

## I. INTERNATIONAL SALE OF GOODS

### I. Progress report of the Working Group on the International Sale of Goods on the work of its fifth session (Geneva, 21 January-1 February) (A/CN.9/87)\*

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#### 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 is currently composed of the following States members of the Commission: Austria, Brazil, France, Ghana, Hungary,

India, Japan, Kenya, Mexico, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and the United States of America.<sup>1</sup>

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the United

<sup>1</sup> The terms of two of the 14 members of the Working Group elected by the Commission at its second and fourth sessions, namely those of Iran and Tunisia, expired on 31 December 1973.

\* 14 March 1974.

Nations Commission on International Trade Law on its second session.<sup>2</sup>

3. The Working Group held its fifth session at the United Nations Office at Geneva from 21 January to 1 February 1974. All members of the Working Group were represented.

4. The session was also attended by observers for Bulgaria, the Federal Republic of Germany, Norway and the Philippines and by observers for the following international organizations: The Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the International Chamber of Commerce.

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

(a) Provisional agenda and annotations (A/CN.9/WG.2/L.1)

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

(d) Analysis of comments and proposals by representatives of States members of the Working Group relating to articles 71 to 101 of ULIS: note by the Secretary-General (A/CN.9/WG.2/WP.17)

(e) Text of comments and proposals by representatives of States members of the Working Group on articles 71 to 101 of ULIS (A/CN.9/WG.2/WP.17/Add.1)

(f) Comments of the representative of Hungary on article 74 of ULIS (A/CN.9/WG.2/WP.17/Add.2)

(g) Compilation of draft articles 1 to 59 to ULIS as approved by the Working Group at its first four sessions (A/CN.9/WG.2/WP.18)

(h) Issues presented by chapters IV to VI of the Uniform Law on the International Sale of Goods: report of the Secretary-General (A/CN.9/WG.2/WP.19).

6. The session of the Working Group was opened by the representative of the Secretary-General.

7. At its first meeting, held on 21 January 1974, the Working Group, by acclamation, elected the following officers:

Chairman . . . . M. Jorge Barrera-Graf (Mexico)

Rapporteur . . M. Gyula Eörsi (Hungary)

8. The Working Group adopted the following agenda:

1. Election of officers
2. Adoption of the agenda
3. Continuation of consideration of articles 58 to 70 of ULIS

4. Consideration of articles 71 to 101 of ULIS

5. Future work

6. Adoption of the report.

9. In the course of its deliberations, the Working Group set up drafting parties to which various articles were assigned.

<sup>2</sup> 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.

10. The text of articles 58-101 as adopted or as deferred for further consideration appears in annex I\* to this report. The texts of comments and proposals to representatives of members on articles 56 to 70 and on articles 71 to 101 ((A/CN.9/WG.2/WP.17/Add.1 and 2) appear as annexes II and III, respectively, and the report of the Secretary-General on issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19) as annex IV.

#### I. CONTINUATION OF CONSIDERATION OF ARTICLES 58 TO 70 OF ULIS

11. The Working Group at its fourth session, in addition to considering articles 18-55 of ULIS, commenced the consideration of articles 56-70. With respect to this second group of articles, the Working Group took action with respect to articles 56 and 57, and gave preliminary consideration to articles 58 and 59. Final action on these two articles was deferred until the present session.

#### CHAPTER IV. OBLIGATIONS OF THE BUYER SECTION I. PAYMENT OF THE PRICE

##### A. Fixing the price (continued)<sup>3</sup>

##### Article 58

12. 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."

13. At the fourth session of the Working Group some representatives proposed that the words "in case of doubt" should be replaced by the words "unless otherwise agreed by the parties".<sup>4</sup>

14. Several representatives opposed the above proposal on the grounds that under article 5 of the revised text the agreement of the parties always prevails over the provisions of the uniform law and, therefore, there was no need to repeat this general rule in specific articles. Some representatives expressed the view that the expression "in case of doubt" should be deleted on the ground that it is but another way to refer to contractual stipulation or usage and is therefore superfluous. Other representatives asserted that doubts might arise in respect of whether there was a contractual stipulation for the case regulated in article 58.

15. At the fourth session it was proposed that a paragraph be added to resolve doubts as to whether the price should be paid in the currency of the seller or of the buyer.<sup>5</sup>

16. The Working Group decided to adopt article 58 of ULIS without any changes.

\* Annexes I to IV are separately reproduced below in this chapter of the Yearbook, sections 2 to 5 respectively.

<sup>3</sup> The headings of the report referring to specific topics are the same as in ULIS. They have been added to facilitate reference to the various parts of the report.

<sup>4</sup> A/CN.9/75, para. 166; UNCITRAL Yearbook, Vol. IV: 1973, part two, I, A, 3.

<sup>5</sup> *Ibid.*, para. 169.

## B. Place and date of payment

## Article 59

17. 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."

18. The Working Group at its fourth session adopted this article without changes, and deferred consideration of a proposed additional paragraph pending submission of a revised draft by the representative concerned.<sup>6</sup> No such draft has been introduced.

19. With reference to the general rule of article 59 that payment shall be in the seller's country, one representative stated that sellers from developing countries sometimes preferred payment in the currency of third countries and quite frequently buyers in developing countries preferred to make payments for international purchases in their own countries. For this reason, it was suggested that the possibility of deviation from the general rule should be clearly expressed, and proposed the addition of the words "unless otherwise agreed" at the beginning of paragraph 1.

20. One representative suggested that in paragraph 2 of this article, after the expression "subsequent to the conclusion of the contract" the words "the risks or" should be inserted. The proposal was not supported by other representatives.

21. The Working Group decided to adopt article 59 of ULIS without any changes.

## Article 60

22. Article 60 of ULIS reads:

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

23. One representative suggested deletion of the words "without the need for any other formality". Another representative expressed the view that article 60 had been inserted in ULIS to avoid the application of national rules requiring the performance of certain formalities before the price is due, and therefore, without the above-quoted words, the whole article would lose its purpose.

24. Some representatives expressed doubts as to the necessity for this article. Other representatives, however, were of the opinion that retention of the article would be useful.

25. The Working Group decided to adopt article 60 of ULIS without any changes.

## New article 59 bis

26. The Secretary-General in his report on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19)<sup>7</sup> came to the conclusion that subsection I B (articles 59 and 60) of ULIS entitled "Place and date of payment" was incomplete. In this report it was noted that while article 59 included certain rules on the place of payment, subsection I B of ULIS made no adequate provision for the time for payment. More particularly, this subsection failed to deal with the relationship between the time and place for payment by the buyer and the seller's handing over of the goods in the normal case where the contract called for despatch of the goods. It was noted that answers to some of the problems could be found in articles 71 and 72 of ULIS, but that it was not easy for a user of ULIS to piece together these scattered provisions on payment, and that articles 71 and 72 presented problems of clarity and completeness.

27. In order to provide for a more unified presentation of rules on the place and date of payment, the above report suggested that subsection I B of ULIS should include an additional article, and suggested the following text which could replace or follow article 60:<sup>7</sup>

"1. The buyer shall pay the price when the seller, in accordance with the contract and the present law, hands over the goods or a document controlling possession of the goods.

"2. Where the contract involves carriage of goods, the seller may either:

"(a) By appropriate notice require that, prior to dispatch of the goods, the buyer at his election shall in the seller's country either pay the price in exchange for documents controlling disposition of the goods, or procure the establishment of an irrevocable letter of credit, in accordance with current commercial practice, assuring such payment; or

"(b) Dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity."

28. All representatives who spoke on this question agreed in principle with the Secretary-General's proposal that a single subsection of ULIS should deal with all aspects of the place and time of payment. However, several comments were made in respect of the terms and language of the suggested draft.

29. Several representatives expressed the view that the terminology of the proposed draft should be brought into line with that of article 20 by replacing the words "hand over the goods" by "deliver the goods" or "place the goods at the buyer's disposal" and that an appropriate single expression should be used for the description of the documents falling within the scope of this article. It was noted that the expres-

<sup>6</sup> *Ibid.*, para. 177.

<sup>7</sup> A/CN.9/WG.2/WP.19, paras. 11 and 21; see annex IV to this report, reproduced below in section 5.

sion "documents controlling possession of the goods" and "documents controlling disposition of the goods" used in the draft may be construed as referring to different types of documents. One representative noted that in common law terminology "entitlement to goods" would seem to be an appropriate expression.

30. As regards paragraph 1 of the draft, one observer noted that the incorporation of the provisions of articles 71 and 72 in the new draft resulted in the loss of the important provision that the seller could make payment a condition for handing over the goods. He therefore suggested that a sentence to this effect should be added to the text.

31. Most comments were directed towards paragraph 2 (a) of the draft. Several representatives considered that this paragraph should be merged with or immediately followed by article 69. One observer expressed the view that the provision in this subparagraph entitling the seller to require the buyer, at the buyer's election, to pay the price or to procure the establishment of an irrevocable letter of credit prior to dispatch of the goods was contrary to commercial usage, and stated that the cost of procuring a letter of credit might in fact prove an excessive burden on the buyer. On the other hand, one representative suggested that the seller should also be entitled to require, where appropriate, the procurement of a performance bond.

