

COMMENTARY

by Mr. André Tunc, Professor on the Faculty of Law
and Economic Science at Paris

of

the Hague Conventions of 1st July, 1964
on the International Sale of Goods and on the
Formation of Contracts of Sale

**THE HAGUE CONVENTIONS OF 1ST JULY 1964 ON
THE INTERNATIONAL SALE OF GOODS AND ON
THE FORMATION OF CONTRACTS OF SALE**

The two Hague Conventions of 1st July 1964: the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, are documents the coming into force of which will in large measure alleviate the inconvenience which diversity of law causes international commerce.

On a higher plane, these Conventions undoubtedly represent the most important contribution which lawyers can make in the field of private law to the creation of a more harmonious and fraternal world.

The hindrance which differences between legal systems causes to international transactions is evident. It explains why the unification of law, difficult as it is to achieve, has been a constant aim of lawyer's endeavours and why it is to-day so keenly sought after at least in some fields or within certain groupings. It is of some significance that all the countries which intend to develop their commercial relations (the latest being the countries of the European Economic Community) seek to unify or to harmonise their law. Their endeavour is, however, especially necessary in regard to international sale. If the parties to a contract of sale have not expressly settled the law applicable to their contract, this law will be entangled in all the doubts which are involved in the application of the private international law of different municipal laws. In any event, the contract will always be subject to a law which, for one of the parties at least, will be a foreign law. Even though all municipal laws may on the whole be satisfactory, they also involve a variety of difficulties for foreigners.

In the first place, many are difficult to ascertain: in France, a country which still prides itself on its codification, the law applied to sale, particularly to commercial sale, has become quite different from what would appear to be the meaning of the texts of the Civil Code and the Commercial Code; in common law countries, the uncertainties which blemish some fundamental aspects of the law of sale have been stressed in recent studies. Moreover, even if these laws are on the whole satisfactory, they always involve peculiarities to be explained by history, but which have little rational justification. The

application of these peculiar rules to a foreign party often results in snares and traps. It may also happen that a party learns that in order to avail of his rights in a given situation, he should have had recourse to some step the need for which was not apparent to him. The possibility of such errors discourages many enterprises from engaging in international operations. Of course, the larger companies have legal advice which enables them to surmount the legal difficulties of international commerce. For companies which are not among the more powerful, the unification of the law of international sale is specially valuable: it means that they need take account of only two systems of law: that of their own country and that of the Uniform Law.

It thus appears that at the present day when international commerce is rapidly developing, the Uniform Law drawn up at The Hague in 1964 will render appreciable service in all parts of the world. An even more radical unification of the law of sale might seem desirable. One could wish that all the nations of the world would agree to unify their law of sale without distinguishing between municipal sale and international sale, and so realise the well-known prediction of Cicero "Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit". This hope cannot yet be realised, at any rate in the near future. The law of sale is too deeply rooted in each nation's law of obligations for there to be any hope of unifying it in the foreseeable future, except at a regional level, in spite of the impressive advances made in the law of international sale. At the present time, therefore, one must be content with a more modest unification: with the acceptance by the different nations of a Uniform Law which will govern international transactions, side by side with municipal law to govern their internal transactions.

The two Hague Conventions are the conclusion of a very long effort. Lawyers as eminent as Rabel, Capitant, Hamel, Meijers, Pilotti, Ussing, Ascarelli — to mention only those who are gone — have devoted their efforts and committed their hopes to it. In 1931 the International Institute for the Unification of Private Law set up, at the suggestion of Ambroise Colin taken up by Ernst Rabel, a Special Commission to prepare a draft Uniform Law. A first version of the draft was submitted by the Institute through the League of Nations for the comments of Governments. This was in 1935, and deliberations had to be discontinued. After the War, the Rome Institute was confronted with new commercial practices. It saw

the need to bring the draft up to date, and in particular to submit it for comment to a Diplomatic Conference. This Conference, which was convoked through the initiative and generosity of the Government of the Netherlands, was held at The Hague from 1st November to 10th November 1951. Its proceedings have been published. (*Actes de la Conférence, Université, 1952*).

The 1951 Conference laid down certain directives to indicate the broad outlines which it wished to see given to the Draft, and named a new Special Commission to prepare another version of the Draft. This Commission held meetings practically every year, which resulted in a Draft which was settled in 1956 and published together with a report. Through the agency of the Government of the Netherlands, which kindly undertook to supply the Permanent Secretariat of the Commission, these documents were widely distributed to foreign Governments as well as to the International Chamber of Commerce.

Whilst this Draft was being examined, a second Special Commission, also working under the auspices of the International Institute for the Unification of Private Law, completed the preparation of a text to regulate the formation of international contracts of sale. This text was also widely distributed.

When it had received the comments of various Governments and of the International Chamber of Commerce, the Special Commission met for the last time in 1962, to study these comments, express an opinion on the more important of them and, in some cases, suggest amendments to the 1956 text.

It was thus the 1962 text, published in 1963, together with a report supplementing that of 1956, which was considered by the Diplomatic Conference which met at The Hague in April 1964, through the initiative and with the generous help of the Government of the Netherlands. Under the distinguished chairmanship of Ambassador Schurmann, this Conference carried out a considerable task. While remaining true to the broad outlines of the Draft, it introduced many amendments. This Conference, which brought together experts belonging to very different legal or political systems, could produce texts which seemed to all to constitute considerable progress having regard to the present situation.

It is not unprofitable to draw attention now to the basic ideas which guided the proceedings of the Special Commission as well as those of the Conference. In their effort to achieve unification, the draftsmen of the Uniform Law have never

made a concession on some part of the Law or particular rule to some national law in exchange for corresponding concessions. The Uniform Law is less a work of compromise than a work of choice and creation. The draftsmen have been guided by municipal institutions whenever these seemed intrinsically good and likely to effect an improvement in international relationships. On every point, they have sought what seemed to them to be the best in the experience of different countries. On numerous problems, however, they have felt compelled to innovate or to override municipal law. If the Uniform Law is a work of compromise, it is so to the extent that its draftsmen have constantly sought to balance the rights of the buyer and the seller and to modify where necessary those concepts which were good in themselves but which favoured too greatly one or other of the parties. If it was necessary to override municipal practices in order to achieve uniformity, there is good reason to think that the law forms a body of rules which it would be to the advantage of all to see generally adopted.

Only the Uniform Law on International Sale of Goods will be examined here. The Law relating to the Formation of the Contract of International Sale seems sufficiently simple not to require a commentary.

In order to facilitate the reading of this commentary, it is arranged in two parts. In the first the answers given by the draftsmen of the Uniform Law to the fundamental problems which faced them will be studied. There follows an examination of the Law Article by Article.¹⁾

¹⁾ Numerous articles have already appeared on the Conventions and the Uniform Laws. See especially:

— **Great Britain:** Some Comparative Aspects of the Law Relating to Sale of Goods. *Int. and Comp. Law Quart. Supplementary Publication* No. 9. (1964); *Michael Aubrey*, The Formation of International Contracts with reference to the Uniform Law on Formation. *14 Int. and Comp. Law Quart.* 1011 (1965).

— **United States:** *John Honnold*, The 1964 Hague Conventions and Uniform Laws on the International Sale of Goods, *13 Am. J. Comp. L.* 451 (1964); *Kurt H. Nadelmann*, The Uniform Laws on the International Sale of Goods: A Conflict of Laws Imbroglia, *74 Yale L.J.* 449 (1965); *André Tunc*, The Uniform Laws on the International Sale of Goods: A Reply to Professor Nadelmann, *74 Yale L.J.* 1409 (1965); *J. Honnold*, The Uniform Law for the International Sale of Goods: The Hague Convention of 1964, *30 Law and Contemp. Prob.* 326 (1965).

— **France:** *André Tunc*, Les Conventions de la Haye du 1er juillet 1964 portant loi uniforme sur la vente internationale d'objets mobiliers corporels. Une étude de cas sur l'unification du droit. *Rev. Int. dr. Com.*

1964, p. 547 et seq. *Philippe Kahn*, Les Conventions de La Haye du 1er juillet 1964 portant loi uniforme sur la vente internationale des objets mobiliers corporels, *Rev. Trim. dr. Com.* 1964, p. 689 et seq.

— **Netherlands:** *H. E. Scheffer*, Eenvormig internationaal kooprecht, *Nederlands Juristenblad* 1964, p. 217 seq and 235 seq; *L. I. de Winter*, la loi uniforme sur la vente internationale des objets mobiliers corporels et le droit international privé, *Nederlands Tijdschrift voor Internationaal Recht* (Revue néerlandaise de droit international) 1964, p. 271; *H. E. Scheffer*, De Haagse Conferentie over eenvormig internationaal kooprecht, *Nederlands Juristenblad* 1965 p. 5 et seq. and p. 39 et seq; *R. D. Kolléwijn*, Les conventions relatives a une loi uniforme sur la vente internationale et le droit international privé, *Nederlands Tijdschrift voor International Recht* (Revue néerlandaise de droit international) 1965, p. 217.

— **Federal German Republic:** *Otto Riess*, Die Haager Konferenz über die Internationale Vereinheitlichung des Kaufrechts vom 2 bis 25 April 1964, Verlauf der Konferenz und Ergebnisse hinsichtlich der materiellen Vereinheitlichung des Kaufrechts, *Rabels Z* 29 (1965) 1 et seq; *Ernst Von Caemmerer*, Die Haager Konferenz über die Internationale Vereinheitlichung des Kaufrechts vom 2 bis 25 April 1964, Die Ergebnisse der Konferenz hinsichtlich der Vereinheitlichung des Rechts des Abschlusses von Kaufverträgen, *Rabels Z* (1965) 101 et seq; *Konrad Zweigert* and *Ulrich Drobnig*, Einheitliches Kaufgesetz und Internationales Privatrecht, *Rabels Z* 29 (1965) 146 et seq.

— **Sweden:** *Algot Bagge, Jan Hellner and Eric Essén*, 1964 Ars Haag-konventioner angående köp, *Svensk juristidning* 1965, p. 248-273;

Gunnar Lagergren, The Uniform Law on Formation of Contracts for the International Sale of Goods. *The Journal of Business Law*, Jan. 1966 p. 22.

— See also **Yugoslavia:** *A. Goldstajn*, *Pravo Modunarodno Kupoprodaja* 2 Vol., 1965.

The comparison of the Uniform Law and several texts designed to effect regional unification of the law of sale (Uniform Commercial Code, the Comecon delivery conditions, the general conditions of the Economic Commission for Europe) was the subject of the colloquium held in New York in 1964 by the International Association for Legal Science and its proceedings will shortly be published by Librairie Dalloz (Paris) under the title "L'Unification du droit de la vente internationale. — Unification of Law Governing the International Sale of Goods."

PART ONE

SOME BASIC ANSWERS SUPPLIED IN THE UNIFORM LAW

Although the problems raised by the preparation of the Uniform Law were numerous, it seems that four were really fundamental: the definition of international sale which would be governed by the Uniform Law, the determination of the scope of operation of the Law, the decision to be taken on its non-mandatory character, and the construction of a system of remedies for the violation of an obligation. The solutions given by the Law to these problems will be examined and in conclusion some comments will be made on the detailed nature of the Law.

