same State, but through the intermediary of its place of business abroad.

All these ambiguities regarding the application of the Convention could be eliminated if a much more simple and precise criterion were adopted: residence of the contracting parties in different States — subject, of course, to the conditions specified in article 1, paragraph (1) (*a*) and (*b*).

Article 11

2. While the provisions of article 11 are acceptable in principle, it would have been preferable, in order to make the Convention reflect more closely the various legislative provisions concerning the form and evidence of contracts, to add a second paragraph providing that the contract of sale should be in written form when the legislation of one of the parties so requires.

Article 15

3. According to article 15, subparagraphs (*b*) and (*c*), delivery is made "by placing the goods at the buyer's disposal". This makes delivery a unilateral act. Yet this does not reflect the reciprocal nature of the performance of the contract. Delivery can be made only with the co-operation of the buyer.

It should be noted that "placing at the buyer's disposal" and "delivery" are different acts. In actual fact, "placing at the buyer's disposal" precedes "delivery". Placing at the buyer's disposal is an act of the debtor, in other words of the seller, while delivery is made with the participation of the creditor, in other words of the buyer.

Assimilation of the two concepts could also create difficulties regarding proof. It would therefore be preferable to adopt the ULIS system, whereby delivery consists in the handing over of the goods.

4. The draft Convention differs from ULIS, in which delivery is deemed to have been made only if the goods conform with the contract.

It is reasonable that, if the goods delivered do not conform with the contract, there should be no delivery, since the parties have agreed on clearly specified goods. The requirement of conformity will obviate the need to apply all the rules concerning guarantees in the event that the goods should be faulty.

Chapter VI

5. In accordance with the views expressed above concerning delivery (para. 3 of these observations), the rules in chapter VI of the Convention concerning passing of risk should specify that the risk passes to the buyer when the goods are handed over to him rather than when they are placed at his disposal. In any case, article 66 of the draft Convention should be brought into line with article 15. In our view, the wording of article 97, paragraph 1, of ULIS should be adopted.

AVOIDANCE OF THE CONTRACT

6. The provisions concerning avoidance of the contract seem very complicated from the logical and practical viewpoint. In our view, the principles underlying the rules concerning avoidance should be simplified and should take into account the inequality of the parties resulting from the non-performance of the contract:

(*a*) The party who has fulfilled his obligations under the contract may declare the contract avoided in the event of a fundamental breach.

(*b*) The creditor forfeits the right to declare the contract avoided if he has accepted performance which does not conform with the contract without immediately protesting.

Articles 47 and 49

7. The present wording of articles 47 and 49 does not clearly show the difference between them. It appears to us that article 49 is superfluous, unless it is included in the form of an addition to article 47.

Articles 15 and 65

8. A provision should be added to article 15, subparagraph (*a*), and to article 65, paragraph 1, to the effect that delivery is made and the risk thus passes when the goods are handed over to the first carrier. This would reflect international commercial practice.

Article 57

9. With regard to article 57, we consider that the damages should be assessed at the time of the failure to deliver the goods or at the time when the buyer could reasonably procure the same goods. In our opinion, the present wording of article 57 would allow the seller to speculate in the event of a price increase.

Articles 64 to 67

10. In our view, it seems more logical to place article 64 before articles 65, 66 and 67, since it states the general rule for the passing of risk.

CZECHOSLOVAKIA (A/CN.9/125/ADD. 2).*

[*Original: English*]

GENERAL COMMENTS

1. The draft Convention on International Sale of Goods which has been worked out by the Working Group of the United Nations Commission on International Trade Law represents a good basis for the discussion at the tenth session of the Commission. Deviations from the text of the Uniform Law on the International Sale of Goods of 1964, as proposed by the Working Group, represent for the most part an improvement and basically represent a more unambiguous regulation of rights and obligations of the seller and buyer. In a great number of provisions the draft Convention deviates from the Uniform Law in the same way as, or in a way similar to, the Czechoslovak International Trade Code. Experiences gained by the application of the Czechoslovak International Trade Code provisions since 1963 give evidence for justification of the proposed modifications. In particular, it is necessary to welcome the simplifica-

* 28 April 1977.

tion and greater precision of the concept of the uniform regulation.

