the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring performance of the contract in accordance with article 42 or reducing the price in accordance with article 46 or declaring the contract avoided in accordance with article 44.

Article 44 (ULIS article 43)

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

2. However, unless the seller has refused to perform, the contract cannot be avoided:

(*a*) In any case where the seller under paragraph 1 of article 43 retains the right to deliver goods or remedy defects, before the seller has had a reasonable time to exercise that right, or

(*b*) In any case where the buyer has requested performance of the contract, before the expiry of any period specified in the request, or, if no period has been specified, before the expiry of a reasonable time.

3. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after he has discovered or ought to have discovered the lack of conformity, or in cases to which paragraph 2 of this article applies, after the expiration of the relevant period of time referred to in that paragraph.

ALTERNATIVE C

Article 43 (merger of articles 43 and 44 of ULIS)

1. Where the non-conformity or goods delivered by the seller amounts to a fundamental breach of contract, the buyer, by notice to the seller, may declare the contract [avoided]. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after he discovered or ought to have discovered the lack of conformity.

2. The seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over. This right may not be exercised if the delay in taking such action constitutes a fundamental breach of contract or if such action causes the buyer either unreasonable inconvenience or unreasonable expense.

3. Although the non-conformity of the goods does not constitute a fundamental breach the buyer may fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with article 46 or, provided that he does so promptly, declare the contract avoided.

ARTICLE 45

27. The Working Group decided to adopt this article without change.

ARTICLE 46

28. The Working Group requested the Secretariat to submit to the next session of the Working Group a study on this article.

ARTICLE 47

29. The Working Group decided to adopt this article without change.

ARTICLE 48

30. The Working Group decided to give further attention to this article. It was concluded that the problem of "anticipatory breach" posed by this article should be studied in connexion with the related provisions on this problem that appear in later sections of ULIS.

ARTICLE 49

31. The Working Group took note of the decision of the Commission at its third session to the effect that "the subject-matter of article 49 of ULIS would come within the scope of a convention on prescription and should be omitted from the Uniform Law on Sales". (A/8017, para. 34)

HANDING OVER OF DOCUMENTS: ARTICLES 50-51

32. The Working Group decided to defer final action on these articles and requested the representative of Japan, in consultation with the representatives of Austria, India and the United Kingdom, to submit to the next session of the Working Group a study on these articles. The Secretariat was requested to circulate this study among members of the Working Group.

TRANSFER OF PROPERTY: ARTICLES 52-53

33. The Working Group decided to defer final action on these articles until its next session. It invited the representative of Mexico to submit a proposal for a separate paragraph to deal with the question of restrictions by public authority.

OTHER OBLIGATIONS OF THE SELLER: ARTICLES 54-55

ARTICLE 54

34. The Working Group decided to substitute the expression "on the terms normally used for the transport of goods of the contract description" for "on the usual terms" in paragraph 1 of this article, and adopted the article as amended. The article as adopted reads as follows:

1. If the seller is bound to despatch the goods to the buyer, he shall make, in the usual way and on the terms normally used for the transport of goods of the contract description, such contracts as are necessary for the carriage of the goods to the place fixed.

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

35. The Working Group decided to defer final action on the proposal contained in document A/CN.9/WG.2/III/CRP.16 suggesting that this article should be transferred to article 21.

ARTICLE 55

36. The Working Group decided to defer final action on this article, and requested the representative of Japan to extend his study on articles 50 and 51 of ULIS to cover this article.

ANNEX II

Reasons for decisions of the Working Group

SPHERE OF APPLICATION OF THE UNIFORM LAW: ARTICLES 1-6

1. The provisions of ULIS defining its sphere of application was one of the principal subjects of consideration at the second session of the Working Group, held in December 1970. At that session the Working Group, *inter alia*, recommended modifications of the rules of articles 1 and 2 as well as other provisions of ULIS relating to its sphere of application. The

reasons for these recommendations appear at paragraphs 43-69 of the report on the second session.[1]

2. The above-mentioned report of the Working Group was considered by the Commission at its fourth session;[2] the Commission's report with respect to these matters was discussed in the Sixth Committee of the General Assembly.[3] Comments and proposals made at the Commission's fourth session and in the Sixth Committee during the twenty-sixth session of the General Assembly relating to articles 1-6 of ULIS were summarized in a note by the Secretary-General (A/CN.9/WG.2/WP.11, paragraphs 6 to 36). The Working Group also had before it a note by Austria, Belgium, Egypt and France on the definition of an international sale of goods (A/CN.9/WG.2/WP.13).

3. In considering the above comments and proposals, the Working Group focused its attention on two objections to the text recommended by the Working Group at its second session: (*a*) that the basic test of applicability of the Law that the parties have their places of business in different States, should be supplemented by one or more tests and, (*b*) that the subjective criterion in article 2 (*a*) based on knowledge of the parties should be replaced by an objective criterion. In connexion with these two objections the Working Group also paid attention to article 5 (1) (*a*) of the previously recommended text removing consumer sales from the scope of the Law.

4. The Working Group set up a drafting party (IV) consisting of the Chairman, the representatives of Austria, Japan and the USSR and the observer for Norway. The Drafting Party was requested to review the text recommended by the Working Group at its second session in the light of the debate and the comments and proposals mentioned above, and, if necessary, to submit an amended text.

5. The report of the Drafting Party appears in document A/CN.9/WG.2/III/CRP.15.

6. The Working Group approved, with minor amendments, the text recommended by the Drafting Party subject to the viewpoints and reservations of some delegations reflected below. The text as adopted is reproduced in paragraph 1 of annex I to the report of the Working Group.

