These differences are not observed in the present text of article 62. It is therefore desirable to exclude the application of article 62 (1) ("*ipso facto* avoidance") when the goods have been delivered to the buyer. There are also further changes which are desirable, but which cannot be discussed without a thorough analysis of the whole section. However, in the opinion of the Norwegian Government, the proposals made at the first session of the Working Group on the International Sale of Goods and which are reproduced in paragraphs 98 to 101 of the report of the Working Group, could very well serve as a basis for further discussions on the subject.

3. The terminological question of substituting some other expression for "*ipso facto* avoidance" should be considered by those who are experts on English legal style.

## ANNEX IV

### Comments by Spain

In general, it can be said that the basic system laid down in the text of the Uniform Law to cover cases involving a fundamental breach of the contract by one of the parties in carrying out his obligation is that the other party may choose between requiring performance of the contract and declaring the contract avoided. However, if he does not inform the first party of his decision within a reasonable time, the contract is *ipso facto* avoided. This follows from articles 26, 30 and 62.

This system was the subject of some criticism in the Working Group on the International Sale of Goods. Some representatives stated, for instance, that the notion of "*ipso facto* avoidance" left considerable uncertainties, was abstract, confusing and difficult to translate into other languages. Other representatives, however, defended the retention of "*ipso facto* avoidance" in the text of the Law (A/CN.9/35, paras. 92-96).

When the question is seen in this light, two fundamental comments may be made on the aspect of the Uniform Law to which we have referred. First, the system laid down is confused, and second, it gives rise to uncertainty between the parties.

The system is confused for various reasons:

(1) The consequences of the fundamental breach appear to depend upon the declaration of the other contracting party requiring either performance or avoidance of the contract. But in reality, the basic principle is that the fundamental breach leads to *ipso facto* avoidance unless within a reasonable time the other contracting party states that he requires performance of the contract. This follows from the text of articles 26(1), 30(1) and 62(1). That being so, it would

have been simpler to state as a general principle that the contract is automatically avoided if the other party does not duly declare that he requires performance.

(2) In fact, the system laid down confuses the real consequences of the fundamental breach. Such a breach gives the injured party a new right, namely the right to avoid the contract. But it does not give rise to the right to require performance, because such a right may be exercised by both parties from the time the contract is concluded and as long as it is not avoided.

That being so, the Uniform Law creates confusion by placing on the same footing, as rights deriving from the fundamental breach, the right to require performance and the right to avoid the contract, because the fundamental breach gives rise only to the latter, since the right to require performance already exists. The logical system would therefore be that unless the injured party exercised the right to avoid the contract, which is the right created by the fundamental breach, the contractual obligation would remain in force, without the need for any declaration, and that consequently performance by the parties would be exigible.

But the Law lays down without justification a contradictory system. If the injured party wishes to keep the contractual obligation in force and to require performance of the contract, he must make an express declaration to that effect, since if he does not do so, the contract is automatically avoided. In other words, the right to require performance of the contract is presented as a right that may be exercised as a consequence of the fundamental breach, even though it arises not from the breach but from the conclusion of the contract. The right that is really linked to the fundamental breach is the right to avoid the contract.

(3) The system is complicated even further by the hypotheses that it may not be possible to require performance of the contract (article 25) or that there may be a reduction in the time allowed to make the declaration requiring performance (articles 26(2) and 30(2)).

Furthermore, the system causes uncertainty between the contracting parties. In fact, if the contract can be avoided without the need for a declaration, it is perfectly possible for it to be avoided as a result of facts of which neither party is aware. It should be remembered that the declaration of avoidance of the contract not only contains a declaration of intent, but also serves to place on record the facts that provide the basis for that declaration.

In view of the foregoing, it would seem advisable to amend the system laid down in articles 26, 30 and 62 of the Uniform Law.

The amendments should be based on the following concepts:

I. The contract is binding on the parties until it is avoided.

II. The failure of one contracting party to fulfil any of his obligations, if it constitutes a fundamental breach of the contract, gives the other party the right to declare the contractual obligation dissolved. If such a declaration is not made expressly, the contractual obligation remains in force.

## ANNEX V

### Comments by Tunisia

Articles 26 and 62 of the Convention relating to a Uniform Law on the International Sale of Goods, which deal especially with this notion of "*ipso facto* avoidance", provide as follows:

1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. The buyer must inform the seller of his decision within a reasonable time; it is in the event of his remaining silent that the contract is *ipso facto* avoided.

2. Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. The seller must inform the buyer of his decision also within a reasonable time; otherwise the contract is *ipso facto* avoided.

These provisions call for the following comments:

(1) There are two procedures whereby the contract may be avoided. The first requires an express declaration by one of the parties (the buyer in article 26, the seller in article 62). The second requires that one of the parties should remain silent for more than "a reasonable time". This duality of procedure is unfortunate. It could give rise to many disputes, owing to the fact that there is a certain period during which the fate of the contract remains uncertain. This period coincides with what is called in the Convention the "reasonable time". If the seller does not deliver the goods at the date agreed upon in the contract, and if the buyer remains silent, the seller will find himself in an awkward situation, since the contract remains in force but might be avoided at any time by the buyer. It is true that the seller can request the buyer to make known his decision promptly; he can also deliver the goods before the buyer has stated his intentions (in which case the contract cannot be avoided), but this will not solve every problem, since it will still have to be determined what is meant by a "reasonable time", by "promptly", and so forth.

It would therefore seem more efficient to do away with this duality of procedure. The contract would be *ipso facto* avoided if, at the date fixed, the seller has not delivered the goods or the buyer has not paid the price. However, the buyer (article 26) or the seller (article 62) could waive *ipso facto* avoidance and grant an additional period of time for delivery of the goods or payment of the price.

