

**3. Texts of comments and proposals by representatives on articles 56 to 70
(A/CN.9/87, Annex II) ***

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* Previously issued as document A/CN.9/WG.2/WP.15/Add.1 of 16 November 1972.

I

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF THE USSR

*Articles 56-60 of ULIS**Article 56*

This article does not give rise to any objection.

Article 57

It seems appropriate to exclude this article from the Uniform Law. In our view, the Law should not provide, even indirectly and restrictedly, for a possibility of concluding sale contracts without stating a price or making provision for the determination of the price.

According to the legislation and practice of many countries, the price is an indispensable or essential element of such contracts, failing which there shall be no contract made at all. It should be mentioned that under article 8 the Uniform Law shall not be concerned with the formation and validity of the contract.

Apart from the inappropriateness of the provision itself, i.e. imposing the obligation on the buyer to pay the price "generally charged" by the seller ("habitulement pratiqué par le vendeur") where no price or a manner of determining thereof has been agreed by the parties, such a provision seems also unacceptable for obvious practical considerations, namely: how may one definitely decide which price is being "charged" by the seller, what kind of evidence might be sufficient or conclusive. Other contracts may well contain a good deal of conditions different from those of the contract made with the buyer concerned and affecting the matter of price at varying degrees. Evidently it is not always possible to find completely identical contracts, particularly for the supply of machines and equipment. In trade practice, prices often depend upon a variety of factors including the volume of other transactions, the business relations and settlements between the parties with regard to other transactions, covering long periods of their commercial dealings. Not infrequently sellers provide various allowances and rebates to buyers either at the time of concluding a contract or thereafter, which fact may not be reflected in any way in the contract itself.

It should be noted also that the provision in question is generally concerned not with the obligations of the buyer but, rather, with the matter of determining the price.

Article 58

It would be recommendable to replace the words "in case of doubt" with the words "unless otherwise agreed by the parties".

Article 59

This article does not give rise to any objection.

Article 60

Generally it would seem advisable to discuss at the next meeting of the Working Group a possibility of formulating provisions on the date of payment along the lines recommended with regard to the date

of delivery at the third session of the Working Group, Geneva, 17-28 January 1972 (A/CN.9/62, para. 22).¹

In any case it would seem useful, for the purpose of simplifying the present text of article 60 of ULIS, to omit the words "without the need for any other formality" (as has been done by the Working Group at its last session in reconsidering article 20 of ULIS—paragraph 22 of the above-mentioned document A/CN.9/62). The above words, as they stand at present, are not sufficiently clear; a question may first be raised as to what kind of "formalities" are meant: do they refer to a demand of payment or the effecting of payment, do they mean formalities to be complied with by the seller or buyer, etc.

II

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF GHANA

*Articles 56-60 of ULIS**Article 56*

This article does not seem to need any comment.

Article 57

The text of this article, in its first part, seems by implication to make provision for cases in which the price is not expressly stated; the contract may make provision for its ascertainment.

The second part of the text does address itself to the question: "What if the contract does not provide a mode for ascertaining the price?" (A subsidiary question, which the text does not pause to answer in its first part, is whether the provision for determination of the price may be deduced by way of implication, where no such provision is expressly made. This will be considered later.)

The delegation of Ghana has been very impressed by the very closely reasoned argument of the representative of the USSR against leaving the price to be fixed in the uncertain manner at present made possible by this article. In municipal law, the concept of the "market price" or the "reasonable price"—not always regarded as the same—may render the uncertainty inherent here manageable; in the field of international sale such a concept is likely to be impracticable except in the comparatively few cases of particular commodities whose prices are fixed by the operations of recognized commodity exchanges.

The delegation of Ghana believes that "the price generally charged by the seller at the time of the conclusion of the contract" is not certain enough, as a test, to be an adequate substitute for the "market price"/"reasonable price" concept in municipal sale law. The reasons stated by the representative of the USSR in the third paragraph of his comment are sufficient to show the unsatisfactory nature of this criterion.

On purely theoretical grounds, also, the text may well create difficulties among jurists and legal advisers

¹ UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5.

who, on doctrinal grounds, cannot regard a sale contract as "concluded" when no price is fixed or fixable by reference to some part of the contract.

For these reasons, the delegation of Ghana finds the present text of article 57 unsatisfactory. That raises a further question. Must it be deleted altogether, or must ULIS make specific provision for this case?

