

[Go to Database Directory](#) || [Go to Table of Contents to Annotated Text of CISG](#) || [Go to Database Bibliography](#)

Reproduced with permission of the publisher, [Kluwer Law International](#), The Hague

# Uniform Law for International Sales under the 1980 United Nations Convention

3rd edition (1999)

© [John O. Honnold](#)

Schnader Professor of Commercial Law Emeritus  
University of Pennsylvania  
Secretary, UNCITRAL, and Chief, U.N. International Trade  
Law Branch, 1969-1974

- [Dedication](#)
- [Preface](#)
- [Table of contents](#)
- [Case-law: Bibliography](#)
- [Abbreviations: Judicial and Arbitral Decisions](#)
- [Index](#)

## Chapter 1.

### The 1980 Convention: A Brief Introduction

❖1 On April 11, 1980, a diplomatic conference of sixty-two States unanimously approved a Convention providing uniform law for international sales of goods. By December 11, 1986, instruments of adherence (e.g., ratification or accession) had been deposited with the Secretary-General by eleven States: Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syrian Arab Republic, United States of America, Yugoslavia and Zambia. Under Article 99 the Convention went into force a year after the deposit of the tenth instrument of adherence; for the above eleven States the Convention entered into force January 1, 1988.

At publication, over 50 States, including States from each region and embracing a large majority of the world's population, have adhered to the Convention. [\[Go to listing of\] these States, with dates of adherence and entry into force, and any applicable reservation.](#) Adherence patterns of other Conventions, with less initial momentum than CISG, indicate that this Convention is moving towards virtually unanimous acceptance.

#### ❖2 A. Primary Role of the Contract

The dominant theme of the Convention is the role of the contract construed in the light of commercial practice and usage❖a theme of deeper significance than may be evident at first glance. In some countries protective rules inspired by the plight of consumers could be superseded by the uniform rules developed for international commerce. To avoid any collision with such protective legislation, consumer purchases are excluded from the Convention. (See the Commentary to Arts. 2(a) and 5, *infra* at ❖❖ [50](#)❖[55](#), [71](#).)

The Convention does not override domestic law that outlaws certain transactions or invalidates proscribed contracts and oppressive terms; outside this narrow area the Convention protects the contractual arrangements made by the parties. (See, e.g., Ch. 2, *infra* at ❖[27](#)). Moreover, the parties may exclude the Convention, and the terms of their contract will **[page 3]** prevail over any inconsistent provision of the uniform law. (See the Commentary to Art. 6, *infra* at ❖[74](#).) In short, like most domestic sales rules applicable to commercial contracts,

the Convention's rules play a supporting role, supplying answers to problems that the parties have failed to solve by contract.

The Convention in two fundamental ways responds to the power of agreement. The Convention itself was produced by agreement. States from all parts of the world, through collaboration sustained for over a decade, reached consensus on a Convention of over a hundred articles. Then, as Contracting States, they agreed that in international sales they would substitute the Convention's rules for their domestic laws. Although we can not know whether civilization grew from a social compact those who saw the development of the Convention can not doubt the power to move towards civilization by agreement.

Consistent with these origins, the Convention does not interfere with the freedom of sellers and buyers to shape the terms of their transactions. Nations can control their domestic commerce and can exclude or restrict the flow of trade. However, with the collapse of imperial and economic empires, commercial enterprises can not compel parties in other countries to trade with them and, with the development of international competition, can not dictate contract terms. Domestic trade may be subject to national management but international trade depends on agreement.

A highly respected legal scholar in a rhetorical flourish (later modified) announced the "Death of Contract". At least for international sales this report (as Mark Twain said of a report that he had died) is "grossly exaggerated".  
[1]

### 3 B. Major Contours of the Convention

The Convention deals with the two basic aspects of the sales transaction. Part II governs the formation of the contract; Part III governs the obligations of the parties under the contract. States by specific declaration (Art. 92) may exclude either Part. (In the Commentary, see the Introduction to Part II of the Convention, *infra* at 131.)  
[page 4]

Part II on Formation (Arts. 14-24) includes rules on the definiteness required of offers, the effect of communications addressed to the general public ("public offers"), the power to revoke an offer, and the requisites for a binding acceptance. The "Sales" rules in Part III (Arts. 25-88) include Chapters on the seller's obligations with respect to quality of the goods and freedom of the goods from third-party claims (Ch. II), the buyer's obligations to pay for the goods (Ch. III), the allocation of risk of loss (Ch. IV), and the remedies available to both parties for breach (Ch. V).

A more precise view of the Convention can be obtained by examining the Detailed Table of Contents. Some may wish at this point to read the introductory passages that are interspersed throughout the Commentary; references to these introductions are given in a footnote.  
[2]

### 4 C. Development of the Convention

#### (1) *Origins: The 1964 Hague Conventions*

Concern for the barriers resulting from legal diversity spans the centuries [3] but we must be content to start our account with the work launched in the 1930s when the International Institute for the Unification of Private Law (UNIDROIT) requested a distinguished group of European scholars to prepare a draft of a uniform law for the international sale of goods. A preliminary draft was issued in 1935. The work, suspended during the war, resumed soon after the end of hostilities. In 1951 a conference of 21 nations encouraged the continuation of the project, and in 1956 and 1963 revised drafts were sent to governments for comments. In the meantime, work was commenced on a uniform law for the formation of the contract; in 1958 a draft uniform law was circulated.

In April 1964 a Diplomatic Conference of 28 States met at the Hague to act on these two related drafts. After three intense weeks the Conference finalized two conventions: One set forth a Uniform Law for the International Sale of Goods (ULIS) and the other a Uniform Law on the Formation of Contracts for the International Sale of

Goods (ULF). In [page 5] 1972 both conventions went into effect following ratification by five States; adherents for the most part were European. [4]

## ❖5 (2) *Worldwide Sponsorship: UNCITRAL*

The 1964 Hague Conventions were of fundamental value but it became evident that success on a worldwide scale called for worldwide participation and sponsorship. In 1966 a resolution by the General Assembly of the United Nations provided for the establishment of a worldwide representative body to promote "the progressive harmonization and unification of the law of international trade." This body, the United Nations Commission on International Trade Law (UNCITRAL), had its first session in 1968; in its first decade UNCITRAL made notable progress in preparing uniform international rules for arbitration, carriage of goods by sea, negotiable instruments and the sales of goods❖progress that was analyzed in a symposium issue of the American Journal of Comparative Law. References to these and other aspects of the Commission❖s work are given in a footnote. [5]

### ❖6 (a) *The Commission: Structure and Working Methods*

UNCITRAL❖s structure has two essential elements❖the number of members is limited and the representation is worldwide. To facilitate efficiency in handling technical legal questions, the Commission❖s membership is limited to 36 States, but that membership is allocated among the regions of the world. A formula in the Commission❖s charter provides the following regional distribution: Africa, 9; Asia, 7; Eastern Europe, 5; Latin America, 6; Western Europe and Others, 9. This last "region" (the [page 6] industrial West) embraces Australia, New Zealand, Canada and the United States. [6]

The full Commission meets once a year for sessions of two to four weeks. At these sessions the Commission decides on topics for work and receives progress reports from its constituent bodies❖principally Working Groups that, even with reduced size, are cross-sections of the Commission❖s worldwide representation. When a Working Group has completed its work on a draft Convention, the full Commission gives detailed consideration to each provision. This legislative process will be seen in a specific context when we turn to the development of the Draft Convention on Sales (*infra* at ❖9).

### ❖7 (b) *The Representatives*

The General Assembly resolution that established UNCITRAL provided that the Member States shall appoint representatives "in so far as possible from among persons of eminence in the field of international trade". In fact, UNCITRAL representatives proved to be a wholesome mix of academic specialists in commercial and comparative law, practicing lawyers, and members of government ministries with years of experience in international lawmaking.

The Commission faced a formidable task. The representatives responded with a flexible, international approach that embraced the premise that their national interests in having an effective uniform law would not be served by bargaining (in the spirit of tariff negotiations) for the use of the maximum number of scraps of national law. Examining the development of the Convention will expose the dangers inherent in using local legal idioms; the representatives minimized this problem by deciding what result was appropriate for a series of pivotal factual examples, and by repeated review of multilingual drafts designed to embody these decisions. Since each nation has both sellers and buyers, agreeing on a solution that was fair to both parties to the contract was only rarely complicated by issues of national interest. On a few points, it was suggested that the interests of industrial and developing countries called for different rules. These issues arose in surprisingly technical settings❖the time within which notice must be given that goods were defective (Arts. 39 and 44, *infra* at ❖❖254 *et seq.*), and the circumstances in which one party [page 7] may suspend performance because of possible failure of counterperformance (Art. 71, *infra* at ❖385). Happily, the delegates finally found acceptable solutions even for these problems.

Throughout the United Nations system, UNCITRAL became known as a businesslike and hard-working group. After a day of legislative sessions, representatives would give evenings and weekends to informal working-group

sessions to resolve stubborn problems. The years of hard, successful work (and brief, notable periods of relaxation in pleasant surroundings) developed an *esprit* somewhat like that of a veteran regiment. The members jealously guarded their record of reaching decisions without a formal vote; in each case the legislative product was approved by consensus.<sup>[7]</sup>

## ❖8 (c) The Secretariat

The Commission and its constituent bodies are served by a Secretariat consisting of the United Nations International Trade Law Branch. This writer cannot speak of the Secretariat with detachment. During the period (1969❖1974) when he served as Chief of this Branch and as Secretary to the Commission he became deeply attached to this remarkable international team <sup>[8]</sup>

The role of the Secretariat was established by a few basic facts of time and space. The Commission meets once a year; during a two to four week session it considers the progress of programs in several complex and diverse legal fields. In the Working Groups, national representatives come together from all parts of the globe, from diverse legal and linguistic backgrounds, for annual sessions of two or three weeks. All of the representatives have primary, full-time responsibilities in their Universities or Ministries. For these reasons, progress at the legislative sessions has depended on preparatory materials provided by the Secretariat. These materials included studies analyzing the divergences among the existing legal rules; reports on commercial practices to assist in making a choice among alternative solutions to pivotal factual examples; draft statutory texts formulated, at crucial spots, with clearly labelled alternatives to facilitate debate and decision with a minimum of confusion or misunderstanding. A strong role for the U.N. Secretariat could touch sensitive political nerves **[page 8]** but at an early stage it was recognized that successful work depended on this help; the desire for success muted this and other divisive issues.

## ❖9 (3) UNCITRAL and a New Convention

At UNCITRAL❖s first session (1968), by common consent, high priority was given to work on uniform law for international sales. The more difficult question was whether UNCITRAL should promote adoption of the two 1964 Sales Conventions (as it did with respect to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards) or whether it should prepare new legal texts.

The crucial question was this: Would it be possible to obtain widespread adoption of the 1964 Conventions? The Commission requested the Secretary-General to transmit to governments the text of the two 1964 conventions and Professor Tunc❖s commentary, and to ask the governments whether they intended to adhere to these Conventions and the reasons for their position.

The replies laid the foundation for the Commission❖s decisions at its second (1969) session. It became evident that the 1964 Conventions, despite the valuable work they reflected, would not receive adequate adherence. The basic difficulty stemmed from inadequate participation by representatives of different legal backgrounds in the preparation of the 1964 Conventions; despite efforts by UNIDROIT to encourage wider participation these Conventions were essentially the product of the legal scholarship of Western Europe.<sup>[9]</sup>

UNCITRAL thereupon established a Working Group of 14 States❖a cross-section of UNCITRAL❖s world-wide representation❖and requested the Working Group to prepare a text that would facilitate "acceptance by countries of different legal, social and economic systems." Under the effective chairmanship of Professor Jorge Barrera Graf of Mexico the Working Group completed this task in nine annual sessions. In 1976 the Working Group completed its work based on the 1964 Hague **[page 9]** Sales Convention (ULIS); this was embodied in a Draft Convention on Sales❖as contrasted with Formation. In 1978 the Working Group completed its work based on the 1964 Hague Formation Convention (ULF), and issued its Draft Convention on Formation. In June 1978 the full Commission completed its review of these two drafts, and combined them in a single Draft Convention that dealt both with the formation of the contract (Part II) and with the rights of the parties to the contract (Part III). This 1978 Draft Convention on Contracts for the International Sale of Goods received the Commission❖s

unanimous approval. The General Assembly of the United Nations promptly authorized the convening of a diplomatic conference to act on the UNCITRAL draft.[\[10\]](#)

### ❖10 (4) *The Diplomatic Conference*

In March 1980, representatives of 62 States and 8 international organizations met in Vienna to finalize the UNCITRAL Draft Convention. The diplomatic conference worked for five weeks within the forbidding walls of the Hofburg; the principal sessions were held in the ornate hall that had provided the setting for the Congress of Vienna and for SALT II❖international arrangements of incomparably greater political portent but (unhappily) without such world-wide representation.[\[11\]](#)

Nearly all the provisions in the UNCITRAL Draft Convention of 1978 were approved in substance by the Conference. Significant changes are listed here in a footnote and are discussed in the Commentary.[\[12\]](#) The degree of approval of the UNCITRAL draft resulted from the fact that representatives from each region of the world had participated in preparing the draft. In addition, most delegates realized that the eighty-eight articles **[page 10]** of the uniform sales law (Parts I❖III) were closely related to each other as parts of an integrated whole; major changes in individual articles could affect the integrity of the structure. As the Conference progressed with its article-by-article discussion it became evident that the time for review of the draft as a whole would be limited, as compared with the repeated reviews that had occurred during the decade of work in UNCITRAL. See ❖9, *supra*. Thus, proponents of amendments had a heavy burden: they needed to show not only that a change was needed but also that a proposed amendment was clearly drafted and would not lead to untoward consequences in relation to other provisions of the law.

Through overtime work and close cooperation between language specialists of the United Nations and members of the Drafting Committee, the Convention was finalized in six official languages❖Arabic, Chinese, English, French, Russian and Spanish.[\[13\]](#)

Plenary sessions met only at the beginning and end of the Conference. The text of the Convention was substantially completed by two "committees." The "committees" resembled the Plenary since all States were represented but the committee concept permitted simultaneous work on different topics and also facilitated flexible procedures❖a committee could take action by a simple majority while decisions in Plenary required a two-thirds vote.

The First Committee prepared the principal substantive provisions of the Convention (Parts I-III, Arts. 1❖88) while the Second Committee prepared Part IV❖Final Provisions (Arts. 89❖101). These Final Provisions govern the steps necessary to bring the Convention into force and the content of permissible "declarations" (reservations) by adhering States.

The Second Committee, in response to authorization from the General Assembly, also prepared a Protocol to the 1974 Convention on the Limitation Period in the International Sale of Goods. This Protocol modified provisions of the 1974 Limitation Convention on its sphere of applicability to make the 1974 Convention conform to the 1980 Sales Convention.[\[14\]](#)

At the end of the Conference, the texts prepared by the First and Second **[page 11]** Committees were voted on in Plenary, article by article. Under the rules of the Conference, each article required approval by a two-thirds majority. In fact, of the 88 substantive articles (Parts I-III), 74 were approved unanimously and 8 additional articles received no more than 2 negative votes. All of the other articles were approved by large majorities but in two instances the majority fell short of two-thirds; on these articles, *ad hoc* working groups then brought in compromise versions that were approved without dissent. The Convention, as a whole, was then submitted to a roll-call vote and was approved without a dissenting vote. In short, the spirit of consensus that had developed in UNCITRAL was maintained to the end of the Diplomatic Conference.**[page 12]**

---

## Chapter 2.



## Salient Features of the 1980 Convention

❖11 This chapter is designed to highlight some of the more significant features of the Convention. This is not a summary of the Convention; a more complete overview can be gained by examining the Detailed Table of Contents and by reading, seriatim, the brief introductions to the various parts of the Convention that appear in the Commentary, *infra*, at ❖❖36, 131, 180 and 458. This chapter draws attention to aspects of the Convention that are of special significance: issues that underlie major parts of the Convention and challenging questions that will be discussed fully later. The most one can hope for here is an apéritif.

### ❖12 A. Scope of the Convention

#### (1) *The Sale Must Be International*

During the half-century of work that led to the present Convention there was general agreement that the uniform rules would apply only to international sales; the 1980 Convention governs contracts "between parties whose places of business are in *different* States." (See the Commentary on Art. 1, *infra* at ❖39.) Why is the Convention's scope restricted in this manner? To many the answer will seem obvious but it may be useful to explore some of the reasons for this basic decision.

#### ❖13 (a) *Reasons for Excluding Domestic Transactions*

Although we cannot claim for law that universality of outlook that has been achieved in basic science, lawmakers have not remained so isolated that it has been necessary to await the separate invention of each legal wheel. The international use of legal ideas is illustrated by widespread acceptance of the French Code Civil; the borrowing of the work embodied in the German and Swiss codes; the adoption within Scandinavia of parallel law on various topics, including Sales; and the widespread acceptance of common law ideas, including those embodied in the (U.K.) Sale of Goods Act.[page 13]

Limiting sales rules to international transactions was necessary because these rules are embodied in a Convention designed for universal adoption. In a Convention, each Contracting State undertakes (in exchange for the comparable undertaking of other States) to implement the same uniform rules. In most States, domestic transactions predominate. States can be expected to bind themselves to the same rules only in an area of shared interest❖their international trade transactions.

#### ❖14 (b) *The Convention as a Model for Improving Domestic Law*

While the obligation to implement the rules of the convention is confined to the international sale, the opportunity to use the legal work embodied in the Convention is not so restricted. It is too early to come to conclusions concerning the Convention's usefulness for domestic law reform; it must suffice to suggest that the question should not be overlooked.

This book includes references to domestic rules, and the Convention will surely stimulate comparative studies in this area. The Scandinavian States have drawn on the Convention in revising their sales law. The results of this experience will shed further light on the value of the Convention for the reform of domestic law.[1]

The Commentary to Article 7 at ❖92 discusses the significance of international case law and scholarship under the Convention and the procedures for making this material generally available. Domestic law based on the Convention can be enriched by this body of thought and experience, and students and practitioners can gain wider horizons by this contact with the world of international commerce.

#### ❖15 (2) *Required Relationship between the Transaction and a Contracting Sale*

The 1964 Sales Convention directed the tribunals of Contracting States to apply its rules to any international sale even though the transaction [page 14] and its parties had no contact with any Contracting State.[2] As we shall

see in the Commentary to Article 1, the 1980 Convention rejects this "universalist" approach. Contracting States are obliged to apply the Convention only when the places of business of both the parties to the sale are in Contracting States (Art. 1(1)(a)) or when the rules of private international law lead to the application of the law of a Contracting State (Art. 1(1)(b)), and this latter ground may be excluded by reservation. (Commentary to Art. 1, *infra* at ¶47.) These provisions do not seem too modest in view of widespread adherence to the Convention and the opportunity of parties to agree on the applicability of the Convention. (See Commentary to Art. 6, *infra* at ¶78.)

## ¶16 B. Interpretation of the Convention

As we approach this difficult problem it may help to bear in mind two principles that will seem banal: (1) Legislation calls for an approach to interpretation that is consistent with its character and purpose. (2) The Convention has a very special function—to replace diverse domestic rules with uniform international law.

### ¶17 (1) *International Character; Uniformity*

The special problems of construing an international text are faced in Article 7, which lays down a series of principles for interpreting the Convention. The most basic principle is this: Interpretation shall respond to the Convention's "international character and to the need to promote uniformity in its application." Ways to effectuate this principle, examined in the Commentary to Article 7, include the following: The effort, in drafting the Convention, to avoid legal idioms that have divergent local meanings and, instead, to speak in terms of physical events that occur in international trade; the use of the legislative history of the Convention as a means of escape from preconceptions derived from domestic laws; and the dissemination and use of international case law (*jurisprudence*) and [page 15] scholarly critique (*doctrine*). (Commentary to Art. 7, *infra* at ¶¶87, 88, and 92.)

### ¶18 (2) *The Convention's Texture: Capacity to Respond to New Circumstances*

Laws that may readily be amended (e.g., income tax laws and regulations) may indulge in detail but this is not feasible for laws that must endure. Most of the domestic laws on obligations and on sales have stood almost for a century and many are even older. International legislative machinery is even harder to put into motion. The Sales Convention must be read and applied in a manner that permits it to grow and adapt to novel circumstances and changing times. The Convention provides for flexibility in various ways.

### ¶19 (a) *The Contract: Practices of the Parties; Usages*

Perhaps the most important vehicle for flexibility is the role that the Convention gives to the contract. (See Overview, Ch. 1, *supra* at ¶2; Art. 6, *infra* at ¶75.) On points where the contract is silent, current practices and usage may apply. Under Article 9, the parties "are bound by any usage to which they have agreed and by any practices which they have established between themselves"; in addition, the parties are considered to "to have impliedly made applicable to their contract" any usage which "in international trade is widely known to, and regularly observed by..." such parties. Statutory norms grow old but applicable practices and usages change with changing times and respond to special circumstances and needs. (See the Commentary to Art. 9, *infra* at ¶112.)

### ¶20 (b) *"Good Faith"*

Adaptation and development are also encouraged by the statement in Article 7 that one of the factors to be considered in interpreting the Convention is the need to promote "the observance of good faith in international trade." The Commentary to Article 7 (*infra* at ¶94) notes that using "good faith" only as a guide for interpretation is less sweeping than the general "good faith" requirements of some legal systems; nevertheless, in many situations interpretation in the light of the principle of "good faith" can avoid stultification or circumvention of specific provisions of the Convention.

### ¶21 (c) *Recourse to "General Principles" of the Convention*

Many legal systems work from the premise that solutions to legal problems can and must be found within the four corners of the Code. [\[page 16\]](#) premise that compels the extension by analogy of one or another of the Code's provisions. Other legal systems take a more strict view of statutes. For example, statutes like the (U.K.) Sale of Goods Act may be regarded as islands in an ocean of uncodified common law; in this setting if the statute does not readily supply an answer the court may draw on general common-law ideas.

Which approach is more appropriate for the Convention? Under the second, narrow approach, if one looks outside the Convention one does not find a body of "common" law; instead, one faces the vagaries of private international law and a fragment of some domestic legal system. Moreover, under this approach the results of individual cases would not contribute to a uniform, growing body of case law under the Convention.

In response to this difficulty, Article 7(2) states that when questions arise concerning matters "governed by this Convention" that "are not expressly settled" in the Convention, the question is to be settled "in conformity with *the general principles*" on which the Convention is based. Only when such a general principle cannot be found may the tribunal turn to "the law applicable by virtue of the rules of private international law."

This leads to important questions: How can one establish the general principles on which the Convention is based? How diligently should a tribunal look for such principles before it turns, *via* rules of private international law, to a rule of domestic law? For this writer, these questions present the Convention's most intriguing challenge; they are explored in the setting of Article 7, *infra* at [94](#).

### **[22](#) C. Formation of the Contract: Part II of the Convention**

Part II of the Convention (Arts. 14-24) addresses issues on contract formation. Questions about the existence of a contract arise more frequently in the classroom than in real life but problems may arise after informal exchanges of letters and cables. The Convention addresses problems of contract formation such as withdrawal or revocation of an offer (Arts. 15 and 16); the point at which an acceptance becomes binding (Arts. 18-22); and the effect of an acceptance that deviates from the offer (Art. 19). As a result of Article 16, when an offeror promises (either expressly or impliedly) that the offer is irrevocable, parties grounded in the civil law need not cope with the mysteries of common-law "consideration" that may deny effect to the offeror's promise. The other articles dealing with formation of the [\[page 17\]](#) contract adequately introduce themselves. See the Commentary to Arts. 14-24, *infra*.

### **[23](#) D. The Sale of Goods: Part III of the Convention**

Part III (Arts. 25-88), encompassing the full range of relationships between the seller and buyer, embodies general themes that may be foreshadowed here.

### **[24](#) (1) A Unified Contractual Approach to Obligations and Remedies**

The Convention's unified contractual approach will seem obvious to some but others who expect liability for breach of contract to be based on fault may find the Convention's contractual approach a startling *tour de force*.

### **[25](#) (a) Obligations of the Parties.**

The Convention's contractual theme is announced in parallel provisions that open Chapter II (Obligations of the Seller) and Chapter III (Obligations of the Buyer): Each party must perform all of the obligations "required by the contract" (Arts. 30 and 53, *infra* at [206](#) and [309](#)). This emphasis on the contract continues throughout the Convention and dominates the provisions dealing with the parties' obligations concerning delivery, quality of the goods, and payment of the price. The significant point is not that the Convention mentions the contract; this is generally true of domestic sales law. What is significant is the fact that giving legal effect to the expectations of the parties (as shown by the language of the contract, the practices of the parties and applicable usages) is so consistently the theme of the Convention.[\[3\]](#)



## ❖ 26 (b) Remedies

The tendency in some codified systems to distinguish between remedies for different categories of breach of contract found its way into the 1964 Hague Convention on Sales. ULIS divided [page 18] performance by the seller into five categories, and set up a separate remedial system for each category—an approach that produced length, complexity and ambiguity. For instance, separate remedies were provided for default as to the date of delivery and the place of delivery; this distinction was difficult to apply since goods that are still en route on the date for delivery can be regarded as either at the wrong place (en route) or delivered at the wrong time. Other artificial distinctions resulted from the fragmented approach to the seller's obligations and to remedies for breach.[4]

The Convention's unified contractual approach to the parties' duties was implemented by a unified system of remedies for breach. Under Article 45 a single set of remedies applies when the seller "fails to perform any of his obligations"; similarly, Article 61 provides a single set of remedies when the buyer "fails to perform any of his obligations." The remedy does not depend on formal classifications of types of breach but on the seriousness of the breach. This approach reduced bulk and complexity.

This unified approach to obligations and remedies at one point touched an important issue of substance. Some legal systems have traditionally restricted the seller's damage liability for defective goods to cases where the defect resulted from the seller's fault; other legal systems base damages simply on breach of contract.[5]

Under the Convention, a party's failure to perform the contract invokes the full range of remedies. For example, under Article 45 if the seller "fails to perform any of his obligations *under the contract*...the buyer may...claim damages...." And, contrary to the result in ULIS, the Convention's excuse from damage liability when non-performance results from an impediment (*cf. force majeure*) does not extend to the delivery of defective goods.[6] [page 19]

## ❖ 27 (2) Preservation of the Contract: Limits on Avoidance; "Cure"

We now face one of the thorniest problems in the law of contracts and sales: When will breach by one party free the other party of his obligation to perform? Students of comparative law do not credit any domestic legal system with a satisfactory approach to this problem; most of the traditional statutes dealing with the sale of goods tend to be casuistic and unresponsive to the interests at stake.[7]

In international sales the problem has special significance because of the cost of transporting goods to a distant buyer and the difficulty of disposing of rejected goods in a foreign country. These factors led to agreement on rules that can save the contract from destruction on technical and trivial grounds. One approach was a series of provisions that permit a party in breach to "cure" the deficiency in performance—Articles 34, 37 and 48. A second approach limits avoidance to breaches that are "fundamental" (Arts. 25, 49, 64). This limitation on the right of an aggrieved party to avoid the contract is subject to a powerful tool for clarifying the position of both parties: An aggrieved party who faces non-performance (failure to deliver goods or to pay the price) may fix a final, "additional period of time of reasonable length for performance"—the famous *Nachfrist* notice adapted from German law. Failure to perform in accordance with this notice is a ground for avoidance; the aggrieved party need not establish that the breach was "fundamental." Articles 47 and 49(1)(b) (avoidance by the buyer); Articles 63 and 64 (1)(b) (avoidance by the seller).[8]

## ❖ 28 (3) Risk of Loss

The Sales part of the Convention devotes a separate chapter to risk of loss (Ch. IV, Arts. 66–70). These rules, applicable when the contract is [page 20] silent, are designed to place the risk of loss on the party who is in the better position to care for or insure the goods. The rules are not complicated by concepts such as "property" but are stated in terms of physical events. For example, risk passes when goods "are handed over to the first carrier" (Art. 67); when the contract does not involve carriage, risk passes when the buyer "takes over" the goods (Art. 69). These rules are, of course, subject to special provisions on the effect of breach of contract (Arts. 69, 70). A

fuller description of the rules on risk appears in the introduction to Part III, Chapter IV, *infra* at ¶358, and in the Commentary on Articles 66-70, *infra* at ¶¶360-383.

### ¶29 (4) *Preservation of the Goods*

The Convention's rules on risk of loss might have been adequate to encourage preservation of the goods except for one practical fact: The parties often have honest differences of opinion over who is in breach and who has responsibility to care for the goods. A separate section of the Convention (Ch. V, Sec. VI, Arts. 85-88) addresses the question of preservation of the goods and, in limited circumstances, provides that even an aggrieved party who may readily avoid imminent deterioration or loss has a duty to do so with a right to full reimbursement for his expense. This part of the Convention is based on the splendid work, of both substance and form, embodied in the 1964 Hague Convention on Sale. (A fuller description of the rules on preservation of the goods appears in the introduction to Ch. V. Sec. VI, *infra*, and in the Commentary on Arts. 85-88, *infra*.)

## ¶30 E. An Invisible Gain: The Omission of "Awesome Relics"

### (1) *Domestic Antiquities and International Commerce*

Ernst Rabel, whose monumental study of the comparative law of sales provided the foundation for the early work towards a uniform sales law, said that one of the gains from the new law would be to avoid the "awesome relics of the dead past that populate in amazing multitude the older codifications of sales law."<sup>[9]</sup> This book notes some of the outdated legal [page 21] formulae that still complicate domestic sales law. One may delight in legal antiques and in the patina of ingenious circumlocutions that have had to substitute for fundamental reform but these aesthetic values may not be appreciated by a modern merchant and, more especially, by his trading partner from a different legal tradition.

### ¶31 (2) *Factors that Affect the Character of the Convention*

The evolution of the 1980 Sales Convention was summarized in Overview, Chapter 1, *supra* at ¶4. Our concern now is with factors that have affected the texture and quality of the Convention and distinguish it from domestic law.

### ¶32 (a) *The Field for Work: The International Sale*

In some legal systems many of the controlling legal formulae must do service across the broad spectrum of the law of obligations, embracing many types of contracts and also torts; in some legal systems the same rules apply to sales of goods and transactions in land. One may concede the power and utility of general legal ideas and yet doubt that provisions of such generality are appropriate for international trade.

In the domain of the common law and in some other countries separate statutes govern the sale of goods. But many of these statutes were primarily designed for domestic transactions and in recent years have been subject to modification and interpretation to take account of the special needs of consumers. On the other hand, observers from codified systems find sales statutes of the common law world unsatisfying because they were designed for insertion into a vast, uncoded body of common law principles.

The 1980 Sales Convention has narrower, clearer boundaries. Confining the work to the international sale permitted a more direct and concrete mode of expression, and embodied careful, explicit choices between those areas that were embraced by the Convention, and other areas (e.g., "validity") that were expressly remitted to domestic law. The fact that the field for work was restricted to the international sale also meant that the project did not threaten any domestic legal system; the work was not burdened by the traditions that have preserved the ancient codes and statutes of domestic law.

To be sure, most of the provisions of the Convention are not innovations of 1980; the legal work spanned half a century. But during the nine years of intensive work in UNCITRAL that produced the 1978 Draft and [page 22] (to a lesser extent) during the review of that draft at the 1980 diplomatic conference, the Convention benefited

from suggestions based on the current practices and needs of international trade. This flow of ideas included suggestions from commercial bodies that were relayed through the national representatives. In addition, international commercial organizations, notably the International Chamber of Commerce, took an active part in the UNCITRAL proceedings and the 1980 Conference.

### ❖33 (b) *The Refining Processes of International Collaboration*

The most powerful forces towards eliminating "awesome relics of the dead past" were intrinsic to the process of international collaboration. Proposals that embodied the idioms or traditions peculiar to a single system were subjected to polite but revealing analysis by puzzled representatives from other systems. Another powerful solvent was the process of translation; formulae that were vague or redolent of domestic legal tradition would set off alarms when they appeared in other languages. Unhappy experience with concepts in the 1964 Sales Convention that defied translation (*délivrance*; *ipso facto avoidance*) helped pave the way for UNCITRAL's use of simpler, clearer language.<sup>[10]</sup>

One device used by the Secretariat in presenting issues to UNCITRAL seemed to facilitate agreement and, perhaps, a more direct mode of expression. At points where proposed legal texts might be read differently by delegates from different legal backgrounds the crucial issues were posed initially in terms of concrete factual examples. It proved to be easier to reach agreement on the results of concrete cases than to agree on legal drafts; and starting with agreement on the substance of the rule made it easier to draft a text that was direct and clear.<sup>[11]</sup>

The process was not always successful; on occasion, the discussion emphasized competing formulas of domestic law and [page 23] agreement was found only through a general rule based on the formula of wider applicability and an exception based on the competing formula. These compromises led to some of the less elegant provisions of the Convention but were the necessary (and less than outrageous) price for international agreement.<sup>[12]</sup> More often, the international deliberative process rejected the anachronisms that complicate domestic law and produced a statutory text that is relatively straightforward and uncluttered with technical detail. The value simply of eliminating technical rules that divert attention from the transaction and its commercial setting could easily be overlooked. (Who notices obstructions that have been removed from a highway?)<sup>[13]</sup> [page 24]

## Part 1

### Sphere of Application and General Provisions (Articles 1❖13)

❖35 The balance of this work is a Commentary on the articles of the Convention. The uniform rules for sales transactions appear in Parts I-III of the Convention. Part I (Arts. 1❖13) defines the Convention's field of application and includes other general provisions. Part II (Arts. 14❖24) governs formation of the contract. Part III (Arts. 25❖88) governs the rights and obligations of the parties to the contract of sale.

A general introduction to each Part of the Convention precedes the Commentary on individual articles.

### ❖36 Introduction to Part I of the Convention

Part I sets forth rules that apply throughout the Convention. Chapter I defines the Convention's field of application. Chapter II addresses other general questions, notably interpretation of the Convention and the sales contract. Each chapter calls for a brief introduction.

### ❖37 A. The Convention's Field of Application: Chapter I

Article 1 addresses two issues that control the applicability of the Convention: When is a sale "international"? What contact between the sales transaction and a Contracting State will invoke the Convention? Articles 2 and 3

exclude specified types of commodities and transactions. Articles 4 and 5 draw the line between issues that are regulated and those that are excluded; the excluded issues include the validity of the contract, the effect of the contract on the ownership rights of third persons (Art. 4) and liability for death or personal injury (Art. 5). The chapter closes with a brief but important provision (Art. 6) yielding overriding effect to the contract made by the parties. [page 27]

## ❖38 B. Interpretation and Related Questions: Chapter II

Challenging problems of interpretation are presented by a Convention that seeks to secure uniform application by tribunals that are accustomed to applying domestic law. These problems are addressed in Article 7❖perhaps the most important provision of the Convention❖and are given close attention in this study. Article 8 deals with interpretation in a different setting❖the interpretation of the contract and other statements by the parties. Article 9 deals with a related issue❖the added dimensions of meaning that the parties❖ practices and trade usages give to the contract. Article 10 defines "place of business"❖a term used in various parts of the Convention. Articles 11 and 12 deal with the effect of domestic rules that contracts must be evidenced in writing.[page 28]

## Chapter I.

### Sphere of Application (Articles 1❖6)

#### Article 1. Basic Rules on Applicability: Internationality; Relation to Contracting State

❖39 The Overview (Ch. 2, *supra* at ❖12) drew attention to the limited applicability of the Convention. In brief, under Article 1 the Convention will apply only if two basic requirements are met: (1) The sale must be international,❖i.e., the seller and the buyer must have their "places of business in *different* States," and (2) The sale must have a prescribed relationship with one or more States that have adhered to the Convention.

##### Article 1 [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.[page 29]

## ❖40 A. Basic Rules on Applicability

### (1) *Internationality*

The 1980 Convention lays down a single basic criterion of internationality: The seller and buyer must have their "places of business in different States." The 1964 Conventions used the same criterion but added further tests: Did the contract "involve" international shipment? Where did "the acts constituting the offer and acceptance" take place? The deliberations in UNCITRAL showed that these additional tests did not give predictable answers; the location of the parties❖ places of business provided more solid footing.[2]

## ◆41 (a) *The Undisclosed Foreign Principal*

Paragraph (2) of Article 1 addresses the following case:

*Example 1A. Agent informed Seller, whose place of business was in State A, that Agent was authorized to purchase goods for a buyer but did not disclose the name or address of the person he represented. Seller and Agent concluded a sales contract; thereafter, it appeared that Agent was acting for a foreign principal, Buyer, whose place of business was in State B.*

The above transaction would not be governed by the Convention. Paragraph (2) of Article 1 is based on the premise that the facts that involve the Convention should be available to the parties at the time of the conclusion of the contract. This premise is also illustrated by Article 10(a), quoted *infra* at ◆42, which states that the choice between multiple places of business◆a choice that is important in determining applicability of the Convention◆shall be based on "circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract."

## ◆42 (b) *Multiple Places of Business*

*Example 1B. Seller has places of business in both State A and State B. Buyer has a place of business in State B.*

In this case, since Seller has a place of business in State A, the parties do have places of business "in different States," but they also have places of business in the same State. If seller negotiated and performed the transaction from its branch in State B, where Buyer has its sole place of business, both parties can be expected to be familiar with and follow the rules of State B. In any event, it is necessary to determine which of Seller◆s two places of business should be used to determine whether the sale was international.

Surprisingly, ULIS (1964) did not face this common problem. The 1980 Convention addresses this issue in paragraph (a) of Article 10. (Other aspects of Art. 10 will be considered *infra*.) Article 10(a) provides:

"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;"

Article 10(a) works from the premise that a single party (such as a corporation) may have multiple places of business, and that a selection of the applicable place of business is based on its relationship to an individual sales contract. Consequently, the Convention does not invoke any of the rules for fixing a single location or "nationality" of a corporation, such as determinations based on the place of incorporation, "domicile", or "seat" ( *siège, siège social or Sitz* ). Article 10(a) must be construed and applied on the basis of its special role in determining the applicability of the Convention.[3]

In Example 1B, let us suppose that the making and performance of the contract are more closely related to State B than to State A. By virtue of Article 10(a), *supra*, Seller◆s relevant place of business is in State B. Consequently, under Article 1(1), the parties◆ relevant places of business are not "in different States"; the Convention does not apply.

