Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods

Professor Jacob S. Ziegel, University of Toronto
and
Professor Claude Samson, Université Laval

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PART I

GENERAL OVERVIEW OF CONVENTION AND RECOMMENDATIONS

preface

We were two of the Canadian delegates at the diplomatic conference convened by the United Nations and held in Vienna from 10 March to April 11, 1980, to consider the adoption of the draft Convention on Contracts for the International Sale of Goods prepared by the United Nations Commission on International Trade Law (UNCITRAL). The Convention was adopted by the conference in an amended form on April 11, 1980, after three weeks of intensive deliberations.

We have now been asked to prepare a report on the Convention for the use of the Uniform Law Conference of Canada assessing its suitability for adoption by the Provinces and accompanied by a section by section analysis of . . . the Convention.

We are pleased to submit our report herewith. . . . Part I contains our "Overview of the Convention and Recommendations"; Part II contains two analyses of Articles 1-88 of the Convention, one by Prof. Ziegel from a provincial common law perspective and the other by Prof. Samson from a Quebec civil law perspective. . . .

We have had to operate under severe time constraints, and we are all too conscious of the shortcomings in our Report. Nevertheless, we believe it contains enough detail to enable the reader to understand the main features of the Convention and the questions it raises with respect to its adoption by Canada. The two analyses are far from exhaustive and, again, are only intended to indicate to what extent the individual articles of the Convention correspond to the domestic laws of the common law Provinces and the Province of Quebec. In preparing our

Report we have made substantial use of earlier work done by us individually for the federal Department of Justice and the Quebec Ministry of Justice.

We wish to express to the officials of both these agencies our grateful appreciation for the many courtesies extended to us both in the preparation of this report and on earlier occasions. We are particularly indebted to Martin Low of the federal Department of Justice for arranging for the translation of our report and looking after the mechanics of its presentation to the Uniform Law Conference.

J.S.Z.

C.S.

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ABBREVIATIONS

BENJAMIN - Benjamin's Sale of Goods, Guest ed. (1975).

CISG - UN Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980

COMMENTARY - Text of Draft Convention on Contracts for the International Sale of Goods approved by UNCITRAL together with a Commentary prepared by the Secretariat A/CONF./97/5, 14 March 1979

DOJ QUESTIONNAIRE - Department of Justice, Ottawa: Responses to Solicitation of Industry Views regarding Draft Convention . . . and Questionnaire prepared by the Department, September 5, 1979.

GRAVESON - Graveson, Cohn and Graveson, *Uniform Laws on International Sales Act, 1967* (London, 1968).

OLRC SALES REPORT - Ontario Law Reform Commission, *Report on Sale of Goods* (Toronto 1979, 3 vols.)

OSGA - The Sale of Goods Act, Ontario, R.S.O. 1970, c. 461, as am.

UCC - (American) Uniform Commercial Code, 1972 Official Text.

ULIS - Uniform Law for the International Sale of Goods, The Hague, 1964.

ULFC - Uniform Law for the Formation of Contracts in the International Sale of Goods, The Hague, 1964.

WADDAMS - The Law of Contracts (1977).

[Introductory Comments]

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1. On 11 April 1980, after five weeks of intensive deliberations in Vienna, a diplomatic conference convened by the United Nations approved the text of a Convention on Contracts for the International Sale of Goods. (1) [1. U.N. Doc. A/Conf. 97/18, 10 April 1980.]

The Convention was drafted by the United Nations Commission on International Trade Law (UNCITRAL) and its adoption marks the culmination of ten years' effort by the UN agency. The purpose of this introduction is to describe the history of the project and to provide an overview of the general structure and salient features of the Convention, coupled with our own reflections on whether Canada, through the Provinces, should subscribe to the Convention and what the effect of such adherence would be on Canadian importers and exporters.

2. *History of Uniformity Movement*. The history of the quest for a uniform law on the international sale of goods goes back at least to the early thirties when a group of distinguished European scholars began work on such a project under the auspices of the (Rome) International Institute for the Unification of Private Law (*Unidroit*). The work was interrupted by the war but was resumed in the fifties. At the same time the locus for the new impetus was moved to The Hague and the Dutch government eventually agreed to sponsor a diplomatic conference in an effort to bring the work to a conclusion. Such a conference was held at the Hague in 1964 and it led to the adoption of two conventions, one on a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) and a second on a Uniform Law on the International Sale of Goods (ULIS). (2) [2. The Laws are reproduced in Graveson, Cohn and Graveson, *The Uniform Laws on International Sales Act 1967* (Butterworths 1968).]

As their titles indicate, the first convention was solely concerned with the formational aspects of the contract of sale, whereas the second dealt with the substantive aspects of the contract of sale and the rights, duties and remedies of the parties under such a contract.

3. The Hague Conventions did not attract widespread support and, as of 1979, apparently only eight, mainly European, countries had ratified or acceded to the conventions. (3) [3. Viz. Belgium, Federal Republic of Germany, United Kingdom, Gambia, Israel, Italy, Netherlands and San Marino. Israel did not accede to the Formation Convention.]

Canada and the U.S.A. were not among them. The United Kingdom was apparently the only common law jurisdiction to adhere to the Conventions, but its accession was of limited significance in view of the fact that, as a result of a reservation in the terms of accession permitted by the Convention. (4) [4. ULIS Convention, Art. V; ULFC Convention, Annex II, Art. 1.] (the Uniform Laws only applied where the parties themselves had adopted the Uniform Laws as the laws of their contract.)

4. The Uniform Law on Formation was by far the shorter of the two Laws and comprised thirteen articles which, needless to say, did not exhaust the subject. The Uniform Law on Sales was much longer and ran to 101 articles. ULFC was generally received quite favourably, but ULIS attracted much criticism. 5 [5. Cf. Honnold, "The Draft Convention on Contracts for the International Sale of Goods: An Overview" (1979) 27 A.J.C.E. 223, 225 et seq.]

The criticisms fell into two broad categories. The first group of criticisms were of a technical character and revolved around the length of ULIS, its repetitiveness, the complex system of notices, and difficulties surrounding such key concepts as *ipso facto* avoidance and the definition of fundamental breach. The second group of criticisms were more politically oriented and were founded on the complaint that the Uniform Laws were essentially a Western European creation (which was true) and tended generally to favour the seller's interests (which was less true). In any event the criticisms were sufficiently widespread to chill effectively any movement towards the wider adoption of the Uniform Laws.

5. *The UNCITRAL Convention*. The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 with the object of promoting the progressive harmonization and unification of the law of international trade. (6) [6. See Honnold, "The United Nations Commission on International Trade Law: Mission and Methods" (1979) 27 A.J.C.L. 201.]

The Commission consists of 36 elected members of the United Nations who are drawn from the various geographical regions and principal economic and legal systems of the world. Canada is not a member; but France, West Germany, the United Kingdom and the United States are members. So is Australia. We note these facts in order to indicate that, even though Canada itself is not represented at UNCITRAL, its two legal systems are well represented through other countries.

6. The Commission meets annually but the detailed work on individual projects is frequently delegated to small working groups. During its first decade the Commission focussed its activities on four major areas of international trade law, viz., international sale of goods, international payments, international commercial arbitration, and international shipping legislation. Sales law absorbed an appreciable part of the Commission's time. The Commission scored an early success in this area with the drafting and subsequent adoption in 1974 by

a U.N. sponsored diplomatic conference of the Convention on the Limitation Period in the International Sale of Goods. (7) [7. UN Doc. A/Conf. 63/15, June 13, 1974. See further, Symposium, *Unification of International Trade Law: UNCITRAL's first Decade* (1979) 27 A.J.C.L. 201 et seq.]

7. However, in the sales area, the Commission's main efforts were directed towards a revision of the Uniform Laws with a view to the preparation of revised texts that would prove more acceptable than the 1964 versions to countries of different legal, economic and social systems. A working group was established for this purpose in 1969 and completed its work in 1976. The draft Convention on the International Sale of Goods prepared by the Working Group was approved at a plenary session of the Committee in June 1977. The Working Group subjected the Uniform Law on Formation to a similar review and completed this phase of its work in September 1977. At its eleventh session held in May and June 1978 the Commission approved the draft provisions on Formation and decided at the same time to integrate both draft Conventions into a single Convention to be known as the Convention on Contracts for the International Sale of Goods (CISG). (8) [8. U.N. Gen. Ass., Off. Records: 33rd Sess., Suppl. No. 17, Doc. No. A/33/17, pp. 10 et seq. The acronym CISG is North American in origin and has no official sanction. The draft convention is examined as part of the Symposium, *supra* n. 7. See also (1979) 106 *Journal du droit international* 745 et seq., and *Problems of Unification of International Sales Law*, Working Papers submitted to the Colloquim of the International Ass'n of Legal Science, Potsdam, Aug. 1979 (Oceana, 1980).]

As already noted, the draft Convention was approved at the Vienna Diplomatic Conference. The Conference made a large number of minor changes but very few of substance. . . .

Structure of CISG. CISG follows the same basic structure as the Uniform Laws which it supersedes but it is substantially shorter and, in several respects, simpler than its predecessors. The greater economy of the convention is due to the substitution of two consolidated regimes of buyer's and seller's remedies (9) [9. CISG, arts. 45, 61.] for the multiple provisions in ULIS. CISG has also attempted to meet many of the other criticisms directed at ULIS, notably by greatly simplifying the definition of fundamental breach, (10) [10. CISG, art. 25.] avoiding the complex system of notices, and abolishing the concept of *ipso facto* avoidance. CISG is divided into three principal parts which deal respectively with the following topics:

PART I-Sphere of Application and General Provisions (Arts. 14-13).

PART II-Formation of the Contract (Arts. 14-24).

PART III-Sale of Goods (i.e. substantive provisions of contract of sale):

Ch. I - General Provisions (Arts. 25-29)

Ch. II - Obligations of Seller (Arts. 30-52)

Ch. III - Obligations of Buyer (Arts. 53-65)

Ch. IV - Passing of Risk (Arts. 66-70)

Ch. V - Provisions Common to the Obligations of the Seller and of the Buyer (Arts. 71-88)

PART IV-Final Provisions (Arts. 89-101). These deal with signature, ratification, acceptance or approval, and accessoion to the Convention. Part IV also contains the important federal-state clause specifically requested by Canada (Art. 93) and the provision (Art. 94) (11) [footnote 11 quotes portions of Arts. 93 and 94.]

8. Annex II to the Convention contains a Protocol amending the Convention on the Limitation Period in the International Sale of Goods. CISG is open for signature and accession by all states and comes into force on the first day of the month following the expiration of 12 months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession (Art. 99). An acceding state may at the time of ratification etc. declare that it will not be bound by Part II or Part III of the Convention . A state that adopts the Convention and

that has also adopted one or both of the Hague Uniform Laws is obliged to denounce them at the time it adopts the Convention .

9. Parts I, II and III of the Convention are clearly and simply written in non-technical language and, for the most part, one does not need to be a comparativist to understand them adequately although no doubt a knowledge of comparative law would be helpful. This does not of course mean that there may not be differences of opinion with respect to the precise interpretation of particular sections. An official commentary would have been very helpful. The UNCITRAL secretariat prepared an unofficial commentary on the draft convention (12) [12. UN Doc. A/Conf./97/5, 14 March 1979, hereafter referred to as the [Secretariat] Commentary.]but, regrettably, no official commentary was approved or authorized to be prepared by the diplomatic conference.

10. *Comparison between CISG and Canadian Sales Laws*. The legal problems engendered by a contract of sale are basically the same in all mature legal systems but the solutions to them differ widely in detail and not infrequently on questions of principle, even among members of the same legal family. There would appear to be at least five types of sales law, viz. Civilian, Common Law, Scandinavian, Communist, and religiously based systems such as Muhammedan law. Within the civilian family, there are also significant differences, as for example, between German and French law. The differences are no less significant between common law jurisdictions. The United Kingdom substantially codified its sales law in the Sale of Goods Act 1893. The Act has been modestly amended since then but otherwise remains substantially intact. (13) [13. The current law is found in the U.K. Sales of Goods Act 1979, c. 54.]

Closely related areas of law--notably consumer credit law and other areas of consumer concern--have been revised much more extensively. All the Canadian common law provinces have adopted the 1893 Act (14) [14. See, for example, R.S.O. 1970, c. 421, as am. (hereafter also referred to as the OSGA).]but only one (British Columbia) has copied any of the British amendments. On the other hand, the Provinces have enacted a great volume of consumer credit and other consumer related legislation which has no precise counterpart in the U.K. (15) [15. For further details, see Ontario Law Reform Commission, *Report on Sale of Goods* (1979), vol. 1, pp. 7 et seq. (hereafter referred to as "OLRC Sales Report").]

11. Mais pour le Québec, seule province de droit civil au Canada, les règles de droit applicables à la vente énoncées aux article 1472 ss. du Code civil, sont complétées par les règles générales du droit des obligations, contenues aux articles 982 ss. du Code. A ces dispositions de droit commun, il faut ajouter certaines règles de droit statutaire dictées pour la protection du consommateur.

12. The governing sales law in the U.S. is Article 2 of the Uniform Commercial Code (UCC). All the states, with the exception of Louisiana, and the District of Columbia have adopted the Uniform Commercial Code, which is a joint product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Article 2 supersedes the Uniform Sales Act (USA) first adopted by the National Conference in 1906. The Uniform Sales Act differed in significant respects from the British Act of 1893 and Article 2 has widened the gap much more substantially. (16) [16. *Ibid*., vol. 1, pp. 12-18.]

13. It will be seen therefore that the draftsmen of the UN Convention, like the draftsmen of the Hague Conventions before them, faced a formidable task in trying to reconcile so many conflicting strains. That they succeeded at all is a credit to their perseverance and a reflection of the functional unity that joins the search for solutions in the sales area. The fact remains that CISG is a composite of many influences, though in drafting style it is closer to the civilian model than to the style familiar to common law lawyers. The syncretic nature of CISG raises important questions of interpretation to which we return later. For the moment we list below some of the important differences between the UN Convention and the Sale of Goods Acts obtaining in the common law Provinces and between the Convention and Quebec law:

A. Difference with law of common law provinces

14... *Formation*

- 1) The binding nature of an irrevocable offer, whether or not it is supported by consideration (Art. 16).

- 2) Adoption of reception rule with respect to the time of acceptance of all offers accepted by communication (Arts. 18(2), 24).

- 3) Abolition of "mirror image" rule with respect to the requirement of exact correspondence between offer and acceptance (Art. 19(2)).

15... *Substantive Provisions*

- 4) Unless a ratifying state has made a contrary reservation, no writing is required as a condition of the enforceability or formal validity of the contract of sale (Art. 11-12, 96).

- 5) Binding character of modified terms or agreement to terminate contract, even though not supported by consideration (Art. 29).

- 6) No *a priori* characterization of terms of the contract into warranties and conditions, as is true under the provincial Sale of Goods Acts. Instead the consequences of a breach of either party's obligations are, with few exceptions, determined by the gravity of the breach, that is, by whether or not it amounts to a "fundamental breach" (Arts. 25, 49(1), 64(1).)

- 7) Different rules with respect to the transfer of risk of loss or damage to the goods and with respect to the definition of circumstances amounting to frustration of the contract and the consequence of frustration. (Arts. 66-70, 79).

- 8) *Remedies for Breach of the Contract*:

- a. The buyer's right to reject non-conforming goods and to cancel a contract for other breaches by the seller are both stronger and weaker under CISG than under the provincial Acts; the same is true with respect to the seller's remedies where the buyer is in breach (Arts. 49(1), 61-64).

- b. The test of remoteness in Art. 74 for the recovery of damages appears to be somewhat more generous in favour of the aggrieved party than the common law rules generally referred to as the rules in *Hadley* v. *Baxendale*.

- c. Unlike provincial law, CISG explicitly recognizes the seller's right of resale when the buyer wrongfully refuses to accept and pay for the goods and the buyer's right "to cover" a non-delivery by the seller as the basis for quantifying the measure of damages of the aggrieved party (Art. 75).

- d. Unlike provincial law, CISG also recognizes an aggrieved party's right to demand assurance of performance from the other party as a condition of proceeding with his own performance where he has justifiable grounds for feeling himself insecure (Art. 71).

B. Différences avec le droit Québécois

Dispositions générales

-1) La règle de la recevabilité de tous les moyens de preuve (art. 11). La grande différence qui existe présentement entre l'article 11 de la C.V.I.M. et le Code civil, nous vient de l'article 1235 al. 4, qui constitue une exception au principe général de l'admissibilité de la preuve testimoniale en matiére commerciale.

Formation du contrat

-2) Une proposition ne constitue une offre que si elle est adressée à une ou plusieurs personnes déterminées (art. 14(1)). Une proposition adressée au public en général ne constitue une offre que si l'offrant l'a clairement indiqué (art. 14(2)).

-3) Même si elle est irrévocable, une offre peut être rétractée, si la rétractation parvient au destinataire avant ou en même temps que l'offre (art. 15(2)).

-4) Si aucun délai n'est accordé, l'offre peut être révoquée en tout temps avant la conclusion du contrat (art. 16(1)).

-5) Une offre verbale doit être acceptée immédiatement (art. 18(2) in fine).

-6) La combinaison des articles 23 et 18(2) de la Convention, a pour effet d'admettre la théorie de la réception en matière de formation de contrat. Le droit québécois n'admet cette théorie que lorsque l'offre et l'acceptation sont faites par des moyens de communication différents.

Ventes de marchandises

-7) Le vendeur est responsable de tout défaut de conformité existant au moment du transfert des risques (art. 36(1)).

-8) Délai péremptoire de deux (2) ans accordé à 1'acheteur pour dé-noncer un défaut de conformié (art. 39(2)).

-9) Le droit de l'acheteur de demander des dommages-intérêts moratoires, malgré le délai de grâce consenti au vendeur (art. 47 (2) in fine).

-10) Le droit du créancier à la résolution de plein droit (art. 49).

-11) La vente peut être conclue même si le prix n'est pas déterminé ou déterminable à partir d'élements contenus au contrat (art. 55).

-12) Le vendeur qui a expédié les marchandises peut s'opposer à ce qu'elles soient remises à 1'acheteur, lorsqu'il apparaît que ce dernier n'exécutera pas une partie essentielle de ses obligations (art. 71(2)).

-13) Le vendeur tenu de restituer le prix, doit également les intérêts de ce prix à compter du jour du paiement (art. 84(1)). L'acheteur doit au vendeur l'équivalent de tout avantage ou profit retiré des marchandises, lorsqu'il doit les restituer (art. 84(2)).

-14) En matière de dommages-intérêts, l'article 74 de la C.V.I.. ne précise pas qu'ils ne comprennent que ceux qui résultent directement de l'inexécution du débiteur; de plus cette disposition ne comporte pas de sanction particulière pour le débiteur de mauvaise foi.

-15) Le transfert des risques s'opere au moment où le vendeur exécute son obligation de livraison ou encore, au moment où l'acheteur accomplit son obligation de prendre livraison (art. 66-67-68-69).

