

## I. INTERNATIONAL SALE OF GOODS

### A. Uniform rules on substantive law

1. *Note by the Secretary-General: analysis of comments and proposals by Governments relating to Articles 56 to 70 of the Uniform Law on the International Sale of Goods (ULIS) (A/CN.9/WG.2/WP.15) \**

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\* 16 November 1972.

#### INTRODUCTION

1. The UNCITRAL Working Group on the International Sale of Goods at its third session decided that "at its next session it would continue consideration of those articles on the agenda of the present session on which no final decision was taken and would also consider articles 56-70".<sup>1</sup> It also decided that "it would hold a meeting during the fifth session of the Commission in order to consider the time and place of its next session and to give further consideration to the preparatory work to be done for that session".<sup>2</sup>

2. Pursuant to the above decision the Working Group on the International Sale of Goods met during the fifth session of the Commission and decided, *inter alia*, to request the representatives of those members listed below to examine articles 56 to 70 of ULIS and to submit the results of their examination to the Secretariat. The allocation of articles was as follows:

Articles 56-60: USSR, in co-operation with Austria, Ghana, Iran, Mexico and the United Kingdom  
Articles 61-64: United Kingdom, in co-operation with Austria, Brazil, Iran, Tunisia and the USSR  
Articles 65-68: Japan, in co-operation with France, Hungary, India, Kenya and the United States  
Articles 69-70: France, in co-operation with Hungary, India, Japan and the United States

3. The following reports relating to articles 56 to 70 of ULIS have been received and appear in document A/CN.9/WG.2/WP.15/Add.1.

<sup>1</sup> A/CN.9/62, para. 15 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

<sup>2</sup> *Ibid.*, para. 17.

*On articles 56 to 60:*

- (a) Comments and proposals of the representative of the USSR (annex I)
- (b) Comments and proposals of the representative of Ghana (annex II)
- (c) Comments and proposals of the representative of Mexico (annex III)
- (d) Comments and proposals of the representative of the United Kingdom (annex IV)

*On articles 61 to 64:*

- (e) Comments and proposals of the representatives of Austria and the United Kingdom (annex V)

*On articles 65 to 68:*

- (f) Proposal of the representative of Japan on article 68 (annex VI)
- (g) Comments by the representative of Hungary on the proposal of the representative of Japan on article 68 (annex VII)

*On articles 69 and 70:*

- (h) Comments and proposals of the representative of France (annex VIII)

4. Pursuant to the decision of the Working Group, the Secretariat circulated the above reports among representatives of the members of the Working Group for comments. No such comments have been received.

5. The proposals and comments made in the above reports that deal with a single issue are considered together in this analysis. This report also includes comments on articles 56-70 that appear in previous documents of the Commission.

## ANALYSIS OF THE COMMENTS AND PROPOSALS

*Article 56*

## 6. Article 56 of ULIS reads:

"The buyer shall pay the price for the goods and take delivery of them as required by the contract and the present Law."

7. The representatives of the USSR, Ghana, Mexico and the United Kingdom, in compliance with the request of the Working Group, examined this article; no change was suggested.

8. The representative of Czechoslovakia at the second session of the Commission submitted that the provision in article 56 concerning the obligations of the buyer was not complete and suggested that the obligation of the seller to co-operate in the fulfilment of the transaction should be more fully regulated.<sup>3</sup>

*Article 57*

## 9. Article 57 of ULIS reads:

"Where a contract has been concluded but does not state a price or make provision for the determination

of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract."

10. This article deals with the determination of the price where neither the price nor the means for its determination are stated in the contract. According to the Commentary on ULIS such silence is not extraordinary; it is even normal practice where sellers publish and distribute catalogues and where the order forms do not repeat the prices.<sup>4</sup> A great number of comments has been submitted on this article. All comments focused mainly on the following two issues: (a) the validity of contracts which do not state the price and (b) the appropriateness of the expression "generally charged" in the text.

