D. Comments by Governments and international organizations on the draft convention on the international sale of goods (A/CN.9/125 and A/CN.9/125/Add. 1 to 3)*

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Introduction

1. At its second session (3-31 March 1969) the United Nations Commission on International Trade Law established a Working Group on the International Sale of Goods to ascertain, *inter alia,* which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render such text capable of wider acceptance by countries of different legal, social and economic systems and to elaborate, if necessary, a new text reflecting such modifications.[1]

* 22 March 1977.

[1] *Official Records of the General Assembly, Twenty-fourth session, Supplement No. 18* (A/7618), para. 38, subpara. 3 (*a*) of the resolution contained therein (Yearbook . . . , 1968-1970, part two, II, A).

2. This Working Group completed its mandate at its seventh session (5-16 January 1976) by approving the text of a draft Convention entitled "Draft Convention on the International Sale of Goods".[2]

3. In accordance with a decision of the Commission taken at its eighth session (1-17 April 1975), the text of this draft Convention,[3] accompanied by a commentary,[4] has been sent to Governments and interested international organizations for their comments.

4. All comments received by the Secretariat as at 22 March 1977 are reproduced herein.

5. An analysis of these comments prepared by the Secretariat is contained in document A/CN.9/126.*

I. Comments by Governments

AUSTRALIA

[*Original: English*]

PRELIMINARY

1. The Working Group has succeeded in producing a draft which may well result in a convention capable of achieving much wider acceptance than the 1964 Convention relating to a Uniform Law on the International Sale of Goods.

2. In accordance with the request of the Secretary-General these comments on the draft convention are restricted to fundamental issues arising under the draft convention.

CONFORMITY WITH THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

3. The approach of the Working Group to the question of conformity with the 1974 Convention on the Limitation Period in the International Sale of Goods is supported. Whilst it is generally desirable that the draft convention conform to the 1974 Convention, the provisions of that Convention should not be emulated at the cost of including in the present draft a provision that is less than appropriate in the circumstances.

OBSERVATIONS ON PARTICULAR ARTICLES

Application. Article 5

4. Careful consideration needs to be given to the question whether the application of the convention to an international sale of goods should be automatic, except to the extent that the parties to the international sale otherwise provide, or whether it should apply only when the parties agree that it apply.

5. States which view the convention quite favourably as a whole may nevertheless have reservations concerning particular issues, having regard to their existing commercial practices. They could be reluctant to accede to the convention if its application is automatic. If it is the case that a significant number of States would find themselves in this situation it may be necessary to provide, in order that the convention receive widespread acceptance, that the convention would apply only if adopted by the parties.

Industrial property claims. Article 7

6. The exclusion from the operation of the convention of any claims that might arise between the buyer and the seller because of the existence in any person of industrial and intellectual property rights significantly diminishes the scope and value of the convention. Where the relationship between the buyer and the seller is otherwise governed by the convention, it is undesirable to leave so substantial an issue to domestic law.

Knowledge

7. Many different expressions dealing with knowledge and constructive knowledge are used in the draft. It is not clear whether some of these are intended to be synonymous or whether they are intended to indicate subtle gradations in states of awareness. In either case, uncertainty and inconsistency of interpretation would appear to be likely consequences of the use of so many different terms.

8. It would be desirable to indicate, preferably by a definition, the standard by reference to which particular states of mind are to be imputed.

Impossibility of performance. Article 50

9. It is considered that the draft convention does not deal satisfactorily with the problems of non-performance due to causes other than fault on the part of the non-performing party. Subject only to a bar in respect of liability for damages the convention treats such non-performance in the same manner as non-performance due to fault, and misperformance (e.g. with regard to the application of the rules as to avoidance and reduction in price). It is thought that quite different considerations should apply in the adjustment of rights between the parties to a contract performance of which is impeded by circumstances for which neither party is responsible from those which should govern their rights where one of the parties has by his own fault been responsible for non-performance or misperformance and so has caused loss to the other party.

10. In particular the present provisions are considered to be inadequate where there is a temporary impediment to performance. The draft convention should take account of the fact that after there has been a temporary impediment to performance, the performance that would then be required of the party in order to carry out his own obligations under the contract may well be radically different from the performance contemplated when the contract was entered into.

Damages. Articles 55, 56 and 57

11. The general principles set out in article 55 for establishing the quantum of damages appear to be reasonable. However, articles 56 and 57 are less satisfactory, in that, as presently drafted, they are apparently intended as alternatives to article 55, rather than illustrations of the operation of article 55 in particular cir-

* Reproduced in this volume, Section E, below.

[2] A/CN.9/116, annex I (Yearbook ..., 1976, part two, I, 2).

[3] *Ibid.*

[4] A/CN.9/116, annex II (Yearbook ..., 1976, part two, I, 3).

cumstances. If the function of damages is to be compensatory, it seems incongruous that three different formulae are provided for the calculation of damages, with the claimant being entitled to select the formula most favourable to him in the particular case.

AUSTRIA

[Original: English]

GENERAL OBSERVATION

1. Austria welcomes in principle the draft Convention on the International Sale of Goods prepared by the Working Group on the International Sale of Goods in the frame of UNCITRAL and is of the opinion that this draft is by and large better and more appropriate than the 1964 ULIS.

OBSERVATIONS ON PARTICULAR ARTICLES

Article 9

2. It would be preferable to return to the version contained in article 10 ULIS 1964. The expression "de même qualité" in the French version, which is by the way not contained in the English version and which is on the one hand ambiguous, on the other hand superfluous, should be dropped.

3. If the new version should be maintained, it should be clarified, at which moment the party in breach of the contract must have foreseen the result or must have had reason to foresee it in order to fulfil this condition for the breach being fundamental.

Articles 21 and 29

4. In article 21 (last sentence) it is expressly said that the buyer retains any right to claim damages as provided in article 55. Article 29 (para. 1) does not contain such a disposition. As there is no reason to distinguish between these two articles in this respect, the said disposition should either be contained in both articles or — it is not necessary to mention it expressly — in none of them.

Articles 48 and 49

5. The order of these two articles should be changed for systematic reasons.

Article 50

6. It would be preferable to return in paragraph 1 to the version contained in article 74, paragraph 1 ULIS 1964 in order to avoid the notion "fault" which could lead to a confusion with the terms of "fault" under national laws. As in article 9, the expression "de même qualité" of the French version which again has no counterpart in the English one should be dropped.

7. The whole version could, however, be shortened as follows:

"(1) If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which he could not reasonably have been expected to take into account or to avoid or to overcome."

8. On the other hand it is proposed to add to the dispositions about the effects of avoidance (before article 51) an article in which the obligation to pay damages is stated fundamentally, in a similar way as the "exemption" in article 50.

Article 54

9. According to paragraph 2 the buyer must account to the seller for all benefits which he has derived from the goods or part of them. It should, however, also be stated that the buyer must account to the seller for all benefits which he reasonably *could* have derived from the goods or part of them.

Article 57

10. In the present version the disposition of paragraph 1 admits a speculation by the party who intends to claim the damages to the detriment of the party obliged to pay the damages. For the party entitled to damages could wait to avoid the contract until the difference between the price fixed by the contract and the current price has reached the maximum. It should therefore be provided that the current price of the moment the delivery was performed or should have been performed is to be paid.

Article 64

11. It should be clarified expressly that only an act of the seller *before* the handing over of the goods can be taken into account.

Article 65

12. Paragraph 2 should be amended in order to express that also in sales involving carriage of the goods the risk passes to the buyer at the earliest at the moment of the conclusion of the contract.

BULGARIA

[Original: French]

The Bulgarian competent authorities wish to make the following observations concerning the draft Convention on the International Sale of Goods:

Article 1

1. According to article 1 of the draft, the application of the Convention depends on the parties' "places of business". It should be noted, however, that this concept may have considerable disadvantages in practice. For example, if two enterprises of the same nationality and with the same residence had places of business in different countries, the Convention would be applied. Such an interpretation clearly does not correspond to the aim of the Convention.

The situation would be the same if an enterprise concluded a contract with another enterprise resident in the

same State, but through the intermediary of its place of business abroad.

All these ambiguities regarding the application of the Convention could be eliminated if a much more simple and precise criterion were adopted: residence of the contracting parties in different States — subject, of course, to the conditions specified in article 1, paragraph (1) (*a*) and (*b*).

Article 11

2. While the provisions of article 11 are acceptable in principle, it would have been preferable, in order to make the Convention reflect more closely the various legislative provisions concerning the form and evidence of contracts, to add a second paragraph providing that the contract of sale should be in written form when the legislation of one of the parties so requires.

Article 15

3. According to article 15, subparagraphs (*b*) and (*c*), delivery is made "by placing the goods at the buyer's disposal". This makes delivery a unilateral act. Yet this does not reflect the reciprocal nature of the performance of the contract. Delivery can be made only with the co-operation of the buyer.

It should be noted that "placing at the buyer's disposal" and "delivery" are different acts. In actual fact, "placing at the buyer's disposal" precedes "delivery". Placing at the buyer's disposal is an act of the debtor, in other words of the seller, while delivery is made with the participation of the creditor, in other words of the buyer.

Assimilation of the two concepts could also create difficulties regarding proof. It would therefore be preferable to adopt the ULIS system, whereby delivery consists in the handing over of the goods.

4. The draft Convention differs from ULIS, in which delivery is deemed to have been made only if the goods conform with the contract.

It is reasonable that, if the goods delivered do not conform with the contract, there should be no delivery, since the parties have agreed on clearly specified goods. The requirement of conformity will obviate the need to apply all the rules concerning guarantees in the event that the goods should be faulty.

Chapter VI

5. In accordance with the views expressed above concerning delivery (para. 3 of these observations), the rules in chapter VI of the Convention concerning passing of risk should specify that the risk passes to the buyer when the goods are handed over to him rather than when they are placed at his disposal. In any case, article 66 of the draft Convention should be brought into line with article 15. In our view, the wording of article 97, paragraph 1, of ULIS should be adopted.

AVOIDANCE OF THE CONTRACT

6. The provisions concerning avoidance of the contract seem very complicated from the logical and practical viewpoint. In our view, the principles underlying the rules concerning avoidance should be simplified and should take into account the inequality of the parties resulting from the non-performance of the contract:

(*a*) The party who has fulfilled his obligations under the contract may declare the contract avoided in the event of a fundamental breach.

(*b*) The creditor forfeits the right to declare the contract avoided if he has accepted performance which does not conform with the contract without immediately protesting.

Articles 47 and 49

7. The present wording of articles 47 and 49 does not clearly show the difference between them. It appears to us that article 49 is superfluous, unless it is included in the form of an addition to article 47.

Articles 15 and 65

8. A provision should be added to article 15, subparagraph (*a*), and to article 65, paragraph 1, to the effect that delivery is made and the risk thus passes when the goods are handed over to the first carrier. This would reflect international commercial practice.

Article 57

9. With regard to article 57, we consider that the damages should be assessed at the time of the failure to deliver the goods or at the time when the buyer could reasonably procure the same goods. In our opinion, the present wording of article 57 would allow the seller to speculate in the event of a price increase.

Articles 64 to 67

10. In our view, it seems more logical to place article 64 before articles 65, 66 and 67, since it states the general rule for the passing of risk.

CZECHOSLOVAKIA (A/CN.9/125/ADD. 2).*

[*Original: English*]

GENERAL COMMENTS

1. The draft Convention on International Sale of Goods which has been worked out by the Working Group of the United Nations Commission on International Trade Law represents a good basis for the discussion at the tenth session of the Commission. Deviations from the text of the Uniform Law on the International Sale of Goods of 1964, as proposed by the Working Group, represent for the most part an improvement and basically represent a more unambiguous regulation of rights and obligations of the seller and buyer. In a great number of provisions the draft Convention deviates from the Uniform Law in the same way as, or in a way similar to, the Czechoslovak International Trade Code. Experiences gained by the application of the Czechoslovak International Trade Code provisions since 1963 give evidence for justification of the proposed modifications. In particular, it is necessary to welcome the simplifica-

* 28 April 1977.

tion and greater precision of the concept of the uniform regulation.

COMMENTS ON SPECIFIC ARTICLES

2. However, some provisions of the draft still require re-examination in order to correspond as much as possible to the needs of international trade. This concerns particularly the following problems:

Article 6

3. In the interest of a uniform regulation it would be proper to define in the draft Convention the "place of business" for the reason that this concept can be interpreted differently by individual countries.

Article 8

4. It is arising out of article 8 of the draft, that any usage should have the preference before the provisions of this regulation. Acceptance of this principle would be the source of serious legal uncertainty because none of the participants of the international trade will be certain whether these provisions will not be replaced by usages which are applied in different States differently. It should be also taken into consideration that the developing countries did not have an opportunity to participate in their formation. Due to these reasons, the usages should have preference before the provisions of this regulation only in the case when the contracting parties express their will that the usage will be applied in this manner.

Article 9

5. Even if the difference between fundamental and non-fundamental breach of contract is formulated more properly in the draft than in the Uniform Law of 1964, it seems too vague because the concept of "fundamental breach of contract" is defined by the same vague concept of "fundamental damages". Further, it is doubtful from the economic point of view whether the avoidance of contract (which is the most important legal consequence of the fundamental breach of contract), is to be dependent on the origin of the fundamental loss. The avoidance of contract should enable the entitled person to prevent its occurrence (for example by substitute sale or substitute purchase of goods). On the other hand, after a certain period of time the performance of the obligation may be useless for the entitled person, even if he did not suffer fundamental damage; therefore such person would have the right to declare avoidance of the contract.

6. The criteria for consideration of the fundamental breach of contract should be more properly objectivized by the purpose of the performance of the contract, as long as it has been expressed in the contract, or if it clearly follows from its contents, as for example: "Fundamental breach of contract is such which the party violating the contract has known or was aware of at the conclusion of the contract in view of a motive that the other party would not have concluded the contract had it envisaged its violation, the motive which is expressly contained in the contract or clearly follows from the contract". It would be also suitable to amend the proposed modification with a provision that in case of doubt the breach of contract would not be deemed fundamental.

Article 11

7. Article 11 of the draft Convention should be left out because the form of contract must be discussed in the framework of its formation and a unified regulation concerning this problem will be on the programme of the Commission in the future.

Article 23

8. Even if a failure to send in time a notice of the defective goods is in the majority legal systems combined with the loss of remedies, it would be suitable to consider whether a mere non-recovery would be sufficient. This would simplify the legal consideration of cases where the seller has satisfied the remedies of the buyer (either due to commercial reasons or reasons that defects in the goods have been caused during the production) even if the notice has not been sent in time.

Chapter III (articles 26-33)

9. It would be useful to reconsider the system of remedies which the buyer has in accordance with articles 27 to 33 of the draft. To limit the possibilities of the buyer to request substitute delivery of goods only in case of fundamental breach of contract, according to article 27, paragraph 2, does not correspond with the requirements of practice because the unification should be directed at the performance of the purpose of the commercial operation expected by the parties. The unification should express that the primary remedy of the buyer is the removal of defects, i.e. the repair of goods or substitute delivery. However, the buyer should not have the right to demand the substitute delivery in cases when inadequate costs have arisen for the buyer. Similarly, there may be also cases when, due to the nature of the goods, their repair is ineffective (particularly in some kind of consumer goods). The seller should be protected against such remedy of the buyer if the repair of goods is not possible or represents for him inadequate costs.

Articles 34 and 35

10. The relation between articles 34 and 35 is not quite clear particularly as concerns the results of the opening of a letter of credit. It would be desirable to amend the proposed wording by the provision that if the price is to be paid by a letter of credit or by a cheque, the payment of the purchase should be considered effected only after the payment is performed by the bank to the seller.

Article 50

11. The first sentence of article 50 states responsibility on the principle of "guilt" but the second sentence contains the "objective responsibility" which is more suitable for regulation of international trade. Definition of *force majeure* should be re-examined again and made more precise. Particularly the condition of unforeseeability should be excluded from it because in the cases in

question this condition is usually replaced (or covered) by the condition of an inevitability. However, there can be cases when it is doubtlessly *force majeure* (for example a war conflict) even if the obstacle could have been foreseen (for example in view of certain political situations). Should, in spite of this, unforeseen conditions be left as one of the basic signs of *force majeure*, it would be suitable to state that the time of the origin of obligation is decisive for its consideration. Though the commentary on the draft pre-supposes such interpretation, this conclusion does not clearly follow from the draft.

Article 58

12. It should be reconsidered whether it would be more appropriate for the seller to be entitled to interest charges in the country of the debtor instead of the creditor, or to combine the discount rate of interest valid in both countries in such a way (or manner) that the non-performance of the monetary obligation be advantageous for the debtor (for instance in cases when the rate is higher in his country).

Article 67

13. It is necessary to re-examine whether it is correct that the risk be passed to the buyer also in a case when the delivered goods are defective. Article 67 deals only with cases of fundamental breach of contract, but in accordance with article 30, paragraph 1, letter (*b*) the buyer can, under certain conditions, avoid the contract also in a case of a non-fundamental breach of contract. Here it is also necessary to take into consideration that it is not appropriate that the possibility of avoidance of contract should be limited only on cases of fundamental breach of contract, particularly if its definition contained in article 9 will be preserved.

