Article 43

10. We suggest the insertion after "seller" in the first line, of the words "after he has duly complied with his obligation under the contract," so that said article will read as follows:

"The seller, AFTER HE HAS DULY COMPLIED WITH HIS OBLIGATION UNDER THE CONTRACT, may require the buyer to pay the price, take delivery or perform any of his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement."

POLAND

GENERAL OBSERVATIONS

1. The Government of the Polish People's Republic is of the view that the draft convention on the international sale of goods prepared by the UNCITRAL Working Group properly reflects a balanced and carefully elaborated compromise between the interests of both parties to a contract of sale of goods.

OBSERVATIONS ON PARTICULAR ARTICLES

2. There are, however, a few matters which are susceptible to improvement.

Article 50

3. One of the most important problems for parties to a contract of sale of goods is the problem of changes of circumstances which could not have been foreseen by them at the conclusion of a contract.

4. Such changes can result in excessive difficulties for the parties or threaten them with considerable damage when performing the contract.

5. Therefore, it seems reasonable to include in the draft a provision dealing with the principle *rebus sic stantibus* according to which any party will have a right to renegotiate conditions of a contract.

6. Thus the following provision should be included after article 50 of the draft:

"If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination."

Article 13

7. It seems advisable to precede article 13 of the draft by a general clause to the effect that in the interpretation and application of the stipulations of a contract, the intention of parties as well as the purpose they wish to achieve are to be taken into account.

8. The rationale of the foregoing suggestion is as follows:

The draft convention deals with a contract of sale of goods. In case of a dispute, the stipulations of the contract concerned are to be examined. If any of the said stipulations gives rise to doubts, the court when considering a case should try to clear up the intention of the parties at the conclusion of the contract. The court should also consider what the parties wanted to achieve, i.e. what was the purpose of the contract.

Additional article: Choice of Law

9. The draft Convention does not indicate the law which is to be applied to the contract when the contract does not contain an appropriate stipulation to this effect. This problem is closely connected with the question of the conflict of laws. It seems therefore advisable to supplement the draft by a provision that, unless the parties agree otherwise, the law of the seller's country is to be regarded as the proper one with respect to a contract of sale of goods. It is justified by a quite common recognition of this principle in the international trade.

Additional article: Penalties

10. It seems also advisable to include in the draft a provision concerning penalties. This will facilitate, to a considerable degree, any claim of damages for a breach of contract.

11. Regulation of the question of penalties in the draft will also eliminate the existing lack of uniformity in this field in the various legal systems.

Article 10

12. Attention should also be drawn to the provisions of article 10, paragraph 3 according to which the addressee bears consequences when the notice fails to arrive within the required time or that its contents have been inaccurately transmitted. This provision ought to be amended in order to balance the rights and obligations of the parties to a contract of sale of goods.

SWEDEN (A/CN.9/125/ADD.1)*

[*Original: English*]

GENERAL REMARKS

1. For international trade transactions to function smoothly, it is desirable that States should as far as possible apply the same substantive rules in respect of international sales. The work carried out within UNCITRAL with a view to achieving a convention in this field is therefore most important.

2. In the opinion of the Swedish Government the draft Convention prepared by the Working Group constitutes a suitable basis for future work. The draft must be regarded as a considerable improvement on the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS).

3. One general criticism can, however, be made of the draft, namely a certain lack of clarity and precision. None the less, it is clear that a fairly high level of abstraction and vagueness is inevitable in rules that are to apply to a large number of States whose legal, social and economic systems differ. The Swedish Government is in favour of revising the text to make it as clear and stringent as possible.

* 30 March 1977.

STRUCTURE OF THE DRAFT

4. One basic feature of the draft is that the remedies for breach of contract by the seller are dealt with together in one section and that the remedies for breach of contract by the buyer are dealt with together in another section. Contrary to the rules of the Nordic legal systems, failure by the buyer to pay the price for goods is equated with failure to take delivery of goods. As a result, the seller in the latter case can declare the contract avoided even if the buyer has paid the price. Here it would be enough for the seller to have the possibility of selling the goods on the buyer's account.