11. The representative of the USSR pointed out that the law of many countries considered the price as an essential element of the contract and provided that contracts which did not state the price were void. He suggested that the law should not allow the conclusion of contracts which did not state the price or the mode of its determination and, therefore, this article should be deleted.<sup>5</sup> The representative of Hungary made similar objections to this article at the second session of the Commission and expressed the view that exception of the rule that no valid contract could be concluded without determination of the price should only be made where the price could be inferred from a previous contract between the same parties for the same goods.<sup>6</sup>

12. The representative of Ghana in his comments supported the views expressed by the representative of the USSR except for the proposal that this article be deleted. He thought that there was need for an appropriate text to settle the status of sales contracts which provided for all questions except for the price. He suggested the following text:

"No contract shall be enforceable by either party under the present law unless it states a price or makes express or implied provision for the determination of the price; unless the parties thereto expressly or by implication otherwise agree."<sup>7</sup>

13. Contrary to the views referred to in paragraphs 10 to 12 above, the representative of the United Kingdom concluded that the present text of the article should be maintained.<sup>8</sup> It was noted that the article was expressly confined to cases where a contract has been concluded. Although this would occur without fixing the price only in exceptional cases, the article was needed for such cases.

14. As indicated in paragraph 10 above, the other issue on which the comments concentrated was the question whether the expression "price generally charged

<sup>4</sup> Commentary by Mr. André Tunc on the Hague Conventions of 1 July 1964, page 70.

<sup>5</sup> Annex I.

<sup>6</sup> A/7618, annex I, para. 92-93 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A). See also A/CN.9/31, para. 126 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

<sup>7</sup> Annex II.

<sup>8</sup> Annex IV.

<sup>3</sup> A/7618, annex I, para. 91 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A). See also A/CN.9/31, para. 124 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

by the seller at the time of the conclusion of the contract" was sufficiently exact to enable the determination of the price in cases where it was not determined in the contract.

15. In the view of the representative of the USSR, whose first preference was for the deletion of this article (cf. para. 11), the above expression was not appropriate because it was difficult to prove what price was "generally charged" by the seller and also because the price often depended upon a variety of factors.<sup>9</sup> These objections were supported by the representative of Ghana.<sup>10</sup> On the other hand, the representative of the United Kingdom came to the conclusion that no change in the language of article 57 was needed. Where the contract did not state a price, the previous price between the parties (by virtue of article 9 on course of dealing) would be the agreed price; in the absence of previous dealings between the parties the price generally charged by the seller to the third parties would be applied.<sup>11</sup>

16. Austria in its comments previously submitted to the Commission also objected to the above provision. It expressed the opinion that the provision in question would oblige the buyer to pay the price generally charged by the seller at the time of the conclusion of the contract even if that price was unknown to the buyer or even if that price was much higher than the usual price for such goods. Austria further noted that the said expression left unresolved the rather common situation where there was no price generally charged by the seller.<sup>12</sup> This situation was also mentioned by the representative of Mexico who, in order to avoid this gap in the law, suggested that the following text be added to the end of paragraph 2:

"... or, in the absence of such a price, the one prevailing in the market at the time of the conclusion of the contract."<sup>13</sup>

17. In addition to the above comments relating to the existing text of article 57, the representative of Mexico suggested that article 57 should contain two further provisions. One would provide for the place and method of payment while the other for the currency in which payment of the price should be effected. These provisions, to be included in ULIS as paragraph 1 and 3, respectively, of article 57, read as follows:

"1. Payment of the price consists in the delivery to the seller or to another person indicated by the seller of the monies or documents provided for in the contract.

"2. ...

"3. Except as otherwise provided in the contract or established by usages, the price shall be paid in the currency of the country of the seller."<sup>14</sup>

<sup>9</sup> Annex I.

<sup>10</sup> Annex II.

<sup>11</sup> Annex IV.

<sup>12</sup> A/CN.9/11, pp. 8-9. See also A/CN.9/31, para. 125 (UNCITRAL Yearbook, vol. 1: 1968-1970, part three, I, A, 1). This situation is also mentioned in the Commentary on the Uniform Law. According to the Commentary, in such cases no valid contract of sale would come into being. See *supra* note 4, *op. cit.*, pp. 70-72.

<sup>13</sup> Annex III.

<sup>14</sup> *Ibid.*

#### Article 58

18. Article 58 of ULIS reads:

"Where the price is fixed according to the weight of the goods, it shall, in case of doubt, be determined by the net weight."

