2. *Working Group on the International Sale of Goods; report on the work of the Second Session, 7-18 December 1970 (A/CN.9/52)* *

CONTENTS

* 5 January 1971.

I. 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 March 1969. The Working Group consists of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Under paragraph 3 of the draft resolution adopted by the Commission at its second session, [1] the Working Group shall:

"(*a*) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-General... in order to ascertain which modifications of the existing texts [the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods] might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(*b*) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;"

2. The Working Group held its first session at the United Nations Headquarters in New York from 5 January to 16 January 1970 and submitted its report [2] to the third session of the Commission.

[1] Report of the United Nations Commission on International Trade Law on the work of its second session (1969) (hereinafter referred to as UNCITRAL, Report on Second Session [1969]), para. 38; Yearbook of the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, II, A.

[2] A/CN.9/35; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

3. The Commission, at its third session, decided: [3]

"(*a*) The Working Group on the International Sale of Goods, established at the second session of the its second session; [4] in order to accelerate its work, Commission, should continue its work under the terms of reference set forth in paragraph 3 (*a*) of the draft resolution adopted by the Commission at the Working Group should meet, for at least ten working days, before the fourth session of the Commission.

"(*b*) Instead of considering selected items, the Working Group should consider ULIS systematically, chapter by chapter, giving priority to articles 1-17.

"(*c*) Members of the Working Group are requested to submit their proposals in writing and in time to allow the Secretary-General to circulate such proposals prior to the meeting.

"(*d*) Representatives of members of the Working Group, alone or in co-operation with representatives of other members, should be entrusted, if so willing, with the examination and redrafting of the articles referred to in paragraph (*b*) above, and any other provisions of ULIS related to those articles. Such representatives should take into consideration the relevant suggestions of Governments, the documents mentioned in the report of the Commission on the work of its third session, and the decisions taken at that session as well as the practices of international trade.

"(*e*) The representatives entrusted with the tasks referred to in paragraph (*d*) above shall submit the result of their work, including explanatory comments on each article, to the Secretary-General not later than 30 June 1970. The Secretary-General is requested to transmit these reports to other members of the Working Group on Sales for comments. The comments which reach the Secretary-General before 31 August 1970 shall be transmitted to the forthcoming session of the Working Group. The Secretary-General is also requested to submit his observations to the Working Group, whose report should contain explanatory comments on each issue or article of ULIS recommended for approval.

"(*f*) Before the new text of a uniform law or the revised text of ULIS is completed, the Working Group should only submit questions of principle to the Commission for consideration.

"(*g*) Members of the Commission are requested to submit their proposals related to the report of the Working Group in writing preferably in advance of the fourth session of the Commission.

"(*h*) The Secretary-General is requested to render assistance to the Working Group in the performance of its task, in particular, by preparing, either at the request of the Working Group or on his own motion, studies and other preparatory documents (with the assistance of experts, if necessary, within the limits permitted by the budget) and by submitting proposals for consideration."

4. The Working Group held its second session at the United Nations Office at Geneva from 7 December to 18 December 1970. All the members of the Working Group were represented. The list of representatives is contained in annex I to this report.

5. The session was also attended by observers from Belgium and Romania and from the following intergovernmental and international non-governmental organizations: The Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the International Chamber of Commerce (ICC).

6. The documents placed before the Working Group were:

(*a*) Provisional agenda (A/CN.9/WG.2/WP.7)

(*b*) Analysis by the Secretary-General of reports, containing comments and proposals relating to articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS), submitted by representatives of members of the Working Group (A/CN.9/WG.2/WP.6)

(*c*) Annexes (I-XIV) to the above Analysis, setting forth the texts of the reports submitted by representatives of members of the Working Group (A/CN.9/WG.2/WP.6/Add.1)

(*d*) Note by the secretariat of UNIDROIT on the concept of "delivery" ("délivrance") in the drafting of the Uniform Law on the International Sale of Goods (A/CN9/WG.2/WP.5).

7. The Working Group adopted the following agenda:

1. Election of officers
2. Adoption of the agenda
3. Consideration of articles 1 to 17 of ULIS
4. Future work
5. Adoption of the report.

8. At its first and third meetings, held on 7 and 8 January 1970, the Working Group, by acclamation, elected the following officers

Chairman: Mr. Jorge Barrera Graf (Mexico)

Rapporteur: Mr. Dileep Anant Kamat (India).

9. With respect to item 3 of this agenda, the Working Group decided to take the above Analysis by the Secretary-General (A/CN.9/WG.2/WP.6) as a basis for its discussions, and to consider the issues involved in the first seventeen articles of ULIS in the order in which they were presented in this Analysis.

10. The Working Group set up Working Parties to consider the drafting of certain articles.

II. Consideration of Articles 1 to 17 of ULIS

Articles 1 and 2: basic rules on the sphere of application of the law

11. The actions of the Working Group with respect to articles 1 and 2 of ULIS are discussed together. These two articles establish the basic rules on the

[3] Report of the United Nations Commission on International Trade Law on the work of its third session (hereafter referred to as UNCITRAL report on third session [1970]), para. 72; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

[4] Reproduced in para. 1 above.

sphere of application of the Law; the structure can best be viewed as a whole. [5]

12. Articles 1 and 2 of ULIS are as follows:

ARTICLE 1

"1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

"(*a*) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

"(*b*) Where the acts constituting the offer and the acceptance have been effected in the territories of different States;

"(*c*) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

"2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

"3. The application of the present Law shall not depend on the nationality of the parties.

"4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

"5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods is in force in respect of them."

ARTICLE 2

"Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law."

13. The Working Group recommended that these articles be replaced by the following:

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.

2. The present Law shall also apply where it has been chosen as the law of the contract by the parties.

Article 2

For the purpose of the present Law:

(*a*) The parties shall be considered not to have their places of business in different States if, at the time of the conclusion of the contract one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State;

(*b*) Where a party has places of business in more than one State, his place of business shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(*c*) Where a party does not have a place or business, reference shall be made to his habitual residence;

(*d*) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration.

(*e*) A "Contracting State" means a State which is Party to the Convention dated... relating to... and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

(*f*) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated... relating to... is in force in respect of them.

1. *International character of the transaction*

14. This revision substantially simplifies the Law by reducing the number of independent tests for the Law's applicability.

15. More specifically, the revision eliminates the tests set forth in article 1 of ULIS in sub-paragraphs 1 (*a*), 1 (*b*) and 1 (*c*). Each of these sub-paragraphs qualifies the basic test (which has been retained) that the parties to a sale of goods shall have their places of business in different States.

16. Paragraph 1 (*a*) of article 1 lays down a test based on whether the contract "involves" the sale of goods that at the time of the contract are in the course of carriage, or will be carried from one State to another. Under this test, serious problems have arisen because of the difficulty in defining the relationship between the obligations of the contract and the movement of goods from one State to another.

