

3. *Progress report of the Working Group on the International Sale of Goods on the work of its fourth session (New York, 22 January-2 February 1973) (A/CN.9/75) **

CONTENTS

	<i>Paragraphs</i>		<i>Paragraphs</i>
INTRODUCTION	1-11	Article 48	131-134
I. CONTINUATION OF CONSIDERATION OF ARTICLES 18-55 OF ULIS	12-149	Article 49	135
Article 18	15	Article 50	136
Article 19	16-21	Article 51	137
Article 20	22-29	Article 52	138-145
Article 21	30	Article 53	146-147
Article 22	31-33	Article 54	148
Article 23	34-35	Article 55	149
Articles 24-32	36	II. CONSIDERATION OF ARTICLES 56-70 OF ULIS	150-178
Article 33	37-44	Article 56	150
Article 34	45	Article 57	151-164
Article 35	46-53	Article 58	165-171
Article 36	54	Article 59	172-177
Article 37	55	Articles 60-70	178
Article 38	56-63	III. FUTURE WORK	179-183
Article 39	64-77		
Article 40	78-82	<i>Annexes</i>	
Article 41	83-86		
Article 42	87-97		
Articles 43 and 44	98-114		<i>Page</i>
Article 45	115-117	I. Revised text of articles 18-70 of the Uniform Law	75
Article 46	118-126	II. Report of the Secretary-General on obligations of the seller in an international sale of goods: consolidation of work done by the Working Group and suggested solutions for unresolved problems	79
Article 47	127-130		

* 20 February 1973.

INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session, held in 1969. The Working Group consists of the following 14 members of the Commission: Austria, Brazil, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

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

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

3. The Commission at its fourth session decided, *inter alia*, that "until the new text of a uniform law or the revised text of ULIS has been completed, the Working Group should submit a progress report on its work to each session of the Commission . . .".

4. The Working Group held its fourth session at the Headquarters of the United Nations in New York from 22 January to 2 February 1973. All members of the Working Group were represented except Kenya and Tunisia.

5. The session was also attended by observers from Australia, Norway, Romania, and from the following international organizations: The Hague Conference on Private International Law and the International Chamber of Commerce (ICC).

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

(a) Provisional agenda (A/CN.9/WG.2/R.1)

(b) Analysis of comments and proposals by Governments relating to articles 56 to 70 of ULIS: note by the Secretary-General (A/CN.9/WG.2/WP.15).*

(c) Text of comments and proposals by representatives of members of the Working Group on articles 56 to 70 ULIS (A/CN.9/WG.2/WP.15/Add.1).

(d) Obligations of the seller in an international sale of goods; consolidation of work done by the Working Group and suggested solutions for unresolved problems: report of the Secretary-General (A/CN.9/WG.2/WP.16).**

(e) Text of studies and proposals by the representatives of the USSR, Japan and Austria relating to certain obligations of the seller (A/CN.9/WG.2/WP.16/Add.1).

(f) Comments by the representative of Hungary on articles 24 to 32 of ULIS (A/CN.9/WG.2/WP.16/Add.2).

(g) Amendments proposed by the observer for Norway for the revision of chapter III of ULIS (A/CN.9/WG.2/IV/CRP.1).

(h) Amendments proposed by the observer for Norway for the revision of chapter IV of ULIS (A/CN.9/WG.2/IV/CRP.2).

7. The session of the Working Group was opened by the Legal Counsel of the United Nations.

8. The Working Group adopted the following agenda:

(1) Election of officers

(2) Adoption of the agenda

(3) Continuation of consideration of articles 18-55 of ULIS

(4) Consideration of articles 56-70 of ULIS

(5) Future work

(6) Adoption of the report.

9. At its first meeting, held on 22 January 1973, the Working Group, by acclamation, elected the following officers:

Chairman: Prof. Jorge Barrera-Graf (Mexico)

Rapporteur: Dr. Roland Loewe (Austria)

10. In the course of its deliberations, the Working Group set up Drafting Parties to which various articles were assigned.

11. The text of articles 18-70 as adopted or as deferred for further consideration appears in annex I to this report.

I. CONTINUATION OF CONSIDERATION OF ARTICLES 18-55 OF ULIS

12. The Working Group at its third session decided that at the present session "it would continue consideration of those articles on the agenda of the [third] session, on which no final decision was taken . . .". At that session, the Working Group had on its agenda articles 1-55 of ULIS.

13. In deciding on the agenda, the Working Group, however, agreed that at the present session it would not deal with articles 1-17, but that it would only continue its consideration of articles 18-55. The Working Group took as a basis for its work the report of the Secretary-General, contained in document A/CN.9/WG.2/WP.16, annexed to this report.*

14. This progress report sets out in paragraphs 15-149 the main trends of opinions expressed on each of the above articles and the action taken thereon.

Article 18

15. The Working Group decided to adopt, with slight drafting changes, the text prepared at its third session. The text as adopted reads:

"The seller shall deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law."

Article 19

16. The text of this article as tentatively drafted at the third session of the Working Group reads:

"Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods."

17. Some representatives were of the opinion that this article was superfluous since the acts that the seller was required to do in order to deliver the goods as provided in article 18, were set out in articles 20-23.

18. It was also pointed out that the above text contradicted article 20; under article 19 delivery was defined as to consist of the seller's doing *all acts* that were necessary to enable the buyer to take over the goods, while under article 20 the same concept was defined as

* Reproduced in this volume, part two, I, A, 1 above.

** Reproduced in this volume, part two, I, A, 2 above.

* Reproduced in this volume, part two, I, A, 2 above.

handing over of the goods to the carrier or placing them at the disposal of the buyer. This contradiction created uncertainty as to when delivery could be considered to be effected.

19. One observer expressed the view that the definition of delivery contained in article 19 would lead to the undesirable result that delivery would be considered to have been effected only when the seller sent to the buyer the necessary documents that would enable him to take over the goods, even though the seller had previously handed over the goods to the carrier.

20. The Working Group referred the text of article 19 to a Drafting Party (I) consisting of the representatives of Austria, Hungary and the observer for ICC for consideration in the light of the above comments.