Suppose that in Example 1B, a business in State B is incorporated in State B but is owned by a parent company incorporated in State A and the sales contract is executed between the company formed in State B and a party located in State B. Even if the corporate subsidiary in State B is closely controlled by the parent in State A the Convention would not apply to the contract. Under Article 1(1), applicability of the Convention is based on the location of the "parties" to the contract, and in this case the [page 31] parties are both in the same State. To avoid circumventing a State◆s regulatory policies it may be necessary to "pierce the corporate veil" but it is difficult to imagine circumstances in which this doctrine would apply to free a corporate subsidiary from the domestic law of its place of incorporation. The effect of the active participation by a manufacturer or other supplier in a sale by a seller to a buyer is explored in connection with Article 4, ◆63 *infra*.



In Example 1B, suppose that the seller's place of business in State B is not incorporated in State B but is a branch office of a company formed in State A and having its headquarters in State A. Determining which place of business, under Article 10(a), *supra*, "has the closest relationship to the contract and its performance" will call for weighing competing considerations. The factors in the scale are reduced by the rule of Article 10(a) that the relationship is to be determined on the basis of the circumstances known to or contemplated by both parties "before or at the conclusion of the contract"; supervision by the head office in State A that is known only to the seller is irrelevant; the same is true of facts learned by the buyer subsequent to the making of the contract.<sup>[4]</sup> The relative importance of the role of the two places of business in making and in performing the contract will be discussed *infra* at <sup>43</sup>. However, where the balance seems close the parties would be well advised to settle the point by contract<sup>43</sup> by stating whether the Convention or specified domestic law is applicable.

The multiple places of business involved in consortia necessarily create difficult problems as to applicable law under traditional domestic law and the Convention. Usually such complex arrangements are governed by a detailed contract which should include an express provision on whether the Convention or a specified domestic legal system applies. See *Kritzer Manual* Ch. 27.

### <sup>43</sup> (c) "Place of Business"; Sojourn During Negotiations

*Example 1C. Seller, in State A, entered into negotiations with Buyer in State B for a complex and important contract for the manufacture of machinery. To complete the negotiations, Seller sent senior officials and a supporting staff to the city in State B where Buyer had its headquarters. Seller's representatives rented a suite of rooms for a month; most of the negotiations and the final execution of the contract took place in that suite. [page 32]*

Did the suite of rooms Seller rented in State B constitute a "place of business"? If so, was this the place which had the "closest relationship to the contract and its performance" (Art. 10(a))?

For reasons explained more fully in the Commentary to Article 10, *infra* at <sup>124</sup>, the answer to both questions should be No. "Place of business", as used in Article 1, should be construed to mean a permanent and regular place for the transacting of general business, and would not include a temporary place of sojourn during *ad hoc* negotiations.<sup>[5]</sup> This interpretation is indicated by Article 10(a) which points to the relationship between the place of business and "the contract *and its performance*." The procurement or production of goods to meet the buyer's requirements is normally of much greater significance to both parties than the place where the contract is negotiated and signed. Moreover, references to "places of business" in other parts of the Convention show that this term excludes a temporary "place" like the hotel room in Example 1C. For example, Article 31(c) provides that where the contract does not "involve carriage of the goods" (para (a)) and the goods are not located at a place known by the parties (para (b)), the seller's obligation to deliver consists in placing the goods at the buyer's disposal "at the place where the seller has his *place of business* at the time of the conclusion of the contract" (para (c)). The meaning of "place of business" as a site of continuing business activity is similarly shown by provisions in Articles 24, 42(b) and 69(2).

In addition, the elusive and insubstantial nature of the place of contracting led UNCITRAL to delete provisions in Article 1(1) of ULIS that made aspects of the making of the contract relevant in determining whether a sale was international. This view is also supported by the emphasis on the place for performance in the 1980 EEC Convention on the Law Applicable to Contractual Obligations (Art. 4(2)).

*Compare:* (1) FR. [CA Paris, J.D.24410, 24 April 1992](#), Fauba v. Fujitsu, affirmed, [C. de Cass. \(Sup. Ct.\), 4 January 1995](#). A French buyer (B) ordered electronic components from a German seller (S) through S's liaison office in France. In a dispute over B's rejection of a shipment, S argued that CISG did not apply on the ground that B (located in France) ordered the goods through the German seller's office in France; thus, the parties to the transaction were not located in different States, as required by Article **[page 33]** 1(1). The court held that S's liaison office was not an autonomous legal entity but, instead, was a French branch of the German seller. Consequently, the transaction was between parties in different States; the Convention applied. UNILEX D.1995-1; CLOUT 155. (2) Cf. ARB. [ICC \(Paris\), 7531/1993 \(1994\)](#). An Austrian buyer (B) and a Chinese seller (S)

made a contract for the purchase from S of scaffold fittings. B conducted part of the negotiations in China, where S was located. Held: Negotiations in the same country did not bar application of Art.1(1)(a); the parties had their places of business in two different Contracting States. UNILEX D. 1994-31. Accord: Bonell/Ligouri ULR, 1996-1, 153 n.33. See: Schlechtriem, Com. (1998) 24.

#### ❖44 (2) *The Transaction's Relation to a Contracting State*

As has already been noted, an international sale is subject to the Convention only if the transaction bears a prescribed relation to one or more Contracting States. The Convention in Sub-paragraphs (1)(a) and (1)(b) of Article 1 states two such relationships, either of which will suffice. (These two provisions will sometimes be referred to as "Sub (1)(a)" and "Sub (1)(b).")

#### ❖45 (a) *Both Parties in Contracting States (Sub (1)(a))*

Under Sub (1)(a) of Article 1 the Convention applies when the places of business of the seller and the buyer are in different Contracting States. In such cases the Convention directs the *fora* of all Contracting States to apply the Convention.

There was prompt agreement that the Convention would apply when the places of business of the seller and buyer were in different Contracting States (Sub(1)(a)). The Convention's central objective was to reduce the legal uncertainty that plagued trade between different legal systems—uncertainty as to which legal system was applicable under rules of private international law and uncertainty that was inherent in the likelihood that the applicable domestic law would be unknown (and often inscrutable) to at least one of the parties. Applicability based on Sub(1)(a) responds to this central interest in certainty in two ways: (1) Applicability is not subject to the uncertainties inherent in general rules of conflicts (PIL); and (2) When the parties have their places of business in different Contracting States, the applicable domestic law, whether [page 34] chosen by agreement or pursuant to conflicts rules, is likely to be unknown to at least one of the parties; these uncertainties are replaced by the applicability of a single uniform law to which both countries (among many others) have agreed.

The Convention's function in enhancing certainty through *uniform* law needs to be emphasized, for in this setting one concern central to conflicts law, the proper allocation of regulatory power among competing sovereignties, has little significance. The "regulatory" aspects of the uniform rules are minimal, evidenced by the parties' freedom to reject the Convention or modify its rules (Art. 6, ❖74, *infra*) and by the Convention's deference to the rules on validity under applicable domestic law (Art. 4(a), ❖64, *infra*).

The Convention's function in reducing the costs of legal uncertainty also supports the decision, made in Sub(1)(a), to apply the uniform rules when the parties have their places of business in different Contracting States even when important aspects of the transaction take place in a non-Contracting State. Uncertainty concerning the parties' obligations generates planning costs that center in the parties' places of business and affect the economic success of the enterprise. These enterprise costs are of concern to the parties and to the States where they have their places of business—rather than to States where aspects of the transaction occur.

There was prompt agreement on Sub(1)(a) or Article 1 but the second ground for applicability, Sub. (1)(b), was sharply contested on the ground that basing applicability on rules of private international law would undermine the legal certainty that was the Convention's central goal. To meet this objection the Conference added Article 95 which permitted Contracting States to reject Sub (1)(b). [8] (The effect of an Article 95 reservation will be considered further in ❖47, *infra*.)

To sum up: The 1980 Convention rejected the "universalist" approach of the 1964 Conventions; Article 1(1) provides for applicability based on either of two types of connection between the sales transaction and a Contracting State: (1) In all Contracting States the Convention will apply when (Sub (1)(a)) the seller and the buyer have their places of business in different Contracting States. (2) The Convention will apply (Sub (1)(b)) when the rules of private international law point to a Contracting State, subject to a reservation by Contracting States that they "will not be bound" by this provision.[page 35]

## ❖46 (b) *Applicability Under Rules of Private International Law; Sub (1)(b): An Introduction*

*Example 1D. Seller's place of business is in State A and the Buyer's place of business is in State B. State A is a Contracting State; State B is not. Buyer brings an action against Seller in State A; State A has retained Sub (1)(b). The rules on private international law of State A point to the law of Seller's state State A.*

In this example, Sub (1)(a) is not applicable since the parties do not have their places of business in two different Contracting States. However, Sub(1)(b) does invoke the Convention, since "the rules of private international law lead to the application of the law of a Contracting State"; in this event Article 1(1) states that "This Convention applies."

### ❖46.1 (c) *The Effect of Reservations*

The Convention permits Contracting States to make a limited number of reservations making specified provisions of the Convention inapplicable to the declaring State. The effect of these reservations sheds light on the interpretation of the rules on applicability in Article 1.

*Example 1E. Seller's place of business is in State A, a Contracting State that has exercised the option provided by Article 92 to exclude Part II on formation of the contract. Buyer's place of business is in State B, a non-Contracting State. The parties disagree over whether they made a contract i.e., whether Seller effectively revoked its offer; a provision on this question (Art. 16) appears in Part II of the Convention. This controversy is brought to a forum in State C, a Contracting State; State C has not excluded Part II. The rules of private international law of the tribunal in State C point to the law of State A. Is the forum in State C precluded from giving effect to State A's reservation excluding Part II by the fact that the forum's version of Article 1 includes Article 1(1)(b) ("Sub (1)(b)": "When the rules of private international law lead to the application of the law of a Contracting State" the "Convention applies"?*

In this situation Article 92(2), in permitting the declaration excluding Part II, gives a clear answer: State A "is not to be considered a Contracting State within paragraph (1) of Article 1 of this Convention." Consequently, Sub (1)(b) jurisdictions like State C would reach the same result as State A and other Article 92 jurisdictions: The Convention would not apply to questions of formation involving any party whose place of business is in a State that has made the reservation.[page 36]

This reservation was appropriately respected by decisions in Germany and Hungary. See: Bonell/Ligouri, ULR, (1997-3) 589, n. 86 & 87.

Suppose that a State (e.g., Canada) declares under Article 93 that the Convention will not apply to one or more of its territorial units. Under Article 93(3) when a party's place of business is in such a territorial unit, that place "is considered *not to be in a Contracting State*". Again, Contracting States that have *not* made this reservation are directed to apply the Convention in a manner that respects the decision of States that *have* made the reservation.

Similar problems can arise under Article 94 involving Contracting States "that have the same or closely related legal rules..." e.g., Scandinavian States that have adopted substantially the same law for domestic sales. Two or more States in such a group may declare that the "Convention is not to apply...where the parties have their places of business in those States". Article 94, unlike Articles 92 and 93, does not state that for such transactions the States are not to be considered as "Contracting States". Nevertheless, a result comparable to that of Articles 92 and 93 must be implied. For example, assume that a case involving a sale between parties in two such States is brought before a *forum* in a Contracting State outside the area. In this setting, as one would expect, the rules of PIL point to one of these States. Sub (1)(b), retained by the forum's State, says that the "Convention applies". Since the forum's State has not made a relevant reservation, Sub (1)(b) seems to say that *all* of the Convention applies so that the *forum* would apply the Convention to the transaction between the Scandinavian States. This, however, would be an inadmissible nullification of the option that Article 92 gave to those States.

In short, when a reservation is made changing the rules on applicability for that State, those rules should be applied by the *forum* of any Contracting State in a case involving parties whose places of business are in the State that made the reservation. Specifically, in cases like Example 1E, it would be basically wrong for the *forum* to apply its own rules of unrestricted applicability to parties who, by a valid reservation made by their States, are entitled to different rules.

We shall meet this problem again (◆◆ 47.4◆47.6 *infra*) in connection with reservations under Article 95 to exclude applicability based on Article 1(1)(b). [page 37]

## B. Alternative Approaches to Applicability

### ◆47 (1) *The Option Not To Apply Sub (1)(b)*

At the 1980 Diplomatic Conference, some representatives proposed the deletion of subparagraph (1)(b) of Article 1. They noted that rules of private international law might point to the law of one State with respect to formation of the contract and to the law of other States with respect to various aspects of performance. Consequently, private international law, invoked by Sub (1)(b), might lead to the applicability of only parts of the Convention whereas the Convention was designed as a unified whole. In this connection, other delegates noted that recourse to private international law became complex where countries (e.g., Czechoslovakia) had enacted a special unified code for international trade. These objections seemed also to stem from the difficulty of applying only part of a unified legal system.

A proposal to delete subparagraph (1)(b) was defeated; as a compromise, the Convention◆s Final Provisions (Part IV) included the following: [11]

#### Article 95

"Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) or article 1 of this Convention."

The above declaration permitted under Article 95 has been made by the following States: China, Czech Republic, Singapore, Slovakia and U.S.A.

We may now return to Example 1D (◆46, *supra*) in which State A, the place of business of the seller, was a Contracting State but State B, where the buyer was located, was not a Contracting State. Now let us assume that State A in ratifying the Convention made the declaration permitted by Article 95. State A will now apply the Convention only to the sales covered by Sub (1)(a)◆transactions between parties in two *Contracting* States. Since Sub (1)(b) is excluded, State A◆s rules of private international [page 38] law designating the law of State A now invoke its domestic law rather than the Convention.

### ◆47.1 (2) *Use of an Article 95 Reservation-Pro and Con*

The factors favoring and opposing the making of an Article 95 declaration will vary from State to State; only a few general considerations can be mentioned. [12] In brief, as Example 1D suggests, in most situations an Article 95 declaration narrows the applicability of the Convention and enlarges the applicability of the domestic law of the declaring State. A Contracting State whose domestic law is ill-suited for international transactions may well prefer the wider applicability of the Convention that results from Sub (1)(b), and will choose not to make an Article 95 declaration. On the other hand, States whose domestic law is modern and well-suited to international transactions may well conclude that the Convention◆s greatest value is within the area defined by Sub (1)(a)◆transactions between two *Contracting* States. Although (in the long run) under Sub(1)(a) in approximately half the cases the Convention will supplant the domestic law of the declaring State, in the other cases the Convention will supplant foreign law, which usually will be less accessible than the Convention and often will be archaic and ill-suited to international transactions. Moreover, this important objective◆displacing foreign law with uniform international law◆is not well served by Sub (1)(b). In most cases, conflict (PIL) rules will point to the State of either the seller or the buyer. (See the provisions of the 1955 and 1986 Hague PIL Conventions at



❖45.2, *supra* and ❖47.3, *infra*. ) As we have seen, when both the seller and buyer are in Contracting States Sub (1)(a) invokes the Convention. Thus, the relevant situation for analysis is that of Example 1D (❖46, *supra*): only one of the parties to the sale is in a Contracting State. The option offered by Article 95 must of course be considered from the point of view of Contracting States since only they can make an Article 95 declaration.

Does the Contracting State effectively displace foreign law by retaining Sub (1)(b)? No: Sub (1)(b) invokes the Convention only when conflicts (PIL) rules points to a *Contracting State*❖ and in the cases where Sub (1)(b) is relevant the trading partners of the Contracting States are in [page 39] *non*-Contracting States. (*Non*-Contracting States can scarcely reproach Contracting States for choosing to apply their domestic law in transactions with non-Contracting States: If these States are concerned about coping with foreign domestic law they can adhere to the Convention!)

#### ❖47.4 (4) *The Effect of the Different Options*

As noted above, five States have made the reservation permitted by Article 95 "not to be bound" by paragraph (1)(b) of Article 1 ("Sub (1)(b)") which provides that the "Convention applies when the rules of private international law lead to the application of the law of a Contracting State". (For simplicity these will sometimes be referred to as "Reservation States" or States that have "rejected" Sub (1)(b). The significance of the latter expression is discussed at ❖47.5, *infra*. ) Most States have not exercised the Article 95 option and *are* bound by Sub (1)(b). Interesting questions arise from the interplay of these differing choices.

As we have seen, Sub (1)(b) is irrelevant when both the seller and buyer are in Contracting States. We now turn to this general situation: One party is in a Contracting State (State A) and the other party is in a *non*-Contracting State (State B). A dispute between these parties comes before a third State (State C), a Contracting State whose rules of private international law (PIL) point to State A, a Contracting State. The question will be: Does the Convention or the domestic law of State A apply to the transaction? The problem will be: What is the effect of various combinations of choices by States A and C to reject or retain Sub (1)(b).

These cases become interesting only when State A (the place of business of one of the parties) and State C (the *forum*) have made different choices with respect to Sub(1)(b). We need to note in passing the following cases where there is no ground for dispute:

- (1) When both State A and State C have *retained* Sub(1)(b), the Convention *will* apply.
- (2) When both State A and State C have *rejected* Sub(1)(b) the Convention will *not* apply. Thus, if the *forum* decides that PIL points to State A the case will be governed by the domestic law of State A.

Now, at long last, we reach the interesting cases where the two Contracting States have taken different decisions about retaining Sub(1)(b). To simplify the discussion let us assume that decisions taken by the *forum* (State C) on private international law are the same as the decisions of other *fora* facing the same situation. We shall also assume, as usual, that the parties (unfortunately) have not solved the problem in their contract.[page 40]

#### ❖47.5 (a) *The Party's State has Retained and the Forum has Rejected Sub (1)(b)*

*Example 1F. Seller is in State A, a Contracting State that has retained Sub (1)(b); Buyer is in State B, a non-Contracting State. A dispute under this contract is taken to a tribunal in State C, a Contracting State that has rejected Sub (1)(b). The PIL rules of the forum point to State A. Is the dispute governed by the Convention or by the domestic law of State A?*

If we look to Article 1 as adopted by the *forum* we may find only Sub (1)(a), since State C has rejected Sub (1)(b). Thus, Article 1 as adopted by the *forum* states that the Convention applies only when the states of both parties are located in Contracting States. Using the *forum*❖s rules leads to strange consequences: Article 1 as adopted by the *forum* suggests that Convention would *not* apply even though State A chose to retain applicability of the Convention based on PIL and the rules of PIL point to that State. This result seems even stranger when we note that if this controversy had been taken to any of the Contracting States that have retained Sub (1)(b)



(including State A) or to any of the non-Contracting States (including the buyer's State, State B), these tribunals should and probably would apply the Convention. (As noted above we are assuming that these *fora* come to the same decision on PIL as the tribunal in State C.)

These grotesque consequences force us to this conclusion: The narrower applicability of the Convention that results from rejecting Sub (1)(b) is relevant only in determining the Convention's applicability to a *party located in a State that has rejected Sub (1)(b)*. (Seller in Example 1F was not such a party since State A, where Seller was located, had chosen to *retain* applicability of the Convention based on Sub(1)(b).)

The proper effect of an Article 95 reservation becomes clearer when we consider the reason why States requested and exercised this option to reject Sub (1)(b) and thereby confine applicability to Sub (1)(a). One State observed that it would make an Article 95 reservation to protect its traders from being deprived of their familiar domestic law without the countervailing gain of supplanting the foreign law of trading partners in non-Contracting States, *e.g.*, State B in Example 1F. [page 41][13] Substituting uniform international law for such foreign law was regarded as one of the important advantages of becoming a Contracting State. Certainly Sub (1)(b) was not rejected because of difficulty or distaste with applying the Convention as a neutral *forum* like State C, for the Article 95 reservation is necessarily made by a Contracting State—a State that is friendly to and willing to apply the Convention.

In short, the proper approach for the *forum* in State C is to decide which State's law is indicated by the rules of PIL. Then, when PIL points to the law of a State that retained Sub. (1)(b) (as in Example 1F) the *forum* should apply the Convention. As we have noted, this approach gives the same result in the *fora* of all States that have retained Sub (1)(b) and all non-Contracting States, and would eliminate the impossible problems (including *forum* -shopping) that would arise if *fora* in States like State C should improperly apply their Article 95 reservation when no party from an Article 95 reservation State is before the court.

Latent in the above solution is this question: By what authority does the forum in State C apply the Convention based on its conflicts (PIL) rules when State C has made an Article 95 reservation "not to be bound" by Sub (1)(b). Has it been wrong to state that an Article 95 reservation "rejects" Sub (1)(b)? When States make a reservation that they are "not bound" by Sub (1)(b) are its tribunals free to apply Sub (1)(b) if they choose? See *Pelichet, 1986 PIL Convention* 43.

In Example 1F on what ground should the tribunal in State C, a Reservation State, apply the Convention law of State A when State C's conflicts (PIL) rules point to State A? Suppose that the dispute between the parties in Example 1F were taken to a tribunal in State N, a *non* -Contracting State, and the conflicts (PIL) rules of N (like those of State C) pointed to State A. The tribunal in State N surely should apply the Convention, since this is the law of State A that applies to this transaction (47.3, *supra* ). Sub (1)(b) is irrelevant in State N, a non-Contracting State; State N would apply the Convention because this is the correct application of State N's rules of private international law. This also is the reason why in Example 1F the tribunal in State C, although a Reservation State, should apply the Convention; here, too, Sub (1)(b) is irrelevant. *Cf. Pelichet, 1986 PIL Convention* 43.

The approach suggested above may be illustrated and tested by the following case: [page 42]

*Example 1G. Seller is in State A, a Contracting State that (unlike State A in Example 1F) has made an Article 95 reservation that it is "not bound" by Sub (1)(b); Buyer is in State B, a non-Contracting State. The forum is in State A which, as was just noted, is a Reservation State. The conflicts (PIL) rules of State A point to State C, a Contracting State that has retained Sub (1)(b).*

Should the *forum* in State A apply the Convention to this transaction? The first step is to recognize that Article 95 does not provide that a State that makes the reservation shall apply its own domestic law; it merely frees that State from Sub (1)(b). Thus, in the present example, if the conflicts (PIL) rules of State A pointed to Buyer's State (State B), a *non*-Contracting State, the State A *forum* would apply the domestic (*non* -Convention) law of State B. This recourse to conflicts (PIL) is, of course, not in response to a command from Sub (1)(b) but simply

in order to decide the case under the most appropriate system of law. This principle also applies if the answer to the conflicts (PIL) inquiry points to a Contracting State such as State C. In Example 1G the *forum* in State A should apply the Convention rather than the domestic law of State C.

This approach to Example 1G is also appropriate since it is applicable to various *fora* to which the dispute might be brought. For example, in this case the plaintiff (e.g. Seller) might choose to bring the action in Buyer's State (State B), a non-Contracting State. State B's conflicts (PIL) rules (particularly with the further succeeds of pending measures for unification) may resemble those of State A. In that event, the conflicts (PIL) inquiry by the *forum* in State B might well point to the law of State C, or some other similar Contracting State where, for a transaction like this, the Convention is the applicable law.

*Example 1H. The facts are the same as in Example 1G in that State A (the Seller's State) made an Article 95 declaration that A "is not bound" by Sub (1)(b). However, in this case the forum is State C, a Contracting State that has retained Sub (1)(b). As in Example 1F, the conflicts, (PIL) rules of the forum point to State A.*

The correct approach follows from the discussion of Example 1F. The *forum* in State C, having determined that PIL points to State A, should conclude that since State A has rejected Sub (1)(b) the law of State A for this transaction does not include the Convention; consequently the *forum* in State C should apply the domestic sales law of State A.

This approach respects State A's option to reject applicability of the Convention under Sub (1)(b) when a party in that State contracts with a party in a non-Contracting State and the rules of PIL point to State A. (Reasons for exercising this option were noted at [47.1](#), *supra*.) Moreover, **[page 43]** this approach would be like the approach of: (1) other States that have rejected Sub (1)(b) (like State A); (2) all non-Contracting States like State N in [47.5](#), *supra*.<sup>[14]</sup>

In short, the fact that States have responded differently to the option offered by Article 95 should present no serious difficulties once it is understood that the choice is exercised in the interest of parties in a State that makes this choice, and that *fora* of other States should respect that choice. In addition, as we have seen ([46.1](#), *supra*), this result is consistent with the result of other reservations permitted by the Convention.

Two of the above examples, 1F and 1H, (perhaps unnecessarily) probed the effect of reservations excluding Article 1(1)(b) in unusual situations litigation brought in a State where neither the seller nor buyer has its place of business. ("The expense of spirit in a waste of shame." W.Sh.S#109.) In this rarified atmosphere, this writer's views have met both support and criticism. See: On the obligations of States (whether or not Contracting) to respect Article 95 reservations excluding Sub 1(1)(b), see Schlechtriem, Comm. (1998) 27 [28](#), [43](#) [44](#); *idem.*, 1986 Commentary 27 n.56a; Bonell/Ligouri, ULR (1996-1) 153 [154](#), n. 37 [40](#), (1997-2) 391 [393](#); [Evans, M., Bianca-Bonell Commentary \(1987\) 656](#) [657](#); Winship, P., 21 Cornell Int. L.J. 487 [533](#) (1988); [Gabor, F. A. 7 N.W.J. Int. L. & Bus. 696](#) [726](#) (1986), 8 *id.* 538 [569](#) (1988). But cf. Ferrari, F., Sphere of Application (CISG) 15 [16](#), n. 201 [206](#).

Happily, controversies involving the applicability of CISG under Article 1(1)(b), and the rare cases involving reservations to this provision, are diminishing as the number of adhering States increases. The future lies with Article 1(1)(a) and its clear-cut rule: The Convention applies when the places of business of the seller and buyer are in different Contracting States. **[page 44]**

## **48 C. Other Problems of Applicability**

### ***(1) Nationality; Civil or Commercial Character***

The rules on applicability of the Convention do not refer to the nationality of the parties or to their civil or commercial character. Consequently, it was not necessary to add in paragraph (3) that these factors are not to be "taken into consideration in determining the application of this Convention."<sup>[15]</sup>

The specific rejection of a distinction between "the civil or commercial character of the parties or of the contract" should prevent any misapprehension by those who are accustomed to separate civil and commercial codes. The 1980 Convention is not of this character. True, the typical international transaction is commercial and, as we shall see, Articles 2(a) and 5 specifically exclude most consumer-type transactions. But the central point, emphasized by paragraph (3), is that the traditional classifications in some legal systems between "civil" and "commercial" parties and transactions are irrelevant in determining the applicability of the Convention.<sup>[16]</sup>

## (2) "Goods"

Article 1(1) provides that the Convention applies to the sale of "goods". The meaning of this term will be examined following the discussion of provisions of Articles 2 and 3 which shed light on this question. See <sup>56</sup>*infra*.<sup>[page 45]</sup>

## Article 2. Exclusions from the Convention

<sup>49</sup> Article 2 excludes from the Convention six specific categories. The first three (paragraphs (a)-(c)) are based on the nature of the transaction; the remaining three (paragraphs (d)-(f)) are based on the nature of the goods.

### Article 2 <sup>[1]</sup>

"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."

## <sup>50</sup> A. Specific Exclusions

### (1) *Purchases for Personal, Family or Household Use*

Most consumers do their shopping at stores in their own community; all of these purchases fall outside the Convention because they are not international (Art. 1, *supra* at <sup>39</sup>). However, consumers may occasionally shop on the other side of a nearby international border or during trips abroad, or may order from foreign mail-order houses. In some of these transactions the seller will know that the buyer is a foreigner so that the transaction would meet the Convention's requirements of internationality. (See Art. 1(2), *supra* at <sup>41</sup>).<sup>[page 46]</sup>

In UNCITRAL attention was drawn to the development of national legislation and case law designed to protect consumers; it was agreed that the Convention should not supersede these rules. Consideration was given to a provision that the Convention would not override any domestic rule that was "mandatory" or that implemented "public policy" (*ordre public*) but it was found that these concepts carried different meanings in various legal systems; the clearest and safest solution was specifically to exclude consumer purchases from the Convention.<sup>[2]</sup>

The phrase "goods brought for personal, family or household use" refers to the purpose of the buyer at the time of the purchase. (A similar definition in (U.S.A.) UCC 9-109 applies when the goods "are used" by the buyer for the above purposes; in UNCITRAL "are used" was deleted so that applicability of the Convention would not depend on action taken by the buyer subsequent to the purchase.) The character of the goods is not decisive; the Convention applies to the international purchase of furniture for a business office even though this type of furniture is customarily bought by consumers.

The "unless" clause that concludes paragraph (a) may be illustrated as follows:

*Example 2A. Seller, a dealer in photographic equipment in State A, accepted an order from Buyer, a resident of State B, for expensive and complex photographic equipment of the type normally used by professionals. In a controversy over the sale, when Seller invoked the Convention, Buyer offered evidence that he bought the equipment for his personal use as an amateur.*

In this case, the seller should be able to show, under the "unless" clause of paragraph (a), that he "neither knew or ought to have known" of the buyer's purpose; in this event, the Convention would govern the sale. As to burden of proof see *O.R. 239, Docy Hist. 460*.

Questions that turn on proof of what a person "knew" or "ought to have known" can hardly be free of doubt but advance planning can minimize the uncertainty. Sellers who distribute catalogues to international customers may wish to place on the catalogue's order forms (and on similar contract forms) a statement such as the following: "International purchases of this equipment may be governed by the United Nations Convention on Contracts for the International Sale of Goods unless the goods are bought for personal, family or household use. If the goods are [page 47] bought for such use, please check the appropriate box below." A buyer who does not make the requested indication could scarcely contend that the seller "ought to have known" of the buyer's purpose.

The structure of Article 2(a) and practical considerations applicable to the allocation of the burden of proof suggest that the buyer has the burden of proving that it bought the goods for personal, family or household use; the seller would have the burden of proving that it did not know (and had no means of knowing) the buyer's purpose.

AUSTRIA, [Ob \(Sup. Ct.\), 10 Ob 1506/95, 11 February 1997](#). B (Swiss) sued S (Austrian), an importer of Italian cars, for failure to deliver a Lamborghini Countach. The Court held, pursuant to Art. 2(a), that CISG did not apply since B purchased the car for personal use. The opinion noted that CISG would have applied if the seller had proved that it "neither knew or ought to have known" that the car was purchased for personal use. CLOUT 190.

(Sales to consumers are included in "Principles of European Contract Law".)

### 51 (2) Sales by Auction

The exclusion of sales "by auction" resulted from various considerations: Auction sales present unique problems with respect to formation of the contract. The seller will not know who the buyer is (and hence whether the Convention applies under Art. 1(1)) until after the sale is "knocked down" to the highest bidder. Local law often applies special regulations to auction sales.[\[3\]](#)

### 52 (3) Sales on Execution or Otherwise by Authority of Law

Execution and other forced sales are fundamentally different from other transactions because of the inability of the parties to negotiate the terms of the contract; in addition, the manner and effect of such forced sales are subject to special regulations.[\[page 48\]](#)

These considerations are useful in defining the scope of this exclusion. For example, when the buyer fails to pay for the goods the seller may be empowered to "avoid" the contract and resell the goods. Similar rights may be given to the buyer when the seller delivers seriously defective goods (Arts. 49, 64, 75, 81, 88). Such resales by a

party to the contract, even though authorized by the Convention, are not excluded from the Convention as sales " (c) on execution or otherwise by authority of law." The same principles apply when a secured party on default by the debtor resells the collateral at a private sale rather than by auction.[4]

### ◆53 (4) *Shares and Other Securities; Money and Money Paper*

The exclusion of the intangible rights listed in Article 2(d) illustrates the fact, discussed more fully in ◆56, *infra*, that the sale of "goods" refers to moveable, corporeal things. In the 1964 Hague Conventions and in UNCITRAL there was general agreement that transactions in the types of assets listed in Article 2(d) should be excluded from the law covering "sales of goods." The exclusion of "negotiable instruments" (Fr.: *effets de commerce*; Sp.: *titulos o efectos de comercio*) refers to instruments calling for the payment of money; documents controlling the delivery of goods (e.g., warehouse receipts, bills of lading) are subject to the Convention when they are employed to effect the delivery of goods. See Arts. 30, 34, 58(1), *infra*. See: HUNG. Arb. [AZVb 92205, 20 December 1993](#). CISG is not applicable to shares. UNILEX D. 1993-27. See: Schlechtriem, Com. (1998) 35.

### ◆54 (5) *Ships, Vessels, Hovercraft, Aircraft*

The 1964 Hague Conventions excluded sales "of any ship, vessel or aircraft, which is or will be subject to registration." ULIS 5 (1)(b); ULF 1(6)(b). The reference to registration was designed to designate goods which, according to Prof. Tunc◆s commentary, "are or will be subject to [page 49] a special system of rules which, moreover, frequently resembles that for immovables." In UNCITRAL it was found that national legislation included many varieties or regulations that might (or might not) be deemed to include "registration"; the concluding phrase was deleted. Consideration was given to excluding only vessels of a specified tonnage; this attempt also was abandoned.[5]

Does the exclusion of the sale of "ships, vessels" (Fr.: *navires, bateaux*; Sp.: *buques, embarcaciones*) extend to small pleasure craft such as sailboats and rowboats? No such restriction seems feasible for the exclusion of "aircraft." UNCITRAL◆s inability to find a workable basis for distinguishing between large and small craft and the difficulty that courts would encounter in developing such a distinction suggest that Article 2(d) must be read without qualification: Sales of small pleasure craft do not fall within the Convention. Article 7(1) provides: "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* ..." International uniformity in interpretation and application would be more readily achieved by an unqualified reading of Article 2(d) than by judicial attempts to narrow the scope of the provision. [6] See Nicholas, LQR (1989) 206. On the other hand, Professor Schlechtriem has suggested that this exception should not be extended to the sale of boats that under domestic law do not come under the special regulations of domestic law applicable to ships.[7] Discussion at the Diplomatic Conference is reported at *O.R.* 240◆241, *Docy Hist.* 461◆462.

Providing a ship with supplies (e.g., fuel) or with equipment necessary for the voyage, although within domestic maritime law would be subject to the Convention if other requirements of Article 1 are met. See McMahon, 21 J. of Mar. L. & C. 305, 306 (1990). On the sale of materials for ship construction see ◆56, *infra*. However, under Article 90 the Convention would yield to an "international agreement" governing the rights of the seller and buyer who "have their places of business in States parties to such agreement". See ◆◆462◆464, *infra*. HUNG. [Sup. Ct. Gf.31-349/1992f9, 25 September 1992](#). *Malev v. Pratt & Whitney*. Aircraft engines [page 50] are subject to CISG. UNILEX, D. 1942-20. See: Winship, P., 50 J. Air L. & Comm. 1053◆1066 (1985).

### ◆55 (6) *Electricity*

The exclusion of contracts for the sale of electricity is explicit and clear-cut. See also ◆56, *infra*.

## ◆56 B. "Sale of Goods"

### (1) "Goods"



As we have seen, Article 1 provides that the Convention applies to contracts of "sale of goods". The Convention does not define "goods" but some of the exclusions specified above in Article 2 and other provisions of the Convention provide guides for construing this basic concept.

It is clear that "goods" governed by the Convention must be tangible, corporeal things, and not intangible rights like those excluded by Article 2(d) above—stocks, shares, investment securities and instruments evidencing debts, obligations or the right to payment. As has been noted at ¶53, *supra*, the point is that these documents represent *intangible rights*—a claim for payment or for receiving dividends or other payments from an enterprise.[8] Article 3(2), ¶60 *infra*, takes a similar approach in excluding contracts in which the preponderant part of a party's obligations "consists in the supply of labour or other *services*". Possible dispute over whether electricity is tangible (a quantum) or intangible (a wave) was avoided by the exclusion of electricity. See Article 2(f). On the other hand, a sale (e.g.) of gas is within the Convention; a motion to exclude gas was defeated.[9] The classification of computer software has led to controversy; some software seems difficult to distinguish from an exceedingly compact book or phonograph record. Here, as in other borderline areas, it seems prudent to state in the contract whether the Convention applies. See Fakes, 3 Software L.J. 559 (1990).[page 51]

The conclusion that "goods" refers to tangible, corporeal things means that sales of patent rights, copyrights, trademarks and "know-how" are not governed by the Convention.[10] (As we shall see, under the Convention a buyer of *goods* has rights against the seller if the goods are subject to a "right or claim of a third party based on industrial property or other intellectual property." See Art. 42, ¶¶267-270, *infra*.)

Many provisions of the Convention also make clear that the term "goods" (French: *merchandises*; Spanish: *mercaderias*) refers to *moveable* tangible assets. A sale of land is excluded. Any possible doubt on this point is foreclosed by numerous provisions that are incompatible with transactions in land—e.g. quality and packaging (Art. 35), replacement or repair of defective parts (Art. 46), shipment and damage during transit (Arts. 67-69), delivery by installments (Art. 73), preservation and warehousing to prevent loss or deterioration (Arts. 85-88). It follows that a contract to construct a bridge, building or other permanent structure is not a contract for the sale of "goods". The building materials are goods but materials that the builder brings to the building site normally may be removed without breaking the contract with the land-owner; Cf. (U.S.A.) UCC 2-105(1). On the other hand, the Convention would apply to an international sale of a mobile building even though the buyer might decide to affix it permanently to his land.[11] See: ICC Arb. 1992:7153. Materials to be used in construction of building are "goods" subject to CISG. CLOUT 26, UNILEX D. 1992-1.

Questions can arise from contracts relating to things that at the making of the contract are a part of or attached to land (e.g. oil, ores, trees, buildings) but which will become moveable at a later stage. Contracts requiring the seller to extract or sever corporeal objects from land and make them available to the buyer seem to be covered by Article 3(1) (¶57, *infra*) as "Contracts for the supply of goods to be *manufactured or produced*...." Legislative history (¶56 n. 9, *supra*) shows that the sale of gas is covered; there is no reason to suppose that a direct underground origin for the gas affects this result. On the other hand, a contract permitting a party to come on land and mine, drill or cut timber does not call for one party to deliver goods to the other; crucial provisions of the Convention on conformity of goods (Art. 35), delivery, shipment (Arts. 31-33) and risk of loss (Arts. 66-70) do not address the special circumstances [page 52] of contracts for mining or other extraction activities. Cf. (U.S.A.) UCC ¶2-107(1): sale of goods includes (minerals and the like only "if they are to be severed by the seller"); *Ont. L. Ref. Sales*, Vol. 3 p. 15 (Draft Act. ¶2.5(1)). But cf. *Bridge, Sale* 28-29. However, the parties by agreement may make the Convention applicable to these transactions (¶81, *infra*).