17. In many cases the contract will clearly require international carriage of the goods, but in many other cases this matter will be left in doubt. The buyer often will not be directly concerned with the point of origin of the goods; his principal interest is in receiving goods of a specified quantity and quality. In other cases, the buyer may provide transportation in trucks or in ships he dispatches to the seller's place of business or to a nearby shipping-point; such arrangements may be made under quotations like "Ex Works" or "f.o.b." at the seller's factory or at a dock in the seller's country. In such cases the seller is not concerned with the destination of the goods; his concern is with receiving the price. Plans about the origin or destination may not

[5] Other provisions, establishing certain exceptions and modifications of these basic rules, will be discussed under articles 3-8, *infra*.

be required or even mentioned in the contract. Even if the contract refers to plans for the international movement of goods, such a reference may not be part of the obligation of the contract, frequently plans for shipment will be developed informally after the conclusion of the contract in the form of shipping instructions.

18. Consideration was given to various ways to solve this problem by revision of paragraph 1 (*a*). These included provision that the contract "contemplates" or the parties "contemplated" or "expected" the requisite international movement. These alternative tests, however, turn on facts concerning matters that are not part of the obligations under the contract, and consequently are difficult of application.

19. Paragraph 1 (*b*) of article 1 of ULIS lays down a test dependent on whether "the acts constituting the offer and acceptance have been effected in the territories of different States". Under this test, the offer (and acceptance) may be a communication that is dispatched in one State and received in another; this problem is dealt with in paragraph 4 of article 1. The more serious problem is that, in the course of negotiation, a series of communications may gradually ripen into agreement, and the agreement may be wholly or partially embodied in a document executed by the parties in one State. In such cases it will be difficult to know when the stage of negotiation has ended, or which are the communications, under articles 1-4, "which contain" the "offer" and "acceptance".

20. Paragraph 1 (*c*) of article 1 of ULIS provides a third test that combines the place of "delivery" of the goods with the place of "offer" and "acceptance". This test involves some of the same problems of application that have been outlined above.

21. The revision removes the qualifications which sub-paragraphs 1 (*a*), 1 (*b*) and 1 (*c*) added to the basic test that the parties have their places of business in different States. This basic test is retained in paragraph 1 of article 1. [6]

22. This simplification of article 1, considered alone, would broaden the scope of the Law's applicability. However, this revision was made in relationship to another significant change narrowing the scope of the Law. Trouble some questions have arisen with respect to the relationship between the rules of ULIS and various types of national laws designed to protect ordinary consumers. In some areas, purchases by consumers from sellers in other States are of significant volume, and may increase. It was decided that the best solution to the problem was wholly to exempt consumer sales from the Law; this is done by article 5-1 (*a*). With this restriction in scope, it was considered that the qualifications imposed by sub-paragraphs 1 (*a*), 1 (*b*) and 1 (*c*) could be removed without unduly increasing the scope of the Law.

23. The basic requirement, that the parties have their "places of business in different States", is defined by the provisions of article 2. This test, as it appeared in article 1 of ULIS, contained no provision dealing with problems presented when a party has places of business in more than one State. Since many business enterprises have branches in different States, doubts as to which place of business was relevant for the applicability of the Law presented problems that required a solution. Paragraph (*b*) of article 2 is addressed to this question. This paragraph, as the basic rule, points to the party's "*principal* place of business". In pointing to a "place of business", the rule excludes centres of only formal significance, such as a place of incorporation which is not a place of "business".

24. It was recognized that in some cases the transaction may be centred at a place of business which is not the "principal place of business"; where such a place is in the same State as the place of business of the other party, failure to take account of this fact would lead to excessive extension of the scope of the Law. [7] Therefore the basic test is qualified, under paragraph (*b*), where "another place of business has a closer relationship to the contract and its performance". This paragraph states that, in applying this test, regard should be given "to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". This latter language excludes aspects of the making of the contract (such as supervision by another office) or of performance (such as foreign origin or destination of the goods) that are known only to one party and which thus are outside the "circumstances known to or contemplated by the parties at the time of the conclusion of the contract".

25. Paragraph (*a*) of proposed article 2 is designed to add to the definiteness of the basic test and to prevent undue extension of the Law by excluding from consideration a place of business where "one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State". This section would be applicable, for exemple, where a transaction of sale was effected through a broker or other agent who did not disclose that he was acting for a foreign principal.

26. One representative proposed that the Law should also exclude transactions where "the offer, the acceptance, and the delivery of the goods have been effected in the State where the goods are, unless otherwise agreed by the parties". It was concluded that such a provision would not be necessary in view of the exclusion of consumer sales and would be difficult of application for the reasons given for the deletion of paragraph 1 (*b*) and (*c*) of article 1 of ULIS, as discussed above in paragraphs 19-22.

27. The Working Group recognized that it is not possible to avoid all doubts that may arise under the application of these tests. It was concluded, however, that the central idea was sufficiently clear for application, and that the rule proposed in paragraph (*b*) of

[6] Questions of applicability of the Law dependent on whether the relevant States have adopted the Uniform Law will be considered at paragraphs 33-35, *infra*. The effect of an agreement by the parties that the Law shall apply will be considered at paragraphs 36-42, *infra*.

[7] Undue extension might also result, in some circumstances, where the centre of the transaction is in a non-contracting State and the other party has his principal place of business in a Contracting State. See article 1-1 (*a*) and (*b*) and paragraphs 32-35, *infra*.

article 2 substantially narrowed the area of doubt that arises under the undefined reference to "places of business" in the original version of ULIS.

28. An observer suggested that more precision would result if it were added that, in order to be a place of business, a "permanent organization" should be maintained there and that the controlling test should be which organization took care of the conclusion of the contract. He proposed the following language, which was supported by another observer:

> "Where a party to a contract also has a place of business in another State than that of his principal place of business, such other place of business shall not be considered his place of business unless the party at that place maintains a permanent organization [including an office and personnel of his own] and the contract was concluded exclusively through the intermediary of such organization."

29. An observer also noted his reservations concerning the definitions set forth in paragraphs (*a*) and (*b*) of article 2. Paragraph (*a*), in his opinion, would pose problems of proof and provided the possibility for improper steps to apply or to escape from the Law. It was also suggested that paragraph (*b*) could encourage litigation over applicability of the Law. It was noted that when a businessman situated in State A bought goods which were found there (for instance for equipping his offices) it was strange that ULIS might be applicable to this contract. Generally, this observer considered that the former text of article 1, which defined the international sale, was preferable.

30. One delegate proposed the rearrangement of paragraphs (*a*) and (*b*) and drafting changes in paragraph (*b*). The Working Group concluded that these changes should not be made at the present time.

31. It may be noted that paragraph (*d*) of article 2 of the proposed revision is based on article 3 and article 7 of ULIS. These provisions of ULIS, and article 2 (*d*) of the revision proposed by the Working Group, do not modify other provisions of the Law, but are designed to avoid misinterpretation which otherwise might arise from the practices of some legal systems. This is particularly true of the provision, drawn from article 7 of ULIS, that consideration shall not be taken of "the civil or commercial character of the parties or the contract". This provision was moved to this section to emphasize its relationship to questions of applicability of the Law.

