

**3. Analysis of comments and proposals relating to articles 18-55 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary-General (A/CN.9/WG.2/WP.10)\***

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\* 3 December 1971.

## I. INTRODUCTION

1. The United Nations Commission on International Trade Law at its fourth session, after consideration of the report of the Working Group on the International Sale of Goods on the work of its second session,<sup>1</sup> decided as follows:

"1. *Decides* that:

"(a) The Working Group on the International Sale of Goods should continue its work under the terms of reference set forth in paragraph 3 (a) of the resolution adopted by the Commission at its second session;<sup>31</sup>

"(b) The Working Group should determine and improve where necessary its own working methods and programme of work;

"(c) 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, and any comments or recommendations which representatives may make at the sessions on issues set out in the progress reports shall be considered by the Working Group in the preparation of the final draft; the Commission will take its decisions on the substantive issues which may arise in connexion with provisions of a new uniform law or the revised text of ULIS when it has before it, for approval, the final text and accompanying commentary prepared by the Working Group;

(d) In accordance with paragraph (c) above, the Working Group, when preparing its final draft, should take into consideration the comments and opinions voiced by representatives in connexion with the items considered at the fourth session of the Commission.

"2. Authorizes the Working Group to request the Secretary-General to prepare studies and other documents which are necessary for the continuation of its work."

<sup>31</sup>Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38. Yearbook of the United Nations Commission on International Trade Law, vol. I:1968-1970, part two, II, A."

2. Pursuant to the above decision, the Working Group on the International Sale of Goods met during the fourth session of the Commission and decided, *inter alia*, as follows:

"2. At its third session, the Working Group will consider the following articles of ULIS:

"(a) Articles 18-55, on the basis of the reports to be submitted by representatives of members of the Commission on these articles;

"(b) Articles 1-17, in the light of the comments and suggestions of members of the Commission made at the fourth session of the Commission.

"3. The Working Group entrusts the representatives of its members set out below with the examination of the following chapters (subchapters) of ULIS:

"(a) Delivery (arts. 18 and 19)	Hungary, in co-operation with United Kingdom and Mexico
"(b) Date of delivery (arts. 20-22)	United States, in co-operation with France and Ghana
"(c) Place of delivery (art. 23)	
"(d) Remedies for the seller's failure to perform his obligations as regards the date and place of delivery (arts. 24 and 25)	Japan, in co-operation with India and Brazil
"(e) Remedies as regards the date of delivery (arts. 26-29) and remedies as regards the place of delivery (arts. 30-32)	
"(f) Lack of conformity (arts. 33-37)	USSR, in co-operation with United Kingdom and Tunisia
"(g) Ascertainment and notification of lack of conformity (arts. 38-40)	Austria, in co-operation with United States and Kenya
"(h) Remedies for lack of conformity (arts. 41-49)	France, in co-operation with Austria and Hungary
"(i) Handing over of documents (arts. 50 and 51)	India, in co-operation with Iran and France
"(j) Transfer of property (arts. 52 and 53)	United Kingdom, in co-operation with USSR and Mexico
"(k) Other obligations of the seller (arts. 54 and 55)	India, in co-operation with Iran and France

"The reports on the results of the examination should be submitted to the Secretariat by 15 July 1971.

"4. The Secretariat is requested to circulate the above reports to the representatives of the members of the Working Group for comments, by 15 August 1971.

"5. Representatives of the members of the Working Group who wish to comment on any of the reports are requested to submit their comments to the Secretariat by 30 September 1971.

"6. The Secretariat is requested

<sup>1</sup> A/CN.9/52.

“... .

“(b) to prepare an analysis of the reports and the comments referred to in paragraphs 3 and 5 above, and submit it to the third session of the Working Group.”

3. The following reports and comments relating to articles 18 to 55 have been submitted to the Secretary-General:

*On articles 18 and 19*

1. Comments and proposals of the representative of Hungary (annex I)
2. Comments and proposals of the representative of the United Kingdom (annex II)

*On articles 20 to 23*

3. Comments and proposals of the representative of the United States (annex III)

*On articles 24 to 32*

4. Comments and proposals of the representative of Japan (annex IV)

*On articles 33 to 37*

5. Comments and proposals of the representative of the USSR (annex V)
6. Comments and proposals of the representative of the United Kingdom (annex VI)

*On articles 38 to 40*

7. Comments and proposals of the representative of Austria (annex VII)
8. Comments of the representative of the United States on the proposals of the representative of Austria (annex VIII)
9. Response by the representative of Austria to the comments of the representative of the United States (annex IX)
10. Comments and proposals of the representative of Kenya (annex X)

*On articles 41 to 49*

11. Comments and proposals of the representative of France (annex XI)

*On articles 50 and 51*

12. Comments and proposals of the representative of India (annex XII)

*On articles 52 and 53*

13. Comments and proposals of the representative of the United Kingdom (annex XIII)
14. Comments and proposals of the representative of Mexico (annex XIV)
15. Comments and proposals of the representative of the USSR (annex XV)

*On articles 54 and 55*

16. Comments and proposals of the representative of India (annex XVI)

*Comprehensive study of articles 18-49, 65 and 97*

17. Comments and proposals of the representative of Mexico (annex XVII)

*Comprehensive study of articles 18-55 and introductory note*

18. Amendments proposed by Norway for the revision of ULIS chapter III: obligations of the seller (annex XVIII)

4. The proposals and comments made in the above reports that deal with a single issue or article are considered together in this analysis. This report also includes comments on articles 18 to 55 that appear in previous documents of the Commission. The text of the proposals and comments (annexes I-XVIII) appears in document A/CN.9/WG.2/WP.10/Add.1.

#### *General comment*

5. The representative of Austria expressed the view that the use in the text of ULIS of the word “promptly” results in a certain degree of inflexibility while the expression “reasonable time” causes ambiguity. It was suggested that this problem affects a large number of the articles of ULIS, and that the Working Group therefore should deal with this issue before taking up chapter III and the following chapters.<sup>2</sup>

## II. ANALYSIS OF THE COMMENTS AND PROPOSALS

### A. Article 18

6. Article 18 of ULIS reads:

“The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law.”

7. This article states the principal obligations of the seller.<sup>3</sup> The representative of the United Kingdom expressed agreement with this provision but noted that the provision was not sufficiently comprehensive because it did not take account of the obligations of the seller provided for in articles 54 (carriage and insurance of the goods) and 91 (preservation of the goods).<sup>4</sup> The representative of Norway suggested some drafting changes in the text of the article. He further suggested that the requirement that the goods shall be in conformity with the contract which is now contained in article 19, paragraph 1, as an element of the concept of delivery, should be expressed in article 18 as a separate obligation of the seller.<sup>5</sup> The text proposed by the Norwegian representative is as follows:

“The seller shall effect delivery of the goods *in conformity with the contract*, hand over any documents relating to the goods and transfer the property thereto, as prescribed by reference to trade terms or by other clauses of the contract or, in the absence of such provisions, by usage and the present Law.”<sup>6</sup>

8. Some comments relating to the concept of delivery in article 19 of the Law may also bear on article 18. These comments are set out in paragraphs 10-14 below.

