delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

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

Chapter V. Passing of risk

Article 78

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

Article 79

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

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

Article 80

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

Article 81

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

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

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

Article 82

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

D. COMMENTARY ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, PREPARED BY THE SECRETARIAT

Document A/CONF.97/5

[Original: English]
[14 March 1979]

PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I. Sphere of application

Article 1

[Sphere of application][1]

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

(a) when the States are Contracting States; or

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

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

[1] The titles to the articles have been prepared by the Secretariat at the request of the United Nations Commission on International Trade Law but have not been approved by the Commission (United Nations Commission on International Trade Law, summary record of the 208th meeting, A/CN.9/SR.208, para 47).

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

PRIOR UNIFORM LAW

Uniform Law on the International Sale of Goods (ULIS), articles 1, 2 and 7.

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Prescription Convention), articles 2 and 3.

Commentary

1. This article provides the general rules for determining whether this Convention is applicable to a contract of sale of goods as well as to its formation.

Basic criterion, paragraph (1)

2. Article 1 (1) provides that the basic criterion for the application of this Convention to a contract of sale of goods as well as to its formation is that the places of business of the parties are in different States.[2]

3. This Convention is not concerned with the law governing contracts of sale or their formation where the parties have their places of business within one and the same State. These matters will normally be governed by the domestic law of that State.

4. By focusing on the sale of goods between parties whose places of business are in different States, the Convention will serve its three major purposes:

(1) to reduce the search for a forum with the most favourable law;

(2) to reduce the necessity of resorting to rules of private international law;

(3) to provide a modern law of sales appropriate for transactions of an international character.

Additional criteria, subparagraphs (1) (a) *and (1)* (b)

5. Even though the parties have their places of business in different States, this Convention applies only if:

(1) the States in which the parties have their places of business are Contracting States; or

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

6. If the two States in which the parties have their places of business are Contracting States this Convention applies even if the rules of private international law of the forum would normally designate the law of a third country, such as the law of the State in which the contract was concluded. This result could be defeated only if the litigation took place in a third non-Contracting State, and the rules of private international law of that State would apply the law of the forum, i.e., its own law, or the law of a fourth non-Contracting State to the contract.

7. Even if one or both of the parties to the contract have their places of business in a State which is not a Contracting State, the Convention is applicable if the rules of private international law of the forum lead to the application of the law of a Contracting State. In such a situation the question is then which law of sales of that State shall apply. If the parties to the contract are from different States, the appropriate law of sales is this Convention.

8. A further application of this principle is that if two parties from different States have desiganted the law of a Contracting State as the law of the contract, this Convention is applicable even though the parties have not specifically mentioned the Convention.

[2] If a party has places of business in more than one State, the relevant place of business is determined by article 9 *(a)*.

Awareness of situation, paragraph (2)

9. Under paragraph (2), the Convention does not apply if "the fact that the parties have their places of business in different States . . . does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract". One example of such a situation is where the parties appeared to have their places of business in the same State but one of the parties was acting as the agent for an undisclosed foreign principal. In such a situation paragraph (2) provides that the sale, which appears to be between parties whose places of business are in the same State, is not governed by this Convention.

Nationality of the parties, civil or commercial character of the transaction, paragraph (3)

10. International conventions which affect the rights of individuals are often intended to protect the rights of the nationals of the Contracting States in their dealings in or with the other Contracting State or States. Therefore, it is typical that these conventions apply only to relations between "nationals" of the Contracting States.

11. However, the question whether this Convention is applicable to a contract of sale of goods is determined primarily by whether the relevant "places of business" of the parties are in different Contracting States. The relevant "place of business" of a party is determined by application of article 9 *(a)* without reference to his nationality, place of incorporation, or place of head office. This paragraph reinforces that rule by making it clear that the nationality of the parties is not to be taken into consideration.

12. In some legal systems the law relating to contracts of sale of goods is different depending on whether the parties or the contract are characterized as civil or commercial. In other legal systems this distinction is not known. In order to ensure that the scope of application provisions of this Convention are not interpreted to apply only to contracts of sale characterized as "commercial" or between parties characterized as "commercial" under the law of a Contracting State, article 1 (3) provides that the civil or commercial character of the parties or of the contract is not to be taken into consideration.

13. It should be noted, however, that article 2 excludes from the sphere of application of this Convention certain contracts for the sale of goods which are likely to be characterized as "civil" contracts by a legal system which recognizes the distinction between civil and commercial contracts. Most notably, article 2 (a) excludes from the sphere of application of this Convention sales "of goods bought for personal, family or household use."

14. Paragraph (3) applies only to the scope of application provisions of this Convention. It does not mean that the civil or commercial character of the parties may not be taken into consideration for the purposes of determining such matters as the period of time which is to be regarded as a reasonable period of time for giving notice of lack of conformity of the goods under article 37 (1).

Article 2

[Exclusions from Convention]

This Convention does not apply to sales:

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

(b) by auction;

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

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

(e) of ships, vessels or aircraft;

(f) of electricity.

PRIOR UNIFORM LAW

ULIS, article 5.
ULF, article 1 (6).
Prescription Convention, article 4.

Commentary

1. Article 2 sets out those sales which are excluded from the application of this Convention. The exclusions are of three types: those based on the purpose for which the goods were purchased, those based on the type of transaction and those based on the kinds of goods sold.

Exclusion of consumer sales, subparagraph (a)

2. Subparagraph *(a)* of this article excludes consumer sales from the scope of this Convention. A particular sale is outside the scope of this Convention if the goods are bought for "personal, family or household use." However, if the goods were purchased by an individual for a commercial purpose, the sale would be governed by this Convention. Thus, for example, the following situations are within the Convention: the purchase of a camera by a professional photographer for use in his business; the purchase of soap or other toiletries by a business for the personal use of the employees; the purchase of a single automobile by a dealer for resale.

3. A rationale for excluding consumer sales from the Convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this Convention. In addition, most consumer sales are domestic transactions and it was felt that the Convention should not apply to the relatively few cases where consumer sales were international transactions, e.g. because the buyer was a tourist with his habitual residence in another country[1] or that the goods were ordered by mail.

4. If the goods were purchased for personal, family or household use, this Convention does not apply "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." The seller might have no reason to know that the goods were purchased for such use if the quantity of goods purchased, the address to which they were to be sent or other aspects of the transaction were those not normal in a consumer sale. This information must be available to the seller at least by the time of the conclusion of the contract so that he can know whether his rights and obligations in respect of the sale are those under this Convention or those under the applicable national law.

Exclusion of sales by auction, subparagraph (b)

5. Subparagraph *(b)* of this article excludes sales by auction from the scope of this Convention. Sales by auction are often subject to special rules under the applicable national law and it was considered desirable that they remain subject to those rules even though the successful bidder was from a different State.

Exclusion of sales on execution or otherwise by authority of law, subparagraph (c)

6. Subparagraph *(c)* of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are normally governed by special rules in the State under whose authority the execution sale is made. Furthermore, such sales do not constitute a significant part of international trade and may, therefore, safely be regarded as purely domestic transactions.

Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)

7. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments or money. Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries are subject to special mandatory rules. Moreover, in some legal systems such commercial paper is not considered to be "goods." Without the exclusion of the sales of such paper, there might have been significant differences in the application of this Convention.

8. This subparagraph does not exclude documentary sales of goods from the scope of this Convention even though, in some legal systems, such sales may be characterized as sales of commercial paper.

Exclusion of sales of ships, vessels or aircraft, subparagraph (e)

9. This subparagraph excludes from the scope of the Convention all sales of ships, vessels and aircraft. In some legal systems the sale of ships, vessels and aircraft are sales of "goods" while in other legal systems some sales of ships, vessels and aircraft are assimilated to sales of immovables. Furthermore, in most legal systems at least some ships, vessels and aircraft are subject to special registration requirements. The rules specifying which ones must be registered differ widely. In order not to raise questions of interpretation as to which ships, vessels or aircraft were subject to this Convention, especially in view of the fact that the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded from the application of this Convention.

Exclusion of sales of electricity, subparagraph (f)

10. This subparagraph excludes sales of electricity from the scope of this Convention on the ground that in many legal systems electricity is not considered to be goods and, in any case, international sales of electricity present unique problems that are different from those presented by the usual international sale of goods.

Article 3

[Contracts for services or for goods to be manufactured]

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

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

PRIOR UNIFORM LAW

ULIS, article 6.
ULF, article 1 (7).
Prescription Convention, article 6.

Commentary

1. Article 3 deals with two different situations in which the contract includes some act in addition to the supply of goods.

Sale of goods and supply of labour or other services by the seller, paragraph (1)

2. This paragraph deals with contracts under which the seller undertakes to supply labour or other services in addition to selling goods. An example of such a contract is where the seller agrees to sell machinery and undertakes to set it up in a plant in working condition or to supervise its installation. In such cases, paragraph (1) provides that if the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether

[1] See article 9 *(b)*.

the seller's obligations relating to the sale of goods and those relating to the supply of labour or other services can be considered as two separate contracts (under what is sometimes called the doctrine of "severability" of contracts), will be resolved in accordance with the applicable national law.

Supply of materials by the buyer, paragraph (2)

4. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured or produced by the seller to the buyer's order is as much subject to the provisions of this Convention as the sale of ready-made goods.

5. However, the concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production," is designed to exclude from the scope of this Convention those contracts under which the buyer undertakes to supply the seller (the manufacturer) with a substantial part of the necessary materials from which the goods are to be manufactured or produced. Since such contracts are more akin to contracts for the supply of services or labour than to contracts for sale of goods, they are excluded from the scope of this Convention, in line with the basic rule of paragraph (1).

Article 4

[Substantive coverage of Convention]

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

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

PRIOR UNIFORM LAW

ULIS, articles 4, 5 (2) and 8.

Commentary

1. Article 4 limits the scope of the Convention, unless elsewhere expressly provided in the Convention, to governing the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from a contract of sale.

Validity, subparagraph (a)

2. Although there are no provisions in this Convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national legal system. In case of conflict the rule in this Convention would apply.

3. The only article in which the possibility of such a conflict is apparent is article 10, which provides that a contract of sale of goods need not be concluded in or by writing and is not subject to any other requirements as to form. In some legal systems the requirement of a writing for certain contracts of sale of goods is considered to be a matter relating to the validity of the contract. It may be noted that pursuant to article 11 and article (X), a Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may make a declaration that, *inter alia,* article 10 shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

Passing of property, subparagraph (b)

4. Subparagraph *(b)* makes it clear that the Convention does not govern the passing of property in the goods sold. In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so since rules are provided by this Convention for several questions linked, at least in certain legal systems, to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person;[1] the obligation of the buyer to pay the price;[2] the passing of the risk of loss or damage to the goods;[3] the obligation to preserve the goods.[4]

Article 5

[Exclusion, variation or derogation by the parties]

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

PRIOR UNIFORM LAW

ULIS, article 3.
ULF, article 2.
Prescription Convention, article 3 (3).

Commentary

1. The non-mandatory character of the Convention is explicitly stated in article 5. The parties may exclude its application entirely by choosing a law other than this Convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.

2. The second sentence of ULIS, article 3, providing that "such exclusion may be express or implied" has been eliminated lest the special reference to "implied" exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded.

CHAPTER II. GENERAL PROVISIONS

Article 6

[Interpretation of Convention]

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

PRIOR UNIFORM LAW

ULIS, article 17.
Prescription Convention, article 7.

Commentary

International character of Convention

1. National rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, article 6 emphasizes the importance, in the interpretation and application of the provisions of

[1] Articles 39 and 40.
[2] Article 49.
[3] Articles 78 to 82.
[4] Articles 74 to 77.

the Convention, of having due regard for the international character of the Convention and for the need to promote uniformity.

Observance of good faith in international trade

2. Article 6 requires that the provisions of the Convention be interpreted and applied in such a manner that the observance of good faith in international trade is promoted.

3. There are numerous applications of this principle in particular provisions of the Convention. Among the manifestations of the requirement of the observance of good faith are the rules contained in the following articles:

— article 14 (2) *(b)* on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;

— article 19 (2) on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;

— article 27 (2) in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;

— articles 35 and 44 on the rights of a seller to remedy non-conformities in the goods;

— article 38 which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;

— articles 45 (2), 60 (2) and 67 on the loss of the right to declare the contract avoided;

—articles 74 to 77 which impose on the parties obligations to take steps to preserve the goods.

4. The principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.

Article 7

[Interpretation of conduct of a party]

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

PRIOR UNIFORM LAW

ULIS, article 9 (3).

ULF, articles 4 (2), 5 (3), 12 and 13 (2).

UNIDROIT Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods, articles 3, 4 and 5.

Commentary

1. Article 7 on interpretation furnishes the rules to be followed in interpreting the meaning of any statement or other conduct of a party which falls within the scope of application of this Convention. Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination.

2. Article 7 states the rules to be applied in terms of interpreting the unilateral acts of each party, i.e. communications in respect of the proposed contract, the offer, the acceptance, notices, etc. Nevertheless, article 7 is equally applicable to the interpretation of "the contract" when the contract is embodied in a single document. Analytically, this Convention treats such an integrated contract as the manifestation of an offer and an acceptance. Therefore, for the purpose of determining whether a contract has been concluded as well as for the purpose of interpreting the contract, the contract is considered to be the product of two unilateral acts.

Content of the rules of interpretation

3. Since article 7 states rules for interpreting the unilateral acts of each party, it does not rely upon the common intent of the parties as a means of interpreting those unilateral acts. However, article 7 (1) recognizes that the other party often knows or could not be unaware of the intent of the party who made the statement or engaged in the conduct in question. Where this is the case, that intent is to be ascribed to the statement or conduct.

4. Article 7 (1) cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In such a case, article 7 (2) provides that the statements made by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

5. In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question. It is common experience that a person may dissimulate or make an error and the process of interpretation set forth in this article is to be used to determine the true content of the communication. If, for example, a party offers to sell a quantity of goods for Swiss francs 50,000 and it is obvious that the offeror intended Swiss francs 500,000 and the offeree knew or could not have been unaware of it, the price term in the offer is to be interpreted as Swiss francs 500,000.

6. In order to go beyond the apparent meaning of the words or the conduct by the parties, article 7 (3) states that "due consideration is to be given to all relevant circumstances of the case." It then goes on to enumerate some, but not necessarily all, circumstances of the case which are to be taken into account. These include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 8

[Usages and established practices]

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

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

PRIOR UNIFORM LAW

ULIS, article 9.
ULF, article 13.

Commentary

1. This article describes the extent to which usages and practices between the parties are binding on the parties to the contract.

2. By the combined effect of paragraphs (1) and (2), usages to which the parties have agreed, are binding on them. The agreement may be express or it may be implied.

3. In order for there to be an implied agreement that a usage will be binding on the parties, the usage must meet two conditions: it must be one "of which the parties knew or ought to have known" and it must be one "which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." The trade may be restricted to a certain product, region or set of trading partners.

4. The determining factor whether a particular usage is to be considered as having been impliedly made applicable to a given contract will often be whether it was "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." In such a case it may be held that the parties "ought to have known" of the usage.

5. Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy.[1] Therefore, the provision in ULIS article 9, paragraph 2, that in the event of conflict between an applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, a provision regarded to be in conflict with the constitutional principles of some States and against public policy in others, has been eliminated as unnecessary.

6. This article does not provide any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade and for which the parties have given no interpretation.[2] In some cases such an expression, provision or form of contract may be considered to be a usage or practice between the parties, in which case this article would be applied.

Article 9

[Place of business]

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

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

PRIOR UNIFORM LAW

ULIS, article 1 (2).
ULF, article 1 (2).
Prescription Convention, articles 2 *(c)* and *(d)*.

Commentary

1. This article deals with the determination of the relevant "place of business" of a party.

Place of business, subparagraph (a)

2. Subparagraph *(a)* deals with the situation in which a party to a contract has more than one place of business. The question arises in this Convention in respect of a number of different matters.

3. First, the determination of the relevant place of business may be important in determining whether this Convention applies to the contract. For this Convention to apply, the contract must be between parties whose places of business are in different States.[1] Moreover, in most cases those States must be Contracting States.[2] For the purpose of determining whether this Convention applies no problem arises where all the places of business of one party *(X)* are situated in Contracting States other than the Contracting State in which the other party *(Y)* has his place of business. Whichever one is designated as the relevant place of business of *X*, the places of business of *X* and *Y* will be in different Contracting States. The problem arises only when one of *X*'s places of business is situated either in the same State as the place of business of *Y* or in a non-Contracting State. In such a case it becomes crucial to determine which of *X*'s different places of business is the relevant place of business within the meaning of article 1.

4. The determination of the relevant place of business is also necessary for the purposes of article 11, 18 (2), 22, 29 *(c)*, 40 (1) *(b)*, 53 (1) *(a)* and (X), In the case of articles 18 (2), 22, 29 *(c)* and 53 (1) *(a)* it may be necessary to choose between two places of business within a given State as to choose between places of business in two different States.

5. In addition, article 81 (2) provides the rule in respect of passage of risk of loss when "the buyer is required to take over the goods at a place other than any place of business of the seller . . ." In this case it is not necessary to determine the relevant place of business under article 9.

6. Subparagraph *(a)* lays down the criterion for determining the relevant place of business: It is the place of business "which has the closest relationship to the contract and its performance." The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. The location of the head office or principal place of business is irrelevant for the purposes of article 9 unless that office or place of business becomes so involved in the transaction concerned as to be the place of business "which has the closest relationship to the contract and its performance."

7. In determining the place of business which has the "closest relationship," subparagraph *(a)* states that regard is to be given to "the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." Therefore, when article 9 *(a)* refers to the performance of the contract, it is referring to the performance that the parties contemplated when they were entering into the contract. If it was contemplated that the seller would perform the contract at his place of business in State *A*, a determination that his "place of business" under article 9 *(a)* was in State *A* would not be altered by his subsequent decision to perform the contract at his place of business in State *B*.

8. Factors that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by a head office located in another State, or the foreign origin or final destination of the goods. When these factors are not known to or contemplated by both parties at the time of entering into the contract, they are not to be taken into consideration.

Habitual residence, subparagraph (b)

9. Subparagraph *(b)* deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 2 *(a)* of this

[1] Article 5.
[2] Article 7 provides rules for the interpretation of statements made by and other conduct of a party.

[1] Article 1 (1). See, however, article 5.
[2] Article 1 (1) *(a)*.

Convention. The present provision provides that in this situation, reference is to be made to his habitual residence.

Article 10

[Form of contract]

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

PRIOR UNIFORM LAW

ULIS, article 15.
ULF, article 3.

Commentary

1. Article 10 provides that a contract of sale need not be evidenced by writing and is not subject to any other requirements as to form.[1]

2. The inclusion of article 10 in the Convention was based on the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract. Nevertheless, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract even though the contract itself would be enforceable between the parties.

3. Some States consider the requirement that contracts for the international sale of goods be in writing to be a matter of important public policy. Accordingly, article 11 provides a mechanism for Contracting States to prevent the application of the rule in article 10 to transactions where any party has a place of business in their State.

Article 11

[Effect of declarations relating to form]

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

PRIOR UNIFORM LAW

None.

Commentary

1. Article 11 recognizes that some States consider that it is an important element of public policy that contracts or their modification or abrogation be in writing. Therefore, article 11 enables a Contracting State to make a declaration under article (X)[1] to prevent the application of any provision of article 10, article 27 or Part II of the Convention which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing where any party has his place of business in that Contracting State.

2. As the operation of article 11 is confined to articles 10 and 27 and to Part II of this Convention (i.e. articles 12 to 22) it does not encompass all notices or indications of intention required under the Convention but only those which relate to the formation of the contract, its modification and its abrogation. Other notices may be given by means appropriate in the circumstances.[2]

3. Since the requirement of writing in relation to the matters mentioned in article 11 is considered to be a question of public policy in some States, the general principle of party autonomy is not applicable to this article. Accordingly, article 11 cannot be varied or derogated from by the parties.

[1] See also para. 3 of the commentary to article 4 and the commentary to article 11.

[1] The text of article (X) is reproduced with the other proposed final clauses in document A/CONF.97/6.

PART II. FORMATION OF THE CONTRACT

Article 12

[Offer]

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

PRIOR UNIFORM LAW

ULF, article 4.

Commentary

1. Article 12 states the conditions that are necessary in order for a proposal to conclude a contract to constitute an offer.

Proposal sent to one or more specific persons

2. In order for a person to accept an offer, that offer must have been addressed to him. In the usual case, the requirement causes no difficulties since the offer to buy or sell goods will have been addressed to one specific person or, if the goods are to be bought or sold by two or more persons acting together, to those specific persons. The specifications of the addressee will usually be by name, but it could be made in some other way such as "the owner or owners of . . .".

3. It is also possible that an offer to buy or sell will be made simultaneously to a large number of specific persons. An advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specific persons," whereas the same advertisement or catalogue distributed to the public at large would not. If an advertisement or catalogue sent to "specific persons" indicated the intention to be bound to a contract in case of acceptance and if it was "sufficiently definite", it would constitute an offer under article 12 (1).

Proposal sent to other than one or more specific persons, paragraph (2)

4. Some legal systems restrict the concept of an offer to communications addressed to one or more specific persons while other legal systems also admit of the possibility of a "public offer". Public offers are of two types, those in which the display of goods in a store window,

[2] See articles 24 and 25 and the commentary thereto.

vending machine or the like are said to be a continuing offer to any person to buy that article or one identical to it, and advertisements directed to the public at large. In those legal systems which admit of the possibility of a public offer, the determination as to whether an offer in the legal sense has been made depends upon an evaluation of the total circumstances of the case, but does not necessarily require a specific indication of intention to make an offer. The fact that the goods are on display for sale or the wording of the advertisement may be enough for a court to determine that there was a legal offer.

5. This Convention, in article 12 (2), takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement such as "this advertisement constitutes an offer" but it must clearly indicate an intention to make an offer, for example, by a statement that, "these goods will be sold to the first person who presents cash or an appropriate banker's acceptance".

Intention to be bound, paragraph (1)

6. In order for the proposal for concluding a contract to constitute an offer it must indicate "the intention of the offeror to be bound in case of acceptance." Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labelled by the parties as an "offer" or as an "acceptance". Whether there is the requisite intention to be bound in case of acceptance will be established in accordance with the rules of interpretation contained in article 7.

7. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As to the revocability of offers, see article 14.

An offer must be sufficiently definite, paragraph (1)

8. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. It goes on to state that an offer is sufficiently definite if it:

— indicates the goods, and

— expressly or implicitly fixes or makes provision for determining the quantity, and

— expressly or implicitly fixes or makes provision for determining the price.

9. The remaining terms of the contract resulting from the acceptance of an offer which only indicates the goods and fixes or makes provision for determining the quantity and the price would be supplied by usage or by the provisions in Part III on the law of sales: If, for example, the offer contained no term as to how or when the price was to be paid, article 53 (1) provides that the buyer must pay it at the seller's place of business and article 54 (1) provides that he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal. Similarly, if no delivery term is specified, article 29 provides how and where the goods are to be delivered and article 31 provides when they are to be delivered.

10. Nevertheless, the fact that a proposal contains only the three terms necessary for the offer to be sufficiently definite may indicate, in a given case, that there was no intention on the part of the offeror to be bound in case of acceptance. For example, it would be necessary to interpret the proposal in the light of article 7 to determine whether there was an intention to be bound in case of acceptance where a seller offered to sell equipment to be manufactured with the only specifications being the type and quantity of the goods and a price of Swiss francs 10 million. It would normally be the case that a seller would not contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters suggests that there might have been as yet no intention to be bound to a contract in case of acceptance. However, even in the case of such a large and complicated sale, the applicable law of sales can supply all of the missing terms if the intention to contract is found to have existed.

Quantity of the goods, paragraph (1)

11. Although, according to article 12, the proposal for concluding a contract will be sufficiently definite to constitute an offer if it expressly or implicitly fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

12. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

13. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the supply of the goods considered to be ancillary provisions. Article 12 makes it clear that such a contract is enforceable even if it is denominated by the legal system as a contract of sale rather than as a concession agreement.

Price, paragraph (1)

14. Article 12 provides the same rule in respect of the price that it does in respect of quantity. Thus, for the proposal to constitute an offer it must expressly or implicitly fix or make provision for the price. It is not necessary that the price could be calculated at the time of the conclusion of the contract. For example, the offer, and the resulting contract, might call for the price to be that prevailing in a given market on the date of delivery, which date might be months or even years in the future. In such a case the offer would expressly make provision for determining the price.

15. Where the buyer sends an order for goods listed in the seller's catalogue or where he orders spare parts, he may decide to make no specification of the price at the time of placing the order. This may occur because he does not have a price list of the seller or he may not know whether the price list he has is current. Nevertheless, it may be implicit in his action of sending the order that he is offering to pay the price currently being charged by the seller for such goods. If such is the case, the buyer has implicitly made provision for the determination of the price and his order for the goods would constitute an offer.

16. Similarly, where the buyer orders goods from a catalogue for future delivery it may be implicit in his order and from other relevant circumstances that the buyer is offering to pay the price currently being charged by the seller at the time of the delivery.

17. In order to determine whether a proposal implicitly fixes or makes provision for determining the price it is necessary to interpret the proposal in the light of article 7, and in particular paragraph (3) of that article.

Article 13

[Time of effect of offer; withdrawal of offer]

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

PRIOR UNIFORM LAW

ULF, article 5.

Commentary

1. Article 13 (1) provides that an offer becomes effective when it reaches[1] the offeree. Therefore, until that moment event though the offeree may have learned of the dispatch of the offer by some means, he cannot accept it.

2. For most purposes the rule as stated above is only of theoretical interest. However, it assumes practical importance if the offeror changes his mind after dispatch of the offer but prior to the time the offer reaches the offeree.

3. If the offeror withdraws the offer and the withdrawal reaches the offeree before or at the same time as the offer, the offer never becomes effective. Therefore, an offer which, once it became effective, would be irrevocable under article 14 (2), can nevertheless be withdrawn so long as the withdrawal reaches the offeree no later than the offer reaches him.

4. This distinction between withdrawal of an offer and revocation is of less significance if the offer is revocable under article 14 (1) since a purported withdrawal which reached the offeree after the offer had reached him would be treated as a revocation. For the effect of the dispatch of an acceptance after the arrival of an offer but prior to the arrival of the revocation, see paragraph 4 of the commentary to article 14.

Article 14

[Revocability of offer]

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

PRIOR UNIFORM LAW

ULF, article 5.

Commentary

Revocation of an offer, paragraph (1)

1. Article 14 states that offers are in general revocable and that the revocation is effective when it reaches[1] the offeree.

2. The right of the offeror to revoke his offer terminates at the moment the contract is concluded. For the reasons explained in paragraph 4 of this commentary, this basic rule applies only in those cases in which the offeree orally accepts the offer and in those cases in which the offeree accepts the offer in conformity with article 16 (3).