2. *Applicability of the Law with reference to the contact between a Contracting State and the parties to a transaction*

32. Article 1 of ULIS refers to contracts between parties whose places of business are in "different States"; this provision does not require that either of these States had adopted the Law. In addition, article 2 of ULIS provides:

> Rules of private international law shall be excluded for the purposed of the application of the present Law subject to any provision to the contrary in the said Law.

33. At sessions of the Commission and at the first session of the Working Group, attention was given to the broad scope that these provisions gave to the Law. Attention was also given to the problem of "forum-shopping", since the applicability of the Law might depend on whether a party could institute litigation in the *forum* of a Contracting State, [8] At the third session, the Commission decided on the substance of a revision which should be used as a basis for future work of the Working Group on Sales. [9] This decision has been implemented in paragraph 1 of article 1 of the proposed revision. Thus, where the parties to a contract have their places of business in different States, under article 1-1, the Law shall apply:

> "(*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."

34. The above reference in paragraph (*a*) to "Contracting States" is supplemented by provisions in paragraphs (*e*) and (*f*) of article 2. Paragraph (*e*) takes account of the possibility that a new convention might provide for reservations, such as those permitted under article V of the Hague Convention of 1964, whereby the Law is applicable only when it is chosen as the applicable law by the parties. Paragraph (*f*) refers to reservations such as those permitted under article II of The Hague Convention of 1964.

35. Under paragraph (*b*) of the proposed article 1, when the parties have their places of business in different States and the rules of private international law point to the law of a Contracting State, the rules of law applicable are those of the Uniform Law and not the rules applicable (e.g.) to domestic transactions.

3. *Applicability based on choice by the parties*

36. Paragraph 2 of the proposed article 1 provides:

> "2. The present Law shall also apply where it has been chosen as the law of the contract by the parties."

37. This language is the same as the opening phrase of article 4 of ULIS.

38. The closing phrase of article 4 of ULIS states:

> "To the extent that it does not effect the application of any mandatory provisions of Law which would have been applicable if the parties had not chosen the Uniform Law."

39. The Working Group concluded that the substance of the above provision concerning mandatory rules should be reserved for later action. This provision was not added to paragraph 2 of article 1 because this problem calls for a general provision. Thus, the effect of national mandatory rules should not be dealt with solely in connexion with the applicability of the law resulting from the choice by the parties; the problem

[8] See UNCITRAL report on second session (1969), annex I, para. 40. See also report of the Working Group on the international sale of goods on its first session held at New York from 5 to 16 January (A/CN.9/35), paras. 10-29.

[9] See UNCITRAL report on third session (1970), para. 30; op. cit, *supra*, foot-note 3.

of national mandatory rules may also arise when the law is automatically applicable under article 1-1.

40. The provisions touching this problem in other sections of ULIS were found to be incomplete. Thus, article 5-2 preserves certain mandatory rules only with respect to purchases involving payment of the price by instalments. Article 8 excludes questions of "validity" of the contract from the scope of the law, but this provision might not preserve regulatory provisions restricting or supplementing provisions of a contract, since these might not be deemed to constitute matters of "validity".

41. The Working Group consequently decided that attention should be given to a general provision on the relationship between the Law and mandatory rules of national law.

42. Several representatives put it on record that while they agreed to recommend the new revised text of article 1 which omitted any reference to 1 (*a*), (*b*) or (*e*) of ULIS, this did not mean that they or their Governments were committed to the change of structure involved in the new text. They would need time to reflect on this change, and whatever agreement was signified in adopting the revised text of article 1 was *ad referendum*. The Working Group decided that the recommendation made in this report about the revision of article 1 did not involve a commitment on the part of the representatives.

ARTICLE 3: EXCLUSION BY THE PARTIES

43. Article 3 of ULIS provides:

"The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied."

44. The Working Group recommended that this article be revised to read as follows:

"The parties may exclude the application of the present Law or derogate from or very the effect of any of its provisions."

45. The proposed revision is the same in substance as the first sentence of article 3 of ULIS, subject only to drafting changes that will be explained below. The principal point of the revision is the omission of the second sentence. Some representatives were concerned lest the special reference to "implied" exclusion might encourage courts to conclude, on insufficient grounds, that the Law had been wholly excluded. Other representatives were of the opinion that there was no ground for such concern, but agreed to the deletion of the second sentence since the Law does not ordinarily attempt to establish special rules for construing agreements.

46. The proposed revision makes certain drafting changes in the first sentence of article 3 of ULIS. The revision more clearly expresses the thought that the article deals with two types of problems. One is the exclusion of the entire system of rules embodied in the Uniform Law; this is dealt with by the words "the parties may exclude the application of the present Law. . .". A second is the relationship between the agreement of the parties and particular provisions of the Uniform Law. Article 3 of ULIS and of the proposed revision both emphasize that the provisions of the Uniform Law are supplementary and yield to the agreement of the parties. This may take many forms; in the language of the proposed revision, the parties may "derogate from or vary the effect of" any of the provisions of the present Law and thus effect a partial exclusion of the Law.

ARTICLE 4: APPLICATION BY PARTIES

47. Article 4 of ULIS provides:

"The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law."

48. The substance of the opening phrase of this article was incorporated in the newly recommended text of article 1 (2). With respect to the closing phrase, the Working Group had decided, for reasons explained in connexion with articles 1 and 2, [10] that the problem of defining the relationship between the Uniform Law and national mandatory rules should be dealt with, at a later stage, by a general provision.

49. The Working Group consequently recommended that article 4 of ULIS be deleted.

ARTICLE 5: EXCLUSION OF CERTAIN TRANSACTIONS AND TYPES OF GOODS

50. Article 5 of ULIS reads as follows:

"1. The present Law shall not apply to sales:

"(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

"(*b*) Of any ship, vessel or aircraft, which is or will be subject to registration;

"(*c*) Of electricity;

"(*d*) By authority of law or on execution or distress.

"2. The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments."

51. The Working Group recommended that this article be redrafted as follows:

"1. The present Law shall not apply to sales:

"(*a*) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller knew that the goods were bought for a different use;

"(*b*) By auction;

"(*c*) On execution or otherwise by authority of law.

[10] See paragraphs 38-42, *supra*.

"2. Neither shall the present Law apply to sales:

"(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

"(*b*) Of any ship, vessel or aircraft [which is registered or is required to be registered];

"(*c*) Of electricity."

52. The proposed revision sets forth two groups of exclusions from the scope of the Law. Paragraph 1 contains exclusions based on the special character of the transaction of sale. Paragraph 2 contains exclusions based on the special character of certain types of goods.

53. Paragraphs 2 (*a*) and 2 (*c*) of the proposed revision are the same as the provisions in article 5, 1 (*a*) and (*c*) of ULIS.