32. A few drafting changes were also proposed in respect of subparagraph 2 (a) of the draft. Thus, one representative suggested the replacement of the expression "in accordance with current commercial practice" by "in accordance with usage"; another representative proposed that after the words "of the goods" the following phrase should be inserted: "or procure such documents relating to payment as will satisfy the seller's requirement under the contract, or will conform to current commercial practice in the particular trade". One observer proposed the deletion of the words "in the seller's country".

33. One representative was of the opinion that paragraph 2 (a) should also contain a provision stating the buyer's obligation to open a letter of credit if required by the contract and the consequences should he fail to do so.

34. The Working Group set up a drafting party (Drafting Party II), composed of the representatives of France, Ghana, Japan, United Kingdom and the observers for Norway and the International Chamber of Commerce, and requested the Drafting Party, taking into consideration the comments and proposals made in the plenary, to redraft the suggested new article.

35. Drafting Party II submitted its proposal to the 13th meeting of the Working Group on 29 January 1974. On the basis of that proposal, the Working Group decided:

(a) To delete article 69 of ULIS and replace it by the following new article 56 *bis*:

"The buyer shall take steps which are necessary in accordance with the contract, with the laws and regulations in force or with usage, to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee".

(b) To include in the law the following new article 59 *bis*:

"1. The buyer shall pay the price when the seller, in accordance with the contract and the present Law, places at the buyer's disposal either the goods or a document controlling their disposition. The seller may make such payment a condition for handing over the goods or the document.

"2. Where the contract involves the carriage of goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

"3. The buyer shall not be bound to pay the price until he has had an opportunity to inspect the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity."

(c) To delete articles 71 and 72 of ULIS.

### C. Remedies for non-payment

#### Articles 61-64

36. Articles 61 to 64 of ULIS read as follows:

#### 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 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."

37. The Working Group at its fourth session decided to replace the separate sets of remedial provisions on the buyer's remedies for the seller's failure to perform his obligations by a consolidated set of such remedies in chapter III of ULIS. The Secretary-General in his report on issues presented by chapters IV to VI of ULIS (A/CN.9/WG.2/WP.19) came to the conclusion that the reasons for consolidating the remedial provisions in chapter III were also applicable to chapter IV.

38. As stated in the Secretary-General's report, several articles in chapter IV contain remedial provisions. Articles 61 to 64 provide for remedies for non-payment, articles 66-68<sup>8</sup> for failure of the buyer to take delivery or to make a specification and article 70<sup>9</sup> for failure of the buyer to fulfil any of his other obligations.

39. The Secretary-General suggested that the consolidated text of remedial provisions should follow the substantive provisions of chapter IV. The last such provision being article 69 of ULIS, and in view of the incorporation of articles 71 and 72 of ULIS in draft article 59 *bis*<sup>10</sup> the Secretary-General proposed that the new remedial articles should provisionally be numbered as articles [70] to [72 *bis*].<sup>11</sup>

40. The consolidated text as suggested by the Secretary-General in his report<sup>12</sup> reads as follows:

*Article [70]*

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

"(a) Exercise the rights provided in articles [71] to [72 *bis*]; and

"(b) Claim damages as provided in articles [82] and [83] or articles [84] to [87].

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

*Article [71]*

"The seller has the right to require the buyer 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 seller has acted inconsistently with that right by avoiding the contract under article [72 *bis*]."

<sup>8</sup> For text of these articles see paras. 71, 73 and 82 below.

<sup>9</sup> For text of article 70 see para. 86 below.

<sup>10</sup> See para. 35 (b) above.

<sup>11</sup> In order to avoid confusion of these articles with articles 70 to 72 of ULIS, in this report the numbers of articles [70] to [72 *bis*] suggested by the Secretary-General appear in square brackets.

<sup>12</sup> A/CN.9/WG.2/WP.19, para. 36; see annex IV to this report, reproduced below in section 5.

*Article [72]*

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

*Article [72 bis]*

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

"(a) Where the failure by the buyer 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 buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article [72].

"2. The seller shall lose his right to declare the contract avoided if he does not give notice thereof to the buyer within a reasonable time after the seller has discovered the failure by the buyer to perform or ought to have discovered it, or, where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article [72]."

*Article [70]*

41. The Working Group decided to adopt article [70] as proposed by the Secretary-General.

*Article [71]*

42. Several representatives expressed the opinion that the parallelism between this article and article 43 as adopted by the Working Group at its fourth session was inappropriate. It was emphasized that the main obligation of the buyer was to pay the price and restrictions in certain national laws on specific performance were not applicable to this obligation of the buyer. A number of representatives suggested that the law should clearly spell out that the above restrictions did not apply to the payment of the price.

43. One representative, supported by an observer, was of the view that the proposed language of article [71], and similarly that of article 43, was misleading because the provision restricting the seller's right to request performance was only set forth in the second phrase, as an exception. He, therefore, suggested that the article should clearly express that the seller has no right to request performance except if it is in conformity with the law of the court.

44. One observer held that the phrase "similar contracts of sale not governed by the Uniform Law" pointed to domestic contracts. He, therefore, suggested that the commentary should contain a clear statement to this effect. One representative supported this suggestion. Another representative suggested that the commentary should also take care of the modalities of payment.

45. Several representatives expressed the view that article 61, paragraph 2 of ULIS seemed to be superfluous on the grounds that it applied mainly to such types of trade which were governed by usage and under article 9 usages always prevail over the provisions of the law.

46. Several representatives and observers expressed views on whether the seller should be entitled to payment or damages in cases where the goods were duly offered or delivered and payment did not follow.

47. One delegate proposed that article [71] should contain a separate rule on payment and another on his obligations other than payment, as well as a provision to the effect that article [71] does not apply where the seller has avoided the contract.

48. The Working Group decided to set up a drafting party (Drafting Party III) composed of the representatives of Austria, Japan and the United States and the observer for ICC and requested the Drafting Party to prepare a revised text of article [71].

49. The Drafting Party submitted its proposal to the 13th meeting of the Working Group on 29 January 1974. The Working Group decided to adopt the proposal with slight modifications.

50. The article as adopted by the Working Group reads:

"1. If the buyer fails to pay the price, the seller may require the buyer to perform his obligation.

"2. If the buyer fails to take delivery or to perform any other obligation in accordance with the contract and the present law, the seller may require the buyer to perform 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 present law.

"3. The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article [72 *bis*]."

#### Article [72]

51. One observer suggested replacing the words "such performance" at the end of the first sentence by the expression "the performance of the contract".

52. The Working Group decided to adopt article [72] with the modification in paragraph 51 above. The article, as adopted reads:

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

#### Article [72] bis

53. One observer suggested that a new subparagraph (c) should be added to this article providing for the seller's right now contained in article 66, paragraph 1 of ULIS to avoid the contract "where the

buyer gives the seller good grounds for fearing that the buyer will not pay the price". This proposal was opposed by several representatives on the grounds that anticipatory breach was dealt with in other articles of ULIS.

54. Another observer noted that from the point of view of remedies distinction had to be made between cases where payment or delivery had already taken place and cases where payment or delivery had not yet taken place. In his view if the goods had not been delivered, the seller should be entitled to avoid the contract for non-payment without any further requirements; if, however, the goods had been delivered, the seller should have to give a reasonable time for payment before avoidance of the contract. In this connexion he expressed the view that it seemed to be unsound to copy the seller's obligations and apply them to the buyer.

55. One observer drew attention to his suggestion in annex VI of document A/CN.9/WG.2/WP.17/Add.1\* to include a new paragraph 2 in article 66 of ULIS providing that the seller should not have the right to claim the return of the goods for non-payment unless in the contract the seller had retained the "property or a security right in the goods" until the price has been paid.

56. One observer introduced a new version for article [72 *bis*] and drew attention to the importance of the doctrine of parallelism, in particular to parallelism between articles 44 and [72 *bis*]. He emphasized that remedies applicable in case of failure of the seller to deliver the goods were not necessarily applicable to failure of the buyer to pay the price. He noted that his proposal was based on a principle adopted by the Working Group at its first session as contained in paragraph 100 of document A/CN.9/35.\*\*

57. Another observer introduced an amendment to paragraph 2 of this article.

58. Several delegates expressed views on the above proposals and the possibility of their reconciliation with article [72 *bis*] suggested in the report of the Secretary-General.

59. The Working Group decided to defer final action on this article until its next session. At that session it will take into consideration the text suggested in the Secretary-General's report<sup>13</sup> and the proposals mentioned in paragraph 56 (proposal A) and 57 (proposal B) above. These latter proposals read:

#### Proposal A

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

"(a) Where the buyer has not paid the price or otherwise has not performed the contract within an additional period of time fixed by the seller in accordance with article 72; or

"(b) Where the goods have not yet been handed over, the failure by the buyer to pay the price or to perform any other of his obligations under the

\* Annex III to this report; see below, section 4.

\*\* UNCITRAL Yearbook, Vol. I: 1968-1970, part three, I, A, 2.

<sup>13</sup> For the text of this proposal see para. 40 above.

contract of sale and the present law amounts to a fundamental breach.