16. Several points need to be emphasized with respect to the above lists. First, they are non-exhaustive. Second, no inference is to be drawn from the lists with respect to the superiority or inferiority of a CISG rule simply because it differs from Canadian provincial law. The Ontario Law Reform Commission has recently made recommendations for the adoption of a revised Ontario Sale of Goods Act (17) [17. See *supra* n. 15.] and a substantial number of its proposed provisions are closer to CISG than the existing Act. In Quebec the Civil Code Revision Office has also recommended the adoption of a revised Civil Code and the proposed rules governing contracts of sale are closer to the CISG provisions than the rules in the existing Civil Code. (18) [18. Office de révision du Code civil, *Rapport sur le Code civil du Quebec*, vol. 1, Project de Code civil. Editeur Officiel, Quebec.]

In any event, there would be no need for an international Act if the sales rules of the national legal systems were the same.

17. ***Should Canada Support Adoption of CISG*****?**

In the second part of this report we subject the individual provisions of CISG to more detailed analysis. As will be seen, the convention contains a number of ambiguities and a substantial number of unanswered questions, and in other areas important policy judgments are open to question, at least as seen through the eyes of a Canadian lawyer. Overall, however, as an exercise in international law making and if the technical quality of the convention were the sole desideratum, much can be said in favour of Canada adopting the Convention. In our view, given the crucially important fact that CISG recognizes expressly the parties' rights to vary its terms or to exclude them entirely (see Art. 6), (19) [19. ***Art. 6*****: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.] informed businessmen should have little difficulty in being able to live with the Convention. (20) [20. This conclusion is supported by the reply of one of the respondents to the Department of Justice (hereafter DOJ) Questionnaire: "The Draft Convention will not have a substantial effect upon obligations of . . . as a seller or customers of as buyers. The Convention does establish a set of common sense guidelines which should be of value in trade between countries of substantially different legal systems or stages of development."]**

It seems to us however that more fundamental questions are at issue than the technical quality of the Convention and that these need to be given careful consideration in determining whether or not Canada should support the Convention in its existing form. These considerations are canvassed in the following paragraphs.

18. ***Arguments in favour of adoption*****.**

The following points argue in favour of supporting the Convention: (1) The desirability of promoting greater uniformity and progressive harmonization of the private law rules governing commercial transactions in the international arena. (2) The psychological importance of supporting UNCITRAL's work. An immense amount of time and effort has been invested in the CISG project and a rejection of the Convention might be interpreted as a repudiation of the Commission's goals. (3) The need for an "impartial" legal regime to govern contractual trading relationships between developed and under-developed countries and between countries with widely divergent social, economic and legal systems.

19. These points largely speak for themselves but the following elaboration may be helpful. So far as the first point is concerned, an important goal of postwar policy in the international arena has been to liberalize international trade and to reduce or eliminate tariff and non-tariff barriers impeding the flow of goods in international commerce. Divergent national rules in the contractual area may also restrict, or at least complicate, international trade and to the extent that they do conventions such as CISG support the macro-economic efforts in the public law areas.

20. The importance of the second point (support for UNCITRAL's work) is more difficult to evaluate. Obviously UNCITRAL's work should be supported but it cannot be seriously suggested that support for the organization's general objectives must lead to unquestioning acceptance of every convention that is approved by the organization, especially in view of the fact that Canada is not a member of UNCITRAL. The need to weigh costs and benefits still remains.

21. This is also true of the third point, the need for an "impartial" legal regime. If countries x and y do not have a mature sales law, or if parties in those states proposing to engage in trade with each other are not happy to accept the law of either state as the proper law of the contract, then obviously an international sales law may provide an appropriate solution to the parties' difficulties. Their needs and preferences however throw little light on the needs and preferences of contracting parties in other countries who are content to have their contract governed by national law and who would not appreciate the need to opt-out of CISG if they do not wish the Convention to apply to their contract.

22. ***Arguments against adoption of CISG in its present form*****.**

The reference to the need to opt-out of the Convention if the parties do not wish it to apply is only one of a substantial number of objections that could be raised, although it is no doubt the most important. Other possible objections that should also be considered are the following: (a) The business community in Canada has not pressed for the adoption of an international sales law and it is not clear who would benefit from it; (b) Important aspects of sales law are excluded from the Convention so that the sought after certainty and uniformity may not in fact be reached; (c) Even where the Convention clearly does apply, many questions of exegesis and application will remain uncertain and it will require a substantial period of time to develop a body of reliable and authoritative precedents.

We will deal first with the opting-in and opting-out problem and then return to the other difficulties later. It goes without saying that in listing these possible objections we are not necessarily agreeing with them.

23. ***The Need to Opt Out of this Convention*****.**

As previously mentioned, the Hague Conventions permitted acceding states to add a reservation not making the Conventions applicable unless the contracting parties had adopted the Uniform Laws (or either of them) as the law of their contract. The UN Convention contains no comparable provision and its terms are binding on contracting parties unless (a) they have excluded the Convention, or part of it, pursuant to Article 6, or (b) a declaration has been made under the "closely related legal rules" clauses in Article 94. (21) [21. For the terms of art. 94 see *supra* n. 11.]

Neither of these exceptions strikes us as satisfactory as a straight opting-in provision would have been. Canada attempted at the Vienna Conference to have such a change introduced but the resolution received negligible support in committee and it was easily defeated. The question was not even debated at the plenary sessions of the Conference. The authors of this report had previously been told privately that UNCITRAL's Secretariat thought that the opting-in reservation in the Hague Conventions was a mistake and undermined the purpose of an international sales convention. In the view of these officials the effect was to convert the Hague Conventions into a model law and to discourage states from subscribing to them. Presumably the delegates at Vienna were guided by a similar sentiment.

24. One could accept the result with equanimity if one could confidently assume that the Convention will only affect sophisticated businessmen who will know of the need to exclude the Convention if they do not wish it to apply or whose contracts are likely to be drafted with the aid of legal counsel. These assumptions cannot safely be made. Article 1 provides that the Convention applies 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."

Although Article 1 refers to the parties' places of business, there is some doubt whether the Convention is in fact confined to "commercial" contracts or to contracts between merchants. (22) [22. There is some difference of opinion on this question between us. See our individual Comments in Part II of this Report on Article 1 of the Convention.]

The only express exclusions are those listed in Article 2, of which goods bought for "personal, family or household use" are among the more important.

25. Even if one assumes that Article 1 is restricted to contracts between merchants, if Canada and the U.S. were to adopt the Convention (to take one important example) it would still result in a high proportion of the trading contracts between the two countries being governed by the Convention unless the Convention has been excluded in the parties' agreement or the U.S. and Canadian governments have made a declaration under Article 94. Many businessmen, it is safe to assume, would know nothing about the Convention and an intensive educational campaign would be necessary to inform them of the necessity of expressly excluding the Convention if they do not wish it to apply to their contracts. Even this might prove ineffectual since a large volume of business is never reduced to writing or never fully reduced to writing.

Businessmen would therefore look to government initiative, via the declaration of non-applicability, to protect them against the unintended application of the Convention.

26. Here too there could be serious difficulties, first, because such declarations apparently must be reciprocal in nature where another Contracting State is involved (23) [23. Art. 94(1). The requirement of reciprocity does not apply where a non-contracting state is involved. While this is a rational distinction (since non-contracting states are not entitled to be consulted about the applicability of the convention), it leads to the curious result that a declaration of exclusion will be easier to make vis-à-vis a non-contracting state than vis-à-vis a contracting state.] and, secondly, because it could be a laborious task to negotiate the necessary agreement with the many governments likely to be involved in the exercise. Still further complications would arise in the Canadian context assuming that sales law falls within the exclusive provincial constitutional competence and that not all the provinces join in requesting the federal government to accede to the Convention on their behalf, or that they make their requests at different times and seek different declarations under Article 94. The federal government might then be involved in a long round of negotiations and businessmen might be hard put to establish with certainty the legal position at any given time.

27. *Will CISG serve the needs of the Canadian business community*?

We recognize that businessmen often take little interest in legislative developments in the private law area, and that this is equally true of national and international legislation. Nevertheless it seems to us a sound principle of public policy that, in the commercial law area as elsewhere, the legislatures should consider the potential impact of the legislation on the persons likely to be affected by it. So far as we know, UNCITRAL has conducted no formal inquiry into the practical benefits of an international convention in this area (24) [24. Presumably the benefits were regarded as so self-evident that formal empirical studies were regarded as unnecessary. In any event UNCITRAL was merely completing the work begun by *Unidroit* and the Hague Conferences. The UNCITRAL Secretariat is of course in regular contact with the governments of its member states and with international commercial associations such as the International Chamber of Commerce, and it also had the benefit of government responses when it began its revisionary work on the Uniform Laws.] and, as noted below, we understand the federal government has so far only had a limited opportunity to canvass the views of the Canadian business community. There also appears to be a lack of comprehensive data on current contracting practices in international sales to which Canadian importers or exporters are parties. In the summer of 1979 the Department of Justice distributed a short questionnaire (25) [25. Hereafter referred to as "DOJ Questionnaire".] to companies and/or associations whose members were known to be actively involved in export trade seeking their reactions to the draft UN Convention and also asking some more general questions. Because of time constraints only about a dozen replies were received, six of which came from members of the Canadian Shipbuilding and Ship Repairing Association. Even the replies that were received cannot always be taken at face value because some of the respondents appear to have misunderstood some of the provisions in the draft convention and because some of the replies were ambiguous.

28. Even allowing for these limitations, the answers to the general questions in Part II of the Questionnaire were instructive. Apparently only one of the respondents (26) [26. One of the other replies was ambiguous but its overall sense pointed to a negative answer; we have so treated it.] had encountered a situation where, while negotiating an international sales contract or after the negotiations had been concluded, the parties were unaware of the differences in their systems of law or felt unable to cope with it. (27) [27. Replies to Part II, Q. 1. One large mining corporation wrote as follows: " does about 75% of its business outside Canada. We generally specify the laws of a province or of Canada in our contracts. We have no significant problems dealing with differences in systems of law nor problems in which the parties to one of our contracts were unaware of such differences".]

Only one of the respondents had experienced gaps in an international contract that gave rise to a need for recourse to an international law to fulfill them (sic). The replies to the question, (Q. 2) "... do you feel that the draft convention ... will have a substantial effect upon the obligations of Canadian buyers?" were more mixed. The majority of the 11 respondents said no or that they believed it would not, one said yes, and the

rest were unsure or thought it would depend on the nature of the contract. It would seem that the respondents replying 'no' assumed they would be free to exclude the Convention in whole or in part.

29. In response to Question 4, 6 of the 11 respondents thought the draft convention would not be acceptable to their trading partners as compared with three who thought it would; one respondent did not know and another reply was ambiguous. It appears that the negative replies merely indicate that the respondents thought their trading partners would seek contract terms different from those applicable under the Convention and not that they were opposed to the concept of a sales Convention as such.

30. The replies to Question 5 are particularly illuminating. Question 5 read:

(a) Would you prefer to choose the uniform law (the draft convention on contracts for the international sale of goods) only in certain circumstances? (e.g. a situation where the uniform law is chosen in preference to a totally unfamiliar system, where both parties conform to a "neutral legal system")

or

(b) Would you prefer *not* to be bound by the draft convention unless you specifically "opt in" (stipulate that you *do* want to be bound by it) in each separate contract, in which you so desired?

or

(c) Would you prefer to be bound automatically by the draft convention, unless you "opt out" (stipulate that you do *not* want to be bound by it) in each separate contract, in which you so desired?

Only one of the 13 respondents favoured alternative (a); nine clearly or apparently favoured alternative (b), i.e., being allowed to "opt-in" into the convention; two supported the automatic application of the convention (solution (c)); and one was not willing to commit itself without further information. Clearly then the overwhelming number of respondents preferred an opting-in provision over an opting-out provision. This is significant because all the respondents were sophisticated companies who could be expected to appreciate the importance of opting-out if the Convention were to be adopted by Canada.

31. Apart from the information disclosed by the Questionnaire, the following points also appear to be reasonably supportable. First, there is little reported litigation in Canada involving international sales contracts of the type to which CISG would apply. There are even fewer - very few in fact - cases in which conflict of laws issues have been raised by the parties and the court has had to concern itself with foreign law issues. (28) [28. This observation is supported by the paucity of sales cases cited in Castel's *Canadian Conflict of Laws* (1977), vol. 2, ch. 19. The same phenomenon has been observed in the U.K. See *Benjamin's Sale of Goods* (1974), ch. 26.]

This suggests either that the parties to international agreements usually manage to resolve any differences out of court or that the disagreements, whatever their character, do not arise out of differences over the proper law of the contract. Thirdly, about two thirds of Canada's trade is with the U.S. It is difficult to see how this trade would be assisted by an international sales convention. Given the CISG provisions, it could have the reverse effect. Much the same could be said about our trading relations with Western Europe, Japan, and other industrialized countries with well established legal systems. If the parties are concerned about the applicable law governing their transaction, they will insert in their contract a choice of law clause. If they fail to do so, it may be either because legal issues do not loom large in their contractual relations, or because the contract contains satisfactory arbitral provisions (as, for example in the international commodities area), or because the parties are relatively indifferent whether it is the seller's law or the buyer's law that will be deemed to apply to their contract.

32. By a process of elimination, therefore, one is led to conclude that a CISG type law is likely to be most useful or needed in a comparatively narrow range of contracts, viz. those involving foreign governments or government trading agencies, or contracts with parties in newly developing countries, where one or

other party is unwilling to submit itself to the domestic sales law of the other party and there is no satisfactory alternative. This conclusion needs to be qualified in one respect. It may be argued that even merchants in countries with mature legal systems may prefer to have their contracts governed by the Convention and that they have not done so in the past because it was not there to be adopted. There may well be such merchants (although if there are they have been surprisingly silent), (29) [29. Significantly there do not appear to be any reported English cases in which the parties have adopted the 1964 Conventions as the law of their contract.] but it has no bearing on the question whether they would prefer an opting-in or an opting-out provision. The answers to the Questionnaire clearly indicate that the overwhelming number of respondents preferred not to be governed by the Convention unless they have expressly adopted it as their proper law. It is reasonable to assume that they reflect the general consensus of Canadian importers and exporters.

33. ***Important gaps in the structure of CISG*****. Another difficulty about the Convention is that it does not purport to codify the whole law of sales. Important facets of sales law are purposely excluded because agreement could otherwise not have been reached among the UNCITRAL members. Article 4 excludes questions concerning the validity of the contract or of any of its provisions or of any usage, and the effect which the contract may have on the property in the goods sold. "Validity" is not defined but it could embrace a very broad range of questions. In addition, there are other types of questions that are not specifically dealt with in CISG, such as the assignability of rights and the delegability of duties, but that are not expressly excluded from the Convention. For all these reasons a court may often be called upon to consider two or more different bodies of law--first, the** ***lex fori*****, if that is the proper law of the contract and, if it is not, whatever other law governs the validity of the contract and the questions not covered by CISG; and, secondly, if the contract is upheld, the provisions of the Convention. Further difficulties may arise in giving effect to Article 7(2). This provides that:**

Art. 7(2). "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

It will be seen therefore that litigation could become even more complex than it is at present where foreign law issues are raised by one of the parties, and the goal of a simple, uniform and readily predictable international law of sales may turn out to be illusory.

34. ***Absence of precedents in interpreting CISG*****.**

This difficulty is not of course peculiar to an international convention. It arises just as often at the national level where a new and important piece of legislation has been approved by the legislature. However, an international convention of the character of CISG raises special difficulties. Its concepts and language may be unfamiliar to the adjudicator and the process of comprehension and assimilation will be slower than in the case of domestic legislation which is grounded in existing concepts and, even if it is not, will usually be couched in familiar language. The difficulties will be compounded if national courts of states adhering to the Convention apply conflicting interpretations to the same provisions of the Convention.

35. Our own view is that the objection dealt with in the preceding paragraph, though not unimportant, is the least persuasive. The reported decisions under the Hague Sales Conventions, though few in number, do not indicate that the courts experienced undue difficulty in applying their provisions. The same is true of other important conventions in the international trade arena such as the conventions on carriage of goods by sea. Nor is it correct to assume that the courts will be groping in the dark--the UNCITRAL working papers and reports are voluminous and very detailed and should provide considerable guidance on most questions. There is a substantial body of literature both on the Hague Conventions and on the draft UN Convention, and this may be expected to grow rapidly and to be supplemented by full fledged textbooks when the Convention comes into force and has been adopted by a substantial number of important trading nations.

CONCLUSION AND RECOMMENDATIONS

36. As a loyal supporter of the UN and as a major trading nation, Canada has strong reasons to support UNCITRAL's goals and the concept of a uniform international law of sales. But sympathy should be combined with realism and practicality, and support should not be based on a misplaced form of idealism. The question that needs to be asked is whether the gains to Canada and the Provinces, both short term and long term but particularly long term, will exceed the costs of adopting a convention that contains some unfavourable features.

37. Particularly worrisome from Canada's point of view is the need for contracting parties to opt out of the Convention if they do not wish to be bound by its provisions. We have suggested that this requirement would particularly affect small exporters and importers (or those only incidentally involved in the importing and exporting of goods) who are least likely to know of the Convention and who could normally be expected to prefer to be governed by a law more familiar to them. One solution to this difficulty would be for Canada to arrange for joint declarations of exclusion with its close trading partners pursuant to Article 94 of the Convention. However, if our interpretation of the article is correct this would not be a simple matter, first, because not all Canada's important trading partners have the same or closely related sales rules as Canada, and secondly, because not all the Provinces may be agreed on the list of countries with whom a joint declaration should be sought. The need for a common approach by the Provinces seems to us important. Many Canadian businesses have offices and plants in more than one Province and it would greatly complicate their foreign contractual arrangements if they had to maintain separate Article 94 lists for each of the ten Provinces.

38. It may be that we underestimate the ability of smaller Canadian businesses to adjust readily to the UN Convention or that we over-estimate the importance they attach to being governed by a familiar system of law. They may be indifferent about it. We may also over-estimate the logistical and legal difficulties of putting Article 94 to good and effective use. All these points require further exploration, but if the Provinces decide in favour of subscribing to the Convention the importance of an informational campaign to educate the business community about its provisions, and particularly smaller enterprises that are not regularly engaged in the import and export of goods, hardly needs to be emphasized. It seems to us equally desirable that Canada should consult with her close trading partners to ascertain their intentions with respect to the Convention. Certainly Canada has no moral obligation to be among the first states to ratify the convention, particularly not given her complex constitutional position, but our reservations may be dispelled if they are not shared by our trading partners or if experience shows them to be groundless. Our immediate recommendation is therefore in favour of a "wait and see" attitude, coupled with the international consultations referred to above and supported by simultaneous consultations with all branches of Canadian trade and industry (including the important federal and provincial Crown corporations engaged in international trade) to see what additional light they can throw on the issues canvassed in this Report.

39. We should like to conclude on a slightly different note. In our view, Canada was seriously handicapped in making a significant input into the UN Convention because Canada is not a member of UNCITRAL and has not sought to play an active role as an observer at the organization's meetings. We feel this passive role is regrettable in view of Canada's status as one of the world's leading trading nations and we would urge a much more active role as an item to be placed high on the agenda for the 1980s.

A. ANALYSIS OF ARTICLES 1-88 FROM A PROVINCIAL COMMON LAW PERSPECTIVE. *

*** For purposes of comparison, the Ontario Sale of Goods Act has been used as the Provincial prototype. The provincial Sale of Goods Acts are almost identical. For a table of concordance of the corresponding section numbers, see G.H.L. Fridman, *Sale of Goods in Canada*, 2nd ed., pp. 4-5.**

PART I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I

SPHERE OF APPLICATION

Article 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.