3. Under article 16 (3) if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent without giving notice to the offeror by performing an act, such as one relating to the dispatch of the goods or payment of the price, the acceptance is effective at the moment the act is performed. Since the acceptance is effective and the contract is concluded at the moment the act is performed, the right of the offeror to revoke his offer terminates at that same moment.

4. In the typical case in which the offer is accepted by a written indication of assent, article 14 (1) provides that the right of the offeror to revoke his offer terminates at the moment the offeree has dispatched his acceptance, and not at the moment the acceptance reaches the offeror. This rule was adopted even though article 16 (2) provides that it is at this later moment that the acceptance is effective and the contract is therefore concluded in accordance with article 21.

5. The value of a rule that a revocable offer becomes irrevocable prior to the moment at which the contract is concluded lies in the fact that it contributes to an effective compromise between the theory of general revocability of offers and the theory of general irrevocability of offers. Although all offers except those which fall within the scope of article 14 (2) are revocable, they become irrevocable once the offeree makes his commitment by dispatching the acceptance.

Irrevocable offers, paragraph (2)

6. Article 14 (2) *(a)* provides that an offer cannot be revoked if it indicates that it is irrevocable. It should be noted that this provision does not require a promise on the part of the offeror not to revoke his offer nor does it require any promise, act or forbearance on the part of the offeree for the offer to become irrevocable. It reflects the judgement that in commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time.

7. The offer may indicate that it is irrevocable in different ways. The most obvious is that the offer may state that it is irrevocable or that it will not be revoked for a particular period of time, The offer may also indicate that it is irrevocable by stating a fixed time for acceptance.

8. Article 14 (2) *(b)* provides that the offeror cannot revoke his offer if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

Article 15

[Termination of offer by rejection]

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

PRIOR UNIFORM LAW

None.

Commentary

1. Once the offeror has received a rejection of an offer, he should be free to contract with someone else without concern that the offeree will change his mind and attempt to accept the offer which he had previously rejected. Most, if not all, legal systems accept this solution in respect of revocable offers. Many legal systems also accept it in respect of irrevocable offers, but some legal systems hold that an irrevocable offer is not terminated by a rejection. Article 15 accepts the solution in respect of both revocable and irrevocable offers and provides that an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

2. An offer may be rejected either expressly or by implication. In particular, article 17 (1) provides that "a reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." A tribunal may find that a given communication from the offeree to the offeror which contained inquiries about possible changes in the terms or which proposed different terms did not purport to be an acceptance and, therefore, that it did not fall under article 17 (1)[1]. Nevertheless, if the communication was found to contain additions, limitations or other modifications to the offer, the offer would be rejected and the offeree could no longer accept it.

[1] Article 22 contains a definition of the term "reaches".

[1] See paragraph 4 of the commentary to article 17.

3. Of course, the rejection of an offer by a reply which contains additions, limitations or other modifications of the offer does not make it impossible to conclude a contract. The reply would constitute a counter-offer which the original offeror might accept. If the additions, limitations or other modifications did not materially alter the terms of the offer, article 17 (2) provides that the reply would constitute an acceptance and the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the offeror rejected the proposed additions, limitations or other modifications, the parties could agree to contract on the terms of the original offer.

4. Therefore, in the context of a reply to an offer which constitutes an explicit or implicit rejection, the significance of article 15 is that the original offer terminates and any eventual contract must be concluded on the basis of a new offer and acceptance.

Article 16

[Acceptance; Time of effect of accceptance]

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to accceptance.

(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An accceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

PRIOR UNIFORM LAW

ULF, articles 2 (2), 6 and 8.

Commentary

1. Article 16 sets out the conduct of the offeree which constitutes acceptance and the moment at which an acceptance is effective.

Acts constituting acceptance, paragraph (1)

2. Most acceptances are in the form of a statement by the offeree indicating assent to an offer. However, article 16 (1) recognizes that other conduct by the offeree indicating assent to the offer may also constitute an acceptance.

3. In the scheme used in this Convention, any conduct indicating assent to an offer is an acceptance. However, subject to the special case governed by article 16 (3), article 16 (2) provides that the acceptance is effective only at the moment the indication of assent reaches the offeror.

4. Article 16 (1) also makes it clear that silence in itself does not amount to acceptance. However, if the silence is coupled with other factors which give sufficient assurance that the silence of the offeree is an indication of assent, the silence can constitute acceptance. In particular, silence can constitute an acceptance if the parties have previously so agreed. Such an agreement may be explicit or it may be established by an interpretation of the intent of the parties as a result of the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties as provided by the rules of interpretation in article 7.

Example 16A: For the past 10 years Buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders Seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question Seller neither shipped the goods nor notified Buyer that he would not do so. Buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that Seller did not need to acknowledge the order and, in such a case, the silence of Seller constituted acceptance of the offer.

Example 16B: One of the terms in a concession agreement was that Seller was required to respond to any orders placed by Buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by Seller. On 1 July Seller received an order for 100 units from Buyer. On 25 July Seller notified Buyer that he could not fill the order. In this case a contract was concluded on 15 July for the sale of 100 units.

Moment at which acceptance by declaration is effective, paragraph (2)

5. Article 16 (2) provides that an acceptance is effective only at the moment a notice of that acceptance reaches the offeror. Therefore, no matter what is the form of the acceptance under article 16 (1), a notice of that acceptance must in some manner reach the offeror in order to bring about the legal consequences associated with the acceptance of an offer.

6. There are two exceptions to this rule. The first exception is mentioned in the opening words of article 16 (2) which state that the rule is subject to article 16 (3). Under article 16 (3), in certain limited circumstances, it is possible for an offer to be accepted by the performance of an act without the necessity of a notice. The other exception follows from the general rule in article 5 that the parties may, subject to article 11, derogate from or vary the effect of any provision of this Convention. In particular, if they have agreed that the silence of the offeree will constitute acceptance of the offer, they have by implication also agreed that no notice of that acceptance is required.[1]

7. It is not necessary that the indication of assent required by article 16 (2) be sent by the offeree. A third party, such as a carrier or a bank, may be authorized to give to the offeror the notice of the conduct which constitutes acceptance. It is also not necessary for the notice to state explicitly that it is notice of accceptance, so long as it is clear from the circumstances surrounding the notice that the conduct of the offeree was such as to manifest his intention to accept.

8. Article 16 (2) adopts the receipt theory of acceptance. The indication of assent is effective when it reaches the offeror, not when it is dispatched as is the rule in some legal systems.

9. Article 16 (2) states the traditional rule that an acceptance is effective only if it reaches the offeror within the time fixed or, if no such time was fixed, within a reasonable time. However, article 19 provides that an acceptance which arrives late is, or may be, considered to have reached the offeror in due time. Nevertheless, the sender-offeree still bears the risk of nonarrival of the acceptance.

Acceptance of an offer by an act, paragraph (3)

10. Article 16 (3) governs the limited but important situation in which the offer, the practices which the parties have established between themselves or usage permit the offeree to indicate assent by performing an act without notice to the offeror. In such a case the acceptance is effective at the moment the act is performed.

[1] No specific rule is given as to when acceptance by silence is effective. See, however, example 16 B in which it is concluded that the acceptance was effective at the expiration of the relevant period of time. In at least one legal system the effect of silence is related back to the time when the offer is received by the offeree. Swiss Code of Obligations, art. 10, subs. 2.

11. An offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay . . .".

12. The act by which the offeree can accept in such a case is that act authorized by the offer, established practice or usage. In most cases it would be by the shipment of the goods or the payment of the price but it could be by any other act, such as the commencement of production, packing the goods, opening of a letter of credit or, as in the second illustration in paragraph 11 above, the procurement of the goods for the offeror.

Article 17

[Additions or modifications to the offer]

(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, *inter alia,* to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

PRIOR UNIFORM LAW

ULF, article 7.

Commentary

General rule, paragraph (1)

1. Article 17 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.

3. However, the acceptance need not use the exact same words as used in the offer so long as the differences in the wording used in the acceptance would not change the obligations of the parties.

4. Even if the reply makes inquiries or suggests the possibility of additional terms, it may be that the reply does not purport to be an acceptance under article 17 (1). The reply may be an independent communication intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

5. This point is of special importance in the light of article 15 which provides that "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

6. Although the explanation for the rule in article 17 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 17 (1), does not give desirable results. Article 17 (2) creates an exception to article 17 (1) in regard to one of these situations.

Non-material alterations, paragraphs (2) and (3)

7. Article 17 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which do not materially alter the terms of the offer. Article 17 (3) provides that certain terms are normally to be considered as material.

8. In most cases in which a reply purports to be an acceptance the offeree does not consider the additional or different terms to be material alterations of the offer. This is particularly the case where the parties do not enter into formal negotiations but communicate with one another by means of an exchange of telegrams, telex or the like or by the exchange of an order form and an acceptance form.

9. If the additional or different terms do not in fact materially alter the terms of the offer, the reply constitutes an acceptance and, according to article 21, a contract is concluded on its receipt. In such a case, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

10. Even if the additional or different terms do not materially alter the terms of the offer, the offeror may object to them. In such a case the reply of the offeree is to be considered as a rejection of the offer rather than as an acceptance.

11. Additional or different terms which are of routine significance to the personnel engaged in ordering or selling the goods may constitute material alterations of the offer from a legal point of view. Article 17 (3), by way of example, sets out a non-exhaustive list of provisions in respect of which any additional or different term in the purported acceptance is considered to be material. Additional or different terms in respect of such a provision would not, however, be considered to be material alterations if the "offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror."

12. For example, an offeree might reply to an offer stating that the offeror has 50 tractors available for sale at a certain price by sending a telegram which accepts the offer but adds "ship immediately." Or a seller who receives an order for a certain quantity of a particular animal fibre might accept by use of a form containing a clause calling for arbitration by the relevant international trade association.

13. Article 17 (3) indicates that the additional or different terms contained in these two replies would constitute material alterations since the term "ship immediately" would change the time of delivery[1] and the arbitration clause is in respect of the settlement of disputes.

14. In both of these cases it may be that the offeree would have, by virtue of the offer or the particular circumstances of the case, reason to believe that the additional or different terms he proposed are acceptable to the offeror. If that was the case, the terms would not constitute a material alteration.

15. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to this reply by shipping the goods or paying the price, a contract may eventually be formed by notice to the original offeree of the shipment or payment. In such a case the terms of the contract would be those of the counter-offer, including the additional or different term.

[1] In the absence of the "ship immediately" term in the contract, delivery would have to be effected "within a reasonable time after the conclusion of the contract" by virtue of article 31 *(c)*.

Article 18

[Time fixed for acceptance]

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

PRIOR UNIFORM LAW

ULF, article 8 (2).
UNCITRAL Arbitration Rules, article 2 (2).

Commentary

1. Article 18 (1) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

2. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 18 (1) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the moment the telegram is handed in for dispatch."

3. In the case of a letter the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope." This order of preference was chosen for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controlled, the offeror could not know the termination date of the period during which the offer could be accepted.

Article 19

[Late acceptance]

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

PRIOR UNIFORM LAW

ULF, article 9.

Commentary

1. Article 19 deals with acceptances that arrive after the expiration of the time for acceptance.

Power of offeror to consider acceptance as having arrived in due time, paragraph (1)

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 19 (1) provides that the late acceptance becomes an effective acceptance if the offeror without delay informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to be effective.

3. Article 19 (1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance as of the moment of its receipt, even though it requires a subsequent notice to validate it. Under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

Acceptances which are late because of a delay in transmission, paragraph (2)

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that, if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment the acceptance reaches the offeror, unless the offeror without delay notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time, the offeror must notify, without delay, the offeree to prevent a contract from being concluded, If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must notify, without delay, the offeree that he considers the acceptance to be effective pursuant to article 19 (1).

Article 20

[Withdrawal of acceptance]

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

PRIOR UNIFORM LAW

ULF, article 10.

Commentary

Article 20 provides that an acceptance cannot be withdrawn after it has become effective. This provision complements the rule in article 21 that a contract of sale is concluded at the moment the acceptance becomes effective.[1]

Article 21

[Time of conclusion of contract]

A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention.

[1] Articles 16 (2) and 16 (3) state when an acceptance becomes effective.

PRIOR UNIFORM LAW

None.

Commentary

1. Article 21 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention which depend on the time of the conclusion of the contract.

2. On the other hand article 21 does not state an express rule for the place at which the contract is concluded. Such a provision is unnecessary since no provision of this Convention depends upon the place at which the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. However, the fact that article 21, in conjunction with article 16, fixes the moment at which the contract is concluded may be interpreted in some legal systems to be determinative of the place at which it is concluded.

Article 22

[Definition: "reaches"]

For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PRIOR UNIFORM LAW

ULF, article 12.

Commentary

1. Article 22 defines the point of time at which any indication of intention "reaches" the addressee for the purposes of Part II of this Convention. A communication "reaches" the addressee when it is delivered to him, not when it is dispatched.

2. One consequence of this rule, as set out in articles 13 and 20, is that an offer, whether revocable or irrevocable, or an acceptance may be withdrawn if the withdrawal reaches the other party before or at the same time as the offer or the acceptance which is being withdrawn. Furthermore, an offeree who learns of an offer from a third person prior to the moment it reaches him may not accept the offer until it has reached him. Of course, a person authorized by the offeror to transmit the offer is not a third person in this context.

3. An offer, an acceptance or other indication of intention "reaches" the addressee when it is delivered to "his place of business or mailing address." In such a case it will have legal effect even though some time may pass before the addressee, if the addressee is an individual, or the person responsible, if the addressee is an organization, knows of it.

4. When the addressee does not have a place of business or a mailing address, and only in such a situation, an indication of intention "reaches" the addressee on delivery to his habitual residence, i.e. his personal abode.[1] As with an indication of intention delivered to the addressee's place of business or mailing address, it will produce its legal effect even though the addressee may not know of its delivery.

5. In addition the indication of intention "reaches" the addressee whenever it is made personally to him, whether orally or by any other means. There are no geographical limitations on the place at which personal delivery can be made.[2] In fact such delivery is often made directly to the addressee at some place other than his place of business. Such delivery may take place at the place of business of the other party, at the addressee's hotel, or at any other place at which the addressee may be located.

6. Personal delivery to an addressee which has legal personality includes personal delivery to an agent who has the requisite authority. The question as to who would be an authorized agent is left to the applicable national law.

[1] See also article 9 *(b)*.

[2] The Spanish language version of article 22 does not conform to the other language versions on this point.

PART III. SALES OF GOODS

CHAPTER I. GENERAL PROVISIONS

Article 23

[Fundamental breach]

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

PRIOR UNIFORM LAW

ULIS, article 10.

Commentary

1. Article 23 defines "fundamental breach".

2. The definition of fundamental breach is important because various remedies of buyer and seller,[1] as well as some aspects of the passing of the risk,[2] rest upon it.

3. The basic criterion for a breach to be fundamental is that "it results in substantial detriment to the [injured] party." The determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.

4. Once this basic criterion is met, a criterion which looks to the harm suffered by the injured party, a breach is fundamental unless the party in breach can prove that he "did not foresee and had no reason to foresee such a result," i.e. the result which did occur. It should be noted that the party in breach does not escape liability merely by proving that he did not in fact foresee the result. He must also prove that he had no reason to foresee it.

5. Article 23 does not specify at what moment the party in breach should have foreseen the consequences of the breach, whether at the time the contract was concluded or at the time of the breach. In case of dispute, that decision must be made by the tribunal.

Article 24

[Notice of avoidance]

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

[1] See articles 42 (2), 44 (1), 45 (1) *(a)*, 47 (2), 60 (1) *(a)*, 63, 64 (1) and 64 (2).

[2] See article 82.

PRIOR UNIFORM LAW

None.

Commentary

1. Avoidance of the contract by one party may have serious consequences for the other party. He may need to take immediate action to minimize the consequences of the avoidance such as to cease manufacturing, packing or shipping the goods or, if the goods have already been delivered, to retake possession and arrange to dispose of them.

2. For this reason article 24 provides that a declaration of avoidance is effective only if made by notice to the other party. It follows that the contract is avoided at the time notice of the declaration of avoidance[1] is given to the other party.

3. The Convention does not require, as do some legal systems, that an advance notice be given of the intention to declare the contract avoided. This Convention requires only one notice, the notice of the declaration of avoidance.[2]

4. The notice can be oral or written and can be transmitted by any means. If the means chosen are appropriate in the circumstances, article 25 provides that a delay or error in the transmission of the notice does not impair the legal effect of the notice.

Article 25

[Delay or error in communication]

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

PRIOR UNIFORM LAW

ULIS, *articles 14 and 39 (3).*
ULF, article 12 (2).

Commentary

1. Article 25 states that the risk of delay or error in the transmission of any notice, request or other communication under Part III of this Convention or its failure to arrive is to be borne by the addressee.[1] This rule applies if the communication is given "in accordance with Part III and by means appropriate in the circumstances."

2. There may be more than one means of communication which is appropriate in the circumstances. In such a case the sender may use the one which is the most convenient for him.

3. A communication is appropriate "in the circumstances" if it is appropriate to the situation of the parties. A means of communication which is appropriate in one set of circumstances may not be appropriate in another set of circumstances may not be appropriate in another set of circumstances. Fot example, even though a particular from of notice may normally be sent by airmail, in a given case the need for speed may make only electronic communication, telegram, telex, or telephone, a means appropriate "in the circumstances".

4. The general rule that the risk of delay, error or loss in respect of a communication is to be borne by the addressee arises out of the consideration that it is desirable to have, as far as possible, one rule governing the hazards of transmission. Acceptance of a generalized receipt theory would have required that the Convention contain supporting procedural rules to establish whether a notice had in fact been received by the addressee since legal systems which operated on the theory that notices were effective on dispatch often did not contain such supporting rules. However, Part III of the Convention contains exceptions to this rule in cases where it was considered that a communication ought to be received to be effective.[2]

Article 26

[Judgement for specific performance]

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

PRIOR UNIFORM LAW

Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964, article VII.

ULIS, article 16.

Commentary

1. This article considers the extent to which a national court is required to enter a judgement for specific performance of an obligation arising under this Convention.

2. If the seller does not perform one of his obligtions under the contract of sale or this Convention, article 42 provides that "the buyer may require performance by the seller". Similarly, article 58 authorizes the seller to "require the buyer to the pay the price, take delivery or perform his other obligations".

3. The question arises whether the injured party can obtain the aid of a court to enforce the obligation of the party in default to perform the contract. In some legal systems the courts are authorized to order specific performance of an obligation. In other legal systems courts are not authorized to order certain forms of specific performance and those States could not be expected to alter fundamental principles of their judicial procedure in order to bring this Convention into force. Therefore, article 26 provides that a court is not bound to enter a judgement providing for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention, e.g., domestic contracts of sale. Therefore, if a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, article 26 does not limit the application of articles 42 or 58. Article 26 limits their application only if a court could not under any circumstances order such a form of specific performance.[1]

4. It should be noted that articles 42 and 58, where not limited by this article, have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party.

Article 27

[Modificaton or abrogation of contract]

(1) A contract may be modified or abrogated by the mere agreement of the parties.

[1] Articles 45, 60, 63 and 64 provide for a declaration of avoidance of a contract under appropriate circumstances.

[2] However, a party who declares the contract avoided pursuant to article 45 (1) *(b)* or article 60 (1) *(b)* must have previously fixed an additional period of time of reasonable length for performance by the other party under article 43 (1) or article 59 (1). In such a case the party who declares the contract avoided must necessarily send two communications to the other party.

[1] Part II of the Convention contains special rules dealing with the time of effect of communications and other indications of intention made during the formation process. See, in particular, articles 19 and 22.

[2] Articles 43 (2), 44 (4), 59 (2), 61 (1), 61 (2) and 65 (4).

[1] See also paragraph 9 of the commentary to article 42.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

PRIOR UNIFORM LAW

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and abrogation of a contract.

General rule, paragraph (1)

2. Paragraph (1), which states the general rule that a contract may be modified or abrogated merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the common law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because "consideration" is lacking.

3. Many of the modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 27 (1) are effective, thereby overcoming the common law rule that "consideration" is required.

4. In addition, article 27 (1) is applicable to the question as to whether the terms in a confirmation from or in an invoice sent by one party to the other after the conclusion of the contract modify the contract where those terms are additional or different from the terms of the contract as it was concluded. If it is found that the parties have agreed to the additional or different terms, article 27 (1) provides that they become part of the contract. As to whether the silence on the part of the recipient amounts to an agreement to the modification of the contract, see article 16 (1) and the commentary to that article.

5. A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 17.

Modificaton or abrogation of a written contract, paragraph (2)

6. Although article 10 provides that a contract of sale need not be concluded in or evidenced by writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or abrogation unless in writing, can be modified or abrogated orally.

7. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 10 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 27 (2) provides that a written contract which excludes any modification or abrogation unless in writing cannot be otherwise modified or abrogated.

8. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, article 27 (2) goes on to state that to the extent the other party has relied on such conduct, the first party cannot assert the provision.

9. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or abrogation to be in writing is precluded from doing so only to the extent that the other party has relied on the conduct of the first party. This may mean in a given case that the terms of the original contract may be reinstated once the first party denies the validity of the non-written modification.

Example 27A: A written contract for the sale to A over a two-year period of time of goods to be manufactured by B provided that all modifications or abrogations of the contract had to be in writing. Soon after B delivered the first shipment of goods to A, A's contracting officer told B to make a slight modificaton in the design of the goods. If this modification was not made, he would instruct his personnel to reject future shipment and not to pay for them. Even though B did not receive written confirmation of these instructions, he did modify the design as requested. The next five monthly deliveries were accepted by A but the sixth was rejected as not conforming to the written contract. In this case A must accept all goods manufactured according to the modified design but B must reinstate the original design for the remainder of the contract.

CHAPTER II. OBLIGATIONS OF THE SELLER

Article 28

[General obligations]

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

PRIOR UNIFORM LAW

ULIS, article 18.

Commentary

Article 28 states the principal obligations of the seller and introduces chapter II of Part III of the Convention. The principal obligations of the seller are to deliver the goods, to hand over any documents relating thereto and to transfer the property in the goods.[1] The seller must carry out his obligations "as required by the contract and this Convention." Since article 5 of this Convention permits the parties to exclude its application or, subject to article 11, to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and this Convention, the seller must fulfil his obligations as required by the contract.

SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

Article 29

[Absence of specified place for delivery]

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

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

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular

[1] Although this Convention provides that the seller must transfer the property in the goods, article 4 *(b)* specifies that, unless expressly provided, the Convention is not concerned with the effect which the contract may have on the property in the goods sold. This matter is left to the applicable law. See also article 39 and the commentary thereto.

place — in placing the goods at the buyer's disposal at that place;

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

PRIOR UNIFORM LAW

ULIS, articles 19 (2) and 23.

Commentary

1. The seller's primary obligation is to "deliver the goods" as required by the contract and this Convention.

2. Article 29 states how and where the seller's obligation to deliver is fulfilled. Article 31 states when the seller is obligated to deliver. Articles 78 to 82 deal with the related problems of the passage of the risk of loss.

"The goods" which must be delivered

3. In order for the seller to deliver "the goods", in the case of specific goods, he must deliver the exact goods called for in the contract. In the case of unidentified goods, he must deliver goods which generally conform to the description of the type of goods called for by the contract. Therefore, if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes. However, the seller has delivered "the goods" if he does the appropriate act called for by subparagraphs *(a)* to *(c)* in respect of the specific goods described in the contract or, in the case of unidentified goods, of goods which conform to the generic description in the contract even though they are nonconforming or are not delivered at the time required or by the means of transportation specified. Therefore, the handing over to the carrier of No. 3 grade corn when No. 2 grade was called for or the handing over to the carrier of five tons when 10 tons were called for would constitute delivery of "the goods". Even though "the goods" had been "delivered", the buyer would be able to exercise any rights which he might have because of the seller's failure to "deliver the goods . . . as required by the contract and this Convention".[1] Among the buyer's rights would be the right to avoid the contract where the failure of the seller amounted to a fundamental breach.[2] Nevertheless, the seller would have "delivered the goods".

Where the contract of sale involves the carriage of goods, subparagraph (a)

4. Where the contract of sale involves the carriage of goods, the general rule is that the seller's obligation to deliver the goods consists of handing them over to the first carrier for transmission to the buyer.

5. The contract of sale involves the carriage of goods if the seller is required or authorized to send the goods to the buyer. Both shipment contracts (e.g. CIF, FOB, FOR) and destination contracts (e.g. Ex Ship, Delivered at . . .) are contracts of sale which involve carriage of the goods.

6. In many cases where the contract of sale involves the carriage of goods, the contract either explicitly or by the use of a trade term specifies the place at which the goods are to the delivered. Where this is the case, the seller's obligation to deliver does not consist of handing the goods over to the first carrier but in doing the act specified in the contract.

7. Therefore, if the contract is a destination contract, the seller's obligation to deliver consists of placing the goods at the disposal of the buyer at the place of destination. Similarly, if the contract is FOB or CIF named port of shipment, the seller's obligation to deliver as determined by the contract consists of placing the goods on board a vessel at the named port of shipment.[3] This is the case even though the seller may need to provide for transport from an inland point to the port of shipment.

8. However, if the contract does not require the seller to deliver the goods at any other particular place and the goods are to be transported by two or more carriers, delivery of the goods is made by handing them over "to the first carrier for transmission to the buyer". Therefore, in such a case if the goods are shipped from an inland point by rail or truck to a port where they are to be loaded aboard a ship, delivery is effected when the goods are handed over to the railroad or trucking firm.

9. The delivery of the goods is effected by handing over the goods to the carrier, not by handing over the documents to the buyer. Even if the seller never handed over the documents to the buyer as required by the contract, he would have delivered the goods when they were handed over to the carrier. Of course the seller would be subject to any remedies provided by the contract and this Convention for his failure to hand over the documents.

Goods at or to be manufactured or produced at a particular place, subparagraph (b)

10. If, at the time of the conclusion of the contract, the parties knew that the goods were at or were to be manufactured or produced at a particular place and the contract does not require or authorize the shipment of the goods, the seller's obligation to deliver the goods consists of placing the goods at the buyer's disposal at the place at which the goods were located or at the place at which they were to be manufactured or produced.

11. There are a number of different situations envisaged by this subparagraph. The first is that the goods are specific goods. For example, if the contract was for the sale by one dealer to another dealer of a specific painting which the parties knew was at a particular location, delivery would be effected by the seller placing the painting at the buyer's disposal at that location. The same solution is given if 10 tons of scrap steel are to be drawn from a specific pile of scrap steel or if 100 chairs are to be manufactured in a particular factory.