14. It would be more desirable to have a regulation according to which the risk would be passed to the buyer only in such case if the buyer, in spite of his right to avoid the contract, does not do so without unnecessary delay or does not request a substitute delivery of goods or, if the buyer has no such right at all. In these cases the risk should pass at the time such transition would take place if the goods did not have such defects. Definite consideration on the question of passing of risk is dependent on the solution of the question of legal consequences of the delivery of defective goods and legal claims arising for the buyer in connexion with it.

DENMARK (A/CN.9/125/ADD. 3)*

[*Original: English*]

In the opinion of the Danish Government the Draft Convention on the International Sale of Goods prepared by a working group within UNCITRAL represents an appreciable improvement compared with the Hague Convention of 1964 on the International Sale of Goods.

As the working group has approved the Draft by consensus apart from a very small number of reservations to certain articles it appears that the new convention should be acceptable to states with different legal systems. The Danish Government therefore considers the Draft convention to be an excellent basis for the discussions at UNCITRAL's forthcoming session.

As to the individual articles of the Draft Convention the Danish Government supports the comments made by the Swedish Government.

In addition the Government wishes to submit the following observations.

Article 19

According to paragraph 2 of this article the buyer cannot claim non-conformity of the goods under subparagraphs (*a*) to (*d*) of paragraph 1 if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity. This provision seems to be too favourable to the buyer. If the contract provides for specified goods and the buyer has examined the goods at the time of the conclusion of the contract, the seller may reasonably suppose that the buyer has discovered any non-conformity, which could be discovered, and accepted the condition of the goods. The same applies when the seller may reasonably suppose that the buyer has examined the goods before the conclusion of the contract. The wording "knew or could not have been unaware of such non-conformity" should therefore be replaced by "knew or ought to have been aware of such non-conformity".

Articles 26 and 50

The rule of exemption from liability in article 50 paragraph 1 should also apply with regard to an impediment to performance which existed at the time of the conclusion of the contract. In the opinion of the Danish Government there is no reason why the liability of the seller should be more strict in this case than in case of an impediment which has occurred after the conclusion of the contract.

Article 29

As the right of the seller to cure any failure to perform his obligations is limited to cases where no unreasonable inconvenience or unreasonable cost is caused to the buyer and presupposes that the failure can be cured without such delay amounting to a fundamental breach of contract, it is proposed that this right of the seller shall be given priority over the buyer's declaration of avoidance or reduction of the price.

Article 45

Paragraph 2 (*a*) provides that the seller loses his right to declare the contract avoided in case of late performance of the buyer when he becomes aware that the performance has been rendered. If there has been a long delay in the buyer's payment of the price, the performance could be rather surprising to the seller, and it does not seem reasonable that the seller should lose all rights of avoidance when the price is paid. The Government therefore proposes the following wording of subparagraph (*a*):

"(*a*) In respect of late performance by the buyer, within a reasonable time after the seller has become aware that performance has been rendered;".

* 23 May 1977.

Finland

[*Original: English*]

General observations

1. The Government of Finland notes with pleasure that the draft Convention on the International Sale of Goods, as elaborated by a working group within UNCITRAL, strikes an equitable balance between the interests concerned and between different legal systems. The draft contains no provision which would be in conflict with the fundamental principles of Finnish law. From the Finnish point of view the draft would form an excellent basis for further deliberations, and a substantial improvement compared with the Hague Convention of 1964 on the International Sale of Goods.

2. The draft could, nevertheless, in the view of the Finnish Government be improved on certain points.

Comments on certain articles in the draft

Article 2, subparagraph (e)

3. Taking into account that the Convention would be of a dispositive character (see art. 5) there seems from the Finnish point of view to be no need for the provision proposed under this subparagraph. Ships and aircraft are in principle subject to national rules on sale of goods on an equal basis with other goods. The international régime might as well be applicable to the sale of ships and aircraft where the parties to the contract have left the question open. In most cases these contracts are made on standard terms.

Article 2, subparagraph (f)

4. From the Finnish point of view this provision could be deleted as electricity would not be regarded as goods.

Article 7, paragraph 2

5. Under this paragraph the effect on the relation between the seller and the buyer of the existence of an industrial or intellectual property right is left to national law. National law, however, differs considerably on this point. The proposed text thus leads to an unsatisfactory result. An earlier version of the draft contained a solution to this problem. It is therefore proposed that the introductory language in this paragraph be changed in the following way:

"Except as otherwise is provided in article 25, paragraph 2, this Convention does not govern . . . (as is)."

Article 10, paragraph 3

6. This paragraph contains a reference to article 23 only when stating which messages are transmitted on the risk of the receiver. The provision should also apply to the provisions of article 16 (1), 27 (2), 30 (2), 45 (2), 48, 49 and 50 (4).

Article 18

7. It seems unclear whether this provision adds anything to the declaration in article 14. Article 18 could therefore be deleted.

Article 22 (1)

8. The words "or cause them to be examined" might lead to confusion as there are several provisions in the draft, where no reference is made to the fact that measures incumbent on a party to the contract might be taken by someone else. The words mentioned might therefore from the Finnish point of view be deleted.

Article 25

9. Attention has been drawn to the fact that this article together with the provision of article 7 (2) would make national law applicable to the effect of an industrial or intellectual right embodied in the goods sold. This problem could be solved by making the seller not liable for such a right in the goods. The problem could also be solved by a provision stating that the seller is responsible to the buyer in respect of rights or claims of a third party based on industrial or intellectual property to the extent such rights or claims arise out of, or are recognized by, the law of the State where the seller has his place of business. This solution would leave the question which industrial or intellectual rights are recognized and whether they could be referred to towards the seller to be determined under national law whilst the effects of such rights would be regulated by the Convention. An industrial or intellectual right would thus be considered as a case of lack of conformity of the goods.

Article 28

10. Under this article the buyer cannot resort to any remedy for breach of contract during the additional period of time. It is submitted that the buyer ought to be entitled to compensation for loss sustained during this period of time. It is submitted that the buyer ought to be should be added to the article:

"After the period has expired, the buyer may resort to any remedy which is not inconsistent with performance by the seller on the buyer's request."

Article 29

11. As the right of the seller to cure any failure to perform his obligations is limited to cases where no unreasonable inconvenience or unreasonable cost is caused to the buyer and presupposes that the failure can be cured without such delay amounting to a fundamental breach of contract, it is proposed that this right of the seller shall be given priority over the buyer's declaration of avoidance or reduction of the price. There seems to be a tendency in modern law on the sale of goods to preserve the contract, and as this tendency often leads to an over-all reduction of costs, it is proposed that this line of reasoning should be followed here too. This result could be achieved by deleting the text after the words "unreasonable expense".

Article 39, paragraph 1

12. It does not seem clear whether the second sentence of this paragraph adds anything to the first sentence. From the Finnish point of view, the second sentence could be deleted.

Article 44

13. If the proposal to article 28 is adopted, article 44 should be amended correspondingly.

Article 47, paragraph 2

14. The second sentence of this paragraph does not seem to add anything to article 7 and might therefore be deleted.

FEDERAL REPUBLIC OF GERMANY

[*Original: English*]

GENERAL REMARKS

1. The Federal Government welcomes UNCITRAL's efforts to unify the law of the international sale of goods. It is of the opinion that the draft Convention elaborated by the Working Group is a good foundation on which to negotiate at the next UNCITRAL session.

2. In these observations the Federal Government will comment on some provisions which, in its opinion, ought to be improved. These remarks are not to be regarded as exhaustive. The Federal Government reserves submitting further proposals during the UNCITRAL session.

3. Beforehand, it seems adequate to point to a general problem which should deserve special attention during the deliberations on the draft. This draft only settles a part of the legal questions that may arise in connexion with an international sale of goods. Other aspects of this field of law are the subject of the 1974 Convention on Prescription in the International Sale of Goods. Again, other questions are intended to be dealt with in the future Convention on the Formation and the Validity of International Contracts of Sale, which is at present being prepared by the UNCITRAL Working Group on the international sale of goods. It seems to be necessary to take into account the links between all these projects and to avoid discrepancies. Thus, when determining the sphere of application of the draft there should be no deviation from the example set by the Prescription Convention except for cogent reasons. To co-ordinate the draft with the future Convention on the Formation and the Validity of International Contracts of Sale the work on that project should be so speeded up that the latter Convention can be passed at the same diplomatic conference as the Convention on the International Sale of Goods.

COMMENTS ON THE INDIVIDUAL ARTICLES

Article 1, paragraph 1 (b)

4. This provision is met by doubts. The sphere of application of the Convention should be limited to cases in which the parties to a contract of sale have their places of business in different contracting States [art. 1, para. 1 (*a*) of the draft]. If UNCITRAL succeeds in creating a uniform law of sale that is approved all over the world, the number of contracting States will be so great that a wide sphere of application will be assured even without the provision of article 1, paragraph 1 (*b*). The Convention on the Limitation Period in the International Sale of Goods, too, provides only for application as between contracting States.

5. Besides, even without the provision of article 1, paragraph 1 (*b*), it is open to every contracting State to prescribe that in cases in which the rules of private international law lead to the application of the law of this contracting State, the provisions of the international law of sale should be applied to the contract of sale. However, contracting States should not be obliged to introduce such a rule, because this may lessen the readiness to ratify the Convention.

6. It is proposed that article 1, paragraph 1 (*b*) be deleted.

Article 4

7. This provision may give rise to the mistaken belief that an agreement between the parties on the application of the Convention will result in setting aside mandatory provisions of national law also in the case of domestic sales contracts without any connexion to a foreign country. In any case, the provision is superfluous.

8. It is proposed that article 4 be deleted.

Article 7

9. It will have to be examined whether, in addition to the legal fields exempted by paragraph 1, further matters will have to be excluded from the sphere of application of the Convention. For instance, national laws for the protection of the buyer purchasing on an instalment plan and the buyer purchasing "at the front door" should take precedence over the Convention. By the exclusion of the consumer-purchase in article 2 (*a*) and the exclusion of the rules on the validity of contracts of sale in article 7, paragraph 1, most, but not all, of these cases are solved satisfactorily. However, when drafting any such exclusion in consideration of national laws for the protection of consumers, care will have to be taken to preserve the justified interests of international trade in a clear delimitation of the sphere of application.

10. Paragraph 2 does not seem to meet the issue. The question, which legal consequences ensue if industrial or intellectual property rights in the goods sold exist in any third person, should not be excluded from the sphere of application of the Convention. Rather, it appears to be justified to treat such rights of third persons like other rights in the goods sold (cf. article 25 *et seq*.).

11. It is proposed that article 7, paragraph 2 be deleted.

Article 9

12. This provision has not been happily drafted. The term "fundamental breach of contract" is not elucidated by defining it through reference to the vague idea of a "substantial detriment". The decisive point should be whether the result of the breach of contract is that the injured party no longer has an interest in the performance of the contract and whether this could have been foreseen by the party committing the breach at the time of the conclusion of the contract. Only under these conditions does it appear to be justified to grant the right of avoidance of contract which follows from a funda-

mental breach of contract [cf. art. 30, para. 1 (*a*); art. 45, para. 1 (*a*)].

13. Article 9 should read as follows:

"A breach committed by one of the parties to the contract is fundamental *if its result is that the other party has no further interest in the performance of the contract* and if the party in breach, *at the time of the conclusion of the contract,* foresaw or had reason to foresee such a result."

Article 11

14. This provision should remain as it stands. Rigid provisions as to form would run contrary to the requirements of international commerce.

Article 19

15. In this provision also the question should be dealt with upon whom the burden of proof lies in a dispute about the non-conformity of the goods.

16. The following additional paragraph is proposed:

"3. *The seller has to prove that the goods delivered by him conform to the contract. However, if the buyer wants to rely on a lack of conformity which he discovered after the expiration of the period within which he had to examine the goods under article 22, the buyer has to prove this lack of conformity. The buyer is considered to have discovered the lack of conformity before the expiration of this period if he has given the seller notice of the lack of conformity within a reasonable time after the expiration of this period.*"

Article 28

17. It should be made clear that the buyer, by the granting of an additional period of time, does not lose the right to claim damages for delay of performance.

18. The following additional sentence is proposed:

"*However, the buyer is not deprived of any right he may have to claim damages for delay in the performance.*"

19. An analogous addition should be made to article 44.

Article 29, paragraph 1

20. In its last clause the provision provides that the buyer, by the declaration of the reduction of the price in accordance with article 31, may prevent the seller from curing a failure to perform his obligations. Seeing, however, that the right to cure such a failure in any case is subject to the condition that no unreasonable inconvenience is caused to the buyer, this additional limitation does not appear to be proper.

21. It is proposed that at the end of paragraph 1 the words "or has declared the price to be reduced in accordance with article 31" be deleted.

22. In addition, it might be made clear in article 31 that the seller's right to cure failures under article 29 takes precedence over the buyer's right to have the price reduced.

Article 30, paragraph 1 (b)

23. The buyer's right to declare the contract avoided should exist also in the case that the seller does not cure a non-conformity of the goods within a reasonable additional period of time. In many cases, the buyer's interest in the performance of the contract will be infringed upon by defective delivery just as much as by failure to deliver at the agreed time. That quite insignificant defects should be left out of consideration seems to be self-evident and, consequently, to require no express rule.

24. Article 30, paragraph 1 (*b*), therefore, should read as follows:

"(*b*) If the seller has been requested to make delivery *or to cure a lack of conformity* under article 28 and *has not complied with the request* within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request."

Article 50

25. In *paragraph 1* there should be no reference to the term "fault" in order to avoid any confusion with the terms of "fault" under national laws.

26. It is proposed that paragraph 1 be shortened as follows:

"1. If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which he could not reasonably have been expected to take into account or to avoid or to overcome."

27. *Paragraph 2* may constitute an unreasonable hardship for the seller. If the seller, as regards his person, is relieved from liability under paragraph 1, his liability for a subcontractor's fault appears to be justified at the most if it is ensured that he can claim indemnity from the subcontractor. Such a claim for indemnity will, however, often fail for reasons of law or of fact, e.g. because of an agreement limiting liability or because of the subcontractor's insolvency.

28. It is proposed that paragraph 2 be deleted.

Article 58

29. The reference to the interest rate applying to unsecured short-term commercial credits seems to be unconvincing. The seller should not be able to claim such a high interest rate in every case of delay in payment of the purchase price, but only if he was actually compelled to take a loan at such a rate of interest. It must moreover be pointed out that interest rates for unsecured short-term commercial credits greatly vary, because lenders take into account the other circumstances under which the credit is granted as well as the customer's creditworthiness.

30. It is proposed that at the end of article 58 the words "but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business" be deleted.

Article 65, paragraph 1

31. This provision gives no reasonable solution to the case where the seller undertook to ship the goods *from a particular place*. If, for instance, a seller having his place of business in the inland binds himself to provide for shipment of the goods from a particular seaport, the risk should not pass when the goods are handed over to the *first* carrier — who carries the goods to the seaport — but only when they are handed over to the sea-carrier.

32. It is proposed that the following sentence be added to paragraph 1:

"However, if the seller is required to hand the goods over to the carrier at a particular place, the risk does not pass to the buyer before the goods are handed over to the carrier at this place."

Hungary

[*Original: English*]

General observations

1. The Secretary-General calls the attention to the fact that UNCITRAL "recommended that, as far as possible, comments should be focused on the fundamental issues covered by the draft Convention in view of the fact that Governments and international organizations would again be invited to submit comments on, and amendments to, the draft Convention in connexion with a conference of plenipotentiaries to which the draft Convention, as approved by the Commission, would be submitted for adoption". Accordingly, the comments of the Government of the Hungarian People's Republic are intended to cover the fundamental issues only, and the comments on details will be submitted at the Conference of Plenipotentiaries.

2. The study of the draft Convention has strengthened the earlier view of the Government of the Hungarian People's Republic about the need for the Uniform Law on the International Sale of Goods envisaged by UNCITRAL.

3. An indication of this is that the principle of universality has been manifested throughout the preparatory works of the draft in which countries of all regions have taken part.

4. Another reason which justifies the making of the Uniform Law is that UNCITRAL, in accordance with the task it had set, succeeded in drawing up a draft Convention in which general circumstances rendering the standardization of law difficult have been left aside, and which can expect world-wide acceptance. It contains realistic and practical rules, it has a clear structure, and for the most part its solutions are free from alienating forms understandable only for legal experts.

5. It enhances the commendability of the draft Convention that it creates a proper balance between the two contractual positions.

6. Special mention should be made of the definition of international sale, the stipulation of the scope of application of the Convention, the regulation of the operation of trade usage, the waiving of *ipso facto* avoidance, the definition of the fundamental breach, and the rule of exemption from liability for damages.