19. The representative of the USSR recommended that the words "in case of doubt" be replaced by "unless otherwise agreed by the parties."<sup>15</sup> A similar proposal was made by the representative of Ghana who considered that cases of "doubt" could be difficult to identify.<sup>16</sup>

20. The representative of Mexico suggested that the rule on the currency of payment, which he proposed to include in article 57 as paragraph 3 (cf. para. 17 above), should be supplemented by a new paragraph 1 in article 58 to read as follows:

"1. When the currency indicated in the contract for the payment of the price gives rise to doubts, the currency of the country of seller shall be deemed as applicable."

The present text of the article would become paragraph 2.<sup>17</sup>

#### Article 59

21. Article 59 of ULIS reads:

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

"2. Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller."

22. The representatives of Ghana and Mexico submitted comments on this article. Both comments doubted the appropriateness of the present text in cases where exchange control regulations existed in the country of either party. Thus, the representative of Ghana noted that exchange control regulations in the buyer's country might forbid the buyer to pay the price at the seller's place of business while the existence of such regulations in the seller's country might cause the seller to ask for payment of the price in a country with convertible currency, i.e. in a country other than his own. He suggested, therefore, that in order to allow the parties to agree freely on the place of payment, the first paragraph of the article should commence with the words "unless otherwise agreed".<sup>18</sup>

23. Based on similar considerations, the representative of Mexico suggested that a new paragraph (3) be added to article 59, reading:

<sup>15</sup> Annex I.

<sup>16</sup> Annex II.

<sup>17</sup> Annex III.

<sup>18</sup> Annex II.

"3. The buyer shall comply with all the requirements of his national laws in order to permit the seller to receive the price as provided in the contract."<sup>19</sup>

*Article 60*

24. Article 60 reads:

"Where the parties have agreed upon a date for the payment of the price or where such date is fixed by usage, the buyer shall, without the need for any other formality, pay the price at that date."

25. The representative of Mexico expressed the view that there was no need for this article since its provisions ensued from the rules contained in articles 1 and 9.<sup>20</sup>

26. It was suggested by the representatives of the USSR that the words "without the need for any other formality", the meaning of which was not clear, be deleted and the language of this article be brought in line with that of article 22 as revised by the Working Group at its third session.<sup>21</sup> The representative of Ghana supported this proposal.<sup>22</sup> The deletion of the above-quoted expression was also recommended by the representative of the United Kingdom.<sup>23</sup>

*Articles 61 to 64*

27. Articles 61 to 64 of ULIS read:

*"Article 61*

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

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

*"Article 62*

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

"2. Where the failure to pay the price at the date fixed does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or, provided that he does so promptly, declare the contract avoided."

<sup>19</sup> Annex III.

<sup>20</sup> Annex III.

<sup>21</sup> Annex I.

<sup>22</sup> Annex II.

<sup>23</sup> Annex IV.

*"Article 63*

"1. Where the contract is avoided because of failure to pay the price, the seller shall have the right to claim damages in accordance with articles 84 to 87.

"2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with articles 82 and 83."

*"Article 64*

"In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace for the payment of the price."

28. The representatives of Austria and the United Kingdom expressed the opinion that articles 61 to 64 should be harmonized with articles 24 *et seq.* as revised by the Working Group at its third session. Such revision would require, *inter alia*, the replacement of "*ipso facto* avoidance" by another remedial system.<sup>24</sup>

29. In respect of article 61 the representative of the United Kingdom noted further that it might be doubtful in practice whether "it is in conformity with usage and reasonably possible for the seller to sell the goods". It might, therefore, be difficult in a given situation to decide which are the remedies that the seller is entitled to claim.<sup>25</sup>