"2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly the seller shall where the goods have not yet been handed over, be deemed to have avoided the contract.

"3. The seller shall lose his right to declare the contract avoided if he does not give notice to the buyer before the price was paid or, where the goods have been handed over, promptly after the expiration of the period of time fixed by the seller in accordance with article [72]."

#### *Proposal B*

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

"(a) Where the buyer has not performed his obligations on time, after the seller has been informed that the price has been paid late or has been requested by the buyer to make his decision as regards performance or avoidance of the contract;

"(b) Where the seller has requested the buyer to perform, after the expiration of the period of time referred to in article [72];

"(c) In all other cases, after the seller has discovered the failure by the buyer to perform or ought to have discovered it. In any event, the seller shall lose his right to claim the return of delivered goods if he has not given notice thereof to the buyer within a period of 6 months [1 year] from the date on which the goods were handed over, unless the contract reserves the seller the property or a security right in the goods."

## SECTION II. TAKING DELIVERY

### *Article 65*

60. Article 65 of ULIS reads as follows:

"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."

61. Several representatives were of the opinion that this article should be retained without any change. Others, however, expressed the view that the present language of the article presented various problems which had to be resolved. Some representatives suggested the deletion of the article.

62. Most comments were directed towards the first phrase of this article providing that the concept of "taking delivery" also included the buyer's doing all such acts as were necessary in order to enable the seller to hand over the goods.

63. Most representatives who spoke on the issue agreed in principle with the above requirement but considered that the language of the article should be improved. Several representatives held that the word "necessary" was too vague and, therefore, it needed

qualification or replacement by a less ambiguous expression. One representative suggested the replacement of the word "necessary" by the phrase "required by the contract". One observer opposed this formulation on the grounds that the buyer's obligations were not limited to those "required by the contract", e.g., he had to give the seller access to his premises in cases where the seller was required to deliver the goods there.

64. It was also suggested that the word "necessary" should be replaced by the expression "can reasonably be expected". This proposal was supported by a number of delegations, subject to eventual drafting improvements.

65. Some representatives suggested that the article should not be drafted as a definition of the concept of "taking delivery" but rather as an express provision to the effect that it was the duty of the buyer to do all such acts as are necessary to enable the seller to effect delivery. One representative noted that article 56 required the buyer to "take delivery".

66. Several representatives expressed the view that the provisions of article 65 should be merged with article 56, while others suggested its merger with article 67. One observer thought that article 20 would be the proper place to provide for the buyer's obligation now contained in article 65.

67. The Working Group at its second meeting on 21 January 1974, established a drafting party (Drafting Party I) composed of the representatives of Austria, Hungary and the United States and the observer for the Federal Republic of Germany and requested the Drafting Party to prepare a revised draft of article 65.

68. The drafting party submitted its proposal for a revised text of article 65 to the fifth meeting of the Working Group on 23 January 1974. In this proposal the drafting party noted that article 20 of ULIS as revised by the Working Group providing for the seller's obligations as regards delivery did not contain obligations of the seller corresponding to those imposed on the buyer by article 65 of ULIS, and suggested that this question should be considered at the second reading of the draft.

69. Several representatives commented on the text submitted by the drafting party. It was observed that the attempt to draft article 65 as a definition of "taking delivery" raised technical difficulties, for example, where the buyer actually took over the goods but had failed to give the seller the required co-operation in connexion with delivery, the approach used in article 65 of ULIS would seem to say that the buyer had not "taken delivery" although he received (or even consumed) the goods. Consequently, it was decided that article 65 should be drafted as a statement of the buyer's obligation to take delivery.

70. The Working Group decided to adopt the following text for article 65:

"The buyers' obligation to take delivery consists in doing all such acts which could reasonably be expected of him in order to enable the seller to effect delivery, and also taking over the goods."

*Article 66*

71. Article 66 of ULIS reads:

"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."

72. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

*Article 67*

73. Article 67 of ULIS reads as follows:

"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."

74. The Secretary-General's report on issues presented by chapters IV to VI of ULIS noted that the remedial provision in this article was inconsistent with the remedial provisions in other articles of the Law, in that it provided for avoidance of the contract for any delay or failure to provide specifications without regard to whether this constituted a fundamental breach. The report suggested that in the interest of consistency, the expression "may declare the contract avoided, provided that he does so promptly" should be deleted from the text, so that delay or failure of the buyer to supply specifications would be subject to the general remedial provisions applicable to a breach of contract by the buyer.<sup>14</sup> It was suggested that the above expression should be replaced by the following phrase: "may have recourse to the remedies specified in articles [70] to [72 *bis*]."

75. The above proposal was supported by some representatives, while others doubted whether the general remedial provisions were well suited for the special cases covered by article 67.

76. One representative suggested the deletion of the article as it provided for a question of detail only. One observer and some representatives emphasized that the article dealt with problems of high practical importance.

77. Some representatives were of the opinion that avoidance of the contract as allowed by the general remedial provisions was too strong a remedy for the buyer's failure to provide specifications and suggested that the only remedy in such cases should be the transfer to the seller of the power to make specification, coupled, where appropriate, with compensation for damage. One representative, supported by an observer, proposed that, in addition to these remedies, avoidance of the contract should also be allowed. Another representative held the view that the law should not provide for compensation but should leave that question to interpretation.

78. One representative expressed the view that specification was only a right and not an obligation of the seller. Another representative suggested that it should be made clear that the buyer is obliged to make specifications if the contract so provides.

79. One representative suggested that the seller should be obliged to give notice before resorting to remedies.

80. One representative submitted that article 67, after appropriate modifications, should be moved to chapter V of ULIS.

81. The Working Group decided to adopt in principle the proposal mentioned at the end of paragraph 74 above and to defer final action on this proposal and on the whole article until a later session.

*Article 68*

82. Article 68 of ULIS reads:

"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."

83. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

## SECTION III. OTHER OBLIGATIONS OF THE BUYER

*Article 69*

84. Article 69 of ULIS reads:

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

<sup>14</sup> A/CN.9/WG.2/WP.19, para. 30; annex IV to this report; see below, section 5.

85. The Working Group decided to delete this article and replace it by a new article 56 *bis*.<sup>15</sup>

#### Article 70

86. Article 70 of ULIS reads as follows:

"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".

87. The Working Group decided to delete this article as the provisions thereof had been incorporated in the consolidated set of new remedial articles [70] to [72 *bis*].

## II. CONSIDERATION OF ARTICLES 71 TO 101 OF ULIS

### CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

#### SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

#### Articles 71-72

88. Articles 71 and 72 of ULIS read as follows:

##### Article 71

"Except as otherwise provided in article 72, delivery of the goods and payment of the price shall be concurrent conditions. Nevertheless, the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods."

##### Article 72

"1. Where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of article 19, effected by handing over the goods to the carrier, the seller may either postpone despatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. In the latter case, he may require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.

"2. Nevertheless, when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods."

89. The Working Group decided to delete these articles as the provisions thereof had been incorporated in article 59 *bis*.

<sup>15</sup> For text of the new article see para. 35, subpara. (a).

#### Article 73

90. Article 73 of ULIS reads as follows:

"1. Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations.

"2. If the seller has already despatched the goods before the economic situation of the buyer described in paragraph 1 of this article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.

"3. Nevertheless, the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods, unless the document contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the document, when he acquired it, knowingly acted to the detriment of the seller."

91. Prior to the present session Governments and representatives on the Working Group submitted several comments on this article. It was noted in these comments that the unilateral decision of the seller as to the economic situation of the buyer might have serious consequences for the buyer;<sup>16</sup> the suggestion was made that the buyer should be allowed to remedy the situation by providing assurances<sup>17</sup> and it was held that the provisions of this article imposing obligations upon the carrier conflicted with those of municipal and international law concerning the carriage of goods.<sup>18</sup>

92. The Secretary-General in his report on issues presented by chapters IV-VI of ULIS (A/CN.9/WG.2/WP.19), based on the above comments and the considerations contained in paragraphs 48 to 61 of that report, suggested the following modifications:

(a) A new paragraph 1 *bis* should be inserted in the article to read as follows:

"A party suspending performance shall promptly notify the other party thereof and shall continue with performance if the other party, by guarantee, documentary credit or otherwise, provides adequate assurance of his performance. On failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract."

(b) At the end of paragraph 2 the following new sentence should be added:

"The foregoing provision relates only to the rights in the goods as between the buyer and the seller [and does not affect the obligations of carriers and other persons]".

(c) Paragraph 3 of the article should be deleted.

<sup>16</sup> A/CN.9/WG.2/WP.17, para. 11.

<sup>17</sup> *Ibid.*, paras. 12 and 14.

<sup>18</sup> *Ibid.*, para. 13.

93. In respect of paragraph 1 of the article there was general agreement in the Working Group that the expression "the economic situation of the other party appears to have become so difficult" was too subjective and vague and, therefore, it should be replaced by a more objective and precise one. One representative expressed the view that as a matter of policy the right to a unilateral suspension might lead to arbitrary actions to the serious detriment of the buyer. One representative proposed the phrase "reasonable grounds for belief that a material part of performance will not be given when due". Another representative supported this proposal with the modification, however, that the words "for belief" should be replaced by "to conclude". One observer suggested the replacement of the expression "reasonable grounds" in the proposed text by a more unambiguous form.