54. Paragraph 1 (*c*) of the proposed revision excludes sales "on execution or otherwise by authority of law". This provision, in substance, is the same as paragraph 1 (*d*) of article 5 of ULIS, but makes a drafting change by omitting the reference to "distress". It was noted that the concept of "distress" is not known outside the common law countries and is merely a specific example of sale by authority of law. In the French language there is no equivalent for this word and, therefore, it does not appear in the French text. The proposed text does not make special reference to sales on distress since the text "otherwise by authority of law" would include such sales also.

55. Paragraph 2 (*b*) of the proposed revision deals with the exemption "of any ship, vessel or aircraft"; the words "which is registered or is required to be registered" were placed in square brackets to indicate that these words present a problem for further drafting. Several representatives pointed out the fact that States may have different rules as to the kind of ships or vessels that are subject to registration. The intention is not to exclude smaller boats from the Law, even though these boats may be subject to municipal or other local registration for purposes of taxation or safety; the provision is concerned with larger ships for purposes of taxation or safety; the provision is concerned with larger ships and vessels which are normally subject to national registration. Nor was it the intention to make the exclusion depend on whether the vessel was actually registered or required to be registered at the time of the sale; the intent was to exclude the type of vessels which, in normal course, would become subject to national registration. It was considered necessary to examine the nature of such registration so that the intention could be expressed more precisely.

56. The Working Group introduced two new exceptions. One of them is the sale of consumer goods, the other is sales by auction.

57. As has been noted in connexion with article 1, [11] problems have been presented with respect to the relationship between the rules of ULIS and various types of national mandatory rules for the protection of consumers. This was an important reason which lead to the exclusion of consumer sales from the Law. In addition, this exclusion permitted the simplification of the rules on applicability of the Law in article 1. This exclusion was considered appropriate for the further reason that, in the usual case, a sale to a consumer was not regarded as an important aspect of international trade. The exception of consumer goods from the field of application of the Law is intended to cover most of those cases where one of the parties, usually the seller, does not know or cannot be aware of the fact that the other party has his place of business or habitual residence in another country. Such sales usually occur where tourists or other foreigners buy goods in retail shops or where a foreigner offers for sale goods "of a kind and in a quantity ordinarily bought by an individual for personal, family or household use". Under this language, the exception does not depend on whether the seller or buyer knew that the place of business of the other party is in another country. If, however, the goods were bought for a different use, i.e. not for personal, family, household or similar use and the seller knew of this fact, then the Law applies, provided, of course, that the parties have their places of business in different States.

58. The second new exception recommended by the Working Group is that of sales by auction. At auctions, buyers may not be identified. But even if the place of business of the successful bidder should be known to the seller, the applicable law could not depend on that circumstance since at the opening of the auction the seller could not know which buyer would make the purchase and hence could not know whether ULIS would apply. It was concluded, therefore, that ULIS should only apply to sales by auction if the parties agreed to apply it to their contract.

59. For reasons explained in connexion with articles 1 and 2, [12] the problem of mandatory rules requires a general provision. The special provision in article 6 5 (2) of ULIS concerning instalment sales was inadequate for the purpose. Consequently, the Working Group decided to delete paragraph 2 of the present text and to defer consideration of the applicability of mandatory rules of national laws to a later session.

60. An observer expressed the view that in light of the new draft of article 1, the exceptions in article 5 should be broadened so that local sales would not fall within ULIS. He proposed the exclusion of sales at places of business open to the public and where the buyer ordinarily takes delivery at the time of the contract.

ARTICLE 6: MIXED CONTRACTS

61. Article 6 of ULIS provides:

"Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production."

[11] See paragraph 22, *supra*.

[12] See paras. 40-42, *supra*.

62. The Working Group recommended that a new paragraph be inserted in the article and that the present text be maintained as paragraph 2. The proposed new paragraph 1 reads as follows:

"1. The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods."

63. The proposed new paragraph 1 is designed to deal with contracts which combine sale of goods with other obligations which lie outside the scope of ULIS. Examples of the latter include the construction of buildings and the supply of services, such as installation of machinery or supervision of such installation. The recommended text lays down the test for determining whether the Uniform Law shall apply to a contract which combines obligations relating to those of a seller and a buyer with other obligations which are lacking in such a character.

64. In a typical contract for the sale of goods, the basic obligation of a seller is the delivery of goods (including in some cases storage and transportation), and that of the buyer is the payment for the goods. Therefore the controlling test, laid down in paragraph 1, of the proposed text, is whether the obligations of the parties under the mixed contract, taken as a whole, are "substantially other than the delivery of and payment for goods". In such a case the contract is not considered a contract for the sale of goods and consequently ULIS will not apply.

65. Whether the obligations of the parties under the mixed contract are "substantially other than the delivery of and payment for goods" is a question of fact in each case. The Working Group considered that this controlling test was sufficiently clear for national courts to decide the character of the contract.

66. This paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. This question (sometimes termed the "severability" of the contract) is left outside the scope of ULIS to be decided by national courts in accordance with the rules of the applicable law.

67. It should be noted that, in contracts excluded by this paragraph, the parties are free to provide for the applicability of ULIS under the provision set forth in paragraph 2 of the recommended text of article 1.

ARTICLE 7: COMMERCIAL OR CIVIL CHARACTER OF THE PARTIES OR OF THE CONTRACT

68. Article 7 of ULIS provides:

"The present Law shall apply to sales regardless of the commercial or civil character of the parties or of the contracts."

69. For reasons explained in connexion with articles 1 and 2, [13] the substance of this article was incorporated in the newly recommended text of article 2 (*d*). The Working Group consequently recommended that article 7 of ULIS be deleted.

[13] See para. 31, *supra*.

ARTICLE 8: THE SCOPE OF THE LAW

70. Article 8 of ULIS provides:

"The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage."

71. No comments or proposals having been made in connexion with this article, the Working Group recommended that it be adopted without change.

ARTICLE 9: USAGES

72. Article 9 of ULIS provides:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"2. They shall also be bound by usage which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, usages shall prevail unless otherwise agreed by the parties.

"3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning given to them in the trade concerned."

73. The Working Group recommended that this article be revised to read as follows:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"2. The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.

"3. In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.

"4. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties."

74. According to the original wording of the article, the parties to a contract are bound by two types of usages: (*a*) those usages which the parties expressly or impliedly made applicable to their contract and (*b*)

those usages which "reasonable persons" in the same situation as the parties usually consider to be applicable to their contract.

75. A sessional Working Party, established by the Commission at its third session to consider this article, came to the conclusion that the wording of this article was unsatisfactory in two main respects. The first was the lack of a definition of the circumstances in which the parties would be considered as having impliedly made usages applicable to their contract. The second was the reference to "reasonable persons" in paragraph 2 of this article. It was concluded that this provision could give rise to doubts and uncertainty; since usages relating to the same type of contract might differ from one region to another, "reasonable persons" from different parts of the world might consider different usages as applicable to the contract. Consequently, the sessional Working Party recommended the deletion of paragraph 2 of article 9 and submitted a text which attempted to define usages which the parties shall be considered to have impliedly made applicable to the contract. They also recommended a revision of paragraph 3.[14] This text was referred by the Commission to the Working Group for consideration.

