

II. THE TENTH SESSION (1977)

A. Report of the United Nations Commission on International Trade Law on the work of its tenth session (Vienna, 23 May–17 June 1977) (A/32/17)*

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INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's tenth session, held at Vienna from 23 May to 17 June 1977.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

CHAPTER I. ORGANIZATION OF THE SESSION

A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its tenth session on 23 May 1977. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.

* Official Records of the General Assembly, Thirty-second Session, Supplement No. 17.

B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 December 1973 and 15 December 1976, are the following States:¹ Argentina,* Australia,** Austria,** Barbados,* Belgium,* Brazil,* Bulgaria,* Burundi,** Chile,** Colombia,** Cyprus,* Czechoslovakia,* Egypt,** Finland,** France,** Gabon,* German Democratic Republic,** Germany, Federal Republic of,* Ghana,** Greece,* Hungary,* India,* Indonesia,** Japan,** Kenya,* Mexico,* Nigeria,** Philippines,* Sierra Leone,* Singapore,** Syrian Arab Republic,* Union of Soviet Socialist Republics,** United Kingdom of Great Britain and Northern Ireland,** United Republic of Tanzania,** United States of America* and Zaire.*

* Term of office expires on the day before the opening of the regular annual session of the Commission in 1980.

** Term of office expires on the day before the opening of the regular annual session of the Commission in 1983.

¹ Pursuant to General Assembly resolution 2205 (XXI), the

5. With the exception of Burundi, Cyprus, Gabon, Kenya, Sierra Leone, the Syrian Arab Republic and the United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States Members of the United Nations: Costa Rica, Cuba, Denmark, Ireland, Malaysia, Mauritania, Mauritius, Norway, Poland, Romania, Spain, Sweden, Turkey, Uruguay and Yugoslavia; and from the following non-member States of the United Nations: Holy See and Switzerland.

7. The following United Nations organs, specialized agencies, intergovernmental organizations and international non-governmental organizations were represented by observers:

(a) *United Nations organs*

United Nations Industrial Development Organization.

(b) *Specialized agencies*

Inter-Governmental Maritime Consultative Organization; International Monetary Fund (IMF).

(c) *Intergovernmental organizations*

Asian-African Legal Consultative Committee; Bank for International Settlements; Caribbean Community; Commission of the European Communities; Council for Mutual Economic Assistance; Council of Europe; East African Community; Hague Conference on Private International Law; International Institute for the Unification of Private Law.

(d) *International non-governmental organizations*

International African Law Association; International Chamber of Commerce; International Law Association.

C. Election of officers

8. The Commission elected the following officers by acclamation:²

members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly, by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session elected 14 members to serve for a full term of six years, ending on 31 December 1976, and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also selected seven additional members. Of these additional members, the term of three members, selected by the President of the Assembly by drawing lots, would expire at the end of three years (31 December 1976) and the term of four members would expire at the end of six years (31 December 1979). To fill the vacancies on the Commission which would occur on 31 December 1976, the General Assembly, at its thirty-first session, on 15 December 1976, elected (or re-elected) 17 members to the Commission. Pursuant to resolution 31/99 of 15 December 1976, the new members took office on the first day of the regular annual session of the Commission immediately following their election (23 May 1977) and their term will expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election (in 1983). In addition, the term of office of those members whose term would expire on 31 December 1979 was by the same resolution extended till the last day prior to the beginning of the regular annual session of the Commission in 1980.

² The election took place at the 180th and 181st meetings, on 23 May 1977, and at the 182nd meeting, on 25 May 1977. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205

Chairman Mr. N. Gueiros (Brazil)
Vice-Chairman . . . Mr. O. Adeniji (Nigeria)
Vice-Chairman . . . Mr. M. Byers (Australia)
Vice-Chairman . . . Mr. S. Michida (Japan)
Rapporteur Mr. L. Kopač (Czechoslovakia)

D. Agenda

9. The agenda of the session as adopted by the Commission at its 182nd meeting, on 25 May 1977, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda; tentative schedule of meetings
4. International sale of goods
5. International payments
6. International commercial arbitration
7. Liability for damage caused by products intended for or involved in international trade
8. Training and assistance in the field of international trade law
9. Future work
10. Other business
11. Date and place of the eleventh session
12. Adoption of the report of the Commission

E. Establishment of two Committees of the Whole

10. The Committee established two Committees of the Whole (Committee I and Committee II) and referred to them for consideration the following agenda items:

Committee I

Item 4. International sale of goods: draft Convention on the International Sale of Goods.