This procedure is more advantageous:

(*a*) Firstly, because the fate of the contract is known as soon as the time allowed for delivery of the goods or payment of the price has expired. There will no longer be this period of uncertainty called a "reasonable time";

(*b*) Secondly, because "*ipso facto* avoidance" could be waived only through an express declaration by one of the parties. Under the existing text, it is the silence of one of the parties that may affect the fate of the contract; yet it is obviously conducive to greater security for parties to contracts that the fate of the agreements which bind them should be established as speedily as possible and in express form;

(*c*) Thirdly, it would be better that *ipso facto* avoidance should be the rule whenever one of the parties does not perform his obligation or is late in performing them.

(2) A particularly notable feature of articles 26 and 62 is their vagueness. Apart from the terms "a reasonable time" and "promptly" referred to above, which may give rise to contention, note should also be taken of another equally vague expression, namely, "a fundamental breach of the contract". Failure to deliver the goods and failure to pay the price can result in avoidance only where they amount to "a fundamental breach of the contract". Since the principal obligation of a seller is to deliver the goods within a fixed time and the principal obligation of the buyer is to pay the price at the agreed date, it is hardly conceivable that a party can fail to perform his obligations, or not perform them properly, without thereby rendering himself liable for a "fundamental breach of the contract". The use of this expression therefore seems pointless. In addition, it will give rise to many disputes.

To conclude, it is felt that the articles in question should be worded as follows:

"Article 26: Failure to deliver the goods at the date fixed entails *ipso facto* avoidance of the contract. The buyer may, however, waive avoidance and require performance by the seller.

"Article 62: Failure to pay the price at the date fixed entails *ipso facto* avoidance of the contract. The seller may, however, waive avoidance and require the buyer to pay the price."

## ANNEX VI

### Comments by the Union of Soviet Socialist Republics

We share the doubts already expressed by a number of other representatives regarding the wide use of the above concept that follows from the present wording of ULIS, particularly in articles 26(1), 30(1) and 62(1).

Perhaps, from the academic point of view the idea of treating the contract as avoided whenever one of the parties commits a certain "fundamental" breach and the other does not require performance "within a reasonable time", might seem to have the effect of ensuring a desired certainty of the mutual rights and obligations of the parties. Although it is evident that even in such a case situations are plausible which find no solution in ULIS or, anyway, give a rise to great complications, as was specifically illustrated by an example where the buyer following the delivery of the goods does not pay the price (see A/CN.9/35, annex II, para. 71).

However, apart from that or another specific shortcoming, it is thought that in practice the acceptance of this abstract concept in the form of a general rule might lead, in many cases, to confusion and vagueness rather than to unambiguity in the relationships of the parties to a transaction. Under the present text of ULIS "*ipso facto* avoidance" is provided to operate not upon the occurrence of certain factual circumstances (failure to delivery or pay at the date fixed, etc.), but is made dependent whether or not the respective breach is "fundamental", which would not be always easy for the parties to determine in a specific situation.

In addition, the rules of the above articles of ULIS, bound to ensure both the protection of the lawful interests of the unfaulty creditor and the certainty of the legal situation resulting from a breach by the debtor of his obligations, give preference in final analysis to the second task, or end; which solution, however, in the present context, objectively tends to operate to a considerable degree in the interests of a faulty debtor.

Eventually, a more effective solution of the problem, taking the balanced cognizance of both tasks, i.e. protection of the creditor's rights, on one side, and certainty in the relationships of the parties, on the other side, could be arrived at when proceeding from the basic prerequisite of stability of contractual relationships. Avoidance of the contract constitutes an act involving consequences too serious to have it inferred from the fact of the creditor's "silence", i.e. failure to make a declaration, on his own initiative, of his intention to keep the contract alive. It is thought more justifiable to presume the creditor's will to retain the contract, whenever the creditor, whose interests are aggrieved by the debtor's misconduct, does not expressly declare his decision to avoid the contract. It would not be out of place to note that in a number of other articles ULIS proceeds from this very principle of the stability of the contractual obligations.

It goes without saying that certain provisions should be drafted to eliminate eventual abuses by the creditor of his right to avoid the contract, particularly with regard to the choice of the time for avoidance. Such a problem, however, could be solved in a satisfactory manner if the debtor who, following his fundamental breach of the contract, has not been notified by the creditor of the avoidance, is accorded the right to ask the creditor whether the latter still requires performance: in this case failure to answer within a reasonable time seems to justify treating the contract as avoided. The said right, of which the realization depends on the debtor himself and does not require much time under existing means of communication, would enable the debtor, at any moment as he thinks necessary, to ascertain the situation with respect to the fate of the contract and his contractual obligations. Besides, the burden of taking measures to ensure such clarity, would be put quite logically on the party in breach.

In addition, it could be stipulated that the debtor is not entitled to perform without asking first for the creditor's approval. Should the debtor effect performance without such an approval, the creditor is entitled to avoidance of the contract, provided that he declares promptly for it. Otherwise, as stipulated in paragraph 3 of article 26 and paragraph 3 of article 30 and as suggested rather than stipulated in article 62 of ULIS (para. 98 in A/CN.9/35), the creditor would lose the right to avoid the contract.

In the course of the previous discussions, some representatives who supported the concept of "*ipso facto* avoidance" referred to the fact that in "some sales" the concept would correspond to commercial practice (see, for example, A/CN.9/35, para. 96). However, it would hardly be appropriate thereunder to formulate this concept in ULIS in the form of a general rule, covering all sales contracts regulated by the Uniform Law. As to the "some sales" referred to above, it would be enough, in our opinion, to stipulate in articles 26(1), 30(1) and 62(1) of ULIS the right of the parties to specify in their transactions those breaches where the contract could be considered avoided *ipso facto*.