12. If the goods are already in transit at the time of the conclusion of the contract, the contract of sale is not one which "involves" the carriage of goods under subparagraph *(a)* of this article but is one which involves goods which are at a particular place and which are therefore subject to this subparagraph. This is true whether the sale is of an entire shipment under a given bill of lading, in which case the goods are specified goods, or whether the sale is of only a part of the goods covered by a given bill of lading. Otherwise, if the contract of sale of goods already in transit were held to "involve the carriage of goods", thereby making it subject to article 29 *(a)*, the seller would never "deliver the goods" because the goods would not be handed over to the carrier "for transmission to the buyer". However, by virtue of article 80 the risk of loss would pass to the buyer at the time the goods were handed over to the carrier who issued the documents controlling the disposition of the goods even though the handing over took place prior to the conclusion of the contract of sale.

13. Both parties must know of the location of the specific goods, of the location of the specific stock from which the goods to be delivered are to be drawn, or of the place at which the goods are to be manufactured or to be produced. They must have actual knowledge; it does not suffice if one or the other party ought to have such knowledge but did not. Moreover, they must have this knowledge at the time of the conclusion of the contract.

In other cases, subparagraph (c)

14. In other cases, not covered by subparagraphs *(a)* and *(b)*, the seller's obligation to deliver consists of placing the goods at the buyer's disposal where the seller had his place of business at the time of the conclusion of the contract. If the seller had more than one place of business, the place at which delivery is to be made is governed by article 9 *(a)*.

15. Although subparagraph *(c)* is a residuary rule to cover those situations not discussed in subparagraphs *(a)* and *(b)*, it does not state a rule for "all other cases." In particular, the contract may provide for delivery to be made at the buyer's place of business or at some other particular place not mentioned in this article. The opening phrase of article 29 recognizes that in all such cases delivery would be made by

[1] Article 28. Buyer's remedies for seller's breach are set forth in article 41.

[2] Article 45 (1) *(a)*. For the effect of a fundamental breach by seller on the passing of the risk of loss, see article 82.

[3] E.g. see Incoterms, FOB condition A.2; CIF condition A.4. (*"Incoterms"*, ICC publication No. 274).

handing over the goods or by placing them at the buyer's disposal, whichever is appropriate, at the particular place provided in the contract.

Placed at the disposal of the buyer

16. Goods are placed at the disposal of the buyer when the seller has done that which is necessary for the buyer to be able to take possession. Normally, this would include the identification of the goods to be delivered, the completion of any pre-delivery preparation, such as packing, to be done by the seller, and the giving of such notification to the buyer as would be necessary to enable him to take possession.

17. If the goods are in the possession of a bailee, such as a warehouseman or a carrier, they might be placed at the disposal of the buyer by such means as the seller's instructions to the bailee to hold the goods for the buyer or by the seller handing over the buyer in appropriate form the documents which control the goods.

Effect of reservation of title

18. Delivery is effected under this article and risk of loss passes under article 79, 80 or 81 even though the seller reserves title to the goods or otherwise reserves an interest in the goods if such reservation of title or other interest is for the purpose, *inter alia*, of securing the payment of the price.[4]

Article 30

[Obligations in respect of carriage of goods]

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

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

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

PRIOR UNIFORM LAW

ULIS, articles 19 (3) and 54.

Commentary

1. Article 30 describes several additional obligations of the seller where the contract of sale involves the carriage of goods.

Identification of the goods, paragraph (1)

2. The seller will normally identify the goods to the contract at or before the time of shipment by marking them with the name and address of the buyer, by procuring shipping documents which specify the buyer as the consignee or as the party to be notified on the arrival of the goods, or by some similar method. However, if the seller ships identical goods to several buyers he may fail to take any steps to identify the goods prior to their arrival. This may especially be the case where the sale is of goods such as grains which are shipped in bulk.

3. Article 30 (1) states that one of the seller's obligations is either to mark the goods with an address, or otherwise to identify them to the contract, or to send the buyer a notice of the consignment which specifies the goods. If the seller does none of these three acts, article 79 (2) provides that the risk of loss does not pass.[1] In addition, the buyer has available all the usual remedies for the seller's breach of an obligation, including the right to require the seller to give notice of the consignment, the right to claim damages and, if the seller's failure to identify the goods to the contract or to send the notice of the consignment amounts to a fundamental breach, the right to avoid the contract.

Contract of carriage, paragraph (2)

4. Certain common trade terms such as CIF and C and F require the seller to arrange for the contract of carriage of the goods while in other cases, such as FOB sales where the seller would not normally be required to do so, the parties on occasion agree that the seller will in fact make the shipping arrangements. Paragraph (2) specifies that in all such cases where "the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation".

Insurance, paragraph (3)

5. Either the seller or the buyer may be obligated under the contract of sale to procure insurance for loss of the goods during their carriage. This obligation will normally be determined by the trade term used in the contract of sale and is not governed by the passage of the risk of loss. For example, if the price is quoted CIF, the seller must procure the insurance[2] even though the risk of loss passes to the buyer when the goods are handed over to the carrier for transmission to the buyer.[3] If the price is quoted C and F or FOB, in the absence of other indications in the contract, it is the buyer's responsibility to procure any necessary insurance.[4]

6. Paragraph (3) provides that if the seller is not bound by the contract to procure the insurance, he must provide the buyer with all available information necessary to enable him to effect such insurance. This is not a general obligation on the seller as he only has to provide such information if the buyer requests it of him. However, in some trades the seller may be required to give such information even without request on the buyer's part by virtue of a usage which becomes part of the contract pursant to article 8 of this Convention.

Article 31

[Time of delivery]

The seller must deliver the goods:

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

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

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

PRIOR UNIFORM LAW

ULIS, articles 20, 21 and 22.

Commentary

1. Article 31 deals with the time at which the seller must fulfil his obligation to deliver the goods.

[4] Article 79 (1) provides, *inter alia*, "The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk."

[1] Article 81 (3) has a similar rule for those cases in which the contract of sale does not involve the carriage of goods.

[2] E.g. Incoterms, CIF, condition A.5.

[3] If Incoterms, CIF is used, the risk of loss passes to the buyer when the goods have effectively passed the ship's rail at the port of shipment (condition A.6). For the rule under this Convention, see article 79 (1) and paras. 4 to 7 of the commentary thereto.

[4] See, for example, Incoterms, CIF, and FOB.

2. Since the seller's obligation is to deliver at a certain time, he must hand over the goods to the carrier, place the goods at the buyer's disposal at the appropriate place as required by article 29 or do such other act as may constitute delivery under the terms of the contract at or by the time specified. Article 31 does not require that the buyer have taken physical possession on the date on which delivery was due or even have been in a position to take physical possession if, for example, delivery was made by handing over the goods to a carrier.

Delivery on fixed or determinable date, subparagraph (a)

3. If the date for delivery is fixed by or determinable from the contract, the seller must deliver on that date. The date for delivery is fixed by or determinable from the contract if it is fixed by or determinable from a usage made applicable to the contract by article 8.

Delivery during a period, subparagraph (b)

4. In international trade it is common for the date of delivery to be fixed in terms of a period of time. This is generally to allow the seller some flexibility in preparing the goods for shipment and in providing for the necessary transportation. Therefore, subparagraph *(b)* authorizes the seller to deliver goods "at any time within that period".

5. However, it should be noted that in some cases the parties may have modified their original agreement which called for delivery within a period by specifying a particular date for delivery, a date which might fall within or without the period of time originally specified. For instance, if the contract originally called for delivery in July, by subsequent agreement the seller may have agreed to deliver on 15 July. In such case delivery must be made on that date.

6. On occassion the provision in the contract or in an applicable usage that delivery must be within a specified period of time is intended to permit the buyer to arrange for carriage of the goods or to schedule the exact arrival time of the goods in order to fulfil his needs and not overtax his storage or handling capacity as those needs or capacity may be determined subsequent to the conclusion of the contract. Subparagraph *(b)* states, therefore, that the seller may not choose the exact delivery date if the "circumstances indicate that the buyer is to choose a date".

7. It should be noted that where the buyer is to choose the delivery date, the seller will need notice of that date in time to prepare the goods for shipment and to make any contracts of carriage he may be required to make under the contract of sale. If the buyer does not give such notice in adequate time, the seller would not be liable for his own non-performance to the extent he could prove that this lack of knowledge constituted an impediment beyond his control within the meaning of article 65 (1).

Delivery in all other cases, subparagraph (c)

8. In all other cases not governed by subparagraphs *(a)* and *(b)* the seller must deliver the goods within a reasonable time after the conclusion of the contract. What is a reasonable time depends on what constitutes acceptable commercial conduct in the circumstances of the case.

Early delivery

9. For the right of the buyer to take delivery or to refuse to take delivery of goods delivered before the date fixed, see article 48 (1) and the commentary thereto.

10. If the seller has delivered goods before the date for delivery, his right to remedy before that date any lack of conformity in those goods is governed by article 35. His right to remedy the lack of conformity after the date for delivery is governed by article 44.

Article 32

[Handing over of documents]

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

PRIOR UNIFORM LAW

ULIS, article 50.

Commentary

1. Article 32 deals with the second obligation of the seller described in article 28, i.e., to hand over to the buyer any documents relating to the goods. The location of this article with the articles dealing with the delivery of the goods emphasizes the close relationship between the handing over of documents and the delivery of the goods.

2. The article does not itself list which documents the seller must hand over to the buyer. In addition to documents of title, such as bills of lading, dock receipts and warehouse receipts, the seller may be required by the contract to hand over certificates of insurance, commercial or consular invoices, certificates of origin, weight or quality and the like.

3. The documents must be handed over at the time and place and in the form required by the contract. Normally, this will require the seller to hand over the documents in such time and in such form as will allow the buyer to take possession of the goods from the carrier when the goods arrive at their destination, bring them through customs into the country of destination and exercise claims against the carrier or insurance company.

4. Article 32 does not limit the right of the seller to withhold the documents until paid by the buyer when the contract calls for payment against documents.[1]

SECTION II. CONFORMITY OF THE GOODS AND THIRD PARTY CLAIMS

Article 33

[Conformity of the goods]

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

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

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

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

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

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

PRIOR UNIFORM LAW

ULIS, articles 33 and 36.

Commentary

1. Article 33 states the extent of the seller's obligation to deliver goods which conform to the contract.

[1] Article 54.

2. This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under this Convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality.[1] It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods.[2]

3. However, the seller's obligation under articles 39 and 40 to deliver goods free from any right or claim of a third party, including a right or claim based on industrial or intellectual property, is independent of the seller's obligation to deliver goods which conform to the contract.[3]

Seller's obligations as to conformity of the goods, paragraph (1)

4. Paragraph (1) states the standards by which the seller's obligation to deliver goods which conform to the contract is measured. The first sentence emphasizes that the goods must conform to the quantity, quality and description required by the contract and must be contained or packaged in the manner required by the contract. This provision recognizes that the overriding source for the standard of conformity is the contract between the parties. The remainder of paragraph (1) describes specific aspects of the seller's obligations as to conformity which apply "except where otherwise agreed."

Fit for ordinary purposes, subparagraph (1) (a)

5. Goods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for all the purposes for which goods of the same description are ordinarily used. The standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description. The scope of the seller's obligation under this subparagraph is not determined by whether the seller could expect the buyer himself to use the goods in one of the ways in which such goods are ordinarily used. In particular, the obligation to furnish goods which are fit for all the purposes for which goods of the contract description are ordinarily used also covers a buyer who has purchased the goods for resale rather than use. For goods to be fit for ordinary purposes, they must be honestly resaleable in the ordinary course of business. If the goods available to the seller are fit for only some of the purposes for which such goods are ordinarily used, he must ask the buyer the particular purposes for which these goods are intended so that he can refuse the order if necessary.

6. The seller is not obligated to deliver goods which are fit for some special purpose which is not a purpose "for which goods of the same description would ordinarily be used" unless the buyer has "expressly or impliedly made known to the seller at the time of the conclusion of the contract" such intended use.[4] This problem may arise if the buyer intends to use the goods for a purpose for which goods of this kind are sometimes, but not ordinarily used. In the absence of some indication from the buyer that such a particular purpose is intended, the seller would have no reason to attempt to supply goods appropriate for such purpose.

Fit for particular purpose, subparagraph (1) (b)

7. Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular use to which the goods are to be put. If the buyer expressly or impliedly makes known to the seller such purpose, the seller must deliver goods fit for that purpose.

8. The purpose must be known to the seller by the time of the conclusion of the contract so that the seller can refuse to enter the contract if he is unable to furnish goods adequate for that purpose.

9. The seller is not liable for failing to deliver goods fit for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement". The circumstances may show, for example, that the buyer selected the goods by brand name or that he described the goods desired in terms of highly technical specifications. In such a situation it may be held that the buyer had not relied on the seller's skill and judgement in making the purchase. If the seller knew that the goods ordered by the buyer would not be satisfactory for the particular purpose for which they have been ordered it would seem that he would have to disclose this fact to the buyer.[5] If the buyer went ahead and purchased the goods it would then be clear that he did not rely on the seller's skill and judgement.

10. It would also be unreasonable for the buyer to rely on the seller's skill and judgement if the seller did not purport to have any special knowledge in respect of the goods in question.

Sample of model, subparagraph (1) (c)

11. If the contract is negotiated on the basis of a sample or model, the goods delivered must possess the qualities which are possessed by the goods the seller has held out as the sample or model. Of course, if the seller indicates that the sample or model is different from the goods to be delivered in certain respects, he will not be held to those qualities of the sample or model but will be held only to those qualities which he has indicated are possessed by the goods to be delivered.

Packaging, subparagraph (1) (d)

12. Subparagraph (1) *(d)* makes it one of the seller's obligations in respect of the conformity of the goods that they "are contained or packaged in the manner usual for such goods". This provision which sets forth a minimum standard, is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging.

Buyer's knowledge of the non-conformity, paragraph (2)

13. The obligations in respect of quality in subparagraphs (1) *(a)* to *(d)* are imposed on the seller by this Convention because in the usual sale the buyer would legitimately expect the goods to have such qualities even if they were not explicitly stated in the contract. However, if at the time of contracting the buyer knew or could not have been unaware of a non-conformity in respect of one of those qualities, he could not later say that he had expected the goods to conform in that respect.

14. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate.[6]

Article 34

[Seller's liability for lack of conformity]

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

[1] The necessity that the seller hand over or place at the buyer's disposal goods which meet the contract description in order to have "delivered the goods" is discussed in paragraph 3 of the commentary on article 29.

[2] Article 41 (1).

[3] For the significance of this rule, see articles 39 and 40 and the commentary to these articles.

[4] Article 33 (1) *(b)*. See paragraphs 7 to 10 below.

[5] This appears to follow from the requirement of the observance of good faith in article 5.

[6] Article 41 (1).

though the lack of conformity becomes apparent only after that time.

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

PRIOR UNIFORM LAW

ULIS, article 35.

Commentary

1. Article 34 deals with the time at which is to be judged the conformity of the goods to the requirements of the contract and this Convention.

Basic rule, paragraph (1)

2. Paragraph (1) contains the basic rule that the seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time the risk passes even though the lack of conformity becomes apparent only after that date. The rule that the conformity of the goods to the contract is to be measured as of the time risk passes is a necessary implication of the rules on risk of loss or damage.

3. Although the conformity of the goods is measured at the time the risk passes, the buyer may not know of a non-conformity until much later. This may occur because the non-conformity becomes evident only after the goods have been used. It may also occur because the contract involves the carriage of goods. In such a case the risk may pass when the goods are handed over to a carrier for transmission to the buyer.[1] The buyer, however, will normally not be able to examine the goods until after they have been handed over to him by the carrier at the point of destination, some time after the risk has passed. In either case if the non-conformity existed at the time the risk passed, the seller is liable.

Example 34A: A contract called for the sale of "No. 1 quality corn, FOB seller's city". Seller shipped No. 1 corn, but during transit the corn was damaged by water and on arrival the quality was No. 3 rather than No. 1. Buyer has no claim against Seller for non-conformity of the goods since the goods did conform to the contract when risk of loss passed to Buyer.

Example 34B: If the corn in example 34A had been No. 3 quality when shipped, Seller would have been liable even though Buyer did not know of the non-conformity until the corn arrived at Buyer's port or place of business.

Damage subsequent to passage of risk, paragraph (2)

4. Paragraph (2) provides that even after the passage of the risk the seller remains liable for any damage which occurs as a breach of one of his obligations. Although this is most evidently true when the damage occurs because of some positive act on the part of the seller, it is also true when the obligation which has been breached is an express guarantee given by the seller that the goods will retain some particular characteristics for a specified period after the risk of loss has passed. Since article 34 (1) states that conformity of the goods is to be judged at the time risk passes, it was considered necessary to state specifically that the seller was liable for any breach of an express guarantee of quality.

5. It should be noted that article 34 (2) states that the seller is liable "for any lack of conformity" which occurs after the risk has passed rather than "for the consequences of any lack of conformity", which appeared in ULIS article 35, paragraph 2. This makes it clear that the defect or flaw in the goods does not have to have existed at the time the risk passed if the lack of conformity in question is due to a breach of any of the obligations of the seller.

[1] Article 79 (1). If the goods are not clearly marked with an address or otherwise identified to the contract, article 79 (2) provides that the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 35

[Cure of lack of conformity prior to date for delivery]

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

PRIOR UNIFORM LAW

ULIS, article 37.

Commentary

1. Article 35 deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but his performance does not conform with the contract.[1] It would be possible to say that the decision whether the seller's performance conforms to the requirements of the contract shall be made once and for all at the time delivery has been made. However, article 35 provides that the seller may remedy the non-conformity by delivering any missing part or make up any deficiency in the quantity of the goods, by delivering replacement goods which are in conformity with the contract, or by remedying any non-conformity in the goods.[2]

2. The seller has the right to remedy the non-conformity of the goods under article 35 only until the "date for delivery". After the date for delivery his right to remedy is based on article 44. In those international sales which involve carriage of the goods, unless the contract otherwise provides, delivery is effected by handing over the goods to the first carrier.[3] Therefore, in those contracts, the date until which the seller may remedy any non-conformity of the quantity or quality of the goods under article 35 is the date by which he was required by the contract to hand over the goods to the carrier.

3. The seller's right to remedy any non-conformity is also limited by the requirement that his exercise of that right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

Example 35A: The contract required Seller to deliver 100 machine tools by 1 June. He shipped 75 by an appropriate carrier on 1 May which arrived on 15 June. He also shipped an additional 25 machine tools on 30 May which arived on 15 July. Seller remedied the non-conformity by handing over these machine tools to the carrier before the contract date for delivery of the 100 machine tools, 1 June.

Example 35B: If the contract in example 35A did not authorize Seller to deliver by two separate shipments, Seller could remedy the original non-conformity as to quantity only if receiving the missing 25 machine tools in a later second shipment did not cause Buyer "unreasonable inconvenience or unreasonable expense".

[1] The buyer is not required to take delivery of the goods prior to the delivery date: article 48 (1).

[2] In order for the seller to be made aware of any non-conformity so that he can effectively exercise his right of remedy, the buyer is required by article 36 to examine the goods within as short a period as is reasonable in the circumstances and by article 37 to give the seller notice of the non-conformity.

[3] Article 29 *(a)*. For the point of time at which risk of loss passes, see article 79 and commentary to that article.

Example 35C: On arrival of the machine tools described in example 35A at Buyer's place of business on 15 June and 15 July, the tools were found to be defective. It was too late for Seller to cure under article 35 because the date for delivery (1 June) had passed. However, Seller may have a right to remedy the lack of conformity under article 44.

Example 35D: The machine tools described in example 35A were handed over to Buyer by the carrier prior to 1 June, the contractual delivery date. When examined by Buyer the tools were found to be defective. Although Seller had the ability to repair the tools prior to the delivery date, he would have had to do the work at Buyer's place of business. If Seller's efforts to remedy the lack of conformity under such circumstances would cause "unreasonable inconvenience or unreasonable expense" to Buyer, Seller would have no right to effect the remedy.

Article 36

[Examination of the goods]

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

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

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

PRIOR UNIFORM LAW

ULIS, article 38.

Commentary

1. Article 36 describes the point of time when the buyer is obligated to examine the goods. The buyer's right to examine the goods prior to paying the price is considered in article 54 (3).

2. This article is prefatory to article 37, which provides that if the buyer fails to notify the seller of lack of conformity of the goods within a reasonable time after he has discovered it or ought to have discovered it, he loses the right to rely on the lack of conformity. The time when the buyer is obligated to examine the goods under article 36 constitutes the time when the buyer "ought to have discovered" the lack of conformity under article 37, unless the non-conformity is one which could not have been discovered by such examination.

3. The examination which this article requires the buyer to make is one which is reasonable in the circumstances. The buyer is normally not required to make an examination which would reveal every possible defect. That which is reasonable in the circumstances will be determined by the individual contract and by usage in the trade and will depend on such factors as the type of goods and the nature of the parties. For example, a party would not be expected to discover a lack of conformity of the goods if he neither had nor had available the necessary technical facilities and expertise, even though other buyers in a different situation might be expected to discover such a lack of conformity. Because of the international nature of the transaction, the determination of the type and scope of examination required should be made in the light of international usages.

4. Paragraph (1) states the basic rule that the buyer must examine the goods or cause them to be examined "within as short a period as is practicable in the circumstances". Paragraphs (2) and (3) state special applications of this rule for two particular situations.

5. Paragraph (2) provides that if the contract of sale involves the carriage of goods "examination may be deferred until after the goods have arrived at their destination". This rule is necessary because, even though delivery is effected when the goods are handed over to the first carrier for transmission to the buyer and even though risk of loss may also pass at that time,[1] the buyer is normally not in a phyiscal position to examine the goods until they arrive at the destination.[2]

6. Paragraph (3) carries this thought one step further. Where the buyer redispatches the goods without a reasonable opportunity for examination by him, examination of the goods may be deffered until after the goods have arrived at the new destination. The typical situation in which the buyer will not have a reasonable opportunity to examine the goods prior to their redispatch is where they are packed in such a manner that unpacking them for inspection prior to their arrival at the final destination is impractical. The redispatch of the goods may be necessary because the buyer intends to use the goods himself at some place other than the place of destination of the contract of carriage, but more often it will arise because the buyer is a middleman who has resold the goods in quantities at least equal to the quantities in which they are packed.

7. The examination may be deferred until after the goods have arrived at the new destination only if the seller knew or ought to have known at the time the contract was concluded of the possibility of redispatch. It is not necessary that the seller knew or ought to have known that the goods would be redispatched, only that there was such a possiblity.

Article 37

[Notice of lack of conformity]

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

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

PRIOR UNIFORM LAW

ULIS, article 39.
Prescription Convention, articles 8 and 10 (2).

Commentary

1. Article 37 states the consequences of the buyer's failure to give notice of non-conformity of the goods to the seller within a reasonable time. The consequences of the buyer's failure to give notice of third party rights or claims over the goods are dealt with in articles 39 (2) and 40 (3).

Obligation to give notice, paragraph (1)

2. Under paragraph (1) the buyer loses his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a specified time. If notice is not given within that time, the buyer cannot claim damages under article 41 (1) *(b)*, require the seller to cure

[1] Articles 29 *(a)* and 79 (1). See paras. 3 to 8 of the commentary to article 79 for a discussion of the rules which determine when risk passes if the contract of sale involves carriage of the goods.

[2] See paragraph 6 of the commentary to article 54 for a discussion of the buyer's obligation to pay the price prior to examination of the goods.

the lack of conformity under article 42, avoid the contract under article 45 or declare a reduction of the price under article 46.[1]

3. The buyer must send the notice to the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If the lack of conformity could have been revealed by the examination of the goods under article 36, the buyer ought to have discovered the lack of conformity at the time he examined them or ought to have examined them.[2] If the lack of conformity could not have been revealed by the examination, the buyer must give notice within a reasonable time after he discovered the non-conformity in fact or ought to have discovered it in the light of the ensuing events.

Example 37A: The non-conformity in the goods was not such that Buyer ought to have discovered it in the examination required by article 36. However, the non-conformity was such that it ought to have been discovered once Buyer began to use the goods. In this case Buyer must give notice of the non-conformity within a reasonable time after he "ought to have discovered" it by use.

4. The purpose of the notice is to inform the seller what he must do to remedy the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Therefore, the notice must not only be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it, but it must specify the nature of the lack of conformity.

Termination of the right to rely on non-conformity, paragraph (2)

5. Even though it is important to protect the buyer's right to rely on latent defects which become evident only after a period of time has passed, it is also important to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture.

6. Paragraph (2) recognizes this interest by requiring the buyer to give the seller notice of the non-conformity at the latest two years from the date the goods were actually handed over to him. In addition, under articles 8 and 10 of the Prescription Convention the buyer must commence judicial proceedings against the seller within four years of the date the goods were actually handed over. It should be noted that while the principles which lie behind paragraph (2) of this article and articles 8 and 10 of the Prescription Convention are the same and while the starting points for the running of the two or four year periods are the same, the obligation under paragraph (1) to give notice is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention.

7. The overriding principle of the autonomy of the will of the parties recognized by article 5, would allow the parties to derogate from the general obligation to give the notice required by paragraph (2). However, in the absence of a special provision, it would not be clear whether the obligation to give notice within two years was affected by an express guarantee that the goods would retain specified qualities or characteristics for a specified period.[3] Accordingly, paragraph (2) provides that this obligation to give notice within two years will not apply if "such time-limit is inconsistent with a contractual period of guarantee". Whether it is, or is not, inconsistent is a matter of interpretation of the guarantee.

Example 37B: The contract for the sale of machine tools provides that the machine tools will produce a minimum of 100 units per day for at least three years. Because of the three-year guarantee, this clause is inconsistent with the two-year time-limit in paragraph (1). It would be a matter of interpretation of the guarantee clause in the contract whether the notice of failure to produce 100 units per day had to be given within three years to notify Seller that within the three-year period there was a breach of the guarantee.

Example 37C: The contract provides that the machine tools will produce a minimum of 100 units per day for one year. It would be unlikely that this contract calling for a specified performance for one year would be interpreted to affect the two-year time-limit in article 37 (2) within which notice must be given.

Example 37D: The contract provides that notice of a failure to produce at least 100 units per day must be given within 90 days of the date of delivery. Such an express clause would be inconsistent with the two-year time-limit in paragraph (2).

Article 38

[Seller's knowledge of lack of conformity]

The seller is not entitled to rely on the provision of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

PRIOR UNIFORM LAW

ULIS, article 40.

Commentary

Article 38 relaxes the notice requirements of articles 36 and 37 where the lack of conformity relates to facts which the seller knew or of which he could not have been unaware and which he did not disclose. The seller has no reasonable basis for requiring the buyer to notify him of these facts.

Article 39

[Third party claims in general]

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

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

PRIOR UNIFORM LAW

ULIS, article 52.