7. The Working Group considered that the reintroduction of the qualifications contained in article 1(1) (*a*) (*b*) and (*c*) of ULIS or the introduction of any similar qualifications, as suggested in document A/CN.9/WG.2/WP.13, was not desirable because of the difficulties and uncertainties set forth in paragraphs 14-22 of the report of the Working Group on its second session.

8. The Working Group also considered that the suggested qualifications were not necessary because the recommended text excluded from the scope of the Law both (*a*) consumer sales and (*b*) transactions where the parties were not aware of the fact that their places of business were in different States. It was also considered that these rules, combined with the basic rule requiring that the parties have their places of business in different States, render the scope of application of the Law similar in result to that of original ULIS or that suggested in document A/CN.9/WG.2/WP.13, but expresses the scope of application in a clearer and simpler form.

9. Article 2 (*a*) of the text adopted at the second session had excluded transactions where the parties were not aware that they had their places of business in different States. The Working Group agreed that this provision was difficult to apply in view of the subjective element contained in the expression "neither knew nor had reason to know".

10. The Working Group therefore substituted the above subjective test by an objective criterion which is contained in article 1, paragraph 2, in the recommended text (annex I, paragraph 1).

11. Article 5(1) (*a*) of the text recommended by the Working Group at its second session provided that goods ordinarily bought for consumer purposes were not excluded from the scope of the Law if "the seller *knew* that the goods were bought for a different use". The Working Group decided that the subjective test in the above phrase should be replaced by the objective test "it appears from the contract that they are bought for a different use". Some members of the Working Group suggested that the test should employ the language used in article 1-2 of the newly recommended text so that the text would read "it appears from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract...".

12. The Working Group was also of the opinion that articles 1-6, as amended, could be arranged in a more logical order. To this end, the previous article 2 (*a*), in its revised form, was transferred to article 1 of the present text (paragraph 2). As a result, article 1 includes all of the basic rules on the applicability of the Law; article 2 (previously article 5) deals with the exclusion of certain transactions and types of goods from the sphere of application of the Law. The rules relating to mixed contracts, previously set forth in article 6, now appear as article 3. Article 4 sets out the provisions previously contained in article 2 (*b*) to (*f*). Finally, the present article 5 is the previous article 3.

13. In deciding on the above rearrangement of the articles, the Working Group did not take decisions on comments with respect to the substance of subparagraph 2 (*b*) of present article 2,[4] paragraph 1 of present article 3,[5] article 4 (*a*) and (*b*)[6] of the present text and present article 5.[7]

14. All members agreed that the present text relating to sphere of application of the Law was an improvement on the previously recommended text. However, some members were of the opinion that the present text did not meet all of their objections, especially the objection that under the recommended text certain sales which are essentially of domestic character might fall within the scope of the Law. These members, therefore, suggested that the basic test of applicability, contained in article 1(1) of the present text, should be supplemented by an additional requirement relating to the carriage of the goods or by the four qualifications contained in document A/CN.9/WG.2/WP.13.

General obligations of the seller; obligations as regards the date and place of delivery: articles 18-32

15. The Working Group discussed these articles in the light of the report of the Secretary-General on "Delivery" in the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.8) and the comments and proposals made in respect of these articles, as summarized in document A/CN.9/WG.2/WP.10, paragraphs 10-23.

16. It was agreed that article 18, which was an introductory article to chapter III of the Law on the obligation of the seller, should be held in abeyance until the revision of that chapter was completed.

17. With respect to the definition of "delivery" in article 19, the Working Group gave preliminary consideration to the

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[1] A/CN.9/52; UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

[2] Report of the United Nations Commission on International Trade Law on the work of its fourth session (29 March-20 April 1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417) (hereinafter referred to as UNCITRAL, report on fourth session (1971)), paras. 57-69; UNCITRAL Yearbook, vol. II, part one, II, A.

[3] Report of the Sixth Committee (A/8506); see above, first part, I, B.

[4] A/CN.9/WG.2/WP.11, para. 34.

[5] *Ibid.*, para. 35.

[6] *Ibid.*, paras. 29-30.

[7] *Ibid.*, para. 31.

question whether the Working Group should attempt to draft a definition of this term which would provide satisfactory solutions for specific problems such as risk of loss. In this connexion, the Working Group considered the above-mentioned report of the Secretary-General (A/CN.9/WG.2/WP.8). The report analysed the attempt in ULIS to employ a single concept of "delivery" for the solutions of specific problems, such as risk of loss, and pointed to difficulties in concrete commercial situations that resulted from this approach. The Working Group concluded that the approach employed in ULIS was unsatisfactory and that in approaching the problem of the definition of "delivery" it would be assumed that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery".

18. A second question was whether the term "delivery" should be defined in the uniform Law. Some representatives were of the opinion that the Law should not provide for a definition. On the other hand, the view was expressed that the lack of any definition would leave a gap in the Law, particularly with reference to rules on time and place of delivery, and it was concluded that a revised definition of "delivery" should be included in the uniform Law.

19. The Working Group also considered the consequences of the definition of "delivery" in ULIS that the goods are not delivered unless they "conform with the contract". It was observed that, as a result, goods that were accepted and consumed by the buyer might not be considered to be "delivered" to him. The Working Group agreed that the conformity of the goods was not an essential element of "delivery", and, therefore, no such requirement was to be included in the definition.

