

nation at which risk passes would, of course, be governed by any applicable provision of the contract or by usage implied by trade term. In the absence of such a provision, the transfer of risk would be governed by article 98 of the revised text. Under that article, risk would pass to the buyer when he takes over the goods; when the buyer is late in taking over the goods, risk passes to him from the moment when such a delay constitutes a breach of contract.¹⁶⁰

211. The observations by the representative of Norway propose clarifying amendments for paragraph 2 of article 97, and also propose the addition of a third paragraph based on ULIS article 100, which the Working Group decided to delete.¹⁶¹

Article 98: risk where the contract does not involve carriage

212. The comments of the representative of Norway propose clarifying amendments for paragraph 1, and a revision of paragraph 2, based on a text placed before the Working Group at the fifth session.¹⁶² The

¹⁶⁰ In the proposed addition to deal with transfer of risk at "destination", the concluding phrase "when time for delivery has come" may be less clear than is article 98 (2) in dealing with casualties that occur during a period allowed to the buyer for taking the goods.

¹⁶¹ Working Group report on fifth session, para. 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1). The report of the Secretary-General on issues presented by chapters IV-VI of ULIS, para. 87, discussed the question whether art. 100 of 1964 ULIS was needed in the setting of the revised rules on risk (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁶² Comments, observations by Norway (reproduced in this volume, part two, I, 3); Working Group report on fifth session, paras. 233-238 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

considerations with respect to the need for such a special provision would seem to be similar to those applicable to the proposal for a special provision as to delivery at "destination" (see para. 210, above). (One aspect of this proposal is to subdivide article 98, as approved by the Working Group, into two articles which would be numbered 98 and 98 bis.)

213. In paragraph 2 of this article, the second sentence, dealing with identification of the goods, was placed within brackets. The observations by the representative of Austria conclude that this sentence should be retained.¹⁶³

Article 98 bis: effect of non-conformity on passing of the risk

214. The above article has been considered by the Working Group, but final action was deferred until the present session.¹⁶⁴ The significance of this article has been discussed in paragraph 205, above. The representative of Austria concludes that the article is needed, but proposes a redraft of paragraph 2. Amendments for the article are also proposed by the representative of Norway.¹⁶⁵

¹⁶³ Comments, observations by Norway (reproduced in this volume, part two, I, 3). Reasons for retention of this provision are set forth in the report of the Secretary-General on issues presented by chapters IV-VI of ULIS, at paras. 83-84 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 5).

¹⁶⁴ Working Group report on fifth session, paras. 239-240, 241 (c) (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

¹⁶⁵ Comments, observations by Austria, Norway (reproduced in this volume, part two, I, 3). The latter proposal is in an article numbered 98 ter.

5. Report of the Secretary-General (addendum): pending questions with respect to the revised text of a uniform law on the international sale of goods (A/CN.9/100, annex IV)*

1. This annex completes the analysis of the observations submitted by representatives of the Working Group on the International Sale of Goods with respect to pending questions. At the time documents A/CN.9/WG.2/WP.21 and Add.1 were prepared, some of these observations, in particular those submitted by the representative of the Union of Soviet Socialist Republics, had either not yet been received or were not available in English. For the sake of completeness those comments of other representatives which were not mentioned in the report of the Secretary-General are noted herein.

Article 1

2. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 2 in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

3. The representative of Mexico suggested that the language of paragraph 2 did not make it sufficiently clear that the Uniform Law would not apply if the fact that the parties had their places of business in differ-

ent States did not appear in the contract or from the dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. Therefore, he suggested the addition of the words "and consequently the present Law shall not apply" following the word "disregard".

4. The representative of Bulgaria suggested the insertion of a provision indicating that if parties who are not otherwise governed by the Uniform Law choose it as the law of the contract, that will not affect the application of any mandatory provisions of law which would otherwise have been applicable. This matter is discussed in the report at paragraphs 14-17.

Article 2

5. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 3

6. The representative of the Soviet Union recommended retention of the bracketed language in paragraph 1 in order to make the provision the same as the

corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

7. The representative of Bulgaria pointed out that it would be helpful if the text of paragraph 1 made it clear whether or not the Law applies to the sale of entire industrial complexes and factories. His comments point out that the text of paragraph 1 would seem to exclude it. In considering this proposal it might be kept in mind that the law governing the sale of goods between the members of the Council for Mutual Economic Assistance, the General Conditions of Delivery of Goods Between Organizations of the Member Countries of the Council for Mutual Economic Assistance (CMEA General Conditions of Delivery, 1968) do apply to the sales of entire plants. See articles 24, 25, 26, paragraph 6, 29, paragraph 2.

Article 4

8. The representative of the Soviet Union recommended retention of the bracketed language in paragraph (a) in order to make the provision the same as the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

Article 9

9. The representative of Bulgaria urged that the rule of paragraph 3 should be reversed. In case of conflict the Law should prevail over usages unless the parties have agreed otherwise. He suggested that the current text would impose a variety of existing usages that are unknown to parties in international trade.