Commentary

Claims of third parties, paragraph (1)

1. Article 39 states the obligation of the seller to deliver goods which are free from the right or claim of any third party other than a right or claim based on industrial or intellectual property.

2. In contrast to article 33 (2) in respect of the lack of conformity of the goods and article 40 (2) *(a)* in respect of third-party claims based on industrial or intellectual property, article 39 holds the seller liable to the buyer even if the buyer knew or could not have been unaware of the third-party right or claim, unless the buyer agreed to take the goods

[1] For a discussion of failure to give notice in relation to the passing of risk, see paragraph 3 of the commentary on article 82 and example 82B.

[2] For a discussion of the extent to which the buyer ought to have discovered a lack of conformity of the goods by the examination required by article 36, see paragraph 3 of the commentary on that article.

[3] Article 34 (2) provides that the seller is liable for any lack of conformity of the goods which occurs after the delivery date if that lack of conformity is in breach of an express guarantee.

subject to that right or claim. Such an agreement will often be expressed, but it may also be implied from the facts of the case.

3. The seller has breached his obligation not only if the third party's claim is valid, i.e., if the third party has a *right* in or to the goods; the seller has also breached his obligation if a third party makes a *claim* in respect of the goods. The reason for this rule is that once a third party has made a claim in respect of the goods, until the claim is resolved the buyer will face the possibility of ligitation with and potential liability to the third party. This is true even though the seller can assert that the third-party claim is not valid or a good faith purchaser can assert that, under the appropriate law applicable to his purchase, he buys free of valid third-party claims, i.e., that *possession vaut titre*. In either case the third party may commence litigation that will be time-consuming and expensive for the buyer and which may have the consequence of delaying the buyer's use or resale of the goods. It is the seller's responsibility to remove this burden from the buyer.

4. This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of the goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous.[1] If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim[2] or the buyer can exercise his rights as set out in article 41.

5. Third-party rights and claims to which article 39 is addressed include only rights and claims which relate to property in the goods themselves by way of ownership, security interests in the goods, or the like. Article 39 does not refer to claims by the public authorities that the goods violate health or safety regulations and may not, therefore, be used or distributed.[3]

Notice, paragraph (2)

6. Paragraph (2) requires the buyer to give the seller a notice similar to the notice required by article 37 (1) in respect of goods which do not conform to the contract. If this notice is not given whithin a reasonable time after the buyer became aware or ought to have become aware of the third-party right or claim, the buyer does not have the right to rely on the provisions of paragraph (1).

Relationship to lack of conformity of the goods

7. In some legal systems the seller's obligation to deliver goods free from the right or claim of any third party is part of the obligation to deliver goods which conform to the contract. However, in this Convention the two obligations are independent of each other.

8. As a consequence, those provisions in this Convention which apply to the seller's obligation to deliver goods which conform to the contract do not apply to the seller's obligation to deliver goods free from the right or claim of any third party under article 39. Those provisions are:

— article 33, Conformity of the goods
— article 34, Seller's liability for lack of conformity
— article 35, Cure of lack of conformity prior to date for delivery
— article 37, Notice of lack of conformity
— article 38, Seller's knowledge of lack of conformity
— article 42 (2), Buyer's right to require performance (paragraph (2) deals with delivery of substitute goods)
— article 46, Reduction of the price
— article 47, Partial non-performance.

[1] Cf. article 62 on the right of a party suspend his performance when he has reasonable grounds to believe that the other party will not perform a substantial part of his obligation.

[2] Although the seller may ultimately free the goods from the third person's claim by successful litigation, this could seldom be accomplished within a reasonable time from the buyer's point of view. When it cannot, the seller must either replace the goods, induce the third person to release the claim as to the goods or provide the buyer with indemnity adequate to secure him against any potential loss arising out of the claim.

[3] If the goods delivered are subject to such restrictions, there may be a breach of the sellers's obligations under article 33 (1) *(a)* or *(b)*.

Article 40

[Third party claims based on industrial or intellectual property]

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

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

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

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

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

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

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

PRIOR UNIFORM LAW

None.

Commentary

1. Third-party claims based on industrial and intellectual property raise somewhat different problems than do other third-party claims.[1] Therefore, such claims are considered specifically in article 40.

Claims for which seller is liable, paragraph (1)

2. Article 40 provides that the seller is liable to the buyer if a third-party has a right or claim in respect of the goods based on industrial or intellectual property. The reasons for this rule and the consequences of it are the same as those described in paragraphs 3 and 4 of the commentary to article 39.

3. It appears to be the general rule in most, if not all, legal systems that the seller is obligated to deliver goods free from any right or claim of any third party based on industrial or intellectual property.[2] In the

[1] In current usage the term "intellectual property" is usually understood to include "industrial property." See, Convention Establishing the World Intellectual Property Organization (Stockholm 14 July 1967), article 2 (viii). Nevertheless, it was thought to be preferable to use the term "industrial and intellectual property", rather than "intellectual property", in order to leave no question as to whether third-party claims based on, *inter alia*, an alleged infringement of a patent were covered by article 40 of this Convention.

[2] The exception to the seller's liability in article 40 (2) *(b)* of this Convention is found in at least some legal systems.

context of a domestic sale, this rule is appropriate. The producer of the goods should be ultimately responsible for any infringement of industrial or intellectual property rights in the country within which he is both producing and selling. A rule that places the liability on the seller allows for this liability ultimately to be placed on the producer.

4. It is not as obvious that the seller of goods in an international trade transaction should be liable to the buyer in the same degree for all infringements of industrial and intellectual property rights. In the first place, the infringement will almost always take place outside the seller's country and, therefore, the seller cannot be expected to have as complete knowledge of the status of industrial and intellectual property rights which his goods might infringe as he would have in his own country. In the second place, it is the buyer who will decide to which countries the goods are to be sent for use or resale. This decision may be made either before or after the contract of sale is concluded. It will even be the case that the buyer's subpurchasers may take the goods to a third country for use.

5. Paragraph (1), therefore, limits the seller's liability to the buyer for infringements of the industrial or intellectual property rights of third parties. This limitation is achieved by specifying which industrial or intellectual property laws are relevant in determining whether the seller has breached his obligation to supply goods free from the industrial or intellectual property rights or claims of a third party. The seller breaches his obligation under the Convention if a third party has industrial or intellectual property rights or claims under the law of a State where the goods were to be resold or used if such resale or use was contemplated by the parties at the time of the conclusion of the contract. In all other cases the relevant law is the law of the State where the buyer has his place of business.[3] In either case, the seller is in a position to ascertain whether any third party has industrial or intellectual property rights or claims pursuant to the law of that State in respect of the goods he proposes to sell.

6. Paragraph (1) introduces an additional limitation on the liability of the seller in that the seller is liable to the buyer only if at the time of the conclusion of the contract the seller knew or could not have been unaware of the existence of the third-party claim. The seller "could not have been unaware" of the third-party claim if that claim was based on a patent application or grant which had been published in the country in question. However, for a variety of reasons it is possible for a third party to have rights or claims based on industrial or intellectual property even though there has been no publication. In such a situation, even if the goods infringe the third party's rights, article 40 (1) provides that the seller is not liable to the buyer.

7. It should be noted that paragraph (1) does not limit any rights which the third party may have against either the buyer or the seller. These rights would follow from the law of industrial or intellectual property of the country in question. Paragraph (1) is limited to providing that it is the buyer, rather than the seller, who must bear any loss arising out of the existence of third-party rights of which the seller could not have been aware at the time of the conclusion of the contract.

8. If the parties did contemplate that the goods would be used or resold in a particular State, it is the law of that State which is relevant even if the goods are in fact used or resold in a different State.

Limitations on sellers's liability, paragraph (2)

9. Article 40 (2) *(a)*, like article 33 (2) in respect of lack of conformity of the goods, provides that the seller is not liable to the buyer if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the third party's right or claim. It differs from article 39 (1) which exempts the seller from liability only if the buyer has agreed to take the goods subject to the third party's right or claim.

10. Article 40 (2) *(b)* also exempts the seller from liability to the buyer if the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer. In such a case it is the buyer, not the seller, who has taken the initiative to produce or make available the goods which infringe on the third-party's rights and, therefore, who should bear the responsibility. However, a seller who knows or could not be unaware that the goods as ordered would or might infringe on a third-party's rights based on industrial or intellectual property may have an obligation under other doctrines of law to notify the buyer of such possible infringement.

Notice, paragraph (3)

11. The notice requirement in paragraph (3) is identical to that found in article 39 (2) and similar to that in article 37 (1).

Relationship to lack of conformity of the goods

12. For the relationship of this article to the consequences of the seller's failure to deliver goods which conform to the contract, see paragraphs 7 and 8 of the commentary to article 39.

SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

Article 41

[Buyer's remedies in general: claim for damages; no period of grace]

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

(a) exercise the rights provided in articles 42 to 48;

(b) claim damages as provided in articles 70 to 73.

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

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

PRIOR UNIFORM LAW

ULIS, articles 24, 41, 51, 52 and 55.

Commentary

1. Article 41 serves both as an index to the remedies available to the buyer if the seller fails to perform any of his obligations under the contract and this Convention and as the source for the buyer's right to claim damages.

2. Article 41 (1) *(a)* provides that in case of the seller's breach, the buyer may "exercise the rights provided in articles 42 to 48". The substantive conditions under which those rights may be exercised are set forth in the articles cited.

3. In addition, article 41 (1) *(b)* provides that the buyer may "claim damages as provided in articles 70 to 73" "if the seller fails to perform any of his obligations under the contract and this Convention." In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfill his obligations. Articles 70 to 73, to which article 41 (1) *(b)* refers, do not provide the substantive conditions as to whether the claim for damages can be exercised but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the seller. First , all the seller's obligations are brought together in one place without the confusion generated by the complexities of repetitive remedial provisions. This makes it easier to understand what the seller must do, that which is of prime interest to merchants. Second, prob-

[3] The criteria for determining where the buyer has his place of business are set out in article 9.

lems of classification are reduced with a single set of remedies. Third, the need for complex cross referencing is lessened.

5. Paragraph (2) provides that a party who resorts to any remedy available to him under the contract or this Convention is not thereby deprived of the right to claim any damages which he may have incurred.

6. Paragraph (3) provides that if a buyer resorts to a remedy for breach of contract, no court or arbitral tribunal may delay the exercise of that remedy by granting a period of grace either before, at the same time as, or after the buyer has resorted to the remedy. The reasons for this provision are discussed in paragraphs 3—5 of the commentary to article 43. Such a provision seems desirable in international trade.

Article 42

[Buyer's right to require performance]

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

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

PRIOR UNIFORM LAW

ULIS, articles 24 to 27, 30, 31, 42, 51 and 52.

Commentary

1. Article 42 describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed.

General rule, paragraph (1)

2. Paragraph (1) recognizes that after a breach of an obligation by the seller, the buyer's principal concern is often that the seller perform the contract as he originally promised. Legal actions for damages cost money and may take a considerable period of time. Moreover, if the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true if alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.

3. Therefore, paragraph (1) grants the buyer the right to require the seller to perform the contract. The seller must deliver the goods or any missing part, cure any defects or do any other act necessary for the contract to be performed as originally agreed.

4. In addition to the right to require performance of the contract, article 41 (2) ensures that the buyer can recover any damages he may have suffered as a result of the delay in the seller's performance.

5. It may at times be difficult to know whether the buyer has made demand that the seller perform under this article or whether the buyer has voluntarily modified the contract by accepting late performance pursuant to article 27.

6. The application of paragraphs 4 and 5 of this commentary can be illustrated as follows:

Example 42A: When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller "Your failure to deliver on 1 July as promised may not be too serious for us but we certainly will need the goods by 15 July." Seller subsequently delivered the goods on 15 July. It is difficult to tell whether Buyer's statement was a demand for performance by 15 July or a modification of the contract delivery date from 1 July to 15 July. If it is interpreted as a demand for performance, Buyer can recover any damages he may have suffered as a result of the late delivery. If Buyer's statement is interpreted as a modification of the delivery date, Buyer could receive no damages for late delivery.

7. In order for the buyer to exercise the right to require performance of the contract, he must not have resorted to a remedy which is inconsistent with that right, e.g. by declaring the contract avoided under article 45 or by declaring a reduction of the price under article 46.

8. The style in which article 42 in particular and Section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief.[1] However, these two different styles of legislative drafting are intendend to achieve the same result. Therefore, when article 42 (1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

9. Although the buyer has a right to the assistance of a court or arbitral tribunal to enforce the seller's obligation to perform the contract, article 26 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this Convention, it is not required to enter such a judgement in a case arising under this Convention, even though the buyer had a right to require the seller's performance under article 42. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 42 are met.[2]

10. Among the other means which may be available to a buyer to enforce the seller's obligation to perform the contract would be in a clause in the sales contract that if the seller fails to perform his obligations in certain respects, such as a failure to deliver on time, the seller must pay the buyer a specific sum of money. Such a clause, sometimes referred to as a "liquidated damages clause" and sometimes as a "penalty clause," can serve both the function of estimating the damages which the buyer would suffer as a cause of the breach so as to ease the problems of proof and of creating a penalty sufficiently large to reduce the likelihood that the seller will fail to perform. All legal systems appear to recognize the validity and social utility of a clause which estimates future damages, especially where proof of actual damage would be difficult. However, while some legal systems approve of the use of a "penalty clause" to encourage performance of the principal obligation, in other legal systems such a clause is invalid. Article 42 does not have the effect of making such clauses valid in those legal systems which do not otherwise recognize their validity.[3]

11. Subject to the rule in paragraph (2) relating to the delivery of substitute goods, this article does not allow the seller to refuse to perform on the grounds that the non-conformity was not substantial or that performance of the contract would cost the seller more than it would benefit the buyer. The choice is that of the buyer.

Substitute goods, paragraph (2)

12. If the goods which have been delivered do not conform to the contract, the buyer may want the seller to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably

---

[1] United Kingdom: Sale of Goods Act 1893, sect. 52 (in part). "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

United States of America: Uniform Commercial Code, sect. 2-716 (1). "Specific performance may be decreed where the goods are unique or in other proper circumstances."

[2] See also paragraph 3 of the commentary to article 26.

[3] Article 4 provides in part that "this Convention is not concerned with . . . the validity of the contract or any of its provisions . . ."

greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice under article 37 or within a reasonable time thereafter."

13. If the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller. Therefore, article 67 (1) provides that, subject to three exceptions set forth in article 67 (2), "the buyer loses his right . . . to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

Buyer's right to remedy the lack of conformity

14. In place of requesting the seller to perform pursuant to this article, the buyer may find it more advantageous to remedy the defective performance himself or to have it remedied by a third party. Article 73, which requires the party who relies on a breach of contract to mitigate the loss, authorizes such measures to the extent that they are reasonable in the circumstances.

Article 43

[Fixing of additional period for performance]

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

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

PRIOR UNIFORM LAW

ULIS, articles 27 (2), 31 (2), 44 (2) and 51.

Commentary

1. Article 43 states the right of the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations and specifies one of the consequences of his having fixed such a period.

Fixing additional period, paragraph (1)

2. Article 43 is a companion of article 42 which states the right of the buyer to require performance of the contract by the seller and which anticipates the aid of a court or arbitral tribunal in enforcing that right. If the seller delays performing the contract, the judicial procedure for enforcement may require more time than the buyer can afford to wait. It may consequently be to the buyer's advantage to avoid the contract and make a substitute purchase from a different supplier. However, it may not be certain that the seller's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 45 (1) *(a)*.

3. Different legal systems take different attitudes towards the right of buyer to avoid the contract because of the seller's failure to deliver on the contract delivery date. In some legal systems the seller's failure to deliver on the contract delivery date normally authorizes the buyer to avoid the contract, However, in a given case the court or tribunal may decide that the buyer may not avoid the contract at that time because the failure to deliver on the contract delivery date was either not sufficiently serious or the buyer had waived his right to prompt delivery. In other legal systems the seller can request a period of grace from a court or tribunal which, in effect, establishes a new delivery date.[1] In still other legal systems the general rule is that late delivery of the goods does not authorize the buyer to avoid the contract unless the contract provided for such a remedy or unless, after the seller's breach, the buyer specifically fixed a period of time within which the seller had to deliver the goods.

4. This Convention specifically rejects the idea that in a commercial contract for the international sale of goods the buyer may, as a general rule, avoid the contract merely because the contract delivery date has passed and the seller has not as yet delivered the goods. In these circumstances the buyer may do so if, and only if, the failure to deliver on the contract delivery date causes him substantial detriment and the seller foresaw or had reason to foresee such a result.[2]

5. As a result of this rule in this Convention there was no reason to allow the seller to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties. Therefore, article 27 (3) provides that "No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract."

6. Although the buyer can declare the contract avoided in any case in which the delay in delivery constitutes a fundamental breach, this will not always be a satisfactory solution for him. Once the seller is late in performing, the buyer may be legitimately doubtful that the seller will be able to perform by the time that performance will be essential for the buyer. This situation is similar to the problems raised by an anticipatory breach under articles 62, 63 and 64. Furthermore, in most contracts for the sale of goods on the point of time at which the detriment to the buyer would become sufficiently substantial to constitute a fundamental breach would be somewhat imprecise. Therefore, article 43 (1) authorizes the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations. This may entail the delivery of all or part of the goods, the remedy of any lack of conformity by repair of the goods of the delivery of substitute goods or the performance of any other act which would constitute performance of the seller's obligations. However, article 45 (1) *(b)* allows the buyer to declare the contract avoided only "if the seller has not delivered the goods" within the additional period of time.

7. The procedure authorized by article 43 (1) of fixing an additional period of time after which the buyer can declare the contract avoided if the goods have not been delivered would have the danger that a buyer could turn an inconsequential delay which would not justify declaring the contract avoided for fundamental breach under article 45 (1) *(a)* into a basis for declaring the contract avoided under article 45 (1) *(b)*. Therefore, article 43 (1) says that the additional period must be "of reasonable length". This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. "within one month from today"). A general demand by the buyer that the seller perform or that he perform "promptly" or the like is not a "fixing" of a period of time under article 43 (1).

8. It should be pointed out that, although the procedure envisaged by article 43 (1) has a certain parentage in the German procedure of *"Nachfrist"* and the French procedure of a *"mise en demeure,"* in its current form it does not partake of either one. In particular, the procedure envisaged by article 43 (1) is not mandatory and need not be used in order to declare the contract avoided if the delay in performance amounts to a fundamental breach.

Buyer's other remedies, paragraph (2)

9. In order to protect the seller who may be preparing to perform the contract as requested by the buyer, perhaps at considerable expense, during the additional period of time of reasonable length the buyer may not resort to any remedy for breach of contract, unless the

[1] Cf. article 41 (3). See para. 5 below.

[2] Article 23, which defines "fundamental breach", and article 45 (1) *(a)*, which authorizes the buyer to declare the contract avoided for fundamental breach.

buyer has received notice from the seller that he will not comply with the request. Once the additional period of time has expired without performance by the seller, the buyer may not only avoid the contract under article 45 (1) *(b)* but may resort to any other remedy he may have.

10. In particular, the buyer may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the seller has performed his obligations within the additional period of time fixed by the buyer.

Article 44

[Seller's right to remedy failure to perform]

(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

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

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

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

PRIOR UNIFORM LAW

ULIS, article 44 (1).

Commentary

1. Article 44 regulates the right of the seller to remedy any failure to perform his obligations under the contract and this Convention after the date for delivery. It is a companion article to article 35 which regulates the right of the seller to remedy any failure to perform his obligations prior to the date for delivery and to articles 42 and 43 which regulate the buyer's right to require performance. The date for delivery is established in accordance with article 31.

General rule, paragraph (1)

2. Paragraph (1) permits the seller to remedy any failure to perform his obligations after the date for delivery subject to three conditions: (1) the seller must be able to perform without such delay as will amount to a fundamental breach of contract, (2) the seller must be able to perform without causing the buyer unreasonable inconvenience or unreasonable uncertainty of reimbursement by the seller of expenses advanced by the buyer, and (3) the seller must exercise his right to remedy his failure to perform prior to the time the buyer has declared the contract avoided.

3. The seller may remedy his failure to perform under this article even though the failure to perform amounts to a fundamental breach, so long as that fundamental breach was not a delay in performance. Thus, even if the failure of the goods to operate at the time of delivery constituted a fundamental breach of contract, the seller would have the right to remedy the non-conformity in the goods by repairing or replacing them, unless the buyer terminated the seller's right by declaring the contract avoided.

4. Once the seller has remedied his failure to perform or has remedied it to the extent that it no longer constitutes a fundamental breach of contract, the buyer may no longer declare the contract avoided.

5. In some cases the failure of the goods to operate or to operate in accordance with the contract specifications would constitute a fundamental breach only if that failure was not remedied within an appropriate period of time. Until the passage of that period of time, the buyer could not preclude the seller from remedying the non-conformity by declaring the contract avoided.

6. The rule that the seller may remedy his failure to perform only if he can do so without such delay as would amount to a fundamental breach of contract applies to two different situations: where there is a complete or substantial failure to deliver the goods and where the goods as delivered, have such a non-conformity that either at the moment of delivery, or at some later time, the condition of those goods, if not remedied, would constitute a fundamental breach of contract. The seller no longer has the right to remedy the failure to perform after the delay amounts to a fundamental breach even if the buyer has not as yet declared the contract avoided.

7. Of course, even if the seller no longer has the right to remedy his failure to perform under this article, the parties can agree to his doing so.

8. If the seller has failed to deliver only a small portion of the goods or there is such a minor non-conformity in the goods that the seller's failure will never amount to a fundamental breach of contract, the seller's right to remedy his failure is limited only by the provision that he cannot remedy the failure if doing so would cause unreasonable inconvenience to the buyer or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

9. At some point of time the buyer must be able to use or resell the goods free of the spector that the seller will claim the right to remedy his failure to perform. It is clear from the text of article 44 (1) that the simple fact that the buyer has declared the price reduced or claimed damages is not enough to cut off the seller's right to remedy his failure to perform.[1] However, the fact that the buyer has declared the price reduced or claimed damages may be a factor in determining whether it would now be unreasonably inconvenient to the buyer for the seller to remedy his failure to perform.

10. It might also be unreasonably inconvenient to the buyer if the seller needed extensive access to the buyer's place of business in order to remedy the failure to perform.

11. Article 44 (1) recognizes that the buyer may have to incur certain expenses in order for the seller to remedy his failure to perform. This in itself does not give the buyer a reason to refuse to allow the seller to remedy his failure to perform. However, if the amount of expenses incurred prior to reimbursement by the seller would be an unreasonable inconvenience to the buyer or if there was an unreasonable uncertainty that the buyer would be reimbursed for those expenses, the buyer may refuse to allow the seller to remedy his failure to perform.

12. The seller's right to remedy his failure to perform under article 44 (1) is a strong right in that it goes against the terms of the contract. For instance, if the seller has not delivered by the contract delivery date of 1 June but delivers on 15 June, he has cured his failure to deliver but he has not and cannot cure his failure to deliver by 1 June. Nevertheless, article 44 (1) authorizes him to remedy his failure in this manner if he can do so before the delay amounts to a fundamental breach.

[1] The fact that the buyer has declared a reduction of the price pursuant to article 46 will not prevent the seller from curing the defect since the remedy of price reduction is expressly subject to the seller's right to cure under article 44 (1). The buyer's right to claim damages is expressly preserved in article 44 (1) (as it is in article 35) so a claim for damages, by itself, will not cut off the seller's right to cure. The original damage claim will, of course, be modified by the cure.

Notice by the seller, paragraphs (2) and (3)

13. If the seller intends to cure the non-conformity he will normally so notify the buyer. He will also often inquire whether the buyer intends to exercise his remedies of avoiding the contract or declaring the price to be reduced or whether he wishes, or will accept, cure by the seller.

14. The first sentence of article 44 (2) makes it clear that the seller must indicate the time period within which the proposed cure will be effected. If there is no indication of this period but merely an offer to cure, the seller can draw no conclusions nor derive any rights from a failure by the buyer to respond.

Risk of loss or error in transmission, paragraph (4)

15. The seller in breach bears the risk of loss or error in transmission of a request or notice under articles 44 (2) and 44 (3). However, the reply by the buyer is governed by the rule in article 25, i.e. if it is given by "means appropriate in the circumstances" it is effective even if it does not arrive or is delayed or contains errors in transmission.

16. Paragraph (2) provides that if the seller sends the buyer such a notice, the buyer must reply within a reasonable time. If the buyer does not reply, the seller may perform and the buyer may not resort to any remedy inconsistent with performance by the seller during the period of time the seller indicated would be necessary to cure the defect. Even if the seller's notice said only that he would perform the contract within a specific period of time, paragraph (3) provides that the buyer must make known his decision or else he will be bound by the terms of the seller's notice unless he can show that for some reason the seller's notice should not be treated as including a request to the buyer to respond.

Article 45

[Buyer's right to avoid contract]

(1) The buyer may declare the contract avoided:

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

(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed.

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

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

(b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

PRIOR UNIFORM LAW

ULIS, articles 26, 30, 32, 43, 44 (2), 51, 52 (3), 52 (4) and 55 (1).

Commentary

1. Article 45 describes the buyer's right to declare the contract avoided. The seller's right to declare the contract avoided is described in article 60.

Declaration of avoidance

2. The contract is avoided as a result of the seller's breach only if "the buyer . . . declare[s] the contract avoided". This narrows the rule from that found in articles 26 and 30 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the buyer. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 45 of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 24 provides that "a declaration of avoidance of the contract is effective only if made by notice to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 25.

Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the buyer may declare the contract avoided is where the failure by the seller to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 23.

5. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under article 44.

6. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time.

7. The rule that the buyer can normally avoid the contract only if there has been a fundamental breach of contract is not in accord with the typical practice under CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have often been able to refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance.

Seller's delay in performance, subparagraph (1) (b)

8. Subparagraph (1) *(b)* further authorizes the buyer to declare the contract avoided in one restricted case. If the seller has not delivered the goods and the buyer has fixed an additional period of time of reasonable length for the seller to perform pursuant to article 43, the buyer can avoid the contract if the seller "has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed".[1]

Loss or suspension of right to avoid, paragraph (2)

9. Article 45 (2) provides that where the seller has made delivery, the buyer will lose his right to declare the contract avoided if he does not make the declaration within a specified period of time. The buyer does not lose his right to declare the contract avoided under this provision until all the goods have been delivered.

10. If the fundamental breach on which the buyer relies to declare the contract avoided is the late delivery of the goods, article 45 (2) *(a)* provides that once the seller has made delivery, the buyer loses his right to declare the contract avoided if he has not done so within a reasonable time after he becomes aware that delivery has been made.