20. Different proposals were made as to the definition of "delivery". Some representatives suggested that the present definition in ULIS, which reads "handing over the goods", should be maintained. Other representatives proposed that "delivery" should be defined as "placing the goods at the disposal of the buyer", and still others proposed the wording "handing over to the buyer or to a carrier or forwarding agent". It was also suggested that the present text should be substituted by a comparatively simple definition in general terms, based on the element of transfer of possession.

21. The Working Group also considered a proposal which defined "making delivery" by analogy to the definition of "taking delivery" contained in article 65 (A/CN.9/WG.2/III/CRP.2). The Working Group adopted this proposal, with minor changes, as a working hypothesis. The text as adopted, reads:

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

22. With respect to articles 20-23, the Working Group set up a drafting party (I) consisting of the representatives of Austria, France, the United States and the Union of Soviet Socialist Republics and the observer for ICC. The report of the Drafting Party is contained in document A/CN.9/WG.2/III/CRP.3. The report, setting forth proposed revised texts for articles 20 and 21, is as follows:

Article 20

(Article 19 (2) and (3), and article 23 (2) of ULIS—article 23 of the United States proposal)

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

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

3. In all other cases, the seller shall [place the goods at the buyer's disposal] at the place where the seller carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence.

Article 21

(Articles 20, 21 and 22 of ULIS—article 20 of the United States proposal)

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

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

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

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

23. In addition to comments and proposals relating to the substance of the recommended text, many representatives suggested that since the Drafting Party had prepared its proposal before the Working Group made its decision on the definition of "delivery" (paragraph 21 above) the text recommended by the Drafting Party should be brought into line with that definition.

24. Pursuant to this proposal the Working Group set up a new drafting party (VIII) consisting of the representatives of Austria, Hungary and the United States, to prepare a revised draft of articles 19-23, taking into account the comments and proposals made during the debate. The proposal of the Drafting Party appears in document A/CN.3/WG.2/III/CRP.16. The text of this proposal reads as follows:

Article 19

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

Article 20

1. Delivery shall be effected:

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

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

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

Article 21

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

2. [Article 54 (2) unchanged.]

25. One representative held that the merit of the original text of article 19 was that it defined delivery when the carriage of goods was involved; in the view of this representative this merit was lost in the new text. Another representative suggested that articles 19 and 20 should be combined. Some representatives were of the opinion that article 54 (2), that had been included in the recommended text as article 21, paragraph 2, should be deleted.

26. The Working Group agreed to add to the proposal of Drafting Party VIII (CRP.16), set forth in paragraph 24 above, article 21 of the text in document CRP.3 as article 22 and to defer final action with respect to the amended text until its next session. The text, as adopted for further consideration, is set out in annex I to the report of the Working Group (paragraph 4).

27. One representative expressed the view that the structure of ULIS was preferable to that in document CRP.16 and submitted the following draft for consideration by the Working Group at its next session:

"Section 1. Delivery of the Goods

"Article 19

"[1. Delivery consists in the seller's accomplishing the final act necessary in order to enable the buyer to take control of the goods.]

"2. Where the contract of sale contemplates carriage of the goods and no other method of delivery has expressly or impliedly been agreed upon, delivery shall be deemed to be effected by handing over the goods to the carrier for transmission to the buyer.

"3. Where the goods handed over to the carrier are not appropriated to performance of the contract, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods."

"Articles 20, 21, 22, 23

"[ULIS unchanged.]"

Articles 24-32

28. In considering articles 24-32 of ULIS the Working Group had before it the analysis of comments and proposals made in respect of these articles (A/CN.9/WG.2/WP.10, paragraphs 25-31) and the report of the Secretary-General on "*ipso facto* avoidance" in the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.9).

29. Most representatives and observers who spoke on the issue agreed that the concept of "*ipso facto* avoidance" that was used, *inter alia*, in articles 25, 26 and 31 of ULIS, should be eliminated from the remedial system of the Law because it created uncertainty as regards the rights and obligations of the parties in case of breach of the contract. The opinion was also expressed that the only advantage that might be derived from application of the concept of "*ipso facto* avoidance" was that this concept could be employed to prevent the buyer from profiting from price fluctuations; on the other hand it was suggested that the problem of possible speculation based on price fluctuation could be dealt with directly without the use of the general concept of *ipso facto* avoidance. Most representatives concluded that any advantage related to the question of speculation was far outweighed by the confusion and uncertainty into which the whole relationship of the parties would be thrown by the retention of the concept of *ipso facto* avoidance. One observer noted that the system of "*ipso facto* avoidance" was one of the major obstacles that prevented many countries from acceding to ULIS.

30. One representative, who felt that the concept of "*ipso facto* avoidance" should be maintained, stated that a similar concept was contained in his national law and that the application of this concept caused no difficulties in practice. The same representative also expressed the view that the uncertainty caused by the concept of "*ipso facto* avoidance" was not worse than that resulting from a system that would require a prolonged exchange of notices in order to avoid the contract. An observer also urged caution with regard to elimination of the concept.

31. The Working Group agreed that in the remedial system of the law avoidance of the contract should be made dependent on notice by the injured party to the party in breach. If the injured party did not declare the contract avoided the contract continued to be in force.

32. The Working Group considered the proposal as set forth in the analysis of comments and proposals (A/CN.9/WG.2/WP.10, paragraph 27) that the provisions of the Law on remedies for breach of contract with regard to the date of delivery and the place of delivery should be amalgamated. Several representatives expressed their agreement with this proposal. One representative, however, objected to this proposal. An observer suggested that the present system of articles 24 to 32 should be retained.