76. The text recommended by the Working Group for adoption is largely based on the text submitted by the sessional Working Party referred to above. Paragraph 1 introduces no change in paragraph 1 of the original article 9 of ULIS; the parties are bound by those usages which they have expressly or impliedly made applicable to their contract. Paragraph 2 is ancillary to paragraph 1, and is designed to define the usages which the parties shall be considered as having impliedly made applicable to their contract. These are of two types: (*a*) usages of which the parties are actually aware and, (*b*) usages of which the parties should have been aware. Two tests—one subjective and the other objective—are therefore employed. But in both cases they should be usages which are widely known to and regularly observed by parties to contracts of the type involved.

77. One representative stated that, in the case of a usage of which the parties are aware, it should not be necessary to show that the usage was widely known to and regularly observed by parties to contracts of the type involved.

78. One representative suggested that, in the recommended text of paragraph 2, the phrase "of which the parties are aware and" should be deleted. This representative observed that such a strict requirement was not necessary for usages to which the parties refer tacitly, and that the revised text should employ an *objective* rather than a *subjective* approach.

79. Some representatives considered that in paragraph 2 of article 9 the word "generally" should be included, in addition to the word "regularly", with regard to the usages observed by parties to contracts of the type involved. This would ensure that the usages which are impliedly made applicable are those which are observed on a wide geographical basis.

80. Paragraph 3 of the recommended text introduces no substantive change in the original article. It gives expression to the principle of the autonomy of the parties which is given effect in article 3 and other provisions of ULIS. Since the usages that are given legal effect under the recommended text are only those which are or may be considered as constituting part of the agreement of the parties, they should prevail over the Uniform Law in case of conflict: This is consistent with the recommended text of article 3 which confers on the parties a power to "exclude the application of the present Law or to derogate from or vary the effect of any of its provisions". This principle is also expressed in the phrase "unless otherwise agreed by the parties" that concludes paragraph 3 of the recommended text. The parties therefore may, if they so wish, make the Law prevail over usages in case of conflict.

81. Paragraph 4 of the recommended text is designed to introduce a rule of interpretation relating to expressions, provisions or forms of contract commonly used in commercial practice. Where such terms or standard contracts are employed, they shall be given the meaning "widely accepted and regularly given to them in the trade concerned". Where the parties expressly or in the course of their dealings establish a meaning, for these terms, expressions or forms of contract, that is different from that which is "widely accepted and regularly given to them in the trade concerned", the parties may be considered as having agreed to adopt that special meaning in their contract. This agreement would be given effect under the phrase "unless otherwise agreed by the parties".

82. Some representatives disagreed with the wording of paragraph 4 as recommended by the Working Group on two grounds: The first ground is that the language attempts to draw a line between the effect of usages (*a*) for the purpose of supplementing or qualifying terms and (*b*) for the purpose of interpreting terms. In their view, this distinction is artificial and will pose practical difficulties. The second ground is that paragraph 4 binds a party to an international usage even though that party did not know and had no reason to know of it. In their opinion, this is undesirable. The representatives, therefore, proposed that paragraph 4 should either be deleted or be redrafted to read:

> "4. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, the meaning usually given to them in the trade concerned shall be used in their interpretation in accordance with the provisions of paragraphs 1 and 2."

ARTICLE 10: DEFINITION OF "FUNDAMENTAL BREACH"

83. Article 10 reads as follows:

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other

[14] See UNCITRAL report on third session (1970), para. 38; op. cit, *supra*, foot-note 3.

party would not have entered into the contract if he had foreseen the breach and its effects."

84. The Working Group decided to defer consideration of this article to a later session when the relevant substantive rules of the Uniform Law are discussed.

85. In advance of the meeting, some representatives had submitted proposals and comments with respect to this article. [15] Most of these related to the term "reasonable person"; several suggestions were made to replace or avoid the use of this term.

86. At the meeting several other proposals were advanced to replace the term "reasonable person" by a more precise expression such as "a merchant engaged in international commerce"; "most persons engaged in international trade"; "a person engaged in international trade in the same situation as the other party"; a party of goodwill engaged in international trade"; or by the addition of the word "ordinarily" before the words "entered into the contract". It was also suggested that the term "reasonable person" be maintained and the interpretation of this term should be left to the Courts. Others, however, expressed the view that this would lead to different interpretations by the Courts in different countries.

87. During the debate, it was also suggested that the definition contained in this article was too complex for effective application.

88. On the suggestion of several representatives, the Working Group came to the conclusion that it was premature to discuss the definition of fundamental breach before the Working Group considered the substantive provisions of the Law in which that term was used; in addition, at the present stage it was difficult to decide whether to maintain the concept of fundamental breach.

ARTICLE 11: DEFINITION OF "PROMPTLY"

89. Article 11 of ULIS reads as follows:

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible in the circumstances from the moment when the act could reasonably be performed."

90. The Working Group recommended that this article be redrafted as follows:

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as is practicable in the circumstances."

91. It was considered that the present text of the article was not clear. The definition refers to two periods: (1) a period "as short... as possible in the circumstances" and (2) a period starting from "the moment when the act could reasonably be performed". This structure was found to be unnecessarily complex. Taken literally, this provision could mean that in cases where an act is required to be performed promptly, it would have to be performed only after the time when it could reasonably be performed. Therefore the definition did not reflect the urgency that was intended by the word "promptly". The provision of two periods of time extended unduly the time for action. Furthermore, it was stated that this definition could not well be applied to several of the articles in which the term was used since those articles had already indicated a starting point (e.g. article 39-1) other than that set fort in article 11.

92. The recommended text is intended to make the definition clear and more easily applicable to the articles in which the term is used. The word "practicable" in the English version is intended to point more to what is possible in practice than to what is convenient in practice.

93. The proposed new definition does not indicate anything regarding the starting point of the period. Consequently, the Working Group recommended that the question of a starting point should be considered in connexion with the articles that do not already indicate such a starting point, e.g., article 38.

94. One representative proposed that this article should refer to what would be deemed "prompt" from the point of view of persons engaged in international trade. [16] Since the Uniform Law applied irrespective of the commercial or civil character of the parties, the lack of this reference might lead to different approaches by courts through the application of domestic (rather than international) or subjective (rather than objective) criteria, particularly when a contracting party was of "civil" status. He further considered it necessary to have a definition of the term "reasonable time" which appeared in many articles of ULIS. In some countries, the above is not used as a legal term; the absence of a definition thus may give rise to difficulties for the courts of these countries.

95. An observer doubted the usefulness of the recommended text of article 11.

ARTICLE 12: DEFINITION OF "CURRENT PRICE"

96. Article 12 of ULIS provides:

"For the purposes of the present Law, the expression 'current price' means a price based upon an official market quotation, or in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price."

97. The Working Group recommended that this article be deleted. The subject-matter of this article should be considered along with the provisions of article 84, which is the only article in ULIS which employs the expression "current price". (*Cf.* article 87).