21. On the recommendation of this Drafting Party, the Working Group *decided* to delete article 19.

Article 20

22. The Working Group considered this article in the light of the text provisionally adopted at its third session. The text reads:

"[Delivery shall be effected:

"(a) Where the contract of sale involves the carriage of goods and no other place for delivery has been agreed upon, by handing the goods over to the carrier for transmission to the buyer:

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

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

23. Several representatives suggested that the words in subparagraph (a) "... and no other place for delivery has been agreed upon ..." be deleted, since under the general provision in article 5 the agreement of the parties always prevailed over the provisions of the Law.

24. One observer objected to the above proposal on the ground that, in the absence of these words, the interpretation of undefined delivery terms used in the contract would become uncertain and suggested that in order to make the provision in subparagraph (a) clearer, the words "or term" should be inserted after the word "place".

25. It was also suggested that in subparagraph (a) the reference to the "carrier" should read "the first carrier" in view of the fact that in many cases, especially in cases of combined transport, several carriers were involved.

26. The Working Group requested the Drafting Party to which article 19 had been referred (see paragraph 20 above), to consider whether the deletion of that article would require changes in the language of article 20.

27. In the light of the above comments and the recommendations of Drafting Party I, the Working Group *decided*:

(a) To delete the words in subparagraph (a) "... and no other place for delivery has been agreed upon ...";

(b) To insert in subparagraph (b) after the words "specific stock" the word "or" which was omitted from the original text by oversight.

28. The Working Group did not find it necessary to refer in subparagraph (a) to the "first carrier" instead of "carrier" since the seller always hand over the goods to the first carrier.

29. The text of article 20, as adopted, reads:

"Delivery shall be effected:

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

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

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

Article 21

30. No comments having been made with respect to this article, the Working Group adopted the text as prepared at its third session. The text as adopted reads as follows:

"1. If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the goods are not clearly marked with an address or otherwise appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

"2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance."

Article 22

31. The text of this article as prepared at the third session of the Working Group reads:

"The seller shall [hand the goods over, or place them at the buyer's disposal]:

“(a) If a date is fixed or determinable by agreement or usage, on that date; or

“(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

“(c) In any other case, within a reasonable time after the conclusion of the contract.”

32. It was suggested that paragraph (a) of this article was superfluous since under the general rule the agreement of the parties prevailed over the provisions of the Law. On the other hand, the view was expressed that although this provision was, strictly speaking, not necessary, nevertheless its inclusion in the context of this article would be useful.

33. The Working Group *decided* to substitute the words “deliver the goods” for the bracketed language in the opening phrase of the article and to adopt the article with this amendment. The text as adopted reads:

“The seller shall deliver the goods:

“(a) If a date is fixed or determinable by agreement or usage, on that date; or

“(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

“(c) In any other case, within a reasonable time after the conclusion of the contract.”

Article 23

34. It was suggested in the Secretary-General's report that the text of article 50 of ULIS relating to handing over of documents as revised in a study by the representative of Japan (see A/CN.9/WG.2/WP.16/Add.1) should be included in the Law as article 23 immediately following the articles dealing with delivery (see annex II, paras. 21-26).

35. The Working Group decided to adopt the proposed text as suggested above. The text reads:

“Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage.”

Articles 24-32

36. The Working Group decided to incorporate these articles in a single unified set of remedial articles for reasons mentioned in paras. 78-82 of this report.

Article 33

37. The text of this article, as drafted by the Working Group at its third session, reads:

“1. [The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract.]

“1 *bis*. [Unless the terms or circumstances of the contract indicate otherwise, the seller shall deliver goods

“(a) Which are fit for the purposes for which goods of the same contract description would ordinarily be used;

“(b) Which are fit for any particular purpose expressly or impliedly made known to the seller;

“(c) Which possess the qualities of a sample or model which the seller has handed over or sent to the buyer;

“(d) Which are contained or packaged in the manner usual for such goods.]

“2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is clearly insignificant.”

38. Some representatives suggested that paragraph 2 of this article should be transferred to an appropriate place within one of the articles that deal with remedies of the buyer. One representative was of the opinion that the paragraph should be kept at its present place in article 33. On the other hand, several other representatives expressed the view that this paragraph was superfluous and should be deleted.

39. One representative suggested that paragraph 1 *bis* of this article should include a provision concerning conformity of the goods with brochures, catalogues and other publications issued by the seller.

40. Different views were expressed as to whether the requirements listed in paragraph 1 *bis* were cumulative or alternative. Most representatives, however, were of the opinion that these requirements were cumulative.

41. One representative pointed out that subparagraph 1 *bis* (b) did not determine the time when the particular purpose for which the goods were intended to fit should be made known to the seller. It was also suggested that the clause should apply only when the buyer relied on the seller's expertise.

42. Several representatives suggested that in view of the fact that article 36 established an exception to the implied warranties contained in article 33, article 36 should be incorporated in article 33.

43. The Working Group decided to delete paragraph 2 of article 33. The Working Group further established a Drafting Party (VI) consisting of the representative of Austria and the observers for Norway and The Hague Conference to prepare, in the light of the above comments, a revised text for article 33 which would incorporate the provisions of article 36.

44. After consideration of the text proposed by the Drafting Party and an alternative draft submitted by one representative, the Working Group adopted the following text for article 33:

“1. The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract and which, where not inconsistent with the contract:

“(a) are fit for the purposes for which goods of the same description would ordinarily be used;

“(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of contracting, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement;

“(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

“(d) are contained or packaged in the manner usual for such goods.

“2. The seller shall not be liable under subparagraphs (a) to (d) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect.”

Article 34

45. No action with respect to this article was required since the Working Group at its third session decided to delete it.

Article 35

46. The Working Group considered this article on the basis of the text prepared at its third session. The text reads:

“1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when the risk passes. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

“2. [The seller shall be liable for the consequences of any lack of conformity even though they occur after the time fixed in paragraph 1 of this article.]”