Iraq

[*Original: English*]

The Iraqi authorities have examined the text of the draft Convention on the International Sale of Goods and seen that the draft Convention is relatively close to the principles of the Iraqi Law of Trade No. 149 of 1970.

Madagascar

[*Original: French*]

General comments

1. The text of the draft appears to be very comprehensive as it stands and is couched in sufficiently flexible language to enable it to be given practical application in its broad outlines. It therefore calls for only a few basic comments relating to the following articles.

Comments on specific articles

Article 6

2. Although it is unquestionably difficult to establish a valid criterion for determining which place of business should be taken into account in cases where one of the parties has places of business in more than one State, the formula which has been adopted, namely "the place of business . . . which has the closest relationship to the contract and its performance", does not appear to be completely satisfactory. Greater precision would be advisable, since, as the article now stands, purely subjective considerations must be applied in determining the place of business.

Article 7

3. This article quite correctly restricts the application of the Convention to rights and obligations of the seller and the buyer arising from a contract of sale and excludes, *inter alia*, the effect of the contract on the property in the goods sold and on industrial or intellectual property — questions which very often bring into play purely domestic considerations that vary from State to State and are difficult to resolve.

Article 11

4. On the other hand, although it is true that international contracts of sale can often be concluded by such modern methods as a cable, it is difficult to understand how proof by means of witnesses can be accepted, as provided in this article. That is a very uncertain method, and it is very much to be hoped that the sentence in question will be deleted. Where no other method is possible — which will very rarely be the case — that procedure will no doubt have to be used, but one wonders whether it is necessary to mention it specifically; to do so opens the door to some very risky contingencies, particularly when one considers that any international contract of sale requires, by definition, the spelling out of a number of important particulars (the nature and quality of the goods, the means of payment, the place and date

of delivery, etc.) — questions which are invariably difficult to resolve in favour of one party or the other in the event of a dispute.

NETHERLANDS

[Original: French]

GENERAL COMMENTS

1. Before turning to the various parts of the draft Convention, a general observation should be made on the commentary accompanying the draft.

2. The Working Group on the International Sale of Goods had at its task "to ascertain which modifications" of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods "might render [that instrument] capable of wider acceptance by countries of different legal, social and economic systems" and "to elaborate a new text" incorporating those modifications.

3. The project does in fact differ from the Hague Convention in a number of rather important respects; moreover, many articles have been deleted even when the modifications made in the system established by the Convention did not require that. However, the commentary on the draft does not always make it clear why these modifications and deletions were thought necessary; very often they fail to indicate, or indicate only in very summary fashion, what will be the practical effects of these differences between the draft and the Hague system. As a result, it is difficult to grasp the precise reasons for some of the modifications made in the original Convention, and this lessens one's understanding of the draft. The commentary should therefore be made more complete on these points.

COMMENTS ON SPECIFIC ARTICLES

Article 1

4. Paragraph (1), in its preambular part and in subparagraph (*a*), provides that the new rules apply by reason of the mere fact that the parties to the contract have places of business in different Contracting States.

5. Article 1 of the Uniform Law on the International Sale of Goods (hereinafter ULIS) requires in addition that the contracts possess one of the international aspects specified in that article. It seems preferable to retain this additional requirement. The system established by the draft Convention implies, for example, that it is applicable to a contract of sale concluded in a country in which the buyer or the seller has his place of business and in which the other party is temporarily present, whereas the delivery of goods already present there must also take place in that country.

6. It is doubtful that such a contract has sufficient international aspects to fall within the sphere of application of the draft Convention.

Article 2

7. On the other hand, it is not made sufficiently clear (page 5 of the commentary on article 2 (*a*)) why it is desirable to exclude from the application of the Uniform Law a contract of sale concluded by correspondence between a sales agency and a buyer having his place of business in another country and thus to make it subject in principle to the legislation of the seller's country.

Article 9

8. In article 9 of the draft, as in article 10 of ULIS, a subjective as well as an objective criterion is used in defining the concept of "fundamental breach". However, the objective criterion is formulated differently in ULIS, which uses the wording, "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".

9. The draft, on the other hand, provides that the party who committed the breach must have foreseen or had reason to foresee that the breach would result in "substantial detriment to the other party". It is often difficult for one party to know whether "substantial" detriment has resulted or will result for the other party; courts may render widely differing judgements in this regard. The criterion used in ULIS provides greater security for the parties affected by the contract and is therefore to be preferred.

Chapter III (articles 26-33)

10. In chapter III of the draft Convention, the effects of breach of contract by the seller are dealt with in a single section. This presentation is an improvement over the system used in ULIS, which deals with these effects in each instance after setting out the various obligations of the seller. Nevertheless, article 26 of the draft should, like article 34 of ULIS, state specifically that the buyer has no rights other than those conferred on him by the Convention.

Article 15

11. It seems advisable that the obligation to deliver goods which conform to the contract should no longer be regarded as part of the obligation of delivery. It is preferable to regard delivery as consisting solely in the act of placing the goods in the possession or, at least, at the disposal of the buyer.

Articles 30 and 45

12. The draft (articles 30 and 45) provides for avoiding a contract only by means of a declaration made to the other party. The cases in which ULIS recognizes a contract as having been *ipso facto* avoided are thus eliminated.

13. In the case of articles 26, 30 and 62 of ULIS, this makes for greater clarity. A difference of opinion can easily arise as to the date on which the reasonable time referred to in those articles has expired, with the result that it remains uncertain whether and on what date the contract has been avoided. That is not true in the cases envisaged in articles 25 and 61 of ULIS. It will not always be apparent, of course, whether usage requires that the other party make a replacement purchase and whether that is reasonably possible. However, this difficulty should not be overestimated; the buyer and the

seller are engaged in the same type of commercial activity and are generally familiar with existing usage and possibilities or, at all events, are presumed to be familiar with them.

14. Articles 25 and 61 of ULIS — which provide that, if the conditions laid down are met, the contract is *ipso facto* avoided as from the time when the replacement purchase (resale) should be effected — have the advantage that the parties cannot put off at the expense of one of them, with the aid of speculation or price fluctuation, their decision concerning performance or avoidance in cases where a replacement purchase (resale) is in conformity with usage and is possible.

Articles 66 and 67

15. Finally, a comment is called for on the rules relating to passing of the risk. Article 97 of ULIS provides that the risk passes to the buyer when delivery of the goods is effected. If the goods are not in conformity with the contract, however, the risk does not pass to the buyer in the two cases referred to in paragraph 2. These two exceptions are not provided for in article 66 of the draft; on the contrary, under article 67 the buyer retains his right to damages. There is no commentary on this modification. The latter is not required by the change noted above (the fact that, in the draft, the obligation to supply goods which conform to the contract is treated independently of the obligation of delivery), for even under this system the two exceptions to passing of the risk are perfectly conceivable.

16. Thus, if the goods are defective and the buyer declares, citing valid reasons, that he does not wish to keep them, the risk of possible loss or deterioration remains with the seller.

NORWAY

[*Original: English*]

GENERAL OBSERVATIONS

1. The Norwegian Government finds the draft Convention on the whole to be a substantial improvement compared with the ULIS 1964. In particular we are satisfied with the simplified system regarding the sphere of application (art. 1), the exception for consumer sales (article 2 (*a*)), the rules on delivery (articles 15-18) and the consolidated system of remedial provisions for breach of contract (sect. III of chap. III and sect. III of chap. IV).

2. We are confident that the prospects of wide acceptance of the Convention have been considerably improved by the new version compared with the old ULIS 1964.

3. The amendments we nevertheless would like to propose are not of a fundamental character.

4. The provisions of chapter I are to some extent taken from the Prescription Convention 1974. In the interest of harmony such corresponding provisions of the two conventions should not *unnecessarily* differ. Nevertheless, a new formulation on some points may be wanted in the Sales Convention by UNCITRAL and the future Conference of Plenipotentiaries. In order to retain the desirable harmonization between the two Conventions on such points it should be considered to extend the terms of reference of the future conference of plenipotentiaries to include consideration of certain possible amendments to the Prescription Convention (possibly arts. 2, 4, 6 and 7?), consequential to the text of a Sales Convention to be adopted by that Conference.

5. A right of *reservation* should be opened in respect of *The Hague Convention 1955* on the applicable law in the field of international sale of goods, cf. article 4 in that Convention.

AMENDMENTS PROPOSED TO CERTAIN ARTICLES

Article 2

6. Delete subparagraphs (*e*) and (*f*). Alternatively subparagraph (*e*) might perhaps be worded as follows:

"(e) *Of any used ship or vessel which is, at the time of the conclusion of the contract, registered in a national /official/ public register as having a gross tonnage of 10 tons or more;*"

COMMENT

7. In view of the dispositive character of the Convention and its non-application to questions of validity (mandatory law), there seems to be no need to make exceptions for vessels or aircraft. In national laws, contracts for the sale of such vessels or aircraft are subject to the general law on sale. The best and simplest solution is to make no special exception, making thereby the international régime in principle applicable to international sales of vessels and aircraft. As regards the alternative suggestion, one encounters the difficulty of determining and calculating the tonnage, see the 1969 Convention on Tonnage Measurement of Ships. It is suggested that this difficulty may be overcome by referring to the registered tonnage.

Articles 4 and 7

8. In accordance with ULIS *article 4* Norway has earlier suggested that this provision should read:

"The present Convention shall also apply where it has been chosen as the law of the contract by the parties, *to the extent that this does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the law.*"

9. The inclusion of the italicized language was considered by the Working Group on the International Sale of Goods at its second session (A/CN.9/52, paras. 38-41;* see also A/CN.9/100, annex III, paras. 15-17).** The Working Group concluded that the effect of mandatory rules should be dealt with in the general provision of article 8 (now article 7).

10. The present language of *article 7*, however, does not seem quite to solve the problems raised by the amendment proposed to article 4. First, the expression in the *second sentence* of article 7 is probably not broad enough to cover any additional or subsequent agreement between the parties relevant to the sale. Thus, the

* See Yearbook . . . , 1971, part two, I, A, 2.

** See Yearbook . . . , 1975, part two, I, 1.

words "the validity of the contract or of any of its provisions" should be substituted by: "the validity of the contract or of any *provision contained therein or in any other agreement relating to the sale*". Second, article 7 does not — as the amendment proposed to article 4 — solve the choice of law problem involved — i.e. whether article 7 yields to the chosen law, to *lex fori* or to the "law which would have been applicable if the parties had not chosen the law". However, it may be considered that this problem should be left to national law and not be solved in the Convention.

11. Further, in the second sentence of article 7 the two words "In particular" seem misleading in relation to validity (mandatory law) and should be deleted. As regards the validity of a usage, the provision could well be transferred to a new paragraph (3) under article 8.

12. Article 7 may then be worded as follows:

"1. This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. *Except* as otherwise expressly provided therein, *the* Convention is not concerned with:

"(*a*) The formation of the contract;

"(*b*) The validity of the contract or of any *provision contained therein or in any other agreement relating to the sale;*

"(*c*) The effect which the contract may have on the property in the goods sold.

[2. *Except as otherwise provided in article 25 paragraph 2,* this convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims *relating* to industrial or intellectual property or the like.]"

Article 6

13. The provision in *subparagraph* (c) should be transferred to a new paragraph 3 of article 1 and read:

"3. *The Convention applies regardless of the* nationality or the civil or commercial character of the parties or of the contract."

COMMENT

14. Cf.ULIS article 7. Even if the Convention applies regardless of the character of the parties or the contract, such character may be "taken into consideration" by the courts in certain respects, e.g. by determining what in the circumstances shall be regarded as a reasonable time for giving notice to the other party.

Article 8

15. Add the following as a *new paragraph (3):*

"3. This Convention is not concerned with the validity of any usage."

Article 10

16. The provision of *paragraph 3* should, in principle, apply to notices of lack of conformity (art. 23), of avoidance (arts. 30 (2), 45 (2), 48 and 49), of suspension (art. 47 (3)) or of requirement to deliver substitute goods (art. 27 (2)) and to any notice under articles 16 (1) or 50 (4). It seems not, however, to be important to refer to article 16. The provision should *not* apply to notices under articles 28, 29 ((2) and (3), 44, 46 or 47 (3), second provision "received the notice"). It seems not clear whether the provision should apply to notices under articles 63 ((1) and (2)) or 65 ((2), "discloses").

17. It is submitted that article 10 should read as follows:

"1. *Communications under* [Notices provided for by] this Convention must be made *by means* appropriate in the circumstances.

"2. A declaration of avoidance of the contract is *effected by* notice to the other party.

"3. Where notice of *lack of conformity,* of avoidance *or of suspension* or any notice required by articles *27 paragraph 2 or 50 paragraph 4* is sent by appropriate means within the required time, the fact that the notice fails to arrive or fails to arrive within such time, or that its contents have been inaccurately transmitted, does not deprive the sender of the right to rely on the notice."

Article 25

18. Present article 7 paragraph 2 excludes *industrial or intellectual property rights* altogether from the scope of the Convention. This provision does not seem satisfactory in cases where such rights are embodied in the goods sold, as a concrete claim *in rem.* The consequences of the exclusion of such claims from the scope of the Convention are that the claim and the seller's liability will depend on the law applied by the court seized with the case. Since the laws in this field, as well as the rules on conflict of law, differ much from State to State, the system will create great uncertainties for the parties. A better solution may be to provide that the seller is responsible to the buyer in respect of rights or claims of a third person based on industrial or intellectual property [only] to the extent that such rights or claims (relative to the goods) arise out of, or are recognized under, the law of the State where the seller has his place of business (including any international convention recognizing such rights or claims, to which that State is a party). Such a provision could be placed in article 25 as a *new paragraph 2* to read as follows:

"2. *Whether a right or claim of a third person based on industrial or intellectual property amounts to a breach of contract by the seller, is determined according to the contract and the law of the State where the seller has his place of business at the time of the conclusion of the contract. The effects of such a breach are determined by the provisions on lack of conformity in this Convention.*"

19. The question arises what *remedies* the buyer shall have for breach of the seller's obligations under article 25 (cf. old ULIS arts. 52 and 53). It is clear that he will have the remedies under articles 26 to 33 (and 47 to 49), except the remedy under article 30 paragraph 1 (*b*) and perhaps remedies under articles 27 paragraph 2, 31 and 32. If it is understood that third party claims under article 25 shall be deemed to constitute a lack of conformity, the provisions under articles 27 (2), 31 and 32 would apply, as they should. It is then a remaining matter of policy whether article 30 (1 *b*)

on avoidance after the *nachfrist* should be extended to cases under article 25. It is submitted that this is not justified, in particular since the third party claim may be more or less well founded.

20. Consideration should also be given to the relation between article 25 and the preceding articles in the same section II, in particular the relation to article 23 paragraph (2). Cf. ULIS 1964 articles 52-53.

Article 26

21. Add the following as a *new paragraph 3* (between the present paras. 2 and 3):

"3. *The rights conferred on the buyer by this Convention exclude all other remedies based on lack of conformity of the goods /or on other failure by the seller to perform his obligations/, except in case of fraud.*"

COMMENT

22. Cf. ULIS 1964 articles 34 and 53. The provision is even more important under the system of the new Convention, which is not a system of uniform law in a strict sense. It is intended to preclude in cases of lack of conformity that the buyer relies on remedies under *national* law which are not considered as remedies for breach of contract, for instance remedies relating to error, mistake, misrepresentation or the like. This point of view applies in principle also to cases of delay and other cases of failure by the seller to perform his obligations (cf. ULIS 1964 art. 53). However, it is felt that any remedy under national law based on tortious fraud shall be available to the buyer (cf. comments *infra* on possible new art. 59 *bis* on fraud).

23. If it is felt that a provision as proposed should be limited to cases of lack of conformity — as the problem of practical importance — the proposed provision with such limited scope could preferably be inserted as a new paragraph 3 in article 19. In this connexion reference is made to the fact that in ULIS 1964 a corresponding provision is found in article 34, immediately after ULIS article 33 which corresponds to the present draft article 19.

Article 27

24. The time limit in paragraph (2) for requesting substitute goods should be given a wider scope and made applicable to any request for performance in cases where the seller has made delivery but where the goods do not conform with the contract. If the right to request performance is unlimited in time (according to arts. 27 and 28), this right might be abused by the buyer for the purpose of evading the time limits for avoiding the contract under article 30 paragraph (2) (*b*).

25. The following wording of article 27 is proposed:

"1. The buyer may require performance by the seller unless he has resorted to a remedy which *is inconsistent with* such requirement.

"2. *If the seller has made delivery, but the goods do not conform with the contract, the buyer loses his right to require performance, unless such request is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.*

"3. If the goods do not conform with the contract, the buyer may require delivery of substitute goods only *where* the lack of conformity constitutes a fundamental *breach*."