30. It is recalled in connexion with the proposal in paragraph 28 above that Norway in its comments at an earlier stage of the revision of ULIS also expressed the opinion that the remedies in article 62 of the seller should be harmonized with those of the buyer. This comment suggested that there should be included in that article a provision, corresponding to that in article 26, paragraph 2 of ULIS, regarding the right of interpellation in favour of the buyer, whereby the seller may request the buyer to make known his decision. It was further suggested that another provision, corresponding to that in article 26, paragraph 3, should be included according to which the seller would be obliged to inform the buyer of his decision if payment was made later than on the date fixed and he nevertheless wished to declare the contract avoided.<sup>26</sup> The fact that no such provisions were included in article 62 was also mentioned in the Commentary on ULIS. According to this document, the non-inclusion in article 62 of such provisions can "be explained by the fact that a payment can ordinarily be made much more quickly than a delivery of goods or merchandise. Such corresponding provisions may, however, be implied."<sup>27</sup>

31. In respect of article 62, paragraph 2, Norway made the suggestion that in cases where the price has not been paid and where delivery had not taken place, the right of the seller to declare the contract avoided should be maintained as long as the delay continued.<sup>28</sup>

<sup>24</sup> Annex V, paras. 1 and 3.

<sup>25</sup> *Ibid.*, para. 4.

<sup>26</sup> A/CN.9/11, p. 26. See also A/CN.9/31, para. 127 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

<sup>27</sup> See above note 4, *op. cit.*, p. 76.

<sup>28</sup> A/CN.9/11, p. 26. See also A/CN.9/31, para. 128 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

32. Both Norway<sup>29</sup> and Sweden<sup>30</sup> made comments concerning revision of the rules providing for *ipso facto* avoidance of the contract. It will be recalled, however, that the Working Group at its third session agreed that the concept of *ipso facto* avoidance should be omitted from the remedial system of the Uniform Law.<sup>31</sup>

*Article 65-67*

33. Articles 65-67 of ULIS read:

*"Article 65*

"Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over."

*"Article 66*

"1. Where the buyer's failure to take delivery of the goods in accordance with the contract amounts to a fundamental breach of the contract or gives the seller good grounds for fearing that the buyer will not pay the price, the seller may declare the contract avoided.

"2. Where the failure to take delivery of the goods does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not taken delivery of the goods at the expiration of the additional period, the seller may declare the contract avoided, provided that he does so promptly."

*"Article 67*

"1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may declare the contract avoided, provided that he does so promptly, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

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

34. No comments were made on these articles.

*Article 68*

35. Article 68 of ULIS reads:

*"Article 68*

"1. Where the contract is avoided because of the failure of the buyer to accept delivery of the goods or to make a specification, the seller shall have the right to claim damages in accordance with articles 84 to 87.

"2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with article 82."

36. The representatives of Japan<sup>32</sup> and Hungary<sup>33</sup> suggested that the word "accept" in paragraph 1 of this article be replaced by the word "take".

*Article 69*

37. Article 69 of ULIS reads:

"The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee."

38. The representative of France recalled the comments in document A/7618, annex I, paragraph 94,<sup>34</sup> of the representative of Japan noting that the provisions of this article did not provide for the many disputes that could arise between buyers and sellers regarding documentary credits. In the opinion of the representative of France, such provision would overburden the text.<sup>35</sup>

*Article 70*

39. Article 70 of ULIS reads:

"1. If the buyer fails to perform any obligation other than those referred to in Section I and II of this chapter, the seller may:

"(a) Where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with articles 84 to 87; or

"(b) In any other case, claim damages in accordance with article 82.

"2. The seller may also require performance by the buyer of his obligation, unless the contract is avoided."

40. The representative of France suggested that article 70 should be given the same language as article 55.<sup>36</sup> The suggestion was based on the comments of Austria that the seller should be given a longer period within which to declare the contract avoided, and that the provisions of article 55 were identical to those of article 70.<sup>37</sup>

<sup>29</sup> Annex VI.

<sup>30</sup> Annex VII.

<sup>31</sup> See also A/CN.9/31, para. 130 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

<sup>32</sup> Annex VIII.

<sup>33</sup> A/CN.9/11, page 9.

<sup>34</sup> Annex VIII.

<sup>29</sup> *Ibid.*, para. 127.

<sup>30</sup> A/CN.9/11/Add.5, p. 4. See also A/CN.9/31, para. 129 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

<sup>31</sup> A/CN.9/62/Add.1, para. 31 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, Annex II). Cf. para. 28 above.