(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 in determining the application of this Convention.

COMMENT

1. Article 1 should be read in conjunction with Articles 2 and 3. Article 1 defines the scope of the CISG; Article 2 excludes certain types of sale, while Article 3 clarifies the application of the Convention to contracts of work and materials.

2. The requirement in Art. 1(1)(a) that the parties must have their places of business in different contracting states means that the mere existence of a foreign element is not sufficient. Thus the fact that the parties have different nationalities or that the contract is to be performed, in whole or in part, in a state other than the state in which the contract was concluded will not be sufficient. "Business" and "places of business" is not defined in the Convention. Article 10 however specifies which place of business applies where a party has more than one, and also that if he does not have a place of business reference is to be made to his "habitual residence". Art. 1(1)(b) also adopts the position that the Convention should apply to parties in *non*-contracting states where the proper law of the contract is the law of a contracting state. The result is a substantial expansion of the scope of CISG, thus promoting the Convention's goal of maximising the uniformity of international sales law. Assume a contract between a Canadian company and an American company, which is to be governed by the law of the State of New York. If the United States has adopted the convention, CISG, rather than the domestic law of New York, will apply to the contract, assuming the U.S. has not invoked the federal-state clause (Art. 93).

3. Article 1 also raises three definitional problems which should be noted:

(a) It is clear from para. (3) that neither the nationality nor the commercial or civil character of the parties affects the applicability of CISG. The same comprehensiveness also applies to the provincial Sale of Goods Acts. The provincial Acts differ however from CISG in that merchant sellers are subjected to a stricter regime of warranty liability than non-merchants. This distinction is not drawn in CISG. For further discussion of this problem see Art. 35. What is less obvious is whether Art. 1, by referring to the parties' places of business, intends to restrict the scope of CISG to persons in business. The secretariat's commentary does not answer the question directly, but, in the light of Art. 2 and 10 the answer would appear to be no, or at least uncertain.

(b) "Contracts of sale" in Art. 1(1) is not defined. It is defined in the OSGA as an agreement for the transfer of general property in goods for a money consideration called the price. The civilian systems appear to adopt a similar, if not identical, definition. Difficulties may arise however with respect to the application of the test, particularly in the near-sales context, to such agreements as equipment leases, hire-purchase and consignment agreements. The Anglo-Canadian courts, where not otherwise required by statute (as under the Personal Property Security Acts), have generally adopted a fairly strict test whereas the American courts have tended to look at the substantive effect of the agreement. The [Secretariat] Commentary offers no guidance as to the type of test to be applied.

(c) A similar difficulty arises with respect to the meaning of goods. The definition in the Ontario Act (s. 1(1)(g)) excludes choses in action but includes growing crops, fixtures and other things attached to land that are to be severed under the contract of sale. Art. 2 suggests that choses in action (incorporeals) are meant to be excluded in their entirety, but it is not clear to what extent this is true of things attached to land that are intended to be severed under the contract of sale. This could be of some significance in contracts for the sale of agricultural products.

Article 2

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, hovercraft or aircraft;

(f) of electricity.

COMMENT

1. The exclusions in Article 2 turn either on the nature of the goods, the character of the parties, or the mode of sale. The exclusions have no exact parallel in the provincial Sale of Goods Acts, although the Acts do distinguish for warranty purposes between sales by merchant and sales by non-merchant sellers.

2. Exclusion (a) is justified in the [Secretariat] Commentary on the ground that consumer sales are frequently regulated by special legislation and that this makes it desirable to continue to apply the appropriate domestic law. All the Provinces have adopted a substantial volume of consumer protection legislation whose provisions are generally non-excludeable. The CISG exclusion is therefore consistent with provincial public policy.

3. Exclusions (b) through (f) rest on different grounds and several of them are perhaps more difficult to justify:

(b) *Sales by auction*. These are excluded from CISG because they "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" ([Secretariat] Commentary, p. 40). There is no similar exclusion in the provincial Acts.

(c) *Sales on execution or otherwise by authority of law*. This exclusion again rests on the existence of separate national rules governing execution sales. Another reason is that such sales are unimportant in international trade.

(d) *Sales of stocks, shares, investment securities, negotiable instruments or money*. "Money" and "things in action" are also excluded from the definition of goods (and therefore from the scope of the Act) in the provincial Acts. It is well settled that "things in action" in the Canadian common law cover all forms of incorporeal property "whether or not the thing in action is evidenced by or incorporated in documents or instruments or other forms of writing, negotiable or otherwise": *OLRC Sales Report*, p. 54. The sale of stocks, shares, etc. are also governed by separate federal and provincial legislation, thus furnishing another reason for supporting their exclusion from CISG.

(e) *Sales of ships, vessels, hovercraft or aircraft*. The draft convention did not include hovercraft and this amendment was adopted at Vienna. The exclusion of all four types of goods is based on two grounds: first, because in some legal systems their sale is assimilated to sales of immovables and, secondly, because in most legal systems at least some ships, vessels and aircraft (and presumably also hovercraft) are subject to special registration requirements.

The Canadian delegation did not think these reasons were sufficiently persuasive, and a resolution was introduced to delete the exclusion. The resolution was not successful.

(f) *Sales of electricity*. The rationales for this exclusion are that in many legal systems electricity is not considered to be goods and because international sales of electricity present unique problems. See [Secretariat] Commentary, p. 40.

Article 3

(1) 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.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

COMMENT

1. Art. 3(1) probably corresponds with the prevailing Canadian law, although one cannot be sure because of the conflict between the two leading British decisions, *Lee* v. *Griffin* [(1861) 1 B. & S. 272.] and *Robinson* v. *Graves* [[1935] 1 K.B. 579 (C.A.)]. In any event, art. 3(1) appears to embody the sounder and simpler rule [cf. *Benjamin's Sale of Goods* (Guest ed.), para. 35]. The same rule is supported in the OLRC Sales Report with respect to domestic contracts [p. 46].

2. Art. 3(2) deals with contracts under which the seller undertakes to supply labour or other services *in addition* to supplying goods, and excludes them from the scope of the convention. The same exclusion applies in Anglo-Canadian law although the courts have applied by analogy sales rules with respect to the supplier's warranty liabilities under such a contract. [see *Young & Marten Ltd.* v. *McManus Childs Ltd.* (1969) 1 A.C. 454].

Article 4

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 in this Convention, it 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.

COMMENT

1. As have been noted earlier (*supra*, Part I, para.33), this important article substantially reduces the scope of CISG and in effect brings into play in every international contract as defined in art. 1 two separate bodies of law, viz. (a) this convention, and (b) whichever municipal law or laws govern (i) the validity of the contract, and (ii) the property effects of the contract assuming it is a valid contract.

2. *Unidroit* has been working on a uniform law on rules governing the validity of international contracts, and these have been circulated by UNCITRAL. [Doc. A/CN.9/143]. However, in view of the difficulty of reaching consensus on a suitable set of rules the UNCITRAL working group preparing the draft convention did not attempt to incorporate such rules into CISG.

3. "Validity" is not defined in art. 4 or elsewhere in CISG. Presumably it includes any defence that may vitiate the contract under the proper law or laws of the contract because, for example, of lack of capacity, misrepresentation, duress, mistake, unconscionability, and contracts contrary to public policy. The exclusion will be of particular importance where the contract contains a disclaimer clause restricting or excluding liability for breach of warranty or other obligation imposed on the seller under the Convention and the buyer invokes the doctrine of "fundamental breach" or impeaches the clause on grounds of unconscionability. [On this see further *infra* Art. 6]. The exclusion of questions of validity from the reach of CISG is therefore a debilitating if unavoidable weakness.

4. The exclusion from CISG of the property effects of the contract is much less serious. Under the convention, unlike provincial sales law [See e.g., OSGA 12(3), 21, 34, 38, 47], the parties' rights and obligations do not turn on the locus of title. In this respect CISG adopts the same approach as the American Uniform Commercial Code (see UCC 2-401) and is greatly superior to existing provincial law. Property questions will of course remain very important but only for the purpose of determining the rights of buyer and seller vis-a-vis third parties, and vice versa.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

COMMENT

1. This article did not appear in the draft convention. It was adopted at Vienna at the suggestion of several delegations who pointed out that the liability of suppliers of defective goods causing personal injuries is governed in many legal systems by separate rules of law and that it has also attracted the attention of separate international conventions. [See Ontario Law Reform Commission, *Report on Products Liability* (1979), Appendices 3-5.]

2. The Canadian position with respect to the seller's liability is rather different. Under the provincial Sale of Goods Acts a seller is liable for all types of damage caused by defective goods and involving a breach of his warranty objectives, whether the damage is physical or only economic and whether or not he has been

negligent. He may also be liable in tort for negligently supplying goods causing physical injury to person or property. The Ontario Law Reform Commission recommended in its *Report on Products Liability* (1979) imposing a regime of strict liability on all business suppliers of dangerously defective goods, but this recommendation still awaits implementation. It is not clear what effect Art. 5 will have in a common law province that has requested adoption of CISG where a buyer suffers injury because the foreign seller has supplied defective goods. Presumably the buyer will lose his right to sue for breach of warranty under the provincial Sale of Goods Act and will be remitted to a claim in tort under the *lex fori*. This could leave him in a less favourable position than he is at present if the *lex fori* only allows recovery in tort where the seller has acted negligently.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

COMMENT

1. The principle of freedom of contract enshrined in article 6 proceeds from the consensual nature of the contract of sale and also appears in the provincial Acts. [e.g., OSGA 55, cf. UCC 1-102(3)]. CISG differs from modern sales legislation in so far as it imposes no restrictions, other than as provided in art. 2, on the parties' freedom to exclude the provisions of the Convention. (Cf. UCC 2-302, and s. 55 of the U.K. Sale of Goods Act as am. by the Supply of Goods (Implied Terms) Act 1973, and the Unfair Contract Terms Act, 1977).

2. Art. 6 raises an important and difficult question of exegesis. Does it permit the exclusion of obligations imposed under the Convention, however basic, even though such a disclaimer would be treated as unconscionable, and therefore unenforceable, under the applicable municipal law? Would this be a question of validity within art. 4 or would art. 6 take priority? The [Secretariat] Commentary throws no light on these issues.

3. It is not clear what language will be deemed sufficient "to exclude the application of this Convention"? Is a choice of law clause (e.g., "this contract shall be governed by the law of British Columbia") sufficient or must the clause also indicate that the *domestic* law of the chosen forum is intended to be applied? The [Secretariat] Commentary, p. 44, explains that art. 6 is intended to discourage exclusion of CISG by implication and this suggests that any doubt should be resolved in favour of the applicability of the Convention.

Chapter II

GENERAL PROVISIONS

Article 7

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

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

COMMENT

1. There was much discussion in UNCITRAL about the desirability of including in the convention a general requirement of good faith and fair dealing, which would embrace the formation of the contract as well as application and interpretation of the provisions of the convention. Article 7(1) was eventually adopted as a compromise. Although paragraph (1) does not refer specifically to the observance of good faith in the formation of the contract, its language is sufficiently broad to admit of its inclusion. The [Secretariat] Commentary (p. 45) provides numerous examples of situations in which good faith may be a relevant factor and several of them include the formational phase of a contract.

2. Good faith, in the sense of fairness in the exercise of contractual rights and the performance of duties, is not clearly recognized under existing Anglo-Canadian law. Indeed, the contrary is often asserted but there are signs of a movement in the opposite direction. See e.g. *Cehave N.V.* v. *Bremer HG m.b.H*. (1976) 1 Q.B. 44 (C.A.). Good faith in the broader sense of fair dealing is a requirement between merchants under Article 2 of the Uniform Commercial Code and is also imposed in many civilian systems. Its adoption is also recommended in the OLRC Sales Report, ch. 7(B). Good faith in bargaining is a more radical concept though here too there are a growing number of common law precedents in Canada that support its adoption.

3. Article 7(2) did not appear in the draft convention and was added at Vienna. It is not however a radical innovation and has a counterpart in art. 17 of ULIS. See Graveson, *op. cit.*, pp. 8-9. An example of a question not directly addressed in the convention is the effect of the buyer's negligence in a claim against the seller for delivering non-conforming goods. Presumably in most cases a tribunal will prefer to deduce the answer from the general provisions of the convention than to rely on a domestic law to which it is referred by the applicable choice of law rule.

Article 8

(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 of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, 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.

COMMENT

1. Art. 8 is concerned with rules for determining the parties' intentions where their language or conduct is ambiguous or, *quaere*, where, to the knowledge of the other party, the first party was operating under a mistaken assumption of fact.

2. It is difficult to generalize about such a broad and ill-defined area. The objective theory of intention is one that is normally applied in Anglo-Canadian Law, [Waddams, *The Law of Contract*, pp. 94-95], but the theory cuts both ways and if an offeree actually knows or must have realized that the offeror has a different intention or was labouring under a mistake then he can scarcely argue that it was reasonable for him to rely on an objective interpretation of the other party's conduct. [*Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597]. Prima facie, therefore, art. 8(1) and (2) would appear to be compatible with common law doctrine.

3. It seems clear from the language of art. 8 that it applies to the interpretation of the contract as well as its formational phase. Cf. [Secretariat] Commentary, pp. 46-47. It may be questioned however whether in practice it is always easy to distinguish the intentions of the parties, objectively ascertained, from the intention of one of them. This will be particularly true where they have both signed or approved a writing. Subject to this caveat, Canadian common law appears to support the rule in art.8 (3). Cf. Waddams, *op. cit.*, pp. 20-21. Note however that Anglo-Canadian law is more restrictive in admitting extrinsic evidence to interpret a concluded agreement which is not ambiguous and which is subject to the parol evidence rule.

Article 9

(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 or its formation 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.

COMMENT

1. Article 9 is broadly in accord with Anglo-Canadian law. However, the definition in art. 9(2) of what constitutes a binding usage [frequently, but misleadingly, referred to in English case law as "custom"] goes beyond generally stated Anglo-Canadian law but is agreeable with UCC 1-205(2). The Anglo-Canadian requirement is said to be [Benjamin's Sale of Goods, para. 844; OLRC Sales Report, pp. 174 et seq.] that "the custom (sic) must be reasonable, universally accepted by the particular trade or profession or at the particular place, certain, not unlawful and not inconsistent with the express or implied terms of the contract." The CISG and Code tests strike me as more reasonable and practical, though in practice there may be little to choose between them and the Anglo-Canadian test.

2. The [Secretariat] Commentary (p. 48) notes that Article 9 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. In most such cases the missing interpretation will be supplied by the parties' practices and trade usages. Difficulties are only likely to arise where the expression has no accepted meaning or has more than one meaning and each of the parties had in mind a different meaning. This difficulty is a familiar one in domestic law and cannot be overcome by rules of interpretation.

Article 10

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.

COMMENT

1. Article 10 is important for the purpose of establishing the applicability of CISG under art. 1. Determination of the relevant place of business to determine the place of delivery is also necessary for the purposes of art. 12, 20(2), 24, 31(c), 42(1)(b), 57(1)(a) and 96.

2. See also the comments under art. 1 with respect to the significance of the reference to the parties' place of residence.

Article 11

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

COMMENT

1. The [Secretariat] Commentary justifies the exclusion of a writing requirement in art. 11 on the ground that many international sales contracts are concluded by modern means of communication which do not always involve a written contract. An equally persuasive reason is that writing requirements encourage litigation and unmeritorious defences. Writing requirements for contracts of sale were repealed in the U.K. in 1954 [Law Reform (Enforcement of Contracts) Act, 1954, c.34] and in British Columbia in 1958 [Stat. B.C. 1958, c.18], and no adverse consequences have resulted. Very few cases have been reported during the past decade in those Provinces that have retained the requirement and a statistical survey conducted on behalf of the Ontario Law Reform Commission shows that manufacturers frequently ignore the requirements in practice when accepting orders for goods [OLRC Sales Report, pp.108-110]. The OLRC Sales Report also recommended repeal of s.5 of the Ontario Act.

2. The precise scope of the second sentence of art. 11 is not clear. Presumably it was intended to override any requirement under domestic law governing the proof of contracts not reduced to writing such as the "commencement de preuve" under the Quebec Civil Code. What is less clear is whether the sentence also permits the introduction of evidence to add to, vary, or contradict the terms of a writing contrary to the parol evidence rule of the common law.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement 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 96 of this Convention. The parties may not derogate from or vary the effect of this article.

COMMENT

1. Art. 12 constitutes an important exception to Art. 11 and was included at the request of some states (notably the USSR) who felt that countries that regard writing as an essential prerequsite for the enforcement of a contract, or to prove its modification or termination, should be free to exclude Art. 12 and the other relevant provisions of CISG by means of a declaration made pursuant to Art. 96.

2. Three features should be noted about Arts. 12 and 96:

***First*, the declaration can only be made by a state whose legislation requires contracts of sale to be concluded in or evidenced by writing--it cannot therefore be made by jurisdictions such as British**

Columbia or the United Kingdom that have deleted writing requirements from their sales legislation or have never had it. (Qu. the position where the domestic law only requires writing for *some* types of sale?).

***Secondly*, Arts. 12 and 96 are not restricted to writing requirements concerning the contract of sale, its modification or termination but extend to any communication under Pt. II of this convention.**

***Thirdly*, the declaration cannot embrace other types of communication, e.g., a declaration of avoidance of the contract pursuant to Arts. 26 and 59. Presumeably, however, it is open to a state to restrict its declaration to some of the matters enumerated in Art. 12.**

***Finally*, it is not clear what the exact effect of a declaration will be. Obviously it will mean that a writing will be required, but how complete a writing and at what time? Will a signature be essential? Will a communication not in writing be a total nullity or only inadmissible in legal proceedings? Since CISG does not appear to answer these questions, one possibility would to say that the domestic requirements of the declaring state apply. However, this would create difficulties where the states of two or more contracting parties have filed declarations and their domestic writing requirements are not the same. Will they all have to be complied with?**

4. In light of the above observations, it should be clear that Art. 12 creates as many difficulties as it purports to resolve (I have only mentioned some of them) and that, in Canada's case, the Provinces should be discouraged from asking for a declaration under Art. 12.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

COMMENT

Art. 13 was added at Vienna to ensure that "writing" was interpreted liberally conformably to modern means of communication. The definition in Art. 13 is not exhaustive and it is not clear whether the definition encompasses any "mechanical, electronic or other form of recording of information" (the definition adopted in s. 1.1(1).27 of the OLRC draft Revised Sale of Goods Act), or whether it requires some form of paper imprinted record. "Writing" is referred to or required inter alia in Arts. 29 and 97(2). Query whether the definition also applies to determine whether writing requirements under Art. 12 and 96 have been met where the domestic law of the declarant state has a narrower definition of writing. The answer presumeably is no since the purpose of Art. 12 is to enable a state to retain its own writing requirements for international contracts.

PART II

FORMATION OF THE CONTRACT

Article 14

(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.