33. In addition to the above general comments and proposals regarding the remedial system of the Law, several specific comments and proposals were made in respect of articles 24 to 32.

34. In respect of article 24 one representative suggested that since this article served no useful purpose it should be deleted.

35. As regards article 25 some representatives were of the opinion that this article should also be deleted. One representative, however, expressed the view that such deletion would only be required if the concept of "*ipso facto* avoidance" had been definitively deleted from the Law. Another representative objected to the deletion of this article but suggested that the article should be redrafted.

36. In respect of article 28 one representative expressed the view that this article was too rigid. Several representatives suggested the deletion of the article. One representative expressed concern at the proposal to delete article 28 although the text of this article was not appropriate. In the view of this representative article 28 should state that the failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract.

37. The Working Group set up a drafting party (II) consisting of the representatives of Hungary, Japan and the United Kingdom and the observers for Belgium and Norway. The report of the Drafting Party is contained in document A/CN.9/WG.2/III/CRP.9. The text of this report is reproduced in annex I to the report of the Working Group at paragraph 7.

38. The Chairman of the Drafting Party reported to the Working Group that doubts had been expressed whether the term "avoided" was the appropriate term in English or whether the term "terminated" or "cancelled" should be used instead. The Drafting Party put the word "avoided" between square brackets to indicate that this question needed further consideration.

39. In articles 25, paragraph 1, and 26, paragraph 1, of the proposed text the Drafting Party substituted the expression "the buyer may . . . retain the right to performance" for the expression "the buyer may . . . require performance", which was used in article 26 of ULIS. The Drafting Group introduced this change because it held that the word "require" (*a*) had overtones of specific performance which would depend on the rules of individual legal systems, and (*b*) could be understood in such a way that the buyer had to state expressly his wish that the contract should be performed.

40. The Drafting Party could not agree on the language of article 25, paragraph 2. Therefore, it included in its report both variants which were proposed for this paragraph and

suggested that with respect to this paragraph the Working Group should take its final decision on the basis of a study to be prepared on the implications of both variants.

41. One representative noted that the text recommended by the Drafting Party, especially articles 25, paragraphs 2, 3 and 4, 26, paragraph 1, and 27, gave the impression that any delivery made at a place other than that fixed was not a delivery at all. The text did not provide for cases in which the seller made delivery but at a wrong place.

42. An observer suggested that the following provision should be included in article 24 as paragraph 2 *bis*:

"When the seller has effected delivery of the goods, the buyer shall lose his rights to remedies [as regards delivery] if he does not give the seller notice of the failure within a reasonable time after he has received the goods and has become or ought to have become aware of the failure."

43. The Chairman of the Drafting Party noted that the Drafting Party had considered the above proposal and decided not to include it in the recommended text. Some representatives who were not members of the Drafting Party also thought that the proposal was not acceptable.

44. In respect of article 25 of the recommended text, one representative suggested that the new system embodied in this article was not practicable; it should be replaced by a system under which the seller's failure to deliver the goods at the right place and at the right time would preclude him from taking any action before the buyer informed him of his (the buyer's) decision. Another representative noted that the new system in article 25, providing that avoidance of the contract could only be effected by express declaration, would not eliminate disputes between the parties because the system had maintained the concept of "fundamental breach" and this concept might give rise to conflicting interpretations.

45. Some representatives noted that the expressions "promptly" and "reasonable time" which were used in several paragraphs of article 25 were not clear and, therefore, some indication was needed as to their exact meaning.

46. One observer suggested that article 25, paragraph 3, of the recommended text should be redrafted as follows:

"3. The buyer shall lose his right to declare the contract avoided, if he does not exercise it promptly after he has received the goods or has been informed of delivery at a certain date and place, unless the seller has effected delivery after he has got notice of the buyer's declaration of avoidance under paragraph 1 of this article."

47. The Working Group decided to defer final action on these articles until its next session and, in accordance with the proposal of the Drafting Party, requested the representative of Hungary to prepare a study on the questions set out in paragraph 8 of annex I.

OBLIGATIONS OF THE SELLER AS REGARDS CONFORMITY OF THE GOODS: ARTICLES 33-49

Article 33

48. Some representatives were of the opinion that the opening phrase of paragraph 1 of this article "the seller shall not have fulfilled his obligation to deliver the goods . . ." was not acceptable because it linked the seller's obligation of delivery to the conformity of the goods, and the Working Group had previously decided that conformity of the goods was not an essential element of delivery.

49. The opinion was also expressed that subparagraphs 1 (*a*) to 1 (*f*) were too complex and that it was not desirable to attempt to enumerate, in an exhaustive list, all possible cases of non-conformity. In the view of some representatives, a preferable approach would be to set forth a short statement of a general principle coupled with a few specific examples.

50. In response to the above criticisms and suggestions, the observer for Norway submitted the proposal contained in document A/CN.9/WG.2/III/CRP.4/Rev.1, which reads as follows:

"1. The seller shall not have fulfilled his obligation *as regards conformity where the goods are not of the quantity or quality* [*or do not have other* characteristics] expressly or impliedly contemplated by the contract, *in particular*, where the goods:

"(*a*) *Are* only part of the goods sold or *are of* a larger or smaller quantity than *contemplated in the contract*;

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

"(*c*) Do not possess the qualities necessary for their *use*.

"2. The seller shall not be *responsible* for the consequences of *a* lack of conformity *as regards qualities necessary for their use* [or other qualities contemplated by the contract], if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity (cp. ULIS art. 36).

"3. (As ULIS art. 33, paragraph 2 revised.)"