94. Some representatives expressed the view that article 73 should be made to apply only in cases where credit had been extended and the terms of this credit were not observed. One representative suggested that the article be limited in scope to cases of bankruptcy and insolvency, and added that paragraph 2 would not be operative because the draft could not have any effect on carriers. It was suggested by one delegate that in many countries there was no reliable information on insolvency of companies and by another that the yearly balances were issued too late to provide for up-to-date information on the financial situation of the companies. Another representative held that the grounds for suspension of performance should be derived from the conduct of the defaulting party during performance. One observer noted his disagreement with all these proposals and another representative suggested that the article should only apply in case of a serious deterioration of the financial situation of the buyer.

95. The Working Group agreed in principle that a provision in line with paragraph 1 *bis* suggested by the Secretary-General (see paragraph 92 above) should be inserted in the article. However, several comments were made as to the content and language of such a provision.

96. One representative suggested that a provision should be inserted in paragraph 1 to the effect that the guarantee of performance must be satisfactory or even accepted by the other party. Another representative was of the opinion that the text should also call for disclosure by the seller of his reasons for suspending performance. Still another representative suggested that the additional costs incurred by the buyer in securing the guarantee should be borne by the seller. This latter proposal was supported by one observer and opposed by another.

97. One observer suggested that the law should also allow the seller to claim a less drastic remedy than avoidance of the contract in addition to his suspension of performance of his obligations under the contract.

98. One representative proposed that the expression "documentary credit" in paragraph 1 *bis* should be replaced by the expression "letter of credit". Another drafting proposal suggested the insertion after "a party suspending performance" at the beginning of the paragraph of the expression "or preventing the handing over of goods".

99. In connexion with paragraph 2 one representative pointed out that the law in most countries allowed a seller to stop goods in transit only in clearly specified cases and suggested that the Uniform Law should also spell out the particular situation in which article 73 would be applicable.

100. One representative and one observer held that the deletion of paragraph 3 of article 73 as suggested in the report of the Secretary-General would leave third parties without any recourse and suggested that this paragraph should therefore be retained.

101. The Working Group requested the drafting party set up for consideration of article 75, paragraph 2 (Drafting Party IV),<sup>19</sup> in view of the interrelation between articles 73 and 75, also to consider article 73 and prepare a revised draft thereof. The drafting party submitted to the Working Group at its 13th meeting a revised text of article 73. Many representatives and observers made comments on this draft and submitted proposals both on the substance and the language of the proposed text. In view of these comments and proposals, the Working Group requested Drafting Party IV to reconsider the draft it had recommended and to submit a revised version thereof.

102. Drafting Party IV submitted its revised draft of article 73 to the 15th meeting of the Working Group on 30 January 1974.

103. One representative expressed the view that there was a discrepancy between the proposed text and article 76 because the protection provided by the former was too narrow while that provided by the latter was too broad. The combined effect of these two articles was to force the parties to avoid the contract rather than to rely on the less drastic remedy of suspension of performance.

104. One observer pointed out that under paragraph 1 of the article the deterioration of the economic situation of a party could only be taken into consideration if this occurred or became known to the other party after the conclusion of the contract. He further noted that paragraph 3 was intended to cover also substantial delay in performance.

105. The representatives of Brazil, Ghana, Hungary and Kenya did not object to the adoption of this article, as suggested by the drafting party, but reserved the right to suggest modification of the text at a later session.

106. The Working Group decided to adopt article 73 as suggested by Drafting Party IV and noted the reservations mentioned in paragraph 105 above. The text of article 73 as adopted by the Working Group reads as follows:

"1. A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the economic situation of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

"2. If the seller has already dispatched the goods before the grounds described in paragraph 1 become evident, he may prevent the handing over of the goods to the buyer even if the latter holds a docu-

<sup>19</sup> See para. 121 below.

ment which entitles him to obtain them. The provision of the present paragraph relates only to the rights in the goods as between the buyer and the seller.

"3. A party suspending performance, whether before or after dispatch of the goods, shall promptly notify the other party thereof, and shall continue with performance if the other party provides adequate assurance of his performance. On the failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract."

## SECTION II. EXEMPTIONS

### Article 74

107. Article 74 of ULIS reads as follows:

"1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.

"2. Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

"3. The relief provided by this article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present law or deprive the other party of any right which he has under the present law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible."

108. Studies submitted by members of the Working Group analysed the above article from the point of view of drafting and of substance.<sup>20</sup> As to substance, the central objection was that under paragraph 1 a party could be too readily excused from performing his contract. Thus, grounds for such excuse were not limited to physical or legal impossibility, or to circumstances where performance had been radically changed, but might extend to situations in which performance had become unexpectedly onerous; one commentary had envisaged the possibility that a seller might claim exemption under article 74 on the ground of an unforeseen rise in prices. Included in the studies were proposals for the redrafting of article 74 designed to narrow the grounds for excuse, and to clarify the relationship among the three paragraphs of the article. In discussing these proposals, several representatives supported the above objectives: i.e. to narrow the

grounds for exoneration and to make them more objective. In this connexion it was noted that it was important that exoneration should only be available on the occurrence of an objective obstacle or impediment.

109. Some representatives suggested that the central issue was the allocation of risks from unforeseen events, and suggested that the redraft of article 74 should refer to the risk factor. Others stated that while this was a correct analysis of the underlying problem, it would be difficult to draft explicitly in terms of risk allocation.

110. One representative and one observer suggested that the article should be drafted in terms of whether the party claiming exoneration had been at fault in failing to perform; others indicated that in their view the principle of fault should be used in the draft but this principle could come into play only following the occurrence of a serious event creating an impediment or obstacle to performance.

111. One observer suggested that a party who wished to be relieved of his liability for non-performance should have a duty to notify the other party. Another observer noted that in redrafting the provision it should be made clear that the exemption should be limited to liability for damages; the obligation to pay the price should not be excused.

112. One observer emphasized that article 74 could possibly be invoked in cases where damages were due to hidden defect in the goods sold. However, such interpretation would lead to a considerable extension of the causes of exemption which, in this particular field, were dealt with by the majority of the legal systems in a very restricted way. He, therefore, came to the conclusion that it would be appropriate to have a provision indicating clearly that article 74 would not be applicable in the case of damages caused by hidden defect in the goods.

113. The Working Group set up a drafting party (Drafting Party V) composed of the representatives of Ghana, Hungary, the United Kingdom and the USSR and the observer for Norway and requested the drafting party to prepare a revised draft of article 74.

114. Drafting Party V informed the Working Group at its 16th meeting on 30 January 1974 that it had not been able to agree on a final draft. It considered that further study would have to be made of the circumstances in which either party may declare the contract avoided (a matter which was partially covered by article 74, paragraph 3 of ULIS) and of the consequences which should follow from such avoidance. It suggested, however, that the draft provisionally adopted by the drafting party and an alternative proposal submitted by an observer should be included in the report to facilitate later consideration of this article.

115. The Working Group decided to record the text provisionally adopted by Drafting Party V and the alternative proposal submitted by an observer. The texts of these proposals read:

#### A. Text of article 74 provisionally adopted by Drafting Party V

"1. Where a party has not performed one of his obligations in accordance with the contract and the

<sup>20</sup> See sections I and X of annex III to this report, reproduced below in section 4.

present law, he shall not be liable in damages for such non-performance if he proves that, owing to circumstances which have occurred without fault on his part, performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract. For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account, or to avoid or to overcome the circumstances.

"2. Where the non-performance of the seller is due to non-performance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would also be exempt if the provisions of that paragraph were applied to him.

"3. Where the impossibility of performance within the provisions of paragraph 1 of this article is only temporary, the exemption provided by this article shall cease to be available to the non-performing party when the impossibility is removed, unless the performance required has then so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract.

"4. The non-performing party shall notify the other party of the existence of the circumstances which affect his performance within the provisions of the preceding paragraphs and the extent to which they affect it. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the circumstances, he shall be liable for the damage resulting from such failure."

#### B. *Alternative proposal*

"1. Where a party has not performed one of his obligations [in accordance with the contract and the present law], he shall not be liable [in damages] for such non-performance if he proves that it was due to an impediment [which has occurred without any fault on his side and being] of a kind which could not reasonably be expected to be taken into account at the time of the conclusion of the contract or to be avoided or overcome thereafter.

"2. Where the circumstances which gave rise to the non-performance constitute only a temporary impediment, the exemption shall apply only to the necessary delay in performance. Nevertheless, the party concerned shall be permanently relieved of his obligation if, when the impediment is removed, performance would, by reason of the delay, be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

"3. The non-performing party shall notify the other party of the existence of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the existence of the impediment, he shall be liable for the damage resulting from this failure.

"4. The exemption provided by this article for one of the parties shall not deprive the other party of any right which he has under the present law to

declare the contract avoided or to reduce the price, unless the impediment which gave rise to the exemption of the first party was caused by the act of the other party [or of some person for whose conduct he was responsible]."