COMMENT

1. Article 14 is very helpfully analysed in the [Secretariat] Commentary to s. 12 of the draft convention (the original section number). It is only necessary therefore to draw attention to the following differences between Art. 14 and the common law and statutory rules obtaining in the common law Provinces:

(a) There is no common law requirement that the proposal must be addressed to one or more "specific" persons; it can be addressed to the world at large if that is the offeror's intention, as it frequently is in the case of unilateral contracts. Cf. *Carlill* v. *Carbolic Smoke Ball Co*. (1892) 2 Q.B. 484 (C.A.).

However, the strictness of art. 14 (1) is substantially qualified by the provision in 14(2) that a proposal not addressed to one or more specific persons may be treated as an offer if such an intention is "clearly indicated". [The [Secretariat] Commentary, p. 55, explains that art. 14(2) was adopted as a "middle position" between those legal systems that recognize public offices and those that do not.]

As a result the difference between the CISG and common law positions is substantially narrowed and is only one of presumption and the burden of proof.

(b) At first sight the second sentence of article 14(1) appears to depart substantially from the common law rule in so far as it requires, as a condition of the definiteness of an offer, that it must "expressly or implicity" fix or make provisions, inter alia, for determining the price. The common law rule, as reproduced in s.9 of the Sale of Goods Act, is that if the contract is silent with respect to the price an agreement to pay a reasonable price will be implied.

The requirement of a fixed price in Art. 14(1) is apparently derived from French law and was the subject of intensive debate at Vienna. The debate was complicated by the fact that Art. 51 of the draft convention contradicted what was then Art. 12(1), because it provided that if the contract does not expressly or impliedly make provision for the price, "the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract."

The Francophone countries and delegates from a substantial number of developing states felt that Art. 12(1) was doctrinally sound and necessary to prevent buyers being confronted by sellers with unreasonable prices after the goods had been delivered, and that Art. 51 should be amended to make it consistent with Art. 12(1). Other delegates felt just as keenly that Art. 12(1) was too rigid and needed the ameliorating touch of Art. 51. A compromise was eventually hammered out. Art. 12(1) was retained without change but Art. 51 (now Art. 55) was amended to read as follows:

"Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."

Article 15

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

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

COMMENT

1. It is not clear to what extent the common law rules of offer differ from the rule in art. 15(1). The common law rule is that an offer cannot be accepted until the offeree learns of it [Cheshire & Fifoot, *The Law of Contract*, 7th ed., pp. 45-46] but it is not clear whether he must learn of it in the manner intended by the offeror. Art. 15(1) states that an offer is not "effective" until it reaches the offeree. "Reaches" is defined in art. 24 (formerly art. 22) and is interpreted in the [Secretariat] Commentary (p. 71) to mean that "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" If this is correct, a purported acceptance by the offeree will be a nullity and the offeror may withdraw even an irrevocable offer at any time before it reaches the offeree.

2. Art. 15(2) deals with the unusual situation where the withdrawal of an offer reaches the offeree before or at the same time as the offer. The meaning of "at the same time" is not defined and could be of importance if the two communications are only separated by minutes and the offer purports to be irrevocable. Presumably a tribunal will be guided by the underlying rationale of 15(2) and (quaere) by whether or not the two communications might be expected to come to the attention of a responsible officer of the offeree at the same time.

Article 16

(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 on the offer as being irrevocable and the offeree has acted in reliance on the offer.

COMMENT

1. Three aspects of Art. 16 call for consideration:

(a) *Notice to offeree where offer made to the public*. Art. 16(1) seems to require that the revocation must actually reach the offeree even where the offer is made to the public. This seems inconsistent with art. 14(2) which, as has been noted, does recognize the validity of offers made to non-specific persons if this was the intention of the person making the proposal. Presumably the meaning of "reaches" must be relaxed accordingly and, in the case of an offer made to the public, or a part thereof, an offer will be effectively revoked if reasonable steps are taken to bring it to the attention of the offerees. [Gaston, para. 34].

(b) *Binding character of offer stated to be irrevocable*. The Anglo-Canadian common law is exceptional in not recognizing the binding character of an offer stated to be irrevocable unless it is supported by consideration. The reversal of the rule was recommended before the war by an English Law Reform Committee and has been recommended again in a recent Working Paper by the English Law Commission *[Firm offers: Working Paper No. 60* (1975)] if the firm offer is made in the course of a business. UCC 2-205 also recognizes the binding character of a firm offer by a merchant for a maximum period of three months and provided it is made in a signed writing. A similar, though not identical, recommendation appears in the OLRC Sales Report, pp. 91-95.

In view of these precedents, there is nothing startling about art. 16(2)(a) and it can be accepted as reflecting modern thinking in the common law as well as the non-common law legal community.

(c) *Reasonable reliance by offeree*. Art. 16(2)(b) has no clear counterpart in the Canadian common law though there is evidence that some courts may be moving in the same direction by penalizing an offeror who acts in bad faith. Art. 16(2)(b) is also supported by section 89B(2) of the Tent. Rest. 2d on Contracts (American Law Institute, Tent. Drafts Nos. 1-7, 1973), which reads:

"89B. (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."

Since it is often in the interests of the offeror that the offeree should have a reasonable opportunity to determine whether or not to accept the offer, the implication of a firm offer as provided in Art. 16(2)(b) seems to be a fair interpretation of the offeror's intention. Whether the implication should be drawn in a particular case will of course depend on all the circumstances, including the relevant trade practices and usages.

Article 17

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

COMMENT

The common law rule is the same as art. 17 in the case of revocable offers. The standard Anglo-Canadian textbooks on contracts do not discuss the effect of the rejection of an irrevocable offer before the period of the offer has expired, but the implication appears to be that it makes no difference. [See however, contra, s. 35A of the *Rest. Contracts 2d*, which deals with the termination of a power of acceptance under an option contract and assimilates a rejection of the offer or a defective acceptance with the rules generally governing the termination of agreements.]

At any rate, that is the position of art. 17 and it appears to me to be a sensible position. The question of what amounts to a rejection is dealt with in art. 19.

Article 18

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

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance 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 the preceding paragraph.

COMMENT

1. The first sentence of Art. 18 possibly goes further than the common law since it fails to take into account a particular mode or place of acceptance prescribed by the offeror. The common law rule is that the offeror is master of his offer and hence is entitled to require such mode and place of acceptance as he deems fit. However, nowadays the courts are relucant to find that an indicated mode of acceptance was intended to be the exclusive mode. Cf. Waddams, *op. cit*., pp. 63-64, and UCC 2-206(1).

2. Paragraph (2) adopts the reception theory of acceptance common to many civil law jurisdictions, and not the postal theory of the common law. Both rules are defensible and merchants in common law jurisdictions should have no difficulty in adjusting to the reception rule. In any event it is not uncommon for an offer to stipulate that an acceptance is not effective until it reaches the offeror.

3. There is a dearth of Anglo-Canadian authority with respect to the circumstances in which an offer may be accepted by performance or part performance where the offer itself is silent with respect to the question. Art. 18(3) is not too helpful since it merely refers us back to the offer or the parties' practices or the usages of the trade in which they are engaged. UCC 2-206 and section 29 of the American *Second Restatement on the Law of Contracts (Tent. Draft)* permit acceptance "in any manner and by any medium reasonable in the circumstance" including, it would seem, performance of the requested act. UCC 2-206(1)(b) further provides that: "an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship by the prompt or current shipment of conforming ... goods, ...".

The [Secretariat] Commentary (p. 64) to the draft convention indicates that its authors envisage a similar result under art. 18(3).

4. Art. 18(3) raises two other questions:

(a) If the offeree is entitled to accept by performance must he give notice of his election to the offeror where the offeror is not otherwise likely to learn promptly of the election? UCC 2-206(1)(b) says yes, and presumably the same conclusion would be reached under the good faith provisions of art. 7.

(b) Can the *beginning* of a requested performance constitute an acceptance? UCC 2-206(2) clearly acknowledges the possibility provided prompt notice of the acceptance is given to the offeror. To the same effect, see *Restatement on Contracts 2d*, s. 63. Semble, the Anglo-Canadian cases have so far only considered the problem in the context of unilateral contracts. See e.g., *Errington* v. *Errington* (1952) 1 K.B. 290 (C.A.); *Sloan* v. *Union Oil of Canada Co. Ltd*. (1955) 4 D.L.R. 664 (B.C.). The CISG [Secretariat] Commentary (p. 64) recognizes that commencement of requested performance may be a sufficient act of acceptance. The conclusion is supported by the language of art. 18(3), which merely requires assent by performing "an act". This is different from requiring full performance.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains 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 contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. 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, among other things, 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.

COMMENT

1. The rule in paragraph (1) corresponds to the common law rule on the effect of an acceptance containing variant terms. See e.g., *Hyde* v. *Wrench* (1840) 49 E.R. 132, Waddams, *op. cit*., p. 73.

2. Paragraph 2 contains a very modest exception to the "mirror image" rule prescribed in paragraph 1, and does not come to grips with the thornier aspects of the "battle of the forms" so much discussed in American literature. See OLRC Sales Report, pp. 81-86. In particular art. 19 does not indicate whether there is a binding contract where the parties have proceeded to perform although their writings are in conflict and, if there is, whose terms will prevail. UCC 2-207 has attempted to provide some guidance but its provisions have engendered much litigation and dissension. Other jurisdictions have been no more successful in finding satisfactory answers to this intractable problem. Given this circumstance, CISG was probably wise not to rush in where angels fear to tread but to leave it to the courts to work out the answers on a case by case basis.

Article 20

(1) A period of time for acceptance fixed by the 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 the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

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

COMMENT

1. Paragraph (1) provides some sensible rules to determine the commencement of the period of time during which an offer can be accepted and appears to be unobjectionable from a common law point of view.

2. Paragraph (2) is a logical corollary to the reception rule for acceptances adopted in art. 18(2). Since the acceptance is not effective until it reaches the offeror some provision is necessary where the last day for acceptance is a non-business day or an official holiday at the offeror's place of business. The practical effect of art. 20(2) appears to be to extend the period for acceptance by at least one day where the notice of acceptance cannot be delivered. It may of course be longer depending on the circumstances.

Article 21

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

(2) If a letter or other writing 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 orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

COMMENT

1. Paragraph (1) deals with the effect of a late acceptance and gives the offeror the option of treating it as an effective acceptance if he so notifies the offeree. I am not aware of any Anglo-Canadian authority that has adopted a similar rule, but it is a reasonable rule and can be justified by analogy with the rule that an acceptance containing variant terms is a counter-offer. Note however that under art. 21(1) the late acceptance takes effect from the date of its receipt and not from the time when the offeror communicates with the offeree.

2. The common law has no counterpart to the rule in art. 21(2), and has no need for it, because of its postal theory of acceptance for letters. Art.21(2) mitigates the rigour of the reception rule and protects the offeree's reasonable reliance interests where he has no reason to anticipate that his acceptance will not reach the offeror on time.

Article 22

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

COMMENT

1. Article 22 is the counterpart to art. 15 on the effect of a simultaneous offer and its withdrawal and complements the rule in art. 18(2) that an acceptance is effective when it reaches the offeror.

2. The meaning of "at the same time" raises the same questions as in art. 15, which see.

Article 23

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

COMMENT

The common law rule is the same as the rule stated in art. 23. Art. 23 fails to deal with the situation where the precise time of acceptance cannot be readily established, as in the well known case of *Brogden* v. *Metropolitan Ry Co*. (1877) 2 A.C. 666 (H.L.) There is no doubt that a binding agreement exists in such a case and the same is presumably true under the Convention.

Article 24

For the purposes of this Part of the 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 personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

COMMENT

1. Art. 24 is a definition section and is a necessary complement to the Convention's adoption of the reception rule to determine the time of effectiveness of acceptances and other communications.

2. Art. 24 applies a uniform rule to the communication of all types of intention governed by Part II of this convention, including acceptances. As previously indicated, this may conflict with the common law rule that an offeror is master of his offer and is free to determine how and when his offeror may be accepted. See Waddams, *op. cit*., p. 63. Where an offeror has evinced an intention that an offer must be accepted in a given way presumeably, that will be sufficient to override the presumptive effect of art. 24. See art. 6.

3. The reception rule in art. 24 should be contrasted with the dispatch rule adopted in art. 26 for communications required under Part III of the convention. There the communication is effective from the time of its dispatch and the risk of non-arrival or late arrival lies with the recipient.

PART III

SALE OF GOODS

Chapter I

GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

COMMENT

1. Article 25 is a key article because the remedies of the buyer and seller under CISG turn on the character of the breach involved. Generally speaking, if the breach is fundamental the aggrieved party is entitled to avoid the contract; if it is not, he is remitted to a claim in damages although in appropriate circumstances he may also be entitled to seek an order for specific performance. See art. 49,64.

2. The common law rules are different and more complex. The OSGA adopts an *a priori* system of classification into warranties and conditions with respect to the implied terms of title, description, merchantability, fitness and sale by sample. The breach of a condition, as thus defined, prima facie entitles the aggrieved buyer to reject the goods and avoid the contract, even though the actual breach is minor in character. (In the interests of conciseness I ignore the important qualifications to this rule in ss. 12 and 34-35). With respect to stipulations as to time, s. 11 provides that, unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence and that whether any other stipulation as to time is of the essence of the contract depends on the terms of the contract. So far as other express terms of the contract of sale are concerned, it was for a long time assumed that they would also have to be classified *a priorily* into warranties and conditions regardless of the severity of the breach.

However, the contrary was held in *Cehave N.V*. v. *Bremer H.G*. (1976) Q.B. 44, and as a result of this and other decisions [in particular, *Reardon Smith Line Ltd*. v. *Yngvar Hansen-Tangen* (1976) 1 W.L.R. 989 (H.L.)] many observers now detect a trend to bring the law of sales into closer alignment with the general rules governing the consequences of a breach of contract as laid down in the *Hong Kong Fir Shipping Co*.

case [*Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* (1962) 2 Q.B. 26 (C.A.)]. This is that they should be governed by the severity of the breach and not turn on the *a priori* classification of the term breached.

3. It will be seen therefore that the remedial regime adopted in CISG is not fundamentally opposed to the rules in other branches of Anglo-Canadian contract law and the integrative movement observable in the law of sales. Some lawyers may regret the loss of certainty provided by a system of classification into warranties and conditions, but others will argue that the certainty is bought at too high a price. Mercantile practice itself, with the possible exception of stipulations as to time in the international commodities trade, seems to support the CISG approach. In any event, CISG does not leave the parties adrift in a sea of uncertainty. First, so far as time is concerned, CISG has borrowed the German concept of *Nachfrist* which enables the aggrieved party to treat a delay in performance as a fundamental breach if the breach is not cured within a reasonable time after notice. [See CISG 47, 63]. Secondly, the parties are always free to make other arrangements with respect to the consequences of a breach and will no doubt frequently do so where stipulations as to time are concerned.

4. I therefore support the CISG approach. However this does not end the inquiry and it needs to be further asked what types of breach should be sufficient to entitle the aggrieved party to avoid the contract and whether it is appropriate to describe such a breach as a fundamental breach. For the purposes of art. 25 a breach is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract unless he could not reasonably have foreseen such a result. This test is substantially more stringent than the test in the original version of art. 25. This merely required proof of "substantial" detriment to the other party. The change was adopted at Vienna, presumably to accommodate the sentiment that an aggrieved person should only be entitled to avoid a contract for very serious breaches.

5. In my view, the new test is too severe and will make it very difficult in practice for a seller or buyer (but particularly a buyer) to cancel a contract because of defective performance by the other. The other common law delegates at the Vienna Conference were not as disturbed by the change as I was and seemed to feel that verbal formulae do not much matter since they are all subject to interpretation by the courts. I am not as sanguine and still feel that the definition will lead to undesireable results. However, it should be borne in mind that the parties are free to adopt their own definition and in practice it is very common for seller to limit, or even exclude entirely, the buyer's right to reject defective goods and to cancel the contract.

Article 26

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

COMMENT

1. "Avoidance" is used in CISG in the sense of cancellation for cause. Cf. UCC 2-106(4), 2-703(f), 2-711(1). "Avoidance" is generally used in Anglo-Canadian law in the context of contracts induced by the misrepresentation or other misconduct of one of the parties rather than to describe the remedy available for breach of a contractual obligation. However, CISG's use of the term seems to me quite acceptable and not likely to cause confusion even among common law lawyers.

2. The OSGA contains no general notice provision corresponding to art. 26. There is an express notice requirement in OSGA 46(2) with respect to the right of resale of an unpaid seller and an implied notice requirement in OSGA 34 involving the buyer's right to reject non-conforming goods. Other situations will be governed by common law principles. The general common law rules are (a) that the party in breach cannot unilaterally terminate the agreement without the consent of the other party [cf. *Decro-Wall*

***International S.A.* v. *Practitioners in Marketing Ltd.* (1971) 2 All E.R. 216 (C.A.)]; and (b) that a party who is entitled to elect among two or more remedies must communicate his election to the other party. In other words, the common law, like CISG, does not recognize a doctrine of *ipso facto* avoidance. There may be circumstances when, at common law, the aggrieved party may have no option but to treat the contract as avoided: for example, where the other party has become bankrupt or, in the case of a sale of specific goods, the goods have been destroyed owing to the seller's fault. In such cases the aggrieved party would not be electing a remedy and a notice requirement would make little sense. It is not clear whether CISG envisages a different result, i.e., whether a declaration of avoidance is always necessary. Cf. arts. 49. 64. Even if the answer is yes, the difference would not appear to be of great practical importance given the fact that no formal requisites are prescribed for the giving of a notice of avoidance. See art. 27.**

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part 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.

COMMENT

1. The provincial Sale of Goods Acts contain no corresponding provision but the Code has a similar provision in UCC 1-201(26), meaning of "notifies" or "gives" a notice.

2. As previously noted "Art. 27 adopts a dispatch theory for communications under this Part of the Convention as contrasted with the receipt rule adopted under Part II. I think the distinction can be justified. Part II is concerned with communications during the formative phase of a contract where neither party has committed a breach. Art. 27 only applies after a contract has been concluded and where, generally speaking, a breach has occurred. It is not unreasonable therefore that the breaching party should run the risk of a communication not reaching him or not reaching him on time. In any event Part III is not inflexible and contains many exceptions to the general rule in Art. 27. See Arts. 47(2), 48(4), 63(2), 65(1), 65(2), and 70(2)."

Article 28

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 would do so under its own law in respect of similar contracts of sale not governed by this Convention.

COMMENT

1. Art. 28 is based on a similar provision in ULIS 16. The common law and equitable rules for the granting of an order for specific performance (or, its equivalent, judgment for the price in an action by this seller) are contained in ss. 47 and 50 of the OSGA and are much narrower than those recognized, for example, under German or French law [see Dawson, "Specific Performance in France and Germany" (1959) 57 Mich. L. Rev. 495]. The CISG draftsmen, like their predecessors, felt that national courts could not be expected to alter "fundamental principles of their judicial procedure" to accommodate CISG. [[Secretariat] Commentary, p. 77]. This seems reasonable enough. For further discussion of Art. 28, see Comment to art. 46.

2. A small but significant change to art. 28 was made at Vienna. The draft version provided that a court was not bound to make an order for specific performance unless the court "could" do so under its own law. The American delegation felt "could" was too loose since a common law court always possesses the power to make an order for specific performance: what was important, in their view, was whether the order *would* be made in fact. To accommodate the American concern, "could" was changed to "would".