47. The Working Group had before it two proposals relating to paragraph 2 of this article. Under one proposal, paragraph 2 would be replaced by the language contained in paragraph 68 of annex II to this report in order to provide for the seller’s liability for breach of guarantee in respect of the goods. According to the second proposal (A/CN.9/WG.2/IV/CRP.1), paragraph 2 would be incorporated in paragraph 1 and the second paragraph of this article would be the original text of paragraph 2 of article 35, which makes the seller liable for the consequences of any lack of conformity which has occurred after the risk passed, if the seller was responsible for such lack of conformity.

48. Several representatives expressed the view that it was not clear whether paragraph 2 of the text reproduced in paragraph 46 above was intended to make the seller liable for consequential loss suffered by the buyer or for latent defects. It was pointed out that the question of consequential loss was governed by the articles relating to damages and that the problem of latent defects was dealt with in article 39.

49. Some representatives had doubts as to whether it was necessary to provide in the law for the seller’s liability in respect of a breach of guarantee since such liability would always arise from an express contractual provision.

50. Several representatives were opposed to the inclusion of the original text of paragraph 2 of article 35 of ULIS on the ground that the lack of conformity referred to in this paragraph might also arise from a breach of a non-contractual obligation of the seller.

51. The Working Group referred the article to a Drafting Party (III) consisting of the representatives of Hungary, Japan, the United Kingdom and the USSR.

52. On the recommendation of the Drafting Party, the Working Group adopted the following text for this article:

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

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

53. With respect to the bracketed sentence in paragraph 1, the Working Group maintained its decision at the third session to postpone its consideration pending final action in connexion with later articles on passing of risk.

Article 36

54. This article has been incorporated into article 33 (see paras. 42-44 above).

Article 37

55. The text of this article had been approved by the Working Group at its third session. However, in view of a decision by the Working Group that, whenever appropriate, the expression “handed over” should be replaced by the word “delivered”, the text was amended accordingly. The text as adopted reads:

“If the seller has delivered goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

The buyer shall, however, retain the right to claim damages as provided in article [82].”

Article 38

56. The working Group, at its third session, adopted paragraphs 1, 2 and 3 of this article and placed paragraph 4 between square brackets for further consideration. The text of the article reads:

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

“2. In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

“3. If the goods are redispached by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known at the time, when the contract was concluded, of the possibility of such redispach, examination of the goods may be deferred until they arrive at the new destination.

“4. [The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.]”

57. Doubt was expressed as to whether paragraph 4 of this article would be consistent in all cases with the expectations of the parties or with commercial practice. The view was also expressed that it was not clear whether the usages referred to in this articles meant the international usages within the meaning of article 9 or local usages by way of exception to that article.

58. Some representatives also pointed out that no reference should be made to the agreement of the parties on the methods of inspection since such agreement could not override mandatory rules of the local law.

59. In view of the above comments several representatives suggested that paragraph 4 should be deleted.

60. Other representatives were of the opinion that the methods of inspection were an important question on which competing rules existed. A clear choice as to the applicables rules should be made in the Law. These representatives were therefore opposed to the deletion of paragraph 4.

61. One representative suggested that the opportunity to examine the goods should also be governed by this paragraph. Other representatives had difficulty with this proposal because of the ambiguity of the word “opportunity” in this context. To avoid this ambiguity, the representative concerned suggested that the expression “The precise time and” should be included at the beginning of the paragraph.

62. Another representative agreed that the question of the method of examination might be regulated by the Law, but suggested that in this case such questions should be governed by the law of the seller.

63. The Working Group reaffirmed its decision to adopt without change paragraphs 1, 2 and 3 of article 38 and it decided to delete paragraph 4.

Article 39

64. The Working Group at its third session approved with slight changes the original text of article 39 of ULIS. The text as adopted reads:

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

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

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

65. A member of the Working Group in a study submitted to the present session (A/CN.9/WG.2/WP.16/Add.1/Annex I) suggested that the last phrase of paragraph 1 of this article should be replaced by the following text:

“If a lack of conformity of the goods constituted a breach of a guarantee referred to in paragraph 2 of article 35, the buyer shall lose the right to rely on such lack of conformity if he has not given notice thereof to the seller within [30] days upon expiration of the period of guarantee [provided the lack of conformity was discovered during that period].”

66. In the Secretary-General's report the question was raised whether paragraph 1 of this article which provides for a cut-off period of two years was consistent with the policy established by the Commission in article 10 (2) of the draft convention on prescription (limitation) in the international sale of goods (see annex II, paras. 88-90). Article 10 (2) of that draft convention reads:

“The limitation period in respect of a claim arising from a defect or lack of conformity which could not be discovered when the goods are handed over to the buyer shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, provided that the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer.”

67. Several representatives expressed the view that there was no conflict between the two provisions; article 39 (1) of ULIS dealt with a time-limit within which notice of lack of conformity of the goods should be given to the seller, while article 10 (2) of the draft convention on prescription established a limitation period within

which an existing claim could be brought before a Tribunal. It was also pointed out that article 1 (2) of the draft convention on prescription expressly provided that the convention would not affect time-limits within which a party was required to give notice as a condition for the acquisition or exercise of his claim.

68. Several other representatives were of the opinion that if no formal conflict between the two provisions existed, as least a clash of policy was created and that it was desirable that the Commission itself should attempt to resolve this problem. In this connexion the suggestion was made that the Commission should postpone decision on this question pending final action on article 10 (2) of the draft convention on prescription by the projected United Nations Conference thereon.

69. One observer expressed the view that any cut-off period beyond the two years established in paragraph 1 of article 39 would not be acceptable to business community.

70. In view of the above comments, the Working Group decided to defer action on this question.

71. With respect to the proposal mentioned in paragraph 65 above, the Working Group agreed in principle to replace the last phrase in paragraph 1 of this article, "unless the lack of conformity constituted a breach of a guarantee covering a longer period", with the provision contained in the above proposal. However, since several drafting changes in the proposed text were suggested, the Working Group referred the drafting of that text to a Drafting Party (V) consisting of the representatives of Japan and the USSR and the observer for Norway.