### ¶56.1 (2) *Exchanges of Goods: Barter Transactions*

Some domestic sales laws exclude exchanges of goods. The (U.K.) Sale of Goods Act applies to transfers or property "for a *money* consideration"—a restriction that raises questions of interpretation when (e.g.) S delivers goods at a stated price to B with the understanding (as in a "trade-in" transaction) that goods that B delivers to S will reduce the price by a stated amount.[12]

The Convention does not state any restrictions as to the price. Article 53 states: "The buyer must pay the price for the goods...". Articles 55-59 speak in the same general terms. This, plus the parties' freedom under the Convention to shape the transaction to meet their needs supports the view that exchanges of goods are not excluded unless the parties so choose (Art. 6 *infra*). [13] On the other hand, some "counter-trade" arrangements, primarily concerned with the balance of payments, may not describe the goods or other obligations of the parties with sufficient definiteness to constitute a contract of sale. See 56.2 and Article 14, 133 *infra*. See UNCITRAL Legal Guide on Drawing up Contracts in International Countertrade Transactions (Ch. III of 1990 draft considers alternative approaches to contract. A/CN.9/332); Kritzer *Manual* Ch. 25; Loeber in *Weidring Conf.* (1986) 299-315. [page 53]

### 56.2 (3) *Framework Agreements for Future Orders and Deliveries; Franchise Agreements*

*Example 2B. A supplier (S) and a distributor (D) make a "framework" agreement that will govern any orders and deliveries by S to D but does not require D to order or S to deliver any specified quantity of goods.*

This agreement, without more, does not constitute a "contract of sale" under Article 1 and is not governed by the Convention. (The definiteness required of offers is discussed under Article 14 at 134-137, *infra*.) However, if orders are thereafter made and accepted, the "framework" agreement can supply the detailed terms of the transaction to supplement or modify the provisions of the Convention. (See: GER [Düsseldorf, 6 U 152/95, 11 July 1996](#). CISG is not applicable to framework agreement, but *is* applicable to individual contracts.) See Article 6, 74-84. If the "framework" agreement was made before the date of the Convention's entry into force, under Article 99 the Convention would govern orders and contracts made after that date but not before.

The arrangements and practices involved in franchise and dealership relationships are too varied for thorough treatment here. Dealers sometimes sue for losses incurred in preparing for a franchise arrangement that is expected on the basis of representations that fall short of promises. These claims present some of the problems presented by outlays during negotiations that fail to ripen into contract—the problem known in some legal systems as *culpa in contrahendo*. These problems arise from such diverse settings that they are dealt with or excluded by provisions of Part II on Formation of the Contract. Other problems arise out of termination clauses in franchise agreements that are challenged as so harsh as to violate standards of conscionability—problems of contract validity that Article 4(a) leaves to domestic law. See 64-69 (validity) and 4-95 (good faith). In addition, close examination of the facts may show that the issue does not arise out of a "contract of sale of goods" and therefore falls outside of the scope of the Convention.

### 56.3 (4) *Undivided Shares of Fungible Goods*

Efficient handling of some types of goods (*e.g.* oil, grain) calls for their storage or their shipment in quantities greater than the units needed for sale. Units of such goods (*e.g.* bushels of No. 2 Durham wheat, barrels of No. 3 heating oil) are sufficiently uniform ("fungible") [page 54] throughout a tank or bulk carrier that contracts of sale may be framed not merely in quantities of generic goods (*e.g.* 1,000 bushels of No. 1 Durham wheat) but instead in terms of quantities or shares of the contents of an identified bulk ("tank #63"; "tanker North Star sailing June 1").

These transactions are clearly "contracts of sale of goods" within Article 1 and no provision excludes them from the Convention. [14] Thus, failure to deliver goods of the agreed quality or quantity and failure to receive and pay for the goods and many related questions are governed by the Convention. The only substantial question is whether sales of quantities or shares in an identified bulk of fungible goods can satisfy the "identification" requirements of Articles 67(1) and 69(3) governing risk of loss. See 371, 378, *infra*.

### 56.4 (5) *Computer "Hardware" and "Software"*

Computer "hardware" is clearly "goods" subject to CISG. See, *e.g.* GER [OLG Koblenz, 2 U 1230/91, 17 September 1993](#); CISG is applicable to computer "chips". See also: Schlechtriem, *Com.* (1998) 23.

The issues are more subtle when the transaction involves "software" ♦ e.g. the tiny silicon "chips" that can bring the "hardware" to life. These "chips", although minute, are tangible; when sold they are "goods" subject to sale. See: GER. [LG München, 8 HKO 24667/93, 8 February 1995](#). CISG applies to "standard software". CLOUT 131, UNILEX D. 1995-3.1. See: Fakes, A., 3 Software L.J. 559-614 (1990); Primak, L.S., 11 Comp. L.J. 197-231 (1991); Bonell/Ligouri ULR (1996-1) 149, id. (1997-2) 388. Cf. License agreements: Lockhart & McKenna, 70 Mich. L. J. 646-655 (1991).

### ♦ 56.5 (6) *Sale of All or Part of an Enterprise*

Sale of an enterprise may include the transfer of "good will" and other intangibles and, sometimes, the assumption of debts; sale of equipment or "goods" such as inventory may be of secondary importance. In these cases, the attempt to apply CISG to a part of the transaction may not be feasible.

See: ARB: [Hung, Ch. of Comm., Ct. of Arbn., AZVb 92205, 20 December 1993](#). Witz, *Premières Applications* 33; [Ferrari, 15 JCL \(1995\) 67 n.448](#). [page 55]

## Article 3. Goods to be Manufactured; Services

♦ 57 Paragraph (1) of Article 3 deals with the Convention's applicability to contracts for the supply of goods to be manufactured or produced; paragraph (2) deals with sales contracts that include the supply of labor or other services.

### Article 3 [1]

"(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."

### ♦ 58 A. Goods To Be Manufactured

Paragraph (1) states the necessary premise that a modern sales law must include transactions which call for the manufacture or production of goods and then addresses this question: Does the Convention extend to contracts in which the party who receives a finished product supplies all or part of the necessary materials?

### ♦ 59 (1) *Buyer Supplies Materials*

*Example 3A. Owner, in possession of unfinished textiles ("grey goods"), makes a contract with Finisher providing that Finisher will bleach and dye the goods and return them to Owner.*

By virtue of paragraph (1) of Article 3, this contract does not fall within the Convention. The same is true even if the contract states that [page 56] the goods are owned by Finisher during the processing and are thereafter sold to Owner for an agreed price. Regardless of the form of the contract, the "unless" clause of paragraph (1) is decisive: The party who ordered the goods undertook "to supply a substantial part of the materials necessary for" their manufacture or production.[2]

Questions of degree inevitably arise along the borders of the statute. Some of these question can be suggested by an example.

*Example 3B. Purchaser contracted with Manufacturer for the supply of stainless steel and agreed to supply the chromium, a necessary ingredient; the value of the chromium supplied by Purchaser comprised 15% of the total value of the materials used in manufacturing the stainless steel.*

The fact that the chromium was necessary for the production does not itself lead to the exclusion of this transaction; exclusion results only when the purchaser supplies "a *substantial part* of the materials necessary" for production. We may assume that the weight or volume of the chromium would not be "substantial" in relation to all of the necessary materials but this should not be decisive: The only commensurable relationship is one based on value. How big a proportion of the value of all the materials is "substantial?" Paragraph (2) refers to "the preponderant part"; a "substantial" part would be less than preponderant. It seems that a tribunal might well conclude that 15% is "substantial" but the evaluation of such questions of degree is difficult to predict. The parties to such an international transaction would be well advised to solve the question of the Convention's applicability in their contract.<sup>[3]</sup>

Assume that Purchaser did not supply chromium or other materials but did supply valuable technical services and "know-how" that had "substantial" value in relation to the total value of the materials. No provision [page 57] of CISG excludes this transaction. Art. 3(2) excludes transactions only on the basis of services provided by the *seller*. At the Vienna Conference a proposal to exclude transactions on the basis of expert services supplied by the buyer was rejected. See O. R. 243-244; *Docy. Hist.* 464-465; *Schlechtriem, 1998 Commentary* 40.

(1) Decisions that *apply* the Convention, on the ground that B did not supply a "substantial" part of the materials, include: HUNG. [Arb. Ch. of Comm. & Ind., VB/94131, 5 December 1995](#) (B supplied only 10% of goods needed for production); GER. [OLG Frankfurt a M., 5 U 164/90 17 September 1991](#)).

(2) CISG did *not* apply: AUS. [OGH \(Sup.Ct.\) 27 October 1994](#), CLOUT 105, UNILEX D.1994-27. FR, [CA Chambéry, 93-648, 25 May 1993](#), CLOUT 157, UNILEX D.1993-17. See also: Bonell/Ligouri, ULR (1996-1) 150-151.

## 60 B. Contracts not Confined to the Supply of Goods

### 60.1 (1) Goods and Services

*Example 3C. In an international contract Supplier agreed to deliver and install manufacturing machinery in Purchaser's factory and also to provide technicians to operate the machinery for the period of one year. The value of the machinery was \$1,000,000 and the value of supplying the technicians was \$200,000.*

The above contract would not be excluded from the Convention by Article 3(2) since the "supply of labour and other services" did not comprise "the *preponderant part* of the obligations of the party who furnishes the good." The opposite answer would result if the contract called for services with value in excess of \$1,000,000.<sup>[4]</sup> For example, Article 3(2) could exclude a contract to repair a complex machine if the cost of labor is greater than that of the replacement parts.

Does the Convention apply not only to the part of the contract dealing with the supply of goods but also to the part dealing with the supply of services? The answer should be Yes. Article 3(2) applies only when the parties deal with both goods and services in a single contract. When there are significant relationships between the two aspects of the contract the Convention should apply to the entire contract. If this is not the case, the [page 58] arrangement should be treated as two contracts and the Convention would apply only to the contract for goods. Because of the relationships between the supplying of goods and services it would be important for a single set of rules to apply to the entire contract. When a controversy arises, the most troublesome problems, not regulated by the contract, are likely to relate to remedies for breach—particularly the question whether the breach justifies avoidance of the entire contract. A unified approach to such problems may be necessary for the effective application of the Convention's provisions to the transaction in goods; pursuant to Article 3(2) the value of goods would at least equal and in most cases would exceed the value of the services. Many of the provisions of the Convention are concerned with the physical aspects of goods—transport, damage, destruction, deterioration. Services do not generate these problems, but the irrelevance of these provisions of the Convention should not present difficulties. And the Convention's general approach to interpretation and enforcement of the contract would be useful for the entire transaction. (The Convention's unitary approach to the contract and its remedies was introduced in the Overview in Ch. 1 at 2 and Ch. 2 at 24-27.)



Decisions that apply CISG since S's services were *not* a "preponderant" part include: [ICC Arb. \(Paris\), No.7153/1992, 26 August 1992](#); FR, [Grenoble, RG 93/4897, 26 April 1995, Roque v. Le Sarl](#). CLOUT 152, UNILEX D.1995-14. Contra: Service was "predominant; CISG not applicable: GER. [OLG Köln, 19 U 282/93, 26 August 1994](#) (contract for market research embodied in report). See: Bonell-Ligouri ULR 152, n. 28-31 (citing cases and articles).

❖60.2 *Severability*. Professor Schlechtriem suggested that domestic law should decide whether a transaction involving both goods and services is one contract governed by the Convention or is two contracts with the service aspect governed by domestic law. [1986 Commentary 32](#). This conclusion is entitled to great weight. The present writer has held a different view but would now be inclined to agree with Schlechtriem if the approach of applicable domestic law to the question of "severability" is sufficiently flexible to give decisive weight to the question mentioned above: Will "severing" the contract prevent the effective application of the uniform international rules to the transaction in goods? If a Contracting State applies domestic rules on "severability" that ignore the effective application of the Convention to a transaction that combines goods and services that State would scarcely be honoring its obligation to give full effect to the rules governing international sales or to the mandate of Article 7(1) (❖❖85❖86, *infra*) that in interpreting the Convention "regard [page 59] is to be had to its *international character* and to the need to promote *uniformity in its application*." See [Khoo, B-B Commentary 3.1, p. 43](#). Article 3(2) is based on the premise that the Convention will apply to some transactions that embrace both goods and services; decisions as to which transactions will be covered can not properly be made solely on the basis of principles of domestic law.

### ❖60.3 (2) *Industrial Plant and Equipment; Turn-key Contracts*

In discussing Article 2 at ❖56, *supra*, we saw that construction of an immovable building was not a sale of "goods". Even when contracts for industrial works call for the buyer to supply the land and building, some of the equipment may become a permanent part of the building while other equipment may be free-standing and readily removable. "Turn-key" contracts may also include the supplying of "know-how" and services in placing the plant in operation.

Such complex contracts should (and often do) designate the applicable law. See Art. 6 at ❖75, *infra*. If the contract is silent, deciding whether the Convention governs any part of the transaction calls for applying by analogy the Convention's provisions on mixed contracts in Article 3, *supra*, and also consideration of the parties' implied intent (Art. 8, ❖❖104❖111, *infra*) in the light of the (1) suitability of the Convention's provisions to the contract *as a whole* and (2) the feasibility of "severing" the contract to make the Convention apply to *only part* (❖60.2, *supra*).[5]

### ❖60.4 (3) *Analogical use of Provisions of the Convention*

In some situations tribunals may find that provisions of the Convention are helpful in solving comparable problems that fall outside its scope. Such voluntary borrowing of solutions from specialized statutes has been useful within domestic legal systems. For example, in the United States the Uniform Sales Act (1906) and its successor, Article 2 of the Uniform Commercial Code (1954), state that they govern "sales" of [page 60] goods, language that literally would exclude the burgeoning field of supplying goods through leasing (hiring or rental) arrangements. However, courts faced with the question whether the user (lessee) of the goods was entitled to legal protection when the goods were defective found that the "sales" statutes dealt with a comparable problem and relied on these provisions; this approach was not in obedience to statutory command but in observance of the principle that similar problems called for similar solutions.[6] The extension of "sales" rules to "leases" of goods has necessarily been selective; for example, some of the "sales" rules dealing with remedies for breach are inappropriate to transactions in which the user's investment is limited to rental payments.[7] Problems such as these led in 1987 to the addition to the Uniform Commercial Code (UCC) of a new Article 2A. *Leases*, immediately following Article 2. *Sales*.

"Lease" or "Sale": *Form or Substance*. Some transactions labelled "lease" in substance are sales❖subject to a security interest. Whether the CISG applies to these transactions should depend on substance rather than form;



"chameleon leases" may be subject to CISG if they satisfy the other requirements for applicability [e.g.](#), Article 1. Penetrating such disguises in the setting of the UCC is discussed in *White & Summers* (1995) 21-3.

Tribunals, of course, are under no international obligation to use the Convention's provisions for transactions that lie outside its scope; such "borrowing" depends on principles of domestic *jurisprudence* and a decision whether rules designed for domestic transactions are as suited to international transactions as the Convention. In a larger sense, careful analogical extension of these and other international rules can make a measured, albeit modest, contribution to the reestablishment of an international law-merchant. [\[8\]](#) [\[page 61\]](#)

### **[60.5](#) (4) Interpretation of Rules on Scope: Certainty v. Flexibility**

Measured *analogical* use of the Convention's provisions can also relieve pressure for doubtful interpretations *extending* the Convention's scope. In discussing Article 7(2), [96](#) [102](#), *infra*, we shall consider the Convention's invitation to use "the general principles on which it is based" to govern questions which, although "not expressly settled" in the Convention, arise out of matters "governed by" the Convention. This provision calling for analogical extension of the Convention's substantive rules to avoid "gaps" in the uniform rules transactions that fall *within the Convention's scope* is profoundly different from principles for interpreting provisions (*e.g.*, Articles 1 [6](#)) which govern the Convention's *outer boundaries*.

As the language quoted from Article 7 shows, its call for a broad analogical approach to the Convention's substantive provisions "governed by" the Convention *does not apply* to provisions such as Articles 1 [6](#), which define the area that the Convention does not "govern". Nor does the Convention contain any provision authorizing analogical extension of its outer boundaries. Indeed, in framing the Convention such a proposal would have received short shrift and for good reason: Doubt about the Convention's outer boundaries generates uncertainty as to nearly every substantive issue that can arise in an international sale.

These factors suggest that provisions defining the Convention's outer boundaries should be interpreted to achieve maximum certainty. On the other hand, as we shall see, Article 7(2) (buttressed by Articles 8 and 9, [104](#) [122](#), *infra*) calls for a more flexible approach in the development of rules to govern transactions that reside within the Convention's domain. [\[page 62\]](#)

## **Article 4. Issues Covered and Excluded; Validity; Effect on Property Interests of Third Persons**

[61](#) Articles 1 [3](#) identify the *transactions* that are subject to the Convention while Article 4 defines the *issues* to which the Convention applies. Article 4 states that the Convention "governs only" the following: (1) "the formation of the contract" (Part II of the Convention) and (2) "the rights and obligations of the seller and the buyer arising from such a contract" (Part III of the Convention). As we shall see, paragraphs (a) and (b) specifically exclude two issues that lie on the fringes of the sales contract.

### **Article 4 [\[1\]](#)**

"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."

### **[62](#) A. Obligations "Arising From" the Contract**

The general statement in Article 4 that the Convention "governs only...the rights and obligations of the seller and the buyer arising from..." the contract of sale will be given further content by provisions that exclude specified issues, such as paragraphs (a) and (b) of the present article and Article 5 (liability for death or personal injury). Other points on the line defining the issues embraced by the Convention are fixed by the substantive provisions in Part III (Arts. 25-88).

A subtle and important problem arises when a domestic law provides legal consequences for the very same operative facts that invoke the rules of the Convention, when the rule of domestic law bears a label other than [page 63] "contract." The question whether such a domestic rule remains in effect as an alternative to the provisions of the Convention is elusive, and can best be considered in a specific context. One example will be provided by domestic rules that bear a label such as "product liability." Article 5, *infra* at 71, which excludes from the Convention liability "for death or personal injury," will provide a concrete setting for examining the above question.

### 63 (1) *Manufacturer's Participation in the Sale*

In recent decades some legal systems have established contractual rights for buyers against manufacturers for damage or loss caused by defects in goods which the buyer purchased from a retail dealer or other distributor. At the outset this development responded to the plight of consumers who suffer personal injury from dangerous products—an area that lies outside the Convention because of the general exclusion of consumer purchases (Art. 2(a)) and the further exclusion (Art. 5, 71, *infra*) of the liability of "the seller for the death or personal injury caused by the goods to any person." However, in some legal systems this development has made manufacturers liable, without regard to negligence, for economic loss caused by defective products purchased from a dealer or other distributor.<sup>[2]</sup>

The first edition of this work concluded that this development under the Convention was barred by the language of Article 4 that the Convention "governs only the formation of the contract of sale and the obligations of the seller and the buyer arising from such a contract." See, e.g., B sued manufacturer (M) for defects in a machine B purchased from S. B's suit was dismissed because B had not contracted with M. GER [LG Düsseldorf, 31 O 231/94, 23 June 1994](#). UNILEX D. 1994-16. (For US domestic cases rejecting this approach, see, e.g., Reitz, 75 Wash.U.L.Rev. 357 at 361 (1997).)

Further reflection calls for reexamination in some commercial settings. For example, some manufacturers (and similar mass distributors such as importers) provide dealers with a written "guarantee" or "warranty" by the manufacturer and instruct dealers to give buyers the manufacturer's "guarantee" in connection with the sale. One purpose is to encourage sales because of the confidence that prospective buyers have in a guarantee to them by a well-known manufacturer. A second, less evident, [page 64] purpose is to limit their responsibility (e.g.) to the replacement of defective parts for a specified limited period and thereby to bar claims for consequential damages caused by defects in the goods.

Such a "guarantee" by the manufacturer to the buyer clearly creates a contract between these parties in connection with the sale of goods. The difficult problem is whether the manufacturer is a "seller" within the language of Article 4 in view of the fact that the dealer executed the contract with the buyer, delivered the goods and received the price.

Some tribunals applying the Convention, like some tribunals applying domestic laws governing the "sale of goods", may be impressed by the fact that the delivery of a "guarantee" through a local dealer was part of a larger setting in which the manufacturer played a dominant role in the sale—by franchise agreements controlling aspects of the dealer's performance and by mass-media advertising addressed to prospective buyers. Indeed, advertising appeals are typically designed to say or imply: "Go to our dealers and buy our product. If you do you will get a good product." This in substance is an offer of a unilateral contract: "If you will do X you will get Y."

Of course these facts alone do not make the manufacturer a "seller"—a contract of sale depends on the buyer's completing a transaction with a dealer. But some tribunals may conclude that when such a transaction is

completed the manufacturer, although not "*the seller*", has participated with the dealer in a "contract of sale" with the buyer.[3]

The supplier's participation may be more evident as when a representative of the manufacturer personally contacts the buyer and persuades him to purchase the manufacturer's goods from a local dealer.[4] In many cases participation by the manufacturer is more tenuous, confined to advertising [5] and possibly control of aspects of the dealer's business such as promotion methods, volume, stocking of repair parts, training of mechanics and, in some cases, the price to be charged.

When (as in the usual case) the buyer and dealer are in the same State the Convention would not apply to a claim against the dealer. Art. 1(1), §40, *supra*. Similarly, the Convention would not apply to a claim against even a foreign supplier if the supplier's place of business applicable to this transaction (Art. 10(a)) is in the same State as the buyer. In any event,[page 65] when domestic law is favorable and the dealer is financially responsible it usually will be more convenient to confine one's claim to a local action against the dealer. The same may be true even when the claim might jeopardize the dealer's resources since the dealer may be able to bring in the manufacturer to defend the action and to satisfy any judgment. Thus, attempts to extend the Convention to foreign suppliers may be confined to special situations such as financial failure of the local dealer. Even here the rules on jurisdiction, private international law and domestic sales law in the buyer's jurisdiction may meet the buyer's needs.

In sum, it is unlikely that the Convention in the foreseeable future will play a large role in claims by buyers against manufacturers and similar remote suppliers. On the other hand, it seems hasty to conclude that the "buyer-seller" language of Article 4 will be an impassable barrier in cases where the supplier has participated substantially (although not formally) in the sale to the buyer. Domestic experience suggests that legal relations with foreign suppliers may be a field for gradual development.

## ❖ 64 B. Issues Excluded from Convention

### (1) *Validity*

Paragraph (a) of Article 4 excludes issues with respect to "the validity of the contract or of any of its provisions or of any usage." One obvious example is a rule of domestic law that prohibits the sale of specified products, such as heroin, and invalidates contracts relating to such illegal sales.[6] There are other applications of paragraph (a) that call for discussion.

### ❖ 65 (a) *Remedies for Fraud*

The Convention does not interfere with the special rights and remedies that domestic law gives to persons who have been induced to enter into a contract by fraud. (As will be suggested under Art. 35, *infra* at §238, a very different problem of the relationship between the Convention and domestic law is presented by an innocent misstatement as to the quality of the goods. Preserving domestic [page 66] protection against intentional fraud could be based on the general rule of Article 4 that the Convention "governs only" the obligations "arising from [the] contract"; the conduct that gives rise to a remedy for fraud may be distinct from the making of the contract. This result is reinforced by paragraph (a) which excludes issues of "validity." Even if domestic law characterizes a contract obtained by fraud as "voidable" rather than "invalid" and gives the innocent party a choice as whether to avoid the contract, these rights are not disturbed by the Convention. The crucial point is that the Convention does not address factual situations involving fraud and should not be construed as wiping out this important field of law by implication. (Compare the discussion at (b) *infra*, of the relation between the Convention and domestic rules on agency.)[7]

*Fraud in action:* GER [OLG Köln 22U4/96, 21 May 1996](#). A car dealer (B) bought a used car from another car dealer (S); the contract excluded warranties. B resold the car to customer (C) who discovered that the license was post-dated and that the car had more mileage than on the odometer. B paid C for the loss, and sued S. CISG applied. S's defense invoked Art. 34(3): B "knew or could not have been unaware of the lack of conformity".

This defense was rejected: (1) Under the "good faith" obligation of Art. 7(1), S cannot rely on B's ability to discover the defect if S knew of the defect; (2) Although CISG Art. 4(1) excludes issues of validity, German law, applicable to fill gaps, invalidates a contract obtained by fraud. B was awarded damages under CISG 74. CLOUT 168, UNILEX D. 1996-5.5.

*Impact of domestic and EU unfair competition rules on individual sales:* GER. [BGH. \("Sup.Ct."\) VIII ZR 134/96, 23 July 1997](#). An Italian manufacturer of fashion goods (S) granted B, a German company, the right to distribute S's goods. B claimed that the framework agreement violated unfair competition rules. Held: validity of these agreements was not within CISG (Art. 4(a)) and did not affect S's right to recover the proceeds of individual sales—an area governed by CISG. UNILEX D. 1997-13.

The fact that a domestic rule bears a label such as "validity" or "fraud" does not determine the question whether the rule is one of "validity" [page 67] within the meaning of Article 4(a) of the Convention. For reasons foreshadowed at the outset of this Article and to be developed in the Commentary to Article 5, the substance rather than the label or characterization of the competing rule of domestic law determines whether it is displaced by the Convention; the crucial question is whether the domestic rule is invoked by the same operative facts that invoke a rule of the Convention. For example, a domestic rule of "validity" provides that a problem raised by facts A + B has result X; the Convention also addresses the problem raised by facts A + B and gives result Y. Does Article 4 provide that the Convention "is not concerned" with this problem? See ¶72, *infra*. To illustrate the point further, suppose that domestic law gives a "contract" label to remedies for fraudulently inducing the buyer's acceptance of goods after their return to the seller. If the Convention can not be construed to deal with these problems (see Art. 7(2), ¶¶95-102, *infra*), domestic remedies are not excluded merely because they are characterized as "contract" rather than "tort". In sum, access to domestic law is neither broadened or narrowed by its label or characterization.[8]

#### ¶66 (b) *Competency; Authority of an Agent*

The Convention does not displace domestic rules on the effect of insanity, infancy or other disability on a party's capacity to make a contract. The Convention does not address any of these difficult questions.

In the setting of international sales, a more important issue is the legal power of one person to represent another. The Convention does not address the complex issues that underlie questions of agency and authority. A UNIDROIT draft dealing with this topic led to a Convention on Agency in the International Sale of Goods (Geneva 1983), 22 Int. Leg. Mat. 249. However until international rules enter into force questions of authority to act for another are left to applicable domestic law. Accordingly, references in the Convention to the acts of a party include persons for whose acts the party is responsible.[9]

#### ¶67 (c) *Harsh, Unanticipated Applications*

The foregoing discussion suggests that Article 4(a), in leaving "validity" to domestic law, does [page 68] not open a large door for escape from the uniform rules of Convention. Does this mean that the Convention requires the enforcement of contract provisions that produce harsh results when conditions arise that were not anticipated when the contract was prepared? The answer depends, in part, on the approach to the interpretation of the contract, an issue that will be considered in the Commentary to Article 8, *infra* at ¶107.1. Related questions arise with respect to the quality of the goods required under the contract and the effect of contract provisions that, broadly construed, would cut deeply into the buyer's normal expectations. (See the Commentary to Art. 35, *infra* at ¶222.) Finally, reference should be made to Article 79, which exempts a party from liability for damages when an unanticipated impediment prevents him from performing. As these cross-references suggest, within this area the law is a seamless web.

Domestic rules on validity—such as requirements of "good faith", "*Treu und Glauben*", "conscionability", or rules controlling contract clauses restricting responsibility for defective goods—may become inapplicable when the contract is interpreted and applied in conformity with the above provisions of the Convention. In short, failure to turn first to rules of Article 8 on construction of the contract could lead to the application of domestic

law to unreal, hypothetical cases, and would restrict the scope of uniform law in violation of the rule of Article 7(1) that the Convention shall be interpreted with regard "to the need to promote uniformity in its application..." See [§§85-87](#), *infra*.

### §69 (d) *The Convention and Domestic Law: Cross-References*

Other issues that might logically fit here have been deferred to Article 35 so that the discussion could take a wider view of the Convention's rules on the obligations of the parties. Thus, under Article 35 consideration is given to the relationship between the Convention and domestic rules designed to preserve implied obligations as to quality of the goods ([§230](#)), rules on "unconscionability" ([§235](#)) and restrictions on the use of standard contract terms ([§236](#)).[\[10\]](#) [\[page 69\]](#)

### §70 (2) *Effect of the Contract on Property in the Goods*

Article 4 also provides that the Convention "is not concerned with...(b) the effect which the contract may have on the property in the goods sold." This specific provision illustrates the general rule of Article 4 that the Convention is concerned only with the "rights and obligations of the *seller and the buyer* " arising from the sales contract. In addition, problems that under some domestic systems are decided by reference to the "property" concept are governed by specific provisions of the Convention. See [Secretariat Commentary O.R. 17, Docy. Hist. 407 \(para. 4\)](#). See also Ch. IV, Passing of Risk (Arts. 66-70) at [§§359-383](#), *infra*.

In conformity with this principle, the Convention (Arts. 41 and 42) deals with the seller's obligation to the buyer that the goods be free of third-party claims. Whether the sale to the buyer cuts off outstanding property interests of third persons is not dealt with by the Convention. Efforts to establish uniform international rules on the rights of good faith purchasers have not yet been successful; in the meantime, this question must be left to applicable domestic law.[\[11\]](#)

As we shall see, the Convention gives one party to the sales contract rights over goods held by the other party that, under domestic law, may affect the rights of third persons. For example, Article 46, [§§279-286](#) *infra*, gives a buyer the right to require the seller to deliver goods that the seller wrongfully withholds; Article 81(2), [§444](#) *infra*, gives a seller the right to claim restitution of goods for which the buyer fails to pay. Article 4 makes it clear that the Convention does not govern the effect of these remedial rights on the claims of third persons. However, domestic law must respect these rights as between the seller and buyer; if such rights between the parties prevail over the claims of creditors or other third parties under domestic law, domestic tribunals should give the same effect to rights established by the Convention. See *infra* at [§444](#).[\[page 70\]](#)

## Article 5: Exclusion of Liability for Death or Personal Injury; "Product Liability"

### §71 A. Reasons for Exclusion

The strong protection that the Convention gives to the international sales contract made it necessary to limit the Convention's scope lest the Convention collide with the special protection that some domestic rules provide for the noncommercial consumer. See Ch. 1 at [§2](#). For this reason, Article 2 provides that the Convention does not apply to sales "(a) of goods bought for personal, family, or household use...." A similar purpose underlies the present article.

#### Article 5 [\[1\]](#)

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

Article 2(a) excludes certain *purchases* from the Convention; Article 5 excludes a specified *type of claim* liability for death or personal injury even though other aspects of the transaction may be governed by the



Convention. This exclusion is significant in the following two situations.

(1) Under Article 2(a), although goods are bought "for personal, family, or household use" the Convention may apply when the seller "neither knew nor ought to have known that the goods were bought for any such use." In these unusual cases, Article 5 provides that the claim of such a buyer or any third person "for death or personal injury" falls outside the Convention, and hence will be governed by applicable domestic law.

(2) Goods not bought "for personal, family, or household use" may give rise to a claim to recover for "death or personal injury." Suppose [page 71] that an industrial machine injures an employee of the purchaser. A claim by the purchaser to recover damages from the seller because of the injury to the employee is not governed by the Convention. (A claim by the employee against the seller would not be based on the "obligation of the seller and the buyer arising from" the contract of sale, and hence would be left domestic law by Art. 4.)

The exclusions under Articles 2(a) and 5 have special significance in relation to the notice requirement of Article 39: A buyer "loses the right to rely on a lack of conformity of the goods" unless he gives notice to the seller within a reasonable time and, in event, within two years after receipt of the goods.

In many countries another important feature of "product liability" is the opportunity to sue a manufacturer or distributor with whom the plaintiff had no direct contractual relationship. The Convention (Art. 4) governs "only...the rights and obligations of the seller and buyer arising from" the "contract of sale". Thus, except for unusual cases (63 *supra*), the Convention would not govern actions by a buyer against persons other than the seller and consequently would not interfere with domestic rules, such as product liability, that permit such actions. Moreover, as we have seen, Article 5 preserves domestic rules on liability for "death or personal injury caused to any person" even for actions by the buyer against the seller.

## 72 B. Labels for Domestic Law and the Scope of the Convention

Article 4 provides that the Convention governs the "obligations of the seller and the buyer arising from (the)...contract...." The discussion of Article 4 mentioned that a subtle issue of the relationship between the Convention and domestic law would be explored here. In schematic form the issue is as follows: Domestic law states that facts A, B, and C lead to legal result X, and gives this rule a label such as "tort" or "products liability." Under the Convention, facts A, B and C lead to legal results Y. Does the label that domestic law gives to its rule determine whether that rule is displaced by the Convention?

This issue was introduced in schematic form because the same basic issue may arise in various settings. But it may help to examine this problem in a specific setting domestic rules of "product liability." [page 72]

### 73 (1) "Product Liability"

"Product liability" differs among the various countries, and even among the fifty states of the United States, where this development (or eruption) has been unusually active. No attempt will be made to catalogue the various species of "product liability." To analyze the relationship between the Convention and domestic law, it will suffice to consider one extreme application of this doctrine. [3]

*Example 5A. Seller, in State A, sold Buyer, in State B, an industrial heater for use in Buyer's factory. Seller was not negligent in manufacturing the heater, but there was a hidden flaw in the burner that led to an explosion that damaged the goods in Buyer's factory. Domestic law of "product liability" would make Seller liable to Buyer for the damage. The operative facts that led to liability were these: (A) The defendant "supplied" the goods; (B) The goods were defective; (C) The goods caused damage to the user. Under such "product liability" Seller is liable to Buyer even if he establishes that he (or his supplier) exercised due care in making the heater. The buyer is not required to notify the seller of the defect in the goods. Local law classifies all such "product liability" under the heading of "tort" rather than "contract". [4]*

Does the Convention displace such domestic rules of "product liability?" The answer should be Yes. Whether the Convention applies is, or course, governed by the provisions of the Convention. Under Article 1 this was a

"contract of sale of goods" and the transaction was not excluded by Articles 2 and 5.

The facts that invoke the domestic rules of "product liability" are the same facts that invoke the Convention. In examining Article 4 we noted that the Convention does not displace domestic remedies for fraud, but [page 73] those remedies respond to facts that are different from the facts that invoke the Convention. Domestic rules that turn on substantially the same facts as the rules of the Convention must be displaced by the Convention; any other result would destroy the Convention's basic function to establish uniform rules. (Art. 7(1)).[5]

A more difficult problem would be presented if, in a setting like problem 5A, Buyer offered to prove that the defect in the heater resulted from a lack of due care in Seller's manufacturing operations and sought recovery under domestic tort law. At stake would be the applicability of the full range of the Convention's rules including the buyer's obligation to notify the seller (Arts. 39, 40, 44), his right to avoid the contract (Art. 49) and the measurement of damages (Arts. 74 and 77).

In terms of the schematic presentation set forth at ¶12, *supra*, the buyer would argue that his claim under domestic tort law would not be based on the same facts as a claim under the Convention for breach of contract. Under the Convention, liability would be based on two elements (A) failure of the goods to conform to the contract (Art. 35) and (B) damage resulting from this defect (Art. 74). The claim in tort would include a third element (C) proof of lack of due care. However, it does not follow that this third element excludes the Convention.

As we shall see, the Convention embodies a deliberate choice that the question of negligence is irrelevant to the buyer's right to recover from the seller for damage caused by nonconforming goods. One of the reasons for this choice is this: When the seller has produced defective goods (as in the present case) it is likely that the defect resulted from lack of due care in production methods. However, proof of lack of due care is expensive and the outcome of litigation is difficult to predict; to promote legal certainty, the Convention makes the seller legally responsible for defects in the goods that it sells. Thus, proof of the seller's lack of due care does not change the essential character of the claim, and access to domestic law based on such proof would make it possible to circumvent the uniform international rules established by the Convention.

In examining articles 4 and 5 we met cases in two quite distinct categories: (1) An action to rescind the contract for fraud (*e.g.*, false statements by the seller concerning his production capability or false financial statements supplied by the buyer) (¶65) and (2) Claims for damages [page 74] caused by defective goods based on domestic rules as to "product liability" or tort (¶73). Between these two poles there may well arise situations where the claim under domestic law depends on facts that differ, in varying degrees, from the facts necessary to establish a claim under the Convention. However, if it is clearly determined that claims like those in category (2), above, may not invoke domestic law, the cases that fall between these two categories should not seriously interfere with the application of the Convention.

Professor Schlechtriem concludes that the Convention supersedes domestic tort rules in actions to recover "for the *inferior value* of nonconforming goods". This type of action protects an "economic interest" which is "the essence of contractual interests". On the other hand the Convention does not supersede actions based on "property" interests that exist "independently of contractual obligations".[6]

From these premises Schlechtriem concludes that actions may be based on domestic law when defective goods "non-conforming to the contract or not" cause "property damage". Domestic law may be invoked even though "damage is recoverable under CISG, Article 74" since this action is "outside the principal domain of interests created by contracts".[7] Domestic tort rules would also apply "even if the goods themselves were destroyed by a defect giving rise to a tort action based on strict liability".[8]

These views are intriguing and merit the most careful consideration. One question that calls for attention is the justification for displacing inconsistent domestic law within only part of the Convention's area of applicability. Displacing inconsistent domestic law is of the essence of establishing uniform law. In areas where appeals for domestic law were [page 75] persuasive to the international legislative body the Convention carved out

exceptions❖ *e.g.*, by excluding sales to consumers (Art. 2(a)), claims based on death or personal injury (Art. 5), and validity of the contract, any of its provisions, or usage (Art. 4(a)). Adding exceptions to the area of uniformity seems inconsistent with the compromises on scope and substance that led to international agreement.