### B. Article 19

9. Article 19 of ULIS reads:

“1. Delivery consists in the handing over of goods which conform with the contract.

<sup>2</sup> Annex IX, para. 3.

<sup>3</sup> Commentary by Mr. André Tunc, p. 44.

<sup>4</sup> Annex II, p. 1.

<sup>5</sup> Annex XVIII, introductory note, para. 2.

<sup>6</sup> *Ibid.*, text of art. 18.

"2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer.

"3. Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods."

(a) *Comments on paragraph 1*

10. The representative of the United Kingdom noted that in several articles of ULIS (e.g. in articles 65 and 75) the word "delivery" is used in a different concept than that defined in article 19. He considered that the definition in article 19 was really a definition of "making delivery" as contrasted with the definition of "taking delivery" in article 65.<sup>7</sup>

11. The question was raised whether "delivery" was a unilateral or a bilateral obligation. According to the opinion previously expressed by the representative of Spain, delivery "presupposes a bilateral act which consists of the seller's supplying the goods and the buyer's accepting them". Therefore, according to that opinion, delivery could not be regarded as an exclusive obligation of the seller.<sup>8</sup> The representative of Mexico expressed the view that the provisions of ULIS failed to answer the above question by separating the obligation of the seller to effect delivery from the obligation of the buyer to take delivery.<sup>9</sup> On the other hand, the representative of Hungary considered that it was clear from the Law that delivery was meant to be a unilateral act of the seller.<sup>10</sup>

12. The representative of Mexico expressed the view that there was a need for a definition in the Law of the notion "delivery". He suggested that the present definition in article 19, paragraph 1, be replaced by a definition providing that delivery is effected when the buyer has the "juridical possibility to dispose of the goods."<sup>11</sup> On the basis of this consideration he suggested the following text:

"The delivery consists in placing the goods at the disposal of the buyer in the terms of the contract."<sup>12</sup>

<sup>7</sup> Annex II, comments on art. 19.

<sup>8</sup> A/CN.9/11/Add.1, p. 29, see also A/CN.9/31, para. 99.

<sup>9</sup> Annex XVII, para. 1.

<sup>10</sup> Annex I, introductory para. (a).

<sup>11</sup> Annex XVII, para. 4.

<sup>12</sup> *Ibid.*, para. 6. It is noted in this connexion that the concept of the representative of Mexico that delivery should be considered as effected when the buyer has the juridical possibility to dispose of the goods was the underlying concept of the definition of "delivery" in the 1939 draft of the Law. This concept was expressed by Professor Ernst Rabel as follows: "Considering the many . . . types of commercial sales, the draft must define delivery in an abstract formula as the act by which the seller accomplishes all the acts (or the last of the acts) that he is required to do in order that the goods should come into the hands of the buyer or some person on his behalf." (UNIDROIT: Unification of Law, 1949, p. 63.) The same concept was reflected in art. 19, para. 1, of the 1939 draft adopted at the XIIth Session of the Council of UNIDROIT which reads as follows:

13. The above proposal was supported by the representatives of Hungary<sup>13</sup> and the United Kingdom.<sup>14</sup> In the same document the representative of the United Kingdom also suggested that all definitions relating to "delivery" be included in the "opening general chapter of the Law".

14. In contrast with the above view of Mexico, Hungary and the United Kingdom (para. 12 above), the representative of Norway suggested that the definition of "delivery" should retain the expression "handing over" and proposed that article 19, paragraph 1, read as follows:

"Delivery of the goods is effected by [consists in] the handing over of goods to the buyer or a person acting on his behalf."<sup>15</sup>

15. Several comments were made as regards the provision in article 19, paragraph 1, that "delivery" did not occur unless the goods conformed with the contract. In the view of the representative of the United States this limitation conflicted with articles 41 to 49.<sup>16</sup> The representative of the United Kingdom held that this provision might cause anomalies—e.g. the goods would not be considered as "delivered" where they do not conform to the contract but the buyer decides to keep them and to reduce the price in accordance with article 41, para. 1(c), of the Law, or where under article 39 of the Law the buyer loses the right to rely upon the lack of conformity. The representative of the United Kingdom suggested that non-conformity should not be dealt with in terms of non-delivery.<sup>17</sup> Similar suggestions were made by the representatives of Hungary<sup>18</sup> and Norway who proposed that the presentation of the provisions on the seller's obligations should be based on the distinction between the seller's obligations as regards the handing over of the goods and the seller's obligations to deliver goods which conform with the contract.<sup>19</sup>

"Delivery is accomplished when the seller has done all the acts which he is bound to do in order that the goods be consigned to the buyer or a person authorized to receive them on his behalf. What acts are necessary for this purpose, depends on the nature of the contract."

Again the same concept was voiced at the 1951 Hague Diplomatic Conference. The Conference informed UNIDROIT of its opinion that it was advisable to examine the content of the obligation of the seller to deliver and of the suggestion made by some delegates in respect of this question according to which "the seller would fulfil his obligation to deliver, if he has accomplished every act incumbent on him in order that the goods may be handed over to the buyer." (Final Act of the Conference, UNIDROIT, Unification of Law, vol. III (1954), pp. 285, 287.)

<sup>13</sup> Annex I, text on art. 19.

<sup>14</sup> Annex II, comments on art. 19, para. 2.

<sup>15</sup> Annex XVIII, text of art. 19, para. 1.

<sup>16</sup> Annex III, in section entitled "Suggestions for consideration by the Working Group".

<sup>17</sup> Annex II, comments on art. 19, paras. 6-7. It is noted that the Tunc commentary (p. 46) expresses the following view on this question: ". . . it may be difficult to know . . . if the delivery was of goods conforming to the contract. But these are simple questions of fact which could not be avoided in any other system, and which could in another system be enmeshed in difficult questions of law".

<sup>18</sup> Annex I, para. 1(b).

<sup>19</sup> Annex XVIII, introductory note, para. 2.

(b) *Comments on paragraphs 2 and 3*

16. The representative of the United Kingdom expressed the view that the opening words in paragraph 2 "where the contract of sale involves carriage of the goods" were not sufficiently precise because in practice delivery took place also in case of "ex works" contract, under which the seller was to hand over the goods to the carrier (who was to take them on behalf of the buyer), while under the above provision such handing over would not be considered as delivery since the contract did not involve carriage of the goods.<sup>20</sup> On the other hand, the representative of Norway retained paragraphs 2 and 3 of the Law, without change, in his revised text of article 19.<sup>21</sup>

17. The representatives of Hungary and Mexico suggested that paragraphs 2 and 3 of article 19 should be brought into line with the wording of paragraph 1 suggested in paragraph 4 above. The representative of Hungary suggested that the words "handing over" and "handed over" in paragraphs 2 and 3 be replaced by "placing at the disposal" and "placed at the disposal". The representative of Mexico followed this suggestion in respect of only paragraph 2; in respect of paragraph 3 he proposed that the above words should be replaced by the word "delivery". In addition to these changes, the representative of Hungary suggested that it should be stated in paragraph 2 that placing the goods at the disposal of the "first carrier or forwarding agent" should effect delivery. After the changes proposed by the representatives of Hungary and Mexico, respectively, article 19 would read as follows:

"2. Where the contract involves carriage of the goods and no other place of delivery has been agreed upon, delivery shall be effected by placing the goods at the disposal [Hungary: of the first carrier or forwarding agent] [Mexico: of the carrier] for transmission to the buyer.