11. If the seller has made delivery but there is a fundamental breach of the contract in respect of some obligation other than late delivery,

[1] However, see article 47 (2) and the commentary thereon.

such as the non-conformity of the goods to the contract, article 45 (2) *(b)* provides that the buyer loses his right to declare the contract avoided if he has not done so wihin a reasonable time after he knew or ought to have known of the breach.[2]

12. Article 45 (2) *(b)* may also take away the right of the buyer to declare the contract avoided in cases where he has fixed an additional period for performance under article 43 (1). If the seller performs after the additional period fixed pursuant to article 43 or if he performs after he has declared that he would not perform within that additional period of time, the buyer loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of that additional period or within a reasonable time after the seller has declared that he would not perform within that additional period of time.

13. Since the buyer does not lose his right to declare the contract avoided under article 45 (2) until all the goods have been delivered, under this provision all the instalments in an instalment contract must be delivered before the buyer loses the right to declare the contract avoided. However, under article 64 (2) the buyer's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the seller which justifies the declaration of avoidance.

14. In addition to article 45 (2), several other articles provide for the loss or suspension of the right to declare the contract avoided.

15. Article 67 (1) provides that "the buyer loses his right to declare the contract avoided . . . if it is impossible for him to make restitution of the goods substantially in the condition in which he received them" unless the impossibility is excused for one of the three reasons listed in article 67 (2).

16. Article 37 provides that a buyer loses his right to rely on a lack of conformity of the goods, including the right to avoid the contract, if he does not give the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it and at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

17. If the seller wishes to cure any defect after the delivery date, the buyer's right to avoid the contract may be suspended for the period of time indicated by the seller as necessary to effect the cure.[3]

Right to avoid prior to the date of delivery

18. For the buyer's right to avoid the contract prior to the contract date of delivery, see articles 63 and 64 and the commentaries thereon.

Effects of avoidance

19. The effects of avoidance are described in articles 66 to 69. The most significant consequence of avoidance for the buyer is that he is no longer obligated to take delivery and pay for the goods. However, avoidance of the contract does not terminate either the seller's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.[4] Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

Article 46

[Reduction of the price]

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

PRIOR UNIFORM LAW

ULIS, article 46.

Commentary

1. Article 46 states the conditions under which the buyer can declare the price to be reduced if the goods do not conform with the contract.

2. Under article 33 (1) goods do not conform with the contract, and are therefore subject to reduction of the price, unless they are of the quantity, quality and description required by the contract, are contained or packaged in the manner required by the contract, and meet the four specific requirements set out in article 33 (1) *(a)* to *(d)*. Goods may conform with the contract even though they are subject to the right or claim of a third party under article 39 or 40.

3. The remedy of reduction of the price is a remedy which is not known in some legal systems. In those legal systems it would be natural to see this remedy as a form of damages for non-performance of the contract. However, although the two remedies lead to the same result in some situations, they are two distinct remedies to be used at the buyer's choice.

4. The remedy of reduction of the price also leads to results which are similar to those which would result from a partial avoidance of the contract under article 47.

5. First, article 46 itself makes it clear that the price can be reduced by the buyer even though he has already paid the price.[1] Article 46 does not depend on the buyer's ability to withhold future sums due. Second, even if the seller is excused from paying damages for his failure to perform the contract by virtue of article 65, the buyer may still reduce the price if the goods do not conform with the contract. Third, the right to reduce the price is not affected by the limitation to which a claim for damages is subjected under article 70 i.e. that the amount of damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of the contract. Fourth, similar to that which prevails in respect of avoidance, the amount of monetary relief which is granted the buyer is measured in terms of the contract price which need not be paid (or which can be recovered from the seller if already paid), and not in terms of monetary loss which has been caused to the buyer. This can have an important effect on the calculation of monetary relief where there has been a change in price for the goods between the time at which the contract was concluded and the time the goods were delivered.

6. The comparison between the remedy of reduction of the price and avoidance of the contract is obvious if the lack of conformity of the goods consists of the delivery of less than the agreed upon quantity. This aspect of the rule can be illustrated by the following examples:

Example 46A: Seller contracted to deliver 10 tons of No. 1 corn at the market price of $ 200 a ton for a total of $ 2,000. Seller delivered only 2 tons. Since such an extensive short delivery constituted a fundamental breach, Buyer avoided the contract, took none of the corn and was not obligated to pay the purchase price.

Example 46B: Under the same contract as in example 46A, Seller delivered 9 tons. Buyer accepted the 9 tons and reduced the price by 10 per cent, paying $ 1,800.

[2] See article 36.
[3] See para. 16 to the commentary on article 44.
[4] Article 66 (1).

[1] In this respect article 46 follows the same policy as does article 66 (2). It is also true, of course, that a claim for damages does not depend on the buyer's ability to withhold future sums due.

7. The calculation is the same if the non-conformity of the goods delivered relates to their quality rather than to their quantity. This can be illustrated by the following example:

Example 46C: Under the same contract as in example 46A, Seller delivered 10 tons of No. 3 corn instead of 10 tons of No. 1 corn as required. At the time of contracting the market price for No. 3 corn was $ 150 a ton. If the delivery of No. 3 corn in place of No. 1 corn constituted a fundamental breach of the contract, Buyer could avoid the contract and not pay the contract price. If the delivery of No. 3 corn did not constitute a fundamental breach or if Buyer did not choose to avoid the contract, Buyer could declare the reduction of the price from $ 2,000 to $ 1,500.

8. Although the principle is simple to apply in a case where, as in example 46C, the non-conformity as to quality is such that the goods delivered have a definite market price which is different from that for the goods which should have been delivered under the contract, it is more difficult to apply to other types of non-conformity as to quality. For instance:

Example 46D: Seller contracted to furnish decorative wall panels of a certain design for use by Buyer in an office building being constructed by Buyer. The wall panels delivered by Seller were of a less attractive design than those ordered. Buyer has the right to "declare the price . . . reduced in the same proportion as the value that the goods actually delivered would have had at the time of conclusion of the contract bears to the value that conforming goods would have had at that time".

9. In example 46D there may be no easy means of determining the extent to which the value of the goods was diminished because of the non-conformity, but that does not affect the principle. It should be noted that it is the buyer who makes the determination of the amount by which the price s reduced. However, if the seller disputes the calculation, the matter can finally be settled only by a court or an arbitral tribunal.

10. It should also be noted that the calculation is based on the extent to which the value of the goods "at the time of the conclusion of the contract" has been diminished. The calculation of the reduction of the price does not take into consideration events which occurred after this time as does the calculation of damages under articles 70 to 72. In the case envisaged in example 46D this would normally cause no difficulties because the extent of lost value would probably have been the same at the time of the conclusion of the contract and at the time of the non-conforming delivery. However, if there has been a price change in the goods between the time of the conclusion of the contract and the time of the non-conforming delivery, different results are achieved if the buyer declares the price reduced under this article rather than if the buyer claims damages. These differences are illustrated by the following examples:

Example 46E: The facts are the same as in example 46C. Seller contracted to deliver 10 tons of No. 1 corn at the market price of $ 200 a ton for a total of $ 2,000. Seller delivered 10 tons of No. 3 corn. At the time of contracting the market price for No. 3 corn was $ 150 a ton. Therefore, if Buyer declared a reduction of the price, the price would be $ 1,500. Buyer would in effect have received monetary relief of $ 500.

However, if the market price had fallen in half by the time of delivery of the non-conforming goods so that No. 1 corn sold for $ 100 a ton and No. 3 corn sold for $ 75 a ton, Buyer's damages under article 70 would have been only $ 25 a ton or $ 250. In this case it would be more advantageous to Buyer to reduce the price under article 46 than to claim damages under article 70.

Example 46F: If the reverse were to happen so that at the time of delivery of the non-conforming goods the market price of No. 1 corn had doubled to $ 400 a ton and that of No. 3 corn to $ 300 a ton, Buyer's damages under article 70 would be $ 100 a ton or $ 1,000. In this case it would be more advantageous to Buyer to claim damages under article 70 than to reduce the price under article 46.

11. The results in examples 46E and 46F are caused by the fact that the remedy of reducing the price has a similar effect to a partial avoidance of the contract. The same result occurs in even greater degree if the buyer totally avoids the contract as is illustrated in the following example:

Example 46G: In example 46E it was shown that if the market price for No. 1 corn had dropped in half from $ 200 a ton to $ 100 a ton and the price of No. 3 corn had dropped from $ 150 a ton to $ 75 a ton, Buyer could retain the No. 3 corn and either receive $ 250 in damages or reduce the price by $ 500. If the delivery of No. 3 corn in place of No. 1 corn amounted to a fundamental breach of contract and Buyer avoided the contract pursuant to article 45 (1) *(a)*, he could purchase in replacement 10 tons of No. 3 corn for $ 750, i.e., for $ 1,250 less than the contract price. However, if he declared the contract avoided, he would be more likely to purchase 10 tons of No. 1 corn for $ 1,000, i.e., for an amount of $ 1,000 less than the contract price.

12. Except for example 46D, all of the examples above have assumed a fungible commodity for which substitute goods were freely available thereby making it feasible for the buyer to avoid the contract, providing a ready market price as a means of measuring damages, and precluding any additional damages by way of lost profits or otherwise. If there is not such a ready market for the goods, the problems of evaluation are more difficult and the possibility of additional damages is greater. These factors do not change the means by which article 46 works but they may change the relative advantage to the buyer of one remedy rather than another.

13. Article 41 (2) makes it clear that the buyer can claim damages in addition to declaring the reduction of the price in those cases where reducing the price does not give as much monetary relief as would an action for damages. A buyer might wish to combine the two remedies in a case like example 46F if there was some possibility that damages could not be recovered, either because there was a question as to whether the seller was exempted from damages (but not from reduction of the price) under article 65 or because there was a question as to whether the damages had been foreseeable under article 70. A declaration of reduction of the price would give the buyer some immediate relief while the rest of his claim for damages was subject to negotation or litigation. More likely, however, would be the case in which the buyer had suffered additional expenses incurred as a result of the breach.[2]

Limitation on right to reduce price

14. The buyer's right to declare a reduction in the price is expressly subject to the seller's right to remedy any failure to perform his obligations pursuant to article 44.[3] If the seller subsequently remedies his failure to perform or is not allowed by the buyer to remedy that failure, the "declaration of reduction of the price is of no effect".

Article 47

[Partial non-performance]

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

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

PRIOR UNIFORM LAW

ULIS, article 45.

Commentary

1. Article 47 states the buyer's remedies when the seller fails to perform only a part of his obligations.

[2] See example 70D.

[3] See paras. 2 to 12 of the commentary to article 44 for a discussion of this rule.

Remedies in respect of the non-conforming part, paragraph (1)

2. Paragraph (1) provides that if the seller has failed to perform only a part of his obligations under the contract by delivering only a part of the goods or by delivering some goods which do not conform to the contract, the provisions of articles 42 to 46 apply in respect of the quantity which is missing or which does not conform to the contract. In effect, this paragraph provides that the buyer can avoid a part of the contract under article 45. This rule was necessary because in some legal systems a party cannot avoid only a part of the contract. In those legal systems the conditions for determining whether the contract can be avoided at all must be determined by reference to the entire contract. However, under article 47 (1) it is clear that under this Convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part.

Remedies in respect of the entire contract, paragraph (2)

3. Paragraph (2) provides that the buyer may avoid the entire contract "only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract". Although this provision reiterates the rule which would otherwise be applied under article 45 (1) *(a)*, it is useful that it be made clear.

4. The use of the word "only" in article 47 (2) also has the effect of negating the implication which might have been thought to flow from article 45 (1) *(b)* that the entire contract could be avoided on the grounds that the seller failed to deliver a part of the goods within the additional period of time fixed by the buyer in accordance with article 43 even though such failure to deliver did not in itself amount to a fundamental breach of the entire contract.

Article 48

[Early delivery; delivery of excess quantity]

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

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

PRIOR UNIFORM LAW

ULIS, articles 29 and 47.

Commentary

1. Article 48 deals with two situations where the buyer may refuse to take delivery of goods which have been placed at his disposal.

Early delivery, paragraph (1)

2. Article 48 (1) deals with the situation where goods have been delivered to the buyer before the delivery date fixed pursuant to article 31. If the buyer were forced to accept these goods, it might cause him inconvenience and expense in storing them longer than anticipated. Furthermore, if the contract links the day payment is due to the day delivery is made, early delivery will force early payment with consequent interest expense. Therefore, the buyer is given the choice of taking delivery of the goods or refusing to take delivery of them when the seller delivers them prior to the delivery date.

3. The buyer's right to take delivery or to refuse to take delivery is exercisable upon the fact of early delivery. It does not depend on whether early delivery causes the buyer extra expense or inconvience.[1]

4. However, where the buyer does refuse to take delivery of the goods under article 48 (1), according to article 75 (2) he will still be bound to take possession of them on behalf of the seller if the following four conditions are met: (1) the goods have been placed at his disposal at their place of destination, (2) he can take possession without payment of the price, e.g., the contract of sale does not require payment in order for the buyer to take possession of the documents covering the goods, (3) taking possession would not cause the buyer unreasonable inconvenience or unreasonable expense, and (4) neither the seller nor a person authorized to take possession of the goods on his behalf is present at the destination of the goods.

5. If the buyer refuses to take the early delivery, the seller is obligated to redeliver the goods at the time for delivery under the contract.

6. If the buyer does take early delivery of the goods, he may claim from the seller for any damages he may have suffered unless, under the circumstances, the acceptance of early delivery amounts to an agreed modification of the contract pursuant to article 27.[2]

Excess quantity, paragraph (2)

7. Article 48 (2) deals with the situation where an excess quantity of goods has been delivered to the buyer.

8. Unless there are other reasons which justify the buyer's refusal to take delivery, the buyer must accept at least the quantity specified in the contract. In respect of the excess amount, the buyer may either refuse to take delivery or he may take delivery of some or all of it. If the buyer refuses to take delivery of the excess quantity, the seller is liable for any damages suffered by the buyer. If the buyer takes delivery of some or all of the excess quantity he must pay for it at the contract rate.

9. If it is not feasible for the buyer to reject only the excess amount, as where the seller tenders a single bill of lading covering the total shipment in exchange for payment for the entire shipment, the buyer may avoid the contract if the delivery of such an excess quantity constitutes a fundamental breach. If the delivery of the excess quantity does not constitute a fundamental breach or if for commercial reasons the buyer is impelled to take delivery of the shipment, he may claim any damages he has suffered as a result.

CHAPTER III. OBLIGATIONS OF THE BUYER

Article 49

[General obligations]

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

PRIOR UNIFORM LAW

ULIS, article 56.

Commentary

Article 49 states the principal obligations of the buyer and introduces Chapter III of Part III of the Convention. The principal obligations of the buyer are to pay the price for the goods and to take delivery of them. The buyer must carry out his obligations "as required by the contract and this Convention." Since article 5 of the Convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the Convention the buyer must fulfil his obligations as required by the contract.

[1] Nevertheless, the buyer must have a reasonable commercial need to refuse to take delivery since article 6 requires the observance of good faith in international trade.

[2] Article 48 (1) does not refer to the buyer's right to seek damages. However, the buyer's right to damages is a general right under article 41 (1) *(b)*.

SECTION I. PAYMENT OF THE PRICE

Article 50

[Obligation to pay the price]

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

PRIOR UNIFORM LAW

ULIS, article 69.

Commentary

1. Articles 50 to 55 provide a number of the details involved in the obligation of the buyer to pay the price, an obligation which is set out in article 49. In the case of article 50, it includes as part of the buyer's obligation to pay the price an obligation to take a number of preliminary actions in order to make possible the payment of the price.

2. Article 50 envisages that, as part of the buyer's obligation to pay the price, he must take the steps and comply with the formalities which may be required by the contract and by any relevant laws and regulations to enable payment to be made. These steps may include applying for a letter of credit or a bank guarantee of payment, registering the contract with a government office or with a bank, procuring the necessary foreign exchange or applying for official authorization to remit the currency abroad. Unless the contract specifically placed one of these obligations on the seller, it is the buyer who must take these steps.

3. The buyer's obligation under article 50 is limited to taking steps and complying with formalities. Article 50 does not require the buyer to undertake that his efforts will result in the issuance of a letter of credit, the authorization to procure the necessary foreign exchange or even that the price will finally be paid. Of course, under article 49 the buyer is obligated to see that the price is paid, an obligation the consequences of which he may be relieved in part by the exemption provision in article 65.

4. Nevertheless, the buyer is obligated to take all the appropriate measures to persuade the relevant Governmental authorities to make the funds available and cannot rely on a refusal by those authorities unless he has taken such measures.

5. The major significance of article 50 lies in the fact that taking such steps and complying with such formalities as may be required to enable payment to be made is considered to be a current obligation, the breach of which gives rise to remedies under articles 57 to 60, and is not considered to be "conduct in preparing to perform or in actually performing the contract", which may give rise to questions of anticipatory breach under articles 62 to 64.[1]

Article 51

[Calculation of the price]

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

PRIOR UNIFORM LAW

ULIS, article 57.

[1] The quoted words are from article 62 (1).

Commentary

1. Article 51 provides a means for the determination of the price when a contract has been validly concluded but the contract does not state a price or expressly or impliedly make provision for its determination.

2. Article 12 (1) provides that a proposal for concluding a contract is sufficiently definite so as to constitute an offer if, *inter alia*, "it . . . expressly or implicitly fixes or makes provision for determining . . . the price". Therefore, article 51 has effect only if one of the parties has his place of business in a Contracting State which has ratified or accepted this Convention as to Part III (Sales of goods) but not as to Part II (Formation of the contract) and if the law of that State provides that a contract can be validly concluded even though it does not expressly or implicitly fix or make provision for determining the price.

Time of calculation of price

3. The price to be determined by the application of article 51 is that charged at the time of the conclusion of the contract. It is the price which would presumably have been agreed upon by the parties at the time of contracting if they had agreed upon a price at that time. Moreover, if a contract had been validly concluded even without specification of the price, the article recognizes that the seller should not later be able to claim that the price was that prevailing at the time of the delivery of the goods, if that price was higher than the one the seller was charging at the time of the conclusion of the contract.

Article 52

[Price fixed by weight]

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

PRIOR UNIFORM LAW

ULIS, article 58.

Commentary

1. Article 52 supplies a convenient rule of interpretation of the contract. If the parties have not expressly or impliedly stipulated otherwise, the buyer does not pay for the weight of the packing materials.

Article 53

[Place of payment]

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

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

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

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

PRIOR UNIFORM LAW

ULIS, article 59.

Commentary

1. Article 53 provides a rule for the place at which payment of the price is to be made. Because of the importance of the question, the contract will usually contain specific provisions on the mode and place of payment. Accordingly, the rule in article 53 is expressly stated to apply

only if "the buyer is not bound to pay the price at any other particular place".[1]

2. It is important that the place of payment be clearly established when the contract is for the international sale of goods. The existence of exchange controls may make it particularly desirable for the buyer to pay the price in his country whereas it may be of equal interest to the seller to be paid in his own country or in a third country where he can freely use the proceeds of the sale.

3. This Convention does not govern the extent to which exchange control regulations or other rules of economic public order may modify the obligations of the buyer to pay the seller at a particular time or place or by a particular means. The buyer's obligations to take the steps which are necessary to enable the price to be paid are set forth in article 50. The extent to which the buyer may be relieved of liability for damages for his failure to pay as agreed because of exchange control regulations or the like is governed by article 65.[2]

Place of payment, paragraph (1)

4. Article 53 (1) *(a)* provides the primary rule that the buyer must pay the price at the seller's place of business. If the seller has more than one place of business, the place of business at which payment must be made "is that which has the closest relationship to the contract and its performance".[3]

5. If payment is to be made against the handing over of the goods or of documents, article 53 (1) *(b)* provides that payment must be made at the place where the handing over takes place. This rule will be applied most often in the case of a contract stipulation for payment against documents.[4] The documents may be handed over directly to the buyer, but they are often handed over to a bank which represents the buyer in the transaction. The "handing over" may take place in either the buyer's or the seller's country or even in a third country.

Example 53A: The contract of sale between Seller with his place of business in State X and Buyer with his place of business in State Y called for payment against documents. The documents were to be handed over to Buyer's bank in State Z for the account of Buyer. Under article 53 (1) *(b)* Buyer must pay the price at his bank in State Z.

Change of seller's place of business, paragraph (2)

6. If the seller changes his place of business at which the buyer is to make payment subsequent to the conclusion of the contract, the buyer must make payment at the seller's new place of business. However, any increase in expenses incidental to payment must be borne by the seller.

Article 54

[Time of payment; payment as condition for handing over: examination before payment]

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

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

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

PRIOR UNIFORM LAW

ULIS, articles 71 and 72.

Commentary

1. Article 54 governs the time for the buyer's payment in relation to performance by the seller.

General rule, paragraph (1)

2. Article 54 (1) recognizes that, in the absence of an agreement, the seller is not required to extend credit to the buyer. Therefore, the general rule stated in paragraph (1) is that the buyer is required to pay the price at the time the seller makes the goods available to the buyer, by placing either the goods or documents controlling their disposition at the buyer's disposal. If the buyer does not pay at that time, the seller may refuse to hand over the goods or documents.

3. The converse of this rule is that, unless otherwise agreed, the buyer ist not bound to pay the price until the seller places either the goods or documents controlling their disposition at the buyer's disposal. Furthermore, under article 54 (3), which is discussed below, the buyer is not bound to pay the price until he has had an opportunity to examine the goods.

Where the contract involves carriage of the goods, paragraph (2)

4. Paragraph (2) states a specific rule in implementation of paragraph (1) where the contract of sale involves carriage of the goods. In such a case "the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price." The goods may be so dispatched unless there is a clause in the contract providing otherwise, in particular by providing for credit.

Payment and examination of the goods, paragraph (3)

5. Paragraph (3) states the general rule that the buyer is not required to pay the price unless he has had an opportunity to examine the goods. It is the seller's obligation to provide a means for the buyer's examination prior to payment and handing over.

6. Where the contract of sale involves carriage of the goods and the seller wishes to exercise his right under article 54 (2) to ship the goods on terms whereby neither the goods nor the documents will be handed over to the buyer prior to payment, the seller must preserve the buyer's right to examine the goods. Since the buyer normally examines the goods at the place of destination,[1] the seller may be required to make special arrangements with the carrier to allow the buyer access to the goods at the destination prior to the time the goods or documents are handed over in order to allow for the buyer's examination.

7. The buyer loses the right to examine the goods prior to payment where the procedures for delivery or payment agreed upon by the parties are inconsistent with the buyer having had such an opportunity. This Convention does not set forth which procedures for delivery or payment are inconsistent with the buyer's right to examine the goods prior to payment. However, the most common example is the agreement that payment of the price is due against the handing over of the documents controlling the disposition of the goods whether or not the goods have arrived. The quotation of the price on CIF terms contains such an agreement.[2]

---

[1] This result is also reached through the operation of article 5. However, the express re-iteration of the principle emphasizes the importance that the contract will usually attach to the place of payment of the price.

[2] For the extent to which the seller may be relieved of the duty to deliver the goods if the buyer does not pay as agreed, see articles 54 (1), 60, 62, 63 and 64.

[3] Article 9 *(a)*. But see also article 53 (2) and paragraph 6 below.

[4] The documents referred to in article 53 (1) *(b)* are those which the seller is required to hand over by virtue of articles 28 and 32.

[1] See article 36 (2).

[2] Incoterms, CIF condition B. 1, provides that the buyer must accept the documents when tendered by the seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract".

8. It should be noted that since the buyer loses the right to examine the goods prior to payment of the price only if the procedures for payment or delivery "agreed upon by the parties" are inconsistent with such right, he does not lose his right to examine the goods prior to payment where the contract provides that he must pay the price against the handing over of the documents after the arrival of the goods. Since payment is to take place after the arrival of the goods, the procedure for payment and delivery are consistent with the right of examination prior to payment. Similarly, the buyer does not lose his right to examine the goods prior to payment where the seller exercises his right under article 54 (2) to dispatch the goods on terms whereby the documents controlling the disposition of the goods will be handed over to the buyer only upon the payment of the price.

9. The buyer's right to examine the goods where the contract of sale involves the carriage of the goods is illustrated by the following examples:

Example 54A: The contract of sale quoted the price on CIF terms. Therefore, it was anticipated that payment would be made in the following manner. Seller would draw a bill of exchange on Buyer for the amount of the purchase price. Seller would forward the bill of exchange accompanied by the bill of lading (along with other documents enumerated in the contract) to a collecting bank in Buyer's city. The contract provided that the bill of lading (and other documents) would be handed over to Buyer by the bank only upon the payment of the bill of exchange. Since this agreed-upon procedure for payment requires payment to be made at the time the bill of exchange is presented, often at a time the goods are still in transit, the means of payment is inconsistent with Buyer's right to examine the goods prior to payment. Therefore, Buyer did not have such a right in this case.

Example 54B: The contract of sale was not on CIF terms and made no other provision for the time or place of payment. Therefore, pursuant to the authority in article 54 (2) Seller took the same actions as in example 54A. Seller drew a bill of exchange on Buyer for the purchase price and forwarded it accompanied by the bill of lading through his bank to a collecting bank in the Buyer's city. Seller gave the collecting bank instructions that it should not hand over the bill of lading to Buyer until Buyer had paid the bill of exchange.

In this example the means of payment, though authorized by article 54 (2), were not "agreed upon by the parties" as is required by article 54 (3). Therefore, Buyer does not lose his right to examine the goods prior to paying the price, i.e., prior to paying the bill of exchange. It is Seller's obligation to assure Buyer of the possibility of examination prior to payment.

Example 54C: The contract of sale provided for payment of the price on presentation of the documents at the point of arrival of the goods but only after the arrival of the goods. In this case the procedures for delivery and payment expressly stipulated by the parties are not inconsistent with the right of Buyer to examine the goods prior to payment even though the price was to be paid against the presentation of the documents.

Article 55

[Payment due without request]

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

PRIOR UNIFORM LAW

ULIS, article 60.

Commentary

Article 55 is intended to deny the applicability of the rule in some legal systems which states that in order for the payment to become due the seller must make a formal demand for it from the buyer. Under article 55 the buyer must pay the price on the date fixed by or determinable from the contract and this Convention[1] whether or not the seller has requested payment.

SECTION II. TAKING DELIVERY

Article 56

[Obligation to take delivery]

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

PRIOR UNIFORM LAW

ULIS, article 65.