72. The Drafting Party submitted two alternative proposals. On examination of these two alternatives, the Working Group concluded that both proposals were not free from difficulties. The Working Group therefore decided to take as basis for its consideration the last phrase in paragraph 1 of article 39 reproduced in paragraph 64 above.

73. Some representatives suggested that the words "longer period" should be replaced by the words "different period" appearing at the end of the phrase in question. In the view of those representatives, the guarantee was an express term in the agreement of the parties which determined the time during which the seller was liable for a lack of conformity and should prevail over the provisions of the law. It therefore followed that the liability of the seller should depend on whether notice of the lack of conformity was given within the period covered by the guarantee, irrespective of whether that period was shorter or longer than the cut-off period of two years provided in article 39.

74. On the other hand, some representatives were of the opinion that in absence of a contrary provision in the contract, the mere fact that the parties had agreed on a shorter period of guarantee should not deprive the buyer from the right to rely on the cut-off period provided in this article. These representatives, therefore, were in favour of maintaining the original expression "longer period".

75. Other representatives suggested that no reference to guarantee should be made in this article; the liability of the seller for breach of a guarantee raised different issues from those dealt with in article 39 and should, therefore, be provided for in a separate article.

76. Since no consensus could be reached on this question, the Working Group decided to put both words "longer" and "different" between square brackets in the text and deferred final action thereon.

77. The text of this article as adopted reads:

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

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

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

Article 40

78. No action with respect to this article was required in view of the fact that the Working Group at its third session decided to adopt the original text of article 40 of ULIS without change. The text reads:

"The seller shall not be entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose."

Articles 24-32, 41-49, 51-52 (2)-(4) and 55: remedies of the buyer for breach of contract

79. The Working Group at its third session decided to consolidate the provisions relating to the buyer's remedies in respect of the seller's breach of the contract as regards date and place of delivery which are dealt with in separate articles of ULIS. On the basis of this merger two alternatives, which carried the consolidation of these remedial articles even further, were submitted in the Secretary-General's report.

80. The first alternative would create two separate sets of consolidated articles; one set would consist of the article consolidated by the Working Group for remedies as regards time and place of delivery (annex II, paras. 27-57), while the other would consolidate the

articles as regards remedies for failure to deliver conforming goods and to transfer title therein (annex II, paras. 111-155).

81. The second alternative would present a single unified set of remedial provisions as regards breaches of all obligations of the seller (annex II, paras. 163-177). According to the Secretary-General's report, this second alternative would have the advantage of avoiding problems of classification involved in the first alternative and accidental gaps that might occur therein. A unified system would also make for simplicity and clarity (for summary of the reasons mentioned in the report, see annex II, para. 177).

82. In the light of the above, the Working Group decided to take as a basis for its consideration of the buyer's remedies, the text of articles 41-48 as suggested in the Secretary-General's report for a single unified set of remedies.

Article 41

83. In the Secretary-General's report it was suggested that the text of this article, which originally dealt with the remedies of the buyer for failure of the goods to conform with the contract, should be reworded to cover the breach of any obligation of the seller. To this end the following text was proposed in the report:

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

"(a) Exercise the rights provided in articles 42 to 46;

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

84. One observer suggested that the words "subject to the requirements of due notice to the seller" be inserted before the word "may" in the opening phrase of this article. The same observer also suggested that paragraph 4 of article 43, as proposed in paragraph 165 of the Secretary-General's report, which provides that the seller shall not be entitled to a period of grace, should become paragraph 2 of this article.

85. Several representatives were of the opinion that the above-quoted text was acceptable and that it was not necessary to refer to any requirement of notice in this article.

86. The Working Group adopted the above text and decided that paragraph 4 of article 43 of the text suggested in paragraph 165 of the Secretary-General's report should become paragraph 2 of this article. The text as adopted reads:

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

"(a) Exercise the rights provided in articles 42 to 46;

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

"2. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace."

Article 42

87. The Working Group at its third session adopted the following text for this article:

"The buyer shall retain the right to performance of the contract, unless he has declared the contract avoided under this Law."

88. It was noted in the report of the Secretary-General that according to the Working Group's report on its third session the above text was not intended to deal with the question whether the court should compel specific performance; that question was dealt with in article 16 of ULIS and in article VII of the Convention of 1964 to which the Uniform Law was attached.

89. In this connexion it was expressed in the Secretary-General's report that the articles outlining the buyer's remedies should make some reference to the remedy of specific performance and it was noted that the limits which the procedural rules of the forum may set on the right to such remedy may also be set out in the same articles. On the basis of this consideration, the following two alternatives for article 42 were submitted in the report:

Alternative A

"(1) The buyer may require the seller to perform the contract if specific performance would be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law. (See ULIS 16 and art. VII of 1964 Convention.)

"(2) The buyer shall not, however, be entitled to require performance of the contract by the seller if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. (See ULIS 25, 42 (1) (c)."

Alternative B

"The buyer may require the seller to perform the contract unless it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. (See ULIS 25, 42 (1) (c)."

90. Some representatives were of the opinion that alternative A was not acceptable because it would allow the buyer to require specific performance only in cases where such request was in conformity with the law of the forum. In the view of these representatives the limits of the right to request specific performance should be determined by the Uniform Law itself.

91. Two observers expressed the view that any reference to national law in this setting would introduce an element of uncertainty in the Law and would encourage forum-shopping. It was suggested in this connexion that, as in original ULIS, article 42 should clearly specify the cases where the buyer may require performance in kind; the reference to the law of the forum was especially unsatisfactory in cases of non-conformity since the parties would not know which court would ultimately be called upon to decide the case.

92. One observer suggested that a distinction should be made between the right of the buyer to request performance and the enforceability of such right. The

Uniform Law should only provide for the right and the question of enforceability should be dealt with in the Convention. This latter suggestion was supported by another observer.

93. Several representatives stated that it would be difficult for countries belonging to the common law system to adopt alternative B or any similar provision, because the law of their countries made the remedy of specific performance discretionary and residual and did not recognize a general right to require specific performance.