"3. Where the goods [Hungary: placed at the disposal of the carrier or forwarding agent] [Mexico: delivered at the carrier] are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall in addition to [Hungary: placing the goods at the disposal of the carrier or forwarding agent] [Mexico: delivering the goods] send to the buyer notice of the consignment and, if necessary, some document specifying the goods."<sup>22</sup>

18. The representative of the United Kingdom expressed the view that at the present stage the Working Group should only take a provisional decision as to the revision of the definition of "delivery" and should re-examine the definition in the context of subsequent articles of the Law.<sup>23</sup>

C. *Articles 20 to 23*

19. Articles 20 to 23 of ULIS read:

*"Article 20*

"Where the parties have agreed upon a date for delivery or where such date is fixed by usage, the

seller shall, without the need for any other formality, be bound to deliver the goods at that date, provided that the date thus fixed is determined or determinable by the calendar or is fixed in relation to a definite event, the date of which can be ascertained by the parties.

*"Article 21*

"Where by agreement of the parties or by usage delivery shall be effected within a certain period (such as a particular month or season), the seller may fix the precise date of delivery, unless the circumstances indicate that the fixing of the date was reserved to the buyer.

*"Article 22*

"Where the date of delivery has not been determined in accordance with the provisions of articles 20 or 21, the seller shall be bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and to the circumstances.

*"Article 23*

"1. Where the contract of sale does not involve carriage of the goods, the seller shall deliver the goods at the place where he 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.

"2. If the sale relates to specific goods and the parties knew that the goods were at a certain place at the time of the conclusion of the contract, the seller shall deliver the goods at that place. The same rule shall apply if the goods sold are unascertained goods to be taken from a specified stock or if they are to be manufactured or produced at a place known to the parties at the time of the conclusion of the contract."

20. The representative of the United States recalled the comments made at The Hague Conference in 1964 that these articles included "unnecessary detail" and they "could usefully be consolidated and simplified", and suggested the consolidation of articles 20, 21 and 22 into one article. He suggested further that in articles 20 to 32 instead of "delivery" the words "handing over" should be used and that article 19(2) and (3) "which do not deal with the definition of *délivrance* but with the handing over of the goods should go in article 23". The report of the representative of the United States noted that the representative of France dissented from this proposal.<sup>24</sup>

21. The text suggested by the representative of the United States reads as follows:

*"Article 20 [including 21 and 22]*

"The seller shall\* hand the goods over, without any formality:

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

\* \* The words 'be bound to' are omitted in conformity with article 23(1)."

<sup>20</sup> Annex II, comments on art. 19, paras. 8-9.

<sup>21</sup> Annex XVIII, text of art. 19.

<sup>22</sup> Hungary: annex I; Mexico: annex XVII, paras. 9 and 10.

<sup>23</sup> Annex II, last para.

<sup>24</sup> Annex III, in section entitled "Suggestions for consideration by the Working Group".

"(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

"1. Where the contract of sale involves the carriage of goods and no other place has been agreed upon, the seller shall hand the goods over to the carrier for transmission to the buyer and shall, where they are not clearly marked with an address or otherwise appropriated to the contract, send the buyer notice of the consignment and, if necessary, some document specifying the goods. [Taken from present art. 19(2), (3).]

"2. Where the sale relates to specific goods and the parties knew that the goods were at a particular place at the time of the conclusion of the contract, the seller shall hand over the goods at that place. The same rule shall apply to unascertained goods to be taken from a specified stock or to be manufactured or produced at a place known to the parties at that time.

"3. In all other cases, the seller shall hand over the goods at the appropriate\*\* place where he 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."<sup>25</sup>

"\* The words 'regard being had to the nature of the goods and to the circumstances' have been omitted in conformity with, e.g., articles 26(1) and 30(1).

"\*\* Inserted to take care of the place where the seller has several places of business."

22. It will be noted that the above draft states that the seller's obligation is to "hand over the goods". In connexion with articles 18 and 19, above, suggestions were made for alternative wording to express the seller's obligation; the Working Group may wish to bear in mind any decision it has taken on this point in considering the above draft.

23. The representative of Norway suggested the reorganization of articles 20 to 23 and some minor drafting changes in article 23. Under his proposal the Law would deal first with the place of delivery and with the date of delivery. Accordingly, article 23 of the present Law should precede articles 20 to 22.<sup>26</sup>

D. Articles 24 to 32

24. Articles 24 to 32 of ULIS read:

"Article 24

"1. Where the seller fails to perform his obligations as regards the date or the place of delivery, the buyer may, as provided in articles 25 to 32:

"(a) require performance of the contract by the seller;

"(b) declare the contract avoided.

"2. The buyer may also claim damages as provided in article 82 or in articles 84 to 87.

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

"Article 25

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

"(a) REMEDIES AS REGARDS THE DATE OF DELIVERY

"Article 26

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

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

"3. If the seller has effected delivery before the buyer has made known his decision under paragraph 1 of this article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided.

"4. Where the buyer has chosen performance of the contract and does not obtain it within a reasonable time, he may declare the contract avoided.

"Article 27

"1. Where failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller.

"2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period shall amount to a fundamental breach of the contract.

"Article 28

"Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

"Article 29

"Where the seller tenders delivery of the goods before the date fixed, the buyer may accept or reject delivery; if he accepts, he may reserve the right to claim damages in accordance with article 82.

<sup>25</sup> *Ibid.*

<sup>26</sup> Annex XVIII, articles 20 to 23.

## “(b) REMEDIES AS REGARDS THE PLACE OF DELIVERY

## “Article 30

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

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

“3. If the seller has transported the goods to the place fixed before the buyer has made known his decision under paragraph 1 of this article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided.

## “Article 31

“1. In cases not provided for in article 30, the seller shall retain the right to effect delivery at the place fixed and the buyer shall retain the right to require performance of the contract by the seller.

“2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period at the place fixed shall amount to a fundamental breach of the contract.

## “Article 32

“1. If delivery is to be effected by handing over the goods to a carrier and the goods have been handed over at a place other than that fixed, the buyer may declare the contract avoided, whenever the failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract. He shall lose this right if he has not promptly declared the contract avoided.

“2. The buyer shall have the same right, in the circumstances and on the conditions provided in paragraph 1 of this article, if the goods have been despatched to some place other than that fixed.