Committee II

Item 4. International sale of goods: general conditions of sale.

Item 5. International payments:
(a) Security interests in goods
(b) Negotiable instruments.

Item 6. International commercial arbitration.

Item 7. Liability for damage caused by products intended for or involved in international trade.

Item 8. Training and assistance in the field of international trade law.

Item 10. Other business: consistency of legal provisions drafted by the Commission or its Working Groups.

11. Committee I met from 23 May to 17 June 1977 and held 32 meetings.³ Committee II met on 6, 7 and 9 June 1977 and held 5 meetings.⁴

(XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14 (Yearbook . . . 1968-1970, part two, I)).

³ Summary records of the meetings of Committee I are contained in A/CN.9(X)/C.1/SR.1 to 32.

⁴ Summary records of the meetings of Committee II are contained in A/CN.9(X)/C.2/SR.1 to 5.

12. The Commission, at its 180th meeting, on 23 May 1977, unanimously elected Mr. G. Eörsi (Hungary) as Chairman of Committee I. At its 4th meeting, on 25 May 1977, Committee I unanimously elected Mr. J. Barrera-Graf (Mexico) as Rapporteur. At its 1st meeting, on 6 June 1977, Committee II unanimously elected Mr. R. Loewe (Austria) as Chairman and Mr. C. O. Magreola (Nigeria) as Rapporteur.

13. The Commission considered the reports of Committee I and Committee II at its 185th and 186th meetings on 17 June 1977. The Commission decided to include the reports of Committees I and II in the present report in the form of annexes (annex I and annex II, respectively).

F. Adoption of the report

14. The Commission adopted the present report at its 185th and 186th meetings, on 17 June 1977.

CHAPTER II. INTERNATIONAL SALE OF GOODS

A. Uniform rules governing the international sale of goods

Introduction

15. The Commission, at its second session, established a Working Group on the International Sale of Goods and requested it to ascertain which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render that Convention capable of wider acceptance or whether it would be necessary to elaborate a new text for this purpose.⁵ The Working Group held seven sessions in carrying out its mandate in respect of the revision of ULIS and submitted to the ninth session of the Commission the text of a draft Convention on the International Sale of Goods.⁶ At that session, the Commission decided to consider the draft Convention at its tenth session, in the light of the comments received from Governments and interested international organizations.

16. At the present session the Commission had before it the following documents:

(a) Report of the Working Group on the International Sale of Goods on the work of its seventh session (A/CN.9/116).^{*} This document reproduces, in annex I, the text of the draft Convention as approved by the Working Group, and in annex II, a commentary on the draft Convention.

(b) Comments by Governments and international

⁵ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 38, subpara. 3 (a) of the resolution contained therein (*Yearbook of the United Nations Commission on International Trade Law, Volume 1: 1968-1970*) (United Nations publication, Sales No. E.71.V.1), part two, chap. II, para. 38, subpara. 3 (a). The 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods and the annexed Uniform Law (ULIS) appears in the *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. 1 (United Nations publication, Sales No. E.71.V.3), chap. I, sect. I.

⁶ Report of the Working Group on the International Sale of Goods on the work of its seventh session (Geneva, 5-16 January 1976), A/CN.9/116.^{*} The text of the draft Convention is set out in annex I of the report.

^{*} *Yearbook . . . 1976*, part two, I.

organizations on the draft Convention on the International Sale of Goods (A/CN.9/125 and Add. 1, 2 and 3).^{*}

(c) Analysis of the comments by Governments and international organizations on the draft Convention on the International Sale of Goods (A/CN.9/126).^{*}

(d) Draft Convention on the International Sale of Goods: draft final clauses (A/CN.9/135).^{*}

(e) Possible Conference of Plenipotentiaries to conclude a Convention on the International Sale of Goods: financial implications (A/CN.9/140).

17. The Commission established a Committee of the Whole I to consider the draft Convention on the International Sale of Goods as adopted by the Working Group on the International Sale of Goods, and requested the Committee to report back to it. Committee I met from 23 May to 17 June 1977 and held 32 meetings. The report of Committee I to the Commission is set forth in annex I to the present report.

Report of Committee of the Whole I⁷

18. The Commission accepted the report of Committee I and the recommendations contained therein. The Commission noted that the Committee had not had sufficient time to consider the draft texts proposed by the Drafting Group.⁸ It was noted that the Committee had considered in detail each individual article of the draft Convention, that the Drafting Group established by the Committee had based its work on the decisions taken and conclusions reached in the Committee, and that the Committee had adopted the texts of the articles of the draft Convention as revised by the Drafting Group without further consideration.