98. Some representatives found the definition of "current price" in article 12 to be complex and misleading. Attention was drawn to the use of the words "based upon an official market quotation". The requirement that reference be made first to an official market

[15] See document A/CN.9/WG.2/WP.6, paras. 65-70; see also part two, I, A, 1 above.

[16] *Ibid.*, para. 72.

quotation raises questions as to what is "an official market quotation". It was suggested that the essential idea should be the price prevailing in a given market or the current market price.

99. The Working Group considered that it was inappropriate to set up a general definition for a term which was used in only one operative article of ULIS. Including a definition of "current price" in article 84 would not unduly burden the provisions of that article.

ARTICLE 13: DEFINITION OF "A PARTY KNEW OR OUGHT TO HAVE KNOWN"

100. Article 13 of ULIS provides:

"For the purposes of the present Law, the expression 'a party knew or ought to have known', or any similar expression, refers to what should have been known to a reasonable person in the same situation."

101. The Working Group recommended that this article be deleted.

102. The first part of the term "a party knew" relates to a question of fact and is not defined. The purpose of this article is to define the phrase "ought to have known". In defining this phrase, article 13 employs two concepts: (1) the reference to a "reasonable person", and (2) placing the reasonable person "in the same situation" as the party in question.

103. The concept of a "reasonable person", which exists in some legal systems, is unknown to others. Representatives of legal systems in which this term is not used find it difficult to introduce it into their law. A literal translation of the term "reasonable man" as a person who can reason or who is rational, is not the same meaning as that given to that expression in legal systems where this term is used. The actual legal meaning which these systems give to that expression is somewhat obscure, but the central idea is to suggest a standard of conduct.

104. The crucial question is how high or strict is the standard imposed. The concept of the "reasonable man" has an important function in common law systems in connexion with the law of torts (or delict) in suggesting the standard of care required to be taken to avoid inflicting damage. However, the same standard is difficult to apply to what a party to an international sales transaction should have known in different situations.

105. Since the definition in article 13 was based on the standard of an abstract "reasonable person", it was necessary to bring the test back to the real problem at hand. This was done by the second element—a reference to a reasonable person "in the same situation" as the party to the transaction of sale. Thus, in substance, this definition brings us back to what a *party* ought to have known and as a general proposition, this definition appears to be rather unhelpful.

106. This article also applies the same definition to "any similar expression". This attempt at a single definition appeared all the more inappropriate in view of the variety of situations in which expressions are used in ULIS to refer to the knowledge required. For instance, articles 36 and 40 (in the context of defects in goods) refer to facts of which a party "could not have been unaware". However, these references to facts of which a party "*could* not have been *unaware*" seem to set a standard approximating actual knowledge and this does not seem "similar" to the term defined in article 13.

107. In other places, ULIS employs expressions that are perhaps "similar" to the particular expression defined in article 13. Article 39-1, in connexion with notice of lack of conformity, refers to the time when the buyer "*ought* to have *discovered*" the defect. In a similar context, article 52-4 refers to the time the buyer "*ought* to have *become aware*" of the right or claims of a third person. Somewhat farther removed from the definition are articles 82 and 86, which refer to losses that a party ought to have "foreseen".

108. The only articles in ULIS using the precise expression defined in article 13 are articles 99-2 and 100. Article 99-2 deals with the unusual circumstances that the goods had already been lost or had deteriorated at the time of the making of the contract; article 100 deals with a similar problem.

109. Consideration was given to a standard expressed in terms of the obligations of "a merchant engaged in international commerce". Some representatives of "a merchant engaged in international commerce". Some representatives considered that most of the transactions governed by ULIS will involve merchants engaged in international commerce, but the scope of the law is not confined to such parties. Various types of parties and situations are governed by the different articles in question. Greater flexibility is therefore required than might be possible under a single overriding standard. In particular those representatives considered it dangerous to create the possibility that a person who is not a merchant would be subjected to the standard appropriate for merchants.

110. Finally, it was decided that article 13 should be deleted. It was also decided that in reviewing the different articles containing an obligation concerning the knowledge of a party, attention should be given to the question whether the language appropriately expressed the standard of investigation required of the party in the particular circumstances of that case. In this review, attention should also be given to the possibility of obtaining greater uniformity of expression.

ARTICLE 14: COMMUNICATIONS

111. Article 14 of ULIS provides:

"Communications provided for by the present law shall be made by the means usual in the circumstances."

112. No comments or proposals having been made with respect to this article, the Working Group recommended that it be adopted without change.

ARTICLE 15: FORM OF CONTRACTS

113. Article 15 reads as follows:

"A contract of sale need not be evidenced by writing and shall not be subject to any other require-

ments as to form. In particular, it may be proved by means of witnesses."

114. The Working Group reached no agreement on this article.

115. One representative proposed adding to the present text of article 15 the following provision:

"The contract, however, shall be in writting if so required by the laws of at least one of the countries in the territories whereof the parties have their place of business."

116. It was noted that in a number of countries the written form for foreign trade contracts was obligatory; the above provision was proposed to accommodate this requirement. One representative stated that this proposal might also have some bearing on article 14 of ULIS.

117. In opposition to the above proposal, it was suggested that the character of "writing" and the legal consequences of its absence vary from country to country. Some legal systems require the contract to be in writing, while others provide that it may be evidenced by a writing, which could even be a memorandum following an oral agreement. Some legal rules require that the contract be signed by both parties, while others are satisfied by exchange of cables or telex. As to the legal consequences of non-compliance with the requirement of writing, some countries consider the contract null and void, while others entitle the parties to have them declared null and void if the other party has not signed a writing. In yet other countries the contract is valid but it is not enforceable against a party who has not signed a writing or memorandum. Therefore if the requirement of a "writing" is made part of ULIS it would be necessary (*a*) to provide for the meaning of "in writing"; and (*b*) to supply rules for a number of problems on the consequences of non-compliance with the requirement.

118. Another representative proposed that the present text of article 15 should be supplemented by the following provision:

"However, where the municipal law of a contracting State requires that an international contract of sale shall be in writing and such contracting State, at the time of the ratification of the present Law, lodges a declaration with the Government of... to this effect, contracts with traders in such contracting State shall comply with the writing requirement."

119. The above proposal was offered to accommodate the legal requirements mentioned in paragraph 116 above; it was thought that requiring a declaration (or reservation) would more clearly identify the countries where a writing would be required. Other representatives stated that businessmen and even lawyers would have no access to the list of reservations and therefore they would not be aware of the requirement of written form; even if they had such access, it would be a considerable burden on their part to find out the provisions relating to the concept of "writing" required by the national law of the State that made the reservation.