### SECTION III. SUPPLEMENTARY RULES CONCERNING THE AVOIDANCE OF THE CONTRACT

#### Article 75

116. Article 75 of ULIS reads:

"1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear failure of performance in respect of future instalments, he may declare the contract avoided for the future, provided he does so promptly.

"2. The buyer may also, provided that he does so promptly, declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their independence such deliveries would be worthless to him."

117. One representative drew attention to his comments in section I of document A/CN.9/WG.2/WP.17/Add.1\* suggesting that in order to bring this article into conformity with the provisions on fundamental breach, the expression "failure of performance" should be replaced by the expression "a fundamental breach". Another representative noted that the provision allowing avoidance of the contract only if avoidance is done "promptly" was not in conformity with the general remedial provision on avoidance as suggested by the Secretary-General in article [72 *bis*] which allowed avoidance "within a reasonable time". The same representative noted that paragraph 1 of article 75 might be irrelevant in view of the provisions contained in article [72 *bis*].

118. As regards paragraph 2 of article 75 several representatives were of the opinion that an objective test was needed to determine the situation when the contract could be avoided in respect of future instalments. The test of worthlessness of goods to the buyer was considered to be too subjective and also too strict: even highly defective goods might not be worthless. One representative recalled his proposal in section II of document A/CN.9/WG.2/WP.17/Add.1\* that the expression at the end of the paragraph "such deliveries would be worthless to him" should be replaced by the phrase "the value of such deliveries to him would be substantially impaired". Some representatives supported this modification; others thought that the original version of ULIS was preferable. In order to make the text more objective, one representative suggested that the words "to him" be replaced by the phrase "to a reasonable person in the buyer's position".

119. One observer drew attention to the difference in the English and French versions of this paragraph. The English version reads "such deliveries would be worthless to him" while the French text talks of "ces livraisons n'ont pas d'intérêt pour lui". The same ob-

\* Annex III to this report, reproduced below in section 4.

server suggested that the approach found in the French version should be the basis for the new formulation. One representative suggested that the expression "such deliveries should not serve the purpose for which they were required" should be used. Another proposal favoured the phrase "such deliveries would not serve their normal purpose". This latter proposal, however, was objected to by several representatives.

120. One representative expressed the opinion that the reference in paragraph 2 to future deliveries might cause confusion because such deliveries were dealt with in paragraph 1 of the article. In his view, therefore, paragraph 2 should be confined to past deliveries.

121. The Working Group set up a drafting party (Drafting Party IV) composed of the representatives of France, Ghana, India, Japan and the United States and the observer for the ICC and requested the Drafting Party to prepare a revised draft of article 75. Drafting Party IV submitted its proposal to the Working Group at its 13th meeting on 29 January 1974 (see paragraph 126 below).

122. One representative expressed the view that there was little or no practical difference between the suggested text of article 75 incorporating the concept of fundamental breach and article 76 and, therefore, one of them seemed to be superfluous. Another representative, however, was of the opinion that these articles provided for different situations.

123. One observer suggested that the phrase "of any given delivery or" should be inserted in paragraph 2 before the words "of future deliveries" and that the expression "or serve any other reasonable purpose for the buyer" be added to the end of this paragraph. The former proposal was supported by another representative and both proposals objected to by several other representatives.

124. Some representatives pointed out that other articles of the law as revised by the Working Group provided for the right of the interested party to avoid the contract within a reasonable time and held that there was no reason for providing in this article for the exercise of the right of avoidance "promptly".

125. One observer suggested that paragraphs 1 and 2 should be merged by connecting them with a sentence commencing "He may at that time also declare the contract avoided in respect of ...".

126. The Working Group decided to adopt article 75 as suggested by the Drafting Party with a slight modification relating to the word "promptly". The text as adopted reads:

"1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

"2. A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the time, declare the contract avoided in respect of deliveries already made, if by reason of

their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract."

127. The Working Group further decided that articles 73, 75 and 76 should comprise a new section I within chapter III of the Law, entitled "Anticipatory breach" and that the provisions providing for exemptions (article 74 of ULIS) should follow that section.

#### Article 76

128. Article 76 of ULIS reads as follows:

"Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided."

129. The Working Group agreed to delete the word "fixed" in the first line of the article in accordance with the suggestion contained in paragraph 29 of document A/CN.9/WG.2/WP.17.

130. The above document also contained a proposal (paragraph 31) to revert to the 1956 wording of this article. That version provided that a party could declare the contract avoided if the other party "so conducts himself as to disclose an intention to commit a fundamental breach of contract". This proposal was supported by one representative who referred to the doctrine of repudiation and held that an anticipatory breach could never be safely assured unless an intention to this effect was disclosed. Having regard to rapidly improving technology and communication systems, there was some merit in restricting the scope of the article as proposed in paragraph 31 of A/CN.9/WG.2/WP.17. This proposal was opposed by several representatives.

131. Some representatives and an observer saw no difference between the case where future breach of contract would be a result of repudiation and where it would be due to another reason, as for instance the burning down of the manufacturer's workshop. One representative pointed out that a great majority of the States attending the 1964 Hague Conference voted for the elimination of the concept of intention from the text. However, he thought that article 76 should be confined to the conduct of the parties and suggested that the expression "from the conduct of the parties" should be inserted after the word "clear". This proposal was objected to by a number of representatives on the grounds that it would narrow the scope of the article. An observer proposed that the insertion should read: "from the conduct or situation of one of the parties, or the conditions on which his performance is dependent".

132. Several representatives expressed their views on the usefulness of merging articles 76 and 48 of ULIS and on the text proposed to this effect by one of the representatives.<sup>21</sup> While some representatives agreed in principle with such a merger, one observer noted that he preferred to keep these articles separate.

133. One observer suggested that article 76 should contain a provision whereby a guarantee or adequate assurance of performance would prevent a declaration

<sup>21</sup> A/CN.9/WG.2/WP.17, para. 33.

of avoidance. Some representatives who commented on this proposal expressed their disagreement therewith.

134. The Working Group decided to adopt article 76 of ULIS with the change mentioned in paragraph 129 above. The article as adopted reads:

"Where prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided."

#### Article 77

135. Article 77 of ULIS reads:

"Where the contract has been avoided under article 75 or article 76, the party declaring the contract avoided may claim damages in accordance with articles 84 to 87."

136. It was observed that this article repeated a rule that had already been established under the basic rules on remedies approved by the Working Group.

137. The Working Group decided to delete this article. It also noted that at its fourth session consideration of article 48 had been deferred pending action on articles 75 to 77. The Working Group decided to delete article 48.

#### Article 78

138. Article 78 of ULIS reads as follows:

"1. Avoidance of the contract releases both parties from their obligation thereunder, subject to any damages which may be due.

"2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently."

139. One observer suggested that the right of the seller to claim the return of the goods should be restricted to cases where he had specifically reserved such right in the contract and even in such cases he should lose that right after the lapse of a certain period. Another observer supported the idea that the seller should only be allowed to claim return of the goods within a certain period but raised the question whether return of the goods could also be claimed where the buyer had gone into bankruptcy or where the goods had been incorporated into his property.

140. Several representatives disagreed with the above proposals. It was held that the party who had fulfilled his obligation should in principle be able to claim the return of whatever he had supplied. This would not apply if the goods had been incorporated in other property or where the buyer went into bankruptcy; in the latter case the national law of the buyer would apply.

141. One representative expressed concern about the solution in this article, according to which in cases where one of the parties avoided the contract that had been partly performed either party could have the right to treat the performance as interdependent and claim restitution without any limitation. He considered that

the solution in the United States Uniform Commercial Code, under which there was a presumption of divisibility, was better.

142. Another representative pointed out that there was some inconsistency between the provisions of the article and those of article 74. Paragraph 1 of this article provided that avoidance released both parties from their obligations "subject to any damage which may be due", while article 74 exempted the party from liability for damages.

143. One representative introduced the following proposal with the request that it should be considered at a later session of the Working Group:

"1. Where the contract is avoided for a fundamental breach which is not excused under article 74, the avoiding party is released from all of his obligations under the contract and may claim damages in accordance with article . . .

"2. Where the avoiding party has performed in whole or in part and has not avoided that part of the contract which has been performed, he may require the other party to perform his obligation with regard to that part. If that part of the contract has been avoided, the avoiding party may claim the return of what was supplied or paid. In either case, the avoiding party may claim damages for breach of the unperformed part in accordance with articles . . .

"3. If the party in breach has, at the time of avoidance, performed part of his obligation, he may claim as restitution the value of that part of the performance to the extent that such value exceeds any claims for performance, damages or restitution established by the other party."

144. The Working Group decided to defer final action on this article until its next session.

#### Article 79

145. Article 79 of ULIS reads as follows:

"1. The buyer shall lose his right to declare the contract avoided where it is impossible for him to return the goods in the condition in which he received them.

"2. Nevertheless, the buyer may declare the contract avoided:

"(a) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

"(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

"(c) If part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered;

"(d) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

"(e) If the deterioration or transformation of the goods is unimportant."