The delegation of Ghana believes that deletion would create an unsatisfactory situation; businessmen will be left in doubt as to the status of a sale contract that was concluded in all important respects except for the fixing of the price. As this situation may be expected not to occur only during negotiations, when nothing is regarded by either party as binding, it seems necessary to legislate specifically for it. For this reason, the delegation of Ghana does not share the view that article 57 should be excluded altogether. It should be modified to meet the difficulty outlined by the representative of the USSR.

The delegation of Ghana believes that one way of doing this would be to retain the first part of article 57 (subject to a small modification to be discussed shortly) and to insist that the agreement shall not generate any obligations for either party until a price agreeable to both has been settled.

If such a rule has the appearance of unnecessary finality, it at least has the merit of certainty in an area where certainty is of paramount importance. It seems that its apparent harshness can be reduced by making it possible to ascertain the price by reasonable implication from other terms of the contract where these bear on the question. To leave no room for doubt, the possibility of drawing such an implication from other terms of the contract ought, it is thought, to be expressly provided for. A possible amendment to article 57, giving effect to these observations, would read as follows:

No contract shall be enforceable by either party under the present Law unless it states a price or makes express or implied provision for the determination of the price; unless the parties thereto expressly or by implication otherwise agree.

The concluding clause in this proposed amendment leaves the door open in the cases where the parties deal with each other in circumstances where it is reasonable to assume that, either because they contracted with reference to a recognized commodity market, or because they have agreed to suspend negotiations on the single issue of price, it is in their mutual interest for the other agreed provisions of the contract to be enforceable.

Article 58

The delegation of Ghana prefers the clause "unless otherwise agreed" to the phrase "in case of doubt" in this article. It seems better to create a definite *prima facie* link between the price and the actual commodity sold (as distinguished from the commodity and its packaging, etc.), and to leave the parties free to modify this if they wish, than to leave this role to cases of "doubt" whose nature is not specified in the law and which, in any case, could be difficult to identify.

Article 59

Paragraph 1. For economic reasons, Ghana and, it is believed, many other developing nations, will find it difficult to commit themselves unreservedly to the rule set out in this paragraph.

The impact of unavoidable exchange control legislation in several of these countries will normally make it difficult, if not altogether impossible, for a buyer in these countries to give such an unreserved undertaking as is entailed in a promise to pay at the seller's place of business, as literally understood. Conversely, where municipal exchange control legislation allows this, a seller in a country with inconvertible currency may well prefer to be paid by a buyer in a country with convertible currency in the latter's country or usual place of business, and wish to stipulate for this in his contract. It would not be satisfactory for such a stipulation to oblige the seller by implication to hand over the goods in the country of the buyer.

For these reasons the delegation of Ghana would prefer this rule to be made facultative by prefacing it with the words: "unless otherwise agreed".

Paragraph 2. This paragraph does not create any problems for the delegation of Ghana.

Article 60

The delegation of Ghana shares the view of the representative of the USSR on the desirability of deleting the words "without any other formality" from the text of this article.

It seems desirable, as noted by the representative of the USSR, also to try to approximate as far as possible the rules relating to date of payment to the principles underlying the newly recommended rules relating to the time of delivery.

III

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF MEXICO

Articles 56-60 of ULIS

CHAPTER IV

OBLIGATIONS OF THE BUYER

Article 56

(No change)

SECTION I. PAYMENT OF THE PRICE

A. Fixing the price

Article 57

1. Payment of the price consists in the delivery to the seller or to another person indicated by the seller of the monies or documents provided for in the contract.

2. Where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract or, in the

absence of such a price, the one prevailing in the market at the time of the conclusion of the contract.

3. Except as otherwise provided in the contract or established by usages, the price shall be paid in the currency of the country of the seller.

Article 58

1. When the currency indicated in the contract for the payment of the price gives rise to doubts, the currency of the country of seller shall be deemed as applicable.

2. Where the price is fixed according to the weight of the goods, it shall, in case of doubt, be determined by the net weight.

Article 59

...

Addition of the following new paragraph (3):

3. The buyer shall comply with all the requirements of his national laws in order to permit the seller to receive the price as provided in the contract.

Comments

1. The obligations of the buyer are established in those articles, specifically the price and the place and the date at which the same should be paid.

2. With respect to the first of these articles, namely, article 56, we do not propose any change, since it limits itself to establish the two basic obligations of the buyer; and corresponds to article 18 in the structure of ULIS, which establishes the respective obligations of the seller.

3. In so far as concerns article 57, that is the one which establishes the rules for the fixing of the price, it is our opinion that it should cover an additional situation, namely in what does the payment of the price consist as well as the rules which are applied when no price is fixed in the contract.