Article 29

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

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. 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.

COMMENT

1. At common law an agreement modifying the terms of an agreement is not binding unless supported by consideration. There are exceptions of varying importance to this rule [e.g., modifications under seal, statutory provisions such as those in the Mercantile Law Amendment Act, R.S.O. 1970, c. 272, s. 16, and, above all, the doctrine of equitable estoppel] - some statutory in origin, others developed by the courts themselves - but the principle itself still applies. The requirement of consideration creates particular difficulties in the so called "duty" cases, i.e., where the seller waives payment of part of the price, or the buyer agrees to pay more than the contractual price [see e.g., *Gilbert Steel Ltd.* v. *University Construction Ltd.* (1973) 3 O.R. 286, aff'd 67 D.L.R. (3d) 606 (C.A.)] in consideration of the other party performing his obligations.

2. The common law rule has been widely criticized and it has been abolished in UCC 2-209(1). The OLRC Sales Report also recommends its reversal. Art. 29(1) is not therefore nearly as radical as may appear at first sight and should arouse no concerns.

3. Presumably art. 29(1) is subject to a requirement of good faith on the strength of either art. 7(1) or art. 7(2). Though not expressly required under UCC 2-209(1), the official comment assumes its existence [UCC 2-209, Comment 2] and arguably good faith may be required at common law even in those cases where consideration exists. [cf. "*The Atlantic Baron*" (1978) 3 All E.R. 1170].

4. The first sentence of art. 29(2) corresponds to UCC 2-209(2), although the Code provision is more circumscribed. A clause requiring modifications to the written contract to be in writing is valid at common law but its effectiveness must be judged in the light of the doctrine of equitable estoppel.

5. The second sentence of art. 29(2) introduces an important, and very necessary, qualification to the rule in the first sentence. A similar qualification is recognized at common law [cf. *Hartley v. Hymans* (1920) 3 K.B. 475; *Chas. Richard Ltd.* v. *Oppenheim* (1950) 1 K.B. 616 (C.A.)] and in UCC 2-209(4). No doubt there may be arguments about the "extent" to which the other party has relied "on that conduct" in a particular case, but this difficulty seems to me unavoidable.

Chapter II

OBLIGATIONS OF THE SELLER

Article 30

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

COMMENT

Art. 30 corresponds to OSGA 26 and UCC 2-301 and, like its common law counterparts, merely states the obvious. The purpose of art. 30 is to set the stage for the more particularized rules on delivery and the required character of the goods set forth in the succeeding chapters.

SECTION I.

Delivery of the goods and handing over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

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

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

COMMENT

1. Art. 31 corresponds to OSGA 28 and UCC 2-308 and contains some very elementary rules about the place of delivery where the contract of sale contains no contrary provisions. Delivery is not defined in art. 31 but presumably has the same meaning as in OSGA 1(1)(d), viz. the voluntary transfer of possession of the goods. In international contracts of a commercial character it is most unlikely that the contract will not spell out the delivery terms more fully; hence art. 31 is not likely to be of great practical importance.

2. (a) Art. 31(a) involves a shipment contract, i.e., a contract obligating the seller to deliver the goods for transmission to the buyer or the buyer's order. In practice, the seller's shipping obligations will be much more precisely specified in terms of a recognized trade term such as "f.o.b.", "c.&f." or "c.i.f." named place of shipment. CISG, like the OSGA, neither refers to such delivery terms nor attempts to define them. The Code does both: see UCC 2-319 to 2-323, and UCC 2-509.

(b) Art. 31 (b) corresponds to OSGA 28(1) and UCC 2-308(b), but is wider than both in so far as it covers future goods - goods to be manufactured or produced at a particular place - and goods to be drawn from a specific stock as well as specific goods.

(c) Art. 31 (c) embraces the residuary category and corresponds to OSGA 28(1) and UCC 2-308(a). Art. 31(c) only refers to the seller's place of business, but it is clear from art. 9(b) that this includes the seller's

habitual residence where the seller has no place of business. Hence there is no difference between CISG and the OSGA and Code provisions on this score.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation 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, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

COMMENT

1. Art. 32 specifies the seller's obligations under a shipment contract and is unremarkable. Comparable, though not identical provisions, are found in s.31 of the Ontario Act and its provincial counterparts, and in UCC 2-504. The Ontario and Code provisions are discussed in the OLRC Sales Report at pp.338-341.

2. Art. 32 like the other articles with respect to the seller's delivery obligations only applies in the absence of contrary agreement between the parties. In practice, the agreement will spell out the seller's delivery obligations quite precisely by adopting an established shipment term (e.g., F.O.B., C.I.F., C. & F.) and less frequently by incorporating the INCOTERMS of the International Chamber of Commerce or the definitions in UCC 2-319 et seq. As a result the need to rely on art. 32, is not often likely to arise in practice.

Article 33

The seller must deliver the goods:

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

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

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

COMMENT

1. Art. 33 deals with the time of delivery. Paragraphs (a) and (b) deal with the construction of the agreement where a date or period of time is fixed by or determinable from the contract. Paragraph (c) is concerned with cases where the contract itself prescribes no time.

2. The provincial Sale of Goods Act contain no provisions exactly corresponding to paragraphs (a) and (b), but since they state no more than the obvious this should make no difference. If a statutory text is needed to justify this conclusion, it can be found in OSGA 26 providing that "it is the duty of the seller to deliver the goods ... in accordance with the terms of the contract of sale." Art. 33(c) finds its counterpart in OSGA 28(2).

3. Art. 33 does not deal with the consequences of a delayed or late delivery. This is dealt with in Art. 47 and 49.

Article 34

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. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

COMMENT

1. Article 34 is merely an expansion of the seller's basic obligations announced in art. 30, but lacks the detail contained in the preceding articles on the seller's delivery obligations with respect to the goods themselves. Presumably it was thought that the subject is already adequately covered in such well known and widely accepted terms as the International Chamber of Commerce's INCOTERMS and its Uniform Customs and Practice for Documentary Credits (ICC Pub. No. 274 and 290).

SECTION II. Conformity of the goods and third party claims

Article 35

(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.

(2) Except where the parties have agreed otherwise, 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 or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of 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 lack of conformity.

COMMENT

1. From a practical point of view, art. 35 is one of the most important articles in Part III of the Convention. Paragraph (1) of art. 35 states the seller's express obligations with respect to the quantity, quality, and description and packaging of the goods and really only states the obvious. Paragraph (2) addresses itself to the seller's *implied* obligations with respect to the general and particular fitness of the

goods, their packaging, and their required qualities where there is a sale by sample or model. These obligations are only presumptive and are displaced to the extent that the parties "have agreed otherwise". One important example of such displacement is given in paragraph (3), viz. where at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

2. The corresponding provisions are to be found in OSGA ss. 14, 15 16, and 55 and its provincial counterparts. There are close resemblances between the CISG provisions and the provincial provisions but there are also some material differences. There are also some unanswered questions. A detailed comparison would require a lengthy exposition: in the interests of time I confine myself to the following points:

(1) *Quantity, quality and description "required by the contract". It frequently happens that the conclusion of a contract is preceded or accompanied by representations by the seller concerning the quality, fitness or other characteristics of the goods offered by him. To what extent will they constitute part of the contract under CISG and what is the applicable test? Is it necessary for the buyer to show that they constitute part of the bargain or will the seller's liability rest on a different theory. If so, which? Will the representee be entitled to invoke non-contractual as well as contractual rights?

Existing Anglo-Canadian law holds that such representations will not form part of the contract--will not be treated as a "warranty"--unless the representor intended them to have contractural effect. See e.g., *Esso Petroleum* v. *Mardon* (1976) 2 All E.R.5 and compare *Oscar Chess Ltd.* v. *Williams* (1957) 1 W.L.R. 370 (C.A.). Whether or not the representation amounted to a warranty, the representee will be entitled to invoke his equitable rights of rescission in appropriate circumstances (*Leaf* v. *International Galleries* (1950) 2 Q.B. 86) or sue for damages for negligent misrepresentation under the *Hedley, Byrne* doctrine: *Mardon*'s case supra, and compare *Nunes Diamond Ltd.* v. *Dominion Electric Protection Co.* (1972) S.C.R. 769. American law allows recovery for breach of warranty without proof that the representor intended to give a warranty so long as it was reasonable for the buyer to rely on the representation and it did in fact induce him to make the purchase: see s.12 of the Uniform Sales Act. UCC 2-313(1)(a) adopts the test of whether the representation has become "part of the basis of the bargain".

The question is not discussed in the [Secretariat] Commentary, but my prima facie impression is that the buyer will not be able to invoke art. 35(1) unless he can show that the representations formed part of the contract in accordance with the general test of intention adopted in art. 8, *supra*: in other words, that CISG adopts the common law (and, I believe, civilian) approach to the nature of the seller's warranty obligations and not the American approach. Since CISG provides no remedies for non-contractual misrepresentations, this leads to the conclusion that the buyer will be remitted to the applicable national law for his remedies. This may be an unfortunate (if inescapable)result since contractual and non-contractual remedies in the sales area should be viewed as part of a single continuum.

(2) *Merchant and non-merchant sellers*. Art. 35 does not distinguish between merchant and non-merchant sellers. The distinction is fundamental in the Canadian common law since the statutory warranties of merchantability and fitness only apply to a seller "who deals in goods of that description" (OSGA 15.2) or to goods of a description that is in the course of the seller's business to supply (OSGA 15.1). As I understand it, the civilian approach is somewhat different but the distinction between commercial and non-commercial sales is equally relevant in many civilian systems in determining the seller's liability for latent defects.

It is not clear why CISG ignores the distinction and the [Secretariat] Commentary throws no light on the question. One reason may be because it was assumed that the convention as a whole only applies to commercial sales. However, as indicated in the Comment to art. 1, this is not clear and even if it was it would not answer the questions whether a seller is liable for breach of the implied obligations under art. 35(2) so long as he is engaged in *a* business or whether it must be shown that he was selling the goods in the course of *his* business. There is an important difference between the two tests. See OLRC Sales Report, p. 209. At the Vienna Conference Canada introduced a resolution to amend art. 35 to clarify these and other points but the attempt was not successful.

(3) "*Are fit for the purposes*". The test of merchantability at common law and under the Sale of Goods Acts goes beyond the use of the goods sold and also embraces their resale value. The test is whether a reasonable buyer, knowing of the defects, would have bought the goods without an abatement on the price. See the discussion of the meaning of merchantability in *Kendall* v. *Lillico* (1969) 2 A.C. 31, as qualified in *Brown & Son* v. *Craiks* (1970) 1 WLR 752 (H.L.). Thus goods may be unmerchantable even though fit for use: e.g., a new vehicle with discoloured paint work or badly scratched furniture. It may be that "fitness for use" has a wider meaning to a civilian than to a common law lawyer, but it would have been better if the answer to so basic a question had not been left to conjecture.

(4) *Relevance of all surrounding circumstances in determining merchantability*. The common law test of merchantability, as now given statutory effect in the U.K. Sale of Goods Act, requires the court to take into account *all* the surrounding circumstances. Art. 35(1)(a) only refers to the purposes for which goods "of the same description" would "ordinarily" be used. This falls markedly short of the Anglo-Canadian test. It is not clear, for example, to what extent price would be a relevant consideration.

(5). *Actual or constructive knowledge of non-conformity*. OSGA 15.2 provides that if the buyer has examined the goods before the sale there is no implied condition of merchantability as regard defects that "*such*" examination "ought" to have revealed". This language has been criticized by commentators as too favourable to the buyer because of its subjective character. However, art. 35(2) appears to be even more lenient since it seems to require actual knowledge of the defect by the buyer or the presence of such obvious defects that he could not have been unaware of them.

Article 36

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

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

COMMENT

1. Art. 36 deals with the difficult question of the extent to which a seller warrants the durability of his goods. Paragraph (1) states that the seller is liable for any non-conformity existing at the time the risk passes to the buyer even though the non-conformity only appears subsequently. Though the provincial Sale of Goods Acts do not deal expressly with the point, the case law is clearly to the same effect. See e.g., *Crowther v. Shannon Motor* Co. (1975) 1 W.L.R. 30 (Eng. C.A.)

2. Article 36(2) addresses itself to the much more difficult question whether a seller can be said to have breached his obligations where the goods do not remain fit for their purpose as long as the buyer expected them to even though the goods were conforming at the time of their delivery. When the seller has given an express performance warranty the answer is obvious--he is liable; in other cases, art. 36(2) says the answer depends on whether there has been a breach of the seller's obligations, which begs the question. However, its language clearly implies that the seller may be held liable where the failure of the goods to remain fit involves, for example, a breach of the seller's obligation under art. 35(2) (a) or (b). The Anglo-Canadian position is the same, at least in the case of perishable goods. See e.g., *Mash & Murrell Ltd.* v. *Emanuel Ltd.* 919610 1 All E.R. 485, rev'd. on other grounds, (1962) 1 All E.R. 77n. The position in other cases is less clear, though in principle it should be the same. See the discussion in the OLRC Sales Report, pp. 215-216. Art. 36(2) seems to me about as much as can be expected in a general sales convention.

Article 37

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. However, the buyer retains any right to claim damages as provided for in this Convention.

COMMENT

1. Art. 37 should be read with its companion article, article 34, conferring a right to cure in the case of a tender of defective documents. In both cases, the right to cure only arises, (i) where the tender on delivery is made before the date for delivery, (ii) the cure is effected before that date, and (iii) where the exercise of the right to cure does not cause the buyer unreasonable inconvenience or expense.

2. The Anglo-Canadian common law recognizes a similar right to cure and it is given statutory effect in UCC 2-508(1). There may be a difference in that the common law right to cure has not been restricted in the case law, as it is qualified in art. 37, to cases where the buyer will not be prejudiced by the seller's exercise or the right. I doubt myself that the distinction exists and I would expect Canadian courts to reach the same result if substantial prejudice to the buyer can be shown [see e.g., *Borrowman, Phillips & Co*. v. *Free & Hollis* (1878) 4 QBD 500].

Article 38

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

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

(3) If the goods are redirected in transit or 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 redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

COMMENT

1. Article 38 addresses itself to two questions: (a) the place of examination of the goods after delivery; and (b) the period of time within which the examination must take place. On the first point, art. 38 is approximately the same as, or possible slightly more favourable than, Canadian law, but seemingly not as favourable to the buyer as UCC 2-513. Article 38 is more stringent than either the provincial Acts or the Code with respect to the time of examination. It is also much more severe than the Canadian common law with respect to the consequences of the buyer failing to satisfy the joint requirements of arts. 38 and 39. Under the convention the buyer loses all his remedies whereas under the OSGA he loses merely his right to reject the goods. Art. 38 and its related provisions therefore depart from the common law in some basic respects. For the moment I will confine my attention to the first two of the above mentioned features of art. 38.

(a) *Place of examination*. OSGA 33 does not specify the place of examination but the common law rule was that prima facie it is the place where the goods are delivered to the buyer. See *Perkins* v. *Bell* (1893) 1 Q.B.

193. It is generally assumed the rule was carried over into the SGA. The rule is manifestly impractical in shipment contracts and the courts have readily found an implied agreement to change the place of examination to the place of destination. However, a major stumbling block was created by the decision in *Hardy & Co*. v. *Hillerns & Fowler* (1923) 2 K.B. 490 (C.A.). This held that trans-shipment of the goods by the buyer after arrival at their destination was an act "inconsistent with" the seller's ownership of the goods within the meaning of OSGA 34. As a result it was held that he had lost the right to reject the goods even though the reasonable period for examination permitted by SGA 33(1) had not expired. The decision in *Hardy* v. *Hillerns & Fowler* has now been reversed in the U.K. by an amendment to the U.K. Act but still represents good law in Canada. However, Canadian courts seem to be quite willing to circumvent it in practice. See e.g., *A.J. Frank & Son Ltd*. v. *Northern Peat Co*. (1963) 39 D.L.R. (2d) 721 (Ont. C.A.).

The "dominion" rule does not appear in CISG, and art. 38(3) expressly provides for the case where the seller ought to have appreciated that the goods might be redispatched by the buyer before he has had a reasonable opportunity to examine them. However, unless subs. 3 is read very broadly, it does not seem to go far enough. It is not clear for example whether it includes the position of a retailer who receives packaged durables (e.g., a T.V. set), stores them and then, in due course, delivers them in their original cartons to the ultimate consumers. [The reasoning in the [Secretariat] Commentary, pp. 99-100, suggests that this situation was intended to be included although it is not discussed specifically.]

(b) *Time of examination*. Art. 38(1) requires the buyer to examine the goods---"within *as short a period* as is practicable in the circumstances". (emphasis added). By way of contrast, OSGA 33(1) entitles the buyer to a "reasonable opportunity" to examine the goods. Again, OSGA 34 speaks of the lapse of a "reasonable time". The Uniform Commercial Code contains similar provisions. See e.g., UCC 2-602, 2-606(1)(b). The [Secretariat] Commentary suggests that art. 38(1) must not be read too literally and that "in the circumstances" coupled with the provisions in subs. 2 and 3, was meant to qualify "within as short a period as is practicable"quite extensively.

2. From the foregoing comments it will be seen that art. 38 contains some important ambiguities and, if read literally, may be too severe in its demands on the buyer. An attempt was made by Canada at Vienna to amend the article to solve both these difficulties but was not successful.

Article 39

(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 this time-limit is inconsistent with a contractual period of guarantee.

COMMENT

1. Both limbs of art. 39 have no counterparts in the provincial Acts, but the principle underlying art. 39(1) has been adopted in UCC 2-607.

2. *Art. 37(1)*. The motivating force behind art. 39(1) is the belief that the seller will be substantially prejudiced if he is not notified of the non-conformity within a reasonable time after the buyer knew or ought to have discovered it. A similar provision often appears in the contract itself. Note however that proof of actual prejudice to the seller is not required in art. 39(1).

3. The absence of a notice requirement in the provincial Acts has not attracted adverse comment from Canadian merchants. Again, American courts operating under the Uniform Sales Act showed growing

reluctance to apply the requirement to consumer transactions. A similar difficulty may arise under art. 39 with respect to non-merchants generally who may not be aware of the statutory requirement. Its adoption must tend to encourage litigation. I am not therefore enthusiastic about art. 39(1). However, the Americans have long had a similar requirement and one can hardly argue that it is alien to the common law world. Moreover, the exclusion of consumer transactions from CISG will remove many, though by no means all, of the past difficulties.

4. *Art. 39(2)*. From a common law perspective this is quite a novel provision. The provincial Sale of Goods Acts do not contain any prescription periods for the bringing of an action by the seller or buyer and do not impose a time limit after which the buyer is precluded from complaining about a delivery of non-conforming goods. The only limitation is that imposed in the provincial Limitations Acts, which generally require an action for breach of contract to be brought within 6 years. [However, in at least one Province shorter periods have been recommended in recent proposals to revise the Limitations Act.] Art. 39(2), it will be noted, cuts off all rights of the buyer after *two* years.

5. Art. 39(2) attracted much debate at Vienna. Some delegations wanted to omit it altogether or at least to provide substantial room for relief when it would operate harshly. Other delegates felt however that sellers needed to know where they stood and that two years was long enough to enable the buyer to discover the non-conformity and make his complaint. It was this school of thought that won the day and the only concession made was the one that now appears in art. 44. Art. 44 extends the period of time for giving notice of a non-conformity where the buyer has "a reasonable excuse" for his failure to give earlier notice. However, art. 44 only applies to art. 39(1) notices and it does not affect the prescription period in art. 39(2).