I. Definition of International Sale

The first Article of the Uniform Law is undoubtedly the one which at The Hague Conference gave rise to the longest discussions. It certainly regulates a fundamental problem: it provides the criterion of the international character of a sale which will warrant the application of the Uniform Law. The problem was very delicate.

When a Convention is concluded to regulate problems of conflict of laws, this Convention can with advantage be given a very wide field of operation: it is enough if a sale involves an element of international character for there to be some benefit in clarifying the law to which it will be subject.

On the other hand, in a Convention on a Uniform Law of International Sale it is important to specify with care the criterion of international character. To allow the Uniform Law to be applied to every sale involving an international element would be to accord it an unreasonably extended sphere. An example would be to declare that the Uniform Law should apply to two companies operating in the same country when the sale related to goods to be imported or exported; another example would be to determine that a sale concluded in a particular country of goods intended to remain in the country should be subject to the Law when one of the parties was a foreigner. These are solutions which it would not be reasonable to accept.

In order to respect the legitimate sphere of application of municipal laws, the Uniform Law limits its application by requiring the joint existence of a subjective factor of international character, that is to say a factor which relates to the contracting parties themselves, and an objective factor of inter-

national character, that is to say a factor relating either to the goods which are the subject matter of the contract or to the circumstances at the conclusion of the contract.

To bring the subjective criterion into operation the Uniform Law in conformity with modern commercial practice does not rely on the nationality of the parties (Article 1 (3) specifies this) as nationality in the case of companies can raise unsettled problems. It refers to a simpler factor, the place of business of the contracting parties. The Uniform Law is only applicable to sales entered into between parties whose places of business are in the territories of different States. Paragraph 2 specifies that if one of the parties has no place of business, reference shall be made to his habitual residence.

The application of the Uniform Law assumes, however, that an objective criterion is also satisfied. It requires that one of the three situations enumerated by the Law be present:

— either the contract involves the sale of goods which are in the course of carriage or will be carried from the territory of another;

— or the acts constituting the offer and the acceptance have been effected in the territories of different States (and paragraph 4 specifies that in the case of sales by correspondence offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documents containing them have all been sent or received in the territory of that State);

— or, finally, delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

In short, there is only an international sale subject to the Uniform Law if the parties have their places of business in the territories of different States and if, moreover, there can be shown to be either a movement of the goods themselves across a frontier or, at least, a delivery of the goods in a country other than that where the exchange of consents took place.

The Uniform Law also makes provision for the case of countries which have identical or similar laws: For them paragraph 5 specifies that States will not be considered to be "different States" as regards the place of business or habitual residence of the parties, if they make the declaration provided for in this regard by Article II of the Convention and this will continue to be the case as long as this declaration remains in force.

It should be noted that the subjective condition of inter-

national character is satisfied when the parties have their places of business or residences in the territories of different States, whether or not these States are signatories of the Convention relating to the Uniform Law.

This is a rule which was discussed at great length at the Diplomatic Conference. It is easy to show that it sometimes leads to surprising results. The example is sometimes put of a sale concluded between two companies, one having its place of business in the United States and the other in Canada. Assuming that neither of these States ratify the Uniform Law, and that litigation relating to this contract comes before the court of a European State which has signed the Uniform Law, it seems paradoxical that this court should apply the Law to the parties.

In regard to this hypothetical case or similar cases which were on several occasions raised at the Diplomatic Conference, some remarks must be made.

In the first place, Article 3 of the Law provides that the parties are always free to exclude the application of the Law either entirely or partially, and that this exclusion can be not only express but also implied. The Uniform Law will therefore only be applicable when the parties have not intended another law to apply.

Again, a tribunal will not normally declare that it is competent to decide on a contract unless the contract has some substantial connection with the country where the tribunal sits.

Thirdly, the case is put of contracting parties having their places of business in neighbouring States. But it is necessary to bear in mind all the other cases which will be infinitely more numerous. Now, in all these cases, the Uniform Law seems undoubtedly superior to municipal laws, if not in itself, at least as regards international contracts: it is stressed, in short, that a municipal law contains peculiar rules the application of which can result in injustice to a contracting party who is not forewarned.

Finally, even when the contracting parties belong to neighbouring countries whose laws are based on common principles, the same phenomenon of local peculiarity can also set apart the two laws to such an extent that a serious risk of injustice to each of the contracting parties can be avoided by applying the Uniform Law, rather than the law of the neighbouring country. The Uniform Law has appeared not only acceptable, but positively good, to experts belonging to very different legal and political systems. That is to say it seems to protect any contract, whatever its type, from the eccentricities and injustices inherent in any municipal system.

On the other hand the Uniform Law does not impose the

solution on which its draftsmen agreed on States which, perhaps because their courts accept jurisdiction more readily than others, feel that the sphere of application of the Uniform Law is too wide. Article III of the Convention allows each State, when it deposits its instrument of ratification or accession, the opportunity to declare that it will only apply the Uniform Law if the parties to the contract of sale have their places of business or residences in the territories of different *contracting* States.

Another reservation is open to States which have already ratified one or more Conventions on conflict of laws in respect of the international sale of goods, especially the Hague Convention of 15th June 1955 on the Law Applicable to International Sale of Goods: by Article IV of the Convention, they can declare that they will only apply the Uniform Law if one of the Conventions which they have ratified requires the application of the Uniform Law.

II. *Object of the Law*

Article 8 specifies exactly what part of a contract of sale is governed by the Uniform Law.

The Law only governs the obligations of the seller and the buyer arising from the contract of sale.

Except as otherwise expressly provided, it does not govern the formation of the contract, nor does it regulate it in regard to the capacity of the parties or the exchange of their consents or in regard to vitiating factors. In fact, as regards the exchange of consents, States now have, of course, the opportunity to ratify the second of the two Conventions drawn up at The Hague in 1964.

Moreover the Uniform Law is not concerned with the effects which the conclusion of a contract may have on the property in the thing sold. It is well known that different municipal systems may produce very different effects in a contract of sale in regard to the passing of property. For some the mere conclusion of the contract results in the passing of property, whilst for others the contract only gives rise to obligations. Now it was clear from the beginning of the discussions relating to the Uniform Law that whilst it was vain to hope for a uniform rule on this question which was deeply involved both in historic traditions and in the regulation of credit and bankruptcy, on the other hand unification was not necessary if, taking a more direct and practical view, rules were merely provided for three types of questions linked, at least in certain legal systems, to the passing of property:

— the obligation of the seller to transfer the property in goods free from any right or claim not accepted by the buyer (Articles 18, 52 and 53),

— the passing of risk, regarded in a number of legal systems as the essential consequence of the passing of property (Articles 96 to 101),

— the obligation to preserve the goods and to bear the cost of preservation, which are subsidiary aspects (Articles 91 to 95).

It will be noted that there is no contradiction in declaring that the Law does not govern the effect of the contract on the property in the goods sold, then regulating the duty laid on the seller to transfer to the buyer the property in the goods, it being clearly understood that it is then exclusively a question of putting a duty on the seller, and that the rule governing the property remains outside the Uniform Law.

Moreover the Law is not concerned with the validity of the contract or of any of its provisions. These are, indeed, very difficult matters: the traditions of different States rendered difficult either the adoption of a uniform law, or, at all events, its uniform interpretation.

Since the Uniform Law does not govern the validity of contracts, it in no way trenches upon regulations of a police character or for the protection of persons which may be included in municipal legal systems.

Finally, the Law is not concerned with the validity of usages on which the parties may rely. A court therefore retains the power to set aside, as contrary to the public policy of its country, a usage which appears to it to disregard a fundamental right of one of the parties. On the other hand, Article 9 of the Law declares that usages prevail over the Law.

If the object of the Law is thus clearly delimited by Article 8, it will also be noted that the Law contains no reference to the principal forms of maritime or land sales (f.o.b., c.i.f., etc.). The draftsmen of the Law considered that this was a matter which was not yet properly ready for unification by means of an international convention. To have made provision for the principal forms of sale would, in the first place, have meant doubling the volume of a Law which was already long. Moreover the rules applicable to the principal forms of sale are still varied and doubtful. It may be said that it is precisely in a situation of this kind that unification is useful. It, however, appears that in this field a process of convergence and unification by persuasion, basically the task undertaken by the International Chamber of Commerce, may be more beneficial to commerce, through the gradual and progressive character of the convergence which it brings about, than an immediate.

unification by way of international convention. In short, the draftsmen of the Uniform Law felt that the rules governing the principal forms of sale were still changing, constantly adapting themselves to new practical needs, and that it was not proper to halt a process probably beneficial to commerce. Of course the Uniform Law can be revised. This revision will, however, require the operation of a rather clumsy procedure. In consequence, it seemed from every point of view that the International Chamber of Commerce would play a more useful part in this field than a Commission or Conference for Unification and that it was better suited to this role.

III. *The non-mandatory character of the Law*

The non-mandatory character of the Law is stated in Article 3. It could not be put in more explicit or general terms. The parties to an international contract of sale are absolutely free to exclude the application of the Law either entirely or partially; this exclusion can be express or merely implied.

Therefore, after the Uniform Law has come into force, contracting parties will remain entirely free to exclude its application. They will remain free to adopt general conditions of sale which seem to them to be more suited to their transaction. They can also expressly or impliedly override any of its provisions, in order to substitute for it any other rule which seems to them to be more appropriate for their relations or merely to abrogate a right which the Law gives to one or other of them.

The Convention relating to the Uniform Law has even provided in Article V an opportunity for a State, at the time of the deposit of its instrument of ratification or accession, to declare that it will only apply the Uniform Law to contracts where the parties have chosen to be governed by the Uniform Law. The opportunity to make this reservation was provided at the request of the United Kingdom. The United Kingdom delegation had indicated that commercial circles in their country were hesitant in their attitude to the Uniform Law. Having at first been very reserved in this regard, they were convinced, on closer study, that the Uniform Law could be beneficial. They would, however, prefer to see it brought into operation in a limited way in the first instance with a view subjecting it to the test of experience. The United Kingdom Government therefore asked that a State should be able to ratify the Convention subject to the reservation in Article V, in the hope that experience would show the value of the Uniform Law and

would allow the State to withdraw its original reservation. The Conference acceded to this wish. Many delegates have, however, expressed the hope that only the United Kingdom, for the special reasons which have been stated, will avail of this reservation, the general adoption of which would introduce a most harmful confusion into the reliability of commercial relations.

IV. *The system of remedies for breach of an obligation*

There will be a discussion in the second part of this commentary of the provisions of the Uniform Law relating to the specific performance of obligations (Article 16) and damages which may be incurred by a party who is in breach of an obligation (Articles 82 to 89).

The most serious question which arises in the field of remedies is that of avoidance of the contract. This will be discussed here. When does a breach of a contract warrant avoidance of the contract and what should be the rules governing it?

It is certain that some breaches of contract, but not all, should entail avoidance. To determine when it is appropriate to avoid a contract, the Law relies on the concept of fundamental breach: in the event of fundamental breach the party at fault incurs avoidance of the contract; in the case of non-fundamental breach, the Law endeavours to keep the contract in being.

When, in fact, is there a fundamental breach of contract? According to Article 10:

“For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.”

This definition may seem rather complex. In fact, however, the fine distinctions which it involves appear to be necessary. To ascertain if the contract should or should not be avoided the first question which should be asked is whether it still offers any advantage to the victim of the breach. It is a question therefore, whether, according to the terms of Article 10, the party who is the victim of the breach “would not have entered into the contract if he had foreseen the breach and its effects.”