10. This concern should be largely overcome by the redrafting of paragraph 2. As the representative of Austria points out, paragraph 2 needs simplification but its point is that the only usages which bind the parties are those of which the parties are aware or should be aware because of the widespread use of the usage. The proposal of the representative of Mexico¹ simplifies and slightly changes the criteria, but the basic test remains the same, the usage is so widely used and known that it justifies an expectation that it will be observed with respect to the transaction in question.

11. The representative of the Soviet Union called for the omission of paragraph 4 for the reasons set out in paragraph 82 of the report on the second session of the Working Group. These reasons, which were not accepted by the Working Group at that time, were first: "that the language of paragraph 4 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. [This distinction was said to be] 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 it".²

12. The redrafting of paragraph 2 as suggested by the representative of Mexico may satisfy the second of these two grounds.

¹ Comments of the representative of Mexico, para. 36 (reproduced in this volume, part two, I, 3).

² Report of the Working Group on the International Sale of Goods on the second session, A/CN.9/52, para. 82 (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

Article 10

13. In addition to the proposal of the representative of Mexico for a redraft of article 10 in order to simplify it and to eliminate the subjective element, the representative of Bulgaria has also suggested a proposed revision.

Article 12

14. The representative of Bulgaria recommended keeping article 12 of the 1964 ULIS on the definition of "current price". This article was dropped from the text by the Working Group at its second session.³

15. The only provision in ULIS which employs the term "current price" is in article 84 on the damages in case of avoidance of the contract. "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."⁴ Nevertheless, no consideration was given to defining "current price" when article 84 was discussed by the Working Group at its fifth session.⁵

Article 13

16. The representative of Bulgaria recommended keeping article 13 of the 1964 ULIS which defines the phrase "a party knew or ought to have known" rather than deleting it as the Working Group recommended at its second session.⁶ Apart from the difficulties with the definition given by the 1964 ULIS, difficulties which are discussed at length in the report of the Working Group on its second session,⁷ it was pointed out that the precise term being defined was used only in articles 99, paragraph 2, and 100. Subsequently, the Working Group recommended dropping these two articles.⁸

Article 14

17. The representative of the Soviet Union expressed the belief that the definition of "communication" may need to be broadened if article 15 is retained.

Article 15

18. The representative of the Soviet Union recommended the deletion of article 15 because it relates to the form of contracts and the consequences of the non-observance thereof. The representatives of Bulgaria and, if article 15 is to be kept, of the Soviet Union recommended amending article 15 to provide that the contract must be in writing if the laws of at least one

³ Report of the Working Group on the International Sale of Goods on the work of the second session, A/CN.9/52, para. 97. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

⁴ *Ibid.*, para. 99.

⁵ Progress report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, paras. 168 to 176 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

⁶ Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, para. 101. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

⁷ *Ibid.*, at paras. 102 to 109.

⁸ Report of the Working Group on the International Sale of Goods on the work of its fifth session, A/CN.9/87, paras. 242 to 244 (UNCITRAL Yearbook, vol. V: 1974, part two, I, 1).

of the countries in which the parties have their business so requires. This matter was discussed at length by the Working Group at its second session⁹ and by the Commission at its fourth session.¹⁰ No decision was reached and the Commission concluded that the Working Group should give further consideration both to the principle of freedom of the parties to conclude oral contracts as well as to any modifications of the specific language of the text of article 15.¹¹

Article 17

19. The representative of the Soviet Union suggested that this article should be identical to the corresponding provision in the Convention on Prescription (Limitation) in the International Sale of Goods.

20. The representative of Bulgaria supported the suggestion previously made in the second session of the Working Group¹² that this article should be supplemented by the following:

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

In support of this proposal it was suggested that the Uniform Law cannot attempt to provide a rule for all problems, which might arise and that the matter is best handled by referring back to the law appropriate under the rules of private international law.

20a. When this matter was discussed by the Working group at its second session, the members agreed that it involved questions of principle that should be decided by the Commission.¹³

21. At its fourth session, the Commission concluded that it was not practicable to reach a decision on this matter until the revised text of ULIS could be read as a whole. Therefore, it concluded that the Working Group should further consider the matter at an appropriate time and take into consideration the observations made at that session of the Commission.¹⁴

Article 20

22. The representative of Bulgaria suggested that this article might be amended by providing for and regulating several means by which delivery could be effected which are not currently mentioned in article 20:

(a) Handing over the goods for storage or bond warehousing to a third party, who would hold and take possession of them for the buyer;

(b) Handing over the goods to the buyer himself or to his representative;

⁹ Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, paras. 113 to 123. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

¹⁰ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), paras. 70 to 80. (UNCITRAL Yearbook, vol. II: 1971, part one, II, A.)

¹¹ *Ibid.*, para. 80.

¹² Report of the Working Group on the International Sale of Goods on the work of its second session, A/CN.9/52, para. 133. (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.)

¹³ *Ibid.* at para. 137.

¹⁴ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 91. (UNCITRAL Yearbook, vol. II: 1971, part one, II, A.)

(c) Handing over the documents giving title to possession and disposal of the goods.