6. I remain unenthusiastic about art. 39(2). It is not difficult to conceive of circumstances in which an important defect in the goods may not come to light more than 2 years after they have entered the stream of commerce. I am particularly concerned because many Canadian importers may not appreciate the presence of art. 39(2) and the need to exclude it in their contract if they do not wish it to apply.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 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.

COMMENT

Article 40 is an excellent example of bad faith depriving the seller of a defence to which he would otherwise be entitled. The provincial Acts contain no counterparts to art. 40 although arguably our courts might reach the same results on common law or equitable grounds. In any event art. 40 is a very sensible provision.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

COMMENT

1. Art. 41 is both narrower and wider than s. 13, the corresponding provision in the OSGA. It is narrower because art. 41 is apparently restricted to rights against the goods existing at the time of delivery to the buyer. It is now established that the implied warranty of quiet possession extends to justifiable claims arising subsequent to delivery. See *Microbeads A.G. v. Vinhurst Road Markings Ltd.*, (1975) 1 W.L.R. 218 (C.A.). The decision has been criticized [see Law Reform Commission, New South Wales, *Working Paper on the Sale of Goods*, paras. 12.5, (1975)] and though it can perhaps be justified on its special facts, it does seem harsh that the seller should be held responsible for post-delivery occurrences. I therefore support this feature of art. 41.

2. Art. 41 goes somewhat beyond OSGA 13 in so far as it embraces "claims" as well as "rights" against the goods. By way of contrast, SGA 13(a) implies a condition that the seller has "*a right* to sell the goods", not that there may not be claims against the goods. Admittedly the existing provincial law creates difficulties for the buyer since he may not be in a position to assess whether or not the third party's claim against the goods is justified. [This is the justification given in the [Secretariat] Commentary, p. 105, for the rule in art. 41.] However, he can always protect himself by joining the seller as a third party in any action that may be brought against him. On balance however the wider language of art. 41 can be justified because the seller's obligations are confined to third party rights and claims existing at the time of delivery. Ordinarily he will be aware of their existence and can then either take steps to settle them or persuade the buyer to buy the goods with such disclosed defects in the seller's title, real or threatened. If he fails to take either step, he may not be acting in good faith and has only himself to blame for the consequences.

3. It would appear that the language of art. 41 is not apt to cover restrictions against the use of the goods, e.g., because of mislabelling or non-compliance with statutory requirements, not involving an infringement of third party rights. Cf. *Niblett Ltd. v. Confectioners' Materials Co.*, (1921) 3 K.B. 387. In this respect art. 41 is narrower than OSGA 13 since a seller under the latter provision is deemed to warrant that he has a "right" to sell the goods and not merely that the goods are free from third party interests. The [Secretariat] Commentary, p. 105, suggests that non-compliance with public law requirements will make the goods unfit for use and therefore involve the seller in a breach of art. 35.

Article 42

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

COMMENT

1. The provincial Acts contain no separate provisions corresponding to art. 42. However, it is well established that OSGA 13 is broad enough to capture patent infringements and other infringements of intellectual property rights. *Niblett's* case, *supra*, and *Microbeads'* case *supra*. Cf. UCC 2-312(3), which does contain some separate provisions on the subject.

An important difference between art. 42 and OSGA 13 is that, under the convention, the seller is only liable for third party claims and rights of which he knew or could not have been unaware at the time of the conclusion of the contract. This important restriction on his liability is apparently justified in the [Secretariat] Commentary (pp. 108-109) on the grounds of the difficulty of establishing intellectual property rights outside the seller's country and the hardship to the seller of making him responsible for claims of which he was not aware. There is a surprising paucity of cases under OSGA 13 involving intellectual property claims and it is difficult to know what difference the restricted wording of art. 42 will make in practice.

3. Art. 42(1)(a) and (b) perhaps go further than existing Canadian law. I am not aware of any direct authority but, based on analogous cases, it would seem that our law will not require the goods to be free of patent claims under the law of the place of delivery unless it is also the proper law of the contract or unless there has been a breach of the implied condition of fitness. Cf. *Sumner Permain & Co.* v. *Webb & Co.* (1922) 7 K.B. 55; *Teheran-Europe Co. Ltd.* v. *S.T. Belton (Tractors) Ltd.*, (1968) 2 Q.B. 545. However, given the fact that art. 42(1)(a) and (b) only apply where the seller knew or is deemed to have known of the claim, the added burden imposed on the seller under the CISG provisions is only a modest one.

4. Art. 42(2)(a) speaks for itself and is patterned on the rationale of art. 35(3); art. 42(2)(b) is equally unobjectionable and finds a precedent in UCC 2-312(3).

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 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 has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

COMMENT

1. Art. 43(1) formerly appeared as art. 40(3); art. 43(2) is new and was added at Vienna. Art. 43(1) is the counterpart of art. 39(1); art. 43(2) matches art. 40, with the exception that the former provision makes no reference to the seller's disclosure of the title and intellectual property defect to the buyer. The reason for the omission is presumably that, under art. 41, mere disclosure of the third party claim or right is not sufficient unless the buyer also agreed to take the goods subject to that right or claim.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

COMMENT

As previously noted, this article is new and was added at Vienna as a partial accommodation to the critics of art. 39(1) and 43(1). The provincial Acts do not contain a similar provision (and do not need one since they impose no general notice requirement on the buyer), and it is difficult to predict how the courts will exercise their relieving power in practice. The buyer's understandable ignorance of the notice requirements coupled with lack of substantial prejudice to the seller may be suggested as examples. Another reason may be the buyer's legitimate failure to appreciate that a problem involving the goods was due to a non-conformity rather than some extraneous factor for which the seller could not be held responsible.

SECTION III. Remedies for breach of contract by the seller

Article 45

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

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(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.

COMMENT

1. The provincial Acts contain no index section of buyer's remedies for breach of contract by the seller, but the remedies enumerated in art. 45 correspond to those known under our law, viz., specific performance, avoidance (cancellation) of the contract, and damages. However, there are substantial differences in detail between the buyer's remedies under the convention and his remedies in the common law provinces.

2. Art. 45(2) rejects the notion that the buyer is forced to elect between claiming damages and exercising the other remedies conferred on him under the convention, viz. specific performance and avoidance. The common law position is the same and, in particular, it is basic law that a buyer who rejects non-conforming goods or cancels the contract on some other ground is not thereby deprived of his entitlement to damages.

3. Art 45(3) is apparently aimed at legal systems like the French which allow the courts some discretion whether or not to grant rescission of a contract of sale for breach. See [Secretariat] Commentary to (former) article 43, p. 116. No such discretion is conferred under our law and art. 45(3) therefore effects no change so far as the common law Provinces are concerned.

Article 46

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

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

COMMENT

1. Art. 46 is concerned with the buyer's remedy of specific performance but will have only limited applicability in common law jurisdictions. This is because art. 28 provides that a court is not bound to grant judgment for specific performance unless it "would" do so in respect of similar contracts of sale not governed by the convention. In the common law Provinces the remedy of specific performance is governed by OSGA 50 and its counterparts in the other Provinces. As a result the remedy is only available in a contract for the sale of "specific or ascertained" goods (*In re Wait* (1927) 1 Ch. 606 (C.A.)), and even then it is discretionary. It is well settled that the remedy will not be granted where damages would provide adequate compensation. See further OLRC Sales Report, ch. 17(B).

2. In view of the fact that an order for specific performance under paragraph (1) is only likely to be available in a common law Province in exceptional circumstances, it is even less likely that an order will be granted under paragraphs (2) and (3).

3. The unfamiliar style of art. 46 is explained in the [Secretariat] Commentary (p. 113) on the ground that "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." The [Secretariat] Commentary adds that while the common law drafting style is different, no difference in result is intended because of the style adopted in art. 46.

Article 47

(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 performance.

COMMENT

1. The purpose of art. 47(1) is to enable the buyer to make time of the essence, where it is not clear from the contract itself or the surrounding circumstances whether failure to make timely performance amounts to a fundamental breach, by allowing him to call on the seller after breach to perform within a reasonable period of time. The consequences of the seller's failure to comply with such a demand are spelled out in art. 49(1)(b).

2. Art. 47(1) is based on the German concept of "Nachfrist" but it has a well-known counterpart in equity in contracts for the sale of land. [See e.g., *Stickney* v. *Keeble* (1915) A.C. 386; Cheshire & Fifoot, *The Law of Contract*, 9th ed., pp. 531-32.]

3. There is some dissonance between art. 47(2) and 49(1)(b). The former purports to apply to *any* breach of the seller's obligations; the latter is restricted to non-delivery of the goods. That being so, it is not clear

what sanctions follow from the seller's failure to comply with a demand not involving delivery of the goods that would not follow without a demand.

4. Art. 47(2) probably goes beyond the common law in one respect. At common law an extension of time granted by the buyer, if not supported by consideration, is only binding on the buyer to the extent that the seller has relied on the extension. Subject to this consideration, the extension may be retracted by the buyer at any time if he gives reasonable notice of his intention. [Cf. *Chas. Rickards Ltd.* v. *Oppenheim* (1950) 1 K.B. 616 (C.A)].

Article 48

(1) Subject to article 49, 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 unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, 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 the preceding paragraph, that the buyer make known his decision.

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

COMMENT

1. Art. 48 confers on the seller a limited right to cure a breach after the date for delivery has elapsed. Cf. the more powerful right to cure under arts. 34 and 37, *supra*. The provincial Acts contain no counterpart to art. 48, but, for the reasons given below, the same results would probably be reached at common law. Art. 48 does not confer a right to cure as extensive as the right conferred under UCC 2-508(2). Contractual provisions for manufactured goods frequently confer on the seller the right to repair or replace defective goods which are not subject to the same restrictions as art. 48. For all these reasons, art. 48 appears quite unobjectionable.

2. Art. 48 must be judged against several well established common law principles: (a) that a buyer is only entitled to reject a non-conforming tender where the non-conformity amounts to breach of an essential term of the contract; (b) that, where breach of an essential term has occurred, the buyer is not obliged to give the seller an opportunity to cure the non-conformity; and (c) the buyer's duty to take reasonable steps to mitigate his damages where a breach has occurred. It follows that at common law the mitigation principle would oblige the buyer to accept an offer to cure from the seller (i) if the non-conformity does not amount to breach of an essential term, or (ii) the buyer has elected to keep the goods. In some cases, the duty to mitigate would oblige the buyer to accept an offer to cure even where the buyer has rightfully rejected the goods. Cf. *R.G. McLean Ltd.* v. *Can. Vickers Ltd.* (1971) 15 D.L.R. (3d) 15 (Ont.); *Payzu Ltd.* v. *Saunders* (1919) 2 K.B. 581.

3. Art. 48 reaches the same results as the common law where the breach is non-essential or the buyer elects not to avoid the contract. The article attaches conditions to the seller's entitlement to offer cure but these would probably also be implied at common law. The same would probably be true of the right conferred on the seller under art. 48(2) to ascertain the buyer's intentions. The common law may go further than art. 48 in obliging the buyer to accept an offer to cure even after the contract has been avoided if it is a

reasonable means of mitigating his damages, but this may be doubtful in view of the general duty to mitigate damages imposed on an aggrieved party under art. 77.

Article 49

(1) The buyer may declare the contract avoided:

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

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

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

(b) in respect of any breach other than late delivery, within a reasonable time:(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

COMMENT

1. The difference between the *a priori* characterization of terms in the OSGA and the treatment of breaches in CISG has been explained, *supra*, in the analysis of art. 25. Art. 49(1) flows logically from CISG's remedial approach and, if severity of the breach is accepted as a sound test, then there should be no difficulty in accepting art. 49(1). Note too that, unlike OSGA 12(3), art. 49 draws no distinction between a sale of specific and a sale of future goods and, for the purposes of avoidance, attaches no importance to the locus of title.

2. Art. 49(2) adopts the reasonable principle that the remedy of avoidance must be exercised within a reasonable period of time and is a logical consequence of the wider rule in art. 50 (1). Similar rules apply at common law. See OSGA 34 (duty to reject defective goods within reasonable period of time) and OSGA12(1) (waiver of breach of condition).

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery 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 37 or article 48 or if the buyer

refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

COMMENT

1. Art. 50 confers on the buyer a right to reduce the price of non-conforming goods in lieu of claiming damages (assuming there is a right to damages). Art. 50 was amended at Vienna by substituting, in line 3, the value of the goods at the time at delivery for their imputed value at the time of the conclusion of the contract as the basis for determining the reduction in price. The provincial Acts contain no comparable provision and art. 50 must not be confused with the right to set-off recognized in OSGA 51 and its other provincial counterparts. Art. 50 is based on the notion that it is unjust to require the buyer to pay the full price for non-conforming goods, and the right to claim a price reduction must be carefully distinguished from the right to claim damages. The difference is carefully explained in the [Secretariat] Commentary, p. 127. See also E.E. Bergsten and A.J. Miller, "The Remedy of Reduction of Price" (1979) 27 A.J.C.L. 255.

2. The principle of art. 50 is implicit in OSGA 29, and I see no objections to it.

Article 51

(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, articles 46 to 50 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.

COMMENT

1. Art. 51 deals with the buyer's remedies where the seller has only delivered part of the goods or where only part of the goods delivered are conforming. See also *infra*, art. 72. The corresponding provincial provisions will be found in OSGA 12(3), 29, and 30.

2. There are several important differences between the CISG provisions and the common law treatment of the same topic. *First*, art. 51 does not distinguish, as do the provincial Acts, between a non-severable contract and a contract for the sale of goods by instalments. *Secondly*, under art. 51(1) the buyer has the same remedies with respect to the undelivered or non-conforming goods as he has with respect to the entire quantity of goods; under the provincial Acts this is true only (i) where there is an instalment contract, or (ii) where the provisions of OSGA 29 apply. In other cases the rule is (OSGA s.12(3)) that the buyer cannot accept part of the goods and reject the rest. He must accept all or reject all. *Thirdly*, under art. 51(2) the buyer is only entitled to avoid the contract in its entirety if the seller's breach amounts to a fundamental breach of the whole contract. The common law rule is the same in the case of instalment contracts (OSGA s.30) but different in the case of indivisible contracts. In the latter case, the buyer has a right to reject the whole consignment and to cancel the contract (OSGA s.29) unless the non-conformity is so minor that it will be disregarded under the *de minimis* rule. This result flows from the *a priori* characterization of the seller's obligation under sections 13-16 and 29 of the Ontario Act and its provincial counterparts.

3. The CISG approach in art. 51 follows logically from its linkage of the right of avoidance to the gravity of the breach. If one accepts this as a sound approach (as I do) then, with one reservation, art. 51 is also unobjectionable. Read literally, art. 51(1) suggest that the non-conforming goods may be subject to the remedy of avoidance regardless of the commercial viability of the rejected goods. UCC 2-601, by way of contrast, provides that only a "commercial unit" may be accepted or rejected by the buyer. Presumably the Convention did not intend a different result.

Article 52

(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.

COMMENT

1. There is no statutory provision in the provincial Acts corresponding to art. 52, and there is a surprising dearth of authority on the effect of an early delivery. Benjamin, *op cit*.[abbreviations section], para. 617, expresses the view that the buyer would not be obliged to accept the goods but that he would not necessarily be entitled to treat the contract as repudiated. This seems a sensible interpretation of the position and, assuming it is correct, the common law position and the position under art. 52(1) will be the same. In both cases, even though early tender or delivery of the goods has been refused, the seller should not be precluded from being able to make a further delivery at the correct time. Cf. art. 34, 37, *supra*.

2. Art. 52(2) is not the same as its provincial counterpart OSGA 29(2), since under the CISG provision the buyer can only reject the excess quantity whereas under the provincial Acts the buyer may elect either to retain the contractual quantity or to reject the whole consignment. However, the [Secretariat] Commentary p. 133, adds the important qualification that where it is not feasible for the buyer only to reject the excess quantity he may be entitled to reject the whole shipment if the delivery of the excess quantity constitutes a fundamental breach. If it does not, the buyer will be remitted to a claim in damages.

Chapter III

OBLIGATIONS OF THE BUYER

Article 53

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

COMMENT

Art. 53 is the counterpart to art. 30 and, like it, is merely a summation of the particularized rules in the succeeding articles. Cf. OSGA 26 and UCC 2-301.

SECTION I. Payment of the price

Article 54

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

COMMENT

Art. 54 has no counterpart in the provincial Acts, but it is a sensible and obvious provision in an international context and should find ready acceptance.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

COMMENT

1. Art. 55 must be read in conjunction with art. 14 which deals with the essential constituents of an offer. Art. 55 was substantially amended at Vienna. The adopted version attempts to reconcile the price requirements of art. 14 with the need to provide for a case where the contract contains no reference to the price, and does so by deeming the parties to have impliedly agreed to adopt the price generally charged for such goods at the time of the conclusion of the contract. It is not clear whether this formula is sufficient to overcome the limitations of art. 14, although it was clearly meant to. Difficulties may still be encountered because art. 55 does not come into play unless a contract has been validly concluded. Further, art. 55 fails to state how the price is to be determined where the seller is the only supplier of the goods (e.g., of a new type of computer or a new drug): presumably the seller's price is to be implied unless the price is clearly unreasonable. Note too that, under art. 55, it is the price obtaining at the time of the conclusion of the contract and not at the time of delivery that will be applied in the absence of contrary agreement.

2. OSGA s.9 corresponds to art. 55. The cases show that OSGA s.9 is incomplete since it does not apply where the agreement provides that the price is to be fixed by agreement at a later date and no provision is made for fixing it if the parties fail to agree. In such a case the prevailing Anglo-Canadian view appears to be that there is no binding agreement. Cf. *May & Butcher Ltd.* v. *R.* (1934) 2 K.B. 17n with *Foley* v. *Classique Coaches, Ltd.* (1934) 2 K.B. 1. It is not clear whether the same result will be reached under arts.14 and 55. It should be open to a court to find (as, for example, UCC 2-305(1) authorizes it to do) that the parties intended a reasonable price to apply where they failed to reach agreement on a price, and there appears to be nothing in CISG to preclude a tribunal from adopting this flexible approach.

Article 56

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.

COMMENT

Art. 56 has no counterpart in the provincial Acts but appears to be unobjectionable.

Article 57

(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 his place of business subsequent to the conclusion of the contract.

COMMENT

1. Art. 57 is concerned with the place where the buyer must pay the price -- a question of considerable importance in international trade because of the widespread existence of exchange controls and other restrictions on the transfer of funds. The rules adopted in art. 57(1) are only presumptive and are subject of course to the parties' express agreement. The provincial Acts contain no provisions on the place of payment, but the view has been expressed that in commercial transactions "the general rule would seem to be that payment is to be made at the place where the creditor resided or carried on business at the time of the contract." Benjamin, *op cit.*, para. 705. Benjamin further says it depends on all the surrounding circumstances whether or not the place of payment changes with a change in the seller's place of business or residence. The presumptive rule under art. 57(1) is that it does. The paucity of litigation suggests that this is more of a theoretical than a practical question.