One might suppose that nothing more than generosity results from permitting claimants to choose more favorable domestic law: This alternative merely adds to the claimant❖s protection; if domestic law is not more favorable than the Convention claimants will invoke the Convention. However, the Convention was devised to provide a fair balance between buyers and sellers, claimants and defendants.

A less basic point: Permitting recourse to domestic law can be unfair since not all domestic systems permit choice between contract law ("*non-cumul*"); under German law parties to contracts may choose ("*Anspruchskonkurrenz*").<sup>[9]</sup> More important, however, is the difficulty of maintaining uniformity of the international rules once a breach has been opened in the line set by the Convention❖s own rules on its sphere of applicability. The appeal of familiar domestic law to domestic judges is strong and should not be given further encouragement.<sup>[page 76]</sup>

## Article 6. The Contract and the Convention

❖74 The dominant theme of the Convention is the primacy of the contract. See, *e.g.*, Overview, Ch. 1 at ❖2, Overview, Ch. 2 at ❖❖19, 24, Art. 4 at ❖61, Art. 31 at ❖207, Art. 35 at ❖222. Of the many provisions that develop this theme, Article 6 is the most important.

### Article 6 [1]

"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."

The most significant statement in Article 6 is that the parties may "vary the effect" of any of the Convention❖s provisions. This rule applies to the formation of the contract (Part II) and supplements the basic principles that the offeror is the master of its offer (Arts. 14❖17) and the offeree the master of its acceptance (Art. 18(1)); in addition, the parties by agreement may set rules for the making of their future contracts. Moreover, the Convention❖s gamut of provisions on the obligations of seller and buyer and the remedies for breach (Part III) may be reshaped by the agreement. The breadth of the parties❖ freedom to modify the Convention❖s rules is emphasized by the one exception stated in Article 6❖the privilege of an adhering State under Articles 12 and 96 to preserve its domestic rules that require a writing. (See the Commentary to Art. 12, *infra* at ❖128.)

This degree of freedom for the parties was made possible by excluding certain transactions and issues from the Convention. The Convention does not apply to consumer purchases (Art. 2(a)) or to liability for death or personal injury (Art. 5). Nor does the Convention displace domestic rules with respect to the validity of the contract or prejudice the rights of third persons (Art. 4).<sup>[page 77]</sup>

### ❖75 A. Exclusion or Modification

#### (1) *Exclusion of the Convention; Designation of Domestic Law*

In the preparation of both ULIS and the present Convention, it was suggested that an agreement excluding the Convention should be effective only if the agreement also designates the applicable domestic law. This suggesting was not accepted; if the parties merely agree that the Convention does not apply, rules of private international law would determine the applicable domestic law.<sup>[2]</sup>

#### ❖76 (2) *Implied Exclusion or Modification*

ULIS (Art. 3) provided that total or partial exclusion of the application of the Law "may be express or implied." In UNCITRAL the reference to "implied" exclusion was deleted on the ground that this language might lead tribunals to exclude the Convention on inadequate grounds; on the other hand, UNCITRAL declined to provide that exclusion must be "express." As a consequence, normal rules of construction of the contract apply to the question of exclusion or modification of the Convention.[\[3\]](#)

A reference in a contract to trade terms, like ICC's *Incoterms*, should not be taken as an exclusion of the Convention, any more than such a reference would exclude rules of national law. Such trade terms articulate the parties' obligations as to loading the goods, risk of loss and related matters, and are similar to contract provisions stating the parties' duties. But such trade terms ordinarily do not set forth the legal consequences of breach. The Convention (like domestic rules of law) and trade terms are complementary; each performs a function that cannot be well served by the other.[\[4\]](#) **[page 78]**

Even detailed standard contracts or general conditions usually recognize the need for a back-up legal system to supply answers for unanticipated problems. In some cases parties may wish to provide for the settlement of disputes by an arbitral tribunal acting as *amiable compositeur* or *ex aequo et bono*. See the UNCITRAL Arbitration Rules, Art. 33<sup>2</sup>. However in the absence of such a provision it is unlikely that the parties chose to divorce their contract from all systems of law.

### **77 (3) Private International Law and Implied Exclusion of the Convention**

*Example 6A. The places of business of Seller and Buyer are in States A and B, both of which are Contracting States. A contract of sale was signed by representatives of Seller and Buyer in State C, a non-Contracting State. The contract provided that Seller would deliver the goods to Buyer in State C. The contract had no provision designating the applicable law.*

What laws should *fora* in States A and B and other Contracting States apply to the above transaction? A firm starting point is this: Since the places of business of both parties are in Contracting States, Article 1(1)(a) ("Sub (1)(a)") provides that the Convention applies unless the parties have agreed (Art. 6) to exclude the Convention.

The law designated by the private international law ("PIL" or "conflicts") rules of the various possible *fora* may be unclear or in conflict. However, let us assume that the PIL rules may point to State C, a non-Contracting State.  
[\[5\]](#)

Would the above rules of private international law exclude the Convention? Article 1 of the Convention tells us that the answer is No. Subs (1)(a) and (1)(b) of Article 1 provide *alternative* grounds for applicability. A conclusion that private international law pointing to the law of a non-Contracting State bars applicability of the Convention, even though **[page 79]** the places of business of both parties are in Contracting States, would nullify Sub (1)(a) of the Convention—the primary and universally accepted basis for the Convention's applicability. (As we have seen at [47](#) *supra*, Article 95 authorizes a reservation excluding applicability under Sub (1)(b); some States have exercised this option.)

If rules of private international law alone will not undermine applicability based on Sub (1)(a), it appears that the only basis for excluding the Convention in the above example is an agreement by the parties under Article 6. The legislative history of Article 6 outlined above ([76](#) at n.3) shows that although an agreement to exclude the Convention need not be "express" the agreement may only be implied from facts pointing to *real* —as opposed to theoretical or fictitious—agreement.[\[6\]](#)

This view is supported by the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods. This Convention gives unqualified effect to an *express* agreement choosing applicable law, but is more cautious about implied agreements. Article 7 provides:

"(1) A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or *be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety....*"[\[7\]](#)

Similar requirements are set forth in the EEC Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980). Article 3 provides:

"(1) The contract shall be governed by the law chosen by the parties. The choice must be expressed or *demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.*"

It is not feasible to comment on the significance of the various facts that adequately evidence an implied agreement to exclude the Convention, except to suggest doubt about the significance of an agreement on the venue for arbitration. In an international transaction a single arbitrator or the chairman of a panel of three is likely to be selected from a "neutral" State having no connection with the transaction. The choice of the place where the arbitrators meet is likely to reflect practical considerations with respect to transport, meeting and translation facilities rather [page 80] than a choice of applicable law. See the UNCITRAL Arbitration Rules (1976), Art. 16 (place of arbitration) and Art. 33 (applicable law).[8]

In sum: When the places of business of the seller and buyer are in different Contracting States, the applicability of the Convention mandated by Article 1(1)(a) is not undercut when rules of private international law point to a non-Contracting State. The Convention may be excluded by the parties, but only by an express agreement or an agreement that is clearly implied in fact.

### ❖ 77.1 (4) *Ambiguous Contracts*

Courts in several countries have faced this situation: The contract includes language to the following effect: "This contract is to be governed by the law of (e.g.) State X.". If State X has adhered to the Convention, this question arises: Did the parties intend to invoke CISG, or the internal, domestic law of State X?

A majority of tribunals have concluded that the parties intended to invoke CISG: E.g., ARB, [ICC Paris, 6653/1993](#) (German B and Syrian S; the contract referred to French law); CISG was applied. UNILEX, D. 1993-1; NETH. [Arr.-Rechtbank Gravenhage, 94/0670, 7 June 1995](#) (contract called for Dutch law; CISG was applied). See: Schlechtriem, Com. (1998) 55❖56.

A few decisions have held that the parties chose non-CISG internal sales law. In some of these cases the contract included language that, without being explicit, suggested an intent to derogate from CISG. E.g. IT. [Arb. Florence, 19 April 1994](#). "Contract to be governed exclusively by Italian law"; domestic Italian law applied; one dissent. CLOUT 96, UNILEX, D. 1994-9.

See Bonell/Liguori, ULR (1995-1) 155❖157 n. 46❖57, (1997-2) 392❖393 n. 49❖54 (citing many cases); [Ferrari, 15 JLC 90, n.628](#) (German cases); [Karollus, Cornell \(Kluwer 1995\) 59](#) (nuanced approach to parties❖ intent); Witz, *Premières App❖ns* (1995) 44, n.87❖90 (French).[page 81]

The present writer, although an advocate for CISG, ventures a surmise that the outlook of some decisions reflects patterns developed during the years when ULIS (1964) was in force in some countries of Europe; in other regions caution about the intent of the parties may be advisable. Special caution seems advisable when the parties invoke the law of one *region* of a contracting State: e.g. an agreement to apply the law of New York. True, the U.S. Constitution provides that a treaty is the "law of the land" in all 50 states. However, a reference to only one of the fifty states may suggest that the parties were not thinking of the Convention.

### ❖ 78 B. *Agreements to Apply the Convention; Effectiveness*

Article 6 refers only to exclusion or modification of the Convention; there is no provision that addresses the question whether the parties may make the Convention applicable to transactions that fall outside the scope of Articles 1❖5. This question may arise in at least three types of situations:

- (a) The contract relates to a type of transaction or a type of commodity that is excluded by Article 2, 3 or 5.
- (b) The place of business of the seller and buyer are not "in different States" as required by Article 1(1).



(c) The transaction does not bear a relationship to a Contracting State that is consistent with Article 1(1)(a) or (b).

### 79 (1) *Legislative History*

ULIS gave sweeping approval to agreements extending the applicability of the 1964 Sales Convention. Article 4 of ULIS provided:

"The present law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law."

The 1980 Convention has no comparable provision. Does this mean that UNCITRAL decided that the sales contract could not invoke the Convention? The answer can be found in a brief review of the legislative history. **[page 82]**

In 1970, UNCITRAL's Working Group on Sales deleted Article 4 of ULIS and added the following provision to Article 1: "2. The present Law shall also apply where it has been chosen as the law of the contract by the parties." The Working Group noted that ULIS, in authorizing the parties to apply the Convention (Art. 4, just quoted), added that this agreement would not affect the application of any "mandatory" provision. The Working Group recognized that some such exception was necessary but noted that the term "mandatory" was subject to varying interpretations, some of which embraced a large portion of domestic law. A final decision was deferred until further consideration could be given to this question.<sup>[9]</sup>

The Commission, in reviewing the Working Group draft, deleted the above provision that gave unqualified effect to the agreement because of concern lest contracts might apply the Convention to consumer transactions and thereby nullify domestic regulations designed to protect such purchasers. It was then proposed to return to Article 4 of ULIS, but limited to contracts between parties in different States when one of those States is a Contracting State. This proposal was rejected on the ground that it would unduly restrict parties who wished to apply the Convention. Article 4, as it stood in ULIS, was also rejected because (as the Working Group had concluded) the term "mandatory" was too vague. The upshot was a decision to omit any provision on the effect of agreements extending the applicability of the Convention. This decision by UNCITRAL's Committee of the Whole was summarized as follows:

"The Committee concludes that Article 4 raises many difficult questions of interpretation which even protracted discussions have failed to solve. Because of this, and in view of the fact that a provision on the lines of Article 4 is not strictly necessary to achieve the purpose for which it was drafted, the Committee recommends to the Commission that the article should be deleted."<sup>[10]</sup>

### 80 (a) *Significance of the Legislative History*

The above legislative history shows that UNCITRAL's deletion of Article 4 of ULIS was not designed to nullify agreements extending the applicability of the Convention. The actions and discussion in UNCITRAL were based on the premise that, in most situations, agreements to **[page 83]** apply the Convention would be effective. A provision regulating the effect of agreements to apply the Convention was not included because of the drafting problem posed by divergent domestic approaches to what rules were "mandatory". In short, courts facing this issue will not be subject to a binding rule of the Convention. Instead, the point of reference will be domestic rules on the contractual freedom of the parties, derived from domestic law and applicable international conventions.<sup>[11]</sup>

International consensus favoring party autonomy is evidenced by the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods. This Convention, finalized by over fifty States, many of them members of UNCITRAL, provides in Article 7(1): "A contract of sale is governed by the law chosen by

the parties." The Explanatory Report authorized by the Conference states (para. 4): "No delegation objected to this general proposition." See also, *id.*, para. 102.<sup>[12]</sup>

Since domestic rules vary on the basic issue of the freedom of the parties to choose applicable law, it would be presumptuous to suggest final solutions to problems in this area. The most that is feasible here is to suggest aspects of the Convention that may be relevant in applying these rules of domestic law. The problem can arise in different settings; the following observations will be related to the three types of situations mentioned at <sup>◆</sup>78, *supra*.

## **<sup>◆</sup>81 (2) *Agreement to Apply the Convention in Various Settings***

### ***(a) Transactions or Issues Specifically Excluded by the Convention***

The exclusions specified in Article 2(a) (consumer purchases) and Article 5 (death or personal injury) resulted from concern over the relationship between some of the provisions of the Convention and protective rules (often of a mandatory character) of domestic law. As we have seen, the Convention does not govern the effect of contracts extending its scope. Consequently, the applicability of the Convention depends entirely on the contract; the Convention's rules would have no greater effect on protective rules of domestic law than would a contract aimed directly at those rules. If the protective rules of domestic law constitute a thorough and unified regulation the Convention might well distort **[page 84]** the legislative pattern; on this assumption the tribunal should not apply the Convention. On the other hand, where the protective rule can readily be separated from the provisions of the Convention it may be feasible to give effect to the agreement calling for the application of the Convention.

The sales mentioned in Article 2(d), (e) and (f) (investment securities; ships; electricity) and in Article 3 (materials supplied by buyer; service contracts) were excluded because of doubts as to the appropriateness of the Convention for these specialized transactions. The parties, however, would be competent to decide this question; there seems little reason to deny them freedom to choose.

### **<sup>◆</sup>82 (b) *Parties Located in Same State***

The discussions in UNCITRAL recognized that a sales transaction could have significant international dimensions and still not meet the Convention's strict test of internationality. For example, a contract between a seller and a buyer whose places of business are in the same State may require the seller to procure the goods by an international transaction or the buyer may contemplate reselling the goods in an international transaction; unity with respect to obligations in such "chain" transactions may be important for all parties. Early ULIS drafts that embraced such "chain" transactions were abandoned because it was impossible clearly to define this extended area. No problem of clarity arises when the parties have agreed to apply the Convention to their contract.<sup>[13]</sup>

### **<sup>◆</sup>83 (c) *International Transactions That Lack the Prescribed Contact With a Contracting State***

The Convention's rules on the relationship between the transaction and a Contracting State (Art. 1(1)(a) and (b)) are strict<sup>◆</sup> particularly for States that make a declaration under Article 95 rejecting sub-paragraph (1)(b). (See the Commentary to Art. 1.) As we have seen, the Hague Sales Conventions of 1964 applied to international transactions even though the parties and the transaction had *no* contact with a Contracting State<sup>◆</sup> an approach that was subject to objection on the ground that the Contracting States were forcing their law on parties in other States. This objection does not apply when the parties to an international sale elect to be bound by the Convention. The relevant issues may be illustrated by the following case: **[page 85]**

*Example 6B. A sales contract between Seller (whose place of business is in State A) and Buyer (whose place of business is in State B) provided that the Convention would apply to the contract. Neither State A nor State B is a Contracting State. The Convention has gone into force.*

This agreement would present no difficulty in legal systems that give full effect to the parties<sup>◆</sup> choice of law. What should be the fate of the agreement in States that require a "reasonable relationship" between the

transaction and the legal system chosen by the parties?

The above example is, to say the least, quite different from classroom examples of agreements that seek to invoke the law of a single, remote State. In Example 6B, the parties have referred to a set of rules approved, without dissent, by an international legislative body representing each region of the world; moreover, these rules were approved, again without dissent, by a diplomatic conference attended by all significant trading nations and are now in force in each continent and region of the world. The rules are readily available in the six official languages of the United Nations and are the subject of substantial international commentary. The burden on the tribunal that would result from applicability of the Convention would be much less than that involved in most cases where rules of private international law call for the application of foreign domestic law. In addition, international sales have special needs for uniform law that emphasize the need for effective party autonomy when they agree on the applicability of a uniform international rule.<sup>[14]</sup>

Suppose that a contract in an international sale provides: "This contract shall be governed by the 1980 Convention on Contracts for the International Sale of Goods." One writer suggests that this contract provision may not be effective since it does not invoke the law of the Convention as adopted by a specified State: the rule favoring party autonomy assumes that the law chosen is "that of a *particular* State".<sup>[15]</sup>

The reasons for this conclusion are not entirely clear. Invoking the Convention law of a designated State could avoid ambiguity over whether the parties intended to have the benefit of a reservation that a few of the Contracting States have made. In the unlikely event that the applicability of a reservation becomes relevant the problem can be solved by deciding whether conflicts (PIL) rules applicable to the transaction invoke the law of a State that has made the reservation. (Tribunals are **[page 86]** accustomed to resolving contract ambiguities more serious than this.) In other cases, when the parties make a general reference to the provisions of the Convention it seems reasonable to conclude that they desire the full application of the Convention. In short, there seems no adequate reason to frustrate the parties' wish to have their contract governed by a uniform law for international sales approved and implemented by countries in each region of the world.

#### ♦ 84 (d) "*Mandatory*" Rules

Rules of domestic law that are "mandatory" are not disturbed when the Convention becomes applicable by virtue of an agreement by the parties. When the Convention is applicable by the action of Contracting States, the terms of the Convention control the extent to which the Convention displaces domestic law; questions may arise as to whether the Convention addresses and displaces a rule of domestic law that in some States would be classified as "mandatory" (See *supra* at ♦79.) These questions cannot arise when the applicability of the Convention is based solely on the parties' contract unsupported by the action of Contracting States; in such cases the legal situation might be analogized to an agreement incorporating a standard contract whose terms duplicate the provisions of the Convention.<sup>[page 87]</sup>

## CHAPTER II.

### GENERAL PROVISIONS

#### (Articles 7♦13)

#### Article 7. Interpretation of the Convention

♦ 85 Article 7 responds to the fact that a Convention establishing uniform international law performs a unique and difficult function. Paragraph (1) emphasizes that this law must be interpreted with sensitive regard for its special character and purpose; paragraph (2) is designed to help the law adapt and grow in the light of new circumstances.

#### Article 7 <sup>[1]</sup>

"(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."

## ❖86 A. International Character; Uniformity

Paragraph (1) provides that in interpreting the Convention there shall be regard for two closely-related principles❖(a) the Convention❖s "international [page 88] character" and (b) "the need to promote uniformity in its application." How to give life to these principles deserves close attention.

### ❖87 (1) *The Problem of Diverse Connotations of Legal Terms*

We have reason to envy those who work in the physical sciences on phenomena that can be photographed and measured, while we must cope with disembodied concepts that have been shaped by diverse historical, economic and cultural conditions, and include concepts that have similar names but different meanings❖ *des faux amis*.[\[2\]](#)

The careful international draftsman tries to avoid abstract, disembodied concepts. For example, in the 1980 Sales Convention risk of loss passes to the buyer "when the goods are *handed over* to the first carrier" or (if the contract does not involve carriage) when the buyer " *takes over* the goods" (Arts. 67(1), 69(1))❖ more stable materials than ideas such as "property" or "title." The ideal is to use plain language that refers to things and events for which there are words of common content in the various languages. But this ideal is difficult to realize, and the principles of interpretation in Article 7(1) run counter to reflexes that have been deeply implanted by our education and professional life❖ the reading of a legal text in the light of the concepts of our domestic legal system, an approach that would violate the requirement that the Convention be interpreted with regard "to its *international* character."

If we are deprived of our most familiar tools, what resources remain for interpreting the Convention? This question was the subject of sixteen national reports, a general report and animated discussion at the Twelfth International Congress of Comparative Law (Australia, 1986); material developed at this Congress with respect to national and international practices will be cited frequently in this work.[\[3\]](#)

### ❖88 (2) *Legislative History*

To read the words of the Convention with regard for their "international character" requires that they be projected against an international background. With time, a body of international experience will develop through [page 89] international case law and scholarly writing. (This prospect will be explored *infra* at ❖92.) In the meantime, the only international setting for the Convention❖s words is its legislative history❖ its genetic background.

The family history of the Convention is rich and revealing. In preparing the Convention, UNCITRAL built on the work, spanning three decades, that produced the Hague Conventions of 1964 (ULIS and ULF). The deliberations in UNCITRAL would commence with an analysis of the handling of the problem in the 1964 Conventions. As we shall see, in many instances the Hague solution was retained; the discussions shed light on the common understanding of the Hague solution and the reasons for its retention. When the Hague approach was modified or rejected, the reasons for the change shed a revealing sidelight on the new provision. As the UNCITRAL draft developed, proposals to delete or amend were made and decided; the views that prevailed in making these decisions add depth to the international understandings that underlie the Convention❖s words.

To introduce this background material, the steps in the legislative process in UNCITRAL and at the Diplomatic Conference were summarized in the Overview, Ch. 1, at ❖❖9, 10. The [Bibliographic Notes](#) . . . introduced the legislative materials. And, in this Commentary, legislative history will be brought to bear on specific problems of interpretation.

The documents that embody this legislative history are reproduced (together with materials on other topics) in Volumes I-X of the UNCITRAL Yearbooks and in the Official Records of the 1980 Diplomatic Conference. As is common in an extended legislative process, the article-numbers of the drafts under discussion kept changing as provisions were added and deleted and as the draft's structure was reorganized. This repeated renumbering of the articles makes it very difficult to trace the development of a provision even when all the documents are at hand. Difficulties the present writer encountered in coping with these problems made it necessary to prepare a Documentary History that reproduces and introduces the relevant documents and provides references in the documents' margins to the final articles of the Convention for which the legislative deliberations were relevant.

[4] [page 90]

### 89 (a) *Domestic Law*

In domestic law we face a conflict over the legitimacy of legislative history. In many civil law countries the use of legislative history has long been accepted.[5] Courts in the United States also freely invoke the legislative history of domestic statutes and international Conventions. For example, a 1985 decision of the United States Supreme Court interpreting the Warsaw Convention on International Transportation by Air relied on the *travaux préparatoires* of the Convention and also "the weight of precedent in foreign and American courts"[6] (We shall return to the use of foreign precedent at 92, *infra* .)

Other legal systems primarily those following judicial patterns established in England have traditionally disavowed the use of such materials in statutory construction: the meaning of legislation must be deduced solely from the words of the statute.[7] However, the "plain meaning" rule has not been applied with the rigor that the traditional formulae might suggest. English courts have long interpreted legislation in the light of "the defect or evil" which the statute was intended to remedy, and have considered reports of special commissions to identify the purpose of legislation that resulted from the commissions' work. And a growing body of opinion holds that the "plain meaning" doctrine stultifies the handling of statutory material and should be modified or abandoned.

[8]

### 90 (i) *The Fothergill Case*

Controversy has centered on the interpretation of domestic legislation; our concern is with the interpretation of an international convention. In this setting, a slow process of development in English law took a large and decisive step in the 1980 House of Lords decision in *Fothergill v. [page 91] Monarch Airlines* a case that called for the interpretation of an Act of Parliament that gave effect to the Warsaw Convention on the liability of air carriers.[9] Under that Convention, notice must be given within seven days of "damage" (*avarie*) but no notice need be given as to "loss" with respect to baggage. A passenger failed to give this notice of the loss of part of the contents of a bag. Kerr, J., and the Court of Appeal rejected the airline's contention that the notice requirement applied to this claim. The House of Lords reversed. All five opinions conceded that "damage" would not normally refer to loss of part of the contents of baggage, but ruled that in this setting the word should be given a wider meaning. In reaching this conclusion, all of the opinions examined basic questions concerning the interpretation of statutes that implement international conventions; four of the five opinions concluded that consideration should be given to *travaux préparatoires*, and also to foreign case law and scholarly writing interpreting the Convention.[10] These opinions stressed that they could not lay down rules to govern all future problems. One question that may still be subject to further development is this: What materials may a court consider in deciding whether the language of a convention is ambiguous? In any event, it seems clear from the decision that in construing a convention, like the 1980 Sales Convention, that is finalized in several languages, the question of "clear meaning" would not be determined solely from the English text. In addition, a majority of the opinions drew attention to the rules on interpretation in the Vienna Convention on the Law of Treaties (1969).[11] [page 92]

Under Article 31 of the 1969 Vienna Convention:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."



Article 32 adds:

"Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

Under Article 32, supplementary aids, including travaux préparatoires, may be used when the terms of the treaty are "ambiguous or obscure" or when the language "leads to a result which is manifestly absurd or unreasonable" and also "to confirm" the meaning derived from the terms of the treaty. The opinions of Lords Diplock and Scarman indicated that, apart from the rules of the Vienna Treaty, interpretative aids could be used when there was a conflict between the literal meaning of the words and the purpose of the Convention.

In view of this development, it seems unlikely that even courts influenced by English judicial tradition will hastily decide that the words of a provision of the Convention are so clear that it is improper to look at the legislative history to ascertain the purpose of the provision. Indeed, the plausibility of the "plain meaning" approach depends upon its use within the confines of a system with established patterns for the use of language, strengthened by a symbiotic relationship between the approach to drafting and to interpretation. This essential feature of the "plain meaning" tradition was stressed by Lord Diplock, who added: **[page 93]**

"The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co., Ltd. v. Babco Forwarding & Shipping (U. K.) Ltd.* [1978] A. C. 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance'."

We shall consider, *infra* at [♦103](#), the difference between interpreting conventions in the field of public international law♦the issue at the forefront of the 1969 Vienna Convention on the Law of Treaties♦and the interpretation of rules regulating the relationship between sellers and buyers. In any event, the rule on interpretation in Article 7 of the 1980 Sales Convention avoids the vestige of the "plain meaning" rule of Article 31(1) of the 1969 Vienna Convention, just quoted, and in addition stresses the special role of the Sales Convention "to promote uniformity." Although the Warsaw Convention did not articulate this objective as a rule of interpretation, in the *Fothergill* case Lord Scarman made this powerful statement on interpreting a Convention to unify private law:

"Rules contained in an international convention are the outcome of an international conference; if, as in the present case, they operate within the field of private law, they will come under the consideration of foreign courts; and uniformity is the purpose to be served by most international conventions, and we know that unification of the rules relating to international air carriage is the object of the Warsaw Convention. It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting states. The mischief of any other view is illustrated by the instant case. To deny them this assistance would be a damaging blow to the unification of the rules which was the object of signing and then enacting the Convention. Moreover, the ability of our judges to fulfill the purpose of the enactment would be restricted, and the persuasive authority of their judgments in the jurisdictions of the other contracting states would be diminished."

### ♦91 (b) *Standards for Use.*

Legislative history (like vintage wine) calls for discretion. One who offers legislative materials as a guide to interpretation should show that they reveal the prevailing understanding of the delegates. [\[12\]](#) Cf. the Preamble ♦[475](#), *infra*.

Of course, a statement by one delegate does not establish a prevailing viewpoint and silence following a statement does not establish assent. A response may require consultation with ministries that is not feasible during debate on this issue; objections are often withheld because further discussion seems unproductive and time consuming.

The *Fothergill* decision illustrated the caution that may be needed in approaching legislative history. At the Hague conference on air carrier liability, two delegates offered an amendment that would have removed the ambiguity that led to the litigation, but withdrew their amendment stating (as the minutes showed) that this was on the understanding that the existing text had the meaning expressed in their amendment. Lord Diplock's opinion considered this legislative background "for what it [page 94] was worth" but noted that, based on his experience in such international conferences, he did "not attach any great significance" to this statement and added, "Machiavellism is not extinct at international conferences". On the other hand, most courts in the United States give great (and sometimes uncritical) weight to legislative history—an enthusiasm that, in the interest of uniformity in construing interpretation conventions, might well take into account the greater caution observed by courts in other countries.[13] In evaluating legislative history, consideration must also be given to the resistance to change that develops as the long processes of deliberation near the end. Thus, an amendment offered to clarify the text may not be accepted because some delegates believe the meaning was already adequately expressed; others would be glad for the clarification but fear that the new language would create drafting problems that could not be solved in the brief time that remains. In short, the legislators placed great stress on the words of the Convention. The only legitimate role of legislative history is to shed light on the meaning of the final text. But it would be hasty to refuse to look at the legislative history on the ground that the "meaning" of the text is "clear"; the setting in which language is used is an essential aspect of its meaning.

*Decisions on Legislative History.* Inter alia: GER, [OLG Frankfurt a. M., 13 U 51/92, 20 April 1994](#) (required quality of goods), UNILEX D. 1993-21; [LG Aachen, 41 O 111/95, 20 July 1995](#). See: Schlechtriem, Com. (1998) 63-64.

## 92 [(3)] *International Case Law and Scholarly Studies*

*Case Law.* Parties to international transactions will often have a choice among the *fora* of different countries. The settlement of disputes would be complicated and litigants would be encouraged to engage in forum shopping if the courts of different countries persist in divergent interpretations of the Convention. The Convention's requirement of regard for "uniformity in its application" calls for tribunals to consider interpretations of the Convention established in other countries.[page 95]

National reporters to the 1986 International Congress on Comparative Law (88, *supra*) reported substantial reliance on foreign decisions interpreting uniform laws and international conventions.[14] Use of foreign judicial decisions in the past has been inhibited by difficulties in obtaining and evaluating this material, which may be in a language unknown to counsel and the court. Special measures to meet this problem will be discussed in 93, *infra*. In addition, substantial aid should be provided by international scholarly writing reporting and analyzing case-law (*jurisprudence*) under the Convention. The widespread interest in the Convention has already generated an extensive body of international literature; scholarly writing will be stimulated further by decisions applying this uniform law.

A majority of the opinions in the *Fothergill* case concluded that consideration should be given to the judicial decisions (*jurisprudence*) in other Contracting States. The opinions suggest that a preponderant body of binding precedent in other Contracting States would be given great weight; otherwise, foreign decisions would be considered for the persuasive force of their reasoning. Lord Diplock's opinion drew attention to the fact that in some countries the decisions of even appellate courts were not "binding." The opinions did not consider whether attention should be given to the *probability* that other courts would follow such decisions—a view that would conform to Oliver Wendell Holmes's famous dictum: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." [15] Indeed, since the dramatic break with tradition of 1966, the House of Lords no longer regards that it is "bound" by its own decisions; the significant point is that the likelihood of an explicit overruling is exceedingly remote. It is true that, for historical reasons, many civil

law systems hold to the theory that courts are not "bound" by precedent but students of these legal systems report that court decisions and especially a body of case law have predictive value that is not significantly different from that in some common-law systems. For example, Ernst Rabel has remarked that, in practice, "one [page 96] must look for the difference between the German...and American systems of precedent with a magnifying glass." [16] Lord Scarman's opinion included this strong general conclusion: "Our courts will have to develop their jurisprudence in company with the courts of other countries from case to case, a course of action by no means unfamiliar to common law judges." [17]

*Scholarly Writing.* Courts on the Continent of Europe and in the United States (*inter alia*) give weight to scholarly writing (*doctrine*). This receptivity, at least in the United States, has responded to the wide range of materials, in addition to statutes and past decisions, that have become relevant to judicial development of the law. Although English judges have been reluctant to use scholarly writing, [18] the need for uniformity in interpreting international conventions led to a more liberal approach. In the *Fothergill* case all of the opinions gave careful attention (but varying weight) to scholarly writing on the Warsaw Convention. Lord Diplock's approach was perhaps the most cautious:

"To a court interpreting the Convention subsequent commentaries can have persuasive value only: they do not come into the same authoritative category as that of the institutional writers in Scots law. It may be that greater reliance than is usual in the English courts is placed upon the writings of academic lawyers by courts of other European states where oral argument by counsel plays a relatively minor role in the decision-making process. The persuasive effect of learned commentaries, like the arguments of counsel in an English court, will depend upon the cogency of their reasoning. Those to which your Lordships have been referred contain perhaps rather more assertion than ratiocination, but for the most part support the construction favoured by your Lordships." [19]

On the other hand, the statement by Lord Scarman, quoted *supra* at 90, looks towards the development of a more unified international approach to the process of interpreting international conventions. [page 97]

### 93 (4) *Access to International Materials*

UNIDROIT has performed a service to the international legal community by publishing case law interpreting important conventions that unify rules of private law. [20] At its 1988 session, UNCITRAL established procedures for gathering and disseminating decisions applying the Sales Convention and other uniform laws prepared by the Commission. Each State that is a party to the Convention is requested to designate a "national correspondent" to obtain and send to the UNCITRAL Secretariat the full text of the decisions in their original languages; the Secretariat will make these decisions accessible to any interested person. [21] (The Secretariat, on request, will send copies of the decisions on payment of the cost of this service.)

The Commission observed that the cost of translating and publishing the full texts of decisions in the six official languages of the United Nations would exceed available resources, and noted that it would be desirable for publishers in the various countries to publish the original decisions in full regardless of whether they were in one of the official languages of the United Nations. (Publishers, individually or in cooperation, may also find it practicable to publish translations of the decisions in one or more languages.)

The Commission also provided for U.N. dissemination of information about the decisions. The "national correspondents" are requested to prepare abstracts of decisions emanating from their country. These abstracts, prepared in one of the U.N. official languages, are translated by the U.N. into the other official languages and are published as part of the regular documentation of the Commission. (The volume of decisions may well call for semi-annual or quarterly interim reports; presumably arrangements can be made to transmit these reports to interested persons.) [22] [page 98]

## 94 B. Interpretation of the Convention to Promote Good Faith in International Trade

### (1) *Evolution of the "Good Faith" Provision*

Paragraph (1) of Article 7 concludes with the statement that in interpreting the Convention there shall be regard for promoting "the observance of good faith in international trade" — a point that did not appear in the rules on interpretation of the other UNCITRAL Conventions. At a late stage in the preparation of the Sales Convention this language was adopted as a compromise between two divergent views: (a) Some delegates supported a general rule that, at least in the formation of the contract, the parties must observe principles of "fair dealing" and must act in "good faith"; (b) Others resisted this step on the ground that "fair dealing" and "good faith" had no fixed meaning and would lead to uncertainty.

The first important step towards a "good faith" provision was taken by the Working Group in preparing a separate Draft Convention on Formation of the Contract. Article 5 of the Draft included the following: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith." In 1978 the Commission, in its final review of the draft Convention, decided that a "good faith" provision should not be confined to formation of the contract; at the same time, the Commission decided that an obligation of "good faith" should not be imposed loosely and at large, but should be restricted to a principle for interpreting the provisions of the Convention. This compromise was generally accepted and was embodied in the concluding words of Article 7(1).<sup>[23]</sup>

National legislation has imposed requirements of "good faith" that are broader than the principle of interpretation stated in Article 7(1). The (U.S.A.) Uniform Commercial Code states: "Every contract or duty within this Act imposes a duty of good faith in its performance or enforcement."<sup>[24]</sup> [page 99]

This general requirements of "good faith" is not typical of common-law statutory drafting; the UCC at this point reveals the unstated influence of some of the civil law codes. The German Civil Code (§242) states: "The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage." (Other examples are cited in a footnote.) And common-law jurisdictions may be increasingly receptive to such legal ideas. The Ontario Law Reform Commission, on the basis of a comparative study, concluded that a revision of the Sale of Goods Act should include a general good faith requirement.<sup>[25]</sup> As we have just seen, the Convention rejects "good faith" as a general requirement and uses "good faith" solely as a principle for interpreting the provisions of the Convention. What content should be given to "good faith" as an aid to interpretation? The Convention's goal "to promote uniformity" should bar the use of purely local definitions and concepts in construing the international text. (See *supra* at §87). But this objection does not apply to "good faith" principles that reflect a consensus — a "common core" of meaning — in domestic law. One may hope that the scholarship in this area will be developed further with special reference to the application of "good faith" principles to issues that arise in international trade.<sup>[26]</sup>

### §95 (2) Possible Areas for Interpretation to Promote "Good Faith"

For reasons that will be developed later, "good faith" probably would be promoted by a liberal application of provisions like Articles 19(2) and 21(2), which require a party to inform another who is known to be subject to a misapprehension. (See *infra* at §100) One who demands performance within an additional period (Arts. 47 & 63) may not, in good faith,<sup>[page 100]</sup> refuse to accept the performance that he requested. (See the Commentary to Art 47, *infra* at §291.) Delay in compelling specific performance or avoiding a contract after a market change or construing ambiguous acts as acceptance — situations that could permit a party to speculate at the other's expense — may well be inconsistent with the Convention's provisions governing these remedies when they are construed in the light of the principle of good faith. (See the discussion of the time for acceptance, *infra* at §144 and Art. 46, *infra* at §285).<sup>[27]</sup> These illustrations, of course, are incomplete and tentative.

Professor Schlechtriem has suggested that "good faith in international trade" should be construed in the light of the Convention's many references to standards of reasonableness — a standard that is so pervasive as to establish this as one of "the general principles on which [the Convention] was based".<sup>[28]</sup> What is "reasonable" can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade. This approach is analogous to and is supported by Article 9, which provides that contractual obligations include "practices established by the parties and usages...in the particular trade". A similar linkage among "good faith",



reasonableness and trade usage is found in (U.S.) UCC 2-103(1)(b): "good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

*Decisions on the Obligation of "Good Faith" (Art. 7(1): ARB. [Hung. C. of C., VB/94124, 17 November 1995](#) (expired bank guarantee was a violation of good faith). UNILEX D.1995-28.2. Cf. AUSTRALIA, [CA. N.S. Wales, Renard C. v. MPW, 12 March 1992](#) (influence of "good faith" (CISG 7(1)) on domestic law) UNILEX D. 1992.7. See also: [Klein, J., Good Faith in Int. Tr., 15 Liverpool L.R. 114-141 \(1993\)](#); Schlechtriem, Com. (1998) 66-68.[page 101]*

## 96 C. Gap-filling: "General Principles" v. Domestic Law

### (1) Evolution of the Approach to Gap-filling

Article 7 (2) addresses the following problem: A matter that is "governed by" the Convention presents a question that is not "expressly settled in it." How should such questions be decided?