Article 28

26. This article should read:

"1. *Subject to the provisions of article 27,* the buyer may *fix* an additional period of time of reasonable length *for performance by the seller*. During such period the buyer cannot resort to any remedy, unless the seller declares that he will not comply. *After the period has expired, the buyer may* resort to any remedy which is *still open to him and not inconsistent with performance by the seller of the buyer's request.*

"2. *Where the buyer requests the seller to perform, without fixing an additional period referred to in paragraph 1, the request is assumed /, for the purpose of the provisions thereof, / to include the fixing of a period of reasonable length.*"

COMMENTS

27. The main purpose of this article is not to provide for a right to request performance (cf. art. 27), but to regulate the buyer's power to fix (or grant) an additional period for performance (a "*nachfrist*"). This purpose should come more in the forefront of the text (cf. old ULIS art. 44 (2)).

28. To avoid uncertainty it should perhaps be expressly stated, not only what the buyer cannot do during the fixed period, but also what he can do after the period has expired (cf. old ULIS arts. 42 (2) and 44 (2)), whether or not the seller then has performed. If the seller performs within the period, it would presumably be inconsistent with the request to avoid the contract because of the delay.

29. The suspending effect of the fixed period in respect of the buyer's right to exercise remedies should apply also where the buyer requests the seller to cure a breach, without expressly fixing a specified period of time (cf. the corresponding provision of art. 29 para. 2). This is a practical case and the buyer should then wait a reasonable time before eventually declaring avoidance or price reduction (and perhaps also before collecting damages?). It is, however, a further question whether such a period of unfixed reasonable time should be given the effect of a *nachfrist* in relation to the right of avoidance under article 30 paragraph 1 (*b*). If not, the provision on the purely suspending effect of the unfixed period may, for convenience of drafting, be placed in a separate *new paragraph 2* of article 28.

Article 30

30. If the proposal of adding a new paragraph (2) in article 28 is adopted, on the understanding indicated above in the comments thereto, the reference in *paragraph (1)* (b) of article 30 should apply only to paragraph (1) of article 28. *Paragraph (1)* (b) should then read:

"(b) *in case of non-delivery,* if the seller *does* not deliver the goods within the additional period of time fixed by the buyer in accordance with article 28 *para-*

graph 1 or declare*s* that he will not comply with the request *to make delivery*."

31. *Paragraph (2)* (b) should refer also to article 29 paragraph (2), for instance so:

"(b) in respect of any other breach than late delivery, after he knew or ought to have known of such breach, or *after the expiration of any additional period of time applicable under articles 28 or 29*."

Article 44

32. If the proposals in relation to articles 28 are adopted, article 44 (and art. 45 para. 1 (*b*)) should be amended correspondingly. Furthermore, the buyer's right of interpellation, and the consequences thereof, should also be provided for, cf. article 29 paragraphs 2 and 3. Article 44 would then read as follows:

"1. The seller may fix an additional period of time of reasonable length *for performance by the buyer. During* such period the seller cannot resort to any remedy, unless the buyer declares that he will not comply. *After the period has expired, the seller may resort to any remedy which is not inconsistent with performance by the buyer of the seller's request.*

"2. *Where the seller requests the buyer to perform, without fixing an additional period referred to in paragraph 1, the request is assumed, for the purpose of the provisions thereof, to include the fixing of a period of reasonable length.*

"3. *Where the seller has not requested performance, the buyer may request the seller to make known whether he will accept performance. If the seller does not comply within a reasonable time, the buyer may perform within the time indicated in his request, or if no time is indicated, within a reasonable time. The seller cannot, during either period of time, resort to any remedy which is inconsistent with performance by the buyer. A notice by the buyer that he will perform within a specified period of time or within a reasonable time is assumed to include a request under this paragraph that the seller make known his decision*."

Article 45

33. It is proposed to draft *paragraph 2* as follows:

"2. However, in cases where the buyer has paid the price the seller loses his right to declare the contract avoided if he has not done so:

"(*a*) In respect of *late payment*, before the seller has become aware that *payment* has been *made;* or

"(*b*) In respect of any other breach than *late payment*, within a reasonable time after the seller knew or ought to have known of such breach, *or after* the expiration of *any additional* period of time applicable under article 44."

COMMENT

34. The drafting of the present *subparagraph* (*a*) of paragraph 2 is objectionable in so far as it keeps open the right of avoidance based on late performance until performance has been rendered, both in respect of payment and in respect of taking delivery. Are there other possible delays in the buyer's performance than delay in payment or in taking delivery? If so, such delay in performance should probably come under subparagraph (*b*), not under (*a*) as in the present draft.

35. The system (both in the present text and as proposed *supra*) is that the right of avoidance is kept open as long as payment in whole (of all instalments) has not been made, see the initial phrase: "where the buyer has paid the price". This applies also in respect of the buyer's delay in taking delivery. It furthermore applies to any breach of the buyer's obligations to make provision for assuring or guaranteeing payment (by bill of exchange, documentary credit etc.), cf. article 35 and old ULIS article 69. A fundamental breach of such obligations gives the seller the right to avoid for the unlimited period of time until (full) payment is made.

36. *After* payment has been made, however, the situation is and ought to be another. Under the proposed text (contrary to the present text) it will then invariably be too late for the seller to declare avoidance in respect of delay in payment. As regards delay in taking delivery one might contemplate two alternative solutions, either to apply the rule formulated in the proposed subparagraph (*a*) or the rule in subparagraph (*b*). Under the first alternative it would, after received payment, be too late for the seller to declare avoidance in respect of the buyer's delay in taking delivery. This would apply even if the buyer never takes delivery after payment, and even if the seller has fixed a *nachfrist* under article 44 for the purpose of obtaining the right to avoid under article 45 paragraph 1 (*b*). The seller would have to resort to other remedies, such as damages and/or steps under articles 62-63. Under the second alternative the rule in paragraph 2 (*b*) would apply and in particular enable the seller to use the *nachfrist* for the purpose of possible avoidance, even after he has received payment. Both alternatives may seem acceptable, but the second one is deemed to be preferable and is proposed in the text above.

37. It would seem implied in the system that any right of avoidance because of previous failure in respect of payment guarantees could not be declared after received payment (in the present text: after performance). But avoidance within a reasonable time after discovery of the breach will be open under subparagraph (*b*) in respect of other breaches, e.g. as regards place, currency and manner of payment. Payment of the price in case of disputed amount is in an intermediate position and may be left to the courts. (Otherwise, payment or performance presumably means payment or performance in whole.)

Article 46

38. The last sentence of *paragraph 2* should read:

"If the buyer fails to do so *after having received the request*, the specification made by the seller is binding."

Article 48

39. *Paragraph 1* of this article states that breach in respect of any one instalment may constitute an anticipatory breach and give the other party reason to avoid the contract for the future (as regards future instalments). *Paragraph 2* states that avoidance in respect of future deliveries may be extended to deliveries already made if they are interdependent. It should also be provided for the possibility of extending an avoidance of any

made delivery (instalment) to previous deliveries (cf. old ULIS art. 75 para. 2), in particular where it is the last delivery that is avoided. Paragraph 2 could then be drafted as follows (alternatively be transferred to art. 32 as a new para. 3?):

"2. If a buyer *avoids* the contract in respect of *any delivery* [*under a contract for delivery of goods by instalments*] *and if,* by reason of *the* interdependence *with such delivery, other previous or future deliveries cannot* be used for the purpose contemplated by the parties in entering into the contract, *the buyer* may also, provided that he does so at the same time, declare the contract avoided in respect of *such previous or future deliveries.*"

Article 50

40. The provision of *paragraph 1* should be drafted more objectively (cf. old ULIS art. 74), for instance as follows:

"1. Where a party has not performed one of his obligations he is not [*shall neither be required to perform nor be*] liable in damages for such non-performance if he proves that it was due to an impediment *beyond his control and of a kind which a party in the same situation could not reasonably be expected neither to take into account* at the time of the conclusion of the contract *nor* to avoid or overcome."

41. *Paragraph 3* should be extended to provide for the practical case where a temporary impediment may entail permanent relief (cf. old ULIS art. 74 para. 2), and read as follows:

"3. The exemption provided by this article has effect for the period during which the impediment existed. *However, the party concerned shall be permanently relieved of his ability /obligation/ if, when the impediment is removed, the performance has so radically changed as to amount to a performance quite different from that contemplated by the contract.*"

42. The consequences of the relief will depend on whether or not the failure to perform under article 50 is deemed to be equal to a breach of contract. If this question is not solved in the Convention, it will depend on national laws, which differ greatly on this point. It should therefore be made clear (in the form of an express reminder) that the other party may apply the provisions on avoidance or price reduction, and, if so, that the provisions of article 50 apply to both parties. Cf. old ULIS article 74 paragraph 3. It is proposed to add the following as a *new paragraph 5:*

"5. *Nothing in this article prevents a party from avoiding the contract or reducing the price in accordance with the provisions of this Convention on account of a failure by the other party to perform any of his obligations.*"

Articles 56 and 57

43. *Articles 55-57* set out three alternative methods for the calculation of damages for breach of contract in case of avoidance. The text of articles 56 and 57 seem to suggest that the claimant shall have a free choice between these remedies, and this point is brought out even more forcefully in the commentaries on article 56 (note 4) and on article 59 (note 3). Articles 55-57 will, of course, have to be read in conjunction with article 59 imposing upon the injured party a duty to adopt reasonable measures to mitigate the loss resulting from a breach. However, the Norwegian Government considers — without accepting as correct the interpretation of these articles set out in the commentaries referred to — that the strong emphasis on this free choice of the claimant may open up for an interpretation of article 59 which will reduce the duty of the claimant to mitigate the loss, far beyond what is today the law in many countries. The net effect of articles 55-57 and 59 can consequently in particular cases be that the claimant is entitled to recovery in excess of his loss as established after appropriate measures to mitigate the loss have been or should have been taken. For these reasons and in accordance with the views expressed below, the Norwegian Government proposes that the reference to article 55 contained in article 56 (1) and in article 57 (1) should be deleted.

44. If a substitute transaction has been made, article 56 (1) allows recovery of the price difference so established, while article 56 (2) allows recovery of additional items of loss in accordance with article 55. In view of this, the reference to article 55 contained in article 56 (1) seems to suggest that even in respect of the price difference a higher amount may be recoverable under article 55. However, this would be tantamount to recovery in excess of the loss in terms of a price difference actually established. Even if the claimant brings his claim under article 55, the price difference established by the substitute transaction must necessarily be a main item in calculating his individual loss. Consequently, the reference to article 55 contained in article 56 (1) should be deleted as misleading.

45. If the claimant does not want to disclose a substitute transaction or if for commercial reasons, it is difficult to conclude that a transaction of the claimant is in fact such a transaction, he may of course choose not to invoke article 56. In that case he may, on the other hand, invoke article 57 to recover in respect of the price difference in the amount set out in article 57 (1). The reasons for making article 57 an alternative to article 56 are consequently appreciated. Again however, article 55 appears as a further alternative. In light of article 57 (3), referring to article 55 as regards recovery of items of loss other than the price difference, the reference to article 55 contained in article 57 (1) can have an independent significance only if the recovery in respect of the price difference may be higher under article 55 than under article 57 (1). It should be kept in mind that the case under consideration is not one where a substitute transaction is proven and invoked by the claimant. This being so it is suggested that the reference to article 55 contained in article 57 (1) should be deleted.

46. Article 57 (1) allows recovery of the price difference as of the date of avoidance, and applies only when the goods may be sold or bought at a current price. Having decided to avoid the contract, the claimant may consequently avoid any further loss in respect of the price difference than that referred to in article 57 (1) by appropriate substitute transaction, cf. article 59. If he fails to do this and the market subsequently rises, he and not the party in breach should bear the consequences. In other words article 55 should not be alternative in the sense of allowing a higher recovery in respect of the price difference than article 57 (1). It is submitted that even if

calculating in such a case the damages under article 55, the result will be the same if due account is taken of article 59. In light of this, the reference to article 55 contained in article 57 (1) — suggesting a ground for higher recovery — is misleading and should be deleted.

47. In *conclusion* the Norwegian Government considers that the key question relevant to articles 55-57 and 59 is the extent of recovery in respect of the price difference. In the cases referred to in article 56 (1) and article 57 (1), the provisions of article 55 should not constitute an alternative basis for any higher recovery in respect of such loss. Other items of loss will of course be governed by the rules of article 55, cf. articles 56 (2) and 57 (3), read in conjunction with article 59.

48. Consequently the Government *proposes* to delete the reference to article 55 contained in articles 56 (1) and 57 (1).

49. In article 56 (1) an alternative drafting may be to substitute the words: "if he does not rely upon the provisions of articles 55 or 57" by the following: "as part of the damages referred to in article 55". (The provision in para. (2) of art. 56 should then be deleted as superfluous.) The claimant's option to invoke either article 56 or article 57 would follow from the wording in article 57.

Article 59

50. Add the following as a *new second sentence:*

"*These measures shall include, where appropriate, notice within a reasonable time to the party in breach for the purpose of enabling him to mitigate the loss.*"

COMMENT

51. The proposed provision on notice within a reasonable time to the party in breach seems reasonable in cases where that party may otherwise be unaware of the breach or the consequences thereof to the other party. A notice will put the party in breach in the position that he may himself adopt measures to mitigate the loss resulting from the breach and thereby reduce his liability in damages. This may be of practical importance in cases where the party in breach is in a better position than the other party to adopt measures to mitigate the loss. There is a particular need for such a provision in cases where damages may be claimed for late delivery (non-delivery included) or other delayed performance, without avoidance of the contract, because there is no provision in such cases corresponding to the provisions on notice in articles 23 and 30.

POSSIBLE NEW ARTICLE 59 BIS ON FRAUD

52. The Working Group has decided to *delete* the provision in old ULIS article 89, which refers the determination of damages in case of *fraud* to national law on contracts on sale not governed by the Uniform Law. The considerations behind this decision seem mainly to have been the following:

(*a*) The need for uniformity;

(*b*) No imperative necessity to modify the limitation of damages provided by the foreseeability test in article 55;

(*c*) To avoid the possible misinterpretation of the old article 89 that the party who is the victim of fraud shall not in any event be entitled to damages at least equal to those which he would have recovered by the simple application of articles 55 to 59.

53. The deletion should be *reconsidered,* taking into consideration, *inter alia,* that the old article 89 deals with fraud on the part of any one of the parties, the victim as well as a fraudulent party claiming damages for a breach by the other party. The provisions of articles 55 to 57 seem to need a correction for cases of fraud committed by the claimant. Cf. also articles 25 and 50. It should also be taken into consideration that the convention does not govern and cannot unify the effect of fraud regarded as a tort independent of contract, in particular where the fraud is committed before or during the conclusion of the contract. It should be made clear whether, and in what way, the Convention regulates the effect of fraud in performance of the contract. Cf. the proposed amendment to article 26 and comments thereto.

Article 65

54. In *paragraph 2* regarding goods in transit it should be made clear that the provision presupposes that the goods, when handed over to the carrier or later, have been separated or otherwise identified for transmission (delivery) to some (specified) person (or consecutive consignees), i.e. either the seller or another predecessor of the buyer. (Cf. prof. Tunc's commentary on old ULIS art. 99.) The provision should not apply to unascertained and unidentified goods in bulk transmission to different consignees whose parts in the goods are not separated. It is proposed to draft paragraph 2 as follows:

"2. *Where the contract of sale relates to* goods already in transit, the risk *is borne by the buyer as from* the time *when such* goods were handed over to the first carrier *for transmission to the seller or another consignee.* However, the risk of loss of goods sold in transit does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods [*or part thereof*] had been lost or damaged, unless the seller discloses such fact to the buyer."

55. As regards possible *new paragraph 3* see A/CN.9/WG.2/WP.25.

Article 66

56. It is proposed that this article should read as follows:

"1. In cases not covered by article 65 the risk passes to the buyer *when* the goods *are* taken over by him or, *where he has not done so in due time, from the earlier moment when the goods have been placed at his disposal and he has committed a breach of contract by failing to take delivery.*

"2. *If, however, the buyer is required to take over the goods at a place other than any place of the seller, the risk passes when time for delivery has come and the buyer is aware, or has received notice, of the fact that the goods are placed at his disposal at such place.*

"3. Where the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have *been separated or otherwise* clearly identified to the contract."

COMMENT

57. *Paragraph 1* amalgamates the present paragraphs 1 and 2 first sentence. The present text is somewhat confusing because, while it would appear that the risk in any event passes when the goods are taken over by the buyer that conclusion is weakened by the cumulative reference to the seller placing the goods at the buyer's disposal.

58. *Paragraph 2* is new and takes care, *inter alia,* of situations where delivery is effected in accordance with present article 15 subparagraph (*b*), e.g. where the goods are held by a bailee or a warehouseman. Cf. ULIS articles 23 (2) and 97 (1). See also the report of the Working Group from its fifth session (A/CN.9/87)* under paragraphs 236-238. Even if the time (period) for delivery has come, this does not necessarily imply that it is a breach of contract by the buyer to omit to collect the goods without delay. If the place for collection (delivery) is a place of the buyer or of a third person, it seems reasonable that the risk passes immediately when the goods have been placed at the buyer's disposal at such place (and this is made known to him). If, however, the place of delivery is a place of the seller, it may be more reasonable or rational (insurance etc.) that the risk does not pass until the delay amounts to a breach of contract.