Nevertheless to pay exclusive attention to the interests of the

party who is the victim of the breach might be unduly harsh on the party who is in default, when he neither knew nor could have known that strict performance of the contract was fundamentally important for the other party. For this reason the definition in Article 10 basically contains two criteria: the breach is only fundamental if, on the one hand, it results in the destruction of the entire interest of the victim in the contract and if, on the other hand, the party in breach "knew, or ought to have known, at the time of the conclusion of the contract that a reasonable person in the same situation as the other party" would in these circumstances have lost all interest in the contract.²⁾

So flexible a definition appears perfectly adapted to the needs of commerce and the intent of the parties. For instance, in regard to a delayed delivery of the goods sold, there are cases where the seller should know, either because of the nature of the goods or because of the circumstances, that punctual delivery is essential for the buyer. If, for example, a restaurateur orders a certain number of turkeys to be delivered on the morning of 24th December, it is clear that turkeys which arrive on 25th or 26th December would no longer be of any interest to him. In other situations, on the other hand, the seller may be entitled to think that the date provided in the contract has no fundamental importance for the buyer. If that is so, the buyer who, for exceptional reasons, insists absolutely on the date being observed, should make this known to the seller at the time of the conclusion of the contract.

In order that the system of remedies provided by the Uniform Law may at this point be understood, Articles 26 to 29, which regulate remedies relating to the date of delivery, will be discussed here. The entire system of remedies, with necessary variations, is based on these Articles.

In the first place Article 26 governs the case where breach in respect of the date fixed for delivery amounts to a fundamental breach of the contract. In this case the buyer quite naturally has an option: he can, of course, subject to Article 16, require performance of the contract from the seller; but he can also declare the contract avoided. He should make known his choice within a reasonable time; as it is the policy

²⁾ The "personne raisonnable de même qualité placée dans la situation de l'autre partie" (French text) is described in the English text by the simpler expression "a reasonable person in the same situation as the other party"; the word "situation" covering both the character of the person and the factual situation in which he is placed. See on this: Tunc *op. cit.*, *Rev. int. dr. comp.* 1964, p. 551.

of the Law that the situation should in the interest of both parties be clarified as speedily as possible so also it does not allow the buyer to wait, watching the movement of prices, to see which limb of the option will be the more advantageous for him. It follows that if he does not inform the seller of his decision within a reasonable time, the contract is *ipso facto* avoided. It may legitimately be presumed that when confronted with a fundamental breach, it is to be concluded that the buyer has no further interest in the contract.

However, Article 26 (2) allows a seller when the buyer has not made known his decision to address an enquiry to him, to ask him to clarify the situation. The seller who is in delay can in fact ask the buyer if he is any longer interested in the delivery of the goods, and what decision he wishes to take. He therefore asks him to make known his decision. If the buyer does not reply promptly (concept defined in Article 11 of the Uniform Law: see second part), the contract is *ipso facto* avoided.

The third paragraph provides for another situation: where the goods are delivered before the buyer has made known his decision. In this case the buyer still retains the right to declare the contract avoided, but clearly he should avail of it promptly, and his silence will amount to waiver of avoidance. The solution is explained both by the construction to be put on his intent, since he is in possession of the goods and does not at once declare that he rejects them, and by the general interest of commerce, which is to avoid a situation where the goods may not be retaken.

The fourth and final paragraph of the Article states a simple but necessary principle: when the buyer has chosen to require performance of the contract but does not obtain it within a reasonable time, he should not remain in perpetuity a prisoner of his choice in the face of the seller's neglect: he may therefore declare the contract avoided.

The complete scheme provided in Article 26 seems clear and to be welcomed.

Article 27 is concerned with the case where failure to deliver on the date fixed does not amount to a fundamental breach of the contract. In this case, avoidance of the contract would not be warranted. The Law endeavours to keep the contract in being: it retains for the seller the right to make delivery and for the buyer, of course, the right to require the seller to perform the contract.

Nevertheless, even if the punctual performance of the contract was not fundamental for the buyer, he cannot remain indefinitely in a state of expectation. If the contract is not

performed within a certain period, it will lose all its advantage for him. The Uniform Law therefore adopts the German institution of the *Nachfrist*. It allows the buyer to specify to the seller an additional period of reasonable duration, in which he expects delivery to take place, it being understood that failure to deliver in this period would amount to a fundamental breach of the contract which would allow the buyer, if he wished, to declare the contract avoided.

This mechanism seems to answer perfectly to the requirements of practice. If, moreover, German law furnished the pattern followed, it seems clear that it corresponds to current practice, even in the absence of explicit rule, throughout the commercial circles of the entire world. It is common practice, for example, that an industrialist, who expected a delivery of coal on a given date, but for whom this date was not essential, takes care to tell the seller after two or three days of delay that the coal is not yet seriously missed, but that he must without fail receive it within, for instance, a period of a fortnight or three weeks, and that if he does not receive it by that fixed date, he will buy it from some other seller and will have it delivered by any method at the expense of the original seller. This institution seemed so reasonable to many at the Hague Diplomatic Conference that it has become a sort of keynote of the Uniform Law. A similar device has been applied to a considerable number of non-fundamental breaches of contract, thus going far beyond the field of the German *Nachfrist*.

The 1956 Draft added a qualification to the mechanism now provided in the Law, contained in Article 30: "If the period of time so fixed by the buyer is not of reasonable duration, the seller may, without undue delay, notify the buyer that he will only deliver at the expiration of a period of time which he himself may fix provided that it is reasonable; in the absence of such notification the seller shall be deemed to have accepted the period fixed by the buyer." The text thus provided for a possible discussion as to the length of a reasonable period. This scheme seemed somewhat complex and no longer appears in Article 27. In fact, however, it may be assumed that this discussion will still take place if the seller considers that the period fixed by the buyer is not reasonable. If the two parties do not arrive at agreement, the court or arbitrator will eventually say later what was a reasonable period at the conclusion of which the buyer could act in accordance with Article 26.

The two following Articles state very simple rules. Article 28 sanctions a usage which is often adopted in commercial transactions: it lays down that failure to deliver on the date fixed

amounts to a fundamental breach of the contract whenever a price for the goods is quoted on a market where the buyer can obtain them.

Article 29 makes provision for an offer by the seller to deliver the goods before the date fixed. It allows the buyer either to accept or reject this delivery and, if he accepts the delivery, to reserve the right to claim damages for overloading or inconvenience caused by the goods arriving prematurely.

That then, as seen in a typical case, is the scheme for regulating the avoidance of a contract provided by the Uniform Law (it is only to be added here that avoidance of the contract does not deprive the party relying on it of the right to claim damages provided in Articles 84 to 89). Some have thought this scheme unduly severe — on one or other of the parties. This does not seem to be so. The draftsmen, of course, intended that a contract, and especially an international contract, should really bind the parties; they would doubtless acknowledge an earnest concern for business morality. It can, however, be seen from this first example that they have also taken into account the realities and difficulties of commercial life. They have endeavoured to find a well-elaborated answer to the need which is beneficial to both parties. It will be shown moreover that they have displayed the same attitude of mind in providing for the obligations of the seller and of the buyer. They firmly resolved to be impartial and to set up a balanced system.

In conclusion it must be emphasised that when the Uniform Law provides for the avoidance of the contract it makes this dependent on the mere declaration of the party who is the victim of a breach, and not upon a judicial decision. This is inevitable, especially in international commerce. If one party contends that the other has declared the contract avoided without justification there will always be time to have recourse to a court or an arbitrator to resolve the dispute.

V. *Detailed character*

To conclude with some general remarks, a further comment will be made on one of the features of the drafting of the Law. The Law attempts to provide solutions which are as definite as possible for the various concrete cases which may confront the contracting parties. This explains why it is made up of 101 Articles.

Some would have preferred a shorter law in which rules were stated in more general terms.

In the first place need they be reminded that the French Civil Code devotes 120 Articles to Sale, of which 56 alone

cover the duties of buyers and sellers and that these provisions are introduced into a general theory of obligations set out in 269 Articles, of which 34 deal merely with the effect of obligations?

On the one hand legislative method cannot be the same with internal law and international law. An internal law is interpreted against a background of institutions and rules well known to the judge and it can on occasion rely on formulae which are in themselves imprecise or even unclear (for instance, "In regard to moveables possession amounts to title"). Against this a Uniform Law is based on concepts some of which will be foreign to the countries in which they have to be applied. These concepts must be set out with the greatest precision.

Furthermore the interpretation of a municipal law depends on the single legal system of the courts, which allows the legislator to state merely the chief rules, leaving to the Court the task of deducing the precise consequences in their application to concrete cases. In contrast to this, in the absence of a single jurisdiction on which the Uniform Law would depend, uniform application can only be obtained from different municipal legal systems if the Law is sufficiently precise and detailed.

In short a choice was to be made between the more elegant technique, which consisted in regulating the subject matter by principles which were somewhat general, and the more practical by which it was sought to supply solutions as directly as possible for different concrete situations which were likely to arise in an international sale. Are the draftsmen of the Law to be reproached for having thought in the first place of those who would make use of it, some of whom will be businessmen rather than lawyers, and for having wished that they should not be obliged to apply themselves to legal reasoning and exercises in logic in order to resolve their problems?

PART TWO

COMMENTARY ON THE ARTICLES OF THE UNIFORM LAW

This commentary merely takes the Articles of the Law in order, following the plan of the Uniform Law itself.

The Law is comprised of six chapters, arranged in three groups. After two introductory chapters, one devoted to the sphere of application of the Law (I), the other to various general provisions which contain in particular a number of definitions (II). Come two fundamental chapters intended to

regulate the reciprocal obligations created by the contract of sale: the obligations of the seller (III) and the obligations of the buyer (IV). The Law concludes with two chapters: the one deals with obligations common to seller and buyer (V), the other governs the passing of risk.

CHAPTER I. SPHERE OF APPLICATION OF THE LAW

There is no need to return here to *Article 1* which defines international sale and which, because of its importance, has been discussed in the first part of this commentary (Part One, D).

Article 2, which declares that rules of private international law shall be excluded for the purposes of the application of the Uniform Law, subject to any provision to the contrary in the Law, resulted from discussions which took place during the preparation of Article I. It seemed advisable, in order to prevent any theoretical discussion which might find an echo in the courts, to exclude the rules of private international law from the sphere of the Uniform Law and to declare that it was simply and directly applicable in accordance with the criteria which it laid down.

Article 3 which states the non-mandatory character of the Law, has already discussed also (Part One, III).

Article 4, which provides that the Uniform Law shall apply when it is chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are parties to the Convention, may appear to be unnecessary. In fact it amounts to an invitation to business circles to make use of the international Law, even if the States in which their places of business are situated have not ratified the Convention or even if they are nationals of such a State.

It is to be emphasised, on the other hand, that it is not the intention of the draftsmen of the Law to allow this opportunity to open the door of frauds on the law. The Law is only applicable at the choice of the parties "to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law.

Article 5 specifies the types of goods to which the Uniform Law applies. In the first place stocks, shares, investment

securities, negotiable instruments and money are excluded from the Law. Investment securities and negotiable instruments are, moreover, not always corporeal things. They should remain in every respect subject to the special rules which govern them.