2. If one accepts the soundness of the proposition that the buyer must "follow" the seller's place of business, then it seems reasonable to allow the buyer to claim reimbursement for any additional expenses incurred by him because of a change in the seller's place of business.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it 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.

COMMENT

Art. 58 is concerned with the time when the buyer must pay the price, and its rules appear to be substantially the same, if not identical, with the rules adopted in the provincial Acts. See OSGA ss. 28, 20 and 33(2), and cf. UCC 2-310, 2-505, 2-512 and 2-513.

Article 59

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 compliance with any formality on the part of the seller.

COMMENT

Art. 59 appears to be compatible with the Canadian common law. The provincial Acts do not explicitly provide that the buyer's obligation to pay arises without the need for any request, but such is the normal rule of the common law: Benjamin, *op cit*., para. 715, and is supported by the language of OSGA 26-27. However, neither art. 59 nor the common law rule must be pressed too hard and in practice it will frequently be necessary for the seller to give the buyer notice of some prescribed event (e.g., that the goods have been shipped or are ready to be collected) in order to trigger the buyer's payment obligation.

SECTION II. Taking delivery

Article 60

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.

COMMENT

1. Art. 60 appears to be in accord with the provincial law on the subject. Art. 60(b) has its counterpart in OSGA 26, although the latter speaks of the buyer's duty to "accept the goods," and not to take delivery of them. The provincial Acts contain no explicit provision comparable to art. 60(a) but the buyer's duty of cooperation is implied at common law and also arises by the use of appropriate mercantile terms. Cf. Benjamin, *op. cit.* para. 1681. The meaning of "in doing all the acts which could reasonably be expected of him" in sub-paragraph (a) is illustrated in the [Secretariat] Commentary, p. 143, by the giving of delivery instructions. Presumably it also includes the furnishing of facilities reasonably suited to receipt of the goods. Cf. UCC 2-503(1)(b).

2. "which could reasonably be expected of him" could cause some difficulty if the phrase is interpreted to mean those steps it is within the buyer's power to take as contrasted with those acts of cooperation that are "necessary" to enable the seller to discharge his delivery obligations. Cf. UCC 2-318 *et seq*. Even if trade terms are not used, a court applying the convention should be willing to imply a general duty of cooperation to make the contract effectual. Cf. UCC 2-311(1) and CISG, art. 7.

SECTION III. Remedies for breach of contract by the buyer

Article 61

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

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

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

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

COMMENT

1. Art. 61 is the counterpart to art. 45 on the buyer's remedies where the seller is in default. However, some comparisons of a general character may be helpful at this point between the seller's remedies in the provincial Acts and his remedies under the convention.

2. It is customary at common law to distinguish between the unpaid seller's rights against the goods and his personal right against the buyer. See OSGA 38-46, and 47-48 and 52. The same distinction is observed in CISG. However, the distinction is less obvious in CISG, *first*, because of the exercise of the seller's *in rem* rights are not linked to questions of title (cf. art. 4(b)), *secondly*, because the seller's right of lien or stoppage *in transitu* is absorbed in the wider concept of a right to suspend performance where there are reasonable grounds for believing that the other party will not be able to perform his obligations (see art. 71), and, *thirdly*, because the unpaid seller's right of resale, after avoidance of the contract, is merely treated as a convenient means of measuring his damages. See art. 76 and cf. UCC 2-706.

2. CISG confers a much broader right to compel specific performance of the buyer's obligations than does the OSGA. The OSGA does not recognize such a right except with respect to the right to payment. Even the right to payment is heavily circumscribed in OSGA 47. However, as previously noted, art. 28 exempts a court from having to enter judgment for specific performance unless it would do so under its own law in respect of similar contracts of sale. An important question arises in this context with respect to the meaning of "specific performance". For a court to order the buyer to take delivery clearly would amount to such an order and, since such an order would not ordinarily be made at common law, art. 28 will apply. But what of a judgment for the price? It is not ordinarily treated as an order for specific performance unless it has been issued by a court exercising its equitable jurisdiction. Where does this leave art. 28? Will it be argued that terminology and means of enforcement are irrelevant for the purposes of art. 28 and that what matters is whether a national court would make such an order however it is designated?

If the answer is yes, then a further point of exegesis requires consideration. The seller's right to sue for the price is much broader under CISG than it is under OSGA 47. Does this matter for the purposes of applying art. 28 or is it sufficient that a national court would be willing to make an order under *some* circumstances? It seems to me the point can be argued both ways, but an important consideration would be whether the seller has already earned the price or whether he is trying to force the buyer to do those things that will enable the seller to do so.

3. The seller's right to claim damages under CISG is broader than his common law rights in several respects: (a) CISG *semble* permits the seller to sue for damages, direct and consequential, as well as for the price ; it was for a long time thought that this was not possible at common law but the position is now unsettled as a result of dicta in *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* [[1952] 2 Q.B. 297 (C.A.); Benjamin, para. 1195]; (b) the test of remoteness of damages in art. 74 is substantially more generous to the plaintiff than the test of remoteness under the rules in *Hadley* v. *Baxendale*; and (c) where there is an available market for the goods the seller is not restricted, as he is under OSGA 48(3), to suing for the difference between the contract price and the market price. Art. 74 entitles him to resell the goods and sue for his actual loss.

4. It is difficult to generalize from the above comparison and to claim tha the CISG remedial regime is superior or inferior to the common law structure. The point is, they differ in some important respects. Some of the CISG features commend themselves on principle; others less so. The more questionable features will be referred to again in the Comments accompanying the articles in question.

Article 62

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 this requirement.

COMMENT

See *supra* Comments to art. 46 and 61.

Article 63

(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 performance.

COMMENT

See Comment to art. 47.

Article 64

(1) The seller may declare the contract avoided:

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

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares 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 the right to declare the contract avoided unless he does 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 by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

COMMENT

1. Art. 64 is the counterpart to art. 44. See my Comments thereon as well as on the definition of fundamental breach in art. 25.

2. I have some difficulties in understanding the reason for linking payment of the price to the seller's right to avoid the contract under art. 64(2). The [Secretariat] Commentary (pp.152-55) throws little light on the question. At common law, and under the OSGA, payment of the price does not *per se* affect the seller's right to rescind the contract for essential breaches by the buyer, e.g., failure to name a vessel. Payment *may* affect his right if it is linked to the passage of title to the buyer. Under art.64 the seller's rights are wholly severed from questions of title.

3. One of the important consequences of this severances is that, *semble*, the seller will be entitled to avoid the contract even after the goods have been delivered to the buyer and title has passed to him under the applicable law. See art. 81(2) and cf. [Secretariat] Commentary, p. 115, para. 14.

This would not be possible under our law in the absence of special circumstances such as fraud on the buyer's part or the retention of a security interest in the goods by the seller. However, the practical effect of art. 64 will not be as dramatic as might appear at first sight because CISG does not purport to determine property rights. See art. 4(b). Presumably this means that the seller's right of avoidance and right to reclaim the goods will be subject to the provisions of the applicable national law on the property effects of the contract and rights in the goods acquired by third parties dealing with the buyer or otherwise. However, the proper harmonization of art. 64 and the applicable national law may present difficulties. The subject requires further study.

Article 65

(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 the requirements of the buyer that may be known to him.

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

COMMENT

1. The provincial Acts confer no rights on the seller comparable to the rights under art. 65 and none exist either at common law. Such a right is recognized in UCC 2-311(2) and is discussed in the OLRC Sales Report, pp. 188-190.

2. Art. 65 is consistent with the theory of specific performance adopted by the convention but, from a practical point of view, the number of occasions when a seller needs to substitute his own specifications for the buyer's specifications in order to protect his interests are likely to be infrequent. In most cases damages should be an adequate remedy. Given its limited practical application (particularly in a jurisdiction where the seller will not be able to compel the buyer to take delivery of the goods when they are ready), it is difficult to become excited over art. 65 one way or the other.

Chapter IV

PASSING OF RISK

Article 66

Loss of 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.

COMMENT

1. Article 66 introduces the short chapter on the passing of risk and states the truism that the buyer is not excused from paying the price if the goods are damaged or lost after the risk of loss has passed to him. The important question is when that transfer is deemed to take place and this question is addressed in art. 67-69.

2. The concluding language, perhaps equally obviously, holds the seller responsible for any loss or damage to the goods caused by his act or omission even though the risk of loss has passed to the buyer. A similar qualification, differently expressed, appears in the provincial Acts: see e.g., OSGA s.21(b). As the [Secretariat] Commentary notes (pp. 198-199), 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, as for example where the seller negligently damages the goods after they have reached their destination. By way of contrast, the reservation in OSGA 21(b) is limited to the duties of the seller or buyer as a bailee of the goods of the other party. This is not intended of course to relieve the seller from liability for damage or loss caused to the goods while he is acting in some other capacity.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, 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 the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

COMMENT

The rules for the transfer of risk in this article are based on the "control" theory and do not turn, as does OSGA s.21, on the locus of title at the time of loss. The common law rule of *res perit domino* has been widely criticized over the years and in practice it is often by-passed either because of the courts' willingness to find that title had not passed to the buyer or because of the use of trade terms, such as f.o.b. or c.i.f., which adopt the control test of risk of loss. The title test has been abandoned in UCC 2-509 and 2-510 and its abandonment is also recommended in the OLRC Sales Report, p. 280. There is no reason therefore to feel concern about the abandonment of the title test in the convention. It would in any event have been an inappropriate test for CISG to adopt in view of the fact that the convention contains no rules for the transfer of title in the goods to the buyer.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

COMMENT

1. Article 68 deals with the time for the transfer of risk of loss where the goods are sold in transit. The draft version of the article provided that the risk of loss was assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. This departure from the control test was justified in the [Secretariat] Commentary (p.203) on the practical ground that it is normally difficult to determine the precise moment in time when goods in transit suffered casualty and that it is more convenient for the buyer to pursue a claim for such loss or damage against the carrier and the insurance company than it is for the seller.

2. The retroactivity rule was opposed at Vienna by a number of countries and a compromise was struck. The adopted version of art. 68 prima facie only transfers the risk from the time of the conclusion of the contract, but "if the circumstances so indicate" the transfer of risk may be deemed retroactive to the date of shipment. The article does not indicate what circumstances will satisfy the displacement of the ordinary rule but it is clear that it does not require an express agreement and in practice, especially in documentary sales, a finder of fact may readily draw the implication.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods 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) However, if the buyer is bound to take over the goods at a place other than a 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 goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

COMMENT

1. Article 69 deals with the time of transfer of risk where the seller is not required to send the goods to the buyer. Para. (1) is directed to those cases where the buyer is obliged to remove the goods from the seller's place of business. This is not stated expressly but is to be inferred from the language of para. (2). See also [Secretariat] Commentary, pp. 203-204. Apart from this slight ambiguity, the first sentence of art. 69(1) is in accord with the rule in UCC 2-509(3).

2. The second sentence of para. (1) is concerned with the consequences of the buyer's delay in taking over the goods. On this point the rule adopted differs both from OSGA 21(a) and UCC 2-510(3). The former requires a causal connection between the buyer's breach and the loss; the latter only transfers the risk of loss to the buyer for a commercially reasonable time and then only to the extent of any deficiency in the seller's insurance. See OLRC Sales Report, p.275. The object of the Code's restrictive approach is to deny the seller's insurance company the subrogation rights to which it would otherwise be entitled and, where the seller is covered by insurance at the time of loss, to relieve the buyer of liability.

[3] Art. 69(2) addressed itself to those situations where the goods are in the hands of a bailee other than the seller. See [Secretariat] Commentary, pp. 204-205, and cf. UCC 2-509(2). The [Secretariat] Commentary explains (*ibid*.) that the intent of para. (2) is to transfer the risk of loss to the buyer as soon as the goods have been put at his disposal even though the buyer is not in breach in not yet having collected them from the bailee. The distinction is a persuasive one and is also adopted in UCC 2-509(2). "Placed at his disposal" is not defined in art. 69 but is explained in the [Secretariat] Commentary (p. 205) to mean when the seller has taken the steps necessary to enable the buyer to take possession of the goods. The expression is not used as a term of art and its content will vary with the circumstances. *Quaere* whether delivery to the buyer of a non-negotiable document of title will suffice or whether the bailee must also have attorned to the buyer?

[4] The rule adopted in paragraph (3) is one that is also familiar in Anglo-Canadian law, but it creates difficulties in the case of fungible goods in the hands of a bailee which are commingled with other like goods. Applied literally, the delivery of a negotiable document of title involving fungible goods in the hands of a carrier or warehouseman may not be sufficient to transfer the risk of loss until the quantity of goods represented by the document is actually segregated by the bailee. Even the English courts have shrunk from such an uncommercial conclusion (see OLRC Sales Report, pp. 267-8, and p. 268, n.54), and presumeably CISG did not intend paragraph (3) to be interpreted this way. The convention contains no definition of "identified goods" but this should not preclude a court from giving it a flexible meaning consistent with the underlying rationale of art. 69.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

COMMENT

The provincial Acts contain no provision corresponding to art. 70 but the same result as in art. 70 would probably be reached on general principles, at least where the buyer has not yet accepted the goods. The Code provisions in UCC 2-510(1) and (2) approach the issue differently, i.e., in terms of whether or not the risk of loss is deemed to have been transferred at all, and reach somewhat different results. [cf. OLRC Sales Report, pp.273-275]. However, the practical effect of art. 70 appears to be the same as if risk of loss had not passed since, by avoiding the contract, the buyer will be relieved from having to pay the price if he has not yet paid it and will be able to recover it if he has. Cf. art. 82 and [Secretariat] Commentary, p. 206.

Chapter V

PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

SECTION I. Anticipatory breach and instalment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph 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. The present 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 of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

COMMENT

1. Art. 71 and 72 deal with related but different aspects of future non-performance by a party of his contractual obligations. Art. 71 is concerned with the situation where "it becomes apparent" that the other party will not perform a substantial part of his obligations whereas art. 72 applies where "it is clear" that one of the parties will commit a fundamental breach of contract. Art. 71 is therefore wider than art. 72 and, in concept at least, was intended to be more easily invokable.

2. The consequences are also different. Under art. 71 the party seeking assurance of performance is only entitled to suspend his own performance pending the provision of the sought assurance; it is only if adequate assurance is not furnished that he is entitled to avoid the contract. Under art. 72, the aggrieved party may immediately avoid the contract if he can discharge the substantially heavier burden of proof incumbent on him and the other party has declared that he will not perform his obligations.

3. Except with respect to the seller's right of stoppage *in transitu* (OSGA, s.42), the provincial Acts contain no counterpart to art. 71. As a result, under existing Canadian law a party is required to continue with performance of his obligations even though he has reasonable grounds for apprehending that the other party may not be able to meet his obligations at the relevant time. UCC 2-609 is more sympathetic to the performing party's dilemma and entitles him to suspend performance and to seek adequate assurance of performance from the other party where the circumstances are similar to those prescribed in art. 71. The OLRC Sales Report regarded UCC 2-609 as "one of the most useful innovations in the performance provisions of Article 2" (p. 529) and recommended the incorporation of a similar provision in the revised Ontario Sale of Goods Act. In view of these common law developments there is no reason to fear untoward consequences from the adoption of such a principle in international sale contracts.

4. Art. 71 was substantially amended at Vienna. It originally provided that a party could suspend performance of his obligations if the prescribed circumstances gave "good grounds to conclude" that the other party would not be able to perform a substantial part of his obligations. Some delegates thought this test too subjective and, after lengthy deliberations, the more objective "it becomes apparent" was adopted in art. 71(1). The compromise may have been achieved at a substantial cost in clarity.

Article 72

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

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

COMMENT

1. It appears from the [Secretariat] Commentary to former art. 63 (now art. 72) that art. 72 is directed both to cases of anticipatory repudiation as understood by a common law lawyer and to cases of frustration where one of the parties will be unable to perform because of events beyond his control e.g., the outbreak of hostilities or destruction of the seller's plant by fire. In the latter type of case the common law would say that, because of the supervening circumstances, the non-performing party is excused from performance and hence has not committed any breach. Art. 72 apparently adopts the approach of some civilian systems that the obligation to perform is strict but that the non-performing party will be excused from liability for his failure to perform where there has been a frustrating event. Cf. [Secretariat] Commentary p. 160, and the comment, *infra*, to art. 79.

2. Subject to these observations, the provincial common law is the same as art. 72 in entitling a party to cancel the contract where the other party refuses to proceed with it. However, the provincial law has no counterpart to the requirement of art. 72(2). The requirement was added at Vienna (again in an effort to meet the concerns of some delegates) and seems a little anomalous.

Article 73

(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 of contract 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 of contract 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 who declares the contract avoided in respect of any delivery may, at the same time, declare it 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.

COMMENT

1. Art. 73 deals with the effect of a breach in a contract of sale by instalments and should read in conjunction with art. 51 and the comments thereon. The rules in art. 73(1) and (2) are substantially the same as the rules in OSGA s.30 and the other provincial Acts.

2. Paragraph (3) appears to differ from the provincial law in two respects: first, in allowing an aggrieved party to return earlier conforming instalments as well as to refuse to accept future instalments and, secondly, in conferring these rights where the contract has only been avoided "in respect of any deliveries". The common law does not *semble* entitle the aggrieved party to return previous instalments at all and he can only refuse future instalments where he cancels the contract in its entirety. See OLRC Sales Report, pp. 547, et seq. However, these differences may be more apparent than real since the rights conferred under art. 73(3) only arise where the deliveries are interdependent. This suggests that "delivery of goods by instalments" in art 73 has a broader meaning than it has under the provincial Acts and may encompass some types of contract that are indivisible or at least indivisible in part. "Delivery of goods by instalments" is not defined in art. 73.

Section II. Damages

Article 74

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

COMMENT

1. *Introductory*. The four articles on the recovery and measurement of damages contained in Section II generally deal with the subject in a manner familiar to common law lawyers. Art. 74 lays down the principal rule for the recovery of damages and, with an important qualification, corresponds to the well known rules in *Hadley*. v. *Baxendale* (1854) 9 Exch. 341. Article 75 is a particularized application of art. 74 and allows damages to be measured by the actual results of a resale by the seller or a covering purchase by the buyer, as the case may be. The provincial Acts contain no provisions corresponding to art. 75, but the Uniform Commercial Code does. See UCC 2-706, 2-712. Article 76 adopts the well known market price test for measuring damages where there is a "current price" for the goods and art. 75 does not apply. Finally, art. 77 imposes on the aggrieved party the equally familiar duty to mitigate his damages.

2. *Art. 74*. This article conforms to the rules in *Hadley* v. *Baxendale* and their statutory reproduction in OSGA 48 and 49, subject to the following exceptions:

(a) The article would appear to be broad enough to include a claim by the seller in respect of consequential damages suffered by him as a result of the buyer's failure to pay the price. As previously indicated (*supra* art. 61), the Anglo-Canadian position is unsettled. In principle I believe art. 74's approach to be correct.