COMMENTS ON SPECIFIC ARTICLES

2. However, some provisions of the draft still require re-examination in order to correspond as much as possible to the needs of international trade. This concerns particularly the following problems:

Article 6

3. In the interest of a uniform regulation it would be proper to define in the draft Convention the "place of business" for the reason that this concept can be interpreted differently by individual countries.

Article 8

4. It is arising out of article 8 of the draft, that any usage should have the preference before the provisions of this regulation. Acceptance of this principle would be the source of serious legal uncertainty because none of the participants of the international trade will be certain whether these provisions will not be replaced by usages which are applied in different States differently. It should be also taken into consideration that the developing countries did not have an opportunity to participate in their formation. Due to these reasons, the usages should have preference before the provisions of this regulation only in the case when the contracting parties express their will that the usage will be applied in this manner.

Article 9

5. Even if the difference between fundamental and non-fundamental breach of contract is formulated more properly in the draft than in the Uniform Law of 1964, it seems too vague because the concept of "fundamental breach of contract" is defined by the same vague concept of "fundamental damages". Further, it is doubtful from the economic point of view whether the avoidance of contract (which is the most important legal consequence of the fundamental breach of contract), is to be dependent on the origin of the fundamental loss. The avoidance of contract should enable the entitled person to prevent its occurrence (for example by substitute sale or substitute purchase of goods). On the other hand, after a certain period of time the performance of the obligation may be useless for the entitled person, even if he did not suffer fundamental damage; therefore such person would have the right to declare avoidance of the contract.

6. The criteria for consideration of the fundamental breach of contract should be more properly objectivized by the purpose of the performance of the contract, as long as it has been expressed in the contract, or if it clearly follows from its contents, as for example: "Fundamental breach of contract is such which the party violating the contract has known or was aware of at the conclusion of the contract in view of a motive that the other party would not have concluded the contract had it envisaged its violation, the motive which is expressly contained in the contract or clearly follows from the contract". It would be also suitable to amend the proposed modification with a provision that in case of doubt the breach of contract would not be deemed fundamental.

Article 11

7. Article 11 of the draft Convention should be left out because the form of contract must be discussed in the framework of its formation and a unified regulation concerning this problem will be on the programme of the Commission in the future.

Article 23

8. Even if a failure to send in time a notice of the defective goods is in the majority legal systems combined with the loss of remedies, it would be suitable to consider whether a mere non-recovery would be sufficient. This would simplify the legal consideration of cases where the seller has satisfied the remedies of the buyer (either due to commercial reasons or reasons that defects in the goods have been caused during the production) even if the notice has not been sent in time.

Chapter III (articles 26-33)

9. It would be useful to reconsider the system of remedies which the buyer has in accordance with articles 27 to 33 of the draft. To limit the possibilities of the buyer to request substitute delivery of goods only in case of fundamental breach of contract, according to article 27, paragraph 2, does not correspond with the requirements of practice because the unification should be directed at the performance of the purpose of the commercial operation expected by the parties. The unification should express that the primary remedy of the buyer is the removal of defects, i.e. the repair of goods or substitute delivery. However, the buyer should not have the right to demand the substitute delivery in cases when inadequate costs have arisen for the buyer. Similarly, there may be also cases when, due to the nature of the goods, their repair is ineffective (particularly in some kind of consumer goods). The seller should be protected against such remedy of the buyer if the repair of goods is not possible or represents for him inadequate costs.

Articles 34 and 35

10. The relation between articles 34 and 35 is not quite clear particularly as concerns the results of the opening of a letter of credit. It would be desirable to amend the proposed wording by the provision that if the price is to be paid by a letter of credit or by a cheque, the payment of the purchase should be considered effected only after the payment is performed by the bank to the seller.

Article 50

11. The first sentence of article 50 states responsibility on the principle of "guilt" but the second sentence contains the "objective responsibility" which is more suitable for regulation of international trade. Definition of *force majeure* should be re-examined again and made more precise. Particularly the condition of unforeseeability should be excluded from it because in the cases in

question this condition is usually replaced (or covered) by the condition of an inevitability. However, there can be cases when it is doubtlessly *force majeure* (for example a war conflict) even if the obstacle could have been foreseen (for example in view of certain political situations). Should, in spite of this, unforeseen conditions be left as one of the basic signs of *force majeure,* it would be suitable to state that the time of the origin of obligation is decisive for its consideration. Though the commentary on the draft pre-supposes such interpretation, this conclusion does not clearly follow from the draft.