94. One observer expressed the view that the text of this article should expressly state that the buyer may not require performance if he declared the contract avoided or the price reduced. In this connexion, several representatives raised the question whether other acts or declarations by the buyer should have the same effect.

95. Several representatives also agreed with the same observer that the buyer should have the right to require replacement of defective goods only if the lack of conformity amounted to a fundamental breach, because such remedy might be even more severe for the seller than avoidance of the contract. For this reason, it was suggested that the requirement of prompt notice by the buyer should also apply to this situation.

96. The Working Group referred the article to a Drafting Party (VI) consisting of the representatives of Austria, Japan and the United Kingdom and the observers for Norway and the International Chamber of Commerce.

97. On the recommendation of the Drafting Party, the Working Group adopted the following text for article 42:

Article 42

"1. The buyer has the right to require the seller to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the buyer has acted inconsistently with that right by avoiding the contract under article 44, or by reducing the price under article 45 [or by notifying the seller that he will himself cure the lack of conformity].

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

Articles 43 and 44

98. On the basis of articles 43 and 44 as redrafted by the Working Group at its third session it was suggested in the Secretary-General's report (see annex II, paras. 128-142) that article 43 should, within the single unified remedial system, read as follows:

"1. Where the failure by the seller to perform any of his obligations under the contract of sale and the

present Law amounts to a fundamental breach of contract, the buyer, by prompt notice to the seller, may declare the contract avoided.

"2. After the date for the delivery of the goods, the seller may deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any other failure to perform his obligations, but only if the delay in taking such action does not constitute a fundamental breach of contract [and such action does not cause the buyer either unreasonable inconvenience or unreasonable expense].

"3. Although the failure by the seller to perform his obligations under the contract of sale and the present Law does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for such performance. If at the expiration of the additional period the seller has not performed such obligation, the buyer, by prompt notice to the seller, may declare the contract avoided.

"4. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace."

99. On the basis of article 25 (4), as drafted by the Working Group at its third session, it was also suggested (see annex II, para. 171) that the provision of that paragraph should be broadened to apply not only to breaches by the seller with respect to date and place of performance, but also to requests by the buyer to supply a missing quantity of a conforming shipment or to repair or replace defective goods. The following text was, therefore, proposed in the Secretary-General's report for article 44:

"If the seller fails to perform any of his obligations under the contract of sale and the present Law and the buyer requests the seller to perform such obligation, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, of a reasonable time, unless the seller refuses to perform his obligation within that time."

100. Some representatives expressed the view that the requirement of prompt notice contained in paragraph 1 of article 43 above might be suitable in cases of failure of the goods to conform to the contract, but might be too stringent in the case of non-delivery. It was suggested that under this provision the buyer might be held to have failed to give prompt notice while he was reasonably awaiting late delivery by the seller.

101. Several representatives advanced the view that the suggested language in paragraph 3 of article 43 was not acceptable since it would enable the buyer to convert a minor lack of conformity into a fundamental breach by using the *Nachfrist* system provided in the paragraph and avoid the contract if the seller did not perform within the additional period. It was therefore suggested that, in such cases, the buyer should be able to avoid the contract only if the failure to perform within the additional period amounted to a fundamental breach.

102. One representative pointed out that if paragraph 3 of article 43 above were construed to apply only when the seller's breach was not fundamental, a curious result would ensue: the buyer who suffered a fundamental breach would not be able to require performance within an additional period if he so desired. His only remedy in such cases would be to avoid the contract promptly.

103. One representative suggested that the above ambiguity would be resolved if the opening word "although" at the beginning of paragraph 3 of article 43 should be replaced by the words "whether or not".

104. Another representative pointed out that the proposed text of article 43 did not mention the right of the buyer to remedy the defect himself at the seller's expense.

105. With respect to article 44, some representatives suggested that it should be merged with article 43. One observer submitted a proposal to change the structure and, to a certain extent, the content of articles 43 and 44.

106. One representative suggested that there was a need to indicate in article 44 that the period of time which the buyer might fix in his request for performance should be reasonable. Another representative was of the opinion that no such requirement should be made since the buyer, under this article, was already entitled to avoid the contract without giving additional time for performance. The buyer should therefore be at liberty to set the additional period in the manner he deemed fit.

107. In the light of the above comments and proposals, the Working Group referred articles 43 and 44 to a Drafting Party (VII), consisting of the representatives of France, the United States of America and the USSR and the observers for Norway and the International Chamber of Commerce.

108. On the basis of the recommendations of this Drafting Party, the Working Group decided to adopt, with several stylistic changes, the proposal submitted by the Drafting Party for articles 43 and 44. The text as adopted by the Working Group reads:

Article 43

"Where the buyer requests the seller to perform, the buyer may fix an additional period of time of reasonable length for delivery or for curing of the defect or other breach. If the seller does not comply with the request within the additional period, or where the buyer has not fixed such a period, within a period of reasonable time, or if the seller already before the expiration of the relevant period of time declares that he will not comply with the request, the buyer may resort to any remedy available to him under the present law."

Article 43 bis

"1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the

buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 44 or the price reduced in accordance with article 45 [or has notified the seller that he will himself cure the lack of conformity].

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

Article 44

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

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

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

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

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

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

109. The square brackets placed around the language in paragraph 1 of article 43 bis, relating to curing of defects in the goods by the buyer himself, were intended to indicate that no final action was taken by the Working Group on this question. Similarly, the placing between square brackets of the words "or documents" in subparagraph 2 (a) of article 44 above was intended to serve the same purpose. The representative of Japan was requested to prepare a study on the latter question.

110. Some representatives and one observer expressed the view that the requirement in paragraph 1 of article 43 bis above, relating to fundamental breach, would unnecessarily restrict the seller's right to cure failure to perform his obligations, and should therefore be deleted; the requirement that such right should not cause the buyer any unreasonable inconvenience or unreasonable expense was sufficient.

111. One representative suggested that the last phrase in article 43 bis commencing with the word "unless" was unnecessary and should be deleted.

112. One observer suggested that the words "within a reasonable time", where they first appear in paragraph 2 of article 43 *bis*, in so far as they related to non-delivery should be substituted by the word "promptly". This observer further suggested that the same change should be made in article 43.