5. Another example of the consequences of the approach adopted is that not only failure to comply with the requirements laid down in the Convention but also cases where a party has not performed his obligations under the contract are treated as breach of contract. Such a rule has far-reaching implications, at any rate formally.

6. However, the Swedish Government considers that the basic structure of the Convention can be accepted.

COMMENTS ON INDIVIDUAL ARTICLES

7. In the Government's opinion, the solutions contained in the individual articles can, generally speaking, be accepted. Certain improvements could, however, be made in respect of specific details. The Government therefore wishes to make the following comments, which are not to be regarded as exhaustive or definitive.

Article 1

8. To enable as many States as possible to accede to the Convention, reservations should be permitted in certain respects. At the present time, Sweden, Denmark and Norway have similar acts relating to the sale of goods. In such circumstances, it should be possible to apply, between different States, common national legal rules that differ from the Convention. Accordingly, when implementing the Convention, a group of States should be able to reserve the right to consider themselves as one State (cf. ULIS, article II). It should also be possible for a State bound by ULIS to become a party to the new Convention.

Articles 5 and 8

9. Under article 5, the Convention's provisions are non-mandatory and article 8, paragraph (2) contains provisions on the effect of usages and practices. On the other hand, there is no express counterpart to ULIS article 9, paragraph (3), whereby provisions or forms of contract commonly used shall be interpreted according to the meaning usually given to them in the trade concerned. In particular, as regards delivery clauses of the f.o.b. and c.i.f. type it is important that it should be made clear that these should generally be interpreted not on the basis of the Convention but in accordance with usages and practices. A provision to this effect should be inserted in article 8.

Articles 15-17 (64-67)

10. The Convention contains separate rules on the delivery and the passing of risk. These rules in part correspond to each other. However, it is difficult to see why different conditions have been laid down. It should be possible to co-ordinate the rules further.

Article 26

11. If the seller has not delivered the goods in time and the buyer wishes to claim damages for the delay, he ought to be required to make his claim known within a specified time-limit.

Article 27 (43)

12. In the commentary on article 27, it is stated that the buyer's right to "require performance" also includes a duty for the seller to "cure any defects". In many situations it would seem appropriate that the seller should have such an obligation but this obligation cannot be unlimited. The defect may be of such a nature that it cannot be cured. To cure the defective performance may also place an unreasonable burden on the seller. The seller's obligation should therefore be clarified in the Convention, possibly in connexion with article 27, paragraph (2).

13. If the seller fails to deliver the goods, the buyer can, under article 27, paragraph (1), *inter alia,* require delivery. In the event of the seller failing to deliver, and the buyer being able to satisfy his requirements in some other way without additional costs, express avoidance would seem in many cases not to arise. Should the price then increase, the draft text allows the seller to require delivery or other performance at a much later date. This provision is unsatisfactory. A condition for maintenance of the right to require performance should be that the buyer presents his request within a reasonable time-limit after the last deadline for delivery. When the buyer has not paid the price, the seller should in the same way be obliged to make his request for performance within the same time-limit.

Article 28 (44)

14. If one party requires performance without indicating "an additional period of time of reasonable length", articles 28 and 44 are not applicable. This seems to apply whether no time-limit has been indicated or the period is shorter than provided for in these articles (e.g. "promptly"). This should not, however, mean that the party who requested performance can then immediately avoid the sale. Instead he should, of course, be obliged to accept delivery effected at once or within the period indicated. The difference between the two types of request for performance should be made clear.

Article 29

15. Article 29, paragraph (2) contains a provision giving the seller a right to request the buyer to make known whether he will accept delivery. Such a rule is natural in those cases where the seller has indicated in his request a reasonable time within which he intends to perform. In other cases the buyer would sometimes find it so evident that he does not wish to accept the goods that he does not bother to reply. This rule should be limited to situations of the former type.