23. Article 20 was drafted by the Working Group at its third session, to present a complete and unified answer to the question at what point, and more specifically at what place, does the seller complete his obligation as to delivery of the goods. Completeness and unity were achieved by introducing paragraph (c) by the words “in all other cases”. The result is that article 20 now provides the place at which the seller is obligated to effect delivery of the goods if the contract of sale involves the carriage of goods (para. (a)) or if the contract relates to specific goods or to unascertained goods and the other criteria of paragraph (b) are met. “In all other cases [delivery shall be effected] by placing the goods at the buyer’s disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence.” (para. (c)).

24. It would seem that each of the examples mentioned by the representative of Bulgaria would currently fall under paragraph (c). The Working Group may wish to consider whether the current language of article 20 leads to the result desired.

25. It would also appear that in the English version of article 20 (b) the words “were at or” were inadvertently left out following the word “goods” in the third line.

Article 33

26. The representative of Bulgaria recommended amending paragraph 2 to provide that the seller shall not be liable when the buyer knew or could not have been unaware of defects of the goods “at the time of delivery of the goods, in the case of the goods concerned”. The adoption of this proposal would lead to the result that the buyer could not accept goods which he knew had a defect and hold the seller responsible for the reduced value of the goods.

27. The words “subparagraphs (a) to (d) of” in paragraph 2 might be deleted since subparagraphs (e) and (f) of paragraph 1 of the 1964 ULIS have previously been deleted.

28. In the English language version the comma in the last line of paragraph 2 should follow the word “unaware” rather than the word “of”.

Article 35

29. The representative of the Soviet Union recommended the retention of the second sentence in paragraph 1 by removing the brackets.

Article 38

30. The representative of Bulgaria recommended amending article 38, paragraph 2 by adding the words “and at the place where the buyer first has the opportunity to examine the goods”. The purpose of the amendment would be to extend the time during which the buyer could discharge his obligation to examine the goods beyond the point of time at which “the goods arrive at the place of destination” if at that time the buyer did not have an opportunity to examine the goods.

31. If the Working Group accepts this proposal, it might consider redrafting the text which has been

suggested. The current language seems to imply that examination could be deferred until the goods arrive at two physically separate places, the place of destination and the place where the buyer can examine the goods.

32. The representative of Bulgaria also recommends deleting from paragraph 3 the words "and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach". This recommendation is similar to that in respect to paragraph 2 in that under certain circumstances it would prolong the seller's responsibility for the quality of the goods for a longer period of time than would the current text if the buyer could not examine the goods at the port of destination.

Article 39

33. The representative of the Soviet Union recommended retention of the sentence in brackets in paragraph 1, using the word "different" rather than "longer".

Article 42

34. The representative of the Soviet Union recommended keeping the bracketed language in paragraph 1.

Article 43 bis

35. The representative of the Soviet Union recommended keeping the bracketed language in paragraph 1.

Article 44

36. The representative of Austria suggested that the words "by notice to the seller" in paragraph 1 duplicate the more precise formulation in the introductory sentence of paragraph 2 and recommended that they be deleted.

Articles 48, 50 and 51

37. The representative of Bulgaria recommends reinsertion of articles 48, 50 and 51 of the 1964 ULIS. As noted in A/CN.9/WG.2/WP.21/Add.1, paragraphs 140 and 142, the problems covered by these articles are treated elsewhere in the current revision.

Article 57

38. The representative of the Soviet Union found the wording of article 57 "unacceptable" and stated that "the price should be determined or determinable".

Article 67

39. The representative of the Soviet Union suggests that the entire article might be eliminated for the sake of simplicity.

40. The Working Group might wish to note that the bracketed language in paragraph 1 should be "have

recourse to the remedies specified in articles 70 to 72 *bis*, or".

Article 72 bis

41. The representative of the Soviet Union supports alternative A.

Article 76

42. The representative of the Soviet Union stated that in preparing the final wording of this article, it would be advisable to mention the basis of alternative A.

Article 78

43. If the Working Group accepts the proposals of the representative of the United Kingdom in respect to article 76, it may wish to consider the relationship of the proposed article 76 *ter*¹⁵ and of the current article 78.

44. The representative of Norway proposed a new paragraph 3 which would read as follows:

"3. If the contract has been avoided in part, the provisions of this article shall apply to such part only."

Article 82

45. The representative of the Soviet Union suggested that it would be preferable to include the possibility of full damages for proven losses.

Article 83

46. The second line of the English language version should read "on such sum as *is* in arrear".

Article 84

47. See the comments to article 12 above.

Article 96

48. The representative of the Soviet Union suggested deletion of the bracketed language in this article in favour of a general provision on the liability of the seller or buyer for the actions of the persons for whom they are responsible. This proposal is similar to that of the representative of Norway.¹⁶

Article 98

49. The representative of the Soviet Union recommended retention of the bracketed sentence in paragraph 2.

¹⁵ Comments, observations by United Kingdom, para. 17 (reproduced in this volume, part two, I, 3).

¹⁶ Comments, observations by Norway (reproduced in this volume, part two, I, 3).