The Law also excludes from its field of application ships, vessels for internal navigation or aircraft which are or will be subject to registration. What is here in question are goods which are or will be subject to a special system of rules which, moreover, frequently resembles that for immovables.

The Law also excludes sales of electricity. Whether or not one regards electricity as goods, it appears that its sale cannot in several respects be governed by the Uniform Law. Furthermore, international sales of electricity are made by means of detailed contracts which are selfsufficient.

Finally, sales by authority of law or on execution or distress are excluded. They also should remain subject to their special system.

The Conference carefully reviewed the problem of hire purchase and credit sales. It was impossible to exclude them from the sphere of application of the Uniform Law, if only because of the number of sales in which an element of credit is to be found and the difficulty of defining the concept of a hire purchase or credit sale transaction. Account had to be taken, however, of mandatory rules which, in some municipal systems, have been brought into force to protect hire purchasers and credit purchasers of consumer goods against various abuses. This explains the second paragraph of Article 5: the Law does not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments. (This concept covers hire purchase contracts in Common Law systems).

Article 6 subjects contracts for the supply of goods to be manufactured or produced to the Uniform Law when the party who is to deliver the goods must supply an essential and substantial part of the raw materials necessary for manufacture of fabrication. It is, indeed, clear that the Uniform Law should apply to the sale of goods to be manufactured to the buyer's order just as much as to the sale of completed goods. This solution, in addition, avoids difficulties raised by the legal analysis of certain contracts. There is, however, no sale when one of the parties is merely obliged to assemble components which are sent to him by the other or to work up raw

materials which are entrusted to him. This explains why a contract is excluded from the Uniform Law when the party who orders the goods must supply an essential and substantial part of the materials necessary for manufacture.

Article 7 provides that the Law applies to sales regardless of the commercial or civil character of the parties or of the contract. Of course the Law will in fact essentially apply to commercial sales, and it has been drafted with these fundamentally in view. There is no difficulty, however, in extending it to civil sales, and it seemed this had to be done to escape problems arising either from divergences between legal systems as to the scope of the commercial field or, in some cases, the absence of any distinction between the commercial or civil character of the sales or the parties.

Article 8, which specifies the subject matter of the Law, has already been discussed (Part One, II).

CHAPTER II. GENERAL PROVISIONS

Article 9, which is to some extent an expansion of Article 3, shows, as the latter does, how restrained the draftsmen of the Uniform Law have been. The Article provides that usages which the parties have expressly or impliedly made applicable, any practices which they have established between themselves, and any usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract, prevail over the Uniform Law. It also lays down a rule of interpretation which follows from this basic principle.

Article 10, which defines the concept of fundamental breach has already been discussed (Part One, IV).

Articles 11 tot' 14 do not seem possible sources of difficulty. Article 11 defines the concept of promptitude by relating it to the circumstances and the reasonable opportunities of the parties. Article 12 defines the concept of current price as the price based upon an official market quotation, or, in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price. It need only be noted that the term market is to be understood in a broad sense; it is not confined merely to commodity exchanges; in the importing of raw materials the "markets" are for the importer the great commercial markets which issue quotations for commodities and where it is presumed that the importer will ordinarily obtain his supplies.

The concept may therefore vary according to the factual situation of the buyer. Article 13 defines expressions such as "a party knew or ought to have known" (which is not to be confused with the more restrictive formulae used in Articles 36 and 40) and Article 14 refers to usage the means to be employed for communications provided for by the Uniform Law.

Article 15 provides that a contract of sale need not be evidenced in writing and shall not be subject to any other requirements as to form (whether for validity or proof). In particular, it may be proved by means of witnesses. This provision troubled the experts of some States who were accustomed to contracts of sale being in writing and who feared that their business concerns might be bound before the formal drawing up of a document. It would seem that Article 4, paragraph 1 of the Uniform Law on the Formation of Contracts of Sale, may relieve their anxieties. It gives a contracting party an opportunity — which moreover he would certainly enjoy at common law — when negotiating with the other party, to declare that it is his intention that no contract should be formed until a formal instrument had been drawn up. It might even be that such a clause could be included in the business papers of a concern.

Article 16 amounts to a notification which it appeared could usefully be included in the Uniform Law, for the benefit of contracting parties belonging to States which would only publish the Uniform Law in an official journal, and not the Convention bringing it into force.

Article 16 refers to Article VII of the Convention. By the terms of the latter Article, when a party is entitled under the provisions of the Uniform Law to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law.

In the abstract, such a provision may seem regrettable, since it limits, in some countries, the rights of which one party may avail himself against the other. It was nevertheless inevitable. It is clear that a State could not be expected to alter fundamental principles of its legal system if it wished to bring the Uniform Law into force. Perhaps it should be emphasised that the provision only relates to the enforcement of rights which remain in being and upon which the person entitled can rely in every other respect.

Article 17 which provides that questions concerning matters governed by the present Law, which are not expressly settled therein shall be settled in conformity with the general principles on which it is based, was indispensable.

In the absence of this provision there would always be the possibility that one of the parties might claim that the provision of the Uniform Law relied on by the other contracting party was not absolutely clear or did not precisely cover the case in hand. From this ambiguity or omission he would argue that he was entitled to the application of a national law might be more advantageous for him. In order to prevent such abuses, it had to be stated that, in regard to matters covered by the Uniform Law, it alone was applicable.

The reference to the general principles of the Law does not seem to involve any perils. It is to be observed, in the first place, that the Law is very detailed so that true omissions will doubtless only be rarely found in it. It will be seen, on the other hand, that because it contains a large number of provisions it will ordinarily be easy to extract its general principles. It will further be noted that this task will be facilitated by consulting the reports which accompanied the Drafts of 1956 and 1962 and the report of the proceedings of the 1964 Conference. Finally, supposing any doubts may remain as to the proper solutions for particular cases, it may be surmised that an international body of case law will be formed, and that it will carry *de facto* authority, even in the absence of a supra-national jurisdiction to give effect to the Uniform Law. The measures provided for in Recommendation I annexed to the Final Act of the Convention will assist to this end.

CHAPTER III. OBLIGATIONS OF THE SELLER

Article 18 merely states the principal obligations of the seller: to effect delivery, hand over if necessary any documents relating to the goods and transfer the property, these three obligations to be carried out as required by the contract and the Uniform Law.

This statement of the obligations of the seller requires two remarks. In the first place it may seem artificial to distinguish between the delivery of the goods and the handing over of the documents. It must not, however, be thought that the Law sets these two facts against one another. For the sake of greater clarity the Law is so arranged as to regulate separately first the delivery of the goods, whether or not these goods have resulted in the creation of documents, and then it deals

with the eventual handing over of these documents, which may or may not stand in place of the goods.

On the other hand it will be observed that in enumerating the obligations of the seller there is no reference to the obligation of guarantee which is, nevertheless, found in the majority of municipal systems. This is a characteristic feature of the Uniform Law, the value of which has already been acknowledged by several commentators. It was possible to amalgamate the rules for delivery and those governing the warranty to be given by the seller, two traditional groups of rules which inevitably resulted in conflicts, by defining delivery as the handing over of goods which conform to the contract (Article 19). Thus conformity of the goods with the terms of the contract now forms an element in delivery and is not a special obligation.

SECTION I. DELIVERY OF THE GOODS

Article 19 contains in its first paragraph the following definition which has just been described as fundamental: "Delivery consists in the handing over of goods which conform with the contract."

This concept of delivery seems clear, simple and can be grasped by any businessman. It renders wholly pointless any discussion of the character of the act. Of course it may be difficult to know whether a handing over has taken place or if the delivery was of goods conforming to the contract. But these are simple questions of fact which could not be avoided in any other system, and which could in another system be enmeshed in difficult questions of law.

It will be seen that this definition explains the subdivisions of Section 1. The seller may be in breach of his obligations by failing to deliver the goods or by effecting late delivery or by making delivery in a place other than that fixed in the contract, — in the two latter cases he has nonetheless effected delivery since he had handed over goods which conform with the contract. — this is the case provided for in the first subsection. He may also be in breach of his obligation to make delivery since he had handed over goods which conform with those specified in the contract: this case is covered in subsection 2.

The definition of delivery which has been given raises a problem when the contract of sale involves carriage of the goods. It may be asked at what point of time does the handing over of the goods which constitutes delivery take place? Article 19 (2) answers this question by providing that where

the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer. The rule, moreover, conforms to international usage.

Again in some cases there may be doubt as to the destination of goods or merchandise handed to a carrier. For this reason the third paragraph of the Article specifies that where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, delivery requires not merely that the seller should have handed over the goods to the carrier, but also should have sent to the buyer notice of the consignment and, if necessary, documents specifying the goods. This involves an obligation supplementary to the duty to deliver and remedies for breach are to be found not in Articles 24 and following but in Articles 55 and 100. From this comes an important consequence in regard to the passing of risk (see *infra*, the commentary on Article 100).

Sub-section 1 - Obligations of the seller as regards the date and place of delivery

The provisions of this sub-section define the date and place of delivery and lay down the remedies for non-performance of the seller's obligations in regard to the date and place of delivery.

A. Date of delivery

Articles 20 to 22 relating to this question scarcely seem to call for any comment. It seems clear that the buyer should not have to take any formal steps to summon the seller to fulfil his obligations. For this reason the seller is bound to deliver the goods on the date fixed by the parties or by usage "without the need for any other formality", provided that the date so fixed is determined or determinable. These provisions do not, of course, affect the possibility that contract or usage may allow the buyer to determine the date of delivery.

B. Place of delivery

Article 23 settling the place where the goods should be delivered is also self-evidently clear and does not call for any remarks.

C. Remedies for the seller's failure to perform his obligations as regards the date and place of delivery

Article 24 is essentially declaratory. It is intended to give a general view of the position of the buyer when the seller has not fulfilled his obligations in regard to the date and place of delivery. It stresses in particular that the situation is not only governed by Articles 25 to 32 which follow, but also by Articles 82 and 84 to 87, which give the buyer an opportunity to obtain damages. The third paragraph of this Article adds that the seller shall not be entitled to apply to a court or arbitral tribunal to grant him a period of grace: it seemed inevitable that such a rule should be provided in international commerce.

Article 25 is intended to eliminate abuses to which the buyer's right to claim performance of the contract might give rise. The buyer is deprived of this right when it is in conformity with usage and reasonably possible in the circumstances to purchase goods to replace those to which the contract relates. It will be seen that there is here a double condition. When this double condition is satisfied the contract is *ipso facto* avoided as from the time when such a purchase should have been effected. This is in fact the rule to be derived from usages. This rule was all the more necessary in this case because the buyer could not be allowed to remain waiting and watching the movement of prices before taking a decision. The aim of the draftsmen to prevent a party who is the victim of a breach of contract from taking advantage of it to speculate at the expense of the other is reflected in many provisions of the Law.

a) Remedies as regards the date of delivery

Articles 26 to 29 which set out the remedies for delay in delivery have already been discussed. They were in fact used as illustrations of the scheme of remedies adopted in the Uniform Law. The remarks which have already been made on them will not be repeated here (see above Part One IV).

b) Remedies as regards the place of delivery

In Articles 30 to 32, which make provision for these remedies, will be found the basic distinction, laid down in Articles 26 to 29, between fundamental and non-fundamental breach of the contract. It is, of course, clear that the distance between the place of delivery agreed in the contract and the

actual place of delivery can amount to a breach of the contract which according to circumstances may or may not be fundamental.