51. Several representatives did not find the above proposal entirely satisfactory. In the view of these representatives, it was important to have a precise and exhaustive list of what constituted non-conformity so that the buyer could determine whether or not the seller was in breach of his obligation.

52. The Working Group set up a drafting party (IX) consisting of the United Kingdom and the United States to prepare a text that would simplify paragraph 1 of article 33.

53. The Drafting Party submitted the text contained in document A/CN.9/WG.2/III/CRP.14. That text reads as follows:

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

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

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

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

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

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

54. The Working Group took note of the above text and deferred final action on paragraph 1 of article 33 until its next session.

55. With respect to paragraph 2 of this article, the Working Group decided that the words "not material" in the English version should be replaced by the words "clearly insignificant" and, accordingly, in the French text the word "*manifestement*" should be inserted immediately before the words "*sans importance*". The reason for these changes was to make it clear that this paragraph was intended to reflect the maxim "*de minimis non curat lex*".

Article 34

56. The Working Group decided that article 34 of ULIS should be deleted.

57. It was noted that the article was intended to protect the uniformity of the rules of article 33 regarding conformity of the goods by preventing recourse to other remedies available under some national rules, like a plea of nullity, based on mistake as to the quality of the goods.

58. The Working Group concluded that the article in its present formulation goes much beyond the intention of the draftsmen of ULIS and could possibly be interpreted to preclude not only remedies under the national law but those remedies that the parties might have agreed upon in the contract.

59. It was suggested that in order to avoid the above interpretation the words "except those provided for by agreement between the parties or by any usage" should be added at the end of the article. This proposal was not accepted on the ground that it would give rise to a serious problem of concordance with the rest of the Uniform Law.

60. Other draft texts were also considered, including a proposal contained in document A/CN.9/WG.2/III/CRP.5. The Working Group held that the language of those proposals was also too broad.

61. It was concluded that since the problem referred to in paragraph 2 above would arise only in exceptional cases, article 34 should be deleted altogether for lack of appropriate language that would clearly reflect the intention of the draftsmen of this article.

Article 35

62. The Working Group decided to adopt without change the first sentence in paragraph 1 of this article.

63. With respect to the second sentence of paragraph 1, the Working Group deferred its consideration to a future session, pending action in connexion with later articles on passing of risk.

64. Paragraph 2 of this article was tentatively redrafted to read as set out in annex I to the report of the Working Group at paragraph 14.

65. One representative suggested that paragraph 2 should also provide for the seller's liability for breach of a guarantee. Some representatives, however, were of the opinion that the subject of contracts of guarantee involved much larger issues than those dealt with in paragraph 2 of this article and should therefore be dealt with in a separate article.

66. In view of the above comments, the Working Group decided to defer final action on paragraph 2 until its next session. The Working Group also requested the representative of the USSR to submit for future consideration a text on the seller's liability for breach of a guarantee in respect of the goods.

Article 36

67. The Working Group took note of the comment in document A/CN.9/WG.2/WP.10, paragraph 42, stating that the deletion or modification of any of the subparagraphs (*d*), (*e*) or (*f*) of paragraph 1 of article 33 might also require re-examination of the references to these subparagraphs in article 36. The Working Group, therefore, deferred consideration of this article until a final decision was taken in respect of article 33.

Article 37

68. The text of the article as adopted by the Working Group appears in annex I, paragraph 18.

69. The last sentence of the article, as adopted by the Working Group, was added to the original text of ULIS to indicate that although the buyer cannot refuse advance delivery where such delivery does not cause him "unreasonable inconvenience or unreasonable expense", the buyer may nevertheless claim compensation for any inconvenience or expense.

Article 38

70. The Working Group reiterated its approval of paragraphs 1, 2 and 3 of the text recommended by the Working Group at its first session.[8]

71. The Working Group concluded that the language of original paragraphs 2 and 3 of article 38 of ULIS required the buyer to inspect the goods under circumstances that would often make such examination impracticable or inconvenient. One example is where the buyer upon delivery redispatches the goods to a customer by rail or road. The problem becomes more serious where the goods are delivered in such containers as would make it impracticable to open them before reaching their final destination. The Working Group therefore considered that the flexible language in paragraphs 2 and 3 in the recommended text would meet those objections.

72. With respect to paragraph 4 of this article one representative suggested that in the absence of agreement by the parties, the methods of examination shall be governed "by the law and usages of the seller". Another representative suggested that the opening phrase of this paragraph should read "The opportunity and methods of examination shall be governed . . .".

73. In view of these comments, the Working Group decided to defer final action on paragraph 4 until its next session.

Article 39

74. The Working Group considered that the use of the word "promptly" in paragraph 1 of this article was inappropriate, since it might result in depriving the buyer of all remedies if he did not notify the seller within the shortest possible time of the lack of conformity.

75. A distinction was drawn between two cases: (1) where the buyer was seeking to avoid the contract and to reject the non-conforming goods, and (2) where he decided to keep the same goods and to claim damages or reduction in the price. It was concluded that while the short notification period established by the word "promptly" was suitable in the first case, it was not appropriate in the second.

76. Where the buyer was rejecting the goods, a prompt communication to the seller was important so that he could have an opportunity to make a tender of conforming goods within the required period. In such cases, a prompt communication might also be important to give the seller an opportunity to care for or redispose of the rejected goods and thus reduce the chance for loss or damage to the goods or the incurring of unnecessary expense. On the other hand, where the buyer decided to keep the defective goods, subject to a claim for damages, the above reasons for prompt notification were not applicable.