59. The proposed paragraph 2 is based on the assumption that the concept "taken over" in paragraph 1 is limited to taking physical possession. Where goods are in the hands of a third person, it has however, been suggested that the buyer "takes over" the goods when an appropriate act has occurred after which the third person is responsible to the buyer for the goods (and that the risk in such cases passes even before the buyer has committed a breach of contract by failing to take over the goods physically). It has been submitted that such appropriate act includes the handing over of a negotiable document of title (e.g. negotiable warehouse receipt) or the acknowledgement by the third person that he holds the goods for the benefit of the buyer. This interpretation would bring about uncertainties in applying the concept "take over" and seems not justified by the current text. But the problem behind calls for a clear provision.

60. *Paragraph 3* corresponds to present paragraph 2 second sentence.

PAKISTAN

GENERAL OBSERVATIONS

General specific contract specimen

1. It would be useful and desirable if in the light of this Convention, the United Nations Commission on International Trade Law drew up a general/specific contract specimen for use in international trade.

2. Similarly, it would be efficacious if the member nations were advised to create inspection/examination bodies in their respective countries in collaboration with the Chambers of Commerce and Industry for the checking of quality, quantity, packing, delivery, conformity with samples, etc. Such agencies should be empowered to check and issue clearances and in the event of any complaint or loss thereafter, the inspection agency and seller should be held responsible for it.

* See Yearbook ... 1974, part two, I, 1.

COMMENTS ON PARTICULAR ARTICLES

Article 1(2)

3. The place of business of the parties should be clearly defined to prevent triangular business which occurs in the case of re-export to a third State by the buyers.

Article 6(b)

4. Clearly defining a place of business, instead of making reference to habitual residence, is necessary.

Article 10(2)

5. For declaration of avoidance of contract the notice given by a party should be well in advance in order to assess reasons for the avoidance of contract and to evaluate its genuineness.

Article 11

6. If a contract of sale is not evidenced by writing then the witness should be their Chambers of Commerce or Associations of trade concerning the commodity in question.

Article 14

7. The original documents should preferably be routed through authorized commercial banks to ensure realization of the amount in question.

Article 15(c)

8. The place of delivery should be clearly defined in the contract to avoid any misunderstanding.

Article 17

9. A clause may be added to this article to explain reasons in case of delay.

Article 20(1)

10. It would be appropriate if the responsibility for lack of conformity rested with the Inspection agency concerned and the seller.

Article 22(2)

11. Examination before shipment of goods is preferable. Ex-destination examination may cause expense and complications.

Article 23(1)

12. The term "reasonable time" wherever it occurs in the draft should be clearly determined and defined.

Article 23(2)

13. Two (2) years time is too long a period as goods will lose their resale value. It is advisable to carry out inspection at the time of unloading.

Article 26(2) and (3)

14. Provided it is included in the contract.

Article 31

15. Reduction in price should be clearly defined in contract or mutually agreed upon thereafter.

Article 36

16. The basis of price determination should be clearly defined in the contract.

Article 39(3)

17. The examination time-limit of goods must be defined.

Article 57(2)

18. In calculating the amount of damages "invoice value" should preferably be the basis.

Article 63(1) and (3)

19. It is reasonable to determine a time-limit and the other party should be duly intimated. Preservation cost should also be intimated to the buyer by the seller.

PHILIPPINES

[*Original: English*]

GENERAL OBSERVATIONS

1. All the articles should have titles. For example: *Article 1. Application of the Convention; Article 2. Sales not covered by the Convention, etc.*

OBSERVATIONS ON PARTICULAR ARTICLES

Article 1

2. It is suggested that in order for this Convention to apply, the parties must not only have places of business in different States but must be of different nationalities.

3. Thus, a Filipino whose place of business is in New York, and another Filipino whose place of business is in Tokyo, shall, in contracts of sale between them, be governed not by this Convention but their own national law. Hence, it is proposed that paragraph (1) of article 1 should read: "(1) This Convention applies to contracts of sale of goods entered into by parties of *different nationalities* whose places of business are in different States:"

Article 2

4. The term "goods" should be defined in order to determine what goods will not be subject to the Convention. The exclusion of "ships, vessels, and aircraft" from the application of the Convention seems unjustified. The general provisions of the Convention may be applied to them, subject to the special requirements imposed by special laws governing them.

Article 5

5. We suggest the addition after the term "exclude" of the following words: "by express stipulation" in order to indicate clearly that "implied" exclusion, derogation or varying of any of the provisions of the Convention, is not recognized. Article 5, as amended, should read as follows: "The parties may exclude by express stipulation, the application of this Convention or derogate from or vary the effect of any of its provisions."

Article 6

6. If our comments on article 1 regarding the taking into account of the nationality of the parties in the application of the Convention is favourably considered, then, paragraph (*c*) of article 6 should read as follows: "(*c*) Neither the civil or commercial character of the parties or of the contract is to be taken into consideration."

Article 9

7. We suggest the deletion of the last portion of the article: "and the party in breach foresaw or had reason to foresee such a result." Unless so deleted, the party in breach will always allege to exempt himself from liability that he did not foresee and had no reason to foresee "substantial detriment" to the other party. It is sufficient that a "substantial detriment", as a fact, resulted from the breach; it is quite difficult to prove further that the party in breach "foresaw or had reason to foresee such a result". This will practically allow exemption of the party in breach from liability for breach of the contract as it would be easy for him to allege his ignorance of such substantial detriment but difficult for the injured party to prove otherwise.

Article 11

8. An international sale of goods is presumed to involve a value greater than 500 pesos (Philippine currency, ₱), equivalent to approximately $US70. Under Philippine law, any sale of goods at a price not less than ₱ 500 must be evidenced by writing, note or memorandum, in order to be *enforceable.* It is suggested that a contract of international sale of goods should always be in writing or evidenced by some note or memorandum of some sort, or exchange of telegrams or the like. This requirement would give certainty to commercial contracts and would prevent unnecessary litigations. Hence, it is proposed that article 11 should read as follows:

"A contract of sale *to be enforceable must be evidenced by writing, note, or memorandum signed or acknowledged by the parties or their authorized agents, although it need not be subject to any* other requirements as to form. It may be proved by means of proof generally recognized by the law of evidence."

Article 16

9. The preposition "to" in article 16, paragraph (1) should be changed to "in" so as to read: "or are not otherwise identified IN the contract, . . .".

Article 43

10. We suggest the insertion after "seller" in the first line, of the words "after he has duly complied with his obligation under the contract," so that said article will read as follows:

"The seller, AFTER HE HAS DULY COMPLIED WITH HIS OBLIGATION UNDER THE CONTRACT, may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement."

POLAND

GENERAL OBSERVATIONS

1. The Government of the Polish People's Republic is of the view that the draft convention on the international sale of goods prepared by the UNCITRAL Working Group properly reflects a balanced and carefully elaborated compromise between the interests of both parties to a contract of sale of goods.

OBSERVATIONS ON PARTICULAR ARTICLES

2. There are, however, a few matters which are susceptible to improvement.

Article 50

3. One of the most important problems for parties to a contract of sale of goods is the problem of changes of circumstances which could not have been foreseen by them at the conclusion of a contract.

4. Such changes can result in excessive difficulties for the parties or threaten them with considerable damage when performing the contract.

5. Therefore, it seems reasonable to include in the draft a provision dealing with the principle *rebus sic stantibus* according to which any party will have a right to renegotiate conditions of a contract.

6. Thus the following provision should be included after article 50 of the draft:

"If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination."

Article 13

7. It seems advisable to precede article 13 of the draft by a general clause to the effect that in the interpretation and application of the stipulations of a contract, the intention of parties as well as the purpose they wish to achieve are to be taken into account.

8. The rationale of the foregoing suggestion is as follows:

The draft convention deals with a contract of sale of goods. In case of a dispute, the stipulations of the contract concerned are to be examined. If any of the said stipulations gives rise to doubts, the court when considering a case should try to clear up the intention of the parties at the conclusion of the contract. The court should also consider what the parties wanted to achieve, i.e. what was the purpose of the contract.

Additional article: Choice of Law

9. The draft Convention does not indicate the law which is to be applied to the contract when the contract does not contain an appropriate stipulation to this effect. This problem is closely connected with the question of the conflict of laws. It seems therefore advisable to supplement the draft by a provision that, unless the parties agree otherwise, the law of the seller's country is to be regarded as the proper one with respect to a contract of sale of goods. It is justified by a quite common recognition of this principle in the international trade.

Additional article: Penalties

10. It seems also advisable to include in the draft a provision concerning penalties. This will facilitate, to a considerable degree, any claim of damages for a breach of contract.

11. Regulation of the question of penalties in the draft will also eliminate the existing lack of uniformity in this field in the various legal systems.

Article 10

12. Attention should also be drawn to the provisions of article 10, paragraph 3 according to which the addressee bears consequences when the notice fails to arrive within the required time or that its contents have been inaccurately transmitted. This provision ought to be amended in order to balance the rights and obligations of the parties to a contract of sale of goods.

SWEDEN (A/CN.9/125/ADD.1)*

[*Original: English*]

GENERAL REMARKS

1. For international trade transactions to function smoothly, it is desirable that States should as far as possible apply the same substantive rules in respect of international sales. The work carried out within UNCITRAL with a view to achieving a convention in this field is therefore most important.

2. In the opinion of the Swedish Government the draft Convention prepared by the Working Group constitutes a suitable basis for future work. The draft must be regarded as a considerable improvement on the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS).

3. One general criticism can, however, be made of the draft, namely a certain lack of clarity and precision. None the less, it is clear that a fairly high level of abstraction and vagueness is inevitable in rules that are to apply to a large number of States whose legal, social and economic systems differ. The Swedish Government is in favour of revising the text to make it as clear and stringent as possible.

* 30 March 1977.

STRUCTURE OF THE DRAFT

4. One basic feature of the draft is that the remedies for breach of contract by the seller are dealt with together in one section and that the remedies for breach of contract by the buyer are dealt with together in another section. Contrary to the rules of the Nordic legal systems, failure by the buyer to pay the price for goods is equated with failure to take delivery of goods. As a result, the seller in the latter case can declare the contract avoided even if the buyer has paid the price. Here it would be enough for the seller to have the possibility of selling the goods on the buyer's account.

5. Another example of the consequences of the approach adopted is that not only failure to comply with the requirements laid down in the Convention but also cases where a party has not performed his obligations under the contract are treated as breach of contract. Such a rule has far-reaching implications, at any rate formally.

6. However, the Swedish Government considers that the basic structure of the Convention can be accepted.

COMMENTS ON INDIVIDUAL ARTICLES

7. In the Government's opinion, the solutions contained in the individual articles can, generally speaking, be accepted. Certain improvements could, however, be made in respect of specific details. The Government therefore wishes to make the following comments, which are not to be regarded as exhaustive or definitive.

Article 1

8. To enable as many States as possible to accede to the Convention, reservations should be permitted in certain respects. At the present time, Sweden, Denmark and Norway have similar acts relating to the sale of goods. In such circumstances, it should be possible to apply, between different States, common national legal rules that differ from the Convention. Accordingly, when implementing the Convention, a group of States should be able to reserve the right to consider themselves as one State (cf. ULIS, article II). It should also be possible for a State bound by ULIS to become a party to the new Convention.

Articles 5 and 8

9. Under article 5, the Convention's provisions are non-mandatory and article 8, paragraph (2) contains provisions on the effect of usages and practices. On the other hand, there is no express counterpart to ULIS article 9, paragraph (3), whereby provisions or forms of contract commonly used shall be interpreted according to the meaning usually given to them in the trade concerned. In particular, as regards delivery clauses of the f.o.b. and c.i.f. type it is important that it should be made clear that these should generally be interpreted not on the basis of the Convention but in accordance with usages and practices. A provision to this effect should be inserted in article 8.

Articles 15-17 (64-67)

10. The Convention contains separate rules on the delivery and the passing of risk. These rules in part correspond to each other. However, it is difficult to see why different conditions have been laid down. It should be possible to co-ordinate the rules further.

Article 26

11. If the seller has not delivered the goods in time and the buyer wishes to claim damages for the delay, he ought to be required to make his claim known within a specified time-limit.

Article 27 (43)

12. In the commentary on article 27, it is stated that the buyer's right to "require performance" also includes a duty for the seller to "cure any defects". In many situations it would seem appropriate that the seller should have such an obligation but this obligation cannot be unlimited. The defect may be of such a nature that it cannot be cured. To cure the defective performance may also place an unreasonable burden on the seller. The seller's obligation should therefore be clarified in the Convention, possibly in connexion with article 27, paragraph (2).

13. If the seller fails to deliver the goods, the buyer can, under article 27, paragraph (1), *inter alia*, require delivery. In the event of the seller failing to deliver, and the buyer being able to satisfy his requirements in some other way without additional costs, express avoidance would seem in many cases not to arise. Should the price then increase, the draft text allows the seller to require delivery or other performance at a much later date. This provision is unsatisfactory. A condition for maintenance of the right to require performance should be that the buyer presents his request within a reasonable time-limit after the last deadline for delivery. When the buyer has not paid the price, the seller should in the same way be obliged to make his request for performance within the same time-limit.

Article 28 (44)

14. If one party requires performance without indicating "an additional period of time of reasonable length", articles 28 and 44 are not applicable. This seems to apply whether no time-limit has been indicated or the period is shorter than provided for in these articles (e.g. "promptly"). This should not, however, mean that the party who requested performance can then immediately avoid the sale. Instead he should, of course, be obliged to accept delivery effected at once or within the period indicated. The difference between the two types of request for performance should be made clear.

Article 29

15. Article 29, paragraph (2) contains a provision giving the seller a right to request the buyer to make known whether he will accept delivery. Such a rule is natural in those cases where the seller has indicated in his request a reasonable time within which he intends to perform. In other cases the buyer would sometimes find it so evident that he does not wish to accept the goods that he does not bother to reply. This rule should be limited to situations of the former type.

Articles 47 and 49

16. Both article 47, paragraph (3) and article 49 contain rules concerning avoidance as a result of an anticipatory breach. While article 49 requires that it is "clear that one of the parties will commit a fundamental breach", a considerably lower risk is required under article 47, paragraph (3). The latter rule goes too far. Article 47 should be limited to "suspending performance" and the conditions for avoidance — apart from the special case dealt with in article 48 — should be those laid down in article 49.

Article 50

17. The Government does not find that the rules of exemption from liability in damages as they now stand are satisfactory, particularly when applied to defects in the goods, and should prefer to have them reconsidered as concerns both the content and the drafting. Furthermore, it would also seem desirable to deal with exemption from the obligation to perform. Otherwise, there are several situations in which exemption from liability in damages may become worthless because the other party can force performance. For instance, let us suppose that such a shortage of a certain kind of goods arises that difficulties in procuring the goods entail exemption under article 50, paragraph (1). As long as performance is not excluded, the buyer may through delivery, avoid any damage.

18. In principle such exemption from the duty to perform should apply only during the period when the impediment exists (cf. article 50, para. (3)). If a party still wishes to obtain performance when the impediment ceases, it may under the obligation suggested above be his responsibility to request performance. Should the impediment last for a long time, the Convention should indicate that the obligation to perform ceases entirely.

19. On the other hand, there do not seem to be adequate grounds for including special rules on limitations on the other party's right to avoid the contract (or to require a reduction of the price). In principle, this right should exist regardless of whether the other party can invoke exemption from the obligation to perform or not.

UNION OF SOVIET SOCIALIST REPUBLICS

[*Original: Russian*]

Article 1

1. For greater clarity, the words "For the purposes of paragraph (1) of this article" should be inserted at the beginning of paragraph (2).

Article 2

2. In order to achieve uniformity with similar questions in conventions relating to the international sale of goods, the wording of article 2 (*a*) should be identical to that of article 4 of the Convention on the Limitation Period in the International Sale of Goods, namely: "(*a*) of goods bought for personal, family or household use". Consideration should also be given to the question of the advisability of including in the Convention provisions similar to those in article 5 of the aforementioned Convention on the limitation period. In addition, the word "gas" should be inserted in article 2 (*f*), since the terms of contracts for the sale of gas are *sui generis.*

Article 7

3. Delete article 7, paragraph (2), which is enclosed within square brackets.

Article 10

4. Since article 10, paragraph (2), is worded in such a way that it may create the assumption that prior notice by the other party is required before a declaration of avoidance of the contract is forwarded to him, it would be advisable to reword that paragraph and, at the same time, to provide that the notice should be in writing, for example, by stipulating that "A declaration of avoidance of the contract is effective only if it takes the form of written notice to the other party".

Article 11

5. This article is unacceptable and should be deleted from the draft Convention. The question of the form of the contract should be regulated by the Convention on the formation of contracts, which the Working Group is preparing to draft. If a decision is taken to retain in the Convention a provision on the form of contracts, then it is necessary to stipulate that contracts should be in writing, if national legislation so requires, even if that applies in the case of only one of the parties to the contract. As to the consequences of not complying with the provision that the contract should be in writing, it would be possible to provide either that the contract in such cases should be regarded as void, or that the law of the State whose legislation requires that the contract be in writing should apply.