“3. If despatch from a place or to a place other than that fixed does not amount to a fundamental breach of the contract, the buyer may only claim damages in accordance with article 82.”

25. The representative of the United States noted that all reports submitted by members of the Working Group were concerned with specific articles or questions; consequently, none of these reports touched upon more general questions as to the remedial system of the Law.<sup>27</sup>

26. In this connexion, the Working Group may wish to examine article VII of the Convention and article 16 of the Uniform Law providing that a court shall not be bound to enter or enforce a judgement providing for specific performance except in cases in

<sup>27</sup> Annex III, in section entitled “Scope and related questions”.

which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law. In chapter III, ULIS provides for specific performance in a number of articles (e.g. art. 24, para. 1(a), art. 26, paras. 1 and 4, art. 27, art. 30, para. 1, art. 31, etc.). However, as a result of article VII of the Convention and article 16 of ULIS, the specific provisions of ULIS are not applicable in cases where in respect of similar contracts the *lex fori* does not provide for specific performance. The Working Group may wish to consider whether this situation would cause uncertainty as to the enforceability of the buyer's request for performance.

27. The representatives of Japan and of Norway suggested that it was unnecessary to make any distinction between the failure to deliver the goods at the date fixed and the failure to deliver the goods at the place fixed.<sup>28</sup> To remove this distinction they suggested that articles 30 to 32 dealing with remedies as regards the place of delivery should be deleted and that articles 24 to 29 should be amended as set out in paragraphs 29 and 31 below.

28. These representatives suggested further that substantive changes be made in the remedial system of the Law. Both representatives proposed that “*ipso facto* avoidance” should be deleted.<sup>29</sup> The representative of Japan noted that this concept might cause disagreements and disputes between the parties due to the uncertainty under the present language of the Law as to the exact time when such avoidance occurred.<sup>30</sup> This representative expressed the opinion that it was basically the buyer's right to cancel the contract if the seller committed a breach but suggested that in case where the buyer requires performance without indicating the date within which such performance has to take place, he should be required to warn the seller of his intention to cancel the contract if the seller does not perform the contract within a reasonable time.<sup>31</sup>

29. The text of articles 24 to 29 as suggested by the representative of Japan reads:

## “Article 24

“1. Where the seller fails to perform his obligations as regards the date or place of delivery, the buyer may, as provided in articles 25-[28]:

“(a) require performance of the contract by the seller;

“(b) declare the contract avoided;

“(c) purchase the goods, after the declaration of avoidance of the contract, to replace those to which the contract relates.

“2. [No change.]

“3. [No change.]

## “Article 25

“The buyer shall not be entitled to require performance of the contract by the seller, if it is in

<sup>28</sup> Japan: annex IV, para. II.6; Norway: annex XVIII, introductory note, para. 3.

<sup>29</sup> Japan: *ibid.*, para. II.1; Norway: *ibid.*, para. 5(e).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, para. 4.

conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.

“Article 26

“1. Where the failure to deliver the goods at the date or place agreed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He may grant the seller an additional period of time. If the seller fails to deliver within this period, the buyer may declare the contract avoided or require performance.

“2. Where the buyer requires performance without specifying length of time, the seller may effect delivery within a reasonable time. To avoid the contract, the buyer shall give a warning to the avoidance of contract. If the seller still fails to deliver, the buyer may declare the contract avoided.

“3. If the buyer does not inform the seller of his decision in the case of paragraph 1 of this article and the seller requests the buyer to make known his decision, the seller may effect delivery unless the buyer does not reply promptly from the moment when the request has arrived and the contract cannot be avoided.

“4. Where the buyer does not specify the period of time for performance under paragraph 2 of this article and the seller requests the buyer to make known his date, the seller shall be entitled to effect delivery unless the buyer does not reply promptly from the moment when the request has arrived and the contract cannot be avoided.

“Article 27

“1. Where failure to deliver the goods at the date or place agreed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller.

“2. The buyer may grant the seller additional period of time. If the seller fails to deliver within this period, the buyer may declare the contract avoided.

“3. Where the buyer does not specify the period of time for performance under paragraph 2 of this article, the delivery and the avoidance of contract shall be governed by the provisions of paragraphs 2 and 3 of article 26.

“Article 28

“[Deleted]

“Article 29

“[No change]”<sup>32</sup>

30. The representative of Norway pointed out that the rules on remedies were not presented in a systematic manner; rules relating to the same remedy were contained in different articles. He, therefore, suggested that each of the various remedies should be dealt with in a separate article. The representative of Norway also noted that the parallel remedial provisions in

article 24 *et seq.* and in article 41 *et seq.* needed to be harmonized both as regards form and substance.<sup>33</sup> For similar reasons, the representative of the United States suggested the exploration of the question whether it was desirable to maintain the sharp distinction between the remedies as to (a) date and place, and (b) conformity of the goods.<sup>34</sup>

31. The text of articles 24 to 29 as proposed by the representative of Norway reads:

“Article 24 [cf. ULIS art. 24 and art. 26, para. (3)]

“1. Where the seller fails to perform his obligations as regards *delivery*, the buyer may, as provided in articles 25 to 28:

“(a) require performance of the contract by the seller;

“(b) declare the contract avoided.

“2. The buyer may also claim damages as provided in article 82 or in articles 84-87, [No change.]

“3. *If the seller has effected delivery of the goods, the buyer shall lose his rights to remedies [as regards delivery] if he has not given the seller notice thereof promptly after he has received the goods. The buyer shall lose his right to declare the contract avoided, if he does not exercise it promptly after he has received the goods.*

“4. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace. [No change.]

“Delete subtitle (a)

“Article 25 (*performance of the contract*)  
[cf. ULIS arts 25, 26, 27]

“1. The buyer may require performance of the contract by the seller, *except in cases where:*

“(a) *the seller is in no position to perform the contract; or*

“(b) *it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.*

“2. *If the buyer requires the seller to perform the contract, he may grant the seller an additional period of time of reasonable length for such performance.*

“3. *The buyer shall lose his right to require performance of the contract if he does not exercise it within a reasonable time after the expiry of the time for delivery.*

“4. *Subject to the provisions of articles 26 and 27 the seller shall retain, after the date fixed for the delivery of the goods, the right to effect delivery.*

“Article 26 [cf. ULIS art. 26, paras. 1 and 2]

“1. *If the buyer does not obtain performance of the contract in accordance with the provisions of article 25, he may insist on his right to performance or declare the contract avoided in accordance with the provisions of article 27.*

<sup>33</sup> Annex XVIII, introductory note, para. 4.

<sup>34</sup> Annex III, in section entitled “Scope and related questions”.

<sup>32</sup> *Ibid.*, suggested text.

"2. If the seller requests the buyer to make known whether he requires performance or will declare the contract avoided, and the buyer does not make known his decision promptly, the contract shall be considered to be avoided.