Article 30, which covers the case of fundamental breach states rules similar to those in *Article 26*. There is however a slight distinction. When delivery is delayed, the delay in delivery may be more or less serious, but it is in any event irreparable. When on the contrary delivery is made at a place other than that agreed in the contract, there remains the possibility that the goods can be transported to the place fixed by the contract within the period provided in the contract or with only such delay as would amount to a non-fundamental breach.

In these circumstances, the opportunity of avoiding the contract on the ground of delivery at a place other than that agreed accorded to the buyer must be subject to a double condition: both failure to deliver at the agreed place and the delay which would result from transporting the goods to the agreed place must amount to fundamental breach.

In all other respect, *Article 30* lays down rules which are similar to those in *Article 26*. It implies the application of *Article 26 (4)*: the buyer who has chosen to require performance of the contract and who does not obtain it within a reasonable period resumes the right, which he had temporarily lost, of declaring the contract avoided.

Article 31 is similarly very like *Article 27*. There is hardly any difference in the drafting. Whilst *Article 27* contemplates the case where failure to deliver on the agreed date does not amount to a fundamental breach of the contract, *Article 31* for reasons which have been indicated in regard to *Article 30* deals with situations where the difference of place and the difference of date are not both fundamental breaches (it is enough for one of them not to be fundamental for the provision to apply). When the justification for the existence of the contract thus remains, the seller retains the right to effect delivery and the buyer the right to require performance of the contract, but the buyer may grant the seller an additional period of time of reasonable length. Failure to deliver within this period at the place fixed will then amount to fundamental breach.

Article 32 allows for the application of the rules relating to fundamental breach to the case where delivery is effected by handing over the goods to a carrier, not only when this

handing over is effected at a place other than that fixed, but also, under paragraph 2, when the goods have been sent to a place other than that fixed.

It will be seen that this Article does not in express terms require that there should be fundamental breach both in respect of the place and the date. It would nonetheless appear that this conjunction should have been required in Article 32 as it is in Article 30. Supposing that the handing over to the carrier which amounts to delivery has been effected at some place other than that fixed but the goods have been sent to the agreed destination, or even supposing that the goods have been sent to some place other than that fixed, then it is possible that these differences may be of no substantial importance to the buyer and so it would not be reasonable to allow him the right to avoid.

It will be noted that the remedy provided in paragraph 3 of Article 32 differs from that in Article 31. This is to be explained by the fact that the seller has lost control of the goods.

Sub-section 2. Obligations of the seller as regards the conformity of the goods

The provisions of this sub-section regulate lack of conformity, its ascertainment and notification, and finally the remedies which it entails, in that order.

A. Lack of conformity

Article 33 in its first paragraph covers the different possible instances of lack of conformity in great detail. It may be asked if it was necessary to make provision for all these cases. In actual fact, those who drafted the Uniform Law did not consider this to be absolutely necessary. In some respects, the principle stated in Article 19 (1): "Delivery consists in the handing over of goods which conform with the contract" was enough. Nevertheless, as they did not wish to leave any possible doubt, they have enumerated the instances of non-fulfillment of the obligation to effect delivery.

The second paragraph of the Article, which states that no difference in quantity, lack of part of the goods or absence of any quality or characteristic is to be taken into consideration when it is not material, is intended to prevent pointless litigation and perhaps to foil any bad faith on the part of the buyer. This rule is not to be confused with the distinction between fundamental and non-fundamental breach of the contract. It contemplates a case of non-fundamental breach

which is so slight as not to be considered as a breach and therefore not entitling the buyer to any remedy.

In stating that, in the cases to which Article 33 relates, the rights conferred on the buyer by the Uniform Law exclude all other remedies based on lack of conformity of the goods Article 34 is not merely intended to preclude recourse to theories of warranty against defects in the goods: such recourse was prevented by the simple substitution of the Uniform Law for the municipal law. It is in particular intended to preclude the possibility of a party who has acquired goods relying on a general theory of nullity based on mistake as to the substance of the goods. Article 8, in limiting the field of the Uniform Law, would otherwise have allowed a person acquiring goods to avail himself of this doctrine, if Article 34 did not prevent it.

Article 35 first states a simple and reasonable principle: conformity with the contract is to be determined by the condition of the goods at the time when risk passes (the time is specified in Articles 97 to 101). This formula, however, standing alone would not be enough, since risk does not pass when goods which do not conform to the contract are handed over when the buyer declares the contract avoided or requires goods in replacement (Article 97 (2)). The bare statement of the principle in Article 35 would therefore involve the danger of creating a vicious circle by referring to a time which would never arrive. This is why it was necessary to specify that if, upon a declaration of avoidance or a request for replacements, risk did not pass, conformity is to be determined by the condition of the goods at the time when risk would have passed had they been in conformity with the contract.

Paragraph 2 adds a very reasonable rule to these provisions: if the lack of conformity occurs after the time fixed in paragraph 1, it is only just that the seller should still be liable for the consequences of this, if it was due to an act of the seller or of a person for whose conduct he is responsible.

Article 36 effects a simple clarification which does not seem likely to give rise to any difficulty of principle.

Article 37 provides that if the seller has handed over goods before the date fixed for delivery, he may, up to the date fixed, bring the goods into conformity with the contract, provided that the steps he takes by way of additional delivery, making good of defects or provision of replacements do not

cause the buyer either unreasonable inconvenience or unreasonable expense.

B. Ascertainment and notification of lack of conformity

Article 38 in its first paragraph, states a rule which is intended to limit as far as possible the scope for disputes between the parties: "The buyer shall examine the goods, or cause them to be examined, promptly."

It was, however, necessary to make provision for both the place and the time for examination so required when the goods were to be transported. The second paragraph of this Article determines that the examination is to be at the place of destination.

There is, however, a special difficulty when the goods are redespached by the buyer without transshipment. The problem was most difficult. From the standpoint of the buyer or subsequent purchasers, it would seem reasonable that examination should only be required at the new destination. From the seller's point of view, on the contrary, this transfer carried the risk of seriously lengthening the period in which disputes might arise and, indeed, in which deterioration of the goods might take place.

The Uniform Law is intended to reconcile as far as possible the divergent interests of the parties in this situation. It declares that examination of the goods may be deferred until they arrive at the new destination, when the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of redespach without transshipment.

Paragraph 4 provides only very limited rules for the methods of examining the goods. First it invites the parties to make provision for these methods in their contract. If no express provision has been made by them, it refers the question to the law or usage of the place where the examination is to be effected.

Whilst *Article 38* requires the buyer to examine the goods, or cause them to be examined, promptly upon delivery, *Article 39* imposes an additional obligation on him: to notify the seller promptly after he has discovered the lack of conformity or ought to have discovered it (especially if he has undertaken the examination required by *Article 38* in a proper way).

This requirement would, however, be unreasonable when the lack of conformity could not be discovered by the examination provided for in *Article 38*. In this case, the second sentence of *Article 39* (1) allows the buyer to rely on

the defect provided that he gives notice to the seller promptly upon discovering it.

In its firm policy of balancing the rights of seller and buyer, the Uniform Law provides that this delayed claim can only be made within a period of two years from the date on which the goods were handed over, unless the lack of conformity constitutes a breach of a guarantee covering a longer period. A relatively long period seemed necessary: some defects in goods may only appear after fairly prolonged use.

Article 39 (2) lays down a rational rule: the buyer should not simply inform the seller that he complains of lack of conformity, he must specify its nature and invite the seller to examine the goods or cause them to be examined by his agent.

Since the notification must be given promptly, it appeared necessary to make provision for the situation where the communication (letter, telegram or any other suitable means) is delayed or lost by the transmitting service. Article 39 (3) settles that this delay shall not deprive the buyer of the right to rely on the communication. No other rule seemed possible. The delay could, indeed, embarrass the seller. But the loss of the right to rely on lack of conformity would have been infinitely more serious for the buyer.

In determining that the seller may not rely on the barring of rights provided for in Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware and did not disclose. *Article 40*, does no more than sanction a rule of good faith.

C. Remedies for lack of conformity

Article 41, like *Article 24*, is merely a list, which states the rights to which the buyer may be entitled when he has given proper notice of lack of conformity. Three possibilities may be open to the buyer corresponding to the courses laid down in *Articles 42 to 46*: to require performance of the contract by the seller, to declare the contract avoided or reduce the price; in addition he may claim damages.

Article 42 specifies the circumstances entitling the buyer to require performance in various possible situations. It must, moreover, be remembered that the right to performance is subject to the reservation in *Article 16*.

Article 43 deals with the buyer's second right: to declare

the contract avoided. This right assumes that the lack of conformity amounts to a fundamental breach of the contract. Article 43 is, however, analogous to Article 30, relating to delivery at a place other than that fixed in the contract. There also a lack of conformity which is in itself fundamental cannot be regarded as a ground of avoidance if this lack of conformity can be made good in such time that the delay will not amount to a fundamental breach of the contract. It is only when there is a fundamental lack of conformity which can only be made good by causing a fundamental delay that avoidance of the contract is open to the buyer. He must then avail himself of this right promptly after notifying the lack of conformity. Once again, the rule was required in order that he be not allowed to wait and watch the movement of prices. In addition the goods have been handed over to him and it must be realised that the Law is strict in its rules for avoidance which would often require that the goods be transported again.

When there is no default which amounts to fundamental breach and which cannot be made good within an acceptable period of time, *Article 44* entitles the seller, as *Article 37* does in the case of premature delivery, either to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

The second paragraph of this Article does, however, allow the buyer to avoid indefinite suspense. The buyer may fix for the seller an additional period of time of reasonable length at the expiration of which he will have the option either again to require performance of the contract, or to reduce the price, or even, provided he acts promptly, to declare the contract avoided.

Where the lack of conformity relates to part only of the goods *Article 45* provides that the provisions of Articles 43 and 44 primarily only apply to that part. The buyer may however, declare the contract avoided in its entirety if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

Article 46 makes provision for the third possibility open to the buyer. If he could not or would not obtain performance of the contract and could not or would not avoid it, he may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity.

Where the seller proffers to the buyer a quantity of goods greater than that provided for in the contract *Article 47* provides that the buyer may reject or accept the excess quantity. If the buyer rejects, he may claim damages if he has suffered any loss through the proffer of the excess quantity. If he accepts, he must pay for it at the contract rate.

Article 48 provides that the buyer may exercise the rights provided in Articles 43 to 46 even before the time fixed for delivery, if it is clear that the goods which would be handed over would not be in conformity with the contract. This rule may not be called into play very often, but it sometimes operates in English law and there were advantages in embodying it in the Uniform Law. It is true that some feared lest it might provide an opening for a dishonest buyer, who was anxious to free himself of a contract which he regretted making. These fears do not seem well-founded. *Article 48* requires that it be clear that the goods do not conform to the contract. What is more, a dishonest buyer will always find some excuse to escape from a contract. The pretext given him in *Article 48* will be neither better nor worse than any other. In the last resort, it is always for the Court or arbitral tribunal to assess its worth.

There were also those who feared, on reading the corresponding *Article* of the 1956 Draft, that it might be construed as perhaps giving the buyer the right to inspect the manufacture of the goods the subject matter of the contract. This was not the meaning of the provision. *Article 48* of the Uniform Law, as redrafted, does not appear open to any doubt.