(b) The test of foreseeability in art. 74 is substantially broader than the test in *Hadley* v. *Baxendale*, as refined by the House of Lords in *The Heron II* (1969) 1 A.C. 350. In the latter case Lord Reid expressly rejected the test of "possible" damages adopted in art. 74. Its retention in art. 74 could lead to the admissibility of damage claims that have hither-to been rejected and enlarge the seller's already very substantial exposure to liability. Surprisingly, no concern was expressed at Vienna about the generous foreseeability test in art. 74 and the article was adopted without amendment. In practice, a well drafted sales contract will almost invariably exclude or limit the seller's liability for consequential damages, whether or not they were foreseeable, and it may be that sellers are more concerned about *any* liability for consequential damages than they are about degrees of foreseeability.

Article 75

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 as well as any further damages recoverable under article 74.

COMMENT

1. As noted under art. 74, the resale and cover provisions in art. 75 have no counterpart in the provincial Acts. However, the OLRC Sales Report, pp. 409, 498 supports the similar provisions in the Uniform Commercial Code and the CISG provisions are equally deserving of support.

[2] There are some important differences between the resale provision in art. 75 and the provisions in UCC 2-706. Note in particular that art. 75 imposes no duty on the seller to notify the buyer of his intention to resell and the fact that, literally construed, the article only applies to a resale of goods that have been identified to the contract at the time of the buyer's breach. In contrast, UCC 2-706 also applies to goods identified to the contract subsequent to breach.

Article 76

(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 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, 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 such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

COMMENT

1. The "current price" test in art. 76 broadly corresponds to the "available market" test in SGA 48 and 49, subject to the following differences:

(a) Art. 76 only applies where the aggrieved party has not proceeded under art. 75, i.e., he cannot ignore the results of an actual resale or covering purchase and claim higher damages. The position under the Uniform Commercial Code is unsettled although there is strong evidence that the aggrieved party was not intended to be put to his election. See further OLRC Sales Report, pp. 409-410.

(b) *Time for determining current price*. The draft version of art. 76 was amended on this point at Vienna and the article now contains two tests to determine the time of the currency price: first, the current price at the time of avoidance when the goods have not been taken over by the buyer and, second, where the goods have been taken over by him, the time when such taking over occurred. The reasons for the adoption of the double test were apparently based on the fact that some delegates felt that the test in the draft article (the time when the aggrieved party first had the right to avoid the contract) was too vague, and because others were concerned that the substitution of the time of actual avoidance might enable the aggrieved party to postpone avoidance to take advantage of a fluctuating market. On the other hand, the time of delivery was not generally suitable either because there might not have been any delivery as in the case of an anticipatory repudiation. Thus the version of art. 76 eventually adopted was regarded as an appropriate compromise.

The provincial Acts only deal with the determination of the market price where the buyer fails or refuses to accept and pay for the goods or where the seller fails or refuses to deliver. In each case the bench mark is the market price at the time of the wrongful failure or refusal. See OSGA ss.48-49. It is sometimes suggested that the same test applies where the buyer has rightfully rejected non-conforming goods but this seems doubtful. See further OLRC Sales Report, pp.525-27.

(c) *Place for determining current price*. The provincial Acts do not cover this point and the case law is sparse and inconclusive. See OLRC Sales Report, p. 524. "Where delivery should have been made", the test in art. 76(2), may be too rigid if the place of receipt of the goods and the place of delivery are different, as they often are. I prefer the test in UCC 2-713(2). viz., "the place for tender (of the goods) or, in cases of

rejection after arrival or revocation of acceptance, as of the place of arrival." Presumably there is some flexibility in art. 76(2) and a court may be able to substitute the price obtaining at the place of arrival of the goods where that is a more reasonable market for a hypothetical covering purchase.

Article 77

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

COMMENT

The parameters of the duty to mitigate under art. 77 are not clear. Presumbly it does not affect the aggrieved party's right to seek specific performance or his right to avoid the contract where a fundamental breach has occurred. Presumably too the greater particularity will have to be supplied in the light of the overall structure of the Convention, the general principles on which it is based (art. 7), and the duty of good faith.

Section III. Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

COMMENT

1. Art. 78 is new and was added at Vienna at the request largely of various European delegates who felt keenly that the convention would be seriously incomplete without some provision on an aggrieved party's entitlement to interest. However, there were sharp differences of opinion about the content of such a provision and art. 78 represents an uneasy compromise between those who were altogether opposed to an interest provision and those who wanted a statement, however bland, at least recognizing the right.

2. Art. 78 is more conspicuous for the questions it fails to answer than the questions it answers. In particular, it does not stipulate the rate of interest or how the rate is to be determined by a tribunal in the absence of explicit guidance in the convention. The delegates were acutely aware of these questions but were unable to reach agreement on appropriate answers. It is equally unclear (at least to me) to what extent the rules of private international law may be involved (via art. 7) to supply the missing answers or what is the proper relationship between art. 78 and a claim for damages under art. 74.

Section IV. Exemptions

Article 79

(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:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect 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 by the other party 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.

COMMENT

1. Art. 79 deals with the circumstances in which the buyer or seller may be excused from performance of his contractual obligations because of an extraneous event that is judged sufficiently important to warrant the excuse--what in the common law is referred to as frustration of the contract and in civilian legal systems under such headings as *force majeure, cause étrangère*, and *Wegfall der Geschaftsgrundlage*. The article is probably one of the most difficult in the whole convention, and this for several reasons [cf. Barry Nicholas, "Force Majeure and Frustration" (1979) 27 Am. J. Comp. Law 231 et seq.].

First, because of the conceptual differences in approach to frustration among the major legal systems, secondly, because of lack of unanimity about the solutions to the policy issues, and thirdly, because of the unsettled state of the law even within a given system. This certainly describes the common law position. Given these complexities it is not possible to do more than to draw attention to some of the more salient features of art. 79 and the extent to which the article differs from the corresponding provincial common law and statutory rules [viz., OSGA ss.7-8, and the Uniform Frustrated Contracts Act. The original or revised version of the Act has been adopted in 9 Provinces and Territories].

2. Art. 79, like its predecessor, art. 74 of ULIS, is more civilian than common law in its conception. Paragraph (1) describes the circumstances when a party "is not liable" for a failure to perform any of his obligations. Paragraph (2) is an extension of the first paragraph and is concerned with the effect of non-performance by a third party whom the contracting party has engaged to perform some of his duties. Paragraph (3) regulates the period of the exemption and paragraph (4) imposes a duty of notification on the party failing to perform. Paragraph (5) deals with the consequences of the non-performance and the remedies available to the parties.

3. *Paragraph (1)*. This paragraph is of critical importance. Two features should be noted. First, the existence of a qualifying impediment to non-performance does not "frustrate" or automatically terminate the contract as is generally the case in the Canadian common law [Cheshire & Fifoot, *op. cit*., 9th ed., pp. 558-59]. The contract apparently continues to exist unless and until it is avoided. The only immediate effect is to excuse the non-performing party from "liability" for failure to perform, i.e., from a claim in damages. Secondly, the impediment must be not only beyond the control of the non-performing party; he

must also be able to show that he could not reasonably have taken the impediment into account, avoided it, or overcome it or its consequences.

Foresight of a supervening frustrating event is also a relevant consideration at common law, as is a "self-induced" act of frustration: see e.g., *Maritime Nat. Fish Ltd.* v. *Ocean Trawlers Ltd.* (1935) A.C. 524; *The Eugenia* (1964) 2 Q.B. 226. However, it appears from the [Secretariat] Commentary, (p. 170, para. 7) that the duty to overcome the impediment may include the duty to tender substitutional performance. *Semble*, no such duty exists in the Canadian common law unless it can be implied from the terms of the contract. (UCC 2-614 recognizes it to a limited extent).

4. Paragraph (1) does not amplify the meaning of "impediment". Presumably it covers physical impediments (notably destruction of specific goods under a contract for the sale of specific goods: cf. OSGA, s.8, and legal impediments such as the outbreak of hostilities or the imposition of foreign exchange controls. It is not clear to what extent "impediment" may embrace frustration of the purpose of the contract (as in the well known Coronation cases) [*Krell* v. *Henry* (1903) 2 K.B. 740; *Herne Bay Steamboat Co.* v. *Hutton* (1903) 2 K.B. 683]] and what is referred to in the literature as economic frustration. The Anglo-Canadian position on these points is also unsettled; for the U.S. position see now UCC 2-615, and the discussion in the OLRC Sales Report, pp. 374 et seq.

5. *Paragraph 3*. This again illustrates an important difference between the common law's approach to frustration and the conceptual basis of art. 79. At common law the contract is only frustrated if the intervening event has destroyed its substratum or so radically interfered with performance that the whole complexion of the contract has been altered: hence a temporary impediment is not sufficient unless it has this effect. See e.g., *F.T. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 A.C. 397, *Cheshire & Fifoot's Law of Contract*, 9th e.g., pp. 550-551. A temporary impediment, regardless of its gravity, clearly is a sufficient excuse under art. 79.

6. *Paragraph 5*. As already indicated, the existence of an "impediment" does not automatically terminate the contract, and it is left to the other party to determine what remedies he wishes to pursue (other than in respect of damages) in the light of the supervening circumstances. He may be entitled to avoid the contract if the non-performance amounts to a fundamental breach, but seemingly he is not obliged to. If he does avoid, the normal consequences of avoidance will follow. See art. 81-84. These remedies may be too rigid for an art. 79 type situation. [Nicholas, *supra n.1*, pp. 241 et seq.]. For example, a seller may be obliged to refund the purchase price in its entirety even though he has incurred substantial reliance expenditures in preparing to perform. Again, the convention provides no guidance as to a seller's duty to prorate his available production among his buyers where, owing to the supervening event, it is no longer sufficient to meet all his commitments. CISG contains no provisions comparable to those in the Uniform Frustrated Contracts Act conferring discretionary powers on the court or those in UCC 2-615 and 2-616 requiring the seller to prorate his production among his customers.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

COMMENT

Art. 80 is new and was added at Vienna out of an abundance of caution. It states the self-evident proposition that a party cannot rely on another party's failure to perform if the failure was induced by the first party's own conduct e.g., by supplying faulty specifications for the construction of a machine or vessel or instructing the seller to use the paint of a particular manufacturer which proves unsuitable for the purpose for which it is intended.

Section V. Effects of avoidance

Article 81

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

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

COMMENT

1. Art. 81(1) has no precise counterpart in the provincial Acts, but is in accord with the generally understood position at common law. The House of Lords has recently reaffirmed that termination of a contract because of breach by the other party, even if it is fundamental, does not nullify the provisions of the contract limiting the liability of the guilty party consequent on breach: *Photo Productions Ltd*. v. *Securicor Transport Ltd*. (1980) 1 All E.R. 556.

2. The provincial Acts do not regulate the restitutionary rights of the parties where the contract has been avoided, and these continue to be governed by the common law. The common law rights are not as extensive as those apparently conferred under art. 81(2). In particular the following limitations on the common law remedy should be noted.

(a) The claimant must be able to show a total, or at least a substantial failure of consideration: *Hunt* v. *Silk* (1804) 5 East 449; Waddams, *op cit*., p. 447 OLRC Sales Report, pp. 504-509.

(b) Except in a claim for the recovery of monies paid, (*Dies* v. *British& International Mining& Finance Co*., (1939) 1 K.B. 724, appvd. in *Stockloser* v. *Johnson* (1954) 1 Q.B. 476, C.A.), a party in breach cannot bring a successful restitutionary claim unless he has substantially completed his performance or unless the other party is deemed to have accepted or agreed to the deficient performance: *Cutter* v. *Powell* (1795) 6 T.R. 320; *Britain* v. *Rossiter* (1879) 11 QBD 123; Cheshire& Fifoot, *The Law of Contract*, 9th ed., pp.523-24.

(c) Likewise, no restitutionary rights exist at common law for partial performance where the contract has been frustrated: *Cutter* v. *Powell*, supra, and *Appleby* v. *Myers* (1867) L.R. 2 C.P. 651. However, this rule has now been reversed by statute in most of the Provinces. Cf. Uniform Frustrated Contracts Act (1974), s.5(1). Apparently art. 81(2) of CISG applies to avoidance of the contract because of frustration as well as to avoidance for other reasons.

(d) At common law there is generally no right to restitution in specie, only a claim *in personam* for the money value of the benefits conferred. In particular, an unpaid seller cannot claim the return of goods delivered to the buyer for non-payment of the price unless he has retained title to the goods or there is an agreement otherwise providing for the return of the goods. Cf. UCC 2-702. Apparently art. 81(2) confers a right of specific restitution--"of whatever he has supplied". However, the [Secretariat] Commentary, p. 176, para. 10, cautions that such a restitutionary claim may be thwarted by bankruptcy or other national insolvency procedures not recognizing the plaintiff's claim in the property or granting him a preferred status in the distribution of the bankrupt's estate.

(e) At common law the restitutionary claim may probably not exceed the expectancy damages the plaintiff would have been entitled to recover in an action for breach of contract: Waddams, *op cit*., pp. 448-449; and cf. *Bowlay Logging Ltd*. v. *Domtar Ltd*. (1978) 4 W.W.R. 105 (B.C.). There is no such restriction in art. 81(2). *Quaere* whether it will be implied?

The first three differences are not too serious and will probably only have a modest effect in practice. Difference (d) could be significant and needs to be explored much more fully if Canada decides to ratify the Convention. Difference (e) is at best doubtful and even if it exists is only likely to have a minor impact.

3. I am not aware of any common law rule corresponding to the second sentence of art. 81(2). It is in fact well settled that a buyer under the provincial Acts has no lien on the seller's goods to secure the return of his payments. See *Lyons& Co*. v. *May& Baker* (1923) 1 K.B. 685. The common law rule has been reversed in UCC 2-711(3).

Article 82

(1) The buyer loses the 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 preceding paragraph 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 the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; 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 or ought to have discovered the lack of conformity.

COMMENT

1. Art. 82(1) appears to be in accord with the common law. Cf. UCC 2-608(2).

2. With respect to the exceptions in art. 82(2),

(a) is probably recognized, though perhaps not in all cases: it may depend on the facts and the reasons for the buyer's avoidance. Cf. *Rowland* v. *Divall* (1923) 2 K.B. 500 (C.A.), and UCC 2-608(2);

(b) appears to be in accord; but

(c) goes further than existing provincial law. Cf. *E. Hardy & Co*. v. *Hillerns & Fowler* (1923) 2 K.B. 490. This is because by using, converting or reselling the goods the buyer will be deemed to have accepted the goods. It will therefore be too late for him to avoid the contract even though the defect was a latent one and could not reasonably have been discovered by the buyer at an earlier date. The Uniform Commercial Code recognizes the buyer's right to revoke his acceptance where the defect is a latent one and to recover his payment after revocation has taken place (see UCC 2-608, 2-711(1)), but it too does not relieve the buyer from having to return the goods.

The theory of the exceptions appears to be that the buyer should not be precluded from being able to avoid the contract if his inability to return the goods is not his fault, and that the seller is adequately

protected by the requirement in art. 84(2) that the buyer must account to him for all benefits which he has derived from the goods.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

COMMENT

The common law is the same as art. 83 in preserving the buyer's other remedies even after he has lost the right to rescind the contract for breach of the seller's obligations, and in particular his right to claim damages. Cf. OSGA, s.51. The [Secretariat] Commentary explains (p. 179) that the other remedies retained by the buyer under CISG are the right to claim damages , to require that any defects be cured under art. 46, and to declare a reduction of the price under art. 50. The second and third remedies have no counterpart in the provincial Acts.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, 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.

COMMENT

1. At common law there is no requirement that a seller must pay interest on the refundable price. See *Chalmer's Sale of Goods*, 17th ed., p. 324, However, the position has now been changed by statute in England and in several of the Provinces. [For the details see Fridman, *Sale of Goods in Canada*, 2nd ed., p.381.] Interest may also be recoverable at common law under the heading of general damages. Art. 84(1) does not state how the rate of interest is to be determined, but the [Secretariat] Commentary, p. 180, explains that it is to be based on the rate current at the seller's place of business. The reason for this choice is that it is the benefit derived by the seller from the goods and not the loss suffered by the buyer that supplies the resitutionary claims under art. 84--hence the seller's place of business is the right forum.

2. There is no general requirement in provincial sales law that a rescinding buyer is accountable for all benefits, the reason being that he would not normally be entitled to reject the goods once he has made substantial use of them. Cf. OSGA 33-34. Again, under the doctrine of *Hunt* v. *Silk* (1804) 5 East 449, the action for money had and received will not lie where the plaintiff has derived any, or *quaere* any substantial, benefit under the contract. However, use or, arguably, even consumption of the goods will not be deemed a benefit where the buyer complains of a defective title. See *Rowland* v. *Divall* (1923) 2 K.B. 500 (C.A.) and the discussion in the OLRC Sales Report, pp. 504-509.

3. The buyer's accountability for benefits derived by him from the goods assumes greater importance under the convention than it does under the provincial Acts because the buyer's right to reject non-conforming goods and to avoid the contract is not as limited in time as it is under the provincial Acts. As a result the buyer is much more likely to have derived some benefits from the goods before his right to avoid has been lost. [The same is true under the doctrine of revocation adopted in UCC 2-608.] But, whatever the measure of the buyer's benefit, it is entirely appropriate that he should be accountable for it and that it should march in step with the seller's accountability to return the price if it has been paid. This also appears to be the American doctrine and similar recommendations were made in the OLRC Sales Report, pp. 505-506.

SECTION VI. Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, 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 is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

COMMENT

Art. 85 does two things: it imposes a duty on the seller to take reasonable steps to preserve the goods if the buyer delays in taking delivery of them, and it gives him a possessory lien in respect of any custodial expenses incurred by him. OSGA 36 and its provincial counterparts cover part of the same ground, i.e., by entitling the seller to recover reasonable charges for the care and custody of the goods. However, OSGA 36 does not prescribe the seller's standard of care and it does not give him a lien in respect of his expenses. Cf. OLRC Sales Report, pp. 399-400. Art. 85 is superior on both these points.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to 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 this can be done 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. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

COMMENT

1. Art. 86(1) is the counterpart to art. 85 and is acceptable for the same reasons. The provincial Acts do not spell out the duties of a rejecting buyer. OSGA 35 merely provides that the buyer is not obliged to return the goods. UCC 2-602(2)(b), on the other hand, supports art. 86(1).

2. Art. 86(2) obliges the buyer to take possession of the goods in prescribed circumstances if they are placed at his disposal at their destination and neither the seller nor his agent are present to take charge of them. Such a provision is particularly appropriate in international trade where goods may be shipped across long distances and the seller has no representative at their destination to protect his interests if the goods are rejected by the buyer. The provincial Acts contain no counterpart to art. 86(2), but similar, though not identical, provisions are to be found in UCC 2-603. Both limbs of art. 86 should be readily acceptable to Canadian traders.

Article 87

A 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.

COMMENT

Art. 87 has no counterpart in the provincial Acts but is supported by UCC 2-603. Its justification follows logically from the custodial duties imposed on a buyer or seller under art. 85 and 86.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 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 price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 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) A 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.

COMMENT

Again there is no counterpart to art. 88 in the provincial Acts, but the aarticle finds a close parallel in UCC 2-603 and 2-604 and should prove quite unobjectionable. A number of differences should be noted between the Code provisions and art. 88: (i) under UCC 2-603 the buyer is bound to follow any reasonable instructions received from the seller with respect to the goods, and (ii) under 2-604 he is entitled to reship the goods to the seller at the seller's expense.

FINAL PROVISIONS

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