"Article 27 (avoidance of the contract)  
[ULIS arts. 26, 27, 28]

"1. Where the seller's failure to perform his obligations as regards delivery amounts to a fundamental breach of the contract, the buyer may declare the contract avoided.

"2. The buyer may also declare the contract avoided on account of failure to deliver the goods at the date fixed whenever a price for such goods is quoted on a market where the buyer can obtain them.

"3. Where, in accordance with article 25, the buyer has required the seller to effect performance, the buyer may [always] declare the contract avoided after the expiry of the additional period of time fixed by the buyer or, failing this, of a reasonable time after he has made such request. Notwithstanding, the provisions of paragraphs 1 and 2 of this article, the buyer is not entitled to declare the contract avoided until after such period has expired.

"Article 28 [as ULIS art. 29]

"Where the seller tenders delivery of the goods before the date fixed, the buyer may accept or reject delivery; if he accepts, he may reserve the right to claim damages in accordance with article 82." [No change.]

#### E. Articles 33 to 37

32. Article 33 of ULIS reads:

"1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:

"(a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;

"(b) goods which are not those to which the contract relates or goods of a different kind;

"(c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;

"(d) goods which do not possess the qualities necessary for their ordinary or commercial use;

"(e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;

"(f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.

"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 not material."

33. The representative of the USSR held that, except for subparagraph (d), all subparagraphs of this article dealt basically with the same question: whether or not the goods conform to the express or implied requirements of the contract. Consequently, there was no need for detailed enumeration of specific cases of non-conformity; in this connexion it was noted that under one of the subparagraphs the goods would be considered as conforming with the contract while under another subparagraph they would not, e.g. goods which conformed to the seller's sample (subpara. (c)) might not possess the qualities required for some particular purpose contemplated by the contract (subpara. (e)). As a consequence, the representative of the USSR suggested the deletion of article 33, paragraph 1, since its substance is covered by article 19, paragraph 1, or, at least, the deletion of subparas. (b) and (c) the provisions of which are self-evident.<sup>35</sup>

34. The representative of the United Kingdom suggested that the differentiation in subparagraph 1(d) between "ordinary use" and "commercial use" was unclear. In his opinion a reference to "the qualities necessary for ordinary use" would suffice.<sup>36</sup> He also thought that there was a considerable overlapping between sub-para. 1(e) and (f) which could be eliminated by reference in para. (e) to "some unusual purpose which the buyer had made known to the seller".<sup>37</sup>

35. The representative of Norway suggested the following language to replace the introductory part of the article:

"The seller shall not have fulfilled his obligation as regards the conformity of the goods where he has handed over."<sup>38</sup>

36. Article 34 of ULIS reads:

"In the cases to which article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods."

37. The representatives of the USSR and of the United Kingdom held that this article was not clear.<sup>39</sup> In the view of the representative of the United Kingdom, the provision did not indicate whether it was the remedies agreed upon in the contract by the parties or those provided for in the *lex fori* or the proper law of the contract which were to be understood under "other remedies" referred to in the article. He therefore suggested the deletion of the article.<sup>40</sup> The representative of the USSR was of the opinion that this article would be interpreted as "forbidding the parties to the contract themselves to agree to some other remedies" in addition to those provided for in ULIS. In order to avoid this interpretation he suggested that at the end of the article

<sup>35</sup> Annex V, para. 1.

<sup>36</sup> Annex VI, para. 5.

<sup>37</sup> *Ibid.*, para. 6.

<sup>38</sup> Annex XVIII, text. of para. 33.

<sup>39</sup> According to the Tunc Commentary, this provision "is in particular intended to preclude the possibility of a party who has acquired goods relying on a general theory of nullity based on mistake as to the substance of the goods. Article 8, in limiting the field of the Uniform Law, would otherwise have allowed a person acquiring goods to avail himself of this doctrine, if article 34 did not prevent it." Tunc Commentary, p. 56.

<sup>40</sup> Annex VI, para. 8.

the following words should be added: "except those provided for by agreement between the parties or by any usage".<sup>41</sup>

38. Article 35 of ULIS reads:

"1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when 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 occurring after the time fixed in paragraph 1 of this article if it was due to an act of the seller or of a person for whose conduct he is responsible."

39. Drafting proposals were submitted with respect to this article. The representative of Norway suggested that the second sentence in paragraph 1 should be deleted and that in paragraph 2 the word "responsible" be substituted for the word "liable".<sup>42</sup> The representative of the USSR suggested that after the words "was due to an act" in paragraph 2 there should be added the words "or failure to act".<sup>43</sup> The representative of the United Kingdom noted that article 35 was too complex; this article should be simplified if simplification of the definition of delivery is agreed on.<sup>44</sup>

40. The representatives of the USSR<sup>45</sup> and of the United Kingdom<sup>46</sup> noted that the present text of the Law did not contain any provision as to guarantees of quality. Consequently, in the view of the representative of the USSR, if a defect in the goods was discovered within the guaranteed period but after the risk had passed to the buyer, the seller would be liable only under the conditions laid down in article 35, i.e. if the defect "was due to an act of the seller or of a person for whose conduct he is responsible". He consequently suggested that paragraph 2 of article 35 be amended to read as follows:

"The seller shall be liable for the consequences of any lack of conformity occurring after the time fixed in the preceding paragraph if it was due to an act or failure to act of the seller or of a person for whose conduct he is responsible, or if it is covered by a guarantee granted by the seller, provided that it was not due to an act of failure to act of the buyer or of a person for whose conduct he is responsible."<sup>47</sup>

41. Article 36 of ULIS reads as follows:

"The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in subparagraphs (d), (e) or (f) of paragraph 1 of article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity."

<sup>41</sup> Annex V, para. 2.

<sup>42</sup> Annex XVIII, text of art. 35.

<sup>43</sup> Annex V, para. 4.

<sup>44</sup> Annex VI, para. 11.

<sup>45</sup> Annex V, para. 4.

<sup>46</sup> Annex VI, para. 11.

<sup>47</sup> Annex V, para. 4.

42. No comment was made with respect to this article. It is noted, however, that if the Working Group deletes or modifies any of subparas. (d), (e) or (f) of paragraph 1 of article 33 it may need to re-examine the references to these subparagraphs in article 36.

43. Article 37 of ULIS reads as follows:

"If the seller has handed over goods before the date fixed 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 handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense."

44. The representative of the USSR held that the seller should only be allowed to avail himself of the right provided for in article 37 if there is no objection on the part of the buyer. He suggested further that the word "unreasonable" was rather vague and should be replaced by the word "material". Accordingly, he suggested that the last half sentence of the article, commencing with the word "provided", should read as follows:

"... provided that the exercise of this right does not cause the buyer either material inconvenience or material expense and takes place before the seller has received any different instructions from the buyer.