Article 48 is the first of the provisions of the Law which give a party preventive rights. Other examples will be seen in *Articles 66, 73, 75 and 76*.

It will be noted that *Article 48* gives the buyer, in the cases which it covers, the rights mentioned in *Articles 43 to 46*, but not those in *Article 42*: the buyer clearly cannot require anticipatory performance of the contract. On the other hand, it is clear that in spite of the silence of the text, he may recover damages in an appropriate case.

Article 49, as is the case with *Articles 38 and 39*, attempts to ensure that the legal position of the parties is clarified as quickly as possible. The buyer who has ascertained a lack of conformity and has notified the seller in accordance with *Article 39*, is deprived of his rights, if he does not avail himself of them, at the expiration of a period of one year unless he

has been prevented from exercising them through the fraud of the seller.

The situation is however a little different if he has not paid for the goods after giving notice of the lack of conformity. In this case his mere inaction indicates his refusal to pay. When this inaction has lasted for a year, he must of course be deprived of the right to avoid: avoidance would be too serious for the seller. He cannot even require that any defect in the goods be remedied or that replacements which do conform to the contract be delivered: it could be that the seller has discontinued a given line of manufacture or terminated certain operations. Against this the buyer does, however, retain the right to advance as a defence to a claim for payment of the price a claim for reduction in the price or for damages.

SECTION II. HANDING OVER OF DOCUMENTS

This section is very brief. The reasons for this have already been explained. (see above Part One, II).

Article 50 does no more than state that where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.

In the event of breach of this obligation, *Article 51* merely refers to the remedies provided by Articles 24 to 32 for late delivery of documents or delivery at a place other than that fixed by the contract, and to Articles 41 to 49 for a delivery of documents which are not in conformity with those which should have been handed over.

It did not seem possible to be more precise, remembering on the one hand that the Law does not regulate the principal forms of export and import sales and on the other the wide variety of documents and the consequences which may result from them not being handed over or their defective character.

SECTION III. TRANSFER OF PROPERTY

Article 52 does not repeat the rule, contained in Article 18, that the seller shall transfer the property in the goods as required by the contract and the Law. It goes further, however; it ensures that the buyer will obtain title free from any right or claim of a third person, unless he has agreed to take the goods subject to such right or claim.

In consequence, the buyer who finds that he is faced with an unexpected claim to the goods by a third person, should notify the seller of the situation, unless he already knows of it, and request that the goods be freed from the claim within a reasonable time or that other goods free from all rights and claims of third persons be delivered to him.

If the seller complies with this request, the second paragraph of the Article allows a buyer who has nonetheless suffered loss to obtain damages.

If the seller fails to comply with this request, the buyer may declare the contract avoided and obtain damages if a fundamental breach of the contract results from the right or claim of the third person. If there is no fundamental breach or if he does not make use of his right to avoid, the buyer is entitled to claim damages.

These various provisions therefore seem to provide a satisfactory guarantee for the buyer's position. Here again, however, it is essential that there should be speedy clarification of the legal situation. Hence the fourth paragraph of the Article provides that the buyer shall lose his right to declare the contract avoided if he fails to send to the seller the notification required by the first paragraph within a reasonable time from the moment when he became aware or ought to have become aware of the right or claim of the third person in respect of the goods.

Article 53, like *Article 34*, provides that the rights conferred on the buyer by the preceding Article, exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person. It was in fact necessary to exclude the possibility, which *Article 8* would otherwise have preserved for the buyer, of relying on municipal rules providing that a sale of another person's goods should be null and void.

SECTION IV. OTHER OBLIGATIONS OF THE SELLER

The two paragraphs of *Article 54* provide very simple rules for two special obligations which may fall on the seller: to despatch the goods or to facilitate the effecting of insurance for the carriage of the goods.

Article 55 merely provides that breach of obligations of the seller other than those covered by *Articles 20 to 53* is to be governed by the general scheme of remedies. The buyer is

always entitled to performance of the obligation and damages. In the event of fundamental breach he may also declare the contract avoided, provided he does so promptly.

CHAPTER IV. OBLIGATIONS OF THE BUYER

Article 56 states the two principal obligations of the buyer: to pay the price and take delivery of the goods as required by the contract and the Law. These obligations raise far fewer problems than do those of the seller.

SECTION I. PAYMENT OF THE PRICE

This section covers the fixing of the price, the date and place of payment and remedies for non-payment in that order.

A. Fixing the Price

Article 57 of the Uniform Law governs the determination of the price. This does not give rise to any difficulty when the price is indicated in the contract, either directly or even by reference, as by referring to price-lists.

It may be, however, that the parties have remained silent as to the price. Such silence is not extraordinary. It is even normal practice in certain fields where sellers publish and distribute catalogues and where the order forms do not repeat the prices.

In such a situation, the rule laid down in *Article 57* will apply without difficulty: the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract.

This rule is useful. It requires the buyer to pay for the goods at the seller's price, even if the prices are higher than he expected, because for instance he consulted an out of date catalogue. It is for him, and him alone, to make any necessary enquiries before concluding the contract or sending an order. Moreover the rule refers to the price charged at the time of the conclusion of the contract (perhaps a forward price) and not at the time of delivery: this rule is derived from the general principles of law ordinarily accepted in Europe.

There is a last situation to be considered, the sale with no price settled either directly or inferentially and relating to goods for which there is no price generally charged by the seller (pictures, engravings, etc. . .). It seems clear, then, that

if there are no special circumstances no contract of sale can have come into being even if the correspondence of one or other of the parties contains so strong an expression as: "I am acquiring" or "I am selling to you". However much it may be necessary not to allow a purchaser to free himself in bad faith from a contract which he intended to conclude, it equally seems impossible if there is no price ordinarily charged by the seller to impose on the buyer a price which would be fixed unilaterally by the seller or even a price which would be fixed at the discretion of a Court or arbitral tribunal unless it appears from the circumstances that the parties had accepted this method of determining the price.

Article 58 does not raise any problem. It merely specifies that where the price is fixed according to the weight of the goods, it shall in case of doubt, be determined by the net weight.

It will be observed that there is no Article in the Uniform Law relating to the money of payment nor to restrictions imposed on international payments. These problems have naturally not been overlooked by the draftsmen of the Uniform Law; it appeared to them however, that they could not make any contribution to their solution.

The parties themselves will normally decide upon the money of payment. If there is any doubt reference must be made to usage or in addition it may be presumed that the price is payable in the seller's currency, since the price is normally to be paid at his place of business (*Article 59*).

Further than that, it did not appear to the draftsmen of the Law to be either possible or useful to lay down rules which took account of national regulation of international payments, and in particular exchange controls.

As the buyer is obliged to pay the price he is also certainly bound to obtain the necessary currency and to carry out all the steps required by any system of controls. The wording of *Article 69*, by which the buyer must take the preparatory steps provided for in the contract to effect payment, leaves no doubt in this regard. But the variety and impermanence of municipal systems of control bar any more precise rule.

If, finally, currency controls prevent the seller from making payment, the seller can obviously declare the contract avoided

and, except in the circumstances covered by Article 74, he can obtain damages.

B. Place and Date of Payment

Article 59 adopts the rule that payment of the price should be made at the seller's place of business or residence. When, however, payment is to be made against the handing over of the goods or of documents, then it is to be made at the place where the handing over takes place.

The second paragraph of the Article lays down a simple and just rule for the case where the seller changes his place of business after the conclusion of the contract; payment must clearly be made at this new place of business. If, however, the expenses incidental to making payment are increased, this increase is to be borne by the seller.

Article 60, which is similar to Article 20, provides that where the parties have agreed upon a date for payment or where the date is fixed by usage, the buyer shall pay the price on that date, without the need for any other formality on the seller's part.

C. Remedies for Non-Payment

These remedies follow a pattern which is directly based on that adopted for the remedies for the seller's obligation to make delivery.

Article 61 first states the rule that if the buyer fails to pay the price in accordance with the contract and the Law, the seller may require him to perform his obligation.

It will be seen that in this case the rule is not even impliedly subject to the reservation in Article 16. Some jurisdictions do refuse to decree the specific performance of some course of action but not, of course, the payment of a price.

There is, however, an exception to the rule in paragraph 2. This paragraph, which may be compared with Article 25, provides that the seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods.

Article 62 provides the answer to the question whether the seller can declare the contract avoided. The answer differs according to whether failure to pay the price on the date

fixed does or not amount to a fundamental breach. The various rules laid down in the Article are only special applications of the general pattern to be found in the Law.

It will be noted that Article 62 does not contain any provisions corresponding to those which appear in Article 26 (2) and (3): it does not make express provision for cases where a buyer who is late in making payment calls upon the seller to exercise his option or proceeds to make payment before the seller has exercised his option. This silence is to be explained by the fact that a payment can ordinarily be made much more quickly than a delivery of goods or merchandise. Such corresponding provisions may, however, be implied. There are even better grounds for implying a rule corresponding to that in Article 26 (4): the seller who chooses to call for payment clearly may, on this step proving fruitless, revert to his right to declare the contract avoided.

Article 63 adds that the seller may claim damages, whether or not the contract is avoided.

Article 64, which may be compared with Article 24 (3) provides that the buyer shall not be entitled to apply to a court of arbitral tribunal to grant him a period of grace for the payment of the price.

SECTION II. TAKING DELIVERY

The taking of delivery is the course of action on the buyer's part which corresponds to that which on the part of the seller constitutes delivery. *Article 65* imposes obligations on the buyer which are reciprocal to those of the seller in this field.

The buyer must, in the first place, see to it that the seller can fulfil his obligations. He must therefore "do all such acts as are necessary in order to enable the seller to hand over the goods": it could be, in consequence, that he should be present at any measuring or testing required for delivery.

In addition, when he has thus allowed the seller to fulfil his obligation to make delivery, the buyer should then "actually take over" the goods, that is to say, eventually remove them from the seller's factory or yard, if delivery is made at the latter's place of business, this moreover being required by Article 23.

Article 66 stating the remedies in respect of the obligation to take delivery, would be nothing more than a simple application of the ordinary distinction between fundamental and

non-fundamental breach of the contract, if it did not equate to fundamental breach the buyer's action in not taking delivery when it gives the seller good grounds for fearing that the price will not be paid.

The buyer's inaction may not, in some cases, cause the seller any appreciable inconvenience, but it may also, in certain circumstances, show an intention on the part of the buyer to disregard the contract and not to pay the price. When the seller has good grounds for fearing that this will be the case, he may avoid the contract. If subsequently the buyer claims that this avoidance was groundless he may, of course, require renewed performance of the contract and obtain damages from the court or an arbitral tribunal, or content himself with damages.

Article 67 deals with the special case of sale by specification.

Article 68 which allows the seller to obtain damages in the event of failure to take delivery on the part of the buyer or failure to make a specification, does not seem likely to raise any problem.

SECTION III. OTHER OBLIGATIONS OF THE BUYER

Article 69 provides, in amplifying the obligation to pay the price, that the buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee.

Article 70 merely applies the ordinary pattern of remedies to obligations of the buyer, other than those referred to in Sections I and II of this Chapter, whether they result from Article 69 or merely from the contract or usages.

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

This chapter comprises six sections, relating to concurrence between delivery of the goods and payment of the price, the possible exemption from liability of one of the parties, supplementary rules concerning the avoidance of the contract and damages, expenses relating to the goods and their preservation.