19. The Commission also noted that the report of Committee I sets forth reservations made by representatives in respect of certain provisions of the draft Convention and was of the view that, because of the fact that these reservations were made in a Committee of the Whole of the Commission, they should be considered as having been made in the Commission.

B. Conference of plenipotentiaries⁹

20. The Commission considered in the context of future action relative to the draft Convention on the International Sale of Goods a proposal that consideration be given to issuing the set of rules on the international sale of goods, elaborated by the Commission, in the form not of a convention as had been planned, but as uniform rules for optional use by the parties to a sales transaction.

21. In support of this proposal, it was argued, firstly, that the suggested procedure would result in substantial cost savings to the United Nations and to States which, in view of the current financial situation of the Organization and of many States, was not an insignificant con-

^{*} Reproduced in this volume, part two, I, F.

⁷ This report was before the Commission at its 185th and 186th meetings; summary records of these meetings are contained in A/CN.9/SR.185 and 186.

⁸ See para. 7 of the report of the Committee of the Whole I (annex I to this report).

⁹ The Commission considered this subject at its 183rd meeting, on 15 June 1977; a summary record of this meeting is contained in A/CN.9/SR.183.

sideration. In comparison to the considerable costs of holding a conference of plenipotentiaries such as was planned, the cost of issuing (i.e., printing and publishing) uniform rules were almost negligible, as had been demonstrated in the case of the UNCITRAL Arbitration Rules which had been issued in the form now being proposed for the rules on sales. Secondly, it was argued that the form of uniform rules such as was being proposed had the advantage over that of a convention in that it provided more flexibility and greater opportunity to change the rules, if need be, than would be the case for a convention. This, it was emphasized, was a significant consideration in the context of rules designed to regulate business practices which themselves were constantly changing.

22. Thirdly, and most significantly, the form of optional rules should be favoured because it would in fact lead to a more speedy implementation of the régime contemplated than would resort to the traditional method of concluding a convention. Uniform rules could be quickly promulgated and thereafter put into immediate use, as had happened in the case of the UNCITRAL Arbitration Rules which, within only a few months of their issue, had already been adopted by the business community in many parts of the world. On the other hand, it was well known how cumbersome and lengthy a procedure must be undergone between the drafting of a text of a convention and the coming into effect of that convention.

23. For all these reasons, it was suggested, the Commission should not at this stage take a final decision on the form in which the rules would be promulgated; it would be advisable first to seek the views of States and of both the Fifth and Sixth Committees of the General Assembly.

24. Some representatives, while not formally supporting the proposal to issue the rules on sales in the form of optional uniform rules, stated that they shared some of the concerns underlying the proposal. The traditional technique of legislating on the international level by the use of conventions was too cumbersome and ill-suited to the task of unification in the sphere of private law. What was required, it was said, was a new approach, better adapted to the needs of regulating private conduct and the Commission should give serious consideration to this question with a view to devising such a method for its future work.

25. Most representatives who spoke on the matter were against the proposal to issue the rules on sales in the form of optional rules and not as a convention. It was generally pointed out that work on the text had proceeded throughout on the basis that the Working Group was engaged in the elaboration of the draft of a future convention and now that that work had been completed and an agreed text presented to the Commission for consideration it was hardly the time to seek to reopen the question of the form in which the rules should be promulgated.

26. Among other reasons adduced against the proposal were the following. To adopt the form of optional uniform rules, thereby dispensing with the need for a conference of plenipotentiaries to consider the text, would deprive many States, especially developing States and those States not represented on the Commission, of the opportunity to scrutinize the draft text in connexion

with such a conference and to influence at the conference the final content and form of that text. Furthermore, it was observed, developing countries had frequently voiced dissatisfaction with international trade practices in the evolution of which they had played no determining role. They would, therefore, prefer to see these trade practices revised by means, wherever possible, of binding multilateral treaties.

27. Furthermore, to promulgate the rules on sales in a form less binding than a convention would not foster the objective of harmonization and unification of international trade law which the Commission was committed to serve since, unlike a convention which applies where the parties have not exercised the right, if granted them, to derogate from its provisions, optional rules were subject to the individual wishes of businessmen. Moreover, optional rules were always open to abuse by the stronger trading party who could very quickly modify the rules to their own advantage and obtain acceptance of such terms by the weaker party in the manner of "contracts of adhesion".