77. The Working Group therefore decided that the phrase "within a reasonable time" should be substituted for the word "promptly" which appears twice in that paragraph.

78. The Working Group considered that the above change was flexible enough to accommodate the two cases mentioned in paragraph 2 above; for what is a "reasonable time" was, of course, a question that depended on the circumstances of each case.

79. In deleting the concluding phrase in paragraph 2 of this article, "and invite the seller to examine the goods or to cause them to be examined by his agent", the Working Group concluded that it was inconsistent with normal commercial practice.

80. The text of the article as adopted appears in annex I, paragraph 22.

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[8] Report of the Working Group on the International Sale of Goods, first session, 5-16 January 1970 (A/CN.9/35), paras. 109-111; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A.

Article 40

81. No comments having been made with respect to this article, the Working Group decided to adopt this article without change.

Article 41

82. Several representatives expressed the opinion that the drafting of article 41 of ULIS could be improved. Other representatives suggested that inasmuch as the controlling provisions were contained in articles 42 to 46, article 41 was not necessary.

83. With a view to simplifying article 41, the Working Group set up a drafting party (V) consisting of the representatives of Austria, India and the United States and the observer for Norway.

84. The Working Group adopted the text proposed by the Drafting Party as contained in document A/CN.9/WG.2/III/CRP.11/Rev.2 which appears in annex I, paragraph 24.

85. One representative suggested that the expression "fully or partially" be inserted after the word "conform" in the opening phrase of this article.

Article 42

86. One observer suggested that article 42 should be amended so as to provide that when the buyer rejects the goods delivered on grounds of non-conformity, he should not be entitled to demand other goods in replacement unless the non-conformity amounted to a fundamental breach. The same observer also suggested that the buyer should lose his right to demand performance if he did not exercise this right within a reasonable time after giving the seller notice of the lack of conformity.

87. Several representatives did not agree with the above suggestions. In the view of these representatives the buyer should be entitled to require performance in all cases where he has not declared the contract avoided nor availed himself of the other remedies open to him, irrespective of whether the breach was or was not fundamental.

88. For the same reason mentioned in paragraph 87 above, several representatives were of the opinion that article 42 of ULIS unnecessarily limited the right of the buyer to require performance. It was also suggested that this article was unnecessarily complex.

89. In view of the above suggestions and comments, the Working Group referred this article to the Drafting Party that was set up in connexion with article 41 (paragraph 83).

90. The Working Group adopted the text proposed by the Drafting Party as contained in document A/CN.9/WG.2/III/CRP.11/Rev.2, which appears in annex I, paragraph 25.

91. One representative suggested that the expression "total or partial" be inserted before the word "performance" in the above text.

92. For the reasons mentioned in paragraph 86 above, one observer stated that the adopted text could be improved and proposed that article 42 should read as follows:

"1. [Same as paragraph 1 of article 42 of ULIS].

"2. However, the buyer may not reject the goods delivered and insist on getting delivered other goods which are in conformity with the contract, unless the lack of conformity amounts to a fundamental breach of the contract. The buyer shall lose his right to such performance if he does not exercise it within a reasonable time after he has discovered or ought to have discovered the lack of conformity.

"3. [Same as in paragraph 2 of article 42 of ULIS]".

Articles 43-44

93. Several representatives were of the opinion that the drafting of articles 43 and 44 of ULIS could be improved.

94. It was suggested that the phrase "and also the failure to deliver on the date fixed" should be deleted since article 43 dealt only with avoidance of the contract for lack of conformity. The remedies as regards delay in delivery were dealt with in articles 26 to 29.

95. Other representatives were of the opinion that the language in question be replaced by the phrase "on the date fixed for delivery" so as to make it clear that the goods should conform to the contract on that date.

96. One representative supported the language of article 43 on the ground that there was a direct link between non-conformity and delivery date. In the view of this representative, the buyer should not be able to avoid the contract unless the delay in making good the defect or deficiency constitutes a fundamental breach of the contract.

97. One observer proposed that article 43 should be redrafted in such a way as to allow the seller a reasonable time to remedy the defect before the buyer could declare the contract avoided provided that the buyer did not suffer unreasonable inconvenience or expense.

98. Several representatives did not agree with this proposal in cases where the non-conformity amounted to a fundamental breach of the contract.

99. It was also mentioned that the reference to paragraph 2 of article 42 at the end of article 43 made the article too complex and difficult to understand.

100. With respect to article 44, some representatives were of the opinion that paragraph 1 of this article was superfluous and should be deleted; if the contract was not avoided, it went without saying that the seller would try to remedy the defect in question.

101. Other representatives were opposed to the deletion of paragraph 1 on the ground that the paragraph dealt with cases where the non-conformity of the goods did not amount to fundamental breach and therefore served a useful purpose.

102. One representative stated that paragraph 1 should not be deleted but that its language was too broad. Thus, the seller's right to cure the defect should be limited to cases where the seller was in some way surprised; otherwise, the provision would protect a seller who knowingly supplied defective goods.

103. The Working Group set up a drafting party (VI) consisting of the representatives of Austria, India, the USSR and the United States, as well as the observer for Norway, to make recommendations with respect to articles 43 and 44 in the light of the above comments and proposals.

104. The Drafting Party could not reach agreement on the drafting of those two articles and submitted for the consideration of the Working Group three alternative proposals that are contained in document A/CN.9/WG.2/III/CRP.17/Add.1. The text of these alternative proposals appears in annex I, paragraph 26.

105. On the recommendation of the Drafting Party, the Working Group deferred further consideration of articles 43 and 44 until its next session and decided to use the above alternative proposals as a basis for future consideration.