SECTION I. CONCURRENCE BETWEEN DELIVERY OF THE GOODS AND PAYMENT OF THE PRICE

Article 71 first lays down the rule that payment of the price should be concurrent with delivery of the goods, unless the parties have agreed otherwise, as they frequently do. This, it would appear, is the normal rule for sales and is accepted expressly or impliedly by almost all legal systems.

Article 71, however, at once adds a qualification to this rule: the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods.

Article 72 deduces one of the consequences of this principle of concurrence for the case where the contract involves carriage of the goods and where delivery is, by virtue of Article 19 (2), effected by handing over the goods to a carrier. In such a case the seller may postpone despatch of the goods until he receives payment. He may alternatively, if he prefers, allow them to be despatched but on terms that reserve to himself the right of disposal over the goods during transit. He may also, in the latter case, require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price provided that the buyer, in his turn, need not make payment until he has an opportunity to examine the goods.

This latter qualification, to be found in the second sentence of Article 72, is, however, subject to an exception contained in Article 71 (2) for the case where the contract requires payment against documents. In accordance with usage, the buyer must then pay the price even though he has not had an opportunity to examine the goods.

Article 73 which allows each party to suspend the performance of his obligations whenever, following the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations, is again to be classified with those protective steps which the Uniform Law allows contracting parties to take. It seemed that this protection had to be given to each party. The seller cannot reasonably be required to give up possession of the goods when there are good grounds for fearing that he will not be paid, nor can a buyer be compelled to effect payments which do not seem to him to be likely to obtain delivery of the goods. Similar or comparable rules are, moreover, to be

found in the majority of municipal legal systems.

Here again it may *a priori* be feared that one of the parties may abuse the rule in the Law; it must be repeated that a dishonest party would find an excuse of some sort, but that it is for the court or arbitral tribunal to assess his conduct.

It will be seen that the parties are only to be protected in this special way against the risks inherent in the situation of the other party which become apparent after the conclusion of the contract. For instance, if, at the time of the conclusion of the contract, a seller agreed to give credit to a buyer whom he knew was already in difficulties, he should not be given any special protection.

The second paragraph of Article 73 is a special extension of the rule laid down in the first paragraph: if the seller has already despatched the goods before the disquieting state of the buyer's economic situation becomes apparent, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.

On the other hand if a third person is the holder of a bill of lading or document of title which entitles him to obtain the goods, this third person will be preferred to the seller in accordance with paragraph 3, unless the document contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the document, when he acquired it, knowingly acted to the detriment of the seller. The rule was necessary to facilitate the negotiation of bills of lading and other similar documents of title. Nevertheless an exception had to be made, as is done in the text, for the situation where there was some fraudulent intent as between the holder of the document and a prior holder. This has been done in the text by using the wording of the Uniform Law on Negotiable Instruments (Geneva Convention 1930, Article 17), the outcome of long discussions, which need not be repeated here.

SECTION II. EXEMPTIONS

Article 74, the only provision in this section, is one of the most important in the Uniform Law, and was one of those which were the subject of lengthy discussions. It seems that in the end its three paragraphs have succeeded in embodying a clear and balanced framework of rules.

Article 74 deals with the problem which arises when one party has not performed his obligations, but relies on circumstances which he considers free him from liability.

It is intended to provide an answer only to the question whether this party should or should not be liable in damages.

Further than that, whatever may be the explanation of the cause of non-performance, the aggrieved party always retains the right to avoid the contract or to reduce the price, as provided in the Law.

To the question when a party is freed from liability to pay damages, Article 74 supplies an answer which is based both on classic concepts and the intention of the parties: the party in default is not liable if he proves that the non-performance "was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or overcome."

It should therefore be asked if the party in default ought, in the light of the intention of the parties at the time of the conclusion of the contract, to have taken account of the circumstances which prevented performance so as to assume the risk of their occurring or should have done what was necessary to prevent these circumstances hindering the performance of the contract (as by using another means of transport) going to another supplier, employing another method of manufacture or acting more expeditiously.) If he did not undertake these obligations, he is exempted.

The intention of the parties must therefore be looked to in the first instance. This may not infrequently be found to have been expressed, especially in clauses which are called — sometimes improperly — "*clauses d'irresponsabilité*" (wide exemption clauses). In the absence of express clauses, certain factors may yet allow the true intention of the parties in regard to the cause of non-performance to be deduced.

It may be, however, that it is not actually possible to make a sound inference as to the intention of the parties in relation to the cause of non-performance: it may in fact be that they never even contemplated it. The second clause of the first paragraph indicates how the problem should then be solved: in the absence of any expression of the intention of the parties "regard shall be had to what reasonable persons in the same situation would have intended."

According to this criterion, which is more rational than that of fictitious intention in respect of what could have been contemplated, a distinction must be made, amongst the impediments which hinder the performance of an obligation, between those which the obligee is liable for not having avoided or overcome when an ordinary contracting party would have foreseen that he ought to avoid or overcome them and those for which he is not liable since an ordinary contracting party would not have foreseen that he would have to avoid or overcome them. The solution to the problem should

therefore be found in accordance with these objective criteria, when it is not possible to infer the true intention of the parties.

Problems raised by alteration of prices have not been overlooked by the draftsmen of the Uniform Law. Many considered that an increase in price could only be regarded as a ground of exemption if it was related to a general convulsion in economic circumstances. It seemed, however, better not to lay down any specific rule and to leave this special case to be governed by the general rule in Article 74 (1). This provision lays down rules which may perhaps be a little complex, but which seem reasonable and which, in the final outcome, would appear to give less grounds for doubt than the concept of *force majeure* (whether it be expressed in French or Latin) or the concept of "Act of God."

It should perhaps be emphasised that in the circumstances covered in the first paragraph there is no liability for damages, whatever may be the nature of the non-performance: exemption from liability will be effective even in the case of the handing over of goods which do not conform to the contract, unless the parties have agreed otherwise, and this is why the text refers to "circumstances" which gave rise to non-performance, a term more vague and general than the term "obstacle" which was used in Article 85 of the Draft.

Paragraphs 2 and 3 of Article 74 are by no means of the same order of difficulty as paragraph 1. Paragraph 2 merely determines that where the circumstances which give rise to the non-performance of the obligation constitute only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation wholly different from that contemplated by the contract. Paragraph 3 is merely a reminder that Article 74 only relates to the question of damages, and not to any other rights accorded to a party aggrieved by non-performance.

SECTION III. SUPPLEMENTARY RULES CONCERNING THE AVOIDANCE OF THE CONTRACT

This section deals first with supplementary grounds for avoidance and then with the effects of avoidance.

A. Supplementary grounds for avoidance

Articles 75 and 76 are to be added to the list of preventive steps provided for the parties (others have been seen in Articles 48, 66 and 73).

According to the first paragraph of *Article 75* when, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear failure of performance in respect of future instalments, he may declare the contract avoided for the future, provided that he does so promptly. No other rule seemed possible: quite clearly a seller who has already made a number of deliveries and has not been paid can not be required to continue with deliveries if he has good grounds for fearing that he will never be paid for them.

Against this, however, it is the aim of the Law to ensure that the position be quickly clarified; the declaration of avoidance must be made promptly.

The second paragraph of the Article adds a point relating to the buyer to the principal rule. He may declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their interdependence such deliveries would be worthless to him. A corresponding right is not given to the seller since a sum of money smaller than had been expected always retains, unlike goods, its value.

Article 76 provides that a party may declare the contract avoided when prior to the date fixed for performance it is clear that one of the parties will commit a fundamental breach of the contract. This provision brings to mind *Article 48*, but that dealt with the goods which were the subject matter of the contract. It also calls to mind *Article 73 (1)*, but that envisaged a change in the economic position of one of the parties and it only gave the other the right to suspend performance of his obligations. *Article 76*, on the contrary, is quite general in its provisions. It is not right that one party should remain bound by the contract when the other has, for instance, deliberately declared that he will not carry out one of his fundamental obligations or when he conducts himself in such a way that it is clear that he will commit a fundamental breach of the contract.

Article 77 adds that when the contract has been avoided under one of the two preceding Articles, the party declaring the contract avoided may claim damages.

B. Effects of avoidance

In declaring that, by the avoidance of the contract, both

parties are released from their obligations, subject to any damages which may be due, *Article 78* (1) states a necessary rule and it does not seem that it can give rise to any difficulty.

The second paragraph shows that this entails that the party who has performed the contract either wholly or in part may claim the return of whatever he has supplied or paid under the contract and if both parties are required to make restitution, they shall do so concurrently.

Article 79 commences by providing in its first paragraph that the buyer normally loses his right to declare the contract avoided when it is impossible for him to return the goods in the condition in which he received them. Here again the rule is reasonable: avoidance assumes, in accordance with the preceding *Article*, *restitutio in integrum*. This is no longer possible when the goods cannot be returned in the condition in which they were received.

In certain circumstances, however, the rule might unjustly deprive the buyer of his right to declare avoidance. For this reason the second paragraph introduces a series of exceptions to the first. The buyer may declare the contract avoided: if the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance; or as a result of the examination prescribed in *Article 38*; or again if the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered; or if the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer but to that of the seller or to some chance happening; or finally, if the deterioration on the transformation of the goods is unimportant.

Article 80 merely specifies that the buyer who has lost the right to declare the contract avoided by virtue of *Article 79* (1) shall retain all the other rights conferred on him by the present Law.

Article 81 makes clear the logical and reasonable consequences of the concept of *restitutio in integrum* in avoidance. The seller who refunds the price must also pay interest (since in commerce above all money is deemed always to show a return) and the buyer must account to the seller for any profit of benefit he has derived from the goods whether he returns them or whether it is impossible for him to return them but the contract is nevertheless avoided.

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

Damages are subject to different rules depending on whether the contract remains in being or is avoided.

A. Damages where the contract is not avoided

When the contract remains in being damages are intended to make good the results of the defective performance.

Article 82 adopts as the basis of this reparation the principle of assessing the damage *in concreto* on the footing of loss suffered or profit lost by the party aggrieved by non-performance.

This reparation is, however, limited to the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract. The Law adopts, in this respect, a concept which is to be found in many legal systems. If one of the parties considers, at the time of the negotiations preliminary to the contract, that breach on the part on the other party would cause him exceptionally heavy loss he may always make this known to the other party.

Article 83 makes an exception to this principle of assessment *in concreto*: where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business plus 1 %.

It must be stressed that this does not prevent the seller obtaining additional damages, in accordance with the rule in *Article 82*; if he can in fact prove that the delay in paying the price caused him loss over and above the mere loss of interest.

B. Damages where the contract is avoided

When the contract is avoided the party aggrieved by the breach may always obtain, in addition to avoidance, damages to compensate for loss caused by the avoidance.

Article 84 first deals with a special case where the determination of loss is simple: where there is a current price for the goods, damages shall be equal to the difference between

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When the contract is avoided the party aggrieved by the breach may always obtain, in addition to avoidance, damages to compensate for loss caused by the avoidance.

Article 84 first deals with a special case where the determination of loss is simple: where there is a current price for the goods, damages shall be equal to the difference between

the price fixed by the contract and the current price on the date on which the contract is avoided, provided, of course, that this difference does not favour the party injured by the breach.