Paragraph (2) was added at a late stage as a compromise between divergent views. The view that prevailed at the 1964 Sales Convention was stated as follows in Article 17 of ULIS:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

This provision reflects the approach established for civil law codes which were designed to displace the entire body of pre-existing law. To discourage the revival of outmoded and non-uniform rules of the *ancien régime*, solutions must be anchored in an article of the code—an approach that led to creative extension by analogy of the code's provisions to meet the myriad of new problems that arose during the following centuries.<sup>[29]</sup> In common law systems abrupt legal change has usually come through narrow, specific statutes that resemble islands surrounded by an ocean of case-law. On the other hand, case-law has developed in a manner that resembles the analogic development of the civil codes: the principles on which the older cases were based are enlarged or reshaped in the course of applying them to new situations.

Even ambitious legislation like the (U.S.A.) Uniform Commercial Code is not a self-contained body of law. At the outset (2-103) this "code" states that, unless displaced by its "particular provisions", the "principles of law and equity [a phrase understood to refer to the general body of case-law]...shall *supplement* its provisions". The vital role of these supplemental principles in the development of the "Code" has been documented in an impressive study of over a thousand pages.<sup>[30]</sup> It is not surprising that the "general principles" provision of ULIS 17 encountered criticism in UNCITRAL. Nor were all of the critics from common law systems; delegates from some countries with codes stemming [page 102] from civil law roots had also developed traditions that emphasized legislative detail and strict construction.

In the UNCITRAL Working Group, objections to ULIS 17 that had been voiced (unsuccessfully) at the Hague Conference were pressed with added vigor: The "general principles" on which the law was based had never been articulated; ULIS 17 injected an unacceptable degree of uncertainty. Supporters of ULIS 17 replied that filling "gaps" by turning to domestic law would involve even greater uncertainty. The rules of private international law were neither clear nor uniform; hence there would be doubt and dispute over which law was applicable. In addition, the domestic law would be foreign to one of the parties, and in most cases would be unsuited to the problems of international trade. Finally, referring gap-filling to the diverse rules of domestic law would never lead to a uniform solution, whereas recourse to the general principles of the Convention in international case law would develop common answers for the questions that arise within the scope of the law.<sup>[31]</sup> In 1970 the Working Group recommended that Article 17 of ULIS be replaced by a provision that the law shall be interpreted with regard "to its international character and the need to promote uniformity" (See Art. 7(1) *supra* at 85). This position was maintained throughout the balance of the proceedings in UNCITRAL. The Commission rejected further proposals to include modified versions of ULIS 17 and also rejected the counter-proposals that problems resulting from "gaps" should be decided under domestic law indicated by the rules of private international law.<sup>[32]</sup> The 1980 Conference developed a compromise that became paragraph (2) of Article 7. In response to those



who feared that courts might turn too quickly to national law, the first part of paragraph (2) reproduced the "general principles" rule of ULIS 17. On the other hand, in response to those who doubted that general principles of the Convention could always be found, paragraph (2) added that "in the absence of such principles" open questions are to be settled "in conformity with the law applicable by virtue of the rules of private international law." [33] [page 103]

### ❖97 (2) *The Nature of "Gaps"; Solutions in Domestic Law*

The Overview (Ch. 2, ❖18) drew attention to the inability of any statute to address and solve all the circumstances and problems that will arise. This is especially true for the 1980 Convention since it cannot be revised frequently and must embrace the gamut of transactions and conditions that will arise in a diverse and developing international economy.

Draftsmen of national codes have recognized this problem. Portalis in his preliminary discourse on the French Civil Code observed that the legislator must take "a large view of the matter" by "principles rich in implication" rather than details. "We shall leave some gaps, and they will be filled in due course by experience. National codes are created in time; indeed, people do not really create them at all." [34] This development occurred under the French Civil Code, unaided by explicit authorization to fill gaps. Other statutes have expressly granted this authority. For example, the Uniform Commercial Code states (❖1❖102(1)) that it is to be "liberally construed and applied to promote its *underlying purposes and policies*." Under the Austrian General Civil Code "Where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles which underlie other laws regarding similar matters." [35] On the other hand, in 1978 this approach was rebuffed by the House of Lords in *Buchanan & Co. v. Babco Forwarding and Shipping*. [36] In the Court of Appeal, Lord Denning, in construing an act of Parliament that implemented an international convention, had concluded that the legislation was subject to a "gap," and that English courts should follow the approach of courts on the Continent, including the EEC Court of Justice, and fill the gap so as [page 104] to carry out the purpose of the legislation. A majority of the House of Lords, in affirming the decision of the Court of Appeal, commented adversely on the "gap-filling" approach. The legislation in question did not contain a provision on interpretation; a court construing the Sales Convention should be led by Article 7(2), *supra*, to take a broader view of the process of interpretation.

### ❖98 (3) *The Area for Gap-Filling: "Matters Governed by" the Convention*

#### (a) *Areas excluded.*

Article 7(2) provides for the use of general principles of the Convention only with respect to unsolved questions "concerning *matters governed by* this Convention." In examining Article 4 (*supra* at ❖64), we saw that the Convention governs only some of the issues that may arise in an international sale. Thus, the Convention specifically excludes issues concerning the validity of the contract (Art. 4(a)) and the effect of the contract on the property in the goods (Art. 4(b)). Nor does the Convention govern rights based on fraud or the capacity of an agent to bind the principal❖vital but complex bodies of law which this Convention could neither supplant nor restate; unification in these areas must await the completion of separate conventions. (See Art. 4, *supra* at ❖65❖66.) Since these areas are not "governed" by the Convention they are beyond the reach of "gap-filling" under Article 7(2). [37]

### ❖99 (4) *General Principles on which the Convention is Based: Examples and Problems*

#### (a) *Reliance on Representations of Other Party: Domestic Law ("estoppel" etc.) v. "General Principles" of Convention.*

We now face a significant problem that can best be considered in a specific factual setting.

*Example 7A. In a transaction governed by the Convention, Buyer ordered Type A fiberboard from Seller. After this fiberboard had arrived but before Buyer put it to use Buyer asked Seller whether the material had been tested for resistance to fire. Seller consulted its records and, by an innocent error, transmitted to Buyer the results*

*of tests of Type B, which was fireproof. Buyer, relying on this report, used the materials in constructing a building. Thereafter, Buyer learned of Seller's error and had to reconstruct the building. Is Seller responsible to Buyer for the added costs? [page 105]*

Since Seller's statement occurred after the making of the contract and the delivery of the goods, it might be difficult to conclude that the seller failed to "deliver goods which are of the...quality...required by the contract" (Art. 35) or (by the same token) that the buyer's loss was "a consequence of the breach" (Art. 74). The buyer might contend that, under Article 29, the contract had been "modified" by "agreement of the parties," but not all courts would so characterize the above exchange of communications that followed the delivery of the goods. To be sure, a court might well extend the concept of "agreement" to include a supplementary representation by the seller on which the buyer relies. But this, in substance, would be an analogical extension of Article 35 to carry out the "general principle" on which this provision was based, even though the court might not refer to Article 7(2).

In the above problem should one conclude that the seller's responsibility for his representation about the goods was not "governed" by the Convention? In this event the tribunal must seek (via the rules of private international law) some rule of domestic law dealing with responsibility for representations. In the common-law world this might lead to the doctrine of "estoppel," which bars a person from contradicting a representation on which another person has reasonably relied. If this were a transaction within the United States, "estoppel" would be available to supplement the provisions of the Uniform Commercial Code. However, in international transactions reference to domestic law has special problems—the uncertainties of the rules of private international law, the difficulty of ascertaining foreign law and the possible incongruity between pieces of domestic law and the overall plan of the Convention.

Is there a "general principle" underlying the Convention that would make one party responsible to the other for his representations that relate to the contract but are not explicitly a part of the agreement? As we have seen, the representation made in Example 7A may fall just outside Article 35, which defines the seller's responsibility for quality. Is Article 35 based on a larger premise—that one party should be entitled to rely on expectations created by the other?

One must be cautious about such an extension of an article of the Convention. Article 35 refers to conformity with "the contract": Would application of the Article's provisions outside the technical area of the "contract" violate a decision that the Convention should not touch non-contractual representations?

To answer this question, we need to examine other provisions of the Convention. For example, we find that Article 16(2)(b) protects a party who "has acted in reliance" on an offer in the reasonable belief that it was [page 106] irrevocable. Article 29(2) provides that when a contract in writing requires that any modification also be in writing, "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." And under Article 47, a buyer who (in effect) invites late performance by the other party must accept the invited performance. In sum, various provisions of the Convention are inconsistent with a technical and narrow view of "contract" and evince a broader view of the relationship between the parties to a sales transaction.

Our principal purpose here is not to solve Example 7A but to illustrate the problems and possibilities presented by Article 7(2). Further light may be cast on this article by considering whether other groups of provisions evince a "general principle."

## ❖100 (b) Communications

A theme that underlies numerous articles of the Convention is the duty to communicate information needed by the other party—a recognition that the consummation of a sales transaction involves interrelated steps that depend on cooperation. Article 19(2) requires an offeror to draw the offeree's attention to modifications in an offeree's acceptance to which the offeror objects. Article 21(2) requires an offeror to inform an offeree of a delay in the transmission of an acceptance if the offeror concludes that the acceptance arrived too late. Article 26

provides that avoidance of a contract must be notified to the other party. Article 39(1) requires the buyer to notify the seller of defects in the goods so the seller can test the goods to ascertain whether they are defective and take steps to cure the defects. Under Article 48(2) the buyer must respond to an inquiry as to whether he will accept late performance. Article 65 requires a buyer to respond to a request for missing specifications for the goods. When the parties make a contract covering goods that are then in transit, under Article 68 the seller is obliged to disclose transit damage that has occurred. Communication of needed information is required if a party suspends performance because of impending failure of counterperformance (Arts. 71(3) & 72(2) or because of excuse arising from a supervening impediment (Art. 79(4)). And under Article 88(1), a party intending to resell goods of which the other party has failed to take possession must give reasonable notice of this intent.

Although numerous specific situations are covered by the above articles, it would have been difficult to anticipate and specify all of the circumstances in which communications are needed. These provisions may well evince a general principle calling for communication of information that is obviously needed by a trading partner in situations that are closely [page 107] analogous to those specified in the Convention.[38] (Provisions evincing a duty to cooperate are listed at [323](#) and [342](#) (n.2).)

### ❖101 (c) *Mitigation*

The Convention also includes several specific provisions that respond to the principle that one party should take steps to avoid deterioration of goods and thus avoid unnecessary hardship on the other party, even when that party has sent defective goods or otherwise has failed to perform the contract. Article 77 lays down the general rule that a party who relies on a breach of contract must take reasonable measures to mitigate the loss resulting from the breach. This general principle for the reduction of waste is applied in specific situations: The seller must take reasonable steps to preserve goods when the buyer is late in taking delivery (Art. 85), and the buyer has a similar duty to preserve non-conforming goods which he intends to reject (Art. 86). Situations may well arise that call for the application of the general principle that underlies these specific provisions.[39]

### ❖102 (d) *General Approach: Boldness v. Restraint*

The above examples (❖❖99❖101) illustrate an approach that was designed to reconcile the two competing values embodied in Article 7(2): (1) That the Convention should be developed in the light of its "general principles" and (2) that this development would be subject to limits. This approach responds to the reference in Article 7(2) to the principles on which the Convention "is based" by requiring that general principles to deal with new situations be moored to premises that underlie specific provisions of the Convention. Thus, like the inductive approach employed in case law development, the first step is the examination of instances regulated by specific provisions of the Convention. The second step is to choose between these two conclusions: (a) The Convention deliberately rejected the extension of these specific provisions; (b) The lack of a specific provision to govern the case at hand results from a failure to anticipate and resolve this issue. If the latter alternative applies, the third step is to consider whether [page 108] the cases governed by the specific provisions of the Convention and the case at hand are so analogous that a lawmaker would not have deliberately chosen discordant results for the group of similar situations. In this event, it seems appropriate to conclude that the general principle embracing these situations is authorized by Article 7(2). In sum, the approach involves the analogical application of specific provisions of the Convention.[40]

The language of Article 7(2) reflects the decision to narrow the scope of ULIS 17 (❖96, *supra*) which authorized tribunals to find (or create) general principles to settle every problem that is not governed expressly by the Convention. More important, the approach illustrated above calls for the development of the Convention subject to the discipline imposed by analyzing the provision of the Convention and by examining the closeness of the analogy between the cases governed by those provisions and the case at hand.

Article 7(2) presents a delicate balance between (1) developing the Convention's general principles and (2) recourse to domestic law❖a choice that inevitably will be influenced by the traditions and mindset of the tribunal. As we have seen (❖96), civil law practice is generally hospitable to the first alternative and common law to the second. Which is more compatible with the objectives of the Convention?

This writer, although nurtured in the common law, has come to believe that international unification calls for us to reexamine our traditional approach. Invoking domestic law under the Convention has more serious consequences than invoking common law principles to solve problems under a statute in a common law jurisdiction. Even in dealing with a statute designed to unify law among the states of a common-law country, references to general common-law principles do not seriously undermine the statute's objective to achieve uniformity for the common law principles stem from common roots. Within the Commonwealth, respect for decisions in England and in other Commonwealth jurisdictions limits the degree of disharmony; in the United States a strong unifying influence is exerted by the periodic Restatements of the law.<sup>[41]</sup> This degree of unity is **[page 109]** not found among the domestic laws of the many States of diverse legal systems that have adopted the Convention. Nor will references to domestic law contribute to a body of international case-law under the Convention. Thus, a generous response to the invitation of Article 7(2) to develop the Convention through the "general principles on which it is based" is necessary to achieve the mandate of Article 7(1) to interpret the Convention with regard to "the need to promote *uniformity* in its *application* ."

In cases of doubt, a proposed application of a general principle may be tested against applicable trade usages (Art. 9, *infra*, at <sup>112</sup>) and against contract practices and modern rules of law specially designed for international transactions. Later in this book, examples of modern contract practices serve to illustrate the Convention's general rules on risk of loss (Art. 67) and on exemption from damages when performance is prevented by an impediment (Art. 79). In addition, the rules of interpretation of Article 7(1), *supra*, call for guidance based on the experience of other Contracting States.

In sum, a response to the Convention's invitation to consider its "general principles" before turning to domestic law can minimize the confusion inherent in conflicts rules and avoid the uncritical and wooden application of scraps of domestic law that were developed without regard for the special needs of international trade. The "general principles" alternative offered by Article 7(2) can help the Convention, through international case law and scholarly writing to live as uniform law that responds to changing circumstances.<sup>[42]</sup> Other examples of this approach are given *infra* at <sup>148</sup>, <sup>151</sup>, <sup>156</sup> (n. 5), <sup>177</sup>, <sup>342</sup> (n. 2).

*Decisions on General Principles* (Art. 7(2)): (1) GER. [OLG Düsseldorf, 17 U 73/93, 2 July 1993](#) (CISG 57(1) (a): basis for principle on place for paying) UNILEX 1993<sup>21</sup>. (2) FR. [CA Grenoble, 23 October 1996, SCEA v. Soc. Teso](#); general principle deduced from Art. 57 when facts were the converse of Art. 57(1)(a) (Seller rather than buyer required to pay; see Art. 57 *infra*), UNILEX 1996-10. (3) SWITZ. [HG Zürich, U.HG93, 9 September 1993](#) (B has burden to prove lack of conformity) UNILEX D. 1993-22; (4) ARB, [Austria, Wien, SCH-4318, 15 June 1994](#) (estoppel- *venire contra factum proprium*: S's conduct led B to believe S would not rely on B's delay in giving notice of defects (UNILEX D. 1994-13. (5) ARB. [ICC, \[page 110\] Paris, 8/28/1995](#) (general principle on interest rate, based on UNIDROIT Principles, Art. 7.4.9.).

See also: [Hellner, J., Gap-filling by Analogy, in Ramberg \(ed.\) Festschrift: Hjerner \(Stockholm, 1990\) at 219-233](#); [Rosenberg M.N., Australia Bus. L.R. 442 \(1992\)](#); [Callaghan, J.J., Gap-filling: Two French Decisions, 14 JLC 183<sup>208</sup> \(1995\)](#); [Koneru, P. 6 Minn. J. Global Tr. 105<sup>152</sup> \(1997\)](#); [Volken P., Dubrovnik Lectures, 19<sup>53</sup>](#); See: Schlechtriem, Com. (1998) 66<sup>68</sup>; in general (Art. 7) *id.*, 59<sup>68</sup> (Huber).

## **103 D. Special Role of the Sales Convention**

### ***(1) Interpretation of the Sales Convention and the Rules on Interpretation of Treaties in the 1969 Vienna Convention***

Students of public international law may wonder why this discussion of the interpretation of the Sales Convention has not given more attention to the 1969 Vienna Convention on the Law of Treaties and its important rules on the interpretation of treaties.<sup>[43]</sup> To what extent are these rules applicable to the Sales Convention?

The question calls for distinctions between different types of Conventions and, more precisely, between different parts of the same Convention. The 1969 Vienna Convention is concerned with the obligations of Contracting States to each other. The 1980 Sales Convention, of course, creates such obligations among the Contracting



States primarily to give legal effect to the rules on international sales that are set forth in Part I III of the Convention (Arts. 1 88).

The obligations of the Contracting States to each other are centered in Part IV Final Provisions. These include: procedures for adherence; rules on reservations whereby a Contracting State may limit its obligations under the Convention; rules governing denunciation of the Convention. All of these provisions of the 1980 Sales Convention should be construed in the light of the 1969 Vienna Convention.

Most of the provisions of the Sales Convention (Arts. 1 88; Parts I III) deal with a very different matter the obligations not of States [page 111] but of the parties to a contract for the sale of goods. With respect to these provisions the Sales Convention states its own rules of interpretation (Art. 7, *supra*). Not surprisingly, these rules call for a more flexible approach than would be acceptable for rules defining the obligations of States. This flexibility is epitomized by the fact that virtually all of the provisions of Parts I III (Arts. 1 88) yield to the contract made by the seller and buyer; in short, the heart of the Sales Convention is the contract of sale. Moreover, as we shall see, the Sales Convention provides that (unless the parties agree otherwise) contracts between sellers and buyers may be made orally (Art. 11) and are to be interpreted against a wide range of circumstances, including negotiations, past practices and trade usages (Arts. 8(3), 9(2)). In contrast, the 1969 Vienna Treaty provides that a "treaty" must be "in written form" (Art. 2 1(a)) and lays down elaborate rules on the authority to represent a State (Arts. 7 8) and on how a State may express its consent to be bound (Arts. 11 17). Consistent with this level of formality, the rules on the interpretation of treaties (Arts. 31 33) reflect the magnitude and complexity that are associated with the obligations of States. These rules are not appropriate for sales contracts and are quite different from the rules of interpretation in Article 7 of the Sales Convention.

In sum, rules of interpretation in the 1969 Vienna Treaty are pertinent to the obligations under the 1980 Sales Convention that the Contracting States undertake to each other, but are not pertinent to the rules relating to the mutual obligations of the parties to the contract of sale.[44]

### 103.1 (2) *The Character and Texture of the Rules*

There is perhaps one principle of statutory interpretation that has general support: One must take account of the character and texture of the law. For example, a code that lays down general principles to cover a wide variety of transactions and is expected to endure, calls for an approach very different from tax laws and similar legislation that is written in great detail and is subject to frequent legislative adjustment.[page 112]

Even international conventions differ widely in their legislative texture. As we have just seen (103), public law conventions that seek to control the conduct of governments in sensitive areas have led to stricter rules of interpretation than uniform rules for private commercial transactions. Nor are private-law conventions all cut from the same cloth. Some deal with a narrow issue (e.g., the 1958 Convention on Recognition and Enforcement of Arbitral Awards) or with a relatively narrow and specialized field (e.g., conventions on the liability of a specific type of carrier). These specialized laws may include detailed provisions that leave little room for interpretation.

What is the character of the Sales Convention? Even here we must draw distinctions for different parts of this law have different textures providing different degrees of leeway for interpretation.

Some of the more "sharp-edged" provisions deal with the Convention's sphere of application: E.g. Articles 1(1) (a), 2 and 5 (*supra* 45, 47, 49 55, 71 73). In this area precise drafting and strict construction are useful: doubt about the applicability of the Convention produces uncertainty as to all of the problems governed by the Convention. Comparable precision, for the same reason, characterizes Part IV, Final Provisions (Arts. 89 101) on the date of entry into force, reservations, and the like.

Most of the rest of the Convention has a very different scope and texture. The substantive sales provisions (Parts I III, Arts. 14 88), in nine printed pages (O.R. 179 188) state principles for resolving the wide range of problems that may arise in the making and performance of sales contracts. The Contracting States vary widely,



and their international trade includes transactions of almost infinite variety: ♦as to types of goods (ranging from raw materials to computers), arrangement for transport, payment, documentation and compliance with government requirements at point of origin and receipt, single-delivery and long-term transactions, and so on...

This does not suggest that the international sales law could or should have been drafted with greater detail; detailed rules for some situations would have created problems of classification and of doubt about the applicability of the Convention ♦s general principles. See ♦26, *supra* . In addition, during the life of the Convention the problems resulting from excessive detail will increase with the development of new commodities and commercial arrangements. Such a general code has a long life expectancy. Preparing the present uniform law required over a decade; substantial world-wide adoption has required a further decade. If serious problems should develop UNCITRAL could prepare a protocol of amendment [page 113] but most, if not all, of the provisions of the present uniform law probably must serve for several decades in a world of accelerating change.

### ♦103.2 (3) *Texture of the Convention and Approaches to Interpretation*

The above facts do not suggest that the domestic tribunals of the world have a free hand in adjudicating cases that are subject to the Convention. Although this uniform law (like national codes that have endured) was drafted in terms of general rules, these rules embody important choices ♦choices that can be appreciated fully only in the setting of the legislative history in which alternatives were proposed, discussed and rejected. Fidelity to these choices is the essence of the commitment that Contracting States make to each other: We will apply these uniform rules in place of our own domestic law on the assumption that you will do the same.

Consistent with this basic obligation of fidelity, the Convention ♦s general rules for a diverse, complex and developing field should not be applied narrowly but should be given full effect to achieve their underlying purpose as shown by the structure of the Convention and its legislative history.[45] At this point several of Article 7 ♦s rules of interpretation converge: (1) Regard for the Convention ♦s "international character" requires sensitive response to the purposes of the Convention in the light of its legislative history rather than the preconceptions of domestic law (♦88, *supra*); (2) Response to "the need to promote *uniformity* in... *application*", which (together with point (1), *supra* ) calls for consideration of interpretations developed in other countries through adjudication (*jurisprudence*) and scholarly writing (*doctrine*) (♦93 *supra*); (3) Regard for "the observance of *good faith* in international trade", a principle that in conjunction with point (1), *supra* and point (4), *infra*, can resist stultification and circumvention of the Convention ♦s rules (♦♦94♦95, *supra*); and (4) Questions not expressly settled by the Convention should be answered, when possible, "in conformity with the *general principles* on which it is based", an approach that reinforces regard for both the Convention ♦s "international character" (point (1), *supra*) and "the need to promote *uniformity* in application (point (2), *supra*) by minimizing recourse to divergent rules of domestic law (♦102, *supra*).[page 114]

## Article 8. Interpretation of Statements or Other Conduct of a Party

♦104 Article 7 dealt with interpretation of the *Convention*; the present Article deals with the interpretation of the statements and conduct of the *parties*.

### Article 8 [1]

"(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."

## ❖ 105 A. The Function and Scope of Article 8

In discussing Article 7 (❖ [103.1](#), *supra*), attention was drawn to the need to apply rules for *statutory* construction with close attention to the [\[page 115\]](#) character of the statute and the texture of the statutory provision in question. This principle applies with even greater force to Article 8's rules for the interpretation of *contracts*. Article 7 on interpretation of the Convention was drafted by the body that drafted the language of the Convention to which Article 7 applies; the provisions of Article 8 on the interpretation of contracts apply to language used by others❖ private parties acting in a remarkably wide variety of situations. The settings range from brief telephone or telex communications for small or routine purchases to detailed contracts negotiated for large and complex transactions. The provisions of Article 8 apply and are relevant to these various types arrangements but have special significance for agreements that have not resulted from detailed negotiations; even detailed agreements are often modified by informal communications.[\[2\]](#) Article 8 is also applicable to questions of interpretation that arise under the contract when the contract is made by an exchange of communications and also when the parties join in executing a single instrument.[\[3\]](#) And, since Article 8 is broadly applicable to "statements made by and other conduct of a party," it reaches post-contract communications and actions, many of which have legal effect and may raise significant problems of interpretation.[\[4\]](#) [\[page 116\]](#)

## ❖ 106 B. Basic Approaches to Interpretation: Subjective Intent v. Objective Meaning

In preparing the present article, UNCITRAL had to face and reconcile conflicting theories about the fundamental nature of the process of contracting. According to one early theory, a person should be bound by contract only when he subjects his "will" to the terms of the contract. In some legal systems this contributed to the view that one's obligation was defined by his "intent" or "consent," or that making a contract required a "meeting of the minds."[\[5\]](#)

The image of a meeting of two minds is attractive but it raises practical difficulties. When a dispute arises over the "meaning" of a contract, the contending parties are scarcely reliable witnesses as to what was in their minds when they made the contract. Moreover, language is such an imprecise medium that shades of differences of understanding are latent in many of the agreements on which commerce depends; a purely "subjective" approach could undermine protection for reasonable reliance on expectations created by another.

These difficulties led many jurists and legal systems to reject "intent" as a basis for the contract. This view was vigorously expressed by Oliver Wendel Holmes: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct."[\[6\]](#) Some legal systems, while clinging to the "subjective" or "mutual intent" theory, have limited this approach to prescribed categories, and have devised remedies to protect a "speaker" when the "hearer" knew or should have known of the ambiguity.[\[7\]](#) However, for the most part, current references to "will" as the basis for contract resemble the echoes of distant thunder from a storm that has passed.[\[page 117\]](#)

### ❖ 107 (1) The Approach of Article 8

Paragraph (1) is built on the "subjective" approach: Interpretation is to be based on a speaker's "intent"❖ but only "where the other party knew or could not have been unaware" of the intent. However, because of the practical barriers to proving identity between the intent of the two parties (particularly when they are involved in a controversy) most problems of interpretation will be governed by paragraph (2) which follows the "objective" approach: Statements by a speaker (Party A) "are to be interpreted according to the understanding that a *reasonable person* of the same kind as the *other party* " (Party B) " *would have had* in the same circumstances."

FR. [CA Grenoble, RG/3275, 22 February 1995. SARL Bri. "Bonaventure" v. SPAE](#). S "could not have been unaware" of B's intent to resell in France; consequently, S was bound to follow French standards. CLOUT 154, UNILEX D. 1995♦7. See: Schlechtriem, Com. (1998) 71♦72.

### ♦107.1 (a) Article 8(2) and Protective Legislation

Article 8(2) places the burden on one who prepares a communication or who drafts a contract to communicate clearly to a reasonable person in the same position as the other party. This provision has roots in the classic rule that doubts are to be resolved against the drafter (*contra proferentem*), but the application of this principle has special significance in international sales. When the parties are based in different language and legal settings, the party who makes a proposal must avoid using expressions that are obscure, or, even worse, are "false friends" (*des faux amis*) with one "clear" meaning to the one who writes and a different "clear" meaning to the one who reads. These problems, intrinsic to language, rise to a higher power in our area through the use of legal terms with different meanings in different legal cultures ( e.g., "warranty", "condition", "disclaimer", "trust") and mercantile terms with divergent meanings in different areas or settings. CISG 8(2) does not, of course, give binding effect to what the listener or reader (Party B) personally understood but, instead, to the understanding of "a reasonable person of the same kind " as the "other party"♦a principle that responds to the fact that only the one who communicates has an opportunity to consider and choose among alternative modes of expression and also takes account of a drafter's opportunity to hide an unpleasant meaning through "the intellectual superiority of the legal virtuoso".[8] [page 118]

Article 8(2) has interesting points of contrast and similarity in relation to various types of domestic protective laws. Some of these laws apply only to sales to consumer as defined in Article 2(a), ♦50, *supra*, and consequently are outside the scope of the Convention. However, some protective legislation may overlap with CISG. See ♦♦232, 236, *infra*. Hence a preliminary analysis of these laws in relation to Article 8(2) can provide helpful background for problems that we shall meet later.

One type of domestic legislation denies effect to contract terms on the ground that they impose excessively harsh consequences even though these contract terms were (or should have been) understood by the other party.[9] Article 8(2) is quite different for it is concerned only with the interpretation of the contract. A second type of domestic law denies full effect to standard terms and form contracts prepared by one party on the ground that the other party may not grasp their full import; this type is closely related to Article 8(2). A third type restricts the effect of standard terms or forms on the ground that their use is so widespread that they deny contractual freedom to the other party. Other laws are difficult to classify for they may reflect concern for both clarity and fairness, or the basis for the law may be unclear.[10]

Determining the basis and impact of these laws is important in deciding whether they are displaced by the Convention. The first and third types, above, do not invade the area of interpretation occupied by Article 8 and are preserved by Article 4 which states that the Convention "is not concerned with: (a) the *validity* of the contract or of any of its provisions..."[11] The relationship between the second type of domestic law and the Convention will be explored in more detail in discussing Article 35 on conformity of goods to the contract (♦♦230♦234, *infra* ).

The above suggestion that under Article 8(2) ambiguity in a statement [page 119] is to be resolved against the party who formulated this statement has considerable significance in view of the wide disparities between the modes of expression and expectations in the different areas and types of enterprises that may meet in international trade. Although this interpretation of Article 8(2) may be disputed,[12] it will at least be prudent for a party in formulating a proposal or other statement to take care that it not be given a different understanding by (Art. 8(2)) "a reasonable person of the same kind as the *other* party".

Following are decisions applying Art. 8(2): (1) GER. [LG Hamburg, 5 O 543/88, 25 September 1990](#): B claimed not obligated to pay S, on the ground that B was acting on behalf of a third party, X. The court rejected this defense: There was no reason for S to understand that B was acting for X. CLOUT 5; UNILEX D. 1990♦6. Cf. GER. [OLG Karlsruhe, 15 U 29/92, 20 November 1992](#); GER. [LG Oldenburg, 12 O 2943/94, 28 February 1996](#).

UNILEX D. 1996♦3.2.0. (2) GER. [OLG Hamm, 11 U 206/93, 8 February 1992](#) (application of trade usages under Art. 8(2) & (3)). See: Rider, C., Who Bears the Cost of Misunderstanding? 61 NY State Bar. J. (Oct. ♦89) 56♦61. Cf.: General provisions on trade usages in Art. 9, *infra*.

## ♦109 D. Interpretation in the Light of Surrounding Circumstances

Paragraph (3) (unlike Paragraph (2)) states rules of interpretation that, *inter alia*, apply to statements embodied in an agreement formulated by both parties. (See ♦105, n. 3, *supra*.) Article 8(3) cuts through technical rules that might bar access to relevant materials: "Due consideration" is to be given to "all relevant circumstances of the case," including (a) negotiations, (b) practices established between the parties (Art. 9(1)), (c) usages (Art. 9(2)) and (d) the parties♦ subsequent conduct.

Let us suppose that one party contends that the agreement, although not expressing result "X," should be construed to reach this result. May a tribunal consider evidence that this party proposed that the contract state result "X" but that this proposal was rejected? Under Article 8(3), such negotiations are "relevant" to the interpretation of the agreement and should be given "due consideration"; of course, they are not conclusive.

*Party♦s Standard Terms:* AUSTRIA, [page 120] [ObG \(Sup. Ct.\), 10 Ob 578/95, 6 February 1996](#). A German buyer (B) ordered goods from an Austrian seller (S). S refused to deliver; B sued for loss of profit (Art. 74, *infra*). S claimed that there was no valid contract since a clause in S♦s standard terms required contracts to be in writing. S♦s claim was rejected: there was no express or implied agreement concerning the clause in S♦s standard terms. UNILEX D.1996♦3.1. See Bonell/Ligouri, ULR (1997♦3) 583, n. 66.

## ♦110 (1) Other Agreements: The "Parol Evidence Rule"

Jurists familiar with the common law will be intrigued by the relationship between Article 8(3) and the "parol evidence rule." This so-called "rule" (as aptly named as the Holy Roman Empire) has been used to bar the consideration of any agreement (whether or not "parol") that contradicts a contemporary or subsequent writing "intended by the parties as a final expression of their agreement"; the rule also bars a prior agreement in relation to a writing which was intended "as a complete and exclusive statement of the terms of the agreement." (The quoted phrases are taken from the relatively mild version of the "parol evidence rule" of (U.S.A.) UCC 2♦202.) [\[13\]](#)

Article 8 does not directly address the "parol evidence rule"; references to this and other technical domestic rules would have cluttered the draft and would have mystified jurists from legal systems that have no such rule. But the language of Article 8(3) that "due consideration is to be given to all relevant circumstances of the case" seems adequate to override any domestic rule that would bar a tribunal from considering the relevance of other agreements. Jurists interpreting agreements subject to the Convention can be expected to continue to give special and, in most cases, controlling effect to detailed written agreements. And contract terms (often called "integration clauses") that any contemporaneous or prior agreement shall be without effect would be supported by Article 6, which gives effect to the contract. But Article 8(3) relieves tribunals from domestic rules that might bar them from "considering" any evidence between the parties that is relevant. This added flexibility for interpretation is consistent with a growing body of opinion that the "parol evidence rule" has been an embarrassment for the administration of modern transactions. [\[14\]](#) [page 121]

A lawyer preparing for trial at common law may note that the parol evidence rule has its greatest significance in restricting the role of juries in the field of contract interpretation. The Convention, of course, does not interfere with domestic rules on the allocation of authority between the judge and jury, and would not interfere with the decision to exclude from a jury evidence of prior or contemporaneous agreements if (in the apparently circular language of UCC 2♦202) "the court finds" (after giving due consideration to all relevant circumstances) that the writing was "intended also as a complete and exclusive statement of the terms of the agreement." [\[15\]](#)

"Parol evidence rule", decisions: (1) [U.S. Court of Appeals \(11th Cir. 29 June 1998\) 47♦4250; MCC-Marble Ceramics \(US; B\) v. Ceramica Nova...\(Ital.; S\)](#). In October 1990, following an oral agreement by S and B on



terms, at S's request B signed one of S's standard order forms, on which the agreements, noted above, were entered. The front of the form, in Italian, stated that the buyer "is aware of the sales conditions stated on the reverse and approves them". B did not understand Italian. In February 1991 S and B agreed on a requirements contract; B signed a number of S's standard order forms for deliveries under this agreement. B sued S for breach of the 1991 contract; S counter-claimed on the ground, inter alia, that B had defaulted on payment for prior shipments. The District (lower) Court, relying in part on the printed provisions in S's standard forms, entered summary judgment (i.e. without further examination of facts offered by B) in favor of S.

On review by the Court of Appeal, one issue was whether B was bound by certain provisions on S's standard forms signed by B. The crucial question was whether the lower court erred in entering summary judgment for S without considering B's claim that these standard provisions were inconsistent with provisions on which the parties had agreed orally before signing the standard forms. In support of the decision, S invoked the domestic "parol evidence rule" denying effect to such oral agreements. (See ¶110, above.)

The Court of Appeals ruled that the domestic "parol evidence rule" was inconsistent with the CISG, Article 8(3) of which provided that, in [page 122] determining an intent or understanding, "due consideration" must be given to "all relevant circumstances...including negotiations..." (See the full text of Article 8, supra.) In this decision, the court relied on the approach of the present author (¶110, supra) and the conclusions of other writers, including: Del Duca, Lookofsky, Flechtner, Murray and Winship (op. cited supra, I. OVERVIEW at 2(b)). See also: [U.S. Dist. Ct. \(S.D.N.Y. 6 April 1998\) 96 Civ. 3253, C. Claudia v. Olivieri F.](#), Dicta: Contracts under CISG are free from the parol evidence rule (1998 U.S. Dist. LEXIS 4586); [U.S. Filanto S. v. Chlewich I. Corp., 789 F. Supp. 1229 \(S.D.N.Y. 1992\)](#), id. at 1238 n. 7. CLOUT 23, UNILEX D. 1992¶9.

*Parol Evidence Rule: Law or Procedure.* In MCC-Marble Ceramics (29 June 1998), supra, S argued that the parol evidence rule was a rule of procedure (i.e., like exclusion of hearsay) rather than of law, and therefore was not governed by legal rules under CISG. The Court of Appeals rejected this argument, citing Farnsworth on Contracts, ¶7.2 at 194 & 196 n. 16, citing cases (1990).

### ¶ 111 (2) *Reflected Light: Conduct Subsequent to the Agreement*

Article 8(3) authorizes "due consideration" for conduct subsequent to the agreement since this may shed light on the intentions and expectations of the parties. Under UCC 2-207(3) "conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale...." And UCC 2-208(1) states that under some circumstances a "course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." On the other hand, English case law has been hostile to evidence of subsequent conduct—an approach that has met resistance and criticism. [16] [page 123]

## Article 9. Usages and Practices Applicable to Contract

### ¶ 112 A. The Role of Usages and Practices

The world's commerce embraces an almost infinite variety of goods and transactions; a law cannot embody the special patterns that now are current let alone those that will develop in the future.

Many of these patterns may be reflected in the contract but there are practical limitations on the ability of the parties to envisage and answer every possible question. Many transactions must be handled quickly and informally. Even when there is time to prepare detailed documents, an attempt to anticipate and solve all conceivable problems may generate disagreements and prevent the making of a contract; moreover, the most basic patterns may not be mentioned because, for experienced parties, they "go without saying." (In the course of collaborating with an exporter in writing out the understandings that underlay a standard export transactions we both were amazed at the number and scope of basic assumptions that were not mentioned in the detailed documents.)



For these reasons, one of the most important features of the Convention is the legal effect it gives to commercial usages and practices.<sup>[1]</sup>

## ❖ 113 B. Usages and Practices under the 1980 Convention

### Article 9 <sup>[2]</sup>

"(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 **[page 124]** which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

Article 9 deals with three situations: (1) Usages to which the parties have agreed (Article 9(1)); (2) Practices that the two parties have established between themselves (Art. 9(1)); and (3) Usages that become part of the contract based on the criteria stated in Article 9(2).