106. One observer suggested that the following words should be added at the end of paragraph 1 in article 43 under alternative B:

"However, this right cannot be exercised when the delay in taking such action amounts to a fundamental breach of contract."

Article 45

107. The Working Group decided to adopt this article without change.

108. One representative was of the opinion that paragraph 1 of this article should be deleted and that the expression "or if only part of the goods delivered conforms to the

contract" be added at the end of subparagraph 1 (*a*) of article 33.

Article 46

109. Several representatives expressed the opinion that article 46 in its present form was difficult to understand. One representative pointed out that the words "the buyer may reduce the price" does not make it clear whether the buyer could claim a return of a portion of the price he had already paid or could only do so under an action for damages. In response to this criticism, one representative suggested that the above phrase should read "the buyer may claim a reduction in the price" so as to enable the buyer to make such a claim in cases where he had paid the full price. The same representative also suggested that the right to claim a reduction in price should be limited to cases of deficiency in quantity and should not extend to cases of defect in quality because of the difficulty of determining objectively the measure of the reduction in price the buyer might make.

110. One representative suggested that in view of the complexity of the language of this article, the article should be deleted. If the buyer made a bad contract, he would in all probability like to avoid the contract. However, this representative was prepared to accept a clear provision that would enable the buyer to set off against an action by the seller for damages a price reduction for lack of conformity.

111. Another representative was of the opinion that the difficulty with article 46 arose partly because of its position in the Uniform Law and partly because of the complexity of its language. The article might become clear if it was merged with paragraph 2 of article 44.

112. One representative doubted whether the measure of reduction in price was adequately expressed by the words "in the same proportion as the value of the goods at the time of the conclusion of the contract". He was not convinced that it was fair to take account of the value of the goods at the time of the conclusion of the contract, especially in the case of commodities the price of which was of a highly speculative nature.

113. One representative expressed the view that the remedy of reduction in price should be one of the options open to the buyer and should not be limited to cases where the buyer had neither obtained performance nor declared the contract avoided. In this connexion, this representative suggested that the Uniform Law should specifically provide for the right of the buyer, as a separate remedy, to cure the defect in the goods at the seller's expense if the buyer so chooses without the need to previously require the seller to cure the defect.

114. The Working Group referred article 46 to the Drafting Party (VI) that was set up in connexion with articles 43 and 44.

115. On the recommendation of the Drafting Party (A/CN.9/WG.2/III/CRP.17), the Working Group deferred further consideration of article 46 and requested the Secretariat to submit to the Working Group at its next session a study on this article.

Article 47

116. No comments having been made in respect of this article, the Working Group decided to adopt this article without change.

Article 48

117. One representative expressed the view that the concept of anticipatory breach that is contained in article 48 was basically taken from the Common Law and was unknown to the legislation of many countries. In the opinion of this representative article 48 did not provide clear guidelines that could assist in the application of the article by judges in countries unfamiliar with the concept of anticipatory breach.

118. Another representative stated that in view of the reference to articles 43 to 46 in article 48, the phrase "even before the time fixed for delivery" in the article would preclude the right of the seller to remedy the defect at or before the actual date of delivery.

119. Another representative stated that the rule set forth in article 48 did not appear to be entirely in conformity with the common law rule relating to anticipatory breach and should therefore be redrafted.

120. At the suggestion of several representatives, the Working Group decided to give further consideration to this article at a future session in connexion with later provisions in ULIS which deal with the question of anticipatory breach (articles 75 to 77).

Article 49

121. The Working Group took note of the decision of the Commission at its third session that "the subject-matter of article 49 of ULIS would come within the scope of a convention on prescription and should be omitted from the Uniform Law on Sale" (A/8017, paragraph 34).

HANDING OVER OF DOCUMENTS: ARTICLES 50-51

122. Some representatives were of the opinion that articles 50 and 51 had little practical advantage since they did not state which documents relating to the goods should be handed over by the seller. Thus, article 50 would be unhelpful if the contract or usage did not specify the time and place for the handing over of the documents; if the contract or usage did govern these questions, the custom or usage would be given effect under other articles of the Uniform Law. For these reasons, article 50 and 51 should be deleted.

123. One representative who shared the view that these articles should be deleted, stated that it would be difficult for the Working Group to regulate in specific provisions of the Uniform Law all issues relating to handing over of documents under the different contracts such as f.o.b., c.i.f., Ex Ship etc. In the view of this representative, article 55 was sufficiently broad to include the seller's obligation relating to such documents. As an alternative, this representative suggested that articles 50 and 51 should deal only with documents of title.

124. Another representative, while agreeing that article 50 should be deleted, held that article 51 should be retained because it equated documentary sales with non-documentary sales and subjected both types of sale to the same law. Such a provision was useful to prevent disputes as to what law was applicable to documentary sales.

125. Other representatives objected to the deletion of articles 50 and 51 on the ground that the handing over of documents was an important question in international sales. One of these representatives suggested that article 50 may be redrafted to read "The seller shall hand over all such documents relating to the goods as are necessary to enable the buyer to take over the goods". Another suggestion was to consolidate articles 50 and 51 with articles 54 and 55 or, as an alternative, to define delivery in such a way as to include the idea of handing over documents relating to the goods.

126. Another representative who favoured the retention of articles 50 and 51 suggested that the word "any" in the first line of article 50 should be deleted and the words "under the contract or usage" be inserted after the word "goods" in the second line of the same article.