113. One representative, supported by one observer, suggested that any right of the buyer to cure defects himself and its repercussions on the remedial system should be made the subject of a separate study.

114. One representative made the general observation that the changes in the remedial system introduced by the new articles 42, 43, 43 *bis*, and 44 were of a rather fundamental character and might need further thorough analysis and eventual adjustment. This view was shared by one observer.

Article 45

115. The Working Group at its third session adopted without change the original text of this article in ULIS. It was suggested in the Secretary-General's report (see annex II, paras. 172-173) that this text should be maintained in the consolidated articles on remedies of the buyer.

116. One observer suggested that the order of articles 45 and 46 should be reversed.

117. The Working Group decided to adopt article 45 of ULIS as article 46, without change. The text as adopted reads:

Article 46

"1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles [43, 43 *bis*, and 44] shall apply in respect of the part or quantity which is missing or which does not conform with the contract.

"2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract."

Article 46

118. It was suggested in the Secretary-General's report (see annex II, paras. 146-152) that in view of the objections to the original text of article 46 (see A/CN.9/62/Add.1, paras. 109-114 *) this article should be redrafted as follows:

"The buyer [on notifying the seller of his intention to do so] may deduct all or any part of the damages resulting from any breach of the contract from any part of the price due under the same contract."

119. Most representatives who spoke on the issue agreed that the uniform law should provide for the remedy of reduction of price because it was widely used, especially in civil law countries.

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, annex II.

120. One representative expressed the view that the right of the buyer to reduce the price should be limited to breaches of contract in respect of non-conformity of the goods. The same representative also pointed out that although in actual business practice it was difficult to, draw a distinction between price reduction and damages from a juridical point of view the two remedies were distinct and should be dealt with separately in the law.

121. Another representative stated that an important difference between price reduction and damages was that for a reduction in price it was not necessary to prove fault while damages could only be recovered if fault was proven. One observer supported this view and added that the right to reduce the price was not even subject to the conditions laid down in article 74 of ULIS.

122. Different views were expressed on the question whether the buyer should be able to seek both damages and price reduction. Some representatives were of the opinion that the buyer should be given the right in certain cases to claim damages as well as price reduction.

123. One representative doubted whether it was wise to establish a system of self-help in the law. In his opinion recourse to the judgement of a court was better than self-help measures.

124. The Working Group referred this article to a Drafting Party (VIII) consisting of the representatives of Hungary, Japan, the United Kingdom and the USSR.

125. On the basis of the text recommended by the Drafting Party, the Working Group, taking also into account its decision to revise the order of articles 45 and 46 (see paragraphs 116 and 117 above), adopted the following text as article 45:

Article 45

"Where the goods do not conform with the contract, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity."

126. It was understood that the phrase "the buyer may declare the price to be reduced" not only authorized the buyer to withhold the designated portion of the price but also served as a basis for the buyer to recover the designated portion of the price that had been paid.

Article 47

127. The Working Group at its third session decided to adopt article 47 of ULIS without change. The text of that article reads:

"Where the seller has proffered to the buyer a quantity of unascertained goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate."

128. It was suggested in the Secretary-General's report that the word "unascertained" in the first sentence of the above text should be deleted in order to make the provision applicable to cases where the seller has, subsequent to the conclusion of the contract, appropriated specific goods to the contract (see annex II, para. 154).

129. One observer suggested that article 27 of ULIS as drafted by the Working Group at its third session should be included in this article as paragraph 1.

130. In the light of the above, the Working Group decided to adopt the text of this article with the above modifications. The text as adopted reads:

"1. Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

"2. Where the seller has proffered to the buyer a quantity of goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate."

Article 48

131. Article 48 of ULIS reads:

"The buyer may exercise the rights provided in Articles 43 to 46, even before the time fixed for delivery, if it is clear that goods which would be handed over would not be in conformity with the contract."

132. The Working Group at its third session postponed action on article 48 of ULIS until it considered the related provisions on anticipatory breach in ULIS (articles 75-77).

133. It was recommended in the Secretary-General's report that this article be included in the consolidated set of remedies (see annex II, para. 176).

134. The Working Group provisionally approved the above recommendation and decided to postpone final action on this article until it considered articles 75-77 on anticipatory breach.

Article 49

135. The Commission at its third session decided to delete this article on the ground that it deals with matters which came within the scope of the draft convention on prescription (see A/8017, para. 34 *).

Article 50

136. The provision of this article relating to delivery of documents has been transferred in a revised form to article 23 (see paras. 34-35 above).

Article 51

137. As a result of the consolidation of the article relating to remedies of the buyer, this article was rendered unnecessary and was, consequently, deleted.

Article 52

138. The Working Group at its third session deferred final action on this article. The text of the article reads:

"1. [Where the goods are subject to a right or claim of a third person, the buyer, unless he agreed to take the goods subject to such right or claim, shall notify the seller of such right or claim, unless the seller already knows thereof, and request that the goods should be freed therefrom within a reasonable time or that other goods free from all rights and claims of third persons be delivered to him by the seller.]

"2. [If the seller complies with a request made under paragraph 1 of this article and the buyer nevertheless suffers a loss, the buyer may claim damages in accordance with article 82.]

"3. [If the seller fails to comply with a request made under paragraph 1 of this article and a fundamental breach of the contract results thereby, the buyer may declare the contract avoided and claim damages in accordance with articles 84 to 87. If the buyer does not declare the contract avoided or if there is no fundamental breach of the contract, the buyer shall have the right to claim damages in accordance with article 82.]

"4. [The buyer shall lose his right to declare the contract avoided if he fails to act in accordance with paragraph 1 of this article within a reasonable time from the moment when he becomes aware or ought to have become aware of the right or claim of the third person in respect of the goods.]"

139. In view of the substantial criticism that was made against this article at the third session of the Working Group (see paras. 128-138 of A/CN.9/62/Add.1 *) the following language for paragraph 1 of the article was suggested in the Secretary-General's report (see annex II, paras. 102 and 108):

"1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim."