Commentary

1. Article 56 describes the second obligation of the buyer set out in article 49, i.e., to take delivery of the goods.

2. The buyer's obligation to take delivery consists of two elements. The first element is that he must do "all the acts which could reasonably be espected of him in order to enable the seller to make delivery." For example, if under the contract of sale the buyer is to arrange for the carriage of the goods, he must make the necessary contracts of carriage so as to permit the seller to "[hand] the goods over to the first carrier for transmission to the buyer".[1]

3. The buyer's obligation is limited to doing those "acts which could reasonably be expected of him". He is not obliged to do "all such acts are necessary in order to enable the seller to hand over the goods", as was the case under ULIS.[2]

4. The second element of the buyer's obligation to take delivery consists of his "taking over the goods". This aspect of the obligation to take delivery is of importance where the contract calls for the seller to make delivery by placing the goods at the buyer's disposal at a particular place or at the seller's place of business.[3] In such case the buyer must physically remove the goods from that place in order to fulfil his obligation to take delivery.[4]

SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

Article 57

[Seller's remedies in general; claim for damages; no period of grace]

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

(a) exercise the rights provided in articles 58 to 61;

(b) claim damages as provided in articles 70 to 73;

[1] For example, a date for payment may be established by usage (article 8) or through the operation of the rule in article 54 (1).

[1] Article 29 *(a)*. Cf. article 30 (2).
[2] ULIS, article 65.
[3] Article 29 *(b)* and *(c)*.
[4] Cf. the buyer's obligation under article 75 (2) to take possession on behalf of the seller of goods which have been dispatched to and have been put at the disposal of the buyer at the place of destination and in respect of which the buyer has exercised his right to reject.

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

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

PRIOR UNIFORM LAW

ULIS, articles 61 to 64, 66 to 68 and 70.

Commentary

1. Article 57 serves both as an index to the remedies available to the seller if the buyer fails to perform any of his obligations under the contract and this Convention and as the source for the seller's right to claim damages. Article 57 is comparable to article 41 on the remedies available to the buyer.

2. Article 57 (1) *(a)* provides that in case of the buyer's breach, the seller may "exercise the rights provided in articles 58 to 61." Although the provisions on the remedies available to the seller in articles 58 to 61 are drafted in terms comparable to those available to the buyer in articles 42 to 48, they are less complicated. This is so because the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. Therefore, the seller has no remedies comparable to the following which are available to the buyer: reduction of the price because of non-conformity of the goods (article 46), right to partially exercise his remedies in the case of partial delivery of the goods (article 47),[1] right to refuse to take delivery in case of delivery before the date fixed or of an excess quantity of goods (article 48).

3. Article 57 (1) *(b)* provides that the seller may "claim damages as provided in articles 70 to 73: if the buyer fails to perform any of his obligations under the contract of sale and this Convention." In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the buyer to fulfil his obligations. Articles 70 to 73, to which article 57 (1) *(b)* refers, do not provide the substantive conditions for the exercise of a claim for damages but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the buyer. First, all the buyer's obligations are brought together in one place without confusions generated by the complexities of repetitive remedial provisions. This makes it easier to understand the rules on what the buyer must do, which are the provisions of prime interest to merchants. Second, problems of classification are reduced with a single set of remedies. Third, the need for complex cross-referencing is lessened.

5. Paragraph (2) provides that a party who has resorted to any remedy available to him under the contract or this Convention is not thereby deprived of the right to claim any damages which he may have incurred.

6. Paragraph (3) provides that if a seller resorts to a remedy for breach of contract, no court or arbitral tribunal may delay the exercise of that remedy by granting a period of grace either before, at the same time as, or after the seller has resorted to the remedy. The reasons for this provision are discussed in paragraphs 3 to 5 of article 43. Such a provision seems desirable in international trade.

Article 58

[Seller's right to require performance]

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

PRIOR UNIFORM LAW

ULIS, articles 61 and 62 (1).

Commentary

1. Article 58 describes the seller's right to require the buyer to perform his obligations under the contract and this Convention.

Failure to pay the price

2. This article recognizes that the seller's primary concern is that the buyer pay the price at the time it is due. Therefore, if the price is due under the terms of articles 54 and 55 and the buyer does not pay it, this article authorizes the seller to require the buyer to pay it.

3. Article 58 differs from the law of some countries in which the seller's remedies in respect of the price are restricted. In those countries, even though the buyer may have a substantive obligation to pay under the contract, the general principle is that the seller must make a reasonable effort to resell the goods to a third party and recover as damages any difference between the contract price and the price he received in the substitute transaction. The seller may recover the price if resale to a third person is not reasonably possible.

4. However, under article 58, when the buyer has a substantive obligation to pay the price under articles 54 and 55, the seller has available a remedy to require him to pay it.[1]

5. The style in which article 58 in particular and Section III on the buyer's remedies in general is drafted should be noted at this point. That style conforms to the view held in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the required relief.[2] However, the two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 58 provides that the "seller may require the buyer to pay the price, take delivery or perform his other obligations", it anticipates that, if the buyer does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

6. Although the seller has a right to the assistance of a court or arbitral tribunal to enforce the buyer's obligations to pay the price, take delivery and perform any of his other obligations, article 26 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this Convention, it is not required to enter such a judgement in a case arising under this Convention even though the seller had a right to require the buyer's performance under article 58. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 58 are met.

7. The seller can require performance under this article and also sue for damages. Where the buyer's non-performance of one of his obligations consists in the delay in the payment of the price, the seller's damages would normally include interest.

Failure to perform other obligations

8. Article 58 goes on to authorize the seller to require the buyer to "take delivery or perform his other obligations".[3]

---

[1] However, article 64 (1) allows the seller to declare the contract avoided as to one instalment where the buyer's failure to perform in respect of that instalment amounts to a fundamental breach of that instalment.

[1] As to the relationship of the principle of mitigation to the right to require payment of the price, see para. 3 of the commentary to article 73.

[2] See the examples in foot-note 1 to para. 8 of the commentary to article 42.

[3] The obligation to "take delivery" is specifically mentioned because it is the second of the two obligations of the buyer set forth in article 49. The definition of taking delivery is found in article 56.

9. In some cases the seller may be authorized or required to substitute his own performance for that which the buyer has failed to do. Article 61 provides that in a sale by specification, if the buyer fails to make the specifications required on the date requested or within a reasonable time after receipt of a request from the seller, the seller may make the specifications himself. Similarly, if the buyer is required by the contract to name a vessel on which the goods are to be shipped and fails to do so by the appropriate time, article 73, which requires the party who relies on a breach of contract to mitigate the losses, may authorize the seller to name the vessel so as to minimize the buyer's losses.

Inconsistent acts by the seller

10. Article 58 also provides that in order for the seller to exercise the right to require perfomance of the contract he must not have acted inconsistently with that right, e.g. by avoiding the contract under article 60.

Article 59

[Fixing of additional period for performance]

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

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

PRIOR UNIFORM LAW

ULIS, article 66 (2).

Commentary

1. Article 59 states the right of the seller to fix an additional period of time of reasonable length for performance by the buyer of his obligations and specifies one of the consequences of his having fixed such a period.

Fixing additional period, paragraph (1)

2. Article 59 is a companion to article 58 which states the right of the seller to require performance of the contract by the buyer and which anticipates the aid of a court or arbitral tribunal in enforcing that right. If the buyer delays performing the contract, the use of judicial procedures for enforcement may not seem feasible or may require more time than the seller can afford to wait. This may be particularly the case if the buyer's failure to perform consists of delay in procuring the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee, or of securing the permission to import the goods or pay for them in restricted foreign exchange. It may be to the seller's advantage to avoid the contract and make a substitute sale to a different purchaser. However, at that time it may not be certain that the buyer's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 60 (1) *(a)*.

3. Different legal systems take different attitudes towards the right of a seller to avoid the contract because of the buyer's failure to pay the price or perform his other obligations on the date specified in the contract. In some legal systems the buyer's failure to perform on the contract date normally authorizes the seller to avoid the contract. However, in a given case the court or tribunal may decide that the seller may not avoid the contract at that time because the failure to perform on the contract date was either not sufficiently serious or the seller had waived his right to prompt performance. In other legal systems the buyer can request a delay of grace from a court or tribunal which, in effect, establishes a new performance date.[1] In still other legal systems the general rule is that late performance does not authorize the seller to avoid the contract unless the contract provided for such a remedy or unless after the buyer's breach the seller specifically fixed a time period within which the buyer had to perform.

4. This Convention specifically rejects the idea that in a commercial contract of sale of goods the seller may, as a general rule, avoid the contract once the contract date for performance has passed and the buyer has not as yet performed one or more of his obligations. In these circumstances the seller may do so if, and only if, the failure to perform on the contract date causes him substantial detriment and the buyer foresaw or had reason to foresee such a result.[2]

5. As a result of this rule in this Convention there was no reason to allow the buyer to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties. Therefore, article 57 (3) provides that "No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract."

6. Although the seller can declare the contract avoided in any case in which the delay in performance constitutes a fundamental breach, this will not always be a satisfactory solution for him. Once the buyer is late in performing, the seller may be legitimately doubtful that the buyer will be able to perform by the time that performance will be essential for the seller. This situation is similar to the problems raised by an anticipatory breach under articles 62, 63 and 64. Furthermore, in most contracts for the sale of goods the point of time at which the detriment to the seller would become sufficiently substantial to constitute a fundamental breach would be somewhat imprecise. Therefore, article 59 (1) authorizes the seller to fix an additional period of time of reasonable length for performance by the buyer of his obligations. However, article 60 (1) *(b)* allows the seller to declare the contract avoided only if the buyer has not performed his obligation to pay the price[3] or has not taken delivery of the goods,[4] or if he has declared that he will not do so within the additional period of time.

7. The procedure authorized by article 59 (1) of fixing an additional period of time after which the seller can declare the contract avoided if the buyer has not performed his obligation to pay the price or taken delivery of the goods would have the danger that a seller could turn an inconsequential delay which would not justify declaring the contract avoided for fundamental breach under article 60 (1) *(a)* into a basis for declaring the contract avoided under article 60 (1) *(b)*. Therefore, article 59 (1) says that the additional period must be "of reasonable length". This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. "within one month from today"). A general demand by the seller that the buyer perform or that he perform "promptly" or the like is not a "fixing" of a period of time under article 59 (1).

8. It should be pointed out that, although the procedure envisaged by article 59 (1) has a certain parentage in the German procedure of *"Nachfrist"* and the French procedure of a *"mise en demeure,"* in its current form it does not partake of either one. In particular, the procedure envisaged by article 59 (1) is not mandatory and need not be used in order to avoid the contract if the delay in performance amounts to a fundamental breach.

Seller's other remedies, paragraph (2)

9. In order to protect the buyer who may be preparing to perform the contract as requested by the seller, perhaps at considerable expense, during the additional period of time of reasonable length the seller may not resort to any remedy for breach of contract, unless the seller has re-

[1] Cf. article 57 (3). See para. 5 below.

[2] Article 23 which defines "fundamental breach", and article 60 (1) *(a)*, which authorizes the seller to declare the contract avoided for fundamental breach.

[3] As to the buyer's obligation to pay the price, see article 50 and the commentary thereto.

[4] As to the buyer's obligation to take delivery of the goods, see article 56 and the commentary thereto.

ceived notice from the buyer that he will not comply with the request. Once the additional period of time has expired without performance by the buyer, the seller may not only avoid the contract under article 60 (1) *(b)* but may resort to any other remedy he may have.

10. In particular, the seller may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the buyer has performed his obligations within the additional period of time fixed by the seller.

Article 60

[Seller's right to avoid contract]

(1) The seller may declare the contract avoided:

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

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

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

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

(b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59 or the declaration by the buyer that he will not perform his obligations within such an additional period.

PRIOR UNIFORM LAW

ULIS, articles 61 (2), 62, 66 and 70.

Commentary

1. Article 60 describes the seller's right to declare the contract avoided. The buyer's right to declare the contract avoided is described in article 45.

Declaration of avoidance

2. The contract is avoided as a result of the buyer's breach only if "the seller . . . declare [s] the contract avoided". This narrows the rule from that found in articles 61 and 62 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the seller. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 60 of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 24 provides that "a declaration of avoidance of the contract is effective only if made by notice to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 25.

Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the seller may declare the contract avoided is where the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 23.

5. If there is a fundamental breach of contract, the seller has an immediate right to declare the contract avoided. He need not give the buyer any prior notice of his intention to declare the contract avoided. It may be questioned, however, how often the buyer's failure to pay the price, take delivery of the goods or perform any of his other obligations under the contract and this Convention would immediately constitute a fundamental breach of contract if they were not performed on the date they were due. If would seem that in most cases the buyer's failure would amount to a fundamental breach as it is defined in article 23 only after the passage of some period of time.

Buyer's delay in performance, subparagraph (1) (b)

6. Subparagraph (1) *(b)* further authorizes the seller to declare the contract avoided in one restricted case. If the buyer has not paid the price or taken delivery of the goods and the seller requests him to do so under article 59, the seller can avoid the contract "if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed."

7. The buyer's obligation to pay the price includes taking such steps and complying with such formalities which may be required by the contract and by any relevant laws and regulations to enable payment to be made, such as registering the contract with a government office or with a bank, procuring the necessary foreign exchange, as well as applying for a letter of credit or a bank guarantee to facilitate the payment of the price.[1] Therefore, the buyer's failure to take any of these steps within an additional period of time fixed by the seller in accordance with article 59 would authorize the seller to declare the contract avoided under article 60 (1) *(b)*. The seller would not be required to use the procedures of either article 60 (1) *(a)* on fundamental breach or article 63 on anticipatory breach.

Loss or suspension of right to avoid, paragraph (2)

8. Article 60 (2) provides that where the buyer has paid the price, the seller will lose the right to declare the contract avoided if he does not declare the contract avoided within a specified period of time. The seller does not lose his right to declare the contract avoided until the total price has been paid.

9. If the fundamental breach on which the seller relies to declare the contract avoided is the late performance of an obligation, paragraph (2) *(a)* provides that where the price has been paid, the seller loses his right to declare the contract avoided at the time he becomes aware that the performance has been rendered. Since the late performance in question will most often be in respect of the payment of the price, in most cases the seller will lose the right to declare the contract avoided under article 60 (1) *(a)* at the time he becomes aware that the price has been paid.

10. If the buyer has paid the price but there is a fundamental breach of the contract in respect of some obligation other than late performance by the buyer, paragraph (2) *(b)* provides that the seller loses the right to declare the contract avoided if the seller does not declare the contract avoided within a reasonable time after he knew or ought to have known of such breach.

11. Article 60 (2) *(b)* may also take away the right of the seller to declare the contract avoided in cases where he has fixed an additional period for performance under article 59 (1). If the buyer performs after the additional period fixed pursuant to article 59 (1) or after he has declared that he will not perform within that additional period of time, the seller loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of the additional pe-

[1] See article 50 and the commentary thereto.

riod or within a reasonable time after the buyer has declared that he will not perform within that additional period of time.

12. Since the seller does not lose his right to declare the contract avoided under article 60 (2) until the total price is paid, under this provision all the instalments in an instalment contract must be paid before the seller loses the right to declare the contract avoided. However, under article 64 (2) the seller's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the buyer which justifies the declaration of avoidance.

Right to avoid prior to the date for performance

13. For the seller's right to avoid prior to the contract date of performance, see articles 63 and 64 and the commentaries thereon.

Effects of avoidance

14. The effects of avoidance by the seller are described in articles 66 and 69. The most significant consequence of avoidance for the seller is that he is no longer required to deliver the goods and he may claim their return if they have already been delivered.

15. Avoidance of the contract does not terminate either the buyer's obligation to any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.[2] Such a provision is important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, which usually means arbitration clauses, terminate with the rest of the contract.

Article 61

[Specification by seller]

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

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

PRIOR UNIFORM LAW

ULIS, article 67.

Commentary

1. Article 61 describes the seller's rights where the buyer fails to specify some aspect or quality of the goods ordered by the date on which he was obligated to do so.

2. It often occurs that the buyer wishes to contract for the purchase of goods even though at that moment he is as yet undecided about some feature of the goods ordered. For example, on 1 April the buyer might order 1,000 pairs of shoes at a certain price for delivery on or before 1 October. The contract might also state that the buyer must specify the styles and sizes to the seller before 1 September or it might state that the buyer has the right, but not the obligation, to make the specification. The seller may be a merchant who will assemble the quantity to be delivered from inventory or he may be a manufacturer who will, subsequent to the notification, manufacture the goods according to the buyer's specifications.

3. Even in these cases in which the buyer is obligated to make the specification, he may fail to do so by the date required, before 1 September in this example, either through oversight or because he would now prefer not to receive the 1,000 pairs of shoes. If he now desires not to receive the shoes, it will usually be because of changes in business conditions which have reduced his need for the 1,000 pairs of shoes or because the price has declined and he could buy them at a lower price elsewhere.

Seller's remedies, paragraph (1)

4. Article 61 rejects any suggestion that the contract is not complete until the buyer has notified the seller of the specification or that the buyer's notification of the specification is a condition to the seller's right to deliver the goods and demand payment of the price.

5. Article 61 (1) authorizes the seller, at his choice, to provide the specification himself or to exercise any other rights he may have under the contract and this Convention for the buyer's breach. Of course, the buyer's failure to make the specification would constitute a breach of the contract only if the buyer was obligated to do so, not if he was merely authorized to do so.

6. If the buyer's failure to make the specification constituted a breach of contract, the seller could pursue his remedies for that breach, in place of or in addition to making the specification himself under article 61. Therefore, the seller could: (1) sue for damages under article 57 (1) *(b)*, (2) if the buyer's failure to make the required specification amounted to a fundamental breach of contract, avoid the contract under article 60 (1) *(a)* and sue for any damages,[1] or (3) fix an additional period of reasonable length for the buyer to perform his obligation under article 59 (1). If, pursuant to article 59, the seller fixes an additional period of time of reasonable length for performance by the buyer and the buyer does not perform within this additional time, the seller could avoid the contract under article 60 (1) *(b)* and sue for any damages even if the buyer's failure to make the specification did not constitute a fundamental breach of contract.

7. If the seller chooses to exercise his right to make the specification himself pursuant to article 61 (1), he may do so immediately upon the passage of the date agreed upon in the contract as the date by which the buyer would make the specification. Alternatively, the seller may request the specification from the buyer, in which case the seller must await a reasonable time after the buyer has received the request from the seller before he can make the specification himself.[2]

Notice to the buyer, paragraph (2)

8. Article 61 imposes three obligations on a seller who intends to make the specification himself. According to article 61 (1) he must make the specification "in accordance with any requirement of the buyer that may be known to him". According to article 61 (2) the seller must inform the buyer of the specification and its details and he must fix a reasonable time within which the buyer may make a different specification.

9. If the seller does not make the specification in accordance with the requirements of the buyer or does not inform the buyer of the specification and its details, the specification would not be binding on the buyer. If the seller does not fix a reasonable period of time for the buyer to make a different specification, the buyer would, nevertheless, be entitled to such a period in which to make the specification.

10. Although the seller is called on to fix the period in the notice by which he informs the buyer of the specification, the reasonableness of that period is measured from the time at which the buyer receives the

[1] Article 66 (1) preserves the right to sue for damages even though the contract has been avoided.

[2] It should be noted that the request for specification here is pursuant to article 61 (1) and not pursuant to article 59 as discussed in para. 6 *supra*.

[2] Article 66 (1).

specification. If the specification is never received by the buyer, it never becomes binding on him.[3]

11. Within the reasonable period of time after the buyer receives the specification, he must either make a new specification or that made by the seller is binding.

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

SECTION I. ANTICIPATORY BREACH AND INSTALMENT CONTRACTS

Article 62

[Suspension of performance]

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

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

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

PRIOR UNIFORM LAW

ULIS, article 73.

Commentary

1. Article 62 describes the extent to which a party may suspend the performance of his obligations because of the existence of good grounds to conclude that the other party will not perform a substantial part of his obligations.

Right to suspend performance, paragraph (1)

2. Paragraph (1) provides that a party may suspend the performance of his obligations if it is reasonable to do so because after the conclusion of the contract a serious deterioration of the other party's ability or willingness to perform "gives good grounds to conclude that the other party will not perform a substantial part of his obligations."

3. The deterioration must have been in the other party's ability to perform or in his creditworthiness or must be manifested by his conduct in preparing to perform or in actually performing the contract in question. It is not enough that the other party's performance in respect of other contracts raises questions as to his future performance in this contract. However, defective performance in other contracts might contribute to a decision that his current conduct gave "good" grounds to conclude he will not perform a substantial part of his obligations in this contract. Moreover, the buyer's failure to pay his debts on other contracts may indicate a serious deterioration of his creditworthiness.

4. The circumstances which justify suspension may relate to general conditions so long as those general conditions affect the other party's ability to perform. For example, the outbreak of war or the imposition of an export embargo may give good grounds to conclude that the party from that country will not be able to perform his obligations.

5. It should be noted that there must be good grounds to conclude that he will not perform a substantial part of his obligations. There is no right to suspend if the other party's performance is apt to be deficient in less than a substantial way. A party who suspends his performance without good grounds to conclude that the other party will not perform a substantial part of his obligations would himself be in breach of the contract.

6. These rules are illustrated by the following examples:

Example 62A: Buyer fell behind in his payments to Seller in respect of other contracts. Even though the late payments were in respect of other contracts, such late payments might indicate a serious deterioration in Buyer's creditworthiness authorizing Seller to suspend performance.

Example 62B: Buyer contracted for precision parts which he intended to use immediately upon delivery. He discovered that, although there had been no deterioration in Seller's ability to manufacture and deliver parts of the quality required, defective deliveries were being made to other buyers with similar needs. These facts alone do not authorize Buyer to suspend his performance. However, if the cause of Seller's defective deliveries to other buyers was the result of using a raw material from a particular source, Seller's conduct in preparing to use the raw material from the same source would give Buyer good grounds to conclude that Seller would deliver defective goods to him also.

7. The question may arise as to whether the parties have impliedly derogated from this article under the provisions of article 5 by using a particular form of contract. For example, if payment is to be made by means of an irrevocable letter of credit, the issuer of the credit is required to pay a draft drawn on it if accompanied by the proper documents even though the buyer has good grounds to believe that the goods are seriously defective.[1] Similarly, it may be that where the buyer has assumed the risk of payment before inspection of the goods, as in a contract of sale on CIF or similar cash against documents terms, that risk is not to be evaded by a demand for assurance.

8. If the criteria discussed in paragraphs 2 to 4 above are met, the party "may suspend the performance of his obligations". A party who is authorized to suspend performance is freed both from the obligation to render performance to the other party and from the obligation to prepare to perform. He is not obligated to incur additional expenses for which it is reasonable to assume he will never be compensated.

9. If an obligation is suspended for a period of time and then reinstated pursuant to article 62 (3), the date required for performance will be extended for the period of the suspension. This principle is illustrated by the following examples:

Example 62C: Under the contract of sale, Seller was required to deliver the goods by 1 July. Because of reasonable doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods. Seller must now deliver the goods by 15 July.

Example 62D: As in example 62C, Seller was required to deliver the goods by 1 July. Because of doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods and Seller delivered on 15 July. However, Buyer contended that the deterioration in his creditworthiness after the conclusion of the contract were not such as to give Seller "good grounds" that he would not pay. If Buyer can sub-

[3] The requirement that the buyer must have received the specification from the seller places the risk of transmission on the sender of the notice and thus reverses the general rule contained in article 25.

[1] Uniform customs and practice for documentary credits (1974), (ICC publication No. 290), art. 9. However, in some legal systems the buyer may be able to obtain a court order directing the bank not to pay under an irrevocable letter of credit where there was fraud, forgery or some other defect not apparent on the face of the documents.

stantiate this claim — before a court or arbitral tribunal if necessary — Seller must reimburse Buyer for any damages he suffered because he furnished the assurances and because of late delivery.

Stoppage in transit, paragraph (2)

10. Paragraph (2) continues the policy of paragraph (1) in favour of a seller who has already shipped the goods. If the deterioration of the buyer's creditworthiness gives the seller good grounds to conclude that the buyer will not pay for the goods, the seller has the right as against the buyer to order the carrier not to hand over the goods to the buyer even though the buyer holds a document which entitles him to obtain them, e.g., an ocean bill of lading, and even if the goods were originally sold on terms granting the buyer credit after receipt of the goods.

11. The seller loses his right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith.

12. Since this Convention governs the rights in the goods only between the buyer and the seller,[2] the question whether the carrier must or is permitted to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question.[3]

Notice and adequate assurances of performance, paragraph (3)

13. Paragraph (3) provides that the party suspending performance pursuant to paragraph (1) or stopping the goods in transit pursuant to paragraph (2) must immediately notify the other party of that fact. The other party can reinstate the first party's obigation to continue performance by giving the first party adequate assurance that he will perform. For such an assurance to be "adequate", it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performance.

Example 62E: The contract of sale provided that Buyer would pay for the goods 30 days after their arrival at Buyer's place of business. After the conclusion of the contract Seller received information which gave him reasonable grounds to doubt Buyer's creditworthiness. After he suspended performance and so notified Buyer, Buyer offered either (1) a new payment term so that he would pay against documents, or (2) a letter of credit issued by a reputable bank, or (3) a guarantee by a reputable bank or other such party that it would pay if Buyer did not, or (4) a security interest in sufficient goods owned by Buyer to assure Seller of reimbursement. Since any one of these four alternatives would probably give Seller adequate assurances of being paid,[4] Seller would be required to continue performance.

Example 62F: The contract of sale called for the delivery of precision parts for Buyer to use in assembling a high technology machine. Seller's failure to deliver goods of the requisite quality on the delivery date would cause great financial loss to Buyer. Although Buyer could have the parts manufactured by other firms, it would take a minimum of six months from the time a contract was signed for any other firm to be able to deliver substitute parts. The contract provided that Buyer was to make periodic advance payments of the purchase price during the period of time Seller was manufacturing the goods.

When Buyer received information giving him good grounds to conclude that Seller would not be able to deliver on time, Buyer notified Seller that he was suspending any performance due the Seller. Seller gave Buyer written assurances that he would deliver goods of the contract quality on time and offered a bank guarantee for financial reimbursement of all payments made under the contract if he failed to meet his obligations.

In this case Seller has not given adequate assurance of performance. Seller's statements that he would perform, unless accompanied by sufficient explanations of the information which caused Buyer to conclude that Seller would not deliver on time, were only a reiteration of his contractual obligation. The offer of a bank guarantee of reimbursement of payments under the contract was not an adequate assurance to a Buyer who needs the goods at the contract date in order to meet his own needs.

14. The first party's obligation to perform remains suspended until either (1) the other party performs his obligations, (2) adequate assurances are given, (3) the first party declares the contract avoided, or (4) the period of limitation applicable to the contract has expired.[5]

15. Prior to the date on which the other party was required to perform, the first party could declare the contract avoided only if the criteria of article 63 were met. After the date on which the other party was required to perform, the first party could declare the contract avoided only if the criteria of article 45 or 60 were met. Avoidance of one or more instalments of a contract for delivery of goods by instalments is governed by article 64.