127. At the suggestion of some representatives who stated that final action on articles 50 and 51 could not be taken without a careful study of the issues involved, the Working Group decided to defer final action on these articles. The Working Group also requested the representative of Japan, in consultation with the representatives of Austria, India and the United Kingdom, to submit to the next session of the Working Group a study on the questions dealt with in articles 50 and 51. The Secretariat was requested to circulate this study among the members of the Working Group.

TRANSFER OF PROPERTY: ARTICLES 52-53

128. One representative introduced the proposal relating to articles 52 and 53 that is contained in document A/CN.9/WG.2/WP.10, paragraph 76. In addition to introducing some drafting changes, the proposal aimed at protecting the buyer from "restrictions imposed by public authority" as well as from rights and claims of third parties.

129. Several representatives were opposed to the above proposal. It was stated that articles 52 and 53, contrary to the title given to them in ULIS, deal with the guarantee of title by the seller rather than the transfer of property. Restrictions imposed by public authority seldom constituted incumbrances to title; they mostly restricted the movement of the goods.

130. Some representatives also stated that the question of public restrictions was too complex to be dealt with under articles 52 and 53. It was pointed out there were various kinds of restrictions imposed by public authority, some of which affected the obligations of the seller alone, while others affected the obligations of both buyer and seller. Furthermore, some restrictions arise before the conclusion of the contract, others after the conclusion of the contract, and therefore the seller could not be held responsible for all their consequences without reference to the passing of risk. In the view of those representatives the question of restrictions by public authorities should be dealt with, if necessary, under separate provisions.

131. Consideration was given to the proviso "unless the buyer knows or should have known at the time of the contract that the goods would be acquired" subject to the right or claim of a third party, which was introduced in the above proposal. In the view of some representatives this proviso was unacceptable. In the absence of an express agreement by the buyer to take the goods subject to a right or claim of a third party, actual or constructive knowledge should not deprive the buyer of his guarantee of title.

132. Several representatives were of the opinion that the régime established by articles 52 and 53 of ULIS leaned heavily in favour of the seller. In the view of these representatives, the seller's failure to transfer a good title to the goods, free from third party's rights or claims, results, in most cases, in a fundamental breach of the contract. The buyer should be entitled to rescind the contract without the necessity of first requesting the seller to perfect the title or to deliver other goods free from incumbrances or claims as article 52 of ULIS required.

133. Some representatives who shared the above view suggested that a defect in title was not different from a non-conformity in the quantity or quality of the goods which constituted a fundamental breach. Consequently, the remedies of the buyer should be the same in both cases, it was proposed that the seller's obligation to transfer a good title should be dealt with under the articles dealing with the obligations of the seller as regards the conformity of the goods to the terms of the contract (article 33).

134. Other representatives, while agreeing that a defect in title should not be treated as less serious than a non-conformity, did not agree with the proposal that the seller's obligation to transfer good title should be dealt with under or close to the articles on conformity of the goods. The two obligations were distinctly different.

135. Some representatives had reservation about the use of the word "claim" in articles 52 and 53. The use of such word might lead to abuse by the buyer in that he might hold the seller responsible for any third party's claim, however frivolous or vexacious. Other representatives did not share this reservation on the ground that the word "claim" could only be interpreted to mean a valid or well-founded claim. One representative stated that if any qualification was used in the text to describe the claim such as the word "valid" might raise the problem of which law should determine the validity of that claim.

136. One representative suggested that the words "except those provided for by the agreement between the parties or by usage" be added at the end of article 53.

137. Another representative proposed that article 52 should be drafted as follows:

"1. The seller shall not have fulfilled his obligation as regards property where the goods are subject to a right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

"2. The buyer shall have the same rights on a failure by the seller to fulfil his obligation as regards property as he has on a failure by the seller to fulfil his obligation as regards conformity."

138. In view of the above comments and proposals the Working Group decided to defer final action on articles 52 and 53 until its next session and requested the representative of Mexico to submit a proposal for a separate article or paragraph to deal with the question of restrictions by public authority.

OTHER OBLIGATIONS OF THE SELLER: ARTICLES 54-55

Article 54

139. In order to conform the language of paragraph 1 of this article to that used in INCOTERMS 1953, the Working Group decided to substitute the expression "on the terms normally used for the transport of goods of the contract description" for the phrase "on the usual terms" and adopted the language of article 54 as amended. The adopted text as amended appears in annex I to the report of the Working Group at paragraph 34.

140. Some representatives were of the opinion that paragraph 2 of article 54 should be deleted. If the seller was not bound by the contract to effect insurance of the goods, he should not be under a legal obligation to provide the buyer with information relating to premiums and insurance policies.

Article 55

141. One representative stated that the remedies provided in article 55 entitling the buyer to require performance of the obligation and to claim damages were more stringent that those provided for in common law countries for breach of similar obligations by the seller; the buyer could normally claim damages only.

142. One observer had doubt as to the desirability of article 55, the wording of which he considered to be too strong.

143. One representative pointed out that the reference to the obligations of the seller under article 53, made in paragraph 1 of article 55, was perhaps a mistake or oversight, as there were no obligations under article 53.

144. In the light of the above comments, the Working Group decided to defer final action on article 55, and requested the representative of Japan to extend his study on articles 50 and 51 of ULIS to cover this article.

ANNEX III

Revised text of articles 1-55 of the Uniform Law*

Article 1

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States:

(*a*) When the States are both Contracting States; or

(*b*) When the rules of private international law lead to the application of the law of a Contracting State.

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* Square brackets indicate that the Working Group took no final decision on the provisions enclosed.