140. The same report also discussed certain drafting problems that were presented by making special provision for a request by the buyer in the setting of the article. A tentative draft provision on this topic was set forth as follows:

"2. Unless the seller already knows of the right or claim of the third person, the buyer shall notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third

* UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, annex II.

persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract."

141. All representatives who spoke on this article agreed that paragraph 1 of the above draft was an improvement on the original text.

142. One representative, however, expressed doubt as to the necessity of the use of the word "claim" in addition to the word "right". It was also stated that, under the present language of the paragraph even an unfounded claim by a third party would give the buyer the right to avoid the contract. On the other hand the view was expressed that it was important to retain the word "claim" without any qualification since otherwise the buyer would have to show that the right was a just and founded claim, and an outstanding claim (even before adjudication) could make it hazardous and impractical to use the goods.

143. One observer suggested that paragraph 2 of this article was unnecessary in view of the fact that articles 41-44 dealing with notice and remedies would govern the situations envisaged in this paragraph. The same observer also stated that the word "shall" where it first appeared in this paragraph would make it a duty on the part of the buyer to request the seller to remedy the defect in title instead of an option. He further submitted that it would be possible to distinguish between property claims and claims purporting to forbid a certain specified use.

144. Two observers noted that the word "claim" in this article was intended to cover claims which might prove unfounded. This word "claim", however, did not cover claims based on administrative regulations or industrial property rights; these would have to be considered under article 33. They further expressed the view that, as in paragraph 3 of article 52 of ULIS, the buyer should have the right to avoid the contract only if the claim resulted in a fundamental breach of the contract, especially in the case of contractually based claims which related to a restriction on a specific use of the goods.

145. The Working Group decided to substitute the word "may" for "shall" where this word first appears in the text reproduced in paragraph 138 above and adopted, with this amendment, the text suggested in the Secretary-General's report. The text as adopted reads:

"1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

"2. Unless the seller already knows of the right or claim of the third person, the buyer may notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract."

Article 53

146. It was suggested in paragraph 157 of the Secretary-General's Report that this article should be deleted because it paralleled with article 34 which the Working Group at its third session had decided to delete.

147. The Working Group decided to delete article 53.

Article 54

148. The substance of this article has been transferred to article 21. (See paragraph 30 above.)

Article 55

149. The substance of this article has been incorporated in articles 41-48.

II. CONSIDERATION OF ARTICLES 56-70 OF ULIS

Article 56

150. The Working Group decided to adopt without change the original text of ULIS for this article. The text of this article reads:

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

Article 57

151. Article 57 of ULIS provides:

"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."

152. Some representatives noted that this article dealing with questions differently resolved in various countries might be construed as establishing validity of contracts which did not contain any indication as to the price, since, according to article 8 of the Uniform Law, the Law was not concerned with the formation of the contract only to the extent where not "otherwise expressly provided therein". In such circumstances the application of this article might lead in practice to considerable uncertainty and even injustices where a buyer might be held bound to pay a price "generally charged by the seller" of which the buyer, in the course of negotiations, had no idea whatsoever. These representatives suggested to delete the article.

153. Several other representatives also pointed out that by article 8 of ULIS the questions of formation of the contract and its validity were expressly excluded from the scope of the law. In the view of these representatives article 57 applied only if the applicable law outside ULIS recognized that the contract was validly concluded. This was also emphasized by the opening words of article 57: "Where a contract has been concluded". The opinion was also expressed that the deletion of this article would result in a lack of uniformity because in such cases national

laws which recognized the valid conclusion of the contract would apply their own rule relating to the method of determining the price for international sales contracts.

154. One observer proposed to add at the end of the provision in this article the phrase "unless this price is unreasonable" so that the seller should not be allowed to demand an exorbitant price.

155. Some representatives stated that it would be difficult to determine whether the price generally charged by the seller was or was not unreasonable and expressed preference for the proposal of one representative that the phrase "... or, in the absence of such a price, the one prevailing in the market at the time of the conclusion of the contract" should be added at the end of the provision, so that the buyer should pay the prevailing market price where the price generally charged by the seller was not ascertainable.

156. One representative also suggested that the following paragraph should be added: "Payment of the price consists of the delivery to the seller, or to another person indicated by the seller, of the monies or documents provided for in the contract."

157. Several representatives were of the opinion that the paragraph suggested above was, in most cases, self-evident, and in certain cases, such as bankruptcy of the seller, might create difficulties.

158. The same representative also suggested that article 57 should also include the following paragraph: "In the case considered in the preceding paragraph, reference shall be assumed to have been made to the currency of the seller's country."

159. Several representatives found it difficult to accept the above proposal. One reason was that the question of international payments should be left outside the purview of the law. It was also mentioned that the suggested provision was nothing more than a rule of interpretation of the contract, and that such a rule should not fall within the scope of the law.

160. The Working Group set up a Drafting Party (IX) consisting of the representatives of Austria, Mexico and the United Kingdom; this Drafting Party was requested to present a redraft for article 57 of ULIS.

161. The Working Group adopted, with certain amendments, the text proposed by the Drafting Party. The text as adopted reads:

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

162. The Working Group requested the representative of Mexico to study the question of the currency of payment mentioned in paragraphs 158 and 159 above with a view to submitting a new proposal at a subsequent session of the Working Group.

163. One representative expressed the view that the approach of the common law and civil law might be reconciled if the opening phrase of the adopted text read "where in contracting a sale the parties do not..." instead of "where a contract has been concluded".

164. One observer proposed that the adopted text should be changed in such a way as to make the price prevailing in the market the principal price and the price generally charged by the seller applicable only where the market price was not ascertainable. This proposal was supported by one representative.

Article 58

165. 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."

166. Some representatives suggested that the words "in case of doubt" were too vague and should be replaced by the words "unless otherwise agreed by the parties".

167. Other representatives were of the opinion that the provision in this article was useful and should be retained without change.

168. Some other representatives expressed the view that this article dealt only with matters of interpretation which might be covered by usages applicable under article 9 of ULIS, and should therefore be deleted.