In any event, the exercise of the above right by the seller shall not affect the buyer's right to claim damages in accordance with article 82."<sup>48</sup>

45. The representative of the United Kingdom suggested that article 37 should be redrafted to read:

"If the seller has handed over goods before the date fixed for delivery but the goods which have been handed over are inadequate (either in quality or quantity) to fulfil the contract, he may at any time up to that date deliver further goods or substitute other goods or remedy defects in the goods already handed over unless he thereby causes unreasonable inconvenience or unreasonable expense to the buyer."<sup>49</sup>

46. The representative of Mexico suggested that the expressions "handed over" and "handing over", where they were used not to express physical handing over but delivery, should be replaced by the word "delivery".

#### F. Articles 38 to 40

47. Articles 38 to 40 of ULIS read as follows:

##### "Article 38

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

"2. In case of carriage of the goods the buyer shall examine them at the place of destination.

"3. If the goods are redespached by the buyer without trans-shipment and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redespach, examination of the goods may be deferred until they arrive at the new destination.

<sup>48</sup> Annex V, para. 3.

<sup>49</sup> Annex VI, para. 13.

"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.

*"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 promptly 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 nonetheless rely on that defect, provided that he gives the seller notice thereof promptly 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 and invite the seller to examine the goods or to cause them to be examined by his agent.

"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."

48. Some of the comments made on these articles relate to more than one article. It seems therefore appropriate first to set out the comments which are of a more general character. This will be followed by comments on specific articles, and then by revised drafts of articles 38 to 40 suggested by members of the Working Group.

49. The representative of the United States held that articles 38 and 39 were too strict and inflexible. Thus the requirements as to inspection were inflexible. In addition, where the buyer failed to notify the seller promptly of the lack of conformity he would not only lose any right to reject the goods but he would also lose the right to claim a price adjustment if he kept the goods. The representative of the United States suggested that article 38 should be deleted or, in any event, should be redrafted to take into consideration the question of latent defects.<sup>50</sup> The language of the articles as suggested by the representative of the United States is reproduced in paragraph 57 below.

50. The representative of Austria objected to the above suggestion that time-limits within which the buyer had to notify the seller of the defects of the goods should vary according to the action of the buyer

<sup>50</sup> Annex VIII, paras. 2 to 4.

(e.g., rejection versus acceptance and claim for damages).<sup>51</sup> He also expressed disagreement with the text proposed by the representative of United States.<sup>52</sup>

51. In respect of article 38, the representative of Japan, at the second session of the Commission, expressed the opinion that the use of the term "promptly" might give rise to uncertainties in cases where the buyer is a middleman and he cannot examine the goods "at the place of destination". Attention was also directed to cases where such a buyer having received goods by ship must forward the goods to the consumer by rail or road; it was noted that in such cases the buyer cannot meet the requirement of redespaching the goods "without trans-shipment".<sup>53</sup> The representative of Austria suggested that this uncertainty be remedied by specifying that in case of carriage of the goods, the buyer's obligation to examine the goods should only commence from the time when the goods arrived at their place of destination.<sup>54</sup>

52. The Government of Norway also commented on the restriction in article 38, paragraph 3, in cases of trans-shipment, and noted that this provision was not appropriate where the goods were shipped in containers. Instead, when there was trans-shipment examination before redespatch should not be required where this would cause to the buyer unreasonable or disproportionate inconvenience.<sup>55</sup> The representative of Austria, while supporting the idea that the present text of ULIS was not apt to cover shipments in containers, did not agree with the above proposal of the Norwegian Government. He suggested that trans-shipment of goods in containers should not be considered a trans-shipment.<sup>56</sup> The text, as suggested by the representative of Austria, is reproduced in paragraph 55 below.

53. In connexion with the possible inclusion in the text of a separate provision on containers, the representative of the United States noted that the word "container" was not sufficiently clear since it could be read to also include other receptacles, e.g. bottles, cans, etc.<sup>57</sup>

54. With respect to article 40, the representative of Austria proposed that the expression "ought to have known" should be substituted for "of which he could not have been aware", in the French text the expression "*et qu'il n'a pas fait connaître*" should be substituted for "*et qu'il n'a pas révélés*",<sup>58</sup> since the proposed language would conform more closely to the language of other articles of ULIS.

55. The representative of Austria proposed the following amendments to articles 38 to 40 of ULIS:<sup>59</sup>

*Article 38*

*Paragraph 2*

*Revised text:* "In case of carriage of the goods the buyer shall examine them promptly after their arrival at the place of destination."

<sup>51</sup> Annex IX, para. 2.

<sup>52</sup> *Ibid.*, para. 4.

<sup>53</sup> A/7618, annex I, para. 89 and A/CN.9/31, para. 114.

<sup>54</sup> Annex VII, para. 2.

<sup>55</sup> A/CN.9/11, pp. 24-25 and A/CN.9/31, para. 115.

<sup>56</sup> Annex VII, para. 2(2).

<sup>57</sup> Annex VIII, para. 1.

<sup>58</sup> Annex VII, paras. 1-2.

<sup>59</sup> *Ibid.*, paras. 2-3.

*Paragraph 3*

Add to the present text: "The redespach of the goods by another means of transport without the goods being removed from a container shall be considered to be redespach without trans-shipment."

*Article 40*

*Revised text:* "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 ought to have known and of which he did not inform the buyer."

56. The representative of Kenya, while expressing his agreement with the amended version of article 38(3), as proposed by the representative of Austria, noted that the omission of the word "promptly" in the revised text of article 38(2) would make no material difference.<sup>60</sup>

57. The representative of the United States suggested the following language:<sup>61</sup>

*"Article 38*

"1. The buyer shall lose the right to avoid the contract for lack of conformity of the goods if he does not give the seller notice specifying its nature [and inviting him to examine them or cause them to be examined] promptly after he discovers or ought to have discovered it.

"[2. In determining whether the buyer ought to have discovered the lack of conformity, he shall not be held to examine them before their place of destination in the case of their carriage, or before the place of their new destination when they are redespached by the buyer without trans-shipment and the seller knew or ought to have known of the possibility of their redespach.]

"3. [Para. 4 of article 38 of ULIS, unchanged.]

*"Article 39*

"1. The buyer shall lose the right to rely on a lack of conformity of the goods for any purpose if he does not notify the seller of it within a reasonable time after he discovers or ought to have discovered it.

"2. The buyer shall lose the right to rely on a lack of conformity of the goods for any purpose if he does not notify the seller of it within two years after the goods were handed over unless the lack of conformity constituted a breach of a guarantee covering a longer period.

*"Article 39, bis*

"Where any notice referred to in articles 38 and 39 has been sent by [letter, telegram or other] appropriate means, a delay or a failure to arrive at its destination shall not deprive the buyer of the right to rely thereon.

<sup>60</sup> Annex X, paras. 1-2.

<sup>61</sup> Annex VIII. The proposal indicated a preference for deletion of the language in brackets.

*"Article 40*

"[Unchanged.]"

58. The representative of Kenya objected to certain amendments proposed by the representative of the United States and noted that he was content with the Austrian proposals.<sup>62</sup>

*G. Articles 41 to 49*

59. Article 41 of ULIS reads as follows:

"1. Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may, as provided in Articles 42 to 46:

"(a) require performance of the contract by the seller;

"(b) declare the contract avoided;

"(c) reduce the price.