4. As to the payment of the price, we believe it should be indicated that the same consists in the delivery of the monies or documents provided for in the contract. We consider that these principles be fixed in order to expressly regulate both the cases of direct payment to the seller—exceptional in international sale transactions—as well as payment through a bank and/or through documents.

5. In connexion with the rules which should be applied when a fixed price is not stated in the contract, they should provide not only the price generally charged by the seller at the time of the conclusion of the contract, but also the case in which said reference is not possible, or when the seller does not normally state the price, in which hypothesis we believe that the price prevailing in the market should be applied also at the time of the conclusion of the contract.

6. With reference to article 58, it is our opinion that two hypotheses be foreseen. The first hypothesis concerns the currency in which payment should be made, when the one indicated in the contract might refer indistinctly to the countries involved in the contract; that is, when the name of the money is the

same in various countries (dollars, francs, pesos, etc.). In such event, we believe that the money of the country of the seller should govern. The second hypothesis is the one currently provided for in ULIS, namely the one relative to the fixing of the price in accordance with the weight of the goods.

7. In connexion with the problems of the place and date of payment, it is our belief that a provision should be added to article 59 to resolve the problems arising when exchange controls exist in the country of the buyer. In such a case, we believe it advisable that ULIS establish a simple rule, namely that the fulfilment of all the requisites fixed by the internal legislation of the buyer shall be his obligation in order that the seller receive the price agreed upon in the terms of the contract.

This rule is important, since if the exit of money from the country of the buyer were to be prevented, it would grant rights to the seller, either to consider the contract *ipso jure* avoided; to detain or vary the shipment of the goods or even to claim damages.

8. Finally, as to article 60, we do not propose any amendment, but we would like to note that this provision could be actually omitted, inasmuch as it does not establish any special rule which was not provided in other articles of ULIS. The contractual agreement, or the usages in the absence of the agreement to which this article 60 refers, are provided for in article 1 and 9 of ULIS.

Furthermore, the special references to the application of the usages in this article and others of ULIS, notwithstanding the general regulation of article 9, are not convenient, since they can be interpreted as limitations to the scope of said article 9, or because in other situations, in which ULIS does not contain express reference to usages, it might be considered that the same would not be applicable.

IV

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF THE UNITED KINGDOM

Articles 56-60 of ULIS

1. Articles 56-60 deal with certain obligations of the buyer, in particular the payment of the price.

2. *Article 56*: no comment.

3. *Article 57*: this provides for the fixing of the price if it has not been stated. It has been objected that a contract would not exist if the price were not fixed. But the article is expressly confined to cases where a contract has been concluded. The chances of an international sales contract being concluded without the price being fixed are very small indeed, but it could happen in exceptional cases, and the article should stay. (The example has been given of publishers who distribute catalogues and whose order forms do not repeat the prices.)

4. The "price generally charged by the seller at the time of the conclusion of the contract" would presumably (as a result of article 9) be established first of all by the course of dealing between the parties, and if that did not show a price, the price generally charged by the seller to third parties would be appli-

cable. Whilst there might be a conflict between the two prices—i.e. the previous price paid by the buyer and the price charged by the seller to third parties at the time of the contract—in my view the previous price between the parties would be the valid price. It does not seem to be worth complicating the article by mentioning this expressly.

5. *Article 58*: no comment.

6. *Article 59*: this article adopts the rule that the debtor shall seek out the creditor. This is in accordance with English Law and is supported by the United Kingdom.

7. *Article 60*: it might be argued that this article is unnecessary since there is an obligation to pay the price. However, some legal systems require notice to establish delay in payment except where the parties have agreed on a date for a payment. This article places a date fixed by usage on the same level as a date determined by agreement. The words "without the need for any other formality" could be omitted.

V

COMMENTS AND PROPOSALS OF THE REPRESENTATIVES OF AUSTRIA AND THE UNITED KINGDOM

Articles 61 to 64 of ULIS

GENERAL OBSERVATIONS

1. Both representatives consider that this group of articles does not give rise to any fundamental objections. Articles 61 to 64 ought, however, to be harmonized with articles 24 *et seq.*, which have not yet been finalized by the Working Group.

Article 61

2. The two representatives have no comments on paragraph 1 of this article.

3. Mr. Loewe (Austria) points out that this process of harmonization might require the deletion of paragraph 2 of article 61 and the replacement of *ipso facto* avoidance ("résolution de plein droit") in paragraph 1 of article 62 by another system. Personally, he regrets the disappearance of the system of *ipso facto* avoidance and finds the text for replacement proposed by the Drafting Group at the session held in Geneva in January 1972 to be extremely unattractive and complicated.