28. With regard to the cost argument, it was noted that the Commission and its Working Group and also those Governments which had been represented at the Working Group's sessions had already invested well over seven years of work and expense in elaborating the draft Convention in question, all or some of which investment might have been unnecessary if the known objective were to produce uniform rules of an optional character. Similarly, with regard to the argument of relative speed of implementation, it was pointed out that nothing would preclude parties after approval of a text by the Conference of Plenipotentiaries from incorporating provisions therefrom into their sales contracts regardless of the question of ratification by States.

29. A number of representatives, speaking in favour of the form of a convention, observed that it would be anomalous for the Commission to issue the rules regulating the actual sales transaction in the form of optional rules when it had utilized the convention technique with regard to the secondary matter of limitation of action. Furthermore, the related matters of formation and validity of sales contracts, on which work was in progress within the Commission, did not lend themselves to the form of optional rules and would, therefore, have to be promulgated in the form of a convention, leading to even greater anomaly should the rules on sales be issued in the form now proposed to the Commission.

30. Some representatives also drew attention to the fact that for many legal systems the preferred manner for receiving international legal rules into national law was by means of treaties and conventions. For such States the promulgation of the rules on sales in the form of merely optional rules for parties would present certain difficulties of implementation.

31. Two ideas were put forward as to possible alternatives that would meet some of the concerns expressed on both sides of this issue. The first was for the rules on sales to be promulgated both as uniform rules for optional use by parties and as a convention. One advantage of this would be that the rules could be in use long before the convention had gone into effect. The other idea would have the Commission obtain by written communication the views and comments of Governments on its draft text and, taking those views and

comments into consideration, adopt itself a final text of a treaty, thereby avoiding the high cost of holding a conference of plenipotentiaries.

32. The Commission decided, in view of the position taken by most representatives, not to adopt the proposal to issue as uniform rules for optional adoption by parties the rules on the international sale of goods, but to recommend to the General Assembly that they should be adopted in the form of a convention.

*Formation and validity of contracts for the international sale of goods*¹⁰

33. The Commission decided that, if the Working Group on the International Sale of Goods should, at its ninth session in September 1977, finalize draft provisions on the formation and validity of contracts for the international sale of goods, it would consider these draft provisions at its eleventh session in June 1978. The Commission also decided that, in conjunction with its consideration of these draft provisions, it would consider the question whether the rules on formation and validity of contracts should be the subject-matter of a convention separate from the Convention on the International Sale of Goods and, if so, whether the two conventions should be submitted to one and the same conference of plenipotentiaries or to two separate conferences.

Decision of the Commission

34. At its 186th meeting, on 17 June 1977, the Commission adopted the following decision:

The United Nations Commission on International Trade Law

1. Approves the text of the draft Convention on the International Sale of Goods, as set out below in paragraph 35 of the report of the Commission;

2. Requests the Secretary-General:

(a) To prepare, under his own authority, a commentary on the provisions of the draft Convention.

(b) To circulate the draft Convention, together with the commentary thereon, to Governments and to interested international organizations for comments and proposals;

(c) To prepare an analytical compilation of the comments and proposals received from Governments and interested international organizations and to submit this analytical compilation to a Conference of Plenipotentiaries which the General Assembly may wish to convene;

3. Recommends that the General Assembly should, at an appropriate time, convene an international Conference of Plenipotentiaries to conclude, on the basis of the draft Convention approved by the Commission, a Convention on the International Sale of Goods;

4. Informs the General Assembly that the Commission may place before it, at its thirty-third session, draft provisions on the Formation and Validity of Contracts for the International Sale of Goods together with appropriate recommendations on the

action to be taken in respect of those draft provisions, including the question whether such draft provisions should be considered at the Conference referred to in paragraph 3 of the present decision.

C. Text of the draft Convention on the International Sale of Goods

35. The draft Convention on the International Sale of Goods, as approved by the Commission, reads as follows:

DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS

Part I. Substantive Provisions

CHAPTER I. SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods entered into by parties whose places of business are in different States:

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:

(a) Of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) By auction;

(c) On execution or otherwise by authority of law;

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

(e) Of ships, vessels or aircraft;

(f) Of electricity.

Article 3

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 4

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

Article 5

For the purposes of this Convention:

(a) If a party has more than one place of business, the place of business is that which has the closest 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;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

¹⁰ The Commission considered this subject at its 186th meeting on 17 June 1977; a summary record of this meeting is contained in A/CN.9/SR.186.