"2. The buyer may also claim damages as provided in article 82 or in articles 84 to 87.

60. The representative of Norway suggested that the present text of the introductory part of article 41, paragraph 1, should be replaced by the following language:

"Where the buyer has given due notice to the seller that the goods delivered do not conform with the contract, the buyer may, as provided for in articles 42-47."<sup>63</sup>

61. Articles 42 to 49 of ULIS read as follows:

*"Article 42*

"1. The buyer may require the seller to perform the contract:

"(a) if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects;

"(b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;

"(c) if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible.

"2. If the buyer does not obtain performance of the contract by the seller within a reasonable time, he shall retain the rights provided in articles 43 to 46.

*"Article 43*

"The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or,

<sup>62</sup> Annex X, para. 3.

<sup>63</sup> Annex XVIII, text of art. 41.

in the case to which paragraph 2 of article 42 applies, after the expiration of the period referred to in that paragraph.

*"Article 44*

"1. In cases not provided for in article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

"2. The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided.

*"Article 45*

"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 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*

"Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.

*"Article 47*

"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.

*"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*

"1. The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in article 39, unless he has been prevented from exercising his right because of fraud on the part of the seller.

"2. After the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. Nevertheless, if the buyer has not paid for the goods and provided that he has given due notice of the lack of conformity promptly, as provided in article 39, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages."

62. The representative of Norway suggested that these articles be revised as follows:

*"Article 42 (performance of the contract)*  
[cf. ULIS, art. 42, art. 44, para. 2]

"1. The buyer may require the seller to perform the contract:

"(a) if the sale relates to goods to be produced or *manufactured*, by remedying defects in the goods;

"(b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;

"(c) if the sale relates to unascertained goods, by delivering the missing part or *quantity*; or

"(d) if the lack of conformity amounts to a *fundamental breach and the buyer rejects the goods delivered*, by *delivering other goods which are in conformity with the contract*."

"2. *In the cases referred to in paragraph 1 the buyer may grant the seller an additional period of time of reasonable length for the performance of the contract*."

"3. *The buyer shall not be entitled to avail himself of the remedies referred to in paragraphs 1 and 2:*

"(a) *if the seller is in no position to perform the contract; or*

"(b) *if it is in conformity with usage and reasonably possible for the buyer to have the defects remedied or to purchase goods in replacement*."

"4. *The buyer shall lose his right to require performance of the contract if he does not exercise it within a reasonable time after giving the seller notice of the lack of conformity*."

*"Article 43 [cf. ULIS art. 44]*

"1. *The seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense*."

"2. The seller shall lose his right to perform the contract if he does not inform the buyer of his intention to do so promptly after having received the buyer's notice of lack of conformity."

"Article 44

[cf. ULIS art. 42, para. 2 and art. 44, para. 2]

"If the buyer does not obtain performance of the contract by the seller in accordance with the provisions of articles 42 or 43, he may insist on his right to performance or, subject to the provisions of articles 45-47, choose between reducing the price or declaring the contract avoided in accordance with the provisions of article 46.

"Article 45 [as ULIS art. 46]

"Where the buyer has neither obtained performance of the contract nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract. [No change.]

"Article 46 (avoidance of the contract)  
[cf. ULIS art. 43]

"1. The buyer may declare the contract avoided if the delivery of goods which do not conform to the contract amounts to a fundamental breach of the contract.

"2. The contract may, however, not be declared avoided until

"(a) in cases where the buyer has required performance of the contract in accordance with Article 42, the expiry of the additional period of time fixed by the buyer or, failing this, of a reasonable time after he has made such request, or

"(b) the seller has had a reasonable time for the exercise of his right to perform the contract according to Article 43.

"3. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in cases to which paragraph 2 of this Article applies, after the expiration of the relevant period referred to in that paragraph.

"Article 47 [as ULIS art. 45 in principle unchanged]

"Article 48-49 [as ULIS arts. 47-48]

"[ULIS art. 49 deleted.]"<sup>64</sup>

63. The representative of Norway offered the following explanations, *inter alia*, of the provisions of the draft:

(a) Contrary to article 42, paragraph 1(c) of ULIS, article 42, paragraph 1(d) of the draft implies that the buyer is not entitled to reject the goods delivered and require the seller to deliver other goods which conform with the contract, unless the lack of conformity amounts to a fundamental breach.

<sup>64</sup> Annex XVIII, text of arts. 42 to 49.

(b) Article 42 (4) includes a new provision requiring the buyer to exercise his right to require performance within a reasonable time.

(c) Article 43 (2) includes a new provision requiring the seller to inform the buyer of his intention to remedy the lack of conformity promptly.

(d) The concept of "*ipso facto* avoidance" has been deleted.

(e) Article 46(2) supplements and at the same time limits application of the general rule that fundamental breach is a condition for the avoidance of the contract; it also departs to a certain degree from the rule contained in article 43 of ULIS.<sup>65</sup>

64. The representative of France suggested that under Article 44(2) the buyer should only have the right to declare the contract avoided if the lack of conformity amounted to a fundamental breach.<sup>66</sup>

H. Articles 50 and 51

65. Articles 50 and 51 read as follows:

"Article 50

"Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.

"Article 51

"If the seller fails to hand over documents as provided in article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under articles 24 to 32 or under articles 41 to 49, as the case may be."

66. The representative of the United States noted that articles 50 and 51 are treated separately from articles 54 and 55, and commented that as a consequence general problems relating to the seller's obligations other than delivery would be lost sight of.<sup>67</sup>

67. The representative of India observed that articles 50 and 51 did not lay down what documents relating to the goods should be handed over by the seller to the buyer and suggested that if the contract or usage did not provide for the handing over of documents these articles would not seem to have any application.<sup>68</sup> He also referred to writings on the Law suggesting that the Law was too simple to be helpful because it did not provide for the obligations of the seller and the buyer in case of the documentary sale, although this was the typical international sale of goods.<sup>69</sup>

<sup>65</sup> *Ibid.*, introductory note, paras. 5(b), (c) and (e).

<sup>66</sup> Annex XI, para. 5(2). This document also commented on proposals made by Norway at a previous occasion (A/CN.9/31, para. 117). Since, however, those proposals are not reflected in the new draft submitted by the representative of Norway (annex XVIII) this analysis considers them as superseded.

<sup>67</sup> Annex III, in section entitled "Scope and related questions".

<sup>68</sup> Annex XII, para. 2.

<sup>69</sup> *Ibid.*, para. 4.