Article 19

6. Paragraph (1) (*b*) should read: "(*b*) are fit for any particular purpose expressly made known to the seller at the time of the conclusion of the contract".

Article 26

7. If it is implied in paragraph (1) that damages may be claimed in addition to the exercise of the rights provided in articles 27 to 33, and not as an alternative, then the meaning of paragraph (2) is not clear.

Article 28

8. Should this article be understood to mean that the penalty provided for in the contract (for example, for delay in delivery) should also be regarded as a remedy to which the buyer cannot resort during the additional period of time provided for in this article?

Article 32

9. In paragraph (2), after the words "if the failure to make delivery completely", the word "and" should be replaced by "and/or" since a fundamental breach of the contract may occur where only one element is present

(failure to make delivery completely, or failure to make delivery in conformity with the contract); it is not necessary for both to be present.

Article 36

10. This article is not acceptable. The price must be determined or determinable.

Article 40

11. The last part of this article should be changed to read: "without the need for any request or other formality on the part of the seller".

Article 42

12. This article gives rise to the same doubts as article 26.

Article 44

13. This article gives rise to the same doubts as article 28.

Article 50

14. The wording of paragraph (1) should be made more precise, as follows: "(1) If a party has not performed one of his obligations, he is not liable for such non-performance if he proves . . .". Paragraph (3) of this article should be deleted.

Article 56

15. Paragraph (2) should be changed to read: "The provisions of paragraph (1) of this article do not preclude the right to seek other damages also, if the conditions of article 55 are satisfied". The proposed change is prompted by a desire to avoid a direct reference to loss of profit, since, in the first place, it is already referred to in article 55, whereby damages are understood to cover loss of profit, and, secondly, in such a situation it is in fact difficult to imagine the possibility of a loss of profit over and above the difference in prices.

Article 57

16. The remarks made in connexion with article 56, paragraph (2), also apply to article 57, paragraph (3).

MATTERS NOT REGULATED OR ONLY PARTLY REGULATED BY THE CONVENTION

17. Provision should be made in the Convention (for example, in article 13) for the application of the law of the country of the seller to those questions which are not regulated or are only partly regulated by the Convention.

STRUCTURAL IMPROVEMENTS TO THE CONVENTION

18. Consideration should be given to the question of the advisability of making certain structural improvements in the draft Convention, in particular, the possibility of combining the provisions concerning remedies for breach of contract by the seller (chap. III, sect. III) and remedies for breach of contract by the buyer (chap. IV, sect. III).

UNITED STATES OF AMERICA

[*Original: English*]

1. The United States of America welcomes the draft Convention on the International Sale of Goods, as submitted to UNCITRAL by the Working Group on this subject (A/CN.9/116, annex I).* The proposals set forth in the draft are the product of much thought and study by the Working Group, which is to be commended for the contribution that it has made to the development of the law of international sales transactions. The draft Convention supplies a good basis for elaboration at the proposed diplomatic conference of a definitive text. The United States will be pleased to participate in this enterprise and wishes to submit the following comments on the text for consideration at the conference. These comments are grouped under three headings: major substantive proposals; drafting proposals; support for other proposals.

MAJOR SUBSTANTIVE PROPOSALS

A. *The commentary*

2. The United States is substantially in accord with the commentary on the draft Convention on the International Sale of Goods (A/CN.9/116, annex II).** It believes that, although not part of the text itself, the commentary is vital to the acceptability of the draft Convention for three reasons.

3. First, there are some instances in which the commentary is necessary to assist those who are not familiar with the text in understanding its meaning. This is particularly true in view of article 13, which speaks of "the need to promote uniformity" in "interpretation and application" of the provisions of the Convention. An example is article 31, which provides that the buyer may declare a reduction in price of non-conforming goods. This remedy is unknown in common law countries and would not be understood by lawyers in those countries without the helpful comments. Comment 3 is of particular importance, since without it such a lawyer might not suppose that the remedy was available to the buyer even though he had already paid the price. A different type of example is afforded by article 28, which allows the buyer to request performance within an additional period of time, but leaves it to comment 3 to tell the reader that, if the seller does not comply, the buyer has the remedy of avoidance of article 30(1)(*b*). A similar point can be made as to articles 30 and 45, which provide for avoidance but leave it to comment 3, in each case, to tell the reader of the notice requirement in article 10 for avoidance. The number of examples, where the comments perform such a vital function, is very large.

4. Second, the commentary will be extremely useful during the period when legal and business circles are considering whether to recommend ratification by their governments. Our advisers from business and the private practice of law are unanimous about the desirability of

* Yearbook . . . , 1976, part two, I, 2.
** *Ibid.*, part two, I, 3.

maintaining the commentary and would, indeed, have difficulty in comprehending the text without it.

5. Third, the commentary will be useful after the text becomes effective in promoting uniformity. Making this valuable aid to interpretation readily available to all will help to achieve the aims of article 13. Background material on the text, including earlier drafts and the present commentary, as well as texts that may be written in the future, will be available to lawyers who are in major commercial centres with substantial law libraries. Less centrally located lawyers will be disadvantaged by their situation unless there is a commentary that accompanies the final text. The comments to our Uniform Commercial Code were designed to serve somewhat this purpose and, although they do not form part of the law that enacts the text they have been well received and are highly regarded. Accordingly, the United States urges that the commentary be submitted to the General Assembly together with the draft articles and recommends that the text adopted by a diplomatic conference should be accompanied by a commentary.

6. Further, the United States proposes that the commentary be expanded by the addition of titles for the discussion of each article in the commentary. These titles could be placed before the text in brackets to indicate that they do not form part of the text of the articles and would appear only in editions containing the commentary.

7. Should a commentary not accompany the text when it leaves the Commission, the United States would find it necessary to propose a considerable number of drafting changes for the text, to make it more detailed and to add cross references which would point the reader to other provisions that qualify or supplement the provisions in question.

B. *Notices and other communications (article 10)*

8. Article 10(3) deals with transmission hazards for only two kinds of communications: (1) declarations of avoidance, and (2) notices of non-conformity required by article 23. Since national rules on transmission hazards are far from uniform, it is important that the text state a clear rule. The draft provides for communications in many other articles: article 16(1) ("send the buyer a notice"), article 16(3) ("at his request"), article 29(2) ("requests the buyer"), article 31 ("declare the price to be reduced"), article 45(1)(b) ("has been requested . . . has declared"), article 46(1) ("specify . . . after receipt of a request"), article 46(2) ("inform the buyer"), article 47(3) ("give notice to the other party . . . received the notice"), article 50(4) ("must notify"), article 63(1) ("notice . . . has been given"), article 63(2) ("give notice"). The situation under the draft is perhaps more complex than if no rules for transmission hazards had been included. In cases not covered by article 10(3), one might expect three competing contentions: (1) non-uniform solutions should be sought in national laws; (2) the rule of article 10(3) should be extended by analogy; (3) a rule opposite to that of article 10(3) should be applied.

9. Furthermore, article 10(1), which says that notices "must be made" by appropriate means, appears to be either unjust or misleading. This might be read to mean that the sanction for non-compliance is that the notice will be denied effect. But this would be unjust if the notice was actually received in time although not by an approved "means". The sentence ought to mean that the sender is deprived of the benefit of a rule like that in article 10(3), relieving him of the risk of transmission hazards.

10. The United States therefore proposes the following revision:

Article 10

"[1. Notices provided for by this Convention must be made by the means appropriate in the circumstances.]

"[2.] 1. A declaration of avoidance of the contract is effective only if notice is given to the other party.

"[3.] 2. If [notice of avoidance or any notice required by article 23] *any other notice, request or communication provided for by this Convention* is sent by [appropriate means] *means appropriate in the circumstances* within the required time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice."

C. *No writing required (article 11)*

11. Article 11 has been placed in brackets because agreement could not be reached on it. The difficulty came in reconciling it with national rules requiring a writing for sales contracts executed by, for example, a State trading organization or other company. The United States assumes that the problem is one of restrictions on the authority of representatives of a State trading organization or company validly to contract other than in a prescribed form. The United States, therefore, proposes the following additional paragraph:

Article 11

"1. A contract of sale need not be evidenced by writing and is not subject to other requirements as to form. It may be proved by means of witnesses.

"2. *The provisions of paragraph (1) do not affect an otherwise valid restriction on the authority of a party to conclude a contract other than in a prescribed form or manner if that restriction is prescribed by statutory law of the State where the party has its place of business and is either known to the other party or is widely known and regularly observed by parties to contracts of the type involved.*"

D. *Action for price (article 43)*

12. Article 43 provides that, unless the seller has resorted to an inconsistent remedy, he "may require the buyer to pay the price". This appears to allow the seller to recover the price in a suit against the buyer, even though buyer has repudiated when the goods are still in the hands of a seller who has an available market on which he can sell them. It would appear that a seller who had not yet begun to manufacture goods could take advantage of this provision. Not only would this rule work an abrupt and regressive change in American law but it is inconsistent with sound commercial practice. A seller who can mitigate his loss by selling on the

market should be expected to do so, consistent with the policy behind article 59 on mitigation of damages. The United States therefore proposes that article 43 be modified:

Article 43

"The seller may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement *or in the circumstances the seller should reasonably mitigate the loss resulting from the breach by reselling the goods.*"

13. An alternative solution would be to modify article 59:

Article 59

"The party who relies on a breach of contract must adopt such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages, *including any claim for the price,* in the amount which should have been mitigated."

14. If such a change is not made, it would be desirable to limit the action for the price to cases in which the buyer has accepted the goods or the goods have been destroyed or damaged after the risk has passed.

E. *Partial avoidance by seller (articles 32 and 48)*

15. The draft attempts to provide comparable rights for sellers and buyers. There appears to be an oversight in this regard as to partial avoidance of the contract by the seller. When the contract provides for delivery in instalments and one party's performance (seller's delivery or buyer's payment) is seriously deficient with respect to one instalment, the other should be permitted to refuse his counter performance (buyer's payment or seller's delivery) as to that instalment. It would be wasteful to force a party to cancel the whole contract unless the breach as to past instalments threatens "a fundamental breach as to future instalments". Article 32 deals with this situation where the seller is in breach, but there is no comparable provision for the situation where the buyer is in breach. The United States proposes that a new paragraph (1) be added to article 48: (Present paragraphs (1) and (2) would be renumbered (2) and (3)).

Article 48(1)

"1. *In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.*"

16. In addition, the caption to section I of chapter V should be expanded to read:

Section I. Anticipatory breach; instalment contracts

F. *Impracticability (article 50)*

17. Article 50 gives the appearance of being the result of compromise. The result is generally satisfactory, but does not sufficiently distinguish between the case of the destruction of specific goods which the parties assume will be in existence (see example 50A in the commentary) and the destruction of goods that the seller planned to use to fulfil the contract (see example 50B in the commentary). (The explanation of example 50B in the commentary is inadequate since no language in the text supports it.) The deficiency can be remedied if a requirement is added that the non-occurrence of the impediment must have been an implied condition of the parties of the contract. The United States proposes the following revision of article 50(1), which also contains some drafting suggestions in the second sentence:

Article 50(1)

"1. If a party has not performed one of his obligations, he is not 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 *and whose non-occurrence was an implied condition of the contract.* For this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to [take] *have taken the impediment into* account *at the time of the conclusion* of the *contract* or to [avoid] *have avoided* or [to] overcome [the impediment] *it after it occurred.*"

G. *Risk in documentary sales (article 65)*

18. The present version of article 65(1) provides that where the contract involves carriage, risk passes to the buyer when the goods are handed over to the first carrier unless the seller is "required to hand them over at a particular destination". This may be adequate to deal with contracts that are clearly "destination" contracts (e.g., f.o.b. buyer's city), but its application to c.i.f. contracts (e.g., c.i.f. buyer's city) is unclear. It may be that no negative implication is intended and that article 65(1) does not apply to either of the types of contracts just mentioned. Or it may be that c.i.f. contracts are governed by article 65 on the ground that the "insurance" term amounts to a degradation from the negative implication of article 65(1) so that risk passes on delivery to the first carrier. (This would not explain why the same result follows under a/c.&f. contract.) Furthermore, it would be desirable to modify article 65 to make it clear that the seller's retention of control through taking a bill of lading does not derogate from the usual rules. If the substance of article 65(1) is to remain the same, it would be desirable to modify article 65(1) as follows:

Article 65(1)

"1. If the contract of sale involves carriage of goods and the seller is not required to hand [them] *the goods* over *to the buyer* at a particular destination, the risk passes to the buyer when the goods are handed over to a carrier for transmission to the buyer. *The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.*"

DRAFTING PROPOSALS

A. *Consistent terminology*

19. As the delegation of the United States pointed out at the seventh session of the Working Group, the draft uses a wide variety of terms such as "have reason to know" (articles 2(*a*), 8(2)), "ought to know" (articles 22(3), 30(2)(*b*), 45(2)(*b*), 50(4), 55, 65(2); cf. article 23(1)), "could not have been unaware of" (articles 19(2), 24), "foresee" (article 9), and "contemplate" (articles 6(*a*), 48(2)). The over-all effect to a lawyer familiar with the drafting of legislation in the United States is that of a carelessly drafted text. Although different shades of meaning may be conveyed by some of the terms listed, the terms "foresee" and "contemplate" are synonymous in our legal usage and "foresee" is in wider current use. The terms "have reason to know" and "ought to know" are also synonymous in our legal usage, and although "have reason to know" is in wider current use, its consistent use in the draft would require a larger number of changes than would consistent use of "ought to know". The United States proposes, therefore, the following changes:

Article 2(a): "... unless the seller, at the time of the conclusion of the contract, [did not know and had no reason to know] *neither knew nor ought to have known that the goods were bought for any such use;* ..."

Article 6(a): "... having regard to circumstances known to or [contemplated] *foreseen* by the parties at the time of the conclusion of the contract."

Article 8(2): "... a usage of which the parties know or [had reason to know] *ought to have known* ..."

Article 48(2): "... for the purpose [contemplated] known to or foreseen by the parties ..."

B. *Conformity of style in articles 15 and 41*

20. Article 15, on the seller's obligation to deliver, and article 41, on the buyer's correlative obligation to take delivery, follow different drafting styles. The United States proposes that the articles be brought into harmony by making the following changes in article 15. (This would also avoid the implication that article 15 *defines* the act of delivery. For example, even though the seller fulfils his *obligation* to deliver by "placing the goods at the buyer's disposal" at a particular place such as the seller's place of business (see end of paragraph (b)), there has been no physical *delivery* because the goods have not been handed over to or taken over by the buyer. Indeed, in most cases where the buyer fails to come for the goods, the seller will resell them and there will never be delivery to the buyer in breach.)

Article 15

"If the seller is not required to deliver the goods at a particular place, [delivery is made] *the seller's obligation to deliver consists:*

"(*a*) If the contract of sale involves carriage of the goods, [by] *in* handing the goods over to the first carrier for transmission to the buyer,

"(*b*) If, in cases not within the preceding paragraph, the contract relates to

(i) Specific goods, or

(ii) Unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, [by] *in* placing the goods at the buyer's disposal at that place;

"(c) In other cases [by] *in* placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."

C. *Location of article 25*

21. The section that deals with conformity of the goods begins with article 19, which states the seller's obligation as to defects of quality, and ends with article 25, which states the seller's obligation as to defects of title. The five intervening sections contain rules that qualify article 19, but their applicability to article 25 is unclear because of its location. The United States believes that, to the extent that the context permits, the rules in those five sections are as applicable to the obligations imposed by article 25 as they are to those imposed by article 19. It therefore proposes that article 25 be moved either to precede or follow article 19, with appropriate renumbering.

D. *Scope of right of avoidance under article 45(1)(b)*

22. In international sales the critical step in buyer's performance is often not the buyer's actual *payment* of the price, but the *establishment* of "a letter of credit or a banker's guarantee" (article 35). Article 44 provides that, on default by the buyer, seller "may request *performance* within an additional period of time of reasonable length". The words "request performance" are sufficiently broad to embrace a request for establishment of a letter of credit or banker's guarantee required by the contract. However, article 45(1)(*b*), in implementing article 44, provides merely for avoidance by the seller if the buyer, after a request, has failed "to *pay* the price or take delivery". This failure "to pay" would not include a failure to take the steps mentioned here. (The use of "pay" in article 34 and "steps to enable the price to be paid" in article 35 suggests that the word "pay" does not encompass such steps.) The United States, therefore, proposes that article 45(1)(*b*) be revised:

Article 45(1)(b)

"1. The seller may declare the contract avoided:

"...

"(*b*) If the buyer has been requested under Article 44 to pay the price, *or to take the necessary steps with respect to payment required under Article 35,* or to take delivery of the goods, and has not [paid the price or taken delivery] *complied with the request* within the additional period of time fixed by the seller in accordance with [that] Article 44 or has declared that he will not comply with the request."