Article 6

This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) The formation of the contract;
- (b) The validity of the contract or of any of its provisions or of any usage;
- (c) The effect which the contract may have on the property in the goods sold.

CHAPTER II. GENERAL PROVISIONS

Article 7

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 8

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

Article 9

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 10

Unless otherwise expressly provided in this Convention, if any notice, request or other communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 11

(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means including witnesses.

(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention.*

Article 12

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 13

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity.

*

Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may, at the time of signature, ratification or accession, make a declaration to the effect that article 11, paragraph (1), shall not apply to any sale involving a party having his place of business in a State which has made such a declaration.

CHAPTER III. OBLIGATIONS OF THE SELLER

Article 14

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 15

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 16

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 17

The seller must deliver the goods:

(a) If a date is fixed by or determinable from the contract, on that date; or

(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

Article 18

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

Section II. Conformity of the goods and third party claims

Article 19

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the

contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

Article 20

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

Article 21

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

Article 22

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 23

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

Article 24

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 25

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on indus-

trial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right of claim.

Article 26

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property.

(a) Under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) In any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Section III. Remedies for breach of contract by the seller

Article 27

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 28 to 34;

(b) Claim damages as provided in articles 56 to 59.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 28

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

Article 29

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 30

(1) Unless the buyer has declared the contract avoided in accordance with article 31, the seller may, even after the date for delivery, remedy at his own expense any failure to perform

his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

Article 31

(1) The buyer may declare the contract avoided:

(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 29 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) In respect of late delivery, after he has become aware that delivery has been made; or

(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 29, or after the seller has declared that he will not perform his obligations within such an additional period.

Article 32

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 30 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

Article 33

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 28 to 32 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 34

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 35

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 36

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

Article 37*

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 38

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

Article 39

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) At the seller's place of business; or

(b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

Article 40

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 41

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

Section II. Taking delivery

Article 42

The buyer's obligation to take delivery consists:

(a) In doing all the acts which could reasonably be expected

* Ghana, the Philippines and the Union of Soviet Socialist Republics expressed formal reservations to this article.

of him in order to enable the seller to make delivery; and
(b) In taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 43

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) Exercise the rights provided in articles 44 to 47;
- (b) Claim damages as provided in articles 56 to 59.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 44

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

Article 45

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 46

(1) The seller may declare the contract avoided:

(a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) If the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 45, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 45 or the declaration by the buyer that he will not perform his obligations within such an additional period.

Article 47

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. Anticipatory breach and instalment contracts

Article 48

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

Article 49

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 50

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Exemptions

Article 51

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Section III. Effects of avoidance

Article 52

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 53

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

Article 54

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 53 retains all other remedies.

Article 55

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section IV. Damages

Article 56

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 57

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the

party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 56.

Article 58

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 57, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 56.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 59

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Section V. Preservation of the goods

Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

Article 62

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 63

(1) The party who is bound to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 60 or 61 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

CHAPTER VI. PASSING OF RISK

Article 64

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 65

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 66

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

Article 67

(1) In cases not covered by articles 65 and 66 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

Article 68

If the seller has committed a fundamental breach of contract, the provisions of articles 65, 66 and 67 do not impair the remedies available to the buyer on account of such breach.

D. General conditions of sale and standard contracts

36. The Commission, at its 185th meeting on 17 June 1977,¹¹ considered paragraphs 4 to 8 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, adopted the following decision:

¹¹ A summary record of this meeting is contained in A/CN.9/SR.185.

The United Nations Commission on International Trade Law

Decides to postpone work on "general" general conditions and to review the matter when it considers, at its eleventh session, the proposals of the Secretary-General for its long-term programme of work.

CHAPTER III. INTERNATIONAL PAYMENTS

A. Security interests¹²

37. The Commission, at its 185th meeting, on 17 June 1977, considered paragraphs 9 to 16 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, adopted the following decision:

The United Nations Commission on International Trade Law

Requests the Secretary-General:

(a) To submit to the Commission at its twelfth session a further report on the feasibility of uniform rules on security interests and on their possible content, taking into account the comments and suggestions made in the Commission;

(b) To carry out further work on the subject in consultation with interested international organizations and banking and trade institutions, and in particular to ascertain the practical need and relevance of an international security interest for international trade.

B. Contract guarantees¹³

38. The Commission considered paragraphs 18 to 21 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, decided to review the item of contract guarantees at its eleventh session when the work of the International Chamber of Commerce on contract guarantees will have been concluded.