Article 58

12. It should be reconsidered whether it would be more appropriate for the seller to be entitled to interest charges in the country of the debtor instead of the creditor, or to combine the discount rate of interest valid in both countries in such a way (or manner) that the non-performance of the monetary obligation be advantageous for the debtor (for instance in cases when the rate is higher in his country).

Article 67

13. It is necessary to re-examine whether it is correct that the risk be passed to the buyer also in a case when the delivered goods are defective. Article 67 deals only with cases of fundamental breach of contract, but in accordance with article 30, paragraph 1, letter (*b*) the buyer can, under certain conditions, avoid the contract also in a case of a non-fundamental breach of contract. Here it is also necessary to take into consideration that it is not appropriate that the possibility of avoidance of contract should be limited only on cases of fundamental breach of contract, particularly if its definition contained in article 9 will be preserved.

14. It would be more desirable to have a regulation according to which the risk would be passed to the buyer only in such case if the buyer, in spite of his right to avoid the contract, does not do so without unnecessary delay or does not request a substitute delivery of goods or, if the buyer has no such right at all. In these cases the risk should pass at the time such transition would take place if the goods did not have such defects. Definite consideration on the question of passing of risk is dependent on the solution of the question of legal consequences of the delivery of defective goods and legal claims arising for the buyer in connexion with it.

DENMARK (A/CN.9/125/ADD. 3)*

[*Original: English*]

In the opinion of the Danish Government the Draft Convention on the International Sale of Goods prepared by a working group within UNCITRAL represents an appreciable improvement compared with the Hague Convention of 1964 on the International Sale of Goods.

As the working group has approved the Draft by consensus apart from a very small number of reservations to certain articles it appears that the new convention should be acceptable to states with different legal systems. The Danish Government therefore considers the Draft convention to be an excellent basis for the discussions at UNCITRAL's forthcoming session.

As to the individual articles of the Draft Convention the Danish Government supports the comments made by the Swedish Government.

In addition the Government wishes to submit the following observations.

Article 19

According to paragraph 2 of this article the buyer cannot claim non-conformity of the goods under subparagraphs (*a*) to (*d*) of paragraph 1 if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity. This provision seems to be too favourable to the buyer. If the contract provides for specified goods and the buyer has examined the goods at the time of the conclusion of the contract, the seller may reasonably suppose that the buyer has discovered any non-conformity, which could be discovered, and accepted the condition of the goods. The same applies when the seller may reasonably suppose that the buyer has examined the goods before the conclusion of the contract. The wording "knew or could not have been unaware of such non-conformity" should therefore be replaced by "knew or ought to have been aware of such non-conformity".

Articles 26 and 50

The rule of exemption from liability in article 50 paragraph 1 should also apply with regard to an impediment to performance which existed at the time of the conclusion of the contract. In the opinion of the Danish Government there is no reason why the liability of the seller should be more strict in this case than in case of an impediment which has occurred after the conclusion of the contract.

Article 29

As the right of the seller to cure any failure to perform his obligations is limited to cases where no unreasonable inconvenience or unreasonable cost is caused to the buyer and presupposes that the failure can be cured without such delay amounting to a fundamental breach of contract, it is proposed that this right of the seller shall be given priority over the buyer's declaration of avoidance or reduction of the price.

Article 45

Paragraph 2 (*a*) provides that the seller loses his right to declare the contract avoided in case of late performance of the buyer when he becomes aware that the performance has been rendered. If there has been a long delay in the buyer's payment of the price, the performance could be rather surprising to the seller, and it does not seem reasonable that the seller should lose all rights of avoidance when the price is paid. The Government therefore proposes the following wording of subparagraph (*a*):

> "(*a*) In respect of late performance by the buyer, within a reasonable time after the seller has become aware that performance has been rendered;".

* 23 May 1977.