E. *Technical suggestions*

23. The United States proposes the following changes which are, it believes, largely self-explanatory:

(*a*) *Article 15*: The words "and at the time ... at that place;" should be indented to indicate that they are part of paragraph (*b*) and do not modify paragraph (a);

(*b*) *Article 16*: In paragraph (3), the phrase "*the*

seller must provide" should be changed to "*he* must provide", to conform to the style of paragraph (2) ("*he* must make"). (In paragraph (1) the phrase "*the seller* must send" is justified because the word "carrier" intervenes between the first use of "the seller" and this phrase).

(*c*) *Article 19(1)*: The words "Except where otherwise agreed" should be deleted as unnecessary in view of Article 5 and as suggesting, by negative implication, that other rules relating to conformity are not subject to derogation or variation by the parties.

(*d*) *Articles 19, 31*: The words "conform *with*" should be changed to "conform *to*" in order to conform to correct English usage.

(*e*) *Article 29*: The words "perform" and "performance", which appear a total of four times in paragraphs (2) and (3), should be replaced by "cure". This will make the reference to paragraph (1) clearer.

(*f*) *Article 36*: The phrase "*generally* prevailing at *the aforesaid* time" should be changed to "prevailing at *that* time" to make it consistent with article 57, which does not use "generally" to modify "prevailing" and to avoid "aforesaid", a stilted word.

(*g*) *Article 39(2)*: The words "at the place of destination" should be deleted.

(*h*) *Article 47(1)*: The word "capacity" should be replaced by "ability" (or perhaps "capability") because the word "capacity" is often used to refer to legal capacity, including questions of insanity and even authority to represent a principal.

(*i*) *Article 48(2)*: The word "*entering* the contract" are ungrammatical and inconsistent with the style of other articles (e.g., article 6(*a*)). They should be changed to "*at the time of the conclusion* of the contract".

(*j*) *Article 63(1)*: The syntax is garbled. The paragraph should be revised to read:

1. If there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation [and notice of his intention to sell has been given], the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 may sell them by an appropriate means, *after giving notice to the other party of his intention to sell.*

SUPPORT FOR OTHER PROPOSALS

A. *United Kingdom proposal for article 50(3)*[1]

24. The United States supports the proposal of the United Kingdom to add a sentence to article 50(3). That paragraph, with a few stylistic changes in the United Kingdom proposal, would read:

Article 50(3)

"3. The provisions of paragraph (1) and (2) are applicable only for the period during which the impediment existed. *However, the non-performing party shall be permanently relieved of his obligation if, when the impediment is removed, the performance has so changed that the contract has become materially more burdensome than had the impediment not occurred.*"

B. *Norwegian proposal for article 66(3)*[2]

25. The United States supports the proposal by Norway to add a new paragraph (3) to article 66, which with a change of style would read:

"3. *If the goods are not identified for delivery to the buyer, by marking with an address or otherwise, they are not clearly identified to the contract, unless the seller gives notice of the consignment and, if necessary, sends some documents specifying the goods.*"

YUGOSLAVIA

[*Original: English*]

GENERAL OBSERVATIONS

1. Yugoslavia attaches exceptional importance to the passage of the Convention on the International Sale of Goods and in keeping with this it has been following the work of the United Nations Commission on International Trade Law (UNCITRAL) on the drawing up of a new text elaborated in the form of the first draft by the Working Group of the Commission. No doubt the task of the Working Group was much harder than the work performed formerly by the International Institute for the Unification of Private Law (UNIDROIT) since, in addition to the existing system of the common law and the systems based on civil law, it was requisite to take into consideration this time the interests of the developed and the developing countries, as well as the systems based on planned economy and the ones characterized by free trade. It is quite understandable that it was neither easy nor simple to harmonize all these interests. This is also where there might have ensued some short-comings in the text, which will be indicated hereafter.

2. Yugoslavia deems it appropriate that UNCITRAL should have taken the initiative to revise the 1964 Hague Uniform Law. This is primarily due to the fact that many developing countries, who need such a document even more than the developed countries, did not have the opportunity to participate in the drawing up of the text.

3. Yugoslavia is of the opinion that the present text should be viewed also as proceeding from the idea of establishing a new economic order stemming from the decisions of the sixth and seventh special sessions of the General Assembly of the United Nations. It is the general impression that the work of UNCITRAL on the adoption of documents which would regulate the relations between the buyer and seller in the context of the conclusion of contracts on international sale of goods is in line with the general aspirations of the developing countries that international trade and its regulation be considered also from the standpoint of the requirements of the developing countries, which so far have not been, or at least not sufficiently, taken care of. It is well known that contracts on international sale of goods are concluded with reference to standard contracts and general conditions, which contain a whole set of clauses suited to

[1] Proposed by the United Kingdom during the seventh session of the Working Group on the International Sale of Goods (5-16 January 1976). [Foot-note inserted by the Secretariat.]

[2] Proposed by Norway during the seventh session of the Working Group on the International Sale of Goods (5-16 January 1976). [Foot-note inserted by the Secretariat.]

the economically more powerful contracting parties. With the adoption of the Convention on the International Sale of Goods some of these weaknesses might be eliminated. Some of the provisions of the Convention in this respect should perhaps be imperative in character.

4. On the other hand, due to the work of UNCITRAL on the revision of the Hague Uniform Law, many countries, among them Yugoslavia, have postponed the taking of any measures with a view to ratifying the Convention on the 1964 Uniform Law, until the emergence of the new text, so that the final adoption of the Convention on International Sale of Goods will put an end to the present state of expectation and incertitude. All the more so because in respect of the definition of the notion of international trade there are three texts at the moment (the Hague Uniform Law, the Convention on the Limitation Period in the International Sale of Goods and the draft Convention on the International Sale of Goods), which has also been a source of doubt and uncertainty. Therefore, it would be indispensable to concentrate all efforts into making this last stage in the passage of the Convention as short as possible.

5. The adoption of the Convention on the International Sale of Goods is indispensable also because it is going to create possibilities to start — proceeding from this, so to say, "basic text" — the drafting of other numerous regulations so badly needed in the field of international sale, particularly by the developing countries.

6. The authority of the United Nations standing behind the present Convention will undoubtedly contribute to its prestige, hence it is right to expect that convention, especially if some improvements in the text are made, to fare better than the previous similar texts, i.e. to be ratified by a larger number of countries.

7. In order to achieve all this it is necessary at this final stage to approach the work with maximum seriousness and goodwill, with no desire to insist on solutions which suit only some particular States, but with the awareness that it is an international text, which should correspond to the interests of the greatest possible number of States. Yugoslavia is of the opinion that it is important to bear in mind the following:

(*a*) The Convention has to reflect the spirit and the aspirations of the new international economic order;

(*b*) The Convention has to protect fairly and equally the interests of both the buyer and the seller.

8. On the basis of the two above-mentioned criteria, one gets the impression that some weaknesses of the former Hague Uniform Law on the International Sale of Goods have been avoided in the draft. In this respect the following could be pointed out as positive:

(*a*) The fact that the breach of the contract "by authority of law" has been abolished, since the institution of an automatic breach can operate only in highly developed economic systems. The breach of a contract "by authority of law" could have serious and harmful consequences to the developing countries;

(*b*) The fact that, at a number of places in the text of the draft "short time" has been replaced by "reasonable time".

9. On the other hand, with regard to the above-mentioned criteria, but also independently from them, the following observations could be made in connexion with the draft Convention on the International Sale of Goods:

OBSERVATIONS ON PARTICULAR ARTICLES

Usages (article 8)

10. Under article 8, paragraph 2 of the draft Convention "the parties are 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". With regard to the similar provision contained in article 9 of the Hague Uniform Law, the second sentence in paragraph 2 of this article on the prevalence of usages over the Uniform Law in case of disagreement has been eliminated, which is good. However, the question is whether the draft does not lend too much strength to usages, which might create a possibility that, by referring to the Convention, those usages be applied which, as is well known, were created by the economically strong groups having positions of power on the world market.

11. It is indispensable therefore to give another meticulous thought to the significance and impact of the provisions contained in paragraph 2 of article 8 of the draft. Formulated like this, this paragraph means that usages will be most frequently applied, thus derogating from the provisions of the Convention.

12. Paragraph 3 of article 9 of the Hague Uniform Law dealing with the interpretation of expressions, provisions or forms used in trade has been omitted. This paragraph seems to have been useful, so its inclusion in the Convention is proposed to be reconsidered.

Fundamental breach of the contract

(article 9)

13. Article 9 of the draft Convention regulates the question of the fundamental breach of the contract proceeding from an objective criterion, i.e. the substantial detriment, and from the subjective one, i.e. that the party "in breach foresaw or had reason to foresee such a result". The question is what is the meaning of the "substantial detriment" and how will it be determined. On the other hand, it seems that the simplicity and easy comprehension of the proposed definition have in a way narrowed the scope of former article 10 of the Hague Uniform Law (which was criticized also by the Yugoslav experts, as being complicated, hard to comprehend and difficult to apply in practice). Namely, comparing these two texts one gets the impression that the definition contained in article 10 of the Hague Uniform Law covers a larger number of situations.

Sanctions in the case of breach of the contract

(articles 26-33 and 42-46)

14. The provisions dealing with sanctions in the case of breach of the contract are concise and simplified, which could be observed as harmful to their systematization and clarity. While the Hague Uniform Law had especially elaborated sanctions in the case of failure to

perform obligations with regard to the place and date of delivery (articles 24-29) and, in particular, with regard to the lack of conformity (articles 41-49), all these sanctions have been concentrated and concisely formulated in the draft Convention, whereby, it is true, the number of articles has been reduced, but on the other hand, reference is frequently made in the text to other articles of the Convention, which is a burden especially to businessmen, for whom such an approach is inconvenient.

The conformity with the contract

(articles 27 and 28)

15. If the goods do not conform with the contract, the buyer may, under the draft Convention, require the performance of the contract (articles 27-28). The missing part here is, what actually is performance of the contract and though in some articles of the draft (e.g. in articles 21 and 29) the cure was mentioned, this question was more adequately regulated in the Hague Uniform Law. In view of the importance of the cure or remedy (particularly when the delivery of machinery, equipment, etc. is involved), as a result of recent times, it would be advisable to include the provision of article 42 of the Hague Uniform Law at the appropriate place in the draft Convention.

The form of the contract

(article 11)

16. Dealing in international sale of goods should be, in principle, informal. Therefore, the present formulation in article 11 of the draft Convention is satisfactory. The second part of the sentence relating to proof by means of witnesses might as well be eliminated on the grounds of its being unreliable, i.e. the fundamental proofs for the sale of goods being the written documents.

ZAIRE

[*Original: French*]

GENERAL OBSERVATIONS

1. A draft Convention on the International Sale of Goods was prepared by the Working Group of the United Nations Commission on International Trade Law in Geneva from 5 to 16 January 1976.

2. The draft consists of 67 articles, which are designed:

To discourage parties from seeking the jurisdiction in which the law is the most favourable;

To reduce the need for recourse to the rules of private international law;

To provide a modern law of sale which will be suitable for international transactions.

3. In general, it appears after analysis of the provisions of the draft that the latter is supplementary and non-binding in character, and the Executive Council of the Republic of Zaire endorses the provisions of article 5, which gives States the option of not applying any given provision because of differences in the legal systems of States.

4. However, the draft Convention says nothing about the multiplicity of customs régimes, which are complex.

5. In that connexion, the Working Group should have included a provision governing the customs régimes of different States and especially those of frontier cities.

6. The foreign trade regulations of the People's Republic of the Congo (see Belgian Foreign Trade Office publication No. 221-1965) provide for a 20 per cent municipal tax on goods imported through the port of Brazzaville, which presupposes exportation through the city of Kinshasa in the Republic of Zaire.

7. This régime affects only the two cities and cannot arise elsewhere.

8. For that reason, the Executive Council wishes the Commission to take account of this international problem.

9. Furthermore, the Executive Council feels that, when the draft Convention is adopted, the Commission should be able to make certain articles more explicit, as set forth in detail in the commentaries on them in annex II of the draft.

OBSERVATIONS ON PARTICULAR ARTICLES

10. In article 10, paragraph 1, the "means appropriate in the circumstances" should be specified.

11. There are various means of communication just as there are various sets of conceivable circumstances, and one therefore wonders whether parties are to be free to employ any means of communications they wish.

12. Similarly, the draft Convention should specify in article 11 which witnesses may prove a contract, since the question arises whether witnesses might not be from States not parties to the contract.

II. Comments by international organizations

INTERNATIONAL CHAMBER OF COMMERCE

[*Original: English*]

GENERAL OBSERVATIONS

1. The ICC welcomed the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS) and has by various means encouraged ratification thereof. Although now a number of ratifications have followed, a still greater number of States have found obstacles to adhering to this Convention in its present shape. The work undertaken by UNCITRAL and its Working Group to revise the text of ULIS 1964 or, more properly expressed, to elaborate a new text of a convention on the subject-matter based upon ULIS 1964 in order to make a uniform law more acceptable to a greater number of States, is likewise welcomed by the ICC and seen as a most important contribution to the work on uniformization of the law on sales. The ICC believes that as a whole the present text represents a substantial progress in the field and that the draftsmen seem to have managed to remove a number of the difficulties which have made many States reluctant to ratify the Hague Convention (ULIS 1964). The ICC hopes therefore that the revised text will attract a greater number of ratifying States than ULIS 1964 and that ratifications will follow without much delay.

2. At the same time, however, the ICC wants to stress the importance of the fact that already a number of States have ratified ULIS 1964 and that therefore the present efforts of unification must take into consideration the fact that the new text ought not, without compelling reasons, to differ from ULIS 1964. It is also important that in the elaboration of the transitional provisions, due consideration be given to the situation of States which have already ratified ULIS 1964 and the difficulties for these States of replacing the earlier Convention by the new one.

3. The new text is presented in the form of a convention and not, as was ULIS 1964, as a uniform law. The ICC regrets this change, as the ultimate goal of uniformity is more definitely achieved with a uniform law applying itself to sellers and buyers instead of a convention applying to contracting States.

OBSERVATIONS ON PARTICULAR ARTICLES

Article 14

4. The Convention provides no "definition" of "international sale". Instead it defines its sphere of application. This has become somewhat wider than that of ULIS 1964; one simplification is that the Convention applies when parties have their place of business in different contracting States. Such extension does not however seem objectionable, nor does the exclusion of consumer sales, as such exception may make the Convention acceptable to a greater number of States.

5. The Convention further applies when the rules of private international law lead to the application of the law of a contracting State. This provision combined with the previous one, to the effect that the Convention applies only when the parties to the sale are from different contracting States, represents a useful compromise instead of the provision in article 2 ULIS 1964 which excluded the rules of private international law for the purpose of application of the uniform law and which, instead of leading to uniformity, resulted in a complicated system of reservations and which in some circles made the uniform law unacceptable.

Article 6

6. The ICC observed, in relation to the provisions on place of business in the Convention on Prescription in the International Sale of Goods, that these provisions could be improved. The ICC repeats this observation in relation to the similar provisions in article 6. No indication is given in the text as to what should qualify as a "place of business". It is most important that not every place that qualifies as "a permanent establishment" in the meaning of numerous double taxation agreements — e.g. the presence of an agent with power to conclude a sale — be understood as a place of business in the meaning of the Convention. To qualify as a place of business for the purpose of an international sale and the application of the Convention, a permanent business organization including localities and employees for the purpose of the manufacture or sale of goods or services should be maintained. Such place of business, usually called a "branch", should not be confused with subsidiaries or a daughter company which are distinct legal entities.

7. Furthermore the criterion of "closest relationship" could lead to undesirable uncertainties and confusion with the private international law doctrine of closest relationship and must therefore be avoided. Only if the contract was concluded in the name of such branch should such place of business be relevant for the application of the Convention.

Article 7

[See paragraph 26 of these comments.]

Article 8

8. The ICC finds it very important that the Convention expressly states the role which usages play in the determination of the legal relations between buyer and seller. Usages are as important for doing justice to the buyer as to the seller and quite independently whether a party has its place of business in an industrialized country or in a developing country. The essence of any rule giving relevance to usage is that the newcomer in the trade should not be able to plead his ignorance of the usages as a defence. For that purpose sometimes also local usages must be taken into consideration, e.g. usages of a certain port from which the goods are going to be shipped. It is therefore regrettable that the provisions in paragraphs 1 and 2 of article 8 which state the relevance of truly international usages do not also deal with local usages. As paragraphs 1 and 2 represent a compromise which it has been difficult to reach, the ICC nevertheless finds the present text acceptable. The ICC thereby notes that, as it understands it, even with the present text so-called local usages are also, in some situations, to be taken into consideration, e.g. in the case where they are internationally known.