16. If the party suspending performance suffers damages because the other party did not provide adequate assurances as required by this article, he may recover any damages he may have suffered, whether or not he declares the contract avoided.[6] For example, if the buyer in example 62F declared the contract avoided and purchased substitute goods elsewhere at a higher price, he can recover the difference between his repurchase price and the cover price.[7]

Article 63

[Avoidance prior to the date for performance]

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

PRIOR UNIFORM LAW

ULIS, article 76.

Commentary

1. Article 63 provides for the special case where prior to the date for performance it is clear that one of the parties will commit a fundamental breach. In such a case the other party may declare the contract avoided immediately.

2. The future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance.[1] The failure by a party to give adequate assurances that he will perform when properly requested to do so under article 62 (3) may help make it "clear" that he will commit a fundamental breach.

---

[2] Article 62 (2) expressly states that it relates only to the rights in goods as between the buyer and the seller. This reflects the general principles expressed in article 4.

[3] The rules governing the carrier's obligation to follow the consignor's orders to withhold delivery from the consignee differ between modes of transportation and between various international conventions and national laws.

[4] The offer of a security interest would be an adequate assurance only if the national law in question allowed such interests and provided a procedure on default which was adequate to assure the creditor prompt reimbursement of his claim.

[5] Under the Convention on the Limitation Period in the International Sale of Goods, art. 8, that period would be four years. That Convention does not prescribe as to whether the rights under the contract are terminated or whether it is the right of a party to commence an action to enforce such a right which is terminated.

[6] Article 66 (1) preserves the right of a party who declares the contract avoided to claim any damages which may occur from the breach of contract.

[7] Article 71. If the buyer did not declare the contract avoided, the measure of damages would be calculated according to article 70.

[1] Even though the imposition of an embargo or monetary controls which renders future performance impossible justifies the other party's avoidance of the contract under article 63, the non-performing party may be excused from damages by virtue of article 65.

3. A party who intends to declare the contract avoided pursuant to article 63 should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation may not have been "clear" and the declaration of avoidance itself be void. In such a case, the party who attempted to avoid would be in breach of the contract for his own failure to perform.

4. Where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 73 may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance.[2]

Article 64

[Avoidance of instalment contracts]

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

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

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

PRIOR UNIFORM LAW

ULIS, article 75.

Commentary

1. Article 64 describes the right to avoid the contract where the contract calls for the delivery of goods by instalments. The contract calls for the delivery by instalments if it requires or authorizes the delivery of goods in separate lots.

2. In a contract for delivery by instalments a breach by a party in respect of one or more instalments can affect the other party in respect of that instalment, in respect of future instalments and in respect of instalments already delivered. The three paragraphs of article 64 treat these three aspects of the problem.

Failure to perform in respect of one instalment, paragraph (1)

3. Paragraph (1) authorizes a party to declare a contract avoided in respect of a single instalment where the other party has committed a fundamental breach in respect of that instalment.[1]

Example 64 A: The contract called for the delivery of 1,000 tons of No. 1 grade corn in 10 separate instalments. When the fifth instalment was delivered, it was unfit for human consumption. Even if in the context of the entire contract one such delivery would not constitute a fundamental breach of the entire contract, the buyer could avoid the contract in respect of the fifth instalment. As a result, the contract would in effect be modified to a contract for the delivery of 900 tons at a proportionately reduced price.

4. There are no particular difficulties in determining whether a breach in respect of an instalment is fundamental where each instalment consists of goods that are usable or resaleable independently of the other instalments, as in example 64 A. However, it may be more difficult where the individual instalments are parts of an integrated whole. This would be the case, for example, where the sale is of a large machine which is delivered in segments to be assembled at the buyer's place. In such a case the determination as to whether the breach in respect of that instalment was fundamental should be made in the light of the detriment suffered by the buyer in respect of the entire contract, including the ease with which the failure in respect of the individual instalment can be remedied by repair or replacement. If the breach is fundamental and, because of their interdependence, instalments already delivered or to be delivered could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract, article 64 (3) authorizes the buyer to declare the contract avoided in respect of those deliveries.

Avoidance in respect of future deliveries, paragraph (2)

5. Paragraph (2) considers the situation where the failure of one party to perform any of his obligations under the contract in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments. In such a case he may declare the contract avoided for the future, provided only that he declares the avoidance of the future performance within a reasonable time of the failure to perform. It should be noted that article 64 (2) permits the avoidance of the contract in respect of future performance of an instalment contract even though it is not "clear" that there will be a fundamental breach of the contract in the future as would be required by article 63.

6. It should be noted that the test of the right to avoid under article 64 (2) is whether a failure to perform in respect of an instalment gives the other party good reason to fear that there will be a fundamental breach in respect of future instalments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear.

Avoidance in respect of past or future deliveries, paragraph (3)

7. In some contracts it will be the case that none of the deliveries can be used for the purpose contemplated by the parties to the contract unless all of the deliveries can be so used. This would be the case, for example, where, as described in paragraph 4 above, a large machine is delivered in segments to be assembled at the buyer's place. Therefore, paragraph (3) provides that a buyer who avoids the contract in respect of any delivery, an action which can be taken under article 64 (1), may also avoid in respect of deliveries already made or of future deliveries "if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract". The declaration of avoidance of past or future deliveries must take place at the same time as the declaration of avoidance of the current delivery.

8. For the goods to be interdependent they need not be part of an integrated whole, as in the example of the large machine. For example, it may be necessary that all of the raw material delivered to the buyer be of the same quality, a condition which might be achievable only if they were from the same source. If this was the case, the various deliveries would be interdependent and article 64 (3) would apply.

---

[2] See the commentary on article 73 and especially examples 73 A and 73 B.

[1] A similar result is achieved by article 47 but only in cases where the seller is in breach. Article 64 (1), however, may be utilized by both buyer and seller.

SECTION II. EXEMPTIONS

Article 65

[Exemptions]

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

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

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

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

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

PRIOR UNIFORM LAW

ULIS, article 74.

Commentary

1. Article 65 governs the extent to which a party is exempted from liability for a failure to perform any of his obligations because of an impediment beyond his control.

General rule, paragraphs (1) and (5)

2. Paragraph (1) sets out the conditions under which a party is not liable for a failure to perform any of his obligations. Paragraph (5) provides that exemption from liability under this article prevents the other party from exercising only his right to claim damages, but does not prevent him from exercising any other right he may have.[1]

3. Under articles 41 (1) *(b)* and 57 (1) *(b)* a party has a right to claim damages for any non-performance of the other party without the necessity of providing fault or a lack of good faith or the breach of an express promise on his part, as is required by some legal systems. However, under article 65 the non-performing party is exempt from liability if he proves (1) that the failure to perform was due to an impediment beyon his control, (2) that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, (3) that he could not reasonably have been expected to have avoided the impediment or its consequences and (4) that he could not reasonably have been excepted to have overcome the impediment or its consequences.

4. The impediment may have existed at the time of the conclusion of the contract. For example, goods which were unique and which were the subject of the contract may have already perished at the time of the conclusion of the contract. However, the seller would not be exempted from liability under this article if he reasonably could have been expected to take the destruction of the goods into account at the time of the conclusion of the contract. Therefore, in order to be exempt from liability, the seller must not have known of their prior destruction and must have been reasonable in not expecting their destruction.

5. It is this later element which is the most difficult for the non-performing party to prove. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future. Frequently, the parties to the contract have envisaged the possibility of the impediment which did occur. Sometimes they have explicitly stated whether the occurrence of the impeding event would exonerate the non-performing party from the consequences of the non-performance. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even though certain impediments might arise. In either of these two classes of cases, article 5 of this Convention assures the enforceability of such explicit or implicit contractual stipulations.

6. However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of the conclusion of the contract. In the final analysis this determination can only be made by a court or arbitral tribunal on a case-by-case basis.

7. Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract.

8. The effect of article 65 (1) in conjunction with article 65 (5) is to exempt the non-performing party only from liability for damages. All of the other remedies are available to the other party, i.e. demand for performance, reduction of the price or avoidance of the contract. However, if the party who is required to overcome an impediment does so by furnishing a substitute performance, the other party could avoid the contract and thereby reject the substitute performance only if that substitute performance was so deficient in comparison with the performance stipulated in the contract that it constituted a fundamental breach of contract.

9. Even if the impediment is of such a nature as to render impossible any further performance, the other party retains the right to require that performance under article 42 or 58. It is a matter of domestic law not governed by this Convention as to whether the failure to perfom exempts the non-performing party from paying a sum stipulated in the contract for liquidated damages or as a penalty for non-performance or as to whether a court will order a party to perform in these circumstances and subject him to the sanctions provided in its procedural law for continued non-perfomance.[2]

Example 65 A: The contract called for the delivery of unique goods. Prior to the time when the risk of loss would have passed pursuant to articles 79 or 80 the goods were destroyed by a fire which was caused by events beyond the control of Seller. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.

[1] See para. 8 below.

[2] Cf. article 26 which provides that if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Example 65B: The contract called for the delivery of 500 machine tools. Prior to the passage of the risk of loss, the tools were destroyed in similar circumstances to Example 65A. In such a case Seller would not only have to bear the loss of the 500 tools but he would also be obligated to ship to Buyer an additional 500 tools. The difference between this example and example 65A is that in example 65A Seller cannot provide that which was contracted for whereas under example 65B Seller can overcome the effect of the destruction of the tools by shipping replacement goods.

Example 65C: If the machine tools shipped in replacement of those destroyed in example 65B could not arrive in time, Seller would be exempted from damages for late delivery.

Example 65D: The contract called for the goods to be packed in plastic containers. At the time the packing should have been accomplished, plastic containers were not available for reasons which Seller could not have avoided. However, if other commercially reasonable packing materials were available, Seller must overcome the impediment by using those materials rather than refuse to deliver the goods. If Seller used commercially reasonable substitute packing materials, he would not be liable for damages. In addition, Buyer could not avoid the contract because there would had been no fundamental breach of the contract but Buyer could reduce the price under article 46 if the value of the goods had been diminished because of the non-performing packing materials.

Example 65E: The contract called for shipment on a particular vessel. The schedule for the vessel was revised because of events beyond the control of both Buyer and Seller and it did not call at the port indicated within the shipment period. In this circumstance the party responsible for arranging the carriage of the goods must attempt to overcome the impediment by providing an alternative vessel.

10. Although it is probably true that the insolvency of the buyer by itself is not an impediment which exempts the buyer from liability for non-payment of the price, the unanticipated imposition of exchange controls, or other regulations of a similar nature, may make it impossible for him to fulfil his obligation to pay the price at the time and in the manner agreed. The buyer would, of course, be exempted from liability for damages for the non-payment (which as a practical matter would normally mean interest on the unpaid sum) only if he could not overcome the impediment by, for example, arranging for a commercially reasonable substitute form of payment.[3]

Non-performance by a third person, paragraph (2)

11. It often happens that the non-performance of a party is due to the non-performance of a third person. Paragraph (2) provides that where this is the case, "that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him".

12. The third person must be someone who has been engaged to perform the whole or a part of the contract. It does not include suppliers of the goods or of raw materials to the seller.

Temporary impediment, paragraph (3)

13. Paragraph (3) provides that an impediment which prevents a party from performing for only a temporary period of time exempts the non-performing party from liability for damages only for the period during which the impediment existed. Therefore, the date at which the exemption from damages terminates is the contract date for performance or the date on which the impediment was removed, whichever is later in time.

Example 65F: The goods were to be delivered on 1 February. On 1 January an impediment arose which precluded Seller from delivering the goods. The impediment was removed on 1 March. Seller delivered on 15 March.

Seller is exempted from any damages which may have occurred because of the delay in delivery up to 1 March, the date on which the impediment was removed. However, since the impediment was removed after the contract date for delivery, the Seller is liable for any damages which occurred as a result of the delay in delivery between 1 March and 15 March.

14. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence[4] and the removal of the impediment reinstates the obligations of both parties under the contract.

Example 65G: Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1) until the plant was rebuilt. Seller's plant was rebuilt in two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and, unless he decided to declare the contract avoided because of fundamental breach, Buyer was obligated to take delivery and to pay the contract price.[5] [6]

Duty to notify, paragraph (4)

15. The non-performing party who is exempted from damages by reason of the existence of an impediment to the performance of his obligation must notify the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, the non-performing party is liable for damages resulting from the failure of the notice to be received by the other party.[7] It should be noted that the damages for which the non-performing party is liable are only those arising out of the failure of the other party to have received the notice and not those arising out of the non-performance.

16. The duty to notify extends not only to the situation in which a party cannot perform at all because of the unforeseen impediment, but also to the situation in which he intends to perform by furnishing a commercially reasonable substitute. Therefore, the seller in example 65D and the party responsible for arranging the carriage of the goods in example 65E must notify the other party of the intended substitute performance. If he does not do so, he will be liable for any damages resulting from the failure to give notice. If he does give notice but the notice fails to arrive he will be also liable for damages resulting from the failure of the notice to have been received by the other party.

SECTION III. EFFECTS OF AVOIDANCE

Article 66

[Release from obligations; contract provisions for settlement of disputes; restriction]

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any dama-

[3] As to the unpaid seller's right to stop delivery of the goods, see articles 54 (1) and 62 (2).

[4] See para. 2 of the commentary on article 45 and para. 2 of the commentary on article 60.

[5] Neither article 65 not any other provision of this Convention would release the seller from the obligation to deliver the goods on the grounds that there had been such a major change in the circumstances that the contract was no longer that originally agreed upon. The parties could, of course, include such a provision in their contract.

[6] The Seller would have no right to insist that the buyer take the goods if the delay constituted a fundamental breach of contract or if the delay caused the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer even if the buyer had not declared the avoidance of the contract (article 44 (1)).

[7] The requirement that the notice be received by the other party places the risk of transmission on the sender of the notice and thus reserves the general rule contained in article 25.

ges which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

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

PRIOR UNIFORM LAW

ULIS, article 78.

Commentary

1. Article 66 sets forth the consequences which follow from a declaration of avoidance. Articles 67 to 69 give detailed rules for implementing certain aspects of article 66.

Effect of avoidance, paragraph (1)

2. The primary effect of the avoidance of the contract by one party is that both parties are released from their obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

3. Partial avoidance of the contract under article 47 or 64 releases both parties from their obligations as to the part of the contract which has been avoided and gives rise to restitution under paragraph (2) as to that part.

4. In some legal systems avoidance of the contract eliminates all rights and obligations which arose out of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration, choice of law, choice of forum, and clauses excluding liability or specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

5. Paragraph (1) provides a mechanism to avoid this result by specifing that the avoidance of the contract is "subject to any damages which may be due" and that it "does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract." It should be noted that article 66 (1) would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law. Article 66 (1) states only that such a provision is not terminated by the avoidance of the contract.

6. The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the advoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this Convention. For example, article 75 (1) provides that "if the goods have been received by the buyer, and if he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them" and article 66 (2) permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself[1] or may arise out of the necessities of justice.

Restitution, paragraph (2)

7. It will often be the case that at the time the contract is avoided, one or both of the parties will have performed all or part of his obligations. Sometimes the parties can agree on a formula for adjusting the price to the deliveries already made. However, it may also occur that one or both parties desires the return of that which he has already supplied or paid under the contract.

8. Paragraph (2) authorizes either party to the contract who has performed in whole or in part to claim the return of whatever he has supplied or paid under the contract. Subject to article 67 (2), the party who makes demand for restitution must also make restitution of that which he has received from the other party. "If both parties are required to make restitution, they must do so concurrently," unless the parties agree otherwise.

9. Paragraph (2) differs from the rule in some countries that only the party who is authorized to avoid the contract can make demand for restitution. Instead, it incorporates the idea that, as regards restitution, the avoidance of the contract undermines the basis on which either party can retain that which he has received from the other party.

10. It should be noted that the right of either party to require restitution as recognized by article 66 may be thwarted by other rules which fall outside the scope of the international sale of goods. If either party is in bankruptcy or other insolvency procedures, it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets. Exchange control laws or other restrictions on the transfer of goods or funds may prevent the transfer of the goods or money to the demanding party in a foreign country. These and other similar legal rules may reduce the value of the claim of restitution. However, they do not affect the validity of the rights between the parties.

11. The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 73 of the party who relies on the breach of the contract to "take such measures as are reasonable in the circumstances to mitigate the loss" may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market where such resale would adequately protect the seller at a lower net cost.[2]

Article 67

[Buyer's loss of right to avoid or to require delivery of substitute goods]

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

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

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

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

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

[1] Article 5.

[2] Cf. article 77 on the authority of one party who holds goods for the account of the other party to sell the goods for the account of the other party.

PRIOR UNIFORM LAW

ULIS, article 79.

Commentary

Loss of right by buyer to avoid or require substitute goods, paragraph (1)

1. Article 67 states that "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

2. The rule in paragraph (1) recognizes that the natural consequences of the avoidance of the contract or the delivery of substitute goods is the restitution of that which has already been delivered under the contract. Therefore, if the buyer cannot return the goods, or cannot return them substantially in the condition in which he received them, he loses his right to declare the contract avoided under article 45 or to require the delivery of substitute goods under article 42.

3. It is not necessary that the goods be in the identical condition in which they were received; they need be only in "substantially" the same condition. Although the term "substantially" is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract.[1]

Exceptions, paragraph (2)

4. Paragraph (2) states three exceptions to the above rule. The buyer should be able to avoid the contract or require substitute goods even though he cannot make restitution of the goods substantially in the condition in which he received them (1) if the impossibility of doing so is not due to his own act or omission, (2) if the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 36, and (3) if part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

5. A fourth exception to the rule stated in article 67 (1) is to be found in article 82 which states that if the seller has committed a fundamental breach of contract, the passage of the risk of loss under article 79, 80 or 81 does not impair the remedies available to the buyer on account of such breach.[2]

Article 68

[Buyer's retention of other remedies]

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies.

PRIOR UNIFORM LAW

ULIS, article 80.

Commentary

Article 68 makes it clear that the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods because he cannot return the goods substantially in the condition in which he received them does not deprive the buyer of the right to claim damages under article 41 (1) *(b)*, to require that any defects be cured under article 42, or to declare the reduction of the price under article 46.

[1] The buyer may require the delivery of substitute goods under article 42 or, with the exception of article 45 (1) *(b)*, declare the avoidance of the contract only if the seller is in fundamental breach of the contract.

[2] See para. 2 of the commentary to article 82.

Article 69

[Accounting for benefits in case of restitution]

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

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

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

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

PRIOR UNIFORM LAW

ULIS, article 81.

Commentary

1. Article 69 reflects the principle that a party who is required to refund the price or return the goods because the contract has been avoided or because of a request for the delivery of substitute goods must account for any benefit which he has received by virtue of having had possession of the money or goods. Where the obligation arises because of the avoidance of the contract, it is irrelevant which party's failure gave rise to the avoidance of the contract or who demanded restitution.[1]

2. Where the seller is under an obligation to refund the price, he must pay interest from the date of payment to the date of refund. The obligation to pay interest is automatic because it is assumed that the seller has benefited from being in possession of the purchase price during this period. Since the obligation to pay interest partakes of the seller's obligation to make restitution and not of the buyer's right to claim damages, the rate of interest payable would be based on that current at the seller's place of business.

3. Where the buyer must return the goods, it is less obvious that he has benefited from having had possession of the goods. Therefore, paragraph (2) specifies that the buyer is liable to the seller for all benefits which he has derived from the goods only if (1) he is under an obligation to return them or (2) it is impossible for him to make restitution of the goods or part of them but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

SECTION IV. DAMAGES

Article 70

[General rule for calculation of damages]

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

[1] See article 66 (2) and para. 9 of the commentary thereon.

PRIOR UNIFORM LAW

ULIS, article 82.

Commentary

1. Article 70 introduces the Section containing the rules on damages in case of a claim under article 41 (1) *(b)* or article 57 (1) *(b)* by setting forth the basic rule for the calculation of those damages. Articles 71 and 72 implement article 70 by providing the means of calculating damages in certain defined cases when the contract has been avoided. Article 73 provides a rule on mitigation of damages while article 65 provides the rules on exemption from liability because of an impediment to performance of the obligation.

2. Article 70 provides the rule for the calculation of damages whenever and to the extent that articles 71 and 72 are not applicable. Therefore, article 70 applies whenever the contract has not been declared avoided by the party claiming damages, whether or not it could have been. It also applies where the contract has been avoided but there are damages in addition to those which can be calculated under article 71 or 72.

Basic damages

3. Article 70 provides that the injured party may recover as damages "a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach". This makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed. The specific reference to loss of profit is necessary because in some legal systems the concept of "loss" standing alone does not include loss of profit.

4. Since article 70 is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damages ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in article 70 describing the appropriate method of determining "the loss . . . suffered . . . as a consequence of the breach." The court or arbitral tribunal must calculate that loss in the manner which is best suited to the circumstances. The following paragraphs discuss two common situations which might arise under article 70 and suggest means of calculating "the loss . . . suffered . . . as a consequence of the breach".

5. Where the breach by the buyer occurs before the seller has manufactured or procured the goods, article 70 would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had incurred in the performance of the contract. The profit lost because of the buyer's breach includes any contribution to overhead which would have resulted from the performance of the contract.

Example 70A: The contract provided for the sale for $ 50,000 FOB of 100 machine tools which were to be manufactured by the seller. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of $ 45,000 of which $ 40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and $ 5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated to contract, Seller did not expend the $ 40,000 in costs which would have been incurred by reason of the existence of this contract. However, the $ 5,000 of overhead which were allocated to this contract were for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of Buyer's breach Seller has lost the allocation of $ 5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is $ 10,000.

Contract price	$ 50,000
Expenses of performance which could be saved	$ 40,000
Loss arising out of breach	$ 10,000

Example 70B: If, prior to Buyer's repudation of the contract in example 70A, Seller had already incurred $ 15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal $ 25,000.

Example 70C: If the product of the part performance in example 70B could be sold as salvage to a third party for $ 5,000, Seller's loss would be reduced to $ 20,000.

6. Where the seller delivers and the buyer retains defective goods,[1] the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the loss resulting from lowered production during the period the tools could not be used.

7. If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract.[2] Since this formula is intended to restore him to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages. To the amount as calculated above there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach.[3]

Example 70D: The contract provided for the sale of 100 tons of grain for a total price of $ 50,000 FOB. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to Buyer of drying the grain was $ 1,500. If the grain had been as contracted, its value would have been $ 55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only $ 51,000.

Contract price	$ 50,000
Value the grain would have had if as contracted	$ 55,000
Value of grain as delivered	$ 51,000
	$ 4,000
Extra expenses of drying the grain	$ 1,500
Loss arising out of breach	$ 5,500

Foreseeability

8. The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can be recovered by the party not in breach "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract". Should a party at the time of the conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

9. In some legal systems the limitation of damages to those "which the party in breach foresaw or ought to have foreseen at the time of the

[1] If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract. In such a case he would measure his damages under article 71 or 72 to the extent that those articles were applicable.

[2] Article 70 gives no indication of the time and place at which "the loss" to the injured party should be measured. Presumably it should be at the place the seller delivered the goods and at an appropriate point of time, such as the moment the goods were delivered, the moment the buyer learned of the non-conformity of the goods or the moment that it became clear that the non-conformity would not be remedied by the seller under article 35, 42, 43 or 44, as the case may be.

[3] These additional elements of the buyer's damages will often be limited by the requirement of foreseeability discussed in para. 8 *infra*.

conclusion of the contract" is not applicable if the non-performance of the contract was due to the fraud of the non-performing party. However, no such rule exists in this Convention.

Article 71

[Damages in case of avoidance and substitute transaction]

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

PRIOR UNIFORM LAW

ULIS, article 85.

Commentary

1. Article 71 sets forth a means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.

Basic formula

2. In such case the injured party may "recover the difference between the contract price and the price in the substitute transaction", i.e. the price paid for the goods bought in replacement or that obtained in the resale. In addition, he may recover any further damages recoverable under article 70.[1]

3. If the contract has been avoided, the formula contained in this article will often be the one used to calculate the damages owed the injured party since, in many commercial situations, a substitute transaction will have taken place. If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs (such as increased transportation) less any expenses saved as a consequence of the breach.

4. Article 71 provides that the injured party can rely on the difference between the contract price and the price in the substitute transaction only if the resale or cover purchase were made in a reasonable manner. For the substitute transaction to have been made in a reasonable manner within the context of article 71, it must have been made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible. Therefore, the substitute transaction need not be on identical terms of sale in respect of such matters as quantity, credit or time of delivery so long as the transaction was in fact in substitution for the transaction which was avoided.

5. It should also be noted that the time limit within which the resale or cover purchase must be made for it to be the basis for calculating damages under article 71 is "a reasonable time after avoidance". Therefore, this time limit does not begin until the injured party has in fact declared the contract avoided.

6. If the resale or cover purchase is not made in a reasonable manner or within a reasonable time after the contract was avoided, damages would be calculated as though no substitute transaction had taken place. Therefore, resort would be made to article 72 and, if applicable, to article 70.

7. If resort is made to article 72, the difference between the contract price and the market price is calculated as of the time the party claiming damages first has the right to declare the contract avoided, which is also the earliest moment in time that the difference between the contract price and the price received on resale or paid for the cover purchase may be calculated under article 71.

[1] See paras. 8 and 9 *infra*.

Additional damages

8. Article 71 recognizes that the injured party may incur further damages which would not be compensated by the basic formula. These further damages are recoverable under article 70.

9. The most usual type of further damages to be recovered under article 70 would be the additional expenses which may have been caused as a result of the receipt of non-conforming goods or the necessity to purchase substitute goods as well as losses which may have been caused if goods purchased in the substitute transaction could not be delivered by the original contract date. The amount of the recoverable damages of this type is often limited by the requirement of foreseeability in article 70.[2]

Article 72

[Damages in case of avoidance and no substitute transaction]

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

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

PRIOR UNIFORM LAW

ULIS, article 84.

Commentary

1. Article 72 sets forth an alternative means of measuring damages where the contract has been avoided but no substitute transaction was entered into under article 71.

Basic formula

2. Where the contract has been avoided, both parties are released from any future performance of their obligations[1] and restitution of that which has already been delivered may be required.[2] Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price as is provided under article 71.

3. Article 72 permits the use of such a formula even though no resale or cover purchase took place in fact or where it is impossible to determine which was the resale or purchase contract in replacement of the contract which was breached[3] or where the resale or purchase was not

[2] See para. 8 of the commentary to article 70.

[1] Article 66 (1).

[2] Article 66 (2). If the contract calls for delivery by instalments, article 64 (3) allows avoidance of the contract and a demand for restitution in respect of deliveries already made only "if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

[3] If the seller has a finite supply of the goods in question or the buyer has a finite need for such goods, it may be clear that the seller has resold or that the buyer has made a cover purchase, as the case may be. However, if the injured party is constantly in the market for goods of the type in question, it may be difficult or impossible to determine

made in a reasonable manner and within a reasonable time after avoidance, as is required by article 71.