120. Several other proposals were advanced to accommodate the requirement of writing. One of these proposals was to commence the present text of the article with the phrase: "Unless otherwise agreed by the parties...". This proposal was opposed on the ground that the application of a mandatory rule of the national law cannot depend on the agreement of the parties. Another representative suggested the use of the words: "Unless one of the parties has notified the other before the conclusion of the contract to the contrary..." and thereby alerted the other party to the requirement of a writing. The notice requirement was also opposed on the ground that the mandatory rules should not be subject to action by one party. Similar objections were raised against the further proposal that written form should be required if it resulted from preliminary negotiations or practices established between the parties.

121. It was also suggested that article 15 be deleted. It was noted that this article deals with the formation and the validity of the contract, both of which are excluded from the scope of the Law. It was also mentioned that article 3 of the Uniform Law on Formation contains the same provision as article 15 of ULIS and therefore there was no need to repeat it in the latter. Some representatives, however, expressed the opinion that there was need for a provision on the form of the contract in the Law because otherwise States which do not ratify the Uniform Law on Formation would have no uniform rule to guide them on this issue.

122. One observer saw a connexion between the requirement of a written form and the problem of national mandatory rules of law discussed in connexion with articles 1 and 2. [17]

123. No consensus could be reached by the Working Group. The matter was deemed to present a question of principle. Therefore the Working Group decided to refer the question to the Commission for consideration.[18]

Thus, it was recommended that the Commission decide the following issues:

(*a*) Should article 15 be maintained?

(*b*) If so, should the present text of article 15 of ULIS be modified in order to accommodate rules of national law requiring particular contracts to be in writing?

(*c*) If so, what approach should be followed in making such accommodation?

ARTICLE 16: SPECIFIC PERFORMANCE

124. Article 16 of ULIS provides:

"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods."

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[17] See paras. 40-42, *supra*.

[18] See UNCITRAL report on third session (1970), para. 7 (*b*); op. cit, *supra*, foot-note 3.

125. No comments or proposals having been made with respect to this Article, the Working Group recommended that it be adopted without change.

ARTICLE 17: PRINCIPLES OF INTERPRETATION

126. Article 17 of ULIS provides:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

127. The Working Group recommended that the present article 17 be deleted and that the following language, for the present, be adopted:

"In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application]."

128. A similar provision was adopted unanimously at the August 1970 meeting of the Working Group on Limitation (Prescription), and appears now as article 5 of the preliminary draft of the Uniform Law on Prescription (Limitation) in International Sale of Goods (A/CN.9/50). The brackets have, however, been placed around the last five words to raise the question whether words are not repetitions and could therefore be deleted when an over-all review on questions of style is undertaken.

129. The proposed revision omits from article 17 the reference to "the general principles on which the present Law is based". This provision was criticized by several representatives on the ground that it was vague and illusory, since the Law did not specify or indicate the general principles on which it was based; such a reference would lead to uncertainty and possibly to a Court's use of its own national rules on the assumption that these were the general principles underlying the Uniform Law.

130. The formula adopted by the Working Group on Limitation (Prescription) expresses two considerations not mentioned in the original article: (1) the international character of the law, and (2) the need for uniform interpretation and application. These considerations were emphasized since some courts might otherwise give local meanings to the language of the Law—an approach that would defeat the law's objective to produce uniformity. It was also suggested that the provision would contribute to uniformity by encouraging recourse to foreign materials, in the form of studies and court decisions, in constructing the Law. This language might also help courts in some countries to make reference to *travaux préparatoires* and other materials on the legislative history of the Law which they may not be otherwise able to do.

131. Several representatives were of the view that the above provision should be supplemented by a provision concerning gaps in the law. Some representatives suggested that a second paragraph should be added which would read as follows:

"Questions concerning matters governed by the present Law which are not expressly settled by it shall be settled in conformity with its underlying principles and purposes."

132. Representatives supporting this language noted that it dealt only with questions concerning "matters *governed* by the present Law"; this language consequently could not be used to extend the Law's field of application. It was suggested that the provision would be helpful in dealing with problems for which no answer was explicitly provided but which could be solved by reference to the Law's "underlying principles and purposes". One source of these principles would be generalizations that appear from the examination of various specific provisions of the Law; another source would be the course of evolution of the Law. In spite of the fear that the provision might not always be applied and that, in exceptional cases, the judge might have a tendency to apply his national law, it would at any rate be preferable to provide the judge with this guidance than to leave the matter in complete uncertainty; such uncertainty would leave the judge free to apply national law whenever a question is not expressly settled by the Uniform Law.

133. Some other representatives suggested that the provision approved by the Working Group should be supplemented by the following:

"Private international law shall apply to questions not settled by the Uniform Law."

134. These representatives supported the view, outlined above, that it was difficult and dangerous to attempt to solve problems by reference to unstated general principles. The question of dealing with gaps in the Law should be expressly dealt with. It was suggested that the above provision would discourage finding gaps in the Uniform Law. It would also make irrelevant the difficult distinction between matters governed but not settled by the Uniform Law and matters not so governed.

135. Other representatives were of the view that such a provision would encourage courts to find gaps in the Law. The provision also could lead to disputes concerning rules of private international law and concerning the provisions of foreign law; such litigation was expensive and led to uncertain results.

136. Some representatives considered any provision concerning gaps in the Law unnecessary. These representatives noted that where the Uniform Law did not apply, courts could always have recourse to rules of private international law, but the decision on this question should be left to the *forum*.

137. The members of the Working Group agreed that the above points of view involved questions of principle that should be decided by the Commission.

III. FUTURE WORK

138. The Working Group at its 17th meeting held on 17 December 1970 considered its future work under item 4 of its agenda. It had before it document A/CN.9/WG.2/WP.7 which dealt, *inter alia*, with this item.

139. The Working Group recommended that the Commission should:

(*a*) Request the Secretary-General to prepare an analysis of the use of the concept of "delivery" in ULIS, and a study of the concept of "*ipso facto* avoidance" and to circulate the same to the members of the Working Group by 31 August 1971;

(*b*) Decide that the Working Group, at its third session, should consider chapter III of ULIS (articles 18-55) and related provisions.

140. The Working Group further decided:

(*a*) To invite the participants to analyse any problems encountered in articles 18-55 and, if possible, to make known the results of their analysis to the Secretariat for circulation to other participants in advance of the fourth session of the Commission;

(*b*) To hold a meeting during the fourth session of the Commission to consider the comments mentioned in paragraph 3 (*a*) above and for a general exchange of views on articles 18-55 of ULIS and to decide what further preparatory work might be necessary for the accomplishment of its task at its third session;

(*c*) To recommend that its third session be held in early January 1972 in New York or Geneva, as the Secretary-General may decide.