4. Mr. Guest (United Kingdom) points out that it may be very doubtful in practice whether or not "it is in conformity with usage and reasonably possible for the seller to sell the goods", so that it will be difficult to decide whether the seller is entitled to sue for the price or only to claim damages. As a general rule, under the Sale of Goods Act, 1893 (United Kingdom), the seller may only maintain an action for the price (i) when the property (ownership) in the goods has passed to the buyer, or (ii) when the price is payable on a day certain irrespective of delivery. The relevant provisions of the 1893 Act are attached as appendix A to this report. It may also be helpful for the Working Group to consider article 2, section 2-709, of the Uniform Commercial Code (United States of America), which is attached as appendix B.

Article 62

5. The observations of Mr. Loewe on article 62, paragraph 1, are contained in paragraph 3 above. Mr. Guest agrees that it will be necessary to replace *ipso facto* avoidance with different provisions.

6. Neither representative has any comments on paragraph 2 of this article.

Article 63

7. Both representatives consider that this article is probably useful.

Article 64

8. Both representatives consider that article 64 should be retained—it corresponds with paragraph 3 of article 24 of the Working Group's draft.

Appendix A

SALE OF GOODS ACT, 1893

s.27 It is the duty ... of the buyer to accept and pay for [the goods] in accordance with the terms of the contract of sale.

s.49 (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. . . .

Note

In English Law, the seller may also claim payment of the price if the goods perish after the risk of their loss has passed to the buyer.

If the contract merely provides for payment against shipping documents, and the buyer refuses to accept the tender of the documents, the seller cannot claim the price, for the property in the goods will not pass until the documents are transferred and the price is not payable on a day certain irrespective of delivery (*Stein, Forbes and Co., v. County Tailoring Co.* (1917) 86 L.J.Q.B.448 (c.i.f.); see also *Colley v. Overseas Exporters* [1921] 3 K.B.302 (f.o.b.—buyer fails to nominate effective ship—no action for price).

Where the seller cannot maintain an action for the price, he may still claim damages for non-acceptance under section 50 of the 1893 Act.

Appendix B

UNIFORM COMMERCIAL CODE, ART. 2

Section 2-709. Action for the price

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) Of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes impossible he may resell them at any time prior to the collection of the judgement. The net proceeds of any such resale must be credited to the buyer and payment of the judgement entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 2-610), a seller who is not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

VI

PROPOSAL OF THE REPRESENTATIVE OF JAPAN ON ARTICLE 68 OF ULIS

In the process of examination of articles 65-68 of ULIS, although we are still to continue our examination, our experts and I would like to make the suggestions intermediately that the word "accept" in paragraph 1 of article 68 should be replaced by "take".

VII

COMMENTS BY THE REPRESENTATIVE OF HUNGARY OF OF THE PROPOSAL OF THE REPRESENTATIVE OF JAPAN ON ARTICLE 68 OF ULIS

We appreciate highly your proposal and agree with your suggestion that the word "accept" in paragraph 1 of article 68 should be replaced by "take".

VIII

COMMENTS AND PROPOSALS OF THE REPRESENTATIVE OF FRANCE

Articles 69 and 70 of ULIS

Articles 69 and 70, which constitute chapter IV, section III, of ULIS, entitled "Other obligations of the buyer", have given rise to only very few comments (see

primarily documents A/CN.9/31, paragraphs 130 and 131).²

Article 69

1. Japan submitted that the provisions of this article made no provision for the many disputes that could arise between buyers and sellers regarding documentary credits, e.g. disputes over contracts providing for a letter of credit without specifying its precise contents, the time of opening the credit or the amount involved.

This point is well taken, but it might be asked whether such provisions, which are more than implicit in the existing text, would not overburden the text, without any great advantage, in comparison with the other ways of making provision for or guaranteeing payment of the price, namely, the acceptance of a bill of exchange and the giving of a banker's guarantee.

Article 70

2. Austria expressed the view that it was difficult to understand why the seller could only declare the contract avoided if he did so promptly, and that an additional period of time for the buyer to perform would be in the latter's interest.

It appears that the structure of this article is exactly the same as that of article 55, which contains identical provisions concerning other obligations of the seller. Logically, therefore, article 70 should be given the same wording as article 55. However, the Working Group was unable to consider any revision of the latter article at its last session (see document A/CN.9/62,³ para. 15, and annex I, para. 36), and it requested the representative of Japan to submit, together with the representatives of other countries including Austria, a study on that article in combination with the study on articles 50 and 51.

² UNCITRAL Yearbook, Vol. I: 1968-1970, part three, I, A, 1.

³ UNCITRAL Yearbook, Vol. III: 1972, part two, I, A, 5.