146. The Working Group agreed to adopt the proposals contained in paragraph 41 of document A/CN.9/WG.2/WP.17, that the phrase "or to require the seller to deliver substitute goods" be inserted after the words "avoided" in paragraph 1 of the article, and that the introductory phrase in paragraph 2 should be redrafted to read: "Nevertheless the preceding paragraph shall not apply:". The Working Group also agreed to insert the words "have been sold in the normal course of business or" after the introductory words "if part of the goods" in subparagraph 2 (c) and to add to the end of this subparagraph the phrase "or ought to have been discovered".

147. One representative drew attention to the proposal contained in paragraph 45 of document A/CN.9/WG.2/WP.17. However, the proposal was opposed by some delegates who held that it did not cover cases in which goods had perished or deteriorated because of their own nature. It was proposed that this difficulty could be solved by adding to the end of the subparagraph the words "or is due to the nature of the goods"; however, this proposal was opposed on the ground that the addition would make the exception too broad. It was stated that subparagraph 2 (d) to which the proposal related provided for cases where a defect was present in the goods at the time of their handing over and in such cases the buyer's right of avoidance should be presumed regardless of the fact that the goods might have perished before discovery of the defect.

148. Several representatives suggested that the difference between the proposed language and paragraph 1 of the article might create confusion; because of this and other reasons mentioned above, subparagraph (d) should be retained without any change. The representative of France reserved his country's position on subparagraph 2 (d) until final adoption of chapter VI on passing of the risk.

149. One representative suggested deletion of subparagraph (e) in line with the Working Group's decision to eliminate from article 33 the former paragraph 2. This proposal was supported by another representative and opposed by some observers.

150. The Working Group decided to adopt article 79 as follows:

"1. The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods in the condition in which he received them.

"2. Nevertheless the preceding paragraph shall not apply:

"(a) If the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;

"(b) If the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in article 38;

"(c) If part of the goods have been sold in the normal course of business or have been consumed or transferred by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered;

"(d) If the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;

"(e) If the deterioration or transformation of the goods is unimportant."

151. One representative suggested that since article 79 deals with a problem unique to the buyer, at the second reading of the Law the Working Group should place this article in chapter III. He further suggested that the Working Group at the same time should consider redrafting article 79 to read as follows:

"1. Where the buyer has taken over all or part of the goods called for under the contract and subsequently discovers a non-conformity that would justify avoidance, the buyer shall lose his right to avoid that part of the contract where it is impossible for him to return the goods in the condition in which he received them."

2. To read as the text of paragraph 70 (2) adopted by the Working Group in paragraph 146 above.

3. To read as Article 80 of ULIS.

#### Article 80

152. Article 80 of ULIS reads as follows:

"The buyer who has lost the right to declare the contract avoided by virtue of article 79 shall retain all the other rights conferred on him by the present law."

153. Several opinions were expressed as to the need for this article.

154. The Working Group decided to retain this article with the addition mentioned in paragraph 50 of document A/CN.9/WG.2/WP.17. The article as adopted reads:

"The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 79 shall retain all the other rights conferred on him by the present law."

#### Article 81

155. Article 81 of ULIS reads as follows:

"1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 83, as from the date of payment.

"2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

"(a) Where he is under an obligation to return the goods or part of them, or

"(b) Where it is impossible for him to return the goods or part of them, but the contract is nevertheless avoided."

156. The Working Group decided to adopt this article with the modification mentioned in paragraph 54 of document A/CN.9/WG.2/WP.17. The article as adopted reads:

"1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by article 83, as from the date of payment.

"2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:

"(a) Where he is under an obligation to return the goods or part of them; or

"(b) Where it is impossible for him to return the goods or part of them, but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods."

#### SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

##### Article 82

157. Article 82 of ULIS reads as follows:

"Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract."

158. The discussion on this article was focused on the draft text contained in paragraph 57 of document A/CN.9/WG.2/WP.17. Most representatives and observers who spoke on the issue supported the proposal, some with certain modifications.

159. Several representatives held that the restriction, in both ULIS and the proposed text, of the amount of damages which could be claimed for breach of contract was not an equitable solution in all situations. However, most speakers agreed that some restriction on consequential damages was necessary. The views which were expressed differed as to whether the principle of foreseeability contained both in ULIS and the proposed text was sufficiently objective.

160. One representative suggested the deletion of the second paragraph of the draft proposal.

161. One representative recalled the comments contained in paragraph 58 of document A/CN.9/WG.2/WP.17 concerning the French text of this article. One observer noted that the omission of any reference to loss of profit might cause doubts in the English text as well.

162. The Working Group decided to set up a drafting party (Drafting Party VI) composed of the representatives of France, Hungary, India, Japan, Mexico and the USSR and the observer for Norway and requested the Drafting Party to prepare a revised draft of this article.

163. Drafting Party VI submitted its proposal to the Working Group at its 16th meeting on 31 January 1974.

164. The representatives of Brazil and the USSR expressed the opinion that restriction on damages contained in the second sentence of the draft proposal was

not necessary and reserved their rights to return to this question at a later stage.

165. The Working Group took note of the reservations in paragraph 164 above and decided to adopt the text proposed by Drafting Party VI. The text as adopted reads:

"Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages shall not exceed the loss which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of contract."

##### Article 83

166. Article 83 of ULIS reads as follows:

"Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1 per cent."

167. The Working Group after consideration of the proposals in paragraph 61 of document A/CN.9/WG.2/WP.17 decided to adopt article 83 without any change.

##### Article 84

168. Article 84 of ULIS reads as follows:

"1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

"2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing in the market in which the transaction took place or, if there is no such current price or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

169. Most representatives and observers who spoke on this article concentrated their comments on the method of assessment of damages. Several representatives expressed the view that the defaulting party should compensate for the loss actually sustained by the other party and thus put the injured party in the position that he would have been in had the contract been duly performed, irrespective of whether in such a case compensation would be higher than if calculated on the basis provided for in article 89. It was pointed out that under article 86, which referred to loss of profit, the injured party may also claim compensation caused by the breach of the contract.

170. The proposal contained in paragraph 63 of document A/CN.9/WG.2/WP.17, suggesting that the reference in paragraph 1 of article 84 to the date "on which the contract is avoided" should be replaced

by a reference to the date "on which delivery took place or should have taken place", was supported by a number of representatives. It was pointed out that this language eliminated the possibility of speculation while the present language of ULIS opened the door thereto because the injured party was free to avoid the contract on a date when market conditions were most favourable for him.

171. Several representatives supported the present solution in ULIS while others proposed different formulations. Several representatives suggested that article 84 should be worded in such a way as to show clearly that the aggrieved party had the option to rely either on this article or on article 82. One representative, supported by another, suggested that distinction should be made between cases where avoidance occurred before the date agreed for delivery and those where avoidance occurred after that date. Another representative proposed the assessment of damage on the basis of the "current price on the date on which damages were actually paid".

172. One representative noted that the expression "current price" in the text may lead to some problems of interpretation in respect of goods which were not quoted on the market.

173. One representative expressed the view that the purpose of this article was to set forth guidelines for the amount of damage. This view was opposed by an observer who held that the article contained substantive provisions as to the maximum amount of damages.

174. The Working Group decided to set up a drafting party (Drafting Party VII) composed of the representatives of Austria, Brazil, Japan and the United States and requested the Drafting Party to prepare a draft of this article.

175. Drafting Party VII submitted its proposal to the 15th meeting of the Working Group on 30 January 1974.

176. The Working Group decided to adopt the text proposed by the Drafting Party with a minor modification suggested by some representatives. The text as adopted reads:

"1. In case of avoidance of the contract, the party claiming damages may rely upon the provision of article 82 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

"2. In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

#### Article 85

177. Article 85 of ULIS reads as follows:

"If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract

price and the price paid for the goods bought in replacement or that obtained by the resale."

178. One representative, supported by others, suggested that it was important that this article should provide not only for the manner in which the replacement or resale of the goods should be effected but also for the time within which such act had to take place. He therefore suggested the addition at the end of the article of the expression "if the resale or replacement occurred in a reasonable manner and within a reasonable time after avoidance".

179. Some representatives expressed the view that article 85 was not necessary and should be deleted because application of other articles containing general rules on damages to the special cases dealt with in this article would lead to the same result as provided for in article 85. The deletion of this article, however, was objected to on the basis that the provisions contained therein were of an important practical nature and eliminated the need to go through a difficult construction of interpretation of other articles to arrive at the same solution.

180. Several representatives pointed out the close relationship between articles 82 to 89 and suggested that these articles be considered in conjunction.

181. The Working Group requested the Drafting Party set up for consideration of article 84,<sup>22</sup> in view of the comments and proposals of representatives on this article, to prepare a draft on article 85.

182. Drafting Party VII submitted its proposal to the Working Group at its 15th meeting on 30 January 1974. The Working Group decided to adopt the text submitted by the Drafting Party with a minor modification. The text as adopted reads:

"If the contract is avoided and, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, he may, instead of claiming damages under articles 82 or 84, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale."

#### Article 86

183. Article 86 of ULIS reads as follows:

"The damages referred to in articles 84 and 85 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract, in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract."