Articles 47 and 49

16. Both article 47, paragraph (3) and article 49 contain rules concerning avoidance as a result of an anticipatory breach. While article 49 requires that it is "clear that one of the parties will commit a fundamental breach", a considerably lower risk is required under article 47, paragraph (3). The latter rule goes too far. Article 47 should be limited to "suspending performance" and the conditions for avoidance — apart from the special case dealt with in article 48 — should be those laid down in article 49.

Article 50

17. The Government does not find that the rules of exemption from liability in damages as they now stand are satisfactory, particularly when applied to defects in the goods, and should prefer to have them reconsidered as concerns both the content and the drafting. Furthermore, it would also seem desirable to deal with exemption from the obligation to perform. Otherwise, there are several situations in which exemption from liability in damages may become worthless because the other party can force performance. For instance, let us suppose that such a shortage of a certain kind of goods arises that difficulties in procuring the goods entail exemption under article 50, paragraph (1). As long as performance is not excluded, the buyer may through delivery, avoid any damage.

18. In principle such exemption from the duty to perform should apply only during the period when the impediment exists (cf. article 50, para. (3)). If a party still wishes to obtain performance when the impediment ceases, it may under the obligation suggested above be his responsibility to request performance. Should the impediment last for a long time, the Convention should indicate that the obligation to perform ceases entirely.

19. On the other hand, there do not seem to be adequate grounds for including special rules on limitations on the other party's right to avoid the contract (or to require a reduction of the price). In principle, this right should exist regardless of whether the other party can invoke exemption from the obligation to perform or not.

Union of Soviet Socialist Republics

[*Original: Russian*]

Article 1

1. For greater clarity, the words "For the purposes of paragraph (1) of this article" should be inserted at the beginning of paragraph (2).

Article 2

2. In order to achieve uniformity with similar questions in conventions relating to the international sale of goods, the wording of article 2 (*a*) should be identical to that of article 4 of the Convention on the Limitation Period in the International Sale of Goods, namely: "(*a*) of goods bought for personal, family or household use". Consideration should also be given to the question of the advisability of including in the Convention provisions similar to those in article 5 of the aforementioned Convention on the limitation period. In addition, the word "gas" should be inserted in article 2 (*f*), since the terms of contracts for the sale of gas are *sui generis*.

Article 7

3. Delete article 7, paragraph (2), which is enclosed within square brackets.

Article 10

4. Since article 10, paragraph (2), is worded in such a way that it may create the assumption that prior notice by the other party is required before a declaration of avoidance of the contract is forwarded to him, it would be advisable to reword that paragraph and, at the same time, to provide that the notice should be in writing, for example, by stipulating that "A declaration of avoidance of the contract is effective only if it takes the form of written notice to the other party".

Article 11

5. This article is unacceptable and should be deleted from the draft Convention. The question of the form of the contract should be regulated by the Convention on the formation of contracts, which the Working Group is preparing to draft. If a decision is taken to retain in the Convention a provision on the form of contracts, then it is necessary to stipulate that contracts should be in writing, if national legislation so requires, even if that applies in the case of only one of the parties to the contract. As to the consequences of not complying with the provision that the contract should be in writing, it would be possible to provide either that the contract in such cases should be regarded as void, or that the law of the State whose legislation requires that the contract be in writing should apply.

Article 19

6. Paragraph (1) (*b*) should read: "(*b*) are fit for any particular purpose expressly made known to the seller at the time of the conclusion of the contract".

Article 26

7. If it is implied in paragraph (1) that damages may be claimed in addition to the exercise of the rights provided in articles 27 to 33, and not as an alternative, then the meaning of paragraph (2) is not clear.

Article 28

8. Should this article be understood to mean that the penalty provided for in the contract (for example, for delay in delivery) should also be regarded as a remedy to which the buyer cannot resort during the additional period of time provided for in this article?

Article 32

9. In paragraph (2), after the words "if the failure to make delivery completely", the word "and" should be replaced by "and/or" since a fundamental breach of the contract may occur where only one element is present