9. The ICC regrets, however, that the paragraph dealing with the interpretation of trade terms has been deleted from the present text. Problems relating to the interpretation of trade terms are not necessarily the same as those connected with the relevance of usages. In any case it should be made clear that the interpretation of a trade term, like FOB or CIF, should not be made with the help of the provisions in the Convention or a definition in any national law indicated by private international law rules, but with reference primarily to international standards of interpretation. The ICC would therefore favour the reintroduction of the provision in article 9, paragraph 3, of ULIS 1964.

10. The ICC notes that some representatives in the Working Group, who have found it difficult to adopt this text have, instead, proposed the following text (A/CN.9/52, para. 82):*

> "Where expressions, provisions or forms of contract commonly used in commercial practice are employed, the meaning usually given to them in the trade concerned shall be used in their interpretation in accordance with the provisions of paragraphs 1 and 2."

11. The ICC prefers such text to none at all. Thereby two things should at least be avoided: that trade terms be interpreted with the help of the Convention (e.g. its rules on passing of the risk), and that local or national standards of interpretation take precedence over international.

* Yearbook ..., 1971, part two, I, A, 2.

Article 9

12. Although the vagueness of the present definition of "fundamental breach" may be regretted, the present definition represents a considerable improvement compared to the definition in ULIS which, as based on a hypothetical situation, is too artificial and difficult to apply.

Article 11

13. The ICC has repeatedly stressed the importance of the provisions in article 15 of ULIS 1964 and the need for such provisions to find their place in the Convention. To expose world trade to the requirements of written form could really create difficulties for such trade and result in injustices to parties involved therein, particularly if applied to later modifications of an earlier agreement. Also as concerns the conclusion of the initial agreement a considerable part of world trade relies upon arrangements other than written contracts.

14. The deletion of such provision would lead to application of conflict of law rules, which would reintroduce some of the uncertainties that a uniform law or a convention should seek to eliminate.

Article 13

15. The redrafting of article 17 of ULIS 1964 now to be found in article 13 of the Convention represents an improvement and is therefore welcomed.

Article 14

16. The deletion of "conformity" as a prerequisite for "delivery" has met with general approval in circles consulted and is therefore to be welcomed by the ICC. The suppression of the distinction between non-delivery (late delivery) and delivery to the wrong place is also an improvement.

Articles 15 and 17

17. The text no longer attempts to establish a general definition of "delivery" — which would be very difficult — but gives definition for a few more important cases, a general approach to which the ICC will not object.

18. As a rule, delivery and the passing of the risk are connected to each other. To make separate sets of rules for delivery and for the passing of the risk is not advisable and would easily result in confusion, if the two sets of rules did not follow each other closely. In article 15, however, the rule in (*b*) and (*c*) is that delivery is effected when the goods are *placed at the buyer's disposal*. "Delivery" here seems to mean that the seller has performed. However, according to the rule proposed in article 66, paragraph (1), "the risk" does not pass to the buyer until the goods have been *taken over* by him. This seems to imply that the seller has to deliver substitute goods in place of those which were lost and also, that his responsibility for buyer's damages could be engaged. Admittedly, an exception is provided in article 66, paragraph (2) for the case where the buyer's failure to take over the goods constitutes a breach of contract.

19. The problem seems therefore to be of significance in the case where a "delivery period" has been agreed upon, e.g. "delivery June 1975". According to article 17, the seller *in dubio* has the option of fixing the exact date of delivery. If the buyer's failure to take over the goods on a day so fixed by the seller constitutes a breach of contract, the question will be resolved with the help of the said provision in article 66, paragraph (2).

20. Sometimes, however, a delivery period must be understood to mean that the buyer commits no breach of contract unless the delivery period has expired without his having taken over the goods. Such a situation would be similar to that when the goods are sold "ex works". According to the definition in INCOTERMS, which reflects commercial practice, the risk passes to the buyer when the goods have been placed at his disposal. It is therefore believed that the same rule should prevail in article 66, paragraph (1) of the Convention and that this provision should be reconsidered accordingly.

21. The ICC understands from the discussion in the Working Group that, when a given particular delivery term such as "ex works", "FOB" or "CIF" has been agreed upon, the interpretation thereof shall be made by the help of usages referred to in article 8 and not with reference to the rules in articles 15, 65 and 66. To avoid any misunderstandings in this respect, it should be expressly so stated in the text and the said articles amended accordingly.

22. Article 17 (*b*) and (*c*) which gives the seller the choice of determining the date of delivery should be amended by a provision that the seller has to give the buyer notice of the seller's choice.

23. Already at the Hague Conference in 1964 the ICC expressed the view that the buyer should, if he wanted to claim damages because of late delivery, give notice thereof to the seller promptly (or at least within reasonable time) after actual delivery. This view is still held by a majority within circles consulted by the ICC and the ICC therefore has found no reason to change its position in this respect.

Article 19

24. Article 19 stipulates, *i.a.*, in paragraph 1 (*b*), that the goods shall be fit for any particular purpose "expressly or impliedly made known" to the seller at the time of contracting. If this expression is to be understood in the sense that the responsibility of the seller is engaged only when such particular purpose has been *made clear* to him, the ICC has no objection to it; otherwise it would be advisable to clarify the text in such direction.

25. The ICC has with special interest observed questions concerning the seller's responsibility for ensuring that the goods comply with administrative regulations or that the goods do not infringe industrial property rights, which have special aspects in international trade. The seller cannot, as a general rule, take such responsibility as to administrative regulations or industrial property rights in the country of the buyer. This view seems, to the satisfaction of the ICC, to be reflected in the text of article 19 as such non-compliance or infringement might be considered not to touch upon the fitness of the goods for purposes for which they would be *ordinarily* used, and the question whether they would be fit for the *particular* purpose of being used in the buyer's country would

have to be answered with the application of subparagraph (*b*) of this paragraph, which exempts from liability when it was not reasonable for the buyer to rely upon the seller's skill or judgement.

26. However, at its seventh meeting the Working Group introduced an amendment to article 7, saying that the Convention does not govern the rights and obligations between the seller and the buyer because of the existence of rights or claims which relate to industrial or intellectual property or the like, thereby excluding the application of article 19 to such "non-conformities". Consequently, national law will apply; it differs considerably in various countries and may not be very well suited to the particular aspects of these questions in international trade. The ICC therefore favours the previous version, i.e. the deletion of article 7, paragraph (2) or, as a second choice, its deletion together with the introduction of a second paragraph in article 25 saying that the seller is not liable to the buyer in respect of rights or claims of third persons based on industrial or intellectual property. Thereby it would be made clear that the seller is not liable in such respect unless he has agreed thereto.

27. The ICC also thinks that article 25, as finally redrafted by the Working Group, is incomplete in so far as it does not spell out the consequences of the goods not being free from rights or claims of a third person. Some provisions as those in the previous article 25, paragraph (2) should therefore be reintroduced.

Article 23

28. The ultimate time-limit for giving notice about hidden defects practised in trade is usually one year, six months or even a shorter period depending on, *i.a.,* the nature of the goods involved. A period as long as two years is difficult to accept, as a general rule, and a strong wish has been expressed among consulted circles that the period not be longer than one year. If the two-year period is going to stand, it should be noted that shorter periods are frequently used in international trade and that the provision for a two-year period may not be interpreted as an attempt to change such practices.

29. The ICC expresses its satisfaction with the wording of paragraph (2) of article 23 as the fact of providing for a shorter period of guarantee in general is to be understood as a shortening of the period within which the buyer may rely on hidden defects in the goods.

Article 25

[See paragraph 27 of these comments.]

GENERAL OBSERVATIONS ON ARTICLES 26 TO 33

30. The doing away with the principle of *ipso facto* avoidance and its replacing by the rule that avoidance generally should take place only upon notice given by the party not in breach has met general approval in circles consulted by the ICC and the ICC therefore supports such change.

31. The Convention has introduced "a consolidated system" of remedies covering seller's failure to deliver as well as lack of conformity. Such system may at first look appealing because of its simplicity. It must be borne in mind, however, that delivery of defective goods and failure to deliver at all give rise to problems of different kinds and the rules in this connexion have to be more or less differentiated, as can be seen in connexion with giving notice and the loss of the right of avoidance. The preference for "a consolidated system of remedies" shown in the draft may therefore be more a matter of presentation than of substance. The ICC does not object to the approach now taken, provided that the remedies for different kinds of breaches, as non-delivery of goods, delivery of defective goods and non-payment, are differentiated sufficiently.

Articles 26 and 27

32. A significant change in the present draft as compared to ULIS is reflected in articles 26 and 27, which do not specify the nature of the performance which the buyer may require. As "performance" or request for performance (not to be confused with the possibility of having a court order for enforcement of specific performance, dealt with in article 12) may be differently understood in different legal systems, clarification is therefore needed in this respect, as in article 42 ULIS 1964.

33. The ICC wants to draw attention to one important aspect of this problem. Article 42 of ULIS 1964 provides that the buyer can request the seller to remedy defects in the goods. This certainly represents a novelty, compared to many legal systems and general conditions in use where the seller may *offer* to remedy a defect but where the buyer has *no right* to request the seller so to do. Since the provision in this connexion in article 42 ULIS 1964 has been deleted in the present draft, the most likely interpretation of it is that the buyer has no right to have the seller remedy a defect. He can, however, as said in article 27, require "substitute goods" when the lack of conformity constitutes a fundamental breach and the request is made within a certain time. To avoid any ambiguities it should be expressly stated as in article 42, paragraph (1) (*c*) ULIS 1964 that such right is limited to unascertained (generic) goods.

34. If on the contrary the present text is to be understood as imposing a duty on the seller to remedy defects in specific goods or in goods to be manufactured or to replace those goods, such duty must be contingent upon the possibility for the seller to remedy defects without unreasonable efforts or costs to himself.

GENERAL OBSERVATIONS ON ARTICLES 28 TO 30

35. The system of remedies available to the buyer for breach of contract by the seller as described in the following articles (28-30) is clearer than that in ULIS.

Article 28

36. The essence of article 28 is only that it states that after the buyer has requested the seller to perform, he must await the expiry of any period set by him before he may resort to any remedy inconsistent with his request. This goes without saying, but if it has to be stated expressly it should be possible to draft this more adequately.

37. Within circles consulted by the ICC as to which should be the effect of a request of the buyer to the seller

to deliver without any time period for such delivery being indicated in the request, the majority believes that such request could only be understood as readiness to receive the goods if delivery follows promptly. This seems now to be adequately reflected in the present text, as article 28 refers only to the case where the buyer has fixed an additional period of time and not to a general request for delivery. Although this is not expressly stated in article 28, the provision must be understood to mean that if performance follows immediately upon a request, the buyer cannot avoid the contract because of late delivery.

Article 29

38. The situation in article 29, paragraph (2), however, is different. If the buyer does not reply to a question of the seller as to whether he is prepared to take delivery, such silence on the buyer's part reasonably can be deemed to extend the seller's right to deliver within a time period indicated in the request. If no time period has been indicated by the seller, his inquiry with the buyer should have no extending effect on his right to deliver at all. The deletion of the words "or . . . time" in paragraph (2) as well as of the corresponding phrase in paragraph (3) is therefore recommended.

Article 30

39. Article 30, paragraph (1) (*b*) gives the buyer the right, irrespective of whether the seller's breach is fundamental or not, to avoid the contract if the seller "has not delivered the goods" within an additional period set by the buyer. According to its wording this rule is restricted to cases where the goods in their entirety have not been delivered. Even so restricted, the rule may sometimes lead to hardships when it applies to goods to be manufactured by the seller especially for the buyer. If only a part is missing or a defect has not been remedied within an additional period, the situation should come under (*a*) and a fundamental breach should be a prerequisite for any avoidance. Otherwise a way would be opened for transforming every non-fundamental breach into a fundamental breach by the setting of an additional period.

40. The ICC has further noted that the provisions about loss of right of avoidance have been reintroduced in the latest draft presented by the Working Group. In the view of the ICC, it should not be possible for the buyer to keep such right of avoidance pending for an indefinite time. Such right to avoid the contract should be forfeited if it has not been exercised within reasonable time after delivery either after discovery of the defect or, if the seller has tried to cure any defect in the goods, after his unsuccessful attempt. This seems, to the satisfaction of the ICC, to be adequately reflected in the present text.

Article 36

41. Article 36 provides that in the case where no price has been agreed upon, the price prevailing at the time the contract was concluded should be applied.

42. In commercial relations the price at the time of delivery is generally understood as definitive, and a change along those lines is therefore recommended.

Article 45

43. Article 45 gives rise to two different delicate problems:

(*a*) When does the right for the seller to avoid the contract arise, and

(*b*) Once arisen, can the right be forfeited because it has not been exercised in time?

44. As to the first question, one may doubt whether the seller should have the right to take back the goods from the buyer once he has allowed him to take possession thereof. In any case it seems unreasonable to allow the seller to take back the goods unless the buyer has failed to pay the price within an additional period set by the seller, and article 45 should be amended accordingly.

45. In cases where the buyer has not yet taken delivery of the goods, one could, as the present text provides, be stricter against the buyer and let a fundamental breach give rise to an immediate right to avoid the contract.

46. As to the time within which the seller has to exercise such right of avoidance, the ICC believes that some limit must be set on it; likewise, in cases where delivery has been made but payment is still missing. The seller should react within a reasonable time after the discovery of the breach and then make his choice upon the expiry of an additional period set by him or set out a new additional period. The ICC therefore recommends that the present text be amended accordingly.

Articles 47 to 49

47. According to article 47 a party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the capacity to perform or the creditworthiness 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.

48. Some right of suspension of performance in case of breach or anticipatory breach is indeed indispensable. The ICC fears, however, that the present provision could be abused by one party to request security from the other party, e.g. letter of credit or a performance guarantee, when such security was not contracted for at the time of the conclusion of the contract. According to article 49, only when it is clear that the breach will be a fundamental one may the contract be avoided. With the help of the procedure envisaged in article 47, paragraphs (1) and (3), however, a party could suspend its performance if the other party's conduct in preparing to perform gives "grounds to conclude that the other party will not perform a substantial part of his obligations" and then the first party could proceed to avoidance under paragraph 3. It is believed that the right to avoid the contract under the last sentence of paragraph 3 should be limited as in article 49 to cases where the anticipatory breach is clear. It is therefore recommended that the last part of paragraph (3) (after the word "thereof" in the first sentence) and every reference to "adequate assurance" be deleted and instead, that the general rule in article 49 be relied upon.

Article 50

49. The exemption clause in article 50, although somewhat vague, is quite in line with *force majeure* clauses commonly used, and may be considered an improvement over article 74 ULIS 1964, which referred to some very hypothetical situations.

50. The exemption covers only liability in damages. The final relief from duty to perform would depend on circumstances such as whether performance is definitely impossible or the conditions have so radically changed that performance amounts to performance under a different contract (frustration). The ICC agrees that no attempt should be made to cover such cases. The choice as to avoiding the contract should lie with the party who performs it and not with the non-performing party.

51. Article 50 does not limit the other party's right to avoid the contract. In that respect a non-performing party who wants to limit his liability has to rely on contractual provisions.

52. To restrict liability to "fault" alone would probably be going too far, but as the term has been defined in the text in a specific way, any objection to the use of it may be more a matter of drafting than of substance. From business contracts the expression "beyond the control of a party" is more familiar and would therefore be preferable to "fault".

53. It is believed that the wording as a whole could be improved in the following way:

"Where a party has not performed one of his obligations he shall not be liable for damages for such non-performance if he proves that it was due to circumstances beyond his control which he could not reasonably have taken into account at the time of the conclusion of the contract and the consequences of which he cannot reasonably be expected to prepare against or to overcome."

54. The clause about failure of a subcontractor to meet his obligations seems to correspond to what is frequently practised and is not believed to meet with any objection.

55. The ICC would like to stress that article 50 may be looked upon not as making exemption clauses of a contractual nature superfluous but as laying down some general principles and offering some protection when contracts are concluded without the help of extensive written documents. It may therefore be accepted to have a rather narrow clause as it is easier to restrict liability by a contractual arrangement than to enlarge it.

Article 55

56. Article 55 as article 82 ULIS 1964 limits damages to the loss which the party in breach ought to have foreseen at the time of conclusion of the contract. It may be doubted what the result of such restriction would be and whether it would be equitable, e.g. when applied to loss of profits on the buyer's part, to overtime pay which the buyer may have to pay to his workers to avoid delay on his side, to delivery fines and other forms of compensation which a seller may have to pay to his buyer, or to currency depreciations when buyer is in delay with payment, etc. Consideration might therefore be given to deleting the restriction in the last sentence of article 55 and relying on a provision of a more general nature. To delete any limitation of the loss for which one party has to compensate the other, would, however, not be advisable.

Article 58

57. The present rule in article 58 is an improvement over the rule in article 83 ULIS 1964. To add only 1 per cent to the official discount is much too little, as in many countries 2-3 per cent is generally added. As the seller, alternatively, may rely upon the rate applied to unsecured short-term commercial credits in his country, the article as a whole nevertheless is acceptable. It is recommended, however, that the surcharge be increased to at least 2 per cent.

Articles 64 to 67

58. See above, paragraphs 16 to 22.