184. Several representatives suggested deletion of this article on the grounds that the revised text of article 82 made article 86 unnecessary.

185. The Working Group decided to delete this article.

<sup>22</sup> See para. 174 above.

*Article 87*

186. Article 87 of ULIS reads as follows:

"If there is no current price for the goods, damages shall be calculated on the same basis as that provided in article 82."

187. The Working Group decided to delete this article.

*Article 88*

188. Article 88 of ULIS reads as follows:

"The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages."

189. One representative suggested the deletion of this article; others, however, were of the opinion that the article served a useful purpose and that it should be retained.

190. Several drafting proposals were submitted. It was suggested that it was the judge who had to decide what measures the injured party could be expected to take in order to mitigate the damages and, therefore, the word "all" before the expression "reasonable measures" should be deleted. Another proposal which received considerable support called for replacement of the expression "all reasonable measures" by the phrase "such measures as may be reasonable in the circumstances". A further proposal suggested that if reference to "loss" was retained then the words "including loss of profit" should be inserted in the text. Finally, it was suggested that the phrase "in the amount of loss which could have been reasonably avoided" should be added to the end of the article.

191. The Working Group requested the Drafting Party originally set up for consideration of article 84 (Drafting Party VII)<sup>23</sup> to consider also article 88 and to prepare a draft text thereof.

192. Drafting Party VII submitted its proposal to the Working Group at its 15th meeting on 30 January 1974 (see paragraph 194 below).

193. One representative commenting on the text submitted by the Drafting Party suggested that the phrase "reduction in the damages in the amount which . . ." in the draft should be replaced by the words "reduction in the amount of damages which . . .".

194. The Working Group decided to adopt the draft as submitted by Drafting Party VII. The text as adopted reads:

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

*Article 89*

195. Article 89 of ULIS reads as follows:

"In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law."

<sup>23</sup> See para. 174 above.

196. Several comments were made as to the need for this article. Those who preferred its deletion noted that national law would apply even in the absence of this article. The view was also expressed that in case of deletion of this article an express provision would have to be included in the Law that the provisions of the Law were without prejudice to the effect of national law in cases of fraud.

197. Several representatives expressed their agreement with the substance of the proposal contained in paragraph 73 of document A/CN.9/WG.2/WP.17. One representative pointed out that this proposal would in practice raise the question of contract validity which was outside the scope of the Law. He noted further that fraud and contract validity were matters of public policy regulated by mandatory provisions of national law.

198. The Working Group decided to retain article 89 of ULIS without any change.

199. On the basis of a proposal by an observer, the Working Group further decided to delete the subtitles in chapter V, section IV of ULIS.

## SECTION V. EXPENSES

*Article 90*

200. Article 90 of ULIS reads as follows:

"The expenses of delivery shall be borne by the seller; all expenses after delivery shall be borne by the buyer."

201. After a discussion on the need for this article and its relation with usages of international trade the Working Group decided to delete this article.

## SECTION VI. PRESERVATION OF THE GOODS

*Article 91-95*

202. Articles 91 to 95 of ULIS read as follows:

*Article 91*

"Where the buyer is in delay in taking delivery of the goods or in paying the price, the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer."

*Article 92*

"1. Where the goods have been received by the buyer, he shall take reasonable steps to preserve them if he intends to reject them; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the seller.

"2. Where goods despatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination."

*Article 93*

"The party who is under an obligation to take steps to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable."

*Article 94*

"1. The party who, in the cases to which articles 91 and 92 apply, is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.

"2. The party selling the goods shall have the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them and shall transmit the balance to the other party."

*Article 95*

"Where, in the cases to which articles 91 and 92 apply, the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with article 94."

203. In respect of article 91 one representative expressed the view that this article was only useful in cases where property had passed before delivery.

204. Another representative noted that the notion of right to reject in article 92 was not defined and not previously used in the Law.

205. The Working Group decided to adopt articles 91-95 of ULIS without any change.

## CHAPTER VI. PASSING OF THE RISK

206. Chapter VI of ULIS: Passing of the risk (articles 96-101) was considered by the Working Group in three steps: (1) the introductory provision contained in article 96; (2) a group of three interconnected substantive articles (articles 97-99); (3) two concluding articles (articles 100-101).

*Article 96*

207. Article 96 of ULIS reads as follows:

"Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible."

208. Consideration was given to whether this article should be retained or whether it should be omitted as unnecessary.

209. On the one hand, it was suggested that the provision that when the risk has passed to the buyer he shall pay the price "notwithstanding the loss or deterioration of the goods", stated an obvious consequence of the passing of risk, and was unnecessary. Attention was directed to article 35 as approved by the Working

Group. It was further indicated that the article appeared to state a definition of risk of loss, but was inadequate for that purpose.

210. On the other hand, it was stated that although the rule of article 96 might be obvious to lawyers who had worked with the Uniform Law, a statement of this rule in chapter VI could be helpful to others. Most representatives were of the view that article 96 should be retained. One representative suggested that this article should be placed after articles 97-99.

211. A question was raised concerning the retention of the concluding phrase of the article, dealing with loss or deterioration which was due to an act of the seller "or some other person for whose conduct the seller is responsible". It was noted that this principle was operative, without express provision, throughout the Uniform Law; to state this principle in isolated instances would cast doubt on the general principle. It was concluded that this involved a question to which attention should be given by the Working Group in its final reading of the draft.

212. The Working Group decided to approve article 96, but to defer final action on the phrase "or of some other person for whose conduct the seller is responsible" until a further session.

*Articles 97-99*

213. The Working Group considered together the provisions of three related articles—articles 97-99. These articles read as follows:

*Article 97*

"1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law.

"2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement."

*Article 98*

"1. Where the handing over of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.

"2. Where the contract relates to a sale of unascertained goods, delay on the part of the buyer shall cause the risk to pass only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done.

"3. Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery."

#### Article 99

"1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.

"2. Where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

214. The report of the Secretary-General on issues presented by chapters IV and VI of the Uniform Law discussed the provisions of chapter VI of ULIS with special reference to the decision of the Working Group, at the third session, to delete the definition of "delivery" in article 19 of ULIS.<sup>24</sup> This report (paragraph 76) proposed a revision and consolidation of the above articles. One aspect of this proposal was that risk would pass when the goods were "handed over" to the buyer or to a carrier; the report discussed the allocation of risk of roles in relation, *inter alia*, to the question as to which party, under normal commercial practice, would be more likely to have effective insurance coverage for the goods (paragraphs 70-73).

215. The Working Group discussed the question as to whether the central concept for transfer of risk should be "delivery" of the goods or the "handing over" of the goods to the buyer. Some representatives preferred the use of "delivery" as the key concept, and suggested that the rules on risk in chapter VI should refer to the rules on "delivery" in article 20. In their view, article 20 constituted an adequate definition of "delivery"; on the other hand it was suggested that article 20 defined the seller's duty of performance, and that under article 20 the seller's duty could be performed even though the buyer never took over physical possession of the goods.

216. Some delegates questioned the clarity of the concept of "handing over" the goods; it was suggested that placing the goods at the buyer's disposal on the seller's premises might be considered as "handing over" the goods. In reply it was noted that "handing over" had been used in various articles of ULIS and in article 20 as approved by the Working Group, and that the term had been clearly understood as referring to a transfer of possession in which the buyer or carrier took over the goods. Some representatives stated that the Uniform Law should be clear on this point, in order to place the risk of loss with the party who would have possession and control of the goods, and who would be most likely to have effective insurance coverage. Consideration was given to expressions which would be clearer on this point, such as "taking over" the goods.

217. In the light of these discussions, one representative proposed a draft proposal which the Working Group used as the basis for its further deliberations. This proposal was as follows:

#### Article 97

"1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when

the goods are handed over to the carrier for transmission to the buyer.

"2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

#### Article 98

"1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

"2. Paragraph 1 shall also apply in the case of delivery of goods not conforming to the contract when the buyer has neither requested the delivery of new goods nor declared the contract avoided.

"3. When the goods have been placed at the disposal of the buyer but have not been taken over, or have been taken over belatedly by him, and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last date when he could have taken the goods over without committing a breach of the contract."

218. The Working Group considered article 97 of the above proposal which dealt with passing of the risk when the contract involved carriage of the goods. It was noted that paragraph 1 constituted a combination of the provisions of articles 19 (2) and 97 (1) of ULIS.

219. It was observed that paragraph 1 was inconsistent with the definition of certain important trade terms; for example, "C.I.F.," as defined in Incoterms, provided for the passage of risk when the goods passed the ship's rail. It was suggested that in view of the importance of such trade terms, paragraph 1 should include a specific reference to usage such as "subject to article 9". On the other hand, several representatives supported the view that the Uniform Law gave effect to the terms of the contract (article 5) and to applicable usage (article 9); to make a specific reference in certain instances would cast doubt on this general principle.

220. The Working Group approved paragraph 1 of article 97 of the above proposal.

221. With respect to paragraph 2 of the same draft article, it was noted that the proposal was a revision of article 99 of ULIS.