169. One representative proposed that the following paragraph should be added to article 58:

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

170. Some representatives were of the opinion that the language of the proposed new paragraph was ambiguous and might be construed to mean the exact opposite of what was intended.

171. In view of the above comments, the Working Group deferred action on this article until its next session.

Article 59

172. 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."

173. One representative suggested that the following paragraph should be added to the above article:

"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."

174. One representative was of the opinion that the proposed new paragraph touched on important questions relating to governmental refusal to allow a transfer of money to be made which, in certain circumstances, might create an exemption from liability. This representative therefore suggested that the proposal should be dealt with in connexion with article 74 of ULIS.

175. Some representatives were of the opinion that the proposed new paragraph was a natural consequence of paragraph 1 and that it dealt only with the question who should comply with the formalities required for the transfer of the money to the seller. In the view of these representatives, the proposed paragraph should be merged with paragraph 2.

176. Other representatives were of the opinion that if the proposed new paragraph simply dealt with the question who should comply with the formalities required for the transfer of money this paragraph would be redundant since paragraph 1 of the article impliedly covered this question.

177. In view of the above comments the Working Group decided to adopt paragraphs 1 and 2 of article 59 of ULIS without change, and postponed consideration of the above proposal pending submission of a revised draft by the representative concerned.

Articles 60-70

178. The Working Group decided to defer consideration of these articles until its fifth session.

III. FUTURE WORK

179. The Working Group took note of the views expressed at the fifth session of the Commission and in the Sixth Committee during the twenty-seventh session of the General Assembly, suggesting that in order to accelerate its work the Working Group should hold, if possible, longer and more frequent sessions.

180. The Working Group agreed that the frequency and length of its sessions could only be decided in view of the frequency and length of the sessions of other subsidiary bodies of the Commission, and the financial implications of extended or further sessions of this Working Group. It therefore decided to submit this question to the Commission for consideration at its sixth session.

181. The Working Group decided that at its next session it would consider articles 60-90 of ULIS.

182. On the recommendation of the Chairman, the Working Group requested the representatives of the countries mentioned below to examine articles 71 to 90 of ULIS as allocated below and to submit their comments and proposals thereon to the Secretariat in time for analysis and circulation to members of the Working Group before its fifth session. The above articles were allocated as follows:

Articles 71-73: USSR. In collaboration with Austria, Brazil and the United Kingdom.

Article 74: United Kingdom. In collaboration with Austria, Ghana, Japan and the USSR.

Articles 75-77: United States of America. In collaboration with France, Hungary, Iran and Japan.

Articles 78-81: France. In collaboration with Hungary, Tunisia and the United States of America.

Articles 82-90: Mexico. In collaboration with Austria, India and Japan.

183. The Working Group invited the representatives of all its members and observers to submit to the Secretariat any comments and proposals on the above articles of ULIS which they might wish the Working Group to consider at its next session.

ANNEX I

Revised text of articles 18-70 of the Uniform Law *

Article 18

The seller shall deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law.

Article 19

(Deleted)

Article 20

Delivery shall be effected:

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

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

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

Article 21

1. If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the goods are not clearly marked with an address or otherwise appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

* Square brackets indicate that no final decision was taken by the Working Group on provisions so bracketed.

2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.

Article 22

The seller shall deliver the goods:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

Article 23

Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage.

Article 24-32

(Incorporated into articles 41-48)

Article 33

1. The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract and which, where not inconsistent with the contract,

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of contracting, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

2. The seller shall not be liable under subparagraphs (a) to (d) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect.

Article 34

(Deleted)

Article 35

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

2. The seller shall also be liable for any lack of conformity which occurs after the time indicated in paragraph 1 of this article and is due to a breach of any of the obligations of the seller,

including a breach of an express guarantee that the goods will remain fit their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period.

Article 36

(Incorporated into article 33)

Article 37

If the seller has delivered goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 82.

Article 38

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

2. In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

3. If the goods are redispached by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known at the time, when the contract was concluded, of the possibility of such redispach, examination of the goods may be deferred until they arrive at the new destination.

Article 39

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

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

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

Article 40

The seller shall not be entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.

Article 41

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

(a) Exercise the rights provided in articles 42 to 46;

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

2. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

Article 42

1. The buyer has the right to require the seller to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the buyer has acted inconsistently with that right by avoiding the contract under article 44 or, by reducing the price under article 45 [or by notifying the seller that he will himself cure the lack of conformity].

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

Article 43

Where the buyer requests the seller to perform, the buyer may fix an additional period of time of reasonable length for delivery or for curing of the defect or other breach. If the seller does not comply with the request within the additional period, or where the buyer has not fixed such a period, within a period of reasonable time, or if the seller already before the expiration of the relevant period of time declares that he will not comply with the request, the buyer may report to any remedy available to him under the present law.

Article [43 bis]

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

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

Article 44

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

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

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

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

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

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

Article 45

Where the goods do not conform with the contract, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity.

Article 46

1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles [43, 43 bis, and 44] shall apply in respect of the part or quantity which is missing or which does not conform with the contract.

2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

Article 47

1. Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

2. Where the seller has proffered to the buyer a quantity of goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

Article 48

[The buyer may exercise the rights provided in articles [43 to 46], even before the time fixed for delivery, if it is clear that goods which would be handed over would not be in conformity with the contract.]

Article 49

(Deleted)

Article 50

(Transferred to article 23)

Article 51

(Deleted)

Article 52

1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

2. Unless the seller already knows of the right or claim of the third person, the buyer may notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract.

Article 53

(Deleted)

Article 54

(Transferred to article 21)

Article 55

(Incorporated into articles 41-48)

Article 56

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

Article 57

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

Article 58

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

Article 59

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

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.

Article 60

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.

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.

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.

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.

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.

Article 69

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.

Article 70

1. If the buyer fails to perform any obligation other than those referred to in sections 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.

ANNEX II

Report of the Secretary-General on obligations of the seller in an international sale of goods: consolidation of work done by the Working Group and suggested solutions for unresolved problems

[For the text, see document A/CN.9/WG.2/WP.16 reproduced in this volume, in the preceding section: part two, I, A, 2]