The second paragraph specifies that the current price to be taken into account shall be that prevailing in the market in which the transaction took place or, if there is no such current price in that market or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

It may be, as will be seen, that the damages resulting from this Article may be increased in accordance with Article 86.

Article 85 states the method of calculating damages in another special case: if the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

The rule could not be otherwise. The buyer or seller who has acted as a prudent and vigilant businessman and in accordance with commercial practice, should at the least receive the indemnity which results from the simple comparison provided in Article 85. Nevertheless, here again, damages can be increased by the application of the following Article.

Article 86 provides that the damages referred to in Articles 84 and 85 may be increased by the amount of any reasonable expenses actually incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract.

The rule is reasonable and it includes the same limit as to foreseeable loss which was met in Article 82.

Setting aside the special cases of goods having a current price, the purchase of replacements and resale by an aggrieved seller, damages cannot further be calculated by the simple subtractions provided in Articles 84 and 85, together with Article 86. *Article 87* then states that damages are to be calculated in accordance with the rules in Article 82.

C. General Provisions concerning Damages

Article 88 provides that the party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. This is a rule often propounded by the courts in Common Law countries and is also found in many of the Codes of European countries. Its reasonableness is evident.

Article 89 deals with fraud on the part of one of the parties. In the majority of municipal legal systems fraud is subject to special rules, the least rigorous of which is that damages are not limited to foreseeable loss.

The draftsmen of the Uniform Law did, however, consider that the concept of fraud was difficult to define and that it was too closely connected with public policy to be the subject of international regulation. Further than that, it did not seem possible to make provision for remedies for fraud. They have confined themselves to saying that in case of fraud damages shall be determined by the rules applicable to contracts not governed by the Uniform Law. It will be noted that the definition of fraud is thus left to whatever municipal law the Court hearing the case considers to be applicable.

It goes without saying that it is intended that under *Article 89* the party who is the victim of the fraud shall be entitled to damages at least equal to those which he would have recovered by the simple application of the preceding Articles.

SECTION V. EXPENSES

Article 90 distinguishes between expenses of delivery which are to be borne by the seller and all expenses after delivery which are to be borne by the buyer.

SECTION VI. PRESERVATION OF THE GOODS

Article 91 makes provision for the cases where the buyer is late in taking delivery of the goods or in paying the price (this entitles the seller to retain them; see *Articles 71* and following). In this situation the first concern of the draftsmen of the Uniform Law was to ensure the preservation of the goods. The Law requires the seller to preserve them, since they are still in his hands. *Article 91* adds that the seller shall have the right to retain them until he has been reimbursed his reasonable expenses.

Article 92 covers the problem of preserving the goods in the converse case, that is to say, when the goods have been received by the buyer and he intends to reject them. Here again it is upon the person who has the goods in his possession, in this case the buyer, that the Law imposes the duty to take reasonable steps for preservation, and gives him a right to retain the goods until he has been reimbursed his reasonable expenses.

The second paragraph of this Article does, however, deal with a case the desirable solution for which is not so clearly evident. This is where goods despatched to the buyer have been put at his disposal at their place of destination and he intends to reject them. In this case the goods are not yet at his place of business, in his factory or in his storage yards. Nonetheless it must be assumed that he will ordinarily be better placed than the seller to take care of them. The Law therefore provides that he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. Even with these qualifications, he need not take possession on behalf of the seller when the seller or a person authorised to take charge of the goods on his behalf is present at the place of delivery. In these cases it is in fact better to leave preservation to the seller since the buyer intends to reject the goods.

Articles 93 and 94 set out provisions which are intended to prevent the duty of preservation being too great a burden on the party on whom it falls.

By *Article 93* the party who is under an obligation to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

By *Article 94* he can even sell the goods by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.

The second paragraph of *Article 94* allows the party selling the goods to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and selling them and requires him to transmit the balance to the other party.

Finally *Article 95* covers two cases where the party under

the duty to preserve the goods is bound to sell them; these are when the goods are subject to loss or rapid deterioration or when their preservation would involve unreasonable expense.

CHAPTER VI. PASSING OF THE RISK

One of the well known characteristics of the Uniform Law, in which it differs from a number of municipal systems, is that the passing of risk is regulated without reference to the passing of property.

Article 96 merely defines the problem in concrete terms: "Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible."

Article 97 lays down in its first paragraph the logical principle from which all the other rules are derived: "The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law." Thus the seller is discharged of his risk from the time when he has carried out all his obligations in respect of the handing over of the goods. This rule like the others is absolutely non-mandatory and dependent on the intent of the parties, who may decide that risk should pass at some other point of time.

It follows from this provision, by reasoning *a contrario*, that if the seller delivers goods which conform to the contract on a date or at a place other than those provided, risk does not necessarily pass. A distinction must then be made between two cases.

When delivery is delayed, this being covered by Articles 26 to 28, risk passes at the time of delivery if the delay does not amount to a fundamental breach; but if there is fundamental breach it only passes if the buyer waives his right to declare the contract avoided and only from that time. Where delivery is made before the fixed date, this being covered by Article 29, then since this is really a problem of risk, it seemed reasonable to provide that, even if the buyer accepts the goods, risk only passes at the date fixed in the contract. If the goods are delivered at a place other than that provided in the contract, the case covered by Articles 30 to 32, and the buyer requires the seller to perform the contract, risk only passes when the goods arrive at the agreed place; but if the buyer cannot or will not declare the contract avoided nor does

he require performance of the contract, risk passes on his acceptance of the goods.

The second paragraph of Article 97 covers the situation where goods which do not conform with the contract are handed over. In this case there is no delivery. In consequence risk will never pass to the buyer, or not at any rate until the seller has carried out the operations necessary to remedy the defect in the goods, deliver the missing part or quantity of goods or supply other goods which do conform with the contract. Whilst there is nothing extraordinary in risk remaining with the seller when the buyer had declared the contract avoided or has requested that other goods be supplied to replace those handed over, it would not be reasonable to allow this to be the rule beyond these cases. If the buyer does not declare the contract avoided and moreover does not request that replacements be supplied, risk must pass to the buyer at the time of the handing over in accordance with the contract and the Law, except in the case of goods which do not conform with the contract; this is the rule laid down in the second paragraph.

The putting into effect of this rule, however well-founded it may be, could give rise to difficulties which are not expressly dealt with in the text. Assuming, for example, that the buyer does not in the first instance declare the contract avoided and does not ask for replacements to be supplied, but merely requires that defects be remedied or a supplementary delivery be made and supposing furthermore that he does not obtain satisfaction and eventually claims avoidance of the contract, as he may do by Article 42 (2), it would seem that it must be agreed, although the Article does not expressly say so, that risk which passed to him on the handing over of the goods returns to the seller without retroactive effect when the declaration of avoidance is made (Article 79 (2) (d) may suggest a retroactive transfer, but the fact that the buyer had accepted the goods should result in the principle in Article 97 (2) overriding this).

Again it may be asked where the risk lies during the short period allowed by Article 38 (1) for the examination of the goods. If, in spite of the loss or deterioration of the goods, it is still possible to prove that they did or did not conform to the contract, then either Article 97 (1) or Article 97 (2) must be applied. In the converse case, where the goods have not been examined, it seems that it should be presumed that they conform with the contract, from which it follows that risk has passed.

The position is different if the buyer has ascertained a lack of conformity and the risk takes effect in the short period

allowed by Article 39 for notification or lack of conformity. It must then be conceded, if the buyer can still prove the want of conformity, that he is entitled to demand avoidance of the contract and can call for replacements, thus negating the passing of risk. The same solution must follow if the risk takes effect after the notification of lack of conformity, but before the buyer has exercised the rights given him by Article 41 and succeeding Articles.

Finally, if, as is envisaged in the second sentence of Article 39, the buyer could not have made known the lack of conformity in the goods even though he carried out the examination prescribed by Article 38 (I), it would appear that his silence up to the time of the discovery of the defect could not amount to a valid acceptance of the goods and of the risk. If he gives notice of the defect promptly upon discovering it, it would seem, by applying Article 97 (I), that the goods were never at his risk. In essence, indeed, the position is little different from that which has just been examined in the preceding paragraph of this commentary.

Article 98 in its first paragraph, provides a reasonable solution for a special case. When the handing over of the goods is delayed by a breach of the buyer's obligations, the buyer must not be allowed to profit from this breach. Hence risk passes to him as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.

This rule could not, however, operate without some qualification where the contract relates to unascertained goods, since it is then impossible to know if the goods which have perished or deteriorated were those which were to be delivered to the buyer. The fraud which could be committed by a seller claiming to have appropriated to the buyer goods which have perished or deteriorated must be prevented. Hence Article 98 (2) provides that where the contract relates to a sale of unascertained goods, delay on the part of the buyer shall cause the risk to pass only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done.

Paragraph 3 of the Article qualifies the exception where unascertained goods are of such a kind that the seller cannot set aside a part of them: risk then passes when the seller has done everything necessary to enable the buyer to take delivery.

Article 99 governs the difficult case of the passing of risk in goods in transit by sea. The difficulty arises from the fact

that the consignee of the goods may perhaps change several times during the voyage, and it might frequently be very difficult to determine the exact moment of time at which they perished or deteriorated. After long discussions the draftsmen of the Uniform Law laid down the rule that in the case of a sea voyage risk is borne by the buyer from the time at which the goods are handed over to the carrier. The final buyer thus takes the risk retroactively: he bears it from a time prior to the conclusion of the contract. This provision is, like all the others in the Law, in every respect fully subject to exclusion by contrary agreement, and parties will amend it if they do not wish to adopt the rule which it lays down. The rule laid down in Article 99 seems to conform to prevailing usage. Moreover it follows logically from a combination of the rules provided in Article 19 (2) and Article 97 (1). In practice what could be a most anxious burden for the purchaser is much reduced by the fact that the goods are usually insured.

Paragraph 2 does, however, provide an exception to this rule to defeat the seller who knew or ought to have known at the time of the conclusion of the contract that the goods had perished or deteriorated: risk remains with him until the time of the conclusion of the contract.

Article 100 lays down a rule, comparable to that in Article 99 (2), for a special case. It will be recalled that Article 19 (2) determines that in the case of sales which involve carriage of the goods, the handing over of the goods to the carrier effects delivery. This handing over therefore passes risk. This passing of risk occurs even if the goods handed to the carrier are not clearly appropriated to the performance of the contract. Though, indeed, Article 19 (3) requires the seller in this case to send the buyer notice of the consignment and, if necessary, some document specifying the goods, it has been emphasised (see above, commentary on that provision) that this involved an obligation additional to the obligation of delivery, but the observance of which was not a condition of delivery (notwithstanding Article 98 (2) which assumes that the handing over of the goods is delayed by reason of a breach by the buyer of his obligations). If the seller delays in sending the notice of consignment, risk therefore passes before the despatch of this notice. Although the situation may not in all respects be identical to that contemplated in Article 99 (1), it is at least comparable to it. The rule which it establishes then calls for a qualification similar to that in Article 99 (2): when the seller knew or ought to have known the condition of the goods at

the time of despatching the notice risk only passes from this time.

Though the parties are free to regulate the passing of risk as they wish, nevertheless they must make their intention sufficiently clear. To avoid misunderstandings *Article 101* provides that the passing of risk shall not necessarily be determined by the provisions of the contract concerning expenses.

ANDRÉ TUNC