222. The Working Group approved the first sentence of the above paragraph 2.

223. Questions arose with respect to the second sentence, which dealt with cases where the seller, at the time of the contract, knew or ought to have known that the goods had been lost or deteriorated. It was suggested that on these facts to permit risk to pass to the buyer at the time of conclusion of the contract was unfair to the buyer in a situation that could amount to fraud. In addition, since the contract was made while the goods were in transit the provision would present difficult problems of proof as to the point in the course of transit when further damage would occur. Attention was directed to the redraft of article 97 (3)

<sup>24</sup> A/CN.9/WG.2/WP.19, chapter III, paragraphs 64-105; see below, section 5.

in the report of the Secretary-General (paragraph 76)<sup>25</sup> whereby, on these facts, risk would remain with the seller unless he disclosed the loss or damage to the buyer.

224. The Working Group then considered article 98, which deals with contracts which do not involve carriage of the goods. In paragraph 1, attention was given to the provision that risk would pass to the buyer when the goods "were placed at his disposal and taken over by him". Some delegates suggested that "handing over" the goods would be clearer, and that the reference to placing the goods at the buyer's disposal was unnecessary and confusing, since the buyer could hardly "take over" the goods unless the goods had been placed at his disposal. Other delegates preferred the proposed language on the ground that it avoided the problems with respect to "handing over" the goods, as discussed above. The Working Group approved paragraph 1.

225. Paragraph 2 dealt with the effect of non-conformity of the goods on the transfer of risk, and on the ability of a buyer to avoid the contract after the loss or destruction of non-conforming goods. It was noted that placing this paragraph in article 98 made the provision inapplicable to cases where the contract involved carriage of the goods (article 97). It was agreed that this unintended result should be avoided by dealing with the above problem in a new article [98 *bis*].

226. Paragraph 3 deals with the effect of delay by the buyer in taking over the goods. The word "date" was replaced by "moment". With this modification, the paragraph was approved.

227. The Working Group decided to supplement the above provisions by a further article similar to paragraph 2 of article 98 of ULIS dealing with contracts which related to unidentified (unascertained) goods. The article, as proposed by an observer and adopted by the Working Group, reads:

"Where the contract relates to unidentified goods, the risk shall in no case pass to the buyer until the moment when the goods have been manifestly identified to the performance of the contract and the buyer has been informed of such identification."

228. In connexion with the above new article some representatives suggested that the expression "the contract relates to unidentified goods" might not be sufficiently clear.

229. Some delegates suggested that this chapter should include an article dealing specifically with transfer of risk when goods were held by a third party, such as a bailee or warehouseman. Other delegates were of the view that such a provision was not necessary, and would complicate the text. It was decided not to draft such a provision at this time.

230. The Working Group decided to set up a drafting party (Drafting Party VIII), composed of the representatives of Austria, Hungary, Japan and the United States, and requested it to prepare draft provisions on (a) the situation dealt with in article 97 (2) (second sentence) (i.e., the seller knew or ought to have known that the goods had been lost or deteriorated)

(see paragraph 223 above) and (b) a new article on the question mentioned in paragraph 225 above.

231. Drafting Party VIII submitted its proposals to the Working Group at its 18th meeting on 31 January 1974. The proposals constitute (a) a revision of the second sentence in article 97 (2); (b) an added sentence for article 98 (2); (c) a new article 98 *bis*. These proposals were incorporated in an integrated text of articles 97, 98 and 98 *bis* as follows:

#### Article 97

"1. Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.

"2. The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk of this loss or deterioration shall remain with him, unless he discloses such fact to the buyer."

#### Article 98

"1. In cases not covered by article 97 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

"2. When the goods have been placed at the disposal of the buyer but have not been taken over or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last moment when he could have taken the goods over without committing a breach of the contract. However, where the contract relates to the sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been clearly identified to the contract and the buyer has been informed of such identification."

#### Article [98 bis]

"1. Where the goods do not conform to the contract and such non-conformity constitutes a fundamental breach, the risk does not pass to the buyer so long as he has the right to avoid the contract.

"2. In the case of a fundamental breach of contract other than for non-conformity of the goods, the risk does not pass to the buyer with respect to loss or deterioration resulting from such breach."

232. The first proposal involved a redrafting of the provisions of article 97 (2) (second sentence) dealing with cases in which the seller knew or ought to have known that the goods had been lost or had deteriorated. The proposed language was approved by the Working Group.

233. The second proposal was for the addition of a sentence to article 98 (2) to deal with cases where goods were not identified at the time of the making of the contract. The Drafting Party proposed this addition as a clarification of the provision earlier adopted by the Working Group as a new article (see paragraph 227 above); under the proposal the new article would not be included in the text of the Law. The Drafting

<sup>25</sup> See annex IV to this report, reproduced in section 5 below.

Party proposed that the provision dealing with unidentified goods should be placed in relation to article 98, which dealt with cases not involving carriage of the goods, and where risk of loss in the event of buyer's delay might pass to the buyer while the goods were retained by the seller.

234. One observer proposed that the provision on unidentified goods should be kept in a separate article so that the rule on identification and notice should also apply to cases involving carriage. This was rejected on the ground, among others, that such a provision would interfere with the transfer of risk when the goods are handed over to the carrier; the notice of shipment might in some cases appropriately be given to the buyer somewhat after delivery to the carrier and the commencement of the transit; a rule that risk of loss is only transferred at the time of notice would present practical problems of proof concerning the time of damage during transit. It was also observed that in the normal case the delivery to the carrier constituted an identification of the goods.

235. One representative suggested that the last sentence of article 98, paragraph 2, after deletion of the introductory word, "however", should become a separate paragraph 3. One observer suggested that the phrase "identified to the contract" in the above sentence should be replaced by the phrase "identified for the performance of the contract".

236. One observer suggested that the following text be included in article 98 of the draft as paragraph 4:

"4. When time for delivery has come and delivery is effected (pursuant to article 20) by placing the goods at the buyer's disposal at his place or at the place of a third person, the risk shall thereby pass to the buyer."

237. The observer who submitted this proposal stated that the proposed provision would be subject to the subsequent article making identification a further condition for passing of the risk. The provision covered, for example, such cases where the goods are deposited with, or to be manufactured by, a third person.

238. The above proposal was opposed by some representatives as being too loose. One representative, however, accepted the proposal, provided that the phrase "at the place of a third person" were replaced by the phrase "in the warehouse of a third person in accordance with the buyer". Another representative expressed the view that the concept of "third person" in the proposal was too broad. The Working Group concluded that it could not take action on this proposal at the present session. Some representatives expressed the view that the proposal dealt with an important problem that should be considered at a later stage.

239. The new article [98 *bis*] proposed by the Drafting Party dealt with the effect of breach of contract by the seller on the transfer of risk to the buyer. It was noted that the two paragraphs of the article gave different effect to fundamental breach with respect to (1) non-conformity of the goods and (2) other types of breach (such as delay, improper shipment and the like). Some representatives supported this proposal; others noted that the proposal was novel and interesting, and deserved further consideration, but hesitated to give approval within the time indicated.

240. One observer noted that the question dealt with in the article had already been solved in paragraph 2 (a) of article 79, the correctness of which interpretation was doubted by two representatives. The question was also raised as to whether users of the Law would see the relationship between chapter VI and article 79. The same observer proposed the following language for the article: "Where the seller has failed to perform his obligations under the contract of sale and the present law, the provisions of articles 97 and 98 shall not impair the remedies afforded the buyer because of such failure of performance".

241. The Working Group decided to:

(a) Adopt article 97 as proposed by the Drafting Party (paragraph 231 above);

(b) Adopt article 98 (paragraph 231 above) except for the last sentence in paragraph (2) which would be considered at the next session;

(c) To defer final action on the proposed new article [98 *bis*] until its next session;

(d) Not to include in the Law the previously adopted new article on unidentified goods (paragraph 227 above).

#### Articles 99-101 of ULIS

242. Articles 99 to 101 of ULIS read as follows:

##### Article 99

"1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.

"2. Where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract."

##### Article 100

"If, in a case to which paragraph 3 of article 19 applies, the seller, at the time of sending the notice or other document referred to in that paragraph, knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document."

##### Article 101

"The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses."

243. It was observed that some of the provisions in these articles had been embraced within articles approved by the Working Group, and that others were unnecessary and unhelpful.

244. The Working Group decided to delete articles 99-101 of ULIS.

### III. FUTURE WORK

245. The Working Group, taking into consideration the proposals contained in document A/CN.9/WG.2/L.1, concerning methods of work and after a debate on the item, decided:

(a) To request the Secretariat to circulate among representatives of member States of the Working Group and the observers who attended the session the text of the uniform law as adopted or deferred for further consideration before 15 March 1974;

(b) To request the representatives of Member States and the observers who attended the session to submit to the Secretariat their comments and proposals on the text preferably by 31 August 1974;

(c) To request the Secretariat, taking into consideration the comments and proposals of representatives submitted before the above date, to prepare a study of the pending questions, including possible solutions thereon, and to circulate the study to members of the Working Group before 30 November 1974;

(d) To hold the sixth session of the Working Group, from 10 to 21 February 1975, subject to approval by the Commission.