### ❖ 114 (1) *Usages to which the Parties have Agreed*

#### (a) *Standards of Agreement*

ULIS (Art. 9(1)) provided that the parties "shall be bound by any usage they have *expressly or impliedly* made applicable to their contract." Article 9(1) of the Convention omitted the phrase "expressly or impliedly," and thereby avoided any inference that abnormal rules are applicable to the construction of the contract. A provision in the contract that trade terms (F.O.B., C.I.F., and the like) are governed by ICC's "Incoterms" would be a clear and common illustration of an agreement expressly making a specified usage applicable to the contract. References that are less explicit might well invoke usages if the court concludes that such was the intent of the parties, in accordance with the Convention's rules of interpretation in Article 8, *supra* at <sup>[3]</sup>

#### (b) *Agreement on Trade Terms*

When a contract uses a technical term drawn from chemistry tribunals scarcely need statutory authorization to consult standard works that give the generally understood meaning of the term. The same approach is appropriate for the technical terms of commerce. The basic definition of a trade term in a standard work like *Incoterms* is a better guide to international understanding than language in a domestic judicial opinion. Giving weight to the basic provisions of widely-accepted commercial definitions could be supported simply as an intelligent approach to interpretation of the contract without invoking the rules on "usage" in Article 9.

However, some "definitions" of trade terms include details regarding the performance of the parties that may not be "widely known to, and **[page 125]** regularly observed by, parties to contracts of the type involved in the particular trade concerned." Art. 9(2). These details become binding under Art. 9(1) by express incorporation (e.g. "sale C.I.F. Buyersport, INCOTERMS 1990") or in trades where the parties regularly use and rely on this set of trade definitions (Art. 9(2)). On the other hand, proposals to give effect to trade definitions that did not meet the above standard set forth in Article 9(2) were rejected. See <sup>[4]</sup>, *infra*.

### ❖ 116 (2) *Practices Established between Two Parties*

Expectations that have the force of contract can be established by patterns of conduct established by the seller and the buyer. Under Article 9(1) the parties are bound by the "practices which they have established between themselves."

"Practices" are established by a course of conduct that creates an expectation that this conduct will be continued. Article 8(2) (<sup>[5]</sup> *supra*) provides that the "conduct of a party" (Party A) is to be "interpreted according to the

understanding that a reasonable person of the same kind as the other party (Party B) would have had in the same circumstances." Under Article 9(1) a course of conduct by A in past transactions may create an expectation by B that will bind A in a future contract. Of course A will not be bound if he notifies B of a change before B enters into a new contract; further reliance by B may also become unreasonable when circumstances change. In short, the reference in Article 9(1) to practices established by the parties is one example of many situations in which binding expectations may be based on conduct. See Articles 19(2), 21(2), 35(2)(b), 47(2), 73(2).

(1) FR. [CA Grenoble, 48992, 13 September 1995, R. Caiato v. S.F.F.](#) Practices of parties created an obligation by S to follow labelling in B's country. CLOUT 152, UNILEX D. 1995-24. (2) ARB. [ICC \(Paris\) 8611/HV/HK, 23 January 1997](#). Although CISG did not apply to contract of distributorship, after cancellation by S, usage of parties (Art. 9(1)) bound S to continue to supply spare parts. UNILEX D. 1997-3. (3) AUSTRIA, [CA Graz, 6 R 194/95, 9 November 1995](#). Seller (Italian) customarily sold Italian marble in Austria. S, in sale to B in Austria, was obliged to consider usage in B's country. CLOUT 175.

### ❖ 117 (3) *Binding Trade Usages: Article 9(2)*

#### (a) *Inapplicable Concept of Usage*

"Usage" and similar legal ideas have been used in settings that are fundamentally different from the [page 126] trade usages to which Article 9 refers. "Custom" or "customary law" has sometimes been invoked as a source of law without regard to the intent of the parties. In those settings, "custom" is strictly confined; to bind "a plurality of persons" the custom must be "long established," or even "ancient." [4]

Even more remote from our current problem is "custom" as a source of public international law that binds States. Governments have sometimes viewed such "custom" as inconsistent with their sovereignty and with principles on which their regimes were based. Echoes of these fears were heard in UNCITRAL in early discussions of trade usage but it became evident that construing sales contracts in the light of the expectations current in international trade does not impair the sovereignty of States.

### ❖ 118 (b) *Trade Term Definitions and Usage Standards*

As has been mentioned (❖115, *supra*), definitions of trade terms (*e.g.*, INCOTERMS) may be (and often are) made binding by express agreement (Art. 9(1)). One of the issues that was discussed repeatedly in framing Article 9 was the applicability of such definitions as international trade usage. ULIS (1964) had provisions on practices and usage similar to CISG 9 but added the following (ULIS 9(3), ULF 13(2)):

"Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually give to them in the trade concerned."

Proposals were made in UNCITRAL and at the Diplomatic Conference to include a similar provision; these proposals were resisted on the ground that phrases like "meaning usually given" might subject parties in some areas to practices with which they were not familiar. Article 9(2) had responded to these concerns since usages bound only those "which the *parties knew or ought to have known* " in addition to the requirement that the usage be "widely known to, and regularly observed by, parties to contracts *of the type involved in the particular trade concerned*." These cumulative requirements did not appear in the proposals for a third paragraph, based on ULIS 9(3), designed to give special effect to trade terms and contract forms. Opposition to these proposals included concern for the problems of parties in developing countries; details embodied in definitions of trade terms and in forms of contract accepted and appropriate in developed, industrialized regions might not be known or appropriate [page 127] in other parts of the world. [5]

In sum, definitions of trade terms can bind the parties even though they have not been incorporated into the agreement under Article 9(1), but only when their regularity of observance meets the standards of Article 9(2). World-wide legal effect from some details in definitions of trade terms and forms of contract must await the wider homogenization of international practice than has yet been achieved.

### ❖ 119 (c) *Trade Usage Under the Convention*

As we have seen, Article 9(2) applies only to a trade 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." This language invokes a pattern of conduct only if it is so "widely known" and "regularly observed" that it can be assumed to be a part of the expectations of the parties.

### ❖ 120 (d) *Usage of Trade in Domestic Law*

Similar principles of contract interpretation have been widely accepted in domestic law.<sup>[6]</sup> The approach of modern case law has been articulated in the (U.S.A.) Uniform Commercial Code (❖1❖205(2)), which defines "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Such usages (like established practices, *supra* at ❖116) "give particular meaning to and supplement or qualify" terms of the agreement. Tribunals construe general provisions of the contract in the light of applicable usage since words commonly used in commerce ("draft," "order," "bill," "average") carry a [page 128] heavy and complex burden of meaning based on the practices with which these words have been associated.<sup>[7]</sup> A contract provision (like a fish out of water) loses its life when it is removed from its setting.

### ❖ 120.1 (e) *Standards for Usage: Time and Place*

As we have seen, the Convention gives effect to a usage only if, on an objective basis, it constitutes a part of the contractual expectations of the parties. This premise sheds light on several important questions.

We have discussed the inapplicability of the view that custom, invoked as regulatory law, must be "ancient" or of "long standing." Under Article 9(2), the usage must have been "regularly observed" for a period of time that would justify the conclusion that the parties "knew or ought to have known" of it.

Must the usage be "international"? This question can lead to confusion but the Convention clarifies the issue. Under Article 9(2) the usage must be one which "in international trade is widely *known to*, and regularly *observed by*, parties to "such transactions. A usage that is of local origin (the local practices for packing copra or jute, or the delivery dates imposed by arctic climate) may be applicable if it is "widely known to, and regularly observed by" parties to international transactions involving these situations.<sup>[8]</sup>

*Requirement of Internationality* (1) GER. [OLG Frankfurt a M., 9 U 81/94, 05 July 1995](#); German usage (France contra) held that a letter of confirmation was binding if the recipient did not object. This usage could not be given effect since the usage was not international. UNILEX D. 1995-17.4. (2) Cf. AUSTRIA, [OGH \(Sup.Ct.\), 10 Ob 518/95, 6 February 1996](#); usage in natural gas trade to quote approximate amounts❖enforced. (3) AUSTRIA, [OLG Graz, 6 R 194/95, 9 November 1995](#) (national or local usage applicable), CLOUT 175; UNILEX D. 1995-28.1.3. See: Schlechtriem, Com. (1998) 78❖79.

*Trade Usage Applied.* NETH. [GH Hertogenbosch, 456/95, 24 April 1996](#); standard terms of Assn of Yarn Traders binding although not included in contract; both the seller (German) and the buyer (Netherlands) were familiar with the above Association practices. UNILEX D. 1996-5.2.

See, supplementing early articles in footnotes: [Audit, B., in Carbonneau, T., ed., Lex Mercatoria and Arbitration \(T.J. 1990\) at 139❖160](#); [page 129][Bainbridge, S., 24 Va J. Int. L. 619❖663 \(1985\)](#). On standard forms and trade terms, see: Drobnig, U., Hague-Zagreb Essays (1983) 117❖134 (German, Dutch & CISG); [Farnsworth, E.A., 21 Cornell Int. L. J. 439❖447 \(1988\)](#).

### ❖ 121 (4) *Practices and Usages: Relationship to Contract Provisions*

As we have seen, Article 9 gives effect to the fact that the parties❖ established practices and usages of the trade constitute an important part of the parties❖ expectations. The parties by contract can negate these expectations. See Art. 6 at ❖74, *supra*. However, when the parties do not clearly address and negate implicit expectations

based on practices and trade usages the relationship between these implicit expectations and the terms of the contract present delicate problems of interpretation.

Answers to this question must be consistent with the rule of Article 8(3) that in interpreting statements of the parties (including contract provisions) due consideration is to be given to "all relevant circumstances of the case including...any *practices* which the parties have established between themselves, *usages* and any subsequent conduct of the parties". This provision reflects the fact that established practices and usages often create expectations that are so basic that they "go without saying" in making a contract ♦ as is true of a buyer ♦'s expectation that the goods will be free of unusual defects (Art. 35(2)(a)) and that he will own the goods (Art. 41). One may not readily conclude that contract provisions were understood to negate such basic expectations.[9]

*Relation between Usage and Contract:* GER. [OLG Saarbrücken, 1 U 69/92, 13 January 1993](#); contract provision, specifying limited period for notification, prevailed over usage. UNILEX D. 1993-2.1.

### ♦ 122 (5) *Practice and Usage and the Convention*

Suppose that a usage specifies a time or place for delivery or a time for the transfer of risk that differs from the rules of Articles 31, 33 or 67.[page 130] Which is applicable? Under Article 6 (*supra* at ♦74), "The parties may...derogate from or vary the effect" of the provisions of the Convention. An applicable practice or usage has the same effect as a contract. Under Article 9(1) practices established by the parties become part of the contract and under Article 9(2) the parties "are considered, unless otherwise agreed, to have *impliedly made applicable to their contract* " those usages that meet the specified criteria. There is one limitation: A practice or usage is invalid if a contract term to the same effect would be invalid under applicable domestic law. Article 4 states that the Convention "is not concerned with: (a) the *validity* of the contract or of any of its provisions or of any *usage*." (See the Commentary to Art. 4, *supra* at ♦61.) This provision, of course, does not give effect to domestic rules on the circumstances that make a usage applicable; this question is governed by Article 9 of the Convention.

Occasionally domestic legislation or case-law jurisprudence declares that a commercial usage is so firmly established that it has the force of law and is binding on the parties without proof that the usage meets the standards of Article 9(2). If such a rule is inconsistent with a provision of the Convention does it, like customs established in accordance with Article 9(2), prevail over the Convention?[10] The answer must be No. CISG 9(2) governs the circumstances in which a usage may be part of the contract and thereby prevail over provisions of the Convention; the crucial point is that factual compliance with these international standards must be established for each case. Many of the rules of domestic law may be thought to be supported by commercial usage;[11] giving effect to domestic law on this ground would be inconsistent with the standards established by Article 9(2) and would undermine the Convention ♦'s central goal to establish uniform law for international trade. See, generally, Schlechtriem, Com. (1998) 75 ♦80 (Junge).[page 131]

## Article 10. Definition of "Place of business"

### ♦ 123 A. Multiple "Places of Business"

The Convention refers to a party ♦'s "place of business" in several Articles: 1, 12, 20(2), 24, 31(c), 42(1)(b), 57(1)(a), 69(2) and 96. A commercial enterprise may maintain a central office and various branch offices; in applying the above provisions of the Convention it may be necessary to choose among multiple places of business. For example, the Convention is applicable only if the seller and the buyer have their places of business "in different States." (See the Commentary to Art. 1, *supra* at ♦42.) In that setting, paragraph (a) of Article 10 was quoted and discussed; the discussion need not be repeated here.

### ♦ 124 (1) *The Transitory Agent*

During the preparation of the Convention, some delegates were concerned lest "place of business" be construed to extend to a hotel room or other temporary place where a travelling agent might conduct negotiations.<sup>[1]</sup> Referring to a "permanent" place of business presented drafting difficulties, and most delegates concluded that temporary sojourns would not establish a "place of business". The term that corresponds to "place of business" in the official French text is *établissement* and in the official Spanish text is *establecimiento* — words that seem to be inconsistent with a temporary stopping place.<sup>[2]</sup> Moreover, as was noted under Article 1 ( *supra* at <sup>[43]</sup>), Article 10(a) points to the place of business "which has the closest relationship to the contract *and its performance*"; the Convention's use of "place of business" in the context of Articles 24, 31(c), 42(b) and 69(2) shows that this term refers to a place for the continuing conduct of business. See <sup>[43]</sup>, *supra*; Schlechtriem, Com. (1998) 81–83 (Herber).<sup>[page 132]</sup>

## ❖ 125 B. No "Place of Business"

Paragraph (b) of Article 10 provides:

### Article 10 <sup>[3]</sup>

"For the purposes of this Convention...

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

Parties to international sales transactions will usually have a "place of business"; paragraph (b) was included to avoid a gap in the law when this is not the case.<sup>[page 133]</sup>

## Article 11. Inapplicability of Domestic Requirement that Contract be in Writing

### ❖ 126 A. Domestic Rules: "Statutes of Frauds"

In 1677 the English Parliament (29 Car. II, c. 3) enacted a Statute of Frauds which required a signed writing for the enforcement of a wide variety of transactions including the sale of goods (<sup>[17]</sup>) — a requirement that was embodied in the (U.K.) Sale of Goods Act (1893) (<sup>[4]</sup>), was closely followed in the (U.S.A.) Uniform Sales Act (1896) (<sup>[4]</sup>) and formed the basis for an elaborate statute of frauds included in the Uniform Commercial Code (<sup>[2]</sup>–<sup>[201]</sup>).

In recent decades the tide has been running against such formal requirements. In 1954 Britain repealed this part of the Sale of Goods Act — a step that has been followed by many of the other countries that had adopted this Act.<sup>[1]</sup>

Many civil codes imposed formal requirements for the making of contracts, but these requirements were usually made inapplicable to commercial transactions.<sup>[2]</sup>

These formal requirements cannot be relied upon to bar enforcement of an international contract, particularly in litigation before a foreign tribunal. Conflict rules are particularly diverse on this point. One approach, of diminishing vitality, considers statutes of frauds as "evidentiary" and "procedural" — a view that tends to invoke the law of the *forum*. Modern authorities, even in common-law areas, regard these rules as "substantive" but in international transactions there will often be doubt as to which law applies.<sup>[3]</sup> <sup>[page 134]</sup>

### ❖ 127 B. The Convention

The 1964 Hague Conventions rejected such formal requirements, an approach that was followed in the 1980 Convention.

### Article 11 <sup>[4]</sup>



"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."

In the UNCITRAL proceedings this question arose: Would Article 11 nullify regulations that required certain contracts to be in writing in order to assist in the enforcement of exchange controls and other regulatory programs? This question is answered by the scope of the Convention as defined in Article 4: the Convention "governs only...the rights and obligations of the seller and the buyer arising from" the sales contract. (See the Commentary to Art. 4, *supra* at ¶61). Consequently, the Convention would not interfere with the imposition of sanctions for evasion or violation of a regulatory program; Article 11 merely removes any impediment to enforcement between the parties based on any domestic "requirement as to form." [5]

Article 11 does not bar the parties from imposing formal requirements. An offeror may require that an acceptance must be in writing; an oral "acceptance" is not an "assent" to the offer. (See Arts. 18 and 19, *infra* at ¶¶157, 165.) Such requirements are often contained in offers and are included in some of the General Conditions of Sale prepared by the Economic Commission for Europe. [6] In addition, pursuant to Article 29 (*infra* at ¶200), the parties by a contract in writing may require "any modification or termination by agreement" to be in writing. [page 135]

A Contracting State, by a "declaration" (reservation) under Article 96, may protect its formal requirements from Article 11. See Art. 12 which follows.


*Government procurement.* Contracts for the purchase of supplies for a government present special problems of administration, such as the authority of government employees to create financial obligations for the public, and the possibility of favoritism, waste and fraudulent claims to public funds. As a consequence, legislation may impose special requirements for the approval, manner of execution and form for procurement contracts made by governmental units. [7] Sales of government property, such as agricultural commodities acquired under a price support program, often pose fewer governmental problems and may be subject to fewer or no special regulations; the same may be true of contracts made by publicly owned corporations that perform functions such as the supply of electricity or transport. [8]


A procurement contract made with a seller in the same State (the most common setting) would not meet the requirement of internationality of Article 1 (¶¶40-43, *supra*). When these requirements are met, the fact that the Convention does not deal with problems of authority of an agent or other representative to bind the principal (¶¶65-66, 98, *supra*) will avoid conflict with many laws on government procurement. [9] A more difficult problem is posed by a procurement contract that would bind the government except for the requirement that it be in written form.

Article 4(a) (¶¶61-64, *supra*) states that the "Convention is not concerned with: (a) the validity of the contract". The fact that a law states a formal requirement in terms of "validity" does not necessarily preserve the requirement from being overridden by Article 11; in this and many other settings achieving the Convention's central goal of uniform application (Art. 7, ¶¶85-87, cf. ¶72-73, *supra*) requires that the relationship between the Convention and domestic law be decided on the basis of the substance of the domestic rule rather than its form. Thus, it would be necessary to consider whether the law in question was addressed to a special problem posed by government procurement; if so, the law probably [page 136] should not be affected by Article 11. Formal requirements that are applicable only to government procurement or that are more strict than for comparable private contracts probably should be unaffected by Article 11. This conclusion would also be supported by applicability of the government's regulations to procurement contracts made and performed abroad, and circumstances showing special needs for formal requirements in government contracting. [10]

### ¶127.1 C. Rejection of Part II, Formation of Contract: A Problem?


*An Unnecessary Concern:* In ratifying CISG, four Scandinavian States (Denmark, Finland, Norway and Sweden) exercised the privilege, provided by Article 92, not to be bound by Part II, Formation of the Contract. (These States had agreed on uniform rules for contract formation.) Article 11, above, provides that a contract of sale

may be concluded without a writing or other formality  a provision dealing with contract formation. Could one imagine that, to give full effect to the rejection of Article II, Formation of Contract, Article 11 might be considered a part of Article II and therefore not applicable to the above four Scandinavian States?

Happily, this query appears to be a non-problem. The present writer has been advised that the above four States do not require a writing or other formality for commercial sales of goods. On this assumption, the laws of these States are not in conflict with Article 11  a view buttressed by the fact that none of these States exercised the right, provided by Article 96, to reject Article 11. For a decision consistent with the above conclusion, see GER. [OLG München, 7 U 5460/94 8 March 1995](#). CLOUT 34, UNILEX D. 1995-8. See discussion: [Bonell/Ligouri ULR \(1997 !\[\]\(2113e5cba4d11862fa536c379e9b61cd\_img.jpg\) 3\) 588 !\[\]\(c9a5cd0ae2be6c3d63effa266a341339\_img.jpg\) 589, n. 85 !\[\]\(068cc37fea7b7e82ca55b0672b7cbfba\_img.jpg\) 87](#) (citing cases). [page 137]

## Article 12. Declaration by Contracting State Preserving Its Domestic Requirements as to Form

### 128 A. The Conflict

Laws of the U.S.S.R. imposed strict formal requirements for the making of foreign trade contracts. In the UNCITRAL proceedings representatives of the U.S.S.R. indicated that preserving these requirements was of great importance to protect established patterns for the making of foreign trade contracts. Most delegates, however, felt strongly that formal requirements were inconsistent with modern commercial practice  particularly in view of the speed and informality that characterized many transactions in a market economy. [1]

### 129 B. The Resolution: A Reservation Under Article 96

The result was a compromise. In Part IV (Final Provisions), Article 96 authorizes a Contracting State "whose legislation requires contracts of sale to be concluded in or evidenced by writing" to make a "declaration" that Article 11 (and certain other provisions of the Convention affecting formal requirements) "does not apply where any party has his place of business in that State." Article 12 articulates the effect of a declaration under Article 96.

#### Article 12 [2]

"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 [page 138] 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."

The final text, above, followed rejection of a proposal that the formalities of one "declaring" State (including matters such as registration, etc.) would govern both parties to the contract. This proposal was rejected on the ground that it would extend formal requirements beyond prevailing law, which depended on agreement of the parties, or conflicts (PIL) rules of the forum.

The crucial language of the compromise (which admittedly is difficult to parse) provides that any provision of Articles 11, 29 or Part II of the Convention that allows a transaction "in a 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 following States have made declarations under Articles 12 and 96: Argentina, Belarus, Chile, China, Estonia, Hungary, Russian Federation and Ukraine. The language of Articles 12 and 96 has led to uncertainty; perhaps concrete examples will help:

*Example 12A.* Seller (S), in State S, claims that S and Buyer (B), in State B agreed on a sale of a tractor by S to B. The agreement was not embodied in a writing. State B requires a signed writing, and has made a declaration under Articles 12 and 96 rejecting Article 11, *supra*, that dispenses with such formalities. State S does not require a writing or other formalities. The above basic, but incomplete, facts need to be considered in different situations.

*Case A.* Seller (S) shipped the tractor to B, whose place of business was in State B, a "reservation" State requiring a written agreement. B refused to receive or accept the tractor or to pay, on the ground that the alleged agreement was not in writing. S sued B in State B; witnesses testified that S and B had agreed on the sale. In the absence of further facts (e.g.: a request by B for shipment, or B's acceptance of delivery of the tractor that would create an estoppel) it seems that the tribunal in B would dismiss S's suit. This is the typical case envisaged by Articles 12 and 96.

*Case B.* The facts are the same as in Case A, except that S sued B in State S, which does not require contracts to be in writing. As in Case A, there are no further facts (e.g.: a request for shipment or acceptance of the tractor that would create an estoppel). Even though conflicts rules point to State S, which does not require a writing, this writer now (contrary to his earlier opinion) suggests that State S should dismiss S's [page 139] suit the same result as in Case A. This about-face results from this combination: (1) "any party" could refer to the application of Article 12 to both parties to the transaction, and (2) the acceptance by the Convention of the need, felt by some States, for protection against claims unsupported by a written agreement. *Compare alleged oral modification (Arts. 12 & 29):* BELG. [Rechtbank v. Kh. A.R. 1894/94, Vital Verry . . . v. Dira-Frost, 2 May 1995](#). B refused to open a letter of credit, claiming an oral agreement for reduction of the price. S's country (Chile) had made an Art. 12/96 reservation. Held: The alleged oral agreement was not effective. UNILEX D. 1995-15:1.2.

*Case C.* A deviation from the facts of Example 12A, above: State S (unlike State S in the above example) enforces agreements only if they have been reduced to writing; State S has made no declaration under Articles 12 and 96. State B has made an Article 12/96 declaration. In addition, the law of State B requires not only a written agreement but also additional formalities such as registration in a specified public office in State B. Should State S refuse to enforce a written agreement because it has not been filed in a public office in State B? This added formality is not protected under Articles 12 and 96 which require only an agreement "in writing". In this setting, it may be necessary to depend on the conflicts (PIL) rules of the forum. (This approach seems also necessary in agreements between States that, in addition to requiring a written agreement, have additional but different formal requirements.)

Are the above views consistent with the following decision?

An agreement was concluded, by telephone, by a German seller (S) and a Hungarian buyer (B). The goods were delivered to B, who refused to pay. In an action brought in a Hungarian court, B argued that, under Hungarian law, sales contracts must be evidenced by a writing, and that Hungary had made a declaration under Article 96 preserving Hungary's formal requirements. The court rejected this view. In this case, under Hungarian conflicts (PIL) rules, German law was applicable. German domestic law did not require a writing; judgment for the price was awarded to the German seller. HUNG. [Met. Ct.: Budapest, AZ12.G.41.471/1991, 24 March 1992](#). UNILEX D. 1992-8. See Witz, p. 74; Schlechtriem, Com. (1998) 92/93.

Note that the result in this decision differs from that suggested above in Case B. Queries: (1) Is the writer wrong about the solution to Case B? Or: (2) Is the Hungarian tribunal's decision applying German law supported by the fact that the goods had been delivered to the Hungarian buyer? Note the qualification in Case B that rules on formalities may be affected by conduct demonstrating that a contract had been made. (In some jurisdiction this would be called an estoppel.)[page 140]

## Article 13. Telegram and Telex as a "Writing"

❖ **130** The Convention imposes no formal requirements with respect to the notices, requests or declarations to which it refers.<sup>[1]</sup> All such communications may be made orally (face-to-face or by telephone) or by other means.

The Convention refers to "writing" in Article 21(2) ("letter or other writing containing a late acceptance") and in Article 29(2) (contract in writing that requires written modification or agreement).<sup>[2]</sup> These provisions are supplemented by the following definition:

### Article 13 <sup>[3]</sup>

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

The Convention's few references to a "writing" do not require a signature or other validating mark or sign. Hence, no problem regarding signatures arises in connection with communication by telegram or telex.

Article 13 was drafted prior to substantial commercial use of electronic transmission of facsimiles (FAX) or the making of contracts by electronic data exchange (EDI). The implications of EDI for contract formation will be considered in Part II, Formation of the Contract. See, e.g., ❖❖ <sup>132.1</sup>, <sup>162</sup> at note 7 and ❖ <sup>170.4</sup>). Stating that "writing" *includes* telegram and telex does not fix the outer limits of this term as used in Articles 21(2) and 29(2) of the Convention; electronic developments such as FAX and EDI do not present more serious problems of verification than "telegram and telex" and should be assimilated to the definition of "writing" in Article 13.

Questions can arise as to whether communications such as EDI can satisfy the requirements of a "signature" under domestic statutes of **[page 141]** frauds.<sup>[4]</sup> However, this question does not arise under the Convention since references to "writing" in Articles 21(2) and 29(2) do not require a "signature". Whether electronic communications satisfy domestic formal requirements preserved by a declaration (reservation) under Article 96 (see Art. 12 at ❖❖ <sup>128</sup>❖ <sup>129</sup>, *supra*) depends on the domestic law preserved by the reservation. As we have seen (❖ <sup>129</sup>, *supra*), domestic formalities in States that have not made an Article 96 reservation (e.g., the U.S.A.) may be applicable in transactions with parties in States that have made a reservation under Article 96. **[page 142]**

## Part II.

### Formation of the Contract (Articles 14❖24)

#### Introduction to Part II of the Convention

#### ❖ **131** A. Relation Between Part II and Other Parts of the Convention

Part II of the Convention, Formation of the Contract, is subject to the rules of Part I (Arts. 1❖13) on the scope and interpretation of the Convention, but is independent of Part III (Arts. 25❖88) which deals with the obligations of the parties to the contract. Article 92 (Part IV) permits a Contracting State to declare that it will not be bound either by Part II or by Part III. This reflects aspects of the Convention's history that were described in the Overview (Ch. 1, *supra* at ❖4)❖the completion in 1964 of two Conventions, one on Formation (ULF) and one on Sales (ULIS), and UNCITRAL's decision to prepare a single Convention, subject to an option to adhere to only Part II on Formation or Part III on Sales.<sup>[1]</sup>

At the conclusion of Article 11, *supra*, attention was drawn to the declaration, under Article 92, by Scandinavian States, not to be bound by Part II on Formation of Contract. Under this declaration these States are "not to be considered as Contracting States" with respect to matters governed by Part II. Formation of the Contract. These States also made a declaration under Article 94 which applies to "Two or more Contracting States which have

the same or closely related rules on matters governed by this Convention". This declaration was applied when both parties have their places of business in Denmark, Finland, Sweden, Iceland or Norway.

The text of Article 94 made it clear that the reservation applied only to transactions among these "parties"; contracts with other States would be governed by the Convention.[page 143]

*For example:* ARB. [ICC \(Paris\), 7585/1992 \(1992\)](#): A contract between an Italian seller and a buyer in Finland was governed by CISG. UNILEX D.1992-32. For a fuller discussion, see Bonell & Ligouri, ULR (1997), pp. 588-590 and n. 90.

## ❖132 B. Structure of Part II

### (1) Summary

The first four articles (14❖17) deal with the offer❖the minimum criteria for an offer (Art. 14), and the withdrawal (Art. 15), revocation (Art. 16) or termination (Art. 17) of an offer. The next five articles (18❖22) deal with acceptance❖"acceptances" that do not match the offer (Art. 19), the period allowed for acceptance (Arts. 20 and 21), and withdrawal of an acceptance (Art. 22). The two final articles (Arts. 23 and 24) relate to the time when a contract is concluded.

#### ❖132.1 (2) "Offer" and "Acceptance" in Statutory Drafting and Contract Formation

As the above summary indicates, most of the provisions of Part II are concerned with "offer" and "acceptance," an emphasis more consistent with traditional patterns of contract formation than with current practices in international trade. Nonetheless, rules on offer and acceptance are still needed when the only relevant facts are two communications❖one that may (or may not) be an "offer" and one that may (or may not) be an "acceptance". In this setting different rules are needed for each communication: An "offer" may be made at any time but the time for "acceptance" is limited (Arts. 18❖21); "offers" in some circumstances may be revoked or expire but an effective "acceptance" closes a contract (Arts. 16, 18(2)).

However, serious problems arise if one assumes that contracts can be made only if they fit this two-step formula. For example, a typical export sale may be instituted by an exchange of letters (including a *pro-forma* invoice), none of which may be an "offer" or "acceptance". Thereafter, correspondence will discuss descriptions and prices of the goods, the expected dates and methods of shipment and the methods of payment❖normally by the buyer❖s arrangement for the issuance of a letter of credit and its confirmation by a bank near the seller; a contract may not be closed before the letter of credit is confirmed and in some cases only when the seller ships the goods and presents the necessary documents [page 144] (invoice, bill of lading, insurance policy and draft) to the confirming bank.[2] In short, in many transactions it is difficult or impossible to isolate an "offer" and "acceptance".[3]

The Convention does not compel the stretching or amputation of a living understanding to fit the Procrustean bed of "offer" and "acceptance". Under Article 18(3) a contract may be concluded "by performing an act, such as one relating to the dispatch of the goods or payment of the price...", ❖❖163❖164, *infra*. In addition, Article 8(3) gives effect to "understanding" that is derived from "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." [4] In short, the Convention accommodates both the simple exchange of two communications and also the development of a contract when it is impossible to isolate an "offer" and "acceptance".[5]

This flexibility is becoming increasingly important with the development and expanding use of programmed systems for making commercial arrangements by "Electronic Data Interchange (EDI)". To help commerce cope with these problems, UNCITRAL established a Working Group on Electronic Data Exchange. On June 2, 1996, UNCITRAL adopted the Model Law on Electronic Commerce, and a Guide to enactment of the Model Law (A/51/17). The Commission also authorized work on related issues, including digital signatures and means to certify such signatures.



Systems for the rapid exchange of pre-programmed electronic signals arranging for the purchase of goods place strain on traditional concepts [page 145] of "offer" and "acceptance". Some of the implications of these current developments are noted *infra*: see ¶162 note 7 (Article 18 and error or delay in transmitting an "acceptance"); ¶170.4 (Article 19 and the "Battle of the Forms")

*Contract Formation: Regional Perspectives*: Logan T.N., P.R. China and Formation (CISG), 5 China L. Rep. (Chicago) 53-74 (1988); Reiley, E.H. & Hu Run Fu, Chinese Contract Law and CISG, 25-94 (1989); Ngongola, C., CISG: South African Legal Environment; Formation of Contract, (London) 4 African J. Int. & Comp. L. 835-853 (1992). [page 146]

## Article 14. Criteria for an Offer

¶133 The basic criterion for an offer, under prevailing law and the Convention, is whether one party has indicated to another "the intention...to be bound in case of acceptance." In applying this standard, two subsidiary factors need to be taken into account: the number of people addressed and the definiteness of the proposal. These standards are set forth in this opening article of Part II:

### Article 14 [1]

"(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."

### ¶134 A. Indication of Intent to be Bound

When one party is in doubt over whether the other intends to be bound or merely to open negotiations the question can usually be resolved quickly by phone or wire. [2] Moreover, doubts suggested by the bare text of the parties' statements will often be dissipated when (as Art. 8 requires) those statements are interpreted in their full context, including "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties." In short, the parties' understanding is a question of fact that is individual to [page 147] each transaction; the general guides in Article 14 for interpreting the parties' intent, to which we now turn, play subordinate and supporting roles.

### ¶135 (1) *Communications to an Indefinite Group: "Public Offers"*

Article 14 incorporates the generally accepted premise that a party may make an offer to as large a group as it wishes. [3] However, a communication addressed to a large group, if construed as an offer, can involve practical difficulties and hazards. For example, sellers often give wide distribution to catalogues describing a line of goods and indicating prices. Some months may be required for the preparation, printing, and distribution of the catalogue. During this period some of the goods may become unavailable because of heavy demand, shortage of materials, or other production difficulties, and cost increases may call for readjustment of prices. If supply or production difficulties are widespread, or if the general price level rises sharply, the seller may face a flood of orders. If these orders should be "acceptances" of an "offer," the result could be ruin for the seller and a windfall for the buyers. In these settings a "reasonable person" (Art. 8(2)) would not think that the catalogue "indicates an intention...to be bound" (Art. 14(1)) and courts have been reluctant to construe communications to create such hazards. [4]

These practical considerations are reflected in Article 14(2): If a proposal is not "addressed to *one or more specific persons*," it is not an offer "unless the contrary is *clearly indicated* by the person making the proposal."

[5]

### ❖136 (a) "Specific Persons"

Even if a proposal is addressed to "one or more specific persons" it is not an offer unless under the basic test of paragraph (1) it "indicates the intention of the offeror to be bound in case of acceptance." This test may be decisive when the line between paragraph (1) and paragraph (2) is difficult to draw.[page 148]

To take a common case: Supplier mails a catalogue to 500 prospective buyers; each envelope is addressed to a specific person. Is this a proposal "addressed to one or more specific persons" and therefore governed by paragraph (1)? The answer should be No. The purpose underlying the dividing line between paragraphs (1) and (2) is to avoid the hazards latent in widespread communications mentioned at ❖135. To this end, the phrase "addressed to one or more specific persons" should refer to communications that are *restricted* to the addressees; a seller who mails out a catalogue normally intends as wide a distribution as possible and would be glad for the addressee to pass the catalogue on to others. Thus, such a mailing to named addressees should be governed by paragraph (2): the intent "to be bound in case of acceptance" must be "clearly indicated." [6]

### ❖137 B. Definiteness of an Offer and the Scope of Party Autonomy

#### (1) *The Goods: Designation and Quantity*

#### ❖ 137.1 (a) *The Role of Article 14: Defining an Offer v. Validity of Contract*

The provisions on definiteness in Article 14(1) are drafted in terms of the question whether a "proposal" constitutes an "offer". We turn first to the question whether a communication should be *construed* as an offer (❖❖137.2❖.4). Later (❖137.5) we shall consider whether these provisions control the *validity* of agreements.

As we have seen (❖❖134❖36 *supra*), the "public offer" provisions of Article 14 are concerned only with the question whether a communication should be *interpreted* as an offer: Under Article 14(2) a clear intent to make a public offer is given full effect. What is the purport of the other provisions of Article 14?

#### ❖137.2 (b) *Description of the Goods: Specifications made by the Seller*

Article 14(1) states that "a proposal is sufficiently definite if it *indicates the goods*". Does a proposal "indicate the goods" if it states [page 149] that the buyer will later "specify the form, measurement, or other features of the goods"? This does not make a contract too indefinite: Article 65 (❖357, *infra*) states that if the buyer fails to make the specification "the seller may...make the specification himself in accordance with the requirements of the buyer that may be known to him".

#### ❖137.3 (c) *Quantity: Requirement and Output Contracts*

Under Article 14(1) a proposal is sufficiently definite if (*inter alia*) it "expressly or implicitly fixes or makes provision for determining the *quantity*...". Long-term contracts often call for the supply of a buyer's requirements or for the delivery of a seller's output; Article 14(1) should not be construed to nullify these important transactions on the ground that the quantity will not be fixed until the buyer's requirements or the seller's output become known.

Under the Convention, as under domestic law, problems can arise if the quantity can be controlled freely by one party by artificially increasing output when costs (or prices) drop, or by artificially increasing "requirements" when costs (or prices) rise.[7] Tools to cope with these problems are provided by the flexible principles of Article 8 governing contract interpretation (❖❖104❖111 *supra*) and by the direction in Article 7(1) to interpret the Convention to promote "the observance of good faith in international trade".

#### (2) *The Price*

### ❖137.4 (a) *Scope of the Problem*

In UNCITRAL and at the 1980 Vienna Conference this question arose: Do the parties have the power to make a binding sales contract that does not (Art. 14) "expressly or implicitly" fix or make "provision for determining" the price? As we shall see, the answer calls for close attention to both Articles 14 and 55 (❖❖137.5❖❖6, 325❖325.3 *infra*).

Usually sales contracts specify the price; long-term contracts may make elaborate provision for adjusting the initial price on the basis of changes in cost. See *Kritzer Manual* Ch. 4. Smaller transactions may make no specific reference to price but the least likely possibility is that the parties have no understanding concerning the price. A common situation in which the price is not expressly stated but (Art. 14) is "implicitly [page 150] fixed" in the course of a series of communications may be illustrated as follows:

*Example 14A. Seller distributed catalogues describing various types of goods and listing prices. Buyer sent Seller a telex requesting Seller to ship goods, designated by a model number in Seller's catalogue, to which the telex referred. Buyer's telex did not specify the price.*

Buyer's order in response to Seller's catalogue did not close a binding contract. Under Article 14(1) Seller's catalogue was not addressed to "specific persons" and is not to be construed as an offer but as an invitation to submit offers. See ❖❖135❖❖136, *supra*. (The catalogue will probably state that the listed prices are subject to change; even in the absence of such a statement Seller may modify the price since the catalogue did not make a binding offer.) Buyer's order was, however, an offer that implicitly referred to the price stated in the catalogue.