68. The representative of India noted further that the provisions of article 51 equating "documents relating to the goods" to the goods themselves, would only be acceptable to the common law system if this provision would only apply to "documents of title to the goods."<sup>70</sup>

69. The representative of India suggested further that since the questions relating to handing over of documents under all the different types of contracts (such as f.o.b., c.i.f., Ex Ship, etc.) could not be completely regulated in the Law, the Working Group should consider whether there was any practical advantage in retaining the provisions of articles 50 and 51.<sup>71</sup> The Arab Republic of Egypt, in its comments submitted to the Commission in 1969, also touched upon this question and suggested that since specific rules on documentary sales were not included in the Law the above two articles of the Law should be deleted.<sup>72</sup>

#### I. Articles 52 and 53

70. Articles 52 and 53 of ULIS read as follows:

##### "Article 52

"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 requests that the goods should be freed therefrom within a reasonable time or that other goods free from all rights and claims or 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 became aware or ought to have become aware of the right or claim of the third person in respect of the goods."

##### "Article 53

"The rights conferred on the buyer by article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person.

71. The representative of the United Kingdom observed that the title of section III (articles 52 and

53), i.e. "Transfer of property" misleadingly suggested that this section dealt with the time, place, etc. of the transfer of property, whereas this was not the case. It was suggested that a better title would be "Guarantee of title".<sup>73</sup>

72. The representative of Tunisia suggested that this chapter dealt only with the question of transfer of property in case of litigation; it might be desirable also to include in the Law provisions for the transfer of property in general.<sup>74</sup> According to the comments by the representative of Mexico the Law provided only for the transfer of the right to use and dispose of the thing in accordance with its nature (*jus utendi*) but it was not concerned with other elements of the transfer of property or "transfer of title"—viz., the transfer of the rights to obtain and enjoy the products and fruits of the thing (*jus fruendi*) and to consume, sell or transfer the thing without limitation (*jus abutendi*).<sup>75</sup> This representative also noted that there were various types of third person claims and administrative limitations and restrictions which prevented the buyer from using or disposing of the purchased goods; he suggested that article 52, paragraph 1, should indicate that, in principle, the buyer would acquire the goods free of liens and limitations and that in addition to the rights or claims from third persons reference should also be made to restrictions imposed by public authority.<sup>76</sup>

73. The Government of Austria observed that in article 52, paragraph 1, there was no distinction between cases where a right of a third person existed and cases where a third person only *claimed* a right. It was held in this connexion that the seller could not be held responsible for unfounded claims; especially this responsibility should not be without any time-limit.<sup>77</sup>

74. In respect of article 52 the opinion was also expressed that any breach of the guarantee of title ought to be treated as a fundamental breach; unless the buyer had accepted the goods with knowledge of the adverse claim such a breach should entitle the buyer to declare the contract avoided and to claim damages.<sup>78</sup>

75. In order to avoid vagueness and ambiguity, several drafting changes were suggested;<sup>79</sup> it was also observed that the English and French versions of these articles were not consistent with each other.<sup>80</sup>

76. The representatives of Mexico and of the USSR suggested that articles 52 and 53 should be amended in accordance with the considerations referred to in paragraphs 72 to 75 above. The amended text would read as follows:

##### "Article 52

"1. The goods shall not be subject to a right or claim of a third person, nor to restrictions imposed by public authority which prevent their use or acquisition, unless the buyer knows or should have known at the time of the contract that the goods would be

<sup>70</sup> *Ibid.*, para. 9.

<sup>71</sup> *Ibid.*, para. 10.

<sup>72</sup> A/CN.9/11/Add.3 and A/CN.9/31, para. 120.

<sup>73</sup> Annex XIII, para. 1. See also annex XV, para. 1.

<sup>74</sup> A/7618, annex I, para. 90 and A/CN.9/31, para. 122.

<sup>75</sup> Annex XIV, paras. 4 and 5.

<sup>76</sup> *Ibid.*, para. 12.

<sup>77</sup> A/CN.9/11, para. II(6) and A/CN.9/31, para. 121.

<sup>78</sup> Annex XIII, paras. 3 and 4.

<sup>79</sup> Annex XIV, subparas. 12(c) and (d); annex XV, para. 2.

<sup>80</sup> *Ibid.*, subpara. 12(e).

acquired under such conditions. In this case the buyer should make known to the seller the right, claim or restriction, unless the seller already knows thereof, and request that, within a reasonable time, the goods should be freed therefrom or that other goods free from all rights and claims of third persons or restrictions imposed by public authority be delivered to him by the seller.<sup>81</sup>

"2. [No change.]<sup>82</sup>

"3. [No change.]<sup>82</sup>

"4. Include the expression 'or the restriction imposed by public authority' after the words 'the right or claim of the third person'.<sup>83</sup>

#### Article 53

Add at the end of the article:

(a) The words "or restrictions imposed by public authority"<sup>84</sup> and

(b) The expression "except those provided for by agreement between the parties or by any usage".<sup>85</sup>

#### J. Articles 54 and 55

77. Articles 54 and 55 of ULIS read as follows:

##### "Article 54

"1. If the seller is bound to despatch the goods to the buyer, 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.

"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 55

"1. If the seller fails to perform any obligation other than those referred to in articles 20 to 53, the buyer 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 buyer may also require performance by the seller of his obligation, unless the contract is avoided."

78. The Government of Austria held that articles 54 and 55 were at odds with each other. Whereas article 55 attached penalties to non-performance by the seller of any obligations not mentioned in articles 20 to 53, article 54 arbitrarily singled out two of those obligations which were not otherwise dealt with.<sup>86</sup> A similar comment was made by the representative of Czechoslovakia. He suggested that it would be useful more completely to specify the obligation of the creditor to co-operate in the fulfilment of the transaction.<sup>87</sup>

79. The representative of India pointed out that the provisions of articles 54 and 55 were not as appropriate and clear as the corresponding rules in common law countries. In his opinion, the requirement under common law to make a "reasonable" contract with the carrier, having regard to the nature of the goods and circumstances of the case, was to be preferred to the requirement under ULIS to make such contracts as are "necessary" for the carriage of the goods. Moreover, it was not clear whether under article 54 (1) the seller was required to conclude a contract with the carrier "on behalf of the buyer" as provided for in common law systems.<sup>88</sup> He also noted that the remedies provided in article 55 entitling the buyer to require performance of the obligation and damages seemed to be stronger than those provided for in common law countries for breach of similar obligations by the seller, where the buyer could normally sue the seller only for damages.<sup>89</sup>

80. On the basis of the considerations referred to in paragraph 79 above, the representative of India suggested that the Working Group should consider whether the provisions in articles 54 and 55 could be improved.<sup>90</sup>

<sup>81</sup> *Ibid.*, para. 13.

<sup>82</sup> *Ibid.*, para. 14.

<sup>83</sup> *Ibid.*, para. 15.

<sup>84</sup> *Ibid.*, para. 16.

<sup>85</sup> Annex XV, para. 2.

<sup>86</sup> A/CN.9/11, p. 8 and A/CN.9/31, para. 123.

<sup>87</sup> A/7618, annex I, para. 41 and A/CN.9/31, para. 124.

<sup>88</sup> Annex XVI, para. 5.

<sup>89</sup> *Ibid.*, para. 9.

<sup>90</sup> *Ibid.*, para. 10.