4. Pursuant to article 72 (2), the price to be used in the calculation of damages under article 72 (1) is the current price prevailing at the place where delivery of the goods should have been made. Article 72 (1) provides that the relevant date for determining the current price is the date on which the contract could first have been declared avoided.

5. The place where delivery should have been made is determined by the application of article 29. In particular, where the contract of sale involves carriage of the goods, delivery is made at the place the goods are handed over to the first carrier for transmission to the buyer whereas in destination contracts delivery is made at the named destination.

6. The "current price" is that for goods of the contract description in the contract amount. Although the concept of a "current price" does not require the existence of official or unofficial market quotations, the lack of such quotations raises the question whether there is a "current price" for the goods.

7. "If there is no current price" at the place where delivery of the goods should have been made, the price to be used is that "at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods". If no such price exists, damages must be calculated under article 70.

Additional damages

8. Article 72 recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the basic formula. In such a case the additional losses may be recovered under article 70, provided, of course, the conditions of article 70 are satisfied.

Example 72A: The contract price was $ 50,000 CIF. Seller avoided the contract because of Buyer's fundmental breach. The current price on the date on which the contract could first have been avoided for goods of the contract description at the place where the goods were to be handed over to the first carrier was $ 45,000. Seller's damages under article 72 were $ 5,000.

Example 72B: The contract price was $ 50,000 CIF. Buyer avoided the contract because of Seller's non-delivery of the goods. The current price on the date on which the contract could first have been avoided for goods of the contract description at the place the goods were to be handed over to the first carrier was $ 53,000. Buyer's extra expenses caused by the Seller's breach were $ 2,500. Buyer's damages under articles 70 and 72 were $ 5,500.

Article 73

[Mitigation of damages]

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

PRIOR UNIFORM LAW

ULIS, article 88.

Commentary

1. Article 73 requires a party who relies on a breach of contract to adopt such measures as may be reasonable in the circumstances to mitigate the loss, including the loss of profit, resulting from the breach.

2. Article 73 is one of several articles which states a duty owed by the injured party to the party in breach.[1] In this case the duty owed is the obligation of the injured party to take actions to mitigate the harm he will suffer from the breach so as to mitigate the damages he will claim under article 41 (1) *(b)* or 57 (1) *(b)*. "If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

3. The sanction provided by article 73 against a party who fails to mitigate his loss only enables the other party to claim a reduction in the damages. It does not affect a claim for the price by the seller pursuant to article 58 or a reduction in the price by the buyer pursuant to article 46.[2]

4. The duty to mitigate applies to an anticipatory breach of contract under article 63 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise. The use of the procedure set forth in article 62, if applicable, would be a reasonable measure even though it may delay the avoidance of the contract and the cover purchase, resale of the goods or otherwise, beyond the date on which such actions would otherwise have been required.

Example 73A: The contract provided that Seller was to deliver 100 machine tools by 1 December at a total price of $ 50,000. On 1 July he wrote Buyer and said that because of the rise in prices which would certainly continue for the rest of the year, he would not deliver the tools unless Buyer agreed to pay $ 60,000. Buyer replied that he would insist that Seller deliver the tools at the contract price of $ 50,000. On 1 July and for a reasonable time thereafter, the price at which Buyer could have contracted with a different seller for delivery on 1 December was $ 56,000. On 1 December Buyer made a cover purchase for $ 61,000 for delivery on 1 March. Because of the delay in receiving the tools, Buyer suffered additional losses of $ 3,000.

In this example Buyer is limited to recovering $ 6,000 in damages, the extent of the losses he would have suffered if he had made the cover purchase on 1 July or a reasonable time thereafter, rather than $ 14,000, the total amount of losses which he suffered by awaiting 1 December to make the cover purchase.

Example 73B: Promptly after receiving Seller's letter of 1 July, in example 73A, pursuant to article 62 Buyer made demand on Seller for adequate assurances that he would perform the contract as specified on 1 December. Seller failed to furnish the assurances within the reasonable period of time specified by Buyer. Buyer promptly made a cover purchase at the currently prevailing price of $ 57,000. In this case Buyer can recover $ 7,000 in damages rather than $ 6,000 as in example 73A.

SECTION V. PRESERVATION OF THE GOODS

Article 74

[Seller's obligation to preserve]

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

which of the many contracts of purchase or sale was the one in replacement of the contract which was breached. In such a case the use of article 71 may be impossible.

[1] Under articles 74 to 77 the party in possession of goods has a duty under certain circumstances to preserve these goods and to sell them for the benefit of the party who has breached the contract, even though the risk of loss is on the party in breach.

[2] Article 46 contains a principle of mitigation in that the buyer is not permitted to reduce the price if he does not permit the seller to remedy any failure on his part in respect of any of his obligations under the contract.

PRIOR UNIFORM LAW

ULIS, article 91.

Commentary

If the buyer is in delay in taking delivery of the goods and the seller is in physical possession of the goods or is in a position to control the disposition of the goods which are in the possession of a third person, it is appropriate that the seller be required to take reasonable steps to preserve the goods for the benefit of the buyer. It is also appropriate that the seller "may retain [the goods] until he has been reimbursed his reasonable expenses by the buyer," as is provided in article 74.

Example 74A: The contract provided that Buyer was to take delivery of the goods[1] at the Seller's warehouse during the month of October. Seller made delivery on 1 October by placing the goods at Buyer's disposal.[2] On 1 November, the day when Buyer was in breach of his obligation to take delivery and the day on which the risk of loss passed to Buyer,[3] Seller shifted the goods to a portion of the warehouse which was less appropriate for the storage of such goods. On 15 November Buyer took delivery of the goods at which time the goods were damaged because of the inadequacies of the portion of the warehouse to which they had been shifted. In spite of the fact that the risk of loss had passed to Buyer on 1 November, Seller is liable for the damage to the goods which occurred between 1 November and 15 November by reason of the breach of his obligation to preserve them.

Example 74B: The contract called for delivery on CIF terms. Buyer wrongfully dishonoured the bill of exchange when it was presented to him. As a result, the bill of lading and other documents relating to the goods were not handed over the Buyer. Article 74 provides that in this case Seller, who is in a position to control the disposition of the goods through his possession of the bill of lading, is obligated to preserve the goods when they are discharged at the port of destination.[4]

Article 75

[Buyer's obligation to preserve]

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

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

PRIOR UNIFORM LAW

ULIS, article 92.

Commentary

1. Article 75 sets forth the buyer's obligation to preserve goods which he intends to reject.

2. Paragraph (1) provides that if the goods have been received by the buyer and he intends to reject them, he must take reasonable steps to preserve them. The buyer may retain those goods until he has been reimbursed his reasonable expenses by the seller.

3. Paragraph (2) provides for the same result where goods which have been dispatched to the buyer have been placed at his disposal at their destination and he exercises his right to reject them.[1] However, since the goods are not in the buyer's physical possession at the time he exercises his right to reject them, it is not as clear that he should be required to take possession of them on behalf of the seller. Therefore, paragraph (2) specifies that the buyer need take possession only if "he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense" and only if the seller or a person authorized to take charge of the goods for him is not present at the place of destination.

4. Paragraph (2) is applicable only if goods which have been dispatched to the buyer "have been placed at his disposal at their destination." Therefore, the buyer is obligated to take possession of the goods only if the goods have physically arrived at their destination prior to his rejection of them. He is not obligated to take possession of the goods under paragraph (2) if before the arrival of the goods he rejects the shipping documents because they indicate that the goods do not conform to the contract.

Example 75A: After the goods were received by Buyer he rejected them because of their failure to conform to the contract. Buyer is required by article 75 (1) to preserve the goods for the Seller.

Example 75B: The goods were shipped to Buyer by railroad. Prior to taking possession, Buyer found on examination of the goods that there was a fundamentsl breach of the contract in respect of their quality. Even though Buyer has the right to avoid the contract under article 45 (1) *(a)*, by virtue of article 75 (2) he is obligated to take possession of the goods and to preserve them, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense and provided that Seller or a person authorized to take possession on his behalf is not present at the place of destination.

Example 75C: The contract provided for delivery on CIF terms. When the bill of exchange was presented to Buyer, he dishonoured it because the accompanying documents were not in conformity with the contract of sale. In this example Buyer is not obligated to take possession of the goods for two reasons. If the goods have not arrived and been put at his disposal at the place of destination at the time Buyer dishonours the bill of exchange, the provisions of article 75 (2) do not apply at all. Even if article 75 (2) were to apply, because Buyer could take possession of the goods only by paying the bill of exchange, he would not be required by article 75 (2) to take possession and preserve the goods.[2]

Article 76

[Deposit with third person]

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

PRIOR UNIFORM LAW

ULIS, article 93.

Commentary

Article 76 permits a party who is under obligation to take steps to preserve the goods to discharge his obligation by depositing them in the warehouse of a third person. The term "warehouse" should be interpreted broadly as any place appropriate for the storage of goods of the type in question.

---

[1] The buyer's obligation to take delivery is set forth in article 56.
[2] See article 29 *(b)* and 29 *(c)*.
[3] Article 81 (1).
[4] Compare example 75C.

[1] Para. (2) states that the buyer "must take possession of [the goods] on behalf of the seller". Once possession is taken, the obligation to preserve the goods arises out of para. (1).
[2] Compare example 74B.

Article 77

[Sale of the preserved goods]

(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

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

PRIOR UNIFORM LAW

ULIS, articles 94 and 95.

Commentary

1. Article 77 sets forth the right to sell the goods by the party who is bound to preserve them.

Right to sell, paragraph (1)

2. Under paragraph (1) the right to sell the goods arises where there has been an unreasonable delay by the other party in taking possession of them or in taking them back or in paying the cost of preservation.

3. The sale may be by "any appropriate means" after "notice of the intention to sell" has been given. The Convention does not specify what are appropriate means because conditions vary in different countries. To determine whether the means used are appropriate, reference should be made to the means required for sales under similar circumstances under the law of the country where the sale takes place.

4. The law of the State where the sale under this article takes place, including the rules of private international law, will determine whether the sale passes a good title to the purchaser if the party selling the goods has not complied with the requirements of this article.[1]

Goods subject to loss, paragraph (2)

5. Under paragraph (2) the party who is bound to preserve the goods must make reasonable efforts to sell them if (1) the goods are subject to loss or rapid deterioration or (2) their preservation would involve unreasonable expense.

6. The most obvious example of goods which must be sold, if possible, because they are subject to loss or rapid deterioration is fresh fruits and vegetables. However, the concept of "loss" is not limited to a physical deterioration or loss of the goods but includes situations in which the goods threaten to decline rapidly in value because of changes in the market.

7. Paragraph (2) only requires that reasonable efforts be made to sell the goods. This is so because goods which are subject to loss or rapid deterioration may be difficult or impossible to sell. Similarly, the obligation to give notice of the intent to sell exists only to the extent to which such notice is possible. If the goods are rapidly deteriorating, there may not be sufficient time to give notice prior to sale.

8. If the party bound to sell the goods under this article does not do so, he is liable for any loss or deterioration arising out of his failure to act.

Right to reimbursement, paragraph (3)

9. The party selling the goods may reimburse himself from the proceeds of the sale for all reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance. If the party selling the goods has other claims arising out of the contract or its breach, under the applicable national law he may have the right to defer the transmission of the balance until the settlement of those claims.

CHAPTER V. PASSING OF RISK

Article 78

[Loss after risk has passed]

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

PRIOR UNIFORM LAW

ULIS, article 96.

Commentary

1. Article 78 introduces the provisions in the Convention that regulate the passing of the risk of loss.

2. The question whether the buyer or the seller must bear the risk of loss is one of the most important problems to be solved by the law of sales. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement with its attendant strain on current assets, and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the allocation of the risk has an even sharper impact.

3. Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C and F may specify the moment when the risk of loss passes from the seller to the buyer.[1] Where the contract sets forth rules for the determination of the risk of loss by the use of trade terms or otherwise, those rules will prevail over the rules set forth in this Convention.[2]

4. Article 78 states the main consequence of the passing of the risk. Once the risk has passed to the buyer, the buyer is obligated to pay for the goods notwithstanding their subsequent loss or damage. This is the converse of the rule stated in article 34 (1) that "the seller is liable . . . for any lack of conformity which exists at the time when the risk passes to the buyer".

5. Nevertheless, even though the risk has passed to the buyer prior to the time that the goods are lost or damaged, the buyer is discharged from his obligation to pay the price to the extent that the loss or damage was due to an act or omission of the seller.

6. The loss or damage to the goods may be caused by an act or omission of the seller which does not amount to a breach of the seller's obligations under the contract. For example, if the contract was on FOB terms, the risk would normally pass when the goods passed the ship's

[1] Article 4.

[1] E.g., Incoterms, FOB, A.4 and B.2; CIF, A.6 and B.3; C & F, A.5 and B.3 provide that the seller bears the risk until the goods pass the ship's rail from which time the risk is borne by the buyer.

The use of such terms in a contract without specific reference to Incoterms or to some other similar definition and without a specific provision in the contract as to the moment when risk passes may nevertheless be sufficient to indicate that moment if the court or arbitral tribunal finds the existence of a usage. See para. 6 of the commentary to article 8.

[2] Article 5.

rail.[3] If the seller damaged the goods at the port of discharge when he was recovering his containers, the damage to the goods may be considered not to be a breach of the contract but, instead, to constitute a tort. If the loss or damage to the goods constitutes a tort rather than a breach of the contract, none of the buyer's remedies under articles 41 to 47 would apply.[4] Nevertheless, article 78 provides that the buyer would not be obligated to pay the price as stated in the contract but would have the right to deduct the damages as they would be calculated under the applicable law of tort.

Article 79

[Passage of risk when sale involves carriage]

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

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

PRIOR UNIFORM LAW

ULIS, articles 19 (2), 19 (3) and 97 (1).

Commentary

1. Article 79 governs the passage of the risk of loss where the contract involves the carriage of the goods and the parties have not, by the use of trade terms or otherwise, provided for a different rule in respect of the risk of loss.[1]

2. The contract of sale involves carriage of the goods if the seller is required to ship the goods or is authorized to ship the goods and in fact does so. It does not involve carriage of the goods if the buyer takes delivery of the goods at the seller's place of business, even though they may need to be shipped by public carrier from that place, or if the buyer makes the arrangements for the goods to be shipped.

3. Contracts of sale which involve the carriage of goods fall into three categories for the purpose of determining the point of time at which the risk passes from the seller to the buyer.

First category

4. If the contract of sale provides for carriage of the goods from the seller's place of business, or such other place at which the goods may be located at the time of shipment, but does not require the seller to hand them over to the buyer or to the carrier at any place other than the place at which the carriage begins, "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer".

5. In many, perhaps in most, of the cases of the first category there will only be one carrier involved. For example, the contract provides that the seller is to arrange for carriage of the goods by truck from his place of business to that of the buyer. In some cases there will be two or more carriers. For example, the contract provides that the seller is to arrange for carriage by rail to a port at which point the goods are to go by ship. In still other cases the contract may provide that the seller is to arrange for the carriage but it is up to his judgement as to the modes of transport to be used.

Second category

6. In many contracts of sale which involve carriage of the goods, the seller is required to hand the goods over to a carrier at a place other than the seller's place of business. For example, an inland seller who contracts to sell on CIF terms is required to hand over the goods to an ocean carrier at a port. By necessity the seller will have to arrange for the goods to be carried to the port. The seller may be able to accomplish this by this own personnel and vehicles, but normally he will use an independent carrier.

7. In cases of the second category where the contract requires the seller to hand the goods over to a carrier at a place other than either the point of original shipment or the final destination of the goods, the risk passes when the goods are handed over to the carrier at that place. Therefore, where the goods are to be handed over to an ocean carrier at a port, risk passes when the goods are handed over to the ocean carrier and not when they are handed over to "the first carrier", i. e. the road or rail carrier, for carriage to the port.

Third category

8. Where the contract provides that the seller is to hand the goods over to the buyer at a particular destination, e.g. by use of an Ex Ship terms, a term which calls for delivery at the port of destination named in the contract, the risk of loss does not pass under article 79 but passes under article 81 (1) after the goods have arrived at the named port of destination. The exact time at which risk passes depends upon factors discussed in the commentary to article 81.

Retention of documents by the seller

9. It is a normal practice for an unpaid seller to retain the shipping documents as a form of security until such time as payment is made. In some legal systems "title" or "property" in the goods does not pass to the buyer until the documents are handed over to him. This can raise the question as to whether the risk of loss has passed.

10. The third sentence of article 79 (1) makes it clear that the fact that the seller is authorized to retain documents controlling the disposition of the goods, or the fact that he acts in accordance with that authority, does not affect the passage of the risk, even though under the applicable national law it may affect the passage of "title" or "property".[2]

Identification of the goods, paragraph (2)

11. It is not infrequent that goods are shipped for the purpose of fulfilling a sales contract but the shipment is such that it would not be possible to tell from the markings on the packages, if any, or from the documents accompanying the shipment or in any other manner that the goods are intended to fill that particular contract. This situation can arise if the seller ships the goods to a party other than the buyer, such as an agent of the seller, who is to arrange for delivery to the buyer. Similarly, goods to fulfil more than one contract may be shipped in bulk. For example, a seller might ship 10,000 tons of wheat to fulfil his obligations to deliver 5,000 tons to each of two separate buyers.

12. In any of these cases in which the goods are not identified to the contract, article 79 (2) provides that the risk does not pass as provided in article 79 (1). Instead, it passes at the moment the seller sends the buyer a notice of the consignment which specifies the goods.

[3] See footnote 1 above.

[4] Article 41 (1) makes these remedies applicable only if the seller "fails to perfom any of his obligations under the contract and this Convention".

[1] Article 82 affects the application of article 79 if there has been a fundamental breach of contract.

[2] Article 4 *(b)* provides that this Convention is not concerned with "the effect which the contract may have on the property in the goods sold".

Article 80

[Passage of risk when goods sold in transit]

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

PRIOR UNIFORM LAW

ULIS, article 99.

Commentary

1. If the goods were in transit at the time the contract of sale was concluded, the risk of loss is deemed to have passed retroactively at the time the goods were handed over to the carrier who issued the documents controlling their disposition. This rule that the risk of loss passes prior to the making of the contract arises out of purely practical concerns. It would normally be difficult or even impossible to determine at what precise moment in time damage known to have occurred during the carriage of the goods in fact occurred. It is simpler if the risk of loss is deemed to have passed at a time when the condition of the goods was known. In addition, it will usually be more convenient for the buyer, who is in physical possession of the goods at the time the loss or damage is discovered, to make claim against the carrier and the insurance company.

2. However, any loss or damage which had already occurred at the time of the conclusion of the contract and of which the seller knew or ought to have known but which he did not disclose to the buyer is at the risk of the seller.

Article 81

[Passage of risk in other cases]

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

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

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

PRIOR UNIFORM LAW

ULIS, articles 97 and 98.

Commentary

1. Article 81 gives the general rule for passage of the risk of loss in those cases which do not fall within articles 79 and 80. In the cases governed by article 81 it is anticipated that the buyer will take possession of the goods and arrange for any necessary transport himself, either in his own vehicles or in public carriers.

Buyer takes over the goods, paragraph (1)

2. Where the buyer takes over the goods at a place of business of the seller, the risk passes when he takes over the goods.

Buyer fails to take over the goods, paragraph (1)

3. If the buyer was obligated to take over the goods at a place of business of the seller and the seller placed the goods at the buyer's disposal but the buyer failed to take them over in due time, the risk passes when the buyer commits a breach of contract by failing to take them over.

Example 81A: Buyer was to take delivery of 100 cartons of transistors at Seller's warehouse during the month of July. On 1 July Seller marked 100 cartons with Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July Buyer took delivery of the 100 cartons. Therefore, the risk of loss passed to Buyer on 20 July at the moment that the goods were taken over by him.

Example 81B: In the contract described in example 81A Buyer did not take over the 100 cartons until 10 August. The risk of loss passed to him at the close of business on 31 July, the moment at which the Buyer was in breach of contract for failing to take delivery.

Example 81C: Although Seller in the contract described in example 81A should have had the 100 cartons ready for Buyer to take delivery at any time during the month of July, no cartons were marked with Buyer's name or otherwise identified to the contract until 15 September. Buyer took delivery on 20 September, which was within a reasonable time after he was notified of the availability of the goods. The risk of loss passed to Buyer on 20 September, the time when Buyer took delivery of the goods. This result occurs, rather than the result given in example 81B, because Buyer was not in breach of the contract for not taking delivery before 20 September.

Goods not at a place of business of seller, paragraph (2)

4. The considerations which go into determining the appropriate time for the passage of the risk are different when the goods are at a place other than any place of business of the seller. So long as the goods are in the physical possession of the seller and the last day of the period during which the buyer was obligated to take over the goods has not as yet passed, it is appropriate that the seller should bear the risk of loss. It is the seller who is in the best position to protect the goods from loss or damage and, if loss or damage occurs, to present claims against those who might have caused the loss or against the insurance carrier.

5. These considerations are no longer present when the goods are in the hands of a third party, such as a public warehouse. The seller is in no better position than the buyer to guard the goods against loss. Nor is the seller in any better position than the buyer to present claims against the third party, a person responsible for causing the loss or an insurance carrier, as the case may be.

6. The Convention chooses the rule that the risk passes to the buyer at the time the buyer is in a position to withdraw the goods from the control of the third party. That time is when delivery of the goods is due, the goods have been placed at the disposal of the buyer and he is aware that they have been placed at his disposal.

Placed at the disposal of the buyer

7. Goods are placed at the disposal of the buyer when the seller has done that which is necessary for the buyer to be able to take possession. Normally, this would include the identification of the goods to be delivered, the completion of any pre-delivery preparation, such as packing, to be done by the seller, and the giving of such notification to the buyer as would be necessary to enable him to take possession.

8. If the goods are in the possession of a bailee, such as a warehouseman or a carrier, they might be placed at the disposal of the buyer by such means as the seller's instructions to the bailee to hold the goods for the buyer or by the seller handing over to the buyer in appropriate form the documents which control the goods.

Article 82

[Effect of fundamental breach on passage of risk]

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

PRIOR UNIFORM LAW

ULIS, article 97 (2).

Commentary

1. Article 82 provides that the passage of the risk of loss under articles 79, 80 and 81 does not impair any remedies which the buyer may have which arise out of a fundamental breach of contract by the seller.

2. The primary significance of article 82 is that the buyer may be able to insist on the delivery of substitute goods under article 42 or 43 or to declare the contract avoided under article 45 (1) *(a)* or *(b)* even though the goods have been lost or damaged after the passage of the risk of loss under article 79, 80 or 81. In this respect article 82 constitutes an exception to article 67 (1) as well as to articles 79, 80 and 81 in that, subject to three exceptions enumerated in article 67 (2), "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

3. Article 82 must be read in connection with articles 37 and 45 (2) because in some examples the buyer will lose his right to declare the contract avoided or to require the seller to deliver substitute goods because he did not act within the time-limits required by those articles.

Example 82A: The contract was the same as in example 81A. Buyer was to take delivery of 100 cartons of transistors at Seller's warehouse during the month of July. On 1 July Seller marked 100 cartons with Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July Buyer took delivery of the 100 cartons at which time he paid the price. Therefore, under article 81 (1) the risk of loss passed to Buyer on 20 July.

On 21 July, before Buyer could make the examination required under article 36, 50 of the cartons were destroyed in a fire. When Buyer examined the contents of the remaining 50 cartons, the transistors were found not to conform to the contract to such a degree that the lack of conformity constituted a fundamental breach of the contract.

In spite of Buyer's inability to return all 100 cartons because of the fire which had occurred after the passage of the risk of loss, Buyer could avoid the contract and recover the price he had paid.

Example 82B: The facts are the same as in example 82A except that Buyer did not examine the remaining 50 cartons of transistors for six months after he received them. In such a case he could probably not avoid the contract because it would probably be held under article 37 (1) that he had not given notice of the lack of conformity "whithin a reasonable time after he . . . ought to have discovered it" and under article 45 (2) *(b)* that he had not declared the contract avoided "within a reasonable time . . . after he . . . ought to have known of such breach".

Example 82C: In partial fulfilment of his obligations under the contract in example 82A on 1 July Seller identified to the contract 50 cartons of transistors rather than the 100 cartons called for in the contract.

On 5 August, before Buyer took delivery of the goods, the 50 cartons were destroyed in a fire in Seller's warehouse. Even though the risk of loss in respect of the 50 cartons had passed to Buyer at the close of business on 31 July,[1] if identifying to the contract only 50 cartons instead of 100 cartons constituted a fundamental breach of contract, Buyer could still declare the contract avoided by reason of article 82. However, he must do so "within a reasonable time . . . after he knew or ought to have known" of the shortage or he will lose the right to declare the contract avoided by virtue of article 45 (2) *(b)*.

Example 82D: Although Seller in the contract described in example 82A should have had the 100 cartons ready for Buyer to take delivery at any time during the month of July, no cartons were marked with Buyer's name or otherwise identified to the contract until 15 September. Buyer took delivery on 20 September. As was stated in example 81C, the risk of loss passed to the Buyer on 20 September, the time when Buyer took delivery of the goods.

On 23 September the goods were damaged through no fault of Buyer. If Seller's delay in putting the goods at Buyer's disposal amounted to a fundamental breach, article 82 provides that the damage to the goods after the passage of the risk of loss would not prohibit Buyer from declaring the contract avoided. However, under article 45 (2) *(a)*, it is likely that it would be held that once Buyer had taken delivery of the goods by picking them up at Seller's warehouse, he had lost the right to declare the contract avoided for not having "done so within a reasonable time . . . after he [became] aware that delivery has been made".

Example 82E: The contract was similar to that in example 82A except that Seller was to ship the goods on FOB terms during the month of July. The goods were shipped late on 15 September. Under article 79 (1) the risk of loss passed on 15 September.

On 17 September the goods were damaged while in transit. On 19 September both the fact that the goods had been shipped on 15 September and that they were damaged on 17 September were communicated to Buyer. Under these facts, if the late delivery constituted a fundamental breach, Buyer could avoid the contract if he did so "within a reasonable time . . . after he has become aware that delivery has been made",[2] a time which would undoubtedly be very short under the circumstances.

[1] See example 81B.
[2] Article 45 (2) *(a)*.

E. DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: DRAFT ARTICLES CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES

Prepared by the Secretary-General

Document A/CONF.97/6

[Original: English]
[31 October 1979]

Introduction

1. The General Assembly, by resolution 33/93 of 16 December 1978 entitled "United Nations Conference on Contracts for the International Sale of Goods", requested the Secretary-General, among other things, to prepare and circulate draft provisions concerning implementation, reservations and other final clauses for the draft Convention on Contracts for the International Sale of Goods. This document is submitted to the Conference in compliance with that request.

2. The draft articles set forth in this document have not been approved by the United Nations Commission