Seller will usually respond to Buyer's order by an "Order Acknowledgement form" that will state the price.[8] If the price is the same as that stated in Seller's catalogue a contract will be closed. If Seller's prices have changed Seller may phone or telex Buyer informing Buyer of a modification in the catalogue price and asking for confirmation of the order at the new price. If Buyer confirms the order, the price has then been fixed and the Order Acknowledgement closes a contract.

If Seller's catalogue prices have not changed Seller may immediately ship the goods and notify Buyer of the shipment by an invoice that states the catalogue price. Under Article 18(3) Seller's shipping, followed by appropriate notification, accepted Buyer's offer "by performing an act, such as one relating to the dispatch of the goods". See ❖❖163❖❖164, *infra*. (Buyer's offer (Art. 14(2)) had "implicitly fixed" the price as that stated in the catalogue to which Buyer referred in its order.)

Let us suppose that Seller had announced higher prices than those in the catalogue to which Buyer referred but, in haste or carelessness, shipped without securing Buyer's agreement to the new prices. This placed Seller at risk. If Buyer accepts the goods without knowledge of Seller's price change the parties are bound by contract at the lower price in Seller's catalogue: Buyer had reason to expect this price, and Seller's shipment without notification would reasonably be understood by Buyer as accepting Buyer's offer at the catalogue's price. Art. 8(2), ❖108, Example 8B, *supra*. If Seller notified Buyer of the price change before Buyer accepted the goods Buyer could either (1) reject the goods or (2) [page 151] accept the goods at the modified price. If Buyer objects to the higher price he would normally phone or telex Seller and an agreement would be reached on the price. (Seller may find it difficult to redispense of the goods in Buyer's country and may be amenable to a compromise.)

Because of the importance of price to economic success, only rarely will the parties enter into a binding contract without at least (Art. 14(1)) an "implicit" understanding on the price or a means "for determining" the price. Situations that approach the edge involve emergency orders for the manufacture of minor replacement parts or requests to rush a shipment of goods for which the seller has not listed a price. Even here, as the examples suggest, the buyer will seldom accept the goods before he receives an invoice or other notification of the seller's price. In other cases a method for determining the price will be established by trade usage or by a practice the parties have established (Art. 9, ❖❖112❖❖122, *supra*). Hence, rarely will it be necessary to face the question whether the Convention bars the parties from making a contract that neither "expressly" nor "implicitly

fixes or *makes provision for determining...the price*". However, this question has generated discussion and raises intriguing questions of statutory interpretation and legal theory. It deserves our attention.

### ❖137.5 (b) *The Power of the Parties to Contract without Providing for the Price*

The contested issue of theory can be exposed and tested in the setting of the following improbable case. (Improbable conduct is more useful to legal theory than to commerce.)

*Example 14B. Following negotiations, Seller and Buyer signed a "Contract of Sale" that called for Seller to manufacture and ship goods according to specifications and quantity stated in the agreement. The agreement did not fix a price and instead stated: "We intend to be bound by this agreement, and hereby derogate from any implication of Article 14(1) of the 1980 U.N. Convention that we have not made a binding contract in the absence of fixing or otherwise determining the price". Seller manufactured and delivered the goods which Buyer accepted and used. Thereafter, the parties were unable to agree on the price.*

Seller seeks to recover for the goods and invokes Article 55 of the Convention:

"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." [page 152]

Buyer defends on the ground that the agreement did not "expressly or implicitly fix...or make provision for determining the...price" as required by Article 14, and therefore there was no contract.

Buyer's argument has to face, at the outset, the fact that Article 14 states that the issue is whether a "proposal" is "sufficiently definite and indicates an intention to be bound" to be "an offer". Here the parties did not exchange an "offer" and "acceptance"; instead they signed a "Contract of Sale" that stated that they intended to be bound by contract even though the price had not been fixed. In addition (to lay bare the basic issue of validity) we assumed that the parties expressly stated that they derogated (Art. 6) from any provision of the Convention that would deny effect to their intent. (This intent would normally be evidenced merely by executing a contract of sale.)

In the Introduction to Part II (❖132.1 *supra*), we noted that the Convention's definitions of "offer" and "acceptance" are useful and necessary for deciding whether a contract was made by an exchange of communications. We found, however, that the Convention recognizes that contracts can be made without following the two-step offer-acceptance pattern: Article 18(3) provides that a contract may be concluded "by performing an act", and Article 8(3) provides that statements (including terms of agreements) are to be interpreted to include trade usages and the parties' practices and also are to be construed in the light of "any subsequent conduct of the parties".

In the life of commerce, as in the above example, there is often no question as to whether a single communication should be construed as an "offer"; the parties' understanding will be disclosed by a series of communications, by their conduct (e.g. by delivering and accepting goods) or by executing a contract of sale.

Does Article 14 deal not only with whether a communication should be construed as an "offer" but also with the validity of a "Contract of Sale" that does not determine the price? This reading of Article 14 is difficult to sustain in the face of Article 4 which states that "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...*". Deference to the parties' agreement is also shown by Article 6: the parties may "derogate from or vary the effect of any of [the Convention's] provisions." [9] In any event, further light is shed by the legislative history of Article 55, *infra*. [page 153]

### ❖137.6 (c) *Article 55 and the Two-Point Compromise*

The question whether Article 14 denies validity to the parties' clearly expressed intent to be bound is important for all States that adopt the Convention without excluding Part II on Formation.<sup>[10]</sup> As we shall see in discussing Article 55 (324 325.3 *infra*), in developing this provision UNCITRAL in 1977 and the Diplomatic Conference in 1980 developed a two-part compromise between delegates that were opposed to and those that supported open-price contracts.

The Working Group draft that led to Article 55 provided: (1) "When a contract *has been concluded*" but does not make provision for the price, (2) the buyer must pay "the price generally charged *by the seller*" when the contract was concluded.<sup>[11]</sup>

(1) In reviewing the above draft UNCITRAL in 1977 changed the opening clause, quoted at (1), to read "If a contract has been *validly* concluded...". The formal statement of the decision by the Commission (sitting as a Committee of the Whole) stated (VIII YB 49 para. 340, *Docy. Hist.* 342): "The Committee decided to introduce an express statement into the article to make it clear that it only applied to agreements which were considered *valid by the applicable law*". The discussion that led to this decision made clear that "applicable law" meant (para. 328) "the applicable *national* law". Indeed, discussion related to the Convention used the phrase "applicable law" to refer to *domestic* law "applicable by virtue of the rules of private international law" (Art. 7(2)), in contrast to the uniform international rules set forth in the Convention.

(2) The second part of the compromise was made in 1980 at the Diplomatic Conference. Some delegates objected that the reference to the price charged by the *seller* gave an unfair advantage to the seller; to meet this objection the reference to the seller's price was replaced by "the price *generally* charged at the time of the conclusion of the contract". (These compromises are discussed further under Article 55, 324 325.3, *infra*.)

As a result of these two compromises, in the formal final votes by the Plenary of the Conference, Article 14 (then draft article 12) was adopted by 41 votes to none with 5 abstentions and Article 55 (then draft article [page 154] 51) was adopted by 40 votes to 3 with 5 abstentions. *O.R.* 205, 211, *Docy. Hist.* 740, 746.

In view of this over-all compromise, including the concession to the *domestic* law of those States that make provision for the price an element of contract validity, it is quite impossible to conclude that Article 14 imposed such a rule of invalidity on all States that adopt Part II of the Convention.

### 137.7 (1) *Consequences of Invalidity for Lack of Provision for Price*

Finally, let us face some of the consequences of holding that the price provision of Article 14(1) reaches beyond the interpretation of the "offer" and invalidates transactions where the parties, by words or conduct, show their agreement to be bound. The consequences can be serious when the seller manufactures or transports goods or when the buyer relies on expected supplies for resale or production; even more serious consequences can result when, in reliance on their agreement, goods are supplied, accepted and put into use.

Part III of the Convention (Arts. 25 88) is premised on the existence of a contract (Arts. 30, 53); denying validity to the agreement deprives the parties of all of the rights provided by the Convention. For example, the seller may not recover the price (Arts. 35, 62) or avoid the "contract" for breach and recover the goods for non-payment (Arts. 64(1), 81(2)). The buyer loses protection of rules on the required quality of the goods (Art. 35) and the right to recover the damages caused by defective goods (Arts. 45, 74). The ultimate irony is that in many situations (e.g., questions as to non-conformity and recovery of damages) the price of the goods is irrelevant.

### 137.8 (a) *Conclusion*

Article 14(1) provides that a communication that does not state or make provision for the price is not an "offer" so that a reply "I accept" does not close a contract. However, Article 14(1) does not bar the parties from concluding a contract by express agreement or by conduct (e.g., by shipping, receiving and using goods) that shows their "intention...to be bound" (Art. 14(1)). The only rule of "validity" with respect to agreement on price results from the opening phrase of Article 55 which defers to applicable domestic law.<sup>[12]</sup> [page 155]



### (3) *Decisions Relating to Definiteness and Price*

#### (a) *Prior to Delivery and Acceptance*

Questions concerning the existence of a contract arise most frequently prior to shipment and receipt of the goods. For example:

- (1) ARB: [Russian Fed.; Trib. of Int. Comml. Arb., Ch of Comm., 309/1993, 3 March 1995](#). Negotiations between Ukrainian S and Austrian B were completed except for S's statement that the price would be agreed "ten days prior to the new year". B agreed to this provision but the agreement on price did not occur. S refused to ship; B sued for damages. The tribunal rejected B's claim, invoking CISG Articles 14 and 55. Article 55 (price generally charged at conclusion of contract) was not applicable since the agreement contemplated that the parties would agree on the price. CLOUT 139, UNILEX D. 1995-7.2.
- (2) [HUNG. Sup. Ct., Gf.I.31 349/1992/9; 25 September 1992](#). S made B alternative offers for B's purchase of aircraft engines, indicating the price for only some types of engines. B agreed to this proposal, but later rejected the contract. No engines were delivered; S sued for damages. Held, reversing the lower court, that the offer was not sufficiently definite: there were "no market prices" for aircraft engines. CLOUT 53, UNILEX D. 1992-20.
- (3) GER. [OLG Frankfurt a M., 10 U 80/93, 4 March 1994](#). B invited S to make an offer for lists of screws. S sent lists and prices; B disagreed as to prices for some items. S did not ship. B sued for either delivery or damages. B's claims were rejected: there was neither delivery nor contract.. CLOUT 21, UNILEX D. 1994-7.1.
- (4) ARB. [ICC \(Paris\) 8324/1995](#). In sale of manganese, parties agreed on a provisional price (which B paid), subject to revision based on the price B received on resale. In view of prior usage of the parties, B was required to pay an additional sum. (French CISG law was applied.) UNILEX D. 1995-35.
- (5) SWITZ. [Handelsgericht K. Aargau, OR. 96 0001 3, 26 September 1997](#). B (Swiss) ordered cutlery from S (Ger.). S shipped the cutlery to B. B rejected the goods. The parties had not agreed on the price. The court awarded damages to S: the contract was sufficiently definite. CLOUT 217.

*See also:* Murray, D.E., Open Price in World-Wide Setting, 89 Comp. L.J. 491-500; Bonell/Ligouri, ULR (1996-1) 158-160 (citing cases).[page 156]

#### (b) *Goods Received; Buyer Obligated to Pay*

The following decisions illustrate the view that, in spite of failure to agree on the price, buyers are bound to pay for goods they have accepted.

- (1) AUSTRIA, [OG \(Sup. Ct.\), 2 Ob 547/93, 10 November 1994](#). Furs, of a range of prices based on quality, were received and resold by B. B was bound to pay; the decision stressed B's conduct following delivery. CLOUT 106, UNILEX D. 1994-29.
- (2) FR. [CA Grenoble, Veyron v. Ambrosio, RG 93/1613, 26 April 1995](#). Goods delivered to B, without prior agreement on price, were considered accepted at the price stated by S as a "reasonable understanding" under Art. 8(2) & (3). See also: [FR. C. de Cass. \(Sup. Ct.\), Fauba v. Fujitsu, 4 January 1995](#) (on appeal from [C.A. Paris, 22 April 1992](#)). Arrangement that the price was to be "modified by market trends" did not bar contract. CLOUT 155, UNILEX D. 1995-1. See also [F. Ferrari, 15 JLC 15, n.79 \(1995\)](#) (references to numerous studies on contract formation).

*Queries re Analysis and Organization.* Should cases in which B receives and accepts goods not be considered here under Part II. Formation of the Contract? Surely, the receipt and acceptance of goods shows that a commercial transaction (neither gift nor theft) has occurred. In this setting, the relevant issues center on questions such as defects in the goods, non-payment or damages matters governed by Part III (Articles

25♦88). In that setting we shall return to Article 55, which governs cases where a contract has been concluded, but does not "make provision for determining the price." [page 157]

---

## Article 15. When Offer Becomes Effective; Prior Withdrawal

♦138 The special and narrow role of Article 15 may be illustrated by the following example:

*Example 15A. On June 1 Seller mailed to Buyer a letter offering to sell Buyer specified goods at a stated price. The offer also stated: "This offer is binding and irrevocable until July 1". A letter from Seller to Buyer takes a week for delivery. On June 6, before Buyer received Seller's June 1 letter, Seller phoned Buyer and said, "Disregard the letter that I mailed to you on June 1. I have decided to withdraw the offer contained in the letter." On receipt of Seller's letter Buyer replied "I accept your June 1 offer."*

The question whether the above parties are bound by contract is answered by the following provision.

### Article 15 [1]

"(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."

In the above example, on June 6, the offer had not yet reached the offeree, and therefore was not yet "effective." The statement that the offer could not be revoked until July 1 would have become binding (Art. 16(2), *infra* at ♦139) when it reached the offeree. But the offer never became "effective" because of the withdrawal that reached the offeree in advance of the offer.

The reason supporting Article 15 is that the enforcement of contracts is designed to protect expectations; none arose in this case before the offeror withdrew the offer. Article 18(2), *infra* at ♦157, provides a parallel rule with respect to an acceptance: the offeree may withdraw the acceptance if the withdrawal "reaches the offeror before or at the same time as the acceptance would have become effective" (Art. 22). [2] [page 158]

---

## Article 16. Revocability of Offer

♦139 As we have seen, Article 15 empowers the offeror to "withdraw" an offer before it reaches the offeree. The present article deals with the power of the offeror to "revoke" an offer after it has reached the offeree and thereby has become "effective."

### Article 16 [1]

"(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."

This article must be viewed as a whole for the rule of revocability in paragraph (1) is deeply eroded by paragraph (2).

## ❖ 140 A. Revocability Until Acceptance

### (1) *The Common Law; "Consideration"*

If Article 16 consisted only of paragraph (1) it would resemble the traditional common-law view that an offer may be revoked until it is accepted. Even if the offeror promises that the offeree will have a specified period for acceptance, under the traditional common-law approach this promise is not binding unless it is supported by "consideration" ❖ a payment or some other act or thing given by the offeree in exchange for the promise to hold the offer open.<sup>[2]</sup> But the common law found a way slightly to curtail this broad power to revoke ❖ the famous "post-box" rule. If the offeror has impliedly authorized the offeree to reply by mail,<sup>[page 159]</sup> the acceptance occurs and, more to the point, the offeror's power to revoke is cut off when the offeree posts his acceptance.<sup>[3]</sup> This common-law feature appears in the general rule of revocability of Article 16(1) ❖ the revocation must reach the offeree "before he has *dispatched* an acceptance." In addition, as we shall see, the effectiveness of an offer ends if it is not duly accepted. See Art. 18(2), ❖ <sup>161</sup>, *infra*.

## ❖ 141 B. Restriction on Revocability: Paragraph (2)

The heart of Article 16 is paragraph (2). Cutting deep into the general rule of paragraph (1), paragraph (2) restricts the offeror's power to revoke on two alternative grounds: (1) a promise or other indication by the offeror that the offer is irrevocable or (2) acts by the offeree in reliance on the offer.

### ❖ 142 (1) *Promise or Indication that the Offer is Irrevocable*

#### (a) *Promise Not to Revoke*

Under the Convention, common law doctrines on "consideration" are not available to nullify a promise that an offer will remain in effect.

*Example 16A. On June 1 Seller delivered to Buyer an offer that included this statement: "I will hold this offer open until June 15." On June 2 Seller delivered to Buyer the following statement "I hereby revoke my offer of June 1." On June 14 Buyer informed Seller that he accepted the offer of June 1.*

Seller's attempt to revoke the offer was ineffective. Buyer accepted within the period set by Seller; the parties are bound by contract.

This result reflects the approach of various civil law systems.<sup>[4]</sup> In addition, under the (U.S.A.) Uniform Commercial Code an offer to sell goods may, under stated circumstances, be irrevocable.<sup>[page 160]</sup>

#### *Section 2-205. Firm Offers*

"An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

The UCC's common-law background helps to explain the limitations on irrevocability in Section 2-205. Limiting the provision to an "offer by a merchant" is not substantially different from the scope of Article 16 in view of the mercantile nature of most international sales and the Convention's exclusion of consumer transactions (Arts. 2(a) and 5, *supra* at ❖❖<sup>49</sup>, 71). More significant are the requirements of a "signed writing" (separately signed if the "assurance" is on a form supplied by the offeree) and the three-month limitation on the effectiveness of a promise not to revoke.<sup>[5]</sup> On the other hand, official recommendations in other common law jurisdictions to revise the rules on the revocability of offers propose minimal formal requirements and are similar to Article 16(2) of the Convention.<sup>[6]</sup>

## ❖ 143 (b) *Implied "Indication" that Offer is Irrevocable*

We turn to offers that do not state that they will be held open. Does the making of an offer, without more, assure the offeree of a period within which it may respond so that the offeror may not revoke the offer during that period?

Attempts to answer this question have had a troubled history. The Draft on Formation that was presented to the 1964 Hague Conference stated: "An offer...may not be revoked unless the offeror has reserved to himself the right of revocation in the offer."<sup>[7]</sup> This proposal was a center of controversy at the 1964 Convention. The upshot was a compromise **[page 161]** (ULF 5) that made revocability turn, in part, on "good faith" and "fair dealing" concepts that many UNCITRAL delegates concluded were too vague to be useful in this context. The revision of these rules on revocability was one of the more difficult tasks that UNCITRAL encountered in its work on formation of the sales contract.<sup>[8]</sup>

The most delicate issue was this: When the offer states a period within which the offeree must reply does it follow that the offer is irrevocable during this period? Support for an affirmative answer was based on civil code provisions that were interpreted to mean that if the offer must be accepted within a certain period it is irrevocable until the end of the specified period.<sup>[9]</sup> In accordance with this view, the 1964 Hague Formation Convention (ULF 5(2)) provided that an offer may not be revoked if "the offer *states a fixed time for acceptance* or otherwise indicates that it is firm or irrevocable."

### ♦143.1 (c) *Effect of "Fixed Time for Acceptance"*

Some delegates urged that UNCITRAL should retain the above language of ULF 5(2) and contended that stating "a fixed time for acceptance" would be understood as a promise to hold the offer open. Others agreed that in some settings the words would be understood as setting a time limit beyond which an acceptance would be *too late* ♦ the issue addressed in Article 18(2) by the provision that an "acceptance is not effective if the indication of assent does not reach the offeror within *the time he has fixed*" (♦161, *infra*) rather than the issue (Article 16(2)) of whether the offeror *promised to hold the offer open* for a prescribed time. Those holding the latter view proposed that the rule on irrevocability be formed in general terms: Does the offer "indicate that it is irrevocable", without specifying the expression that would communicate this meaning.

The UNCITRAL Working Group, however, approved this language: "...an offer cannot be revoked:...(b) If the offer states a fixed time for acceptance" ♦ a formulation that seemed to give decisive effect to a **[page 162]** specified form of expression.<sup>[10]</sup> UNCITRAL in its 1978 review of the draft provisions on formation revised the Working Group draft to provide that an offer can not be revoked: "(a) If it indicates, whether by stating that a fixed time for acceptance or otherwise, that it is irrevocable". Some, but not all, delegates stated that this revision reflected the view that the ultimate test was the interpretation of the offer rather than the use of a specified expression.<sup>[11]</sup> At the Vienna Conference the "fixed time" and "general rule" proponents were unable to modify the language to clearly express their positions; the 1978 UNCITRAL draft became Article 16(2)(a) of the Convention.<sup>[12]</sup>

It is not easy to assess the outcome of this dispute, which may well appear to be a tempest in a teapot. It seems necessary to give effect to two decisions: (1) The 1978 UNCITRAL retreat from the Working Group draft and (2) The retention of the reference to a "fixed time for acceptance". Both decisions can be accommodated by concluding that (1) the reference in an offer to a "fixed time for acceptance" creates a presumption of irrevocability until the stated date, but (2) the presumption can be rebutted by showing that the offer in its full setting (Art. 8(3)) would be understood to refer to the automatic expiration of the offer (Art. 18(2)) rather than a promise not to revoke.<sup>[13]</sup> (The mandate of Article 8(3) for interpretation of statements in their full setting is discussed at ♦♦109♦111, *supra*.)

An offeror who wishes to set a date for expiration of the offer and also to reserve the power to withdraw the offer should make this meaning clear. The Convention, of course, respects the basic principle that the offeror is "master of its offer". See Article 6; *Kritzer Manual* Ch. 22.

### ♦143.2 (d) *The Meaning of Specified Words: International Drafting Technique*

To this writer (who did not take part in the controversy over Article 16), the most interesting question is not the area of irrevocability but a general question about statutory drafting: Should a statute attempt to state the meaning of specified words or expressions used in private contracts? Statutory drafters may define the words *they* use but should not try to state the meaning of words and expressions used by *others*, especially in contracts made by private persons in a virtually infinite variety of settings.[page 163]

Attempts in domestic statutes to define the expressions used in contracts have led to difficulties;[14] the problems are multiplied in an international statute prepared for enactment and use in numerous different languages and commercial settings. The only vessel in which one can hope to carry a uniform rule across multi-lingual terrain is by the description of a *thought* or an *idea* not by a specified expression in a contract to which the statute attributes a particular meaning.

### 144 (2) *Action in Reliance on the Offer*

We now assume that the offeror made no statement that promised or indicated that the offer was irrevocable (Art. 16(2)(a)). Nevertheless, under paragraph 2(b) an offer cannot be revoked "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". One application of this provision may be illustrated as follows:

*Example 16B. On May 1 Builder asked Supplier to submit an offer for the sale to Builder of a specified quantity of bricks. Builder explained that he needed the offer to use in computing a bid on a contract to construct a building. Builder added that he must submit the bid by June 1 and that the bids would be opened and the contract awarded on June 15. On May 7 Supplier gave Builder an offer for the bricks, and Supplier used the offer in preparing his June 1 bid for the building contract. On June 10 Supplier notified Builder that he revoked his offer. On June 15 the bids were opened and Builder was awarded the contract. Builder thereupon informed Supplier that he accepted Supplier's offer.*

In the above example, it was "reasonable for the offeree [Builder] to rely on the offer as being irrevocable" since Supplier knew that Builder would use the offer in compiling its bid. In addition, Builder "acted in reliance on the offer" in submitting a bid that led to a contract binding it to construct the building at an agreed price. Both requirements of paragraph (2)(b) are satisfied, and Supplier's attempt to revoke his offer is ineffective.[15]  
[page 164]

This approach has support in domestic law. As we have seen, some civil law legal systems hold offers to be irrevocable for the period needed for a response; other legal systems do not go so far but hold that reasonable reliance on the offer bars revocation or (in some cases) makes the offeror responsible in tort for damages.[16] In the United States the prevailing view is consistent with the Convention in barring revocation in cases like Example 16B.[17]

Example 16B provides only one illustration of situations where revocation of an offer may be ineffective because the offeree has reasonably relied on the offer. However, the legal effect of Article 16(2) is subject to an important limitation imposed by the Convention's rules on the time for acceptance. Regardless of the offeree's reliance, under Article 18(1), *infra* at 157, the making of a contract requires a "statement...or other conduct...indicating assent." And, under Article 18(2) there is no contract if the offeree's "indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time..." (See Art. 18, *infra* at 164).

This limit on the time for acceptance imposed by Article 18(2) is especially significant in situations in which Article 16(2) does not limit the period of irrevocability—as in paragraph (2)(a) when an offer states that it is irrevocable "without stating a fixed time for acceptance" and in paragraph (2)(b) when "the offeree has acted in reliance on the offer".

This time limit is important to prevent the offeree from speculating at the offeror's expense. Some acts of reliance that create irrevocability under paragraph (2)(b), like seller's shipment of goods in response to an order



([¶164](#), *infra*), create little danger of abuse; the acts that led to irrevocability clearly commit the actor to performance. Other acts may be ambiguous, such as the purchase or assembly of goods or supplies that the seller might (or might not) need to fill the buyer's order. In these cases, later events that make the contract more (or less) attractive may tempt the seller to claim that these steps were (or were not) taken in reliance on the buyer's order.

The mandate of Article 7(1) to interpret the Convention "to promote the observance of good faith in international trade" indicates the usefulness of two safeguards: (1) caution in basing irrevocability on ambiguous [\[page 165\]](#) conduct and (2) enforcement of the time limits for acceptance established by Article 18(2) [¶164](#), *infra*. There are other similar situations calling for construction to prevent abuse and promote good faith; see, *e.g.*, Art. 7 at [¶95](#) *supra* and Art. 46 at [¶285](#) *infra*..[\[18\]](#)

### [¶145](#) C. Responsibility in Tort for Reliance on Offer

In some legal systems, if an offeror induces the offeree to incur expense in reliance on an offer and then withdraws the offer, the offeror may be liable in tort even though the withdrawal prevents the conclusion of a contract and thereby excludes the full battery of remedies for breach of contract.[\[19\]](#) Will such rules of domestic law apply, alongside the Convention, when the offeree suffers loss by reliance on an offer? One cannot envisage all of the circumstances in which this question may arise; hence, there will be no attempt to give a general answer but the question does deserve attention because of its relationship to basic issues concerning the scope of the Convention.

#### [¶146](#) (1) *Non-Contract Labels in Domestic Law*

In the Commentary to Article 4 we examined some of the implications of the statement that the 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*." This question arose: Do domestic rules of "product liability," applicable when defective goods are supplied under a sales contract, co-exist with the Convention's rules that regulate breach of contract? In that context it was suggested that when the very facts that invoke rules of "product liability" invoke rules of the Convention, the domestic rules are supplanted by the Convention. In short, it would be wrong to bypass the uniform international rules by pinning a non-contract label to the very facts that are regulated by the Convention. (See Art. 5, *supra* at [¶71](#).) Are there situations in which this line of thought would bar recourse to domestic law that awards damages for wrongful revocation of an offer?[\[page 166\]](#)

#### [¶147](#) (a) *Operative Facts That Reach Beyond Contract*

Domestic law would not be excluded whenever the offeror harms the offeree by wrongful conduct other than the making and revocation of the offer. For example, domestic remedies for fraudulent inducement to make a contract are not affected by the Convention. (See Art. 4, *supra* at [¶65](#) and Art. 7, *supra* at [¶97](#).)

#### [¶148](#) (2) *Wrongful Revocation that Aborts the Process of Contracting*

A more difficult question can best be examined against the following setting:

*Example 16C. Buyer offered to purchase complex machinery from Seller, which Seller would manufacture according to designs supplied by Buyer. The offer included a stated price and stated that the offer would be held open for two months to enable Seller to determine whether he could make the machinery at that price. Seller immediately started the process of designing manufacturing procedures and computing costs of production. Two weeks later, when Seller had spent substantial sums in computing costs but had not completed this work, Buyer notified Seller that he could no longer use the machinery and withdrew the offer. Seller thereupon stopped work on the cost estimates since it would be uneconomic to invest further funds in preparing to make machinery that Buyer would not accept and perhaps could not pay for.*

#### [¶149](#) (a) *Applicability of the Convention*

Has Seller a claim under the Convention? In Example 16C Buyer purported to revoke an offer that, under Article 16(2), "cannot be revoked". However, the only remedy explicitly stated in Part II of the Convention is to hold the offer open so that the offeree can accept and thereby complete a contract (Arts. 18 and 23). Examination of the remedies specified in Part III of the Convention indicates that they are applicable to breach of contract.<sup>[20]</sup> In Example 16C the offeror's (Buyer's) wrongful revocation made it impractical to conclude a contract since a decision as to acceptance would require further expenditures and it would be hazardous and uneconomical to invest added funds that could be recouped only by a lawsuit.<sup>[page 167]</sup>

### ❖ 150 (b) *Gap-filling*

The above discussion suggests that a situation can arise where the Convention bars revocation but fails to provide an effective remedy. This invites our attention to Article 7(2), which provides that "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..." Does this authorize tribunals to develop a remedy under the Convention for the offeror's wrongful revocation?

The Convention and only the Convention controls the question whether the revocation of the offer is rightful. The Convention provides one remedy for wrongful revocation—the offeree can accept the offer in spite of the revocation. But when special circumstances (as in Example 16C) make this remedy ineffective it would be reasonable for a tribunal to close the gap that is revealed by the above example. The need for a remedy addressed directly to the damages caused by a wrongful revocation is supported by domestic law and by recent studies directed to the reform of domestic law.<sup>[21]</sup> Responding to this need by filling a gap in the Convention could promote the declared goal of uniformity since solutions applying the Convention would be taken into account by other tribunals and a common *jurisprudence* would develop. (See the Commentary to Art. 7, *supra* at ¶96.)<sup>[22]</sup>

### ❖ 151 (c) *Remedy Supplied by Domestic Law*

Let us now assume that, contrary to the above suggestion, a tribunal declines to develop a remedy under Article 7(2) of the Convention. In this event, the tribunal should at least work from the premise that, by command of the Convention, the revocation of the offer was wrongful and draw on applicable domestic law for the remedy that is appropriate for this type of wrong.<sup>[page 168]</sup>

## Article 17. Rejection of Offer Followed by Acceptance

❖ 152 The role of this brief article (quoted below) can be illustrated as follows:

*Example 17A. On May 1 Seller delivered to Buyer an offer that stated: "I will hold this offer open until June 1." On May 7, Buyer delivered to Seller the following: "I cannot accept your offer since the price is too high," but on May 10 he delivered to Seller the following: "I hereby accept your offer of May 1." Seller immediately informed Buyer that this "acceptance" was not effective because of the earlier rejection; Buyer replied that this was not true because Seller had promised to hold the offer open.*

This issue is settled by the following provision:

### Article 17 <sup>[1]</sup>

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

### ❖ 153 A. Explicit Rejection

In the above example, Buyer's rejection of May 7 "terminated" the offer even though it would otherwise have been binding until June 1; there was no contract. In such cases, Article 17 avoids doubt that might arise from the rule of Article 16 that the offer was "irrevocable."<sup>[2]</sup> In addition, the rule that a rejection terminates an offer is

supported by practical considerations. When an offer is rejected the offeror has no reason to expect that the offeree will change its mind; Article 17 enables the offeror to make plans promptly and make maximum use of its resources.[page 169]

### ◆154 (1) *Prevailing Rules*

The approach of Article 17 is widely supported in civil law systems, and probably in most common-law jurisdictions.[3] Decisions in the United States have held that one who has purchased an option for a specified term does not destroy the "option" by a rejection. However, most of these cases involve situations, like the rental of premises with an option to purchase, where substantial value has been given for the option and forfeiture or substantial loss would result from termination of the option. There is ground for skepticism that courts would extend this approach to an offer to sell or buy goods which becomes irrevocable merely on the basis of a statement that the offer is "firm." (See UCC 2◆205 quoted under Art. 16, *supra* at ◆141.) [4] In contrast to these doubts, Article 17 is clear.

### ◆155 B. "Acceptance" that Modifies an Offer Followed by Unqualified Acceptance

An offeree can create difficult problems by a response that is not a clearcut acceptance or rejection; the ambiguity may be a bargaining tool in the attempt to secure better terms while trying to hold the offer open. Whether an "acceptance" that includes modifications is an acceptance or a rejection is addressed by Article 19 and can best be considered under that article. However, the link between Articles 17 and 19 can be usefully illustrated at this point:

*Example 17B. On May 1 Seller made the "firm" offer that was described in Example 17A. On May 7 Buyer delivered the following: "I accept your offer, as evidenced by my purchase-order which is enclosed." The purchase-order included a provision that the parties agreed to binding arbitration of any dispute arising under the contract; Seller◆s offer did not refer to arbitration. On May 8, Seller replied that he could not accept the Buyer◆s proposal and that the offer had terminated. On May 10, Buyer notified Seller: "I hereby accept your May 1 offer without qualification." [page 170] Seller immediately responded: "As I informed you on May 8, my offer has been terminated."*

As we shall see more fully in examining Article 19, Buyer◆s May 7 communication, although it "purported to be an acceptance", probably was a "rejection" because of the additional material term and, in any event, gave Seller the power to terminate its offer. (Cases where the parties proceed with performance: Art. 19 at ◆167.)

### ◆156 C. Rejection Overtaken by Acceptance

*Example 17C. On May 1 Seller made an offer as in Example 17A. On May 7 Buyer mailed a rejection but on May 8, before the letter reached Seller, Buyer phoned (or telexed) to Seller as follows: "Ignore my May 7 letter. I accept your offer." Seller contended that Buyer◆s letter of May 7 terminated the offer.*

Article 17 states that an offer is terminated when a rejection "reaches" the offeror. Similarly, under Article 18(2), *infra* at ◆161, an acceptance becomes effective when the indication of assent "reaches" the offeror. In Example 17C the acceptance reached the offeror before the rejection, and a contract was concluded.[5] [page 171]

## Article 18. Acceptance: Time and Manner for Assent

◆157 The first four articles of Part II deal with the offer; we turn now to the acceptance. This initial article sets forth the criteria and also the time and manner for an acceptance.

### Article 18 [1]

"(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."

## ❖ 158 A. Criteria for Acceptance

Under paragraph (1), an acceptance is effected by a statement or other conduct of the offeree "indicating assent." The words "indicating" and "assent" epitomize the two major problems of contract formation: (1) communication and (2) agreement. The present article concentrates on problems of communication; Article 19, *infra* at ❖165, addresses questions concerning assent.[page 172]

Paragraph (2) of Article 18 governs the time when an acceptance becomes "effective"❖a concept that paragraph (2) uses in stating rules on whether an acceptance is too late to form a contract. The time when an acceptance becomes "effective" is also employed to decide whether an offeree may withdraw an "acceptance" after transmission (Article 22, *infra* at ❖177) and to specify the time when a contract is concluded (Article 23, *infra* at ❖178).

## ❖159 B. Indication of Assent; Communication

In connection with assent the Convention uses a delicate term❖"indicating." A stronger word such as "stating" would not have been appropriate since assent may be shown not only by a "statement" but also by "other conduct." The mode of expression is unrestricted but communication of assent in some form is essential. This is suggested by the statement in paragraph (1) that "silence or inactivity" does not in itself amount to acceptance and, more clearly, by the rule in paragraph (2) that the indication of assent must "reach" the offeror. (At ❖161, *infra*, we shall consider whether paragraph (3) deviates from this principle by providing that, in some circumstances, the offeree "may indicate assent by performing an act.")

### ❖ 160 (1) Silence or Inactivity

Principles of fair dealing do not permit an offeror to impose on the offeree the duty to reply. Such is the predominant rule of domestic law.[2] The Convention❖s approach, embodied in Article 18(1), may be illustrated as follows:

*Example 18A. On June 1 Seller sent Buyer an offer to sell a specified type and quantity of goods at a stated price, and added: "This is such an attractive offer that I shall assume that you accept unless I hear from you by June 15." Buyer did not reply. Seller shipped the goods on June 16.[page 173]*

By virtue of Article 18(1), no contract was formed and Buyer may reject the goods. This provision states that silence or inactivity does not "in itself" amount to acceptance, and thus indicates that in special circumstances silence may constitute acceptance. This possibility may be explored in the following setting:

*Example 18B. On June 1 Buyer delivered the following to Seller: "Please rush price quotation for the following goods [specifying quantity and quality]. If you do not hear from me within three days after I receive your*

*quotation, consider your offer as accepted." Seller delivered the quotation to Buyer on June 3; Buyer did not respond until June 10, when he objected to the prices that Seller had quoted.*

In this case, Buyer's silence was an acceptance of Seller's offer. Unlike Example 18A, where the offeror tried to force the offeree to respond, the duty to respond was here assumed by the offeree—the one who failed to respond. The provision regarding silence in Article 18(1) is no barrier: Article 6 permits the parties to "derogate from or vary the effect" of any of the provisions of the Convention.<sup>[3]</sup> Buyer proposed that if Seller sent a quotation Buyer would be bound if he failed to reply within three days, and Seller sent the quotation with this understanding. (If Seller had shipped the goods before Buyer objected to Seller's price quotation, the problem could have been solved under paragraph (3), which provides for acceptance by performing an act. See *infra* at <sup>163</sup>.)

Under Article 9 the parties are also contractually bound "by any usage to which they have agreed and by any practices which they have established between themselves." (Art. 9, *supra* at <sup>114</sup>.) In Example 18A, an applicable usage or practice that no response was required could provide a basis for the making of a contract without an explicit response to the offer. Intriguing questions are presented by domestic rules on the effect of silence after receiving a letter "confirming" the terms of an "agreement" that had not been finalized. These domestic rules vary and present distinct problems of relationship to the Convention. To the extent that these rules create rebuttable presumptions regarding the actual practices of the parties or usages of the trade, questions of incompatibility with Article 18(1) are avoided by Article 9 which gives contractual effect to such practices and usages. However, more serious problems are presented by **[page 174]** rules that reach beyond Article 9 since they may invade and conflict with the Convention's rules on formation of the contract. Assume, for example, that in a transaction between parties in States A and B, only State B has a rule of law giving effect to silence after receipt of a letter of confirmation. In this setting application of the domestic rules of State B raises serious questions of conflict with Article 18 and the Convention's basic goal (Art. 7) to achieve uniformity in application.<sup>[4]</sup>

*Decisions on silence and duty to reply:* (1) USA, [U.S.D.Ct. S.D.N.Y., \*Filanto v. Chilewich\*, 789 F. Supp. 1229, 984 F.2d 58 \(1993\)](#): B's offer, including a master agreement for arbitration in Russia, was not promptly answered by S. Course of dealing (Art. 8(3)) gave S a duty to respond promptly; S was bound by the above agreement. CLOUT 23, UNILEX D.1992-9. See [Brand & Flechtner, 12 JLC 239 \(1993\)](#). (2) Cf. GER. [OLG Köln, 22 U 202/93, 22 February 1994](#): S offered to terminate a contract with B; B did not reply. Under Art. 18(1) silence alone is not effective, but here conduct of the parties was binding. CLOUT 120, UNILEX D. 1994-6. (3) SWITZ. [HG K Zürich, HG 940513, 10 July 1996](#). After agreement on the price for printed chips, S (Ger.) notified B (Switz.) of an increase in price because of higher production costs; B did not reply. S sued B to recover the price, including the price increase notified by S. The court rejected S's claim for the increase in price; under CISG 18(1) & (3) B's silence (absent other conduct) did not give consent. CLOUT 193. (For the court's decision on interest see Art. 78.) See: Schlechtriem, Com. (1998) 129-130.

*Domestic rules on Letters of Confirmation:* BELG. [Rechtbank v. Koop., Hasselt, A.R. 2532/93, 24 January 1995. Wilvorst...v. Erarts](#). One issue: Did CISG apply? The seller (S) was located in Germany, a party to CISG; the buyer (B) was located in Belgium, not then a party to CISG. The conflict (PIL) rules of the Belgian forum pointed to Germany; pursuant to CISG Art. 1(1)(b) the Convention would apply. However, the German seller (S) argued that CISG was excluded by a clause in S's standard terms, which S had sent B after the conclusion of the contract, and that B had not objected to this provision. The Belgian court applied German domestic law on letters of confirmation, and held that this standard term was binding to exclude the Convention. UNILEX D. 1995-1.0. (Query: When, as in the above case, the law of a Contracting State is applicable, should a forum apply that State's domestic law or the law of the Convention? Under the latter view, the rules applicable to the seller's standard term would, e.g., be CISG Article 9(1) on usages and practices **[page 175]** of the parties and Article 9(2) on international usages. On letters of confirmation, see Bonell/Ligouri, ULR (1997-3) 587-588, n.79-84, and fn. 4, *supra*.); Schlechtriem, Com. (1998) 99-101, 127-128, 138-139.

## 161 C. Time Limits for Acceptance



Paragraph (2) of Article 18 provides that acceptance is not effective unless and until the offeree's "indication of assent *reaches* the offeror" and that this communication must take effect within prescribed time limits.

Paragraph (2) states that an "oral" offer (when the parties speak face-to-face or over the telephone) "must be accepted *immediately* unless the circumstances indicate otherwise." (The most normal and decisive "circumstances" that indicates "otherwise" would be the offeror's consent to a later reply.<sup>[5]</sup>) In other cases, if the offeror has not fixed a time, the reply must be received within "a reasonable time" in the light of all the circumstances.<sup>[6]</sup> As has been suggested at <sup>144</sup>, a delay that permits the offeree to speculate at the offeror's expense may not be "reasonable," particularly in the light of Art. 7(2) ("good faith" at <sup>95</sup>).

### **162 (1) Delay or Loss in Transmission**

Work on this article encountered two competing theories concerning the time when an acceptance becomes effective: the "dispatch" (or "post-box") theory and the "receipt" theory.

We have met the "dispatch" theory in connection with attempts by the offeror to revoke his offer. (Art. 16 *supra* at <sup>140</sup>.) In that setting the rule that an acceptance is effective when it is dispatched has been useful to limit the offeror's power to revoke an offer—a power that has been given wide latitude (even when the offeror promised not to revoke) by the common-law doctrine of "consideration." Article 16(2), as we have seen, gives effect to the offeror's promise not to revoke. Once this specific problem was solved, it was possible to consider whether the "dispatch" or "receipt" approach is more appropriate for the problem presented by [page 176] the delay or loss of a communication sent by the offeree. This problem can be illustrated as follows:

*Example 18C. On June 1 Seller mailed to Buyer the following letter: "I offer you, for your prompt acceptance, the following goods: (details as to quantity, price, etc.)." The mails between Seller and Buyer normally require a week for delivery and Seller's offer reached Buyer in due course on June 8. On June 9 Buyer mailed a letter to Seller accepting the offer. The letter was properly addressed and stamped but it was lost in the mails; Seller learned of the letter a month later when Buyer complained that the goods had not arrived.*

Article 18(2) provides that an acceptance "is not effective if the indication of assent does not "reach" the offeror within the time he has fixed." (In Example 18C the offeror asked for "prompt acceptance.") Article 18(2) puts the risk of transmission on the offeree—the one who sent the message; in Example 18C, the acceptance was not "effective" within the time limit fixed by the offer. (The result would be the same if the offeree's reply, after a month's delay in the mails, had reached the offeror. However, under Art. 21(2), the offeror must notify the offeree that the offer has lapsed when the late acceptance shows that the period of transmission has been abnormal. See the Commentary to Art. 21, *infra* at <sup>176</sup>.)

Should the hazards of communicating an acceptance fall on the sender (the offeree) or on the addressee (the offeror)? The balance of interests is about even but the following considerations may tip the scale. When the transaction reaches the point of acceptance, delays or mishaps in communication become crucial, for acceptance creates a duty of performance, and failure to perform leads to disappointment and legal liability. The "receipt" principle calls for special care by the sender, and the sender has a greater opportunity to know whether the medium he uses is then subject to hazards or delays. At any rate, the "receipt" approach is widely followed in the civil law world, and the reasons that contributed to the common-law "dispatch" or "post-box" approach have been met by the Convention's rules (Art. 16) restricting revocation by the offeror.

### **163 D. Assent by Performing an Act**

Paragraph (3) confronts the difficult questions that arise when the offeror requests performance of an act rather than a verbal acceptance or promise. It will be prudent to start with a relatively simple illustration:

*Example 18D. On June 1 Buyer delivered to Seller the following: "Please rush shipment of the following goods: (description of the [page 177] goods)." On June 2 Seller shipped the goods to Buyer. The next morning (June 3) Seller drafted a telex to Buyer informing him that the goods were on the way. Before Seller could transmit the*

telex, Buyer phoned Seller and said: "Do not ship goods ordered June 1." Seller replied that it was too late to countermand the order since the goods had already been shipped. Seller's telex of the shipment reached Buyer on June 3 and the goods arrived on June 20. Buyer rejected the goods on the ground that there was no contract.

Under the Convention it seems clear that a contract was formed and the Buyer is liable to Seller for breach of contract. Buyer's instruction "rush shipment" would invoke Article 18(3): "by virtue of the offer...the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods." [7]

In addition, as we shall see *infra* at ¶164, the same result follows from the rules on revocability in Article 16(2)(b). In view of the request for prompt shipment, "it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer" by shipping the goods. Thus Article 16(2)(b) and 18(3) respond to the same interest; the protection of one who changes position in reliance on a request contained in an offer.

### ¶164 (1) *Communication of Acceptance by Action*

*Example 18E.* On June 1 Seller received a letter from Buyer dated May 28 requesting Seller to ship certain goods, at a price that was specified in Seller's catalogue. Seller did not reply to Buyer's offer but dispatched the goods on June 2. Normal delivery time was two weeks, and the goods arrived in Buyer's city in due course on June 16. On that date the carrier notified Buyer that the goods had arrived. When the carrier notified Buyer that the goods had arrived, Buyer notified both Seller and [page 178] the carrier that he would not accept the goods since Seller had failed to accept Buyer's offer and added that, in the meantime, he had procured substitute goods.

Seller would rely on paragraph (3) of Article 18: "By virtue of the offer" Seller had "indicated assent by performing an act" (dispatching the goods) and thereby had closed a contract. Buyer would reply that paragraph (3) must be read in conjunction with the more general rule of paragraph (2) which states that an acceptance becomes effective only when "the indication of assent reaches the offeror," and that this must occur "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." Moreover, under Article 18(3) acceptance "is effective at the moment the act is performed" only if the offer has authorized not only "assent by performing an act" but also assent "without notice to the offeror".

This issue of acceptance by an act without notice needs to be examined in relation to the limits on the time for acceptance by *communication*. Article 18(2) states: "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..." Let us assume that in Example 18E Buyer's order had stated, "Your acceptance of this offer must reach me by June 18"; in the alternative, assume that "the circumstances of the transaction" lead to the conclusion that June 18 would be a "reasonable time". Either assumption, of course, leads to a quick solution for Example 18E since Seller's acceptance reached Buyer on June 16 via the carrier's notice that the goods had arrived.

Let us now suppose that Buyer's offer, or the "reasonable time" required by Article 18(2), sets June 8 as the time within which Seller's acceptance must reach Buyer to be "effective". An acceptance by letter or telex that reached Buyer on June 16 would not be "effective": Buyer's offer had expired (lapsed) on June 8. On the same assumption that the "reasonable time" under Article 18(2) was June 8, does Article 18(3) on "assent by performing an act" mean that Seller's shipment on June 2 alone constituted an "effective" acceptance? The answer should be No; Buyer should be bound by contract only if notice of shipment or other indication of acceptance reaches him by June 8. A different result would be required only if (e.g.) Buyer's offer (Art. 18(3)) or the parties' practices or trade usage authorized acceptance by shipment alone without notification within a specified or reasonable time.

We now return to the unadorned facts of Example 18E. In the absence [page 179] of special circumstances, Buyer may reject the goods. This case is unlike Example 18D, in which Buyer's request to "rush shipment"

should be understood to authorize immediate shipment with notice delayed until the following day. In Example 18E Buyer's request to ship could arguably authorize shipment followed promptly by phone or telex notice, but nothing in Buyer's order or the circumstances of the case can be construed to authorize a two-week delay in notification: Seller should have realized that Buyer needed to know whether Seller was sending the goods so he could decide whether to order the goods elsewhere.

This conclusion is consistent with the theme that runs throughout Article 18 that an acceptance calls for communication; Paragraphs (1), (2) and (3) all state that the offeree must "*indicate* assent."<sup>[8]</sup> The indication of assent can be communicated via the act itself by the prompt arrival of the goods or by a notice that the act has been performed. The statement in paragraph (3) that the offeree "*may indicate* assent by performing an act...*without notice* to the offeror means that if an act (arrival of goods), or a communication that the act *has been* performed, gives the offeror the information he needs within the time he needs it, the offeree has made a contract without a separate communication that he *promises* to ship and thereby "*assents*" to the offer of a contract. Article 18(3) thus preserves the substance of the Convention's theme that acceptance calls for communication. What the Convention does is to relax the form of the communication sufficiently to permit the offeree safely to take prompt action in response to an offeror's request.<sup>[9]</sup>

Does interpreting Article 18 to require timely communication create danger for an offeree (either seller or buyer) who takes action invited by an offer before he communicates acceptance? The danger in this setting would come from the offeror's revocation of the offer. As was noted at <sup>163</sup>, *supra*, this problem is met by Article 16(2): "an offer *cannot be revoked*... (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*". For discussion of this provision see <sup>144</sup>, *supra*.

Let us examine the combined effect of Articles 16(2)(b) and 18(2) & (3) if the Buyer-offeror in Examples 18D and 18E attempted to revoke **[page 180]** the offer. In Example 18D, on June 1 Buyer said "Please rush shipment" and Seller shipped the goods on June 2. Article 16(2)(b) would bar Buyer's attempt to revoke his offer on June 3, even though Seller had not yet telexed notice of the shipment. On the other hand, in Examples 18D and 18E suppose that Seller promptly shipped the goods but Buyer received no notice of acceptance or shipment, from either Seller or the carrier, until after the expiry of a time for acceptance prescribed by Article 18(2). In this setting the combined effect of Articles 16 and 18 leads to the conclusion that Buyer is not bound by contract and may reject the goods. (Suppose Buyer attempts to revoke his offer before the Article 18(2) period for acceptance has expired. In this setting Seller, if he has not already done so, can then give notice of the shipment and of his acceptance of Buyer's order.)

Revocation of an offer after the goods have been dispatched to a distant point can place the seller in an awkward position with respect to the disposition of the goods. However, a seller can (and normally will) avoid this difficulty by giving the buyer prompt notice that the goods will be, or have been, shipped.<sup>[10]</sup> **[page 181]**

## Article 19. Acceptance With Modifications

### <sup>165</sup> A. The Commercial Setting

We now face the following situation: A reply to an offer purports to be an acceptance but states one or more provisions that add to or are inconsistent with provisions in the offer. Such "acceptances" are a common form of commercial life. High-speed, standardization production has been accompanied by measures to accelerate the placing and the acceptance of orders; the central tools in this process are pre-printed Purchase or Sales Order and Acknowledgment of Order forms. The front of the form has blank lines and spaces where the seller or buyer states the description, quantity and price and other individualized aspects of the transaction; the front of the form also states that additional terms and conditions appear on the back of the form.

These additional terms on the back of forms prepared by sellers include provisions that limit responsibility if supply or production difficulties are encountered, and limit liability for defects in the goods particularly liability for consequential damages. The forms prepared by buyers tend, of course, to emphasize different points.

In routine transactions, these forms are exchanged and the goods are supplied without attention to the divergent provisions on the back of the forms. A businessman who responded to a survey about the use of such forms added the wry comment that business would come to a halt if sellers and buyers should "read the back-sides of the other's forms." [1]

It is vital to focus on the precise and full situation from which each problem arises. Needless to say, no problem arises when O sends an offer to R whose reply rejects the offer. Difficulty arises only when R's reply is subject to ambiguity: The reply "purports to be an acceptance" but adds one or more terms that add to or differ from the offer. To complete the picture we need to know what, if anything, happens next. If O, without undue delay, objects to the modifications in R's reply the answer [page 182] should be clear: There is no contract and will be none unless the parties agree on the disputed terms.

As we have seen, difficulty results from the routine exchange of Order and Acknowledgment forms without attention or objection to discrepancies between the terms printed on their forms.

In this setting the transaction usually moves ahead without controversy. Orders for standard goods are likely to be filled promptly before either party has reason to regret the transaction. When the transaction calls for delay in delivery, as in an order for the production of goods to the buyer's specifications, changes in costs or price levels occasionally may lead one of the parties to claim that it is not bound by contract.

Most problems, however, develop after delivery of the goods when the buyer claims that defects in goods lead to dissatisfaction or claims by subpurchasers, or defects in production materials or machinery cause shut-down costs or other consequential damages. In this setting the problem is not "Was there a contract?" but "What were its terms?" A common source of difficulty is a provision in the seller's form limiting its responsibility to replacement or repair of defects; controversy has also developed from a clause in one of the forms that disputes shall be resolved by arbitration.

It is fortunate that problems arising out of the "battle of the forms" do not arise more frequently for legal science has not yet found a satisfactory way to decide what the parties have "agreed" when they have consummated a transaction on the basis of the routine exchange of inconsistent forms.

## ❖ 166 B. The Convention

The Convention, of course, could not ignore this problem:

### Article 19 [2]

"(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.[page 183]

"(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."

Paragraph (1) of Article 19 states the traditional and widely accepted rule that a reply which purports to accept an offer but which contains modifications "is a rejection of the offer and constitutes a counter-offer." Paragraphs (2) and (3) state exceptions from the traditional rule. We shall need to consider the article as a whole.[3]

## ❖ 167 (1) *The Offeror is Silent in the Face of a Modification*



*Example 19A. On June 1 Seller delivered to Buyer a Sales Order form that proposed the sale of \$1,000 bags of No. 1 quality sugar on specified terms, including shipment on July 1. Printed provisions on the back of the Sales Order form included the statement: "The goods will be packaged in sound bags." On June 5 Buyer delivered to Seller a Purchase Order form that purported to accept Seller's offer. The back of the Purchase Order had printed terms that, in general corresponded with those on Seller's form, but included the statement: "Shipment in new packages or bags." Seller did not object to Buyer's Purchase Order and expected to ship the sugar on July 1 in new bags. On June 25 there was a sharp drop in the price of sugar. Buyer consulted his lawyer to see whether he was legally bound. Comparison of the two forms revealed the divergency as to "new bags," and on June 27 Buyer cancelled the order on the ground that Seller had not accepted his "offer" of June 5.[page 184]*

Under Article 19, the cancellation probably would not be effective. A tribunal could conclude that the "modification" did not "materially alter the terms of the offer" (Art. 19(2)). Since the offeror (Seller) did not object to the "modification," the parties were bound by a contract consisting of "the terms of the offer with the modifications contained in the acceptance" i.e., shipment in new bags. The Buyer would consequently be liable to Seller for breach of contract.

The approach of Article 19 is probably inconsistent with traditional doctrine in many legal systems. However, there is evidence that tribunals have found ways to defeat attempts to escape from contracts because of immaterial deviations between the offer and "acceptance" by finding that the alleged deviation was not really inconsistent with the offer in the light of commercial practice or good faith, or was a request for modification of an agreement, or had been waived by the proposer or accepted in silence by the other party.[4]

Moreover, legislative measures in a few countries have responded to this problem. Particularly significant is legislation adopted in the Scandinavian countries, since this was the basis of a provision that was added during the course of the 1964 Hague Conference and (after redrafting) became Article 19 of the 1980 Convention.

*Answer Deviates from Offer; Material?* (1) GER. [LG Baden-Baden, 4 O 113, 14 August 1991](#). Modification in "acceptance" by offeree (S): B must give notice of defects within 30 days; S's modification was not material. UNILEX D. 1991 7. (2) FR. [CA Paris, Fauba v. Fujitsu, 22 April 1992](#), sustained, [C. de Cass. \(Sup. Ct.\), 4 January 1995](#); Modification in acceptance, stating terms for revision of price in response to market trends, was not a material alteration. UNILEX D. 1995 1.3. (3) AUSTRIA, [ObB \("Sup. Ct."\), 2 Ob 58/97m, 20 March 1997](#). B (Russ. Fed.) ordered from S (Austria) 10,000 tons of chemicals (MAP), giving chemical specifications. S's reply "accepted" the offer but set forth different specifications. The issue: Did S's reply materially alter the offer? (CISG Art. 19(2) & (3)) The Court directed the lower court to ascertain whether S's reply altered B's offer in a way that favored B; if so, a contract was concluded. CLOUT 189; UNILEX D. 1997 6. See: Schlechtriem, Com. (1998) 140 141.[page 185]

*Battle of the Forms; Comments:* Gabriel, H.D., 49 Bus. Lawyer 1053 1064 (1994); Moccia C., 34 Ford. Int.L. J. 649 677 (1989 90); Kenji Nakata, G., Transn. Lawyer 141 163 (1994); [Vergne, F., 33 Am. J. Comp. L. 223 285 \(1985\)](#); Bonell/Ligouri, ULR (1996 1) 162 163, (1997 3) 584 586.

## 168 (2) The Offeror Objects

*Example 19B. On June 1 and June 5 Seller and Buyer exchanged Sales Order and Purchase Order forms like those in Example 19A. In this case (unlike Example 19A where there was no objection) on June 6 Seller wired Buyer: "Do not have adequate supply of sugar in new bags; can ship sugar in sound, secondhand bags." On June 7 Buyer replied: "Insist on new bags." On June 8 Seller wired "Cannot comply with your request." Buyer did not reply and Seller did not ship. By July 1 the price of sugar had advanced, and Buyer claims damages for breach of contract.*

Under the Convention (and the Scandinavian legislation) no contract was formed. Seller "without undue delay" objected to "the discrepancy" (Art. 19(2)). Consequently, the answer is supplied by paragraph (1): Buyer's reply, because of the modification, was "a rejection of the offer"; the "counter-offer" was not accepted and no contract was formed.



## ❖ 169 (a) What Modifications are "Material"?

The Convention provides a definition of "material". Under paragraph (3) the modifications that are considered to be "material" cover most of the aspects of the contract. As a result, most cases will probably fall under the traditional rule, stated in paragraph (1), that a reply with modifications "is a rejection of the offer and constitutes a counter-offer."[\[5\]](#) **[page 186]**

In some settings, an obligation to reply to a purported "acceptance" with even "material" alterations might be based on usage or on the practices the parties have established between themselves. (See Art. 9, *supra* at [❖112](#).) But the issue needs to be sharpened: The question is whether applicable usages and practices, in point of fact rather than legal theory, include the scrutiny of the clauses on the back of an acceptance form in a transaction like the one in question. Such a usage or practice would be more readily established where the transaction is large and does not call for rapid and routine handling. And even for a modest and routine order one might find that objection would be expected if the acceptance form was transmitted by a letter that stated: "We call your attention to the provision, on the back of the enclosed form, that provides for arbitration." If the recipient of such a letter proceeded with the transaction a tribunal might well conclude that he had agreed to the arbitration clause❖ but not to the other provisions of the form. See [❖100](#) and [❖160](#), Example 18B, *supra*, and Articles 39(1) and 48(2) on the duty to communicate needed information to the other party.

A term may be rendered immaterial by the fact that it states an obligation that would be an implied term of the contract because of practices established by the parties or by trade usage (Art. 9, [❖❖112❖122](#), *supra*).[\[6\]](#) Suppose that the parties❖ practices or trade usage imply an obligation to arbitrate disputes. Article 19(3) states that terms relating to "settlement of disputes" are considered "material". However, an arbitration clause that reflects the parties❖ practices or an applicable trade usage should not make a material modifications in an offer that does not deal with dispute settlement. Thus, such a reply could close a contract if the offeror fails to object to this added term.[\[7\]](#) **[page 187]**

## C. Contract Formation Based on Acts of Performance

### ❖ 170 (1) Scope of the Rules of Offer and Acceptance

The Introduction to Part II of the Convention ([❖132.1](#), *supra*) discussed the special and restricted scope of the Convention❖s provisions on whether a contract is formed when all that has happened is a communication by one party ("O") and a reply by the second party ("R"). As we have seen, these rules are necessary and useful in dealing with situations limited to an exchange of communications. In this setting we have met these problems: Is O❖s communication "sufficiently definite" and does it sufficiently indicate O❖s "intention to be bound" so that a contract is made if R replies "I accept"? (Art. 14, *supra* at [❖❖134❖137](#).) Does O have the right to withdraw or revoke an offer communicated to R? (Arts. 15 and 16, *supra* at [❖❖138❖143](#).) Who bears the risk of the delay or loss in the transmission of R❖s reply to O? (Art. 18, *supra* at [❖162](#).)

Under Article 19 we meet this problem: On receipt of an offer from O, a reply from R, although purporting to be an acceptance, deviates from the offer. In this setting the rules of Article 19 are strict: R❖s reply to O❖s offer will not close a contract if it contains a "material" deviation from the offer; an "immaterial" deviation will be fatal if O objects without undue delay. This strict approach is appropriate. Within the period between R❖s reply and the time allowed for O❖s objection substantial reliance interests rarely develop.[\[8\]](#) If a dispute develops at this threshold stage of a transaction the terms of an agreement can be settled more effectively by the parties than by the law. Thus, it would be fair to say that Article 19 follows a "traditional" approach. However, the important question is whether this approach is confined, as its terms suggest, to the effect of an "offer" and a "reply to an offer" or whether it extends to transactions where agreement is shown by the parties❖ conduct.

Serious problems do develop if the "offer"❖"reply" provisions of Article 19 are extended more widely. Fortunately, the Convention does not deny commercial reality by suggesting that contracts can develop only from the exchange of communications. Under Article 18(3) an offeree "may indicate assent by *performing an act*, such as one relating to the dispatch of the goods or payment of the price..." By Article 18(3), and by several

other provisions noted below, the Convention gives legal [page 188] effect to the fact that in sales transactions (as in other human affairs) actions can speak more loudly than words.[9]

*Contract Based on Conduct.* FR. [CA Grenoble, Veyron v. Ambrosio, RG 93/1613, 26 April 1995](#). B's acceptance of goods bound B to S's proposed price. CLOUT 151, UNILEX D. 1995♦15. To similar effect: GER. [OLG Frankfurt a M., 5 U 209/94, 23 May 1995](#). UNILEX D. 1995♦15.3.

### ♦ 170.1 (2) *Conduct of the Parties and Contract Formation*

The introduction to Article 19 (*supra* at ♦165) stressed the importance of facing the full setting of the transaction. As a step towards analyzing more complex problems we may consider the following example.

*Example 19C. On June 1 Buyer delivered to Seller a Purchase Order that offered to purchase specified production machinery. The Order, in addition to identifying the machinery, stated the price at \$20,000, to be paid one month after receipt of the machinery, and called for shipment by August 1. The reverse side of the Order set forth the following terms: Clause #1: Seller will be responsible for damages resulting from defects in the machinery; Clause #2: Any dispute will be settled by arbitration.*

*On June 15 Seller delivered to Buyer an Order Acknowledgment stating that Seller would ship the machine ordered by Buyer by August 1 and that the price was \$20,000 to be paid one month after receipt, as has been set forth in Buyer's Order. The reverse side of Seller's form included the following terms: Clause #1: Seller will replace or repair any defective part of the machinery but will not be responsible for shut down costs or other consequential damages; Clause #2: An arbitration clause like the one in Buyer's Order.*

*Neither party mentioned the terms on the reverse of the other's forms. Seller shipped the goods on July 15 and they were received and put into use on August 1. However, Buyer failed to pay for the goods.[page 189]*

In response to Seller's demand for payment Buyer claimed: Seller's Acknowledgment included a provision (Clause #1, above) on the "extent of one party's liability to the other"; under Article 19(3) this was a "material alternation" of Clause #1 in Buyer's Order. Consequently, under Article 19(1), Seller's purported acceptance was a rejection of the offer and a "counter-offer". Since Buyer did not accept Seller's counter-offer there was no contract on which Seller could base an action for the price.

How would a tribunal react to Buyer's objections? In practice one could not avoid seeing the transaction in its full context: The exchange of Purchase and Acknowledgment forms followed by shipment and acceptance of the goods show that Seller and Buyer made a contract. The Order and Acknowledgment forms showed agreement on these basic terms: the description of the goods, the price, the time for shipment, and payment and the procedures for resolving disputes. As we have seen, this examination of the transaction as a whole is required by the Convention in Articles 18(1) and (3), 16(2), 8(1), 8(2), 9(1) and 29(2), quoted above at note 10.

### ♦170.2 (3) *Problems Not Solved by the Contract Terms*

In the above Example the parties' communications agreed on the point at issue—the price for the goods that Buyer ordered and received. We now turn to a case where the communications fail to provide a solution for the problem that develops.

*Example 19D. The facts are the same as in Example 19C except for the situation that led to difficulty: Shortly after Buyer placed the machinery in operation, defects in the machinery led to shutdown in Buyer's assembly plant with serious consequential damages. Seller offered to repair or replace the defective machinery pursuant to Clause #1 on the back of Seller's Acknowledgment. Buyer contended that, in addition, Seller must pay for shutdown and other consequential damages pursuant to Clause #1 on the back of Buyer's Order.*

Does Article 19 of the Convention answer the above problem? Immediately after the exchange of forms the answer was clear: Because of the material difference between the terms of Buyer's offer and Seller's reply,

there was no contract; either party could refuse to perform.

This case, however, involves much more than the exchange of forms. For reasons developed in connection with Example 19C, above, it is clear from the parties' conduct<sup>10</sup> the exchange of an offer and a purported acceptance, followed by shipment and acceptance of the goods<sup>11</sup> that the parties made a contract. What rule governs the scope of Seller's responsibility for the defective goods?[page 190]

### 170.3 (4) *Conduct Showing Agreement: "Last Shot Theories"*

One approach seeks a way to choose between the terms of the two conflicting communications. One application of this approach gives effect to the *last* form in the sequence on the ground that further performance indicates agreement to its terms.<sup>[10]</sup> (This is often called the "Last Shot" approach, invoking the metaphor that the parties have been engaged in a "Battle of the Forms" and the aphorism that battles are won by the side that "fires the last shot".)

Let us examine the "last shot" theory in the setting of Example 19D, 170.2, *supra*. One will recall that under Article 19 Seller's reply purported to accept Buyer's offer but contained a material modification and therefore was "a rejection of the offer" and constituted a "counter-offer". Seller then shipped the goods to Buyer. Since no contract was formed, Buyer would have been free to reject the goods but, instead, accepted them. Acceptance of the goods was an acceptance of Seller's "counter-offer"; Buyer is bound by the provision in Seller's Sales Order that limited liability to repair or replacement of the defective goods.

Again, the precise facts become important. Suppose the Seller had sent its Order Acknowledgment with a covering letter that drew attention to Clause #1 on the back of the form and asked Buyer to reply before the agreed time for shipment.<sup>[11]</sup> In this setting Buyer's silence could be construed as assent. However, when there is merely an exchange of forms with a conflict between clauses on the reverse side, it is difficult to conclude that the Buyer gave (or was bound to give) closer attention to the Seller's form than the Seller apparently gave to Buyer's form.

It is especially troubling to place this burden on one who received a reply that purported to be an acceptance and thereby created an ambiguity between the purported acceptance on the front of the Acknowledgment and one of the form clauses on the back. When both parties proceed with performance in the face of this ambiguity, if it were necessary to choose between competing forms, Article 8(2) would be relevant: statements or conduct of one 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"<sup>12</sup> the generally accepted principle that doubt is to be resolved against the party who created the ambiguity. This [page 191] approach also might discourage ambiguity by denying benefit to the party who created the ambiguity by sending an ambiguous "acceptance".<sup>[12]</sup> However, even this approach for choosing between conflicting forms seems artificial. (There may be a better way. See part (5), 170.4, *infra*.)

We can test the reality (as well as the practicality and fairness) of the "last shot" approach by the following case: Suppose that after arrival of the goods Buyer rejected the shipment. The "last shot" theory that there was no contract until buyer accepted the goods would support Buyer's rejection. It is difficult to conclude that such a rejection, in view of the transportation and redisposal costs typical in international sales, would be consistent with commercial expectations or with standards of good faith and fair dealing.<sup>[13]</sup>

"Last shot" theories have been rightly criticized as casuistic and unfair.<sup>[14]</sup> They do not reflect international consensus that justifies importing them into the Convention.

### 170.4 (5) *Gap-Filling by the Convention*

Analysis of Example 19D led to the following conclusions: (1) Performance by the parties showed that they made a contract of sale; (2) The question that led to dispute was not resolved by contract.

If these conclusions are sound we are dealing with the commonest problem in commercial law: a contract fails to solve a problem that leads to dispute. Indeed, providing solutions to gaps left in contracts is the most basic function of laws applicable to commercial sales. For the gap in the contract in Example 19D, the Convention, of course, supplies an answer—a body of rules on remedies for breach (Arts. 45–52, 61–65) and especially the general rule on measurement of damages in Article 74.<sup>[15]</sup> The rule of Article 74 (and of many domestic systems) that a party in breach is liable for foreseeable consequential damages is not popular with sellers. Under Article 6 the parties can exclude or modify this and other provisions of the Convention but this must be done by agreement; fictitious theories for finding agreement should not suffice.<sup>[page 192]</sup>

## Article 20. Interpretation of Offeror's Time-Limits for Acceptance

♦171 Article 18(2) (*supra* at ♦161) provides that an acceptance is not effective "if the indication of assent does not reach the offeror within the time *he had fixed*...." The offeror's statement fixing the time for acceptance may be ambiguous if it states a period of time (e.g., 15 days) for acceptance and does not specify when the period starts to run or does not deal with the effect of holidays.

### Article 20 [1]

"(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."

Article 20 is merely a guide to interpreting the offeror's statements. Under Article 18(2) the offeror may "fix" the time for acceptance: A statement such as "You may accept this offer within ten days after this offer *reaches you*" would override the interpretive rule of Article 20(1). The offeror's intention could be shown by less explicit language. Suppose that on June 1 Seller mails an offer to Buyer and states, "You will have five days to consider this offer." The mails between Seller and <sup>[page 193]</sup> Buyer normally take four or five days for delivery. It would be inconsistent with the expressed intention of the offer to start the five-day period on June 1. Article 20 thus plays the modest role of answering questions concerning the meaning of the offer when no answer is provided by the usual rules for interpreting the statements of a party. See Art. 8, *supra* at ♦♦106♦111. <sup>[page 194]</sup>

## Article 21. Late Acceptances: Response by Offeror

♦172 The present article, like Article 20, extends and elaborates the basic rule of Article 18(2) that 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...." Under this rule the following two questions can arise. (1) The offeree's reply indicating assent "does not reach the offeror within the time he has fixed": When a late reply reaches the offeror can he make it "effective" by notifying the offeree? (2) A reply that normally would have arrived on time is subject to delays in transmission: Must the offeror notify the offeree that the offer has lapsed?

Answers to these questions may be found in the following article:

### 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."

### ❖173 A. Notice Giving Effectiveness to Late Acceptance

The offeree's reply may fail to be effective as an acceptance either (1) because it was sent too late or (2) because of delays in transmission.

#### ❖174 (1) Tardy Dispatch

*Example 21A. On June 1 Seller mailed Buyer an offer that stated: "Your acceptance must reach me by June 30." Mail between Seller and Buyer normally takes 5 days. On June [page 195] 29 Buyer mailed a letter expressing acceptance of the offer; the letter reached Seller in due course on July 4. On July 4 Seller sent the following telegram to Buyer: "Your June 29 letter was mailed too late to reach me by the June 30 limit set in my offer but I am treating it as an acceptance."*

Although Buyer immediately objects to the closing of the contract, and even if the Buyer had dispatched a letter on June 30 withdrawing the acceptance, both parties are bound by contract. True, the market level or other conditions affecting Buyer's interest in the contract may have changed during the five-day period between June 29 and July 4 while Buyer's acceptance was in the mails. Nevertheless, Buyer bears the burden of such changes. Buyer chose a medium of communication that required five days for arrival, and failed to make use of this opportunity under Article 22, *infra* at ❖177, to overtake his letter by a withdrawal communicated by phone or wire.<sup>[1]</sup>

#### ❖175 (2) Lateness Because of Transmission Delays

It may now be useful to examine Article 21 (1) when this provision is subject to stress. The following problem will not occur frequently but it may help us to explore the relationship between several provisions of the Convention.

*Example 21B. As in Example 21A, on June 1 Seller mailed an offer that stated, "Your acceptance of this offer must reach me by June 30." On June 15 Buyer posted a reply that stated "I accept your June 1 offer." This letter, dated June 15, would normally have reached seller on June 20, but was delayed in the mails and did not reach Seller until a month later, on July 20. In mid-July the price-level for the goods in question had fallen sharply and Seller was glad to close a deal at the higher level reflected in his June offer. Consequently, on July 20 Seller wired Buyer, "In spite of late arrival of your June 15 letter I am treating it as an acceptance." Buyer objected on the ground that conditions had changed during the month while his letter was in the mails.*

Article 21(1), read in isolation, suggests that Seller's wire would close a contract based on Buyer's reply, even though the reply otherwise would have lapsed because of its late arrival. In cases where the delay in transmission of the reply is not extreme, this view must be accepted in order to give effect to the policy expressed in paragraph (1). However, when [page 196] the reply has been subject to extended delay and conditions have radically changed during this period, the scope of Article 21(1) may need to be considered in relation to other provisions of the Convention.

As we have seen, Article 21 provides an extension of the principle of Article 18(1) that an acceptance is made by a statement of other conduct that indicates "assent" to an offer—an assent that, under Article 18(2), is effective only when "the indication of assent reaches the offeror." Accord, Art. 22, *infra*. In Example 21B, the sharp price-drop, during an extreme delay in the transmission of the offeree's reply, might support on finding that the



offeree's June 20 letter, when read by the offeror on July 20, did not indicate to the offeror that the offeree still assented to the June 1 offer.

Article 18(2) states that an acceptance "is not effective if the indication of assent does not reach the offeror" within the prescribed time limit. In that setting we noted (Art. 18 at ¶162) that this provision places transmission risks on the offeree. This proposition might suggest that in Example 21B the offeree bore the risk of the offeror's action. But the risk that Article 18(2) places on the offeree is the risk of *failing* to close a contract. A different and grave risk would result if, after a substantial change of circumstances, an offeror could elect to take up an "acceptance" that had lapsed because of delay in transmission. The period of such a delay could be indefinitely long; the period within which an acceptance must be received under Article 18(2) would be more circumscribed. And if an offeree *fails* to close a contract because of a delay in transmission (Art. 18(2)), the results do not lead to an unfair advantage to either party: there is no contract regardless of whether this favors the offeror or the offeree. But if the offeror is given a free choice to approve or disapprove an "acceptance" that has been delayed in transmission while conditions radically change, the offeror will notify the offeree that the offer has lapsed if the change in conditions has made the transaction less attractive (Art. 21(2)) and will notify the offeree that he treats the reply as an acceptance if the change in conditions makes the transaction more favorable to him—an opportunity to speculate at the expense of the other party.<sup>[2]</sup> See also ¶¶95, 144, and 285.

This opportunity will be avoided in such extreme cases by construing Article 21(1) in relation to the basic rule of Article 18(1) that a statement is an acceptance only if it indicates "assent" to the offer in the light of the objective facts available to both parties when (Art. 18(2)) the reply [page 197] "reaches the offeror." This result would also respond to the rule of Article 7(1) that "in the interpretation of this Convention, regard is to be had...to the need to promote...the observance of *good faith* in international trade." (See the discussion of Art. 7, *supra* at ¶94.)

## ¶ 176 B. Obligation to Notify Offeree of Apparent Delay in Transmission of Acceptance

We may now explore further the role of paragraph (2) of Article 21.

*Example 21C.* On June 1 Seller sent Buyer an offer like the one in Example 21B. Buyer's reply, dated June 15, was similarly delayed in transmission and reached Seller only on July 20. But in this case Seller did not respond to Buyer's acceptance; Buyer learned of the delay only on August 1 when he called Seller to ask why the goods had not arrived. Seller replied that he had ignored the Buyer's June 15 acceptance because it had not reached him by June 30, the