ANNEX I

List of participants

BRAZIL

Representative

Mr. Nehemias DA SILVA GUEIROS, Professor of Law, Ambassador

FRANCE

Representative

Mr. André TUNC, Professor of Law, Faculté de Droit et des Sciences économiques de Paris

GHANA

Representative

Mr. J. E. B. HAIZEL, Second Secretary, Permanent Mission of Ghana to the United Nations, Geneva

HUNGARY

Representative

Mr. Gyula FÖRSI, Professor of Law, "Eötvös Loránd" University, Budapest

Alternate

Mrs. Judit JUHÁSZ, Expert on Juridical Matters, Ministry of Foreign Trade, Budapest

INDIA

Representative

Mr. D. A. KAMAT, Assistant Legal Adviser, Ministry of External Affairs, New Delhi

IRAN

Representative

Mr. Mansour SAGHRI, Professor of Commercial Law, University of Teheran

JAPAN

Representative

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto

KENYA

Representative

Mr. Raphael Joseph OMBERE, Assistant Secretary, Ministry of Local Government, Nairobi

Alternate

Mr. Bernard Andrew MUDHO, Assistant Secretary, Ministry of Foreign Affairs, Nairobi

MEXICO

Representative

Mr. Jorge BARRERA-GRAF, Professor of Law, University of Mexico

NORWAY

Representative

Mr. Stein ROGNLIEN, Head of Department of Legislation, Ministry of Justice, Oslo

TUNISIA

Representative

Mr. Slaheddine ANNABI, Secretary of Embassy, Permanent Mission of Tunisia to the United Nations, Geneva

UNION OF SOVIET SOCIALIST REPUBLICS

Representative

Mrs. Aella STRELIANOVA, Expert on Juridical Matters, Ministry of Foreign Trade, Moscow

Alternate

Mr. Sergey LEBEDEV, Ministry of Foreign Trade, Moscow; Assistant Professor, Institute of International Relations

UNITED KINGDOM

Representative

Mr. Anthony G. GUEST, Professor of English Law, University of London

Alternate

Mr. Michael John WARE, Senior Legal Assistant, Department of Trade and Industry, London

UNITED STATES

Representative

Mr. E. Allan FARNSWORTH, Visiting Professor of Law, Harvard Law School, Cambridge, Massachusetts

Mr. Lawrence H. HOOVER, Jr, Legal Officer, Permanent Mission of the United States to the United Nations, Geneva

Observers

A. GOVERNMENTS

Belgium

Mr. Paul JENARD, Director of Administration, Ministry of Foreign Trade and External Trade, Brussels

Romania

Mr. Ion PAH, Government official, Geneva

B. INTERGOVERNMENTAL ORGANIZATIONS

Hague Conference on Private International Law

Mr. Matthijs VAN HOOGSTRATEN, Secretary-General

International Institute for the Unification of Private Law

Mr. Jean-Pierre PLANTARD, Deputy Secretary-General

C. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION

International Chamber of Commerce

Mr. Lars A. E. HJERNER, Professor of International Law, Rapporteur to the ICC Commission on Law and Commercial Practices

Mr. Frédéric EISEMANN, Director, Juridical Matters and Commercial Practices Department

Secretariat of the World Group

Mr. John HONNOLD, Chief, International Trade Law Branch, Office of Legal Affairs

Mr. Peter KATONA, Secretary of the Working Group, Senior Legal Officer

Mr. Hassan O. AHMED, Assistant Secretary of the Working Group, Legal Officer

ANNEX II

Text of revised Articles 1-17 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.

2. The present Law shall also apply where it has been chosen as the law of the contract by the parties.

Article 2

For the purpose of the present Law:

(*a*) The parties shall be considered not to have their places of business in different States if, at the time of the conclusion of the contract, one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State;

(*b*) Where a party has places of business in more than one State, his place of business shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(*c*) Where a party does not have a place of business, reference shall be made to his habitual residence;

(*d*) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration;

(*e*) A "Contracting State" means a State which is Party to the Convention dated ... relating to ... and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

(*f*) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated ... relating to ... is in force in respect of them.

Article 3

The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions.

Article 4

[Deleted [1]]

Article 5

1. The present Law shall not apply to sales:

(*a*) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller knew that the goods were bought for a different use;

(*b*) By auction;

(*c*) On execution or otherwise by authority of law.

2. Neither shall the present Law apply to sales:

(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

(*b*) Of any ship, vessel or aircraft [which is registered or is required to be registered];

(*c*) Of electricity.

Article 6

1. The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

Article 7

[Deleted [2]]

Article 3

The present Law shall govern only the obligations of the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage. [Unchanged.]

Article 9

1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

2. The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.

3. In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.

4. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties.

Article 10 [3]

[For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion

[1] See article 1 (2) and the report of the Working Group at paragraphs 37-41.

[2] See article 2 (*d*).

[3] Deferred for later consideration; see report of the Working Group on this article at paragraphs 83-88.

of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.]

Article 11

Where under the present Law an act is required to be performed "promptly", it shall be performed within as short a period as is practicable in the circumstances.

Article 12

[Deleted [4]]

Article 13

[Deleted [5]]

Article 14

Communications provided for by the present Law shall be made by the means usual in the circumstances. [Unchanged.]

Article 15 [6]

[A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.]

Article 16

Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except in accordance with the provisions of article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods. [Unchanged.]

Article 17

In interpreting and applying the provisions of this law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application].

[4] See report of the Working Group on this article at paragraphs 96-99.

[5] See report of the Working Group on this article at paragraphs 100-110.

[6] Referred to Commission; see report of the Working Group on this article at paragraphs 113-123.

3. *List of relevant documents not reproduced in the present volume*

Title or description	*Document reference*
Consideration of the report of the Working Group on the International Sale of Goods: note by the Secretariat	A/CN.9/R.4
Memorandum to the Working Group on the International Sale of Goods by the delegation of Ghana	A/CN.9/IV/CRP.12
Report by Mr. E. Allan Farnsworth, the representative of the United States of America, on article 1 of ULIS	A/CN.9/WG.2/WP.6/Add.1 — Annex I
Observations and proposals by Mr. G. S. Burguchev, the representative of the USSR, relating to the definition of the sphere of application of the Uniform Law on the International Sale of Goods	A/CN.9/WG.2/WP.6/Add.1 — Annex II
Comments by the representative of the United Kingdom on article 1 of ULIS	A/CN.9/WG.2/WP.6/Add.1 — Annex III
Report by Professor S. Michida, the representative of Japan, on article 2 of ULIS	A/CN.9/WG.2/WP.6/Add.1 — Annex IV
Report by Professor A. G. Guest, the representative of the United Kingdom, on article 3 of ULIS	A/CN.9/WG.2/WP.6/Add.1 — Annex V
Report by Mr. Stein Rognlien, the representative of Norway, on articles 5 and 7 of ULIS	A/CN.9/WG.2/WP.6/Add.1 — Annex VI
Comments by Professor André Tunc, the representative of France, on Mr. S. Rognlien's report on articles 5 and 7 of ULIS	A/CN.9/WG.2/WP.6/Add.1 — Annex VII
Draft revision of article 9 of ULIS and explanatory comments by Professor L. Reczei, the representative of Hungary	A/CN.9/WG.2/WP.6/Add.1 — Annex VIII
Draft revision of articles 10-13 and 15 of ULIS and explanatory comments by Mr. G. S. Burguchev, the representative of the USSR	A/CN.9/WG.2/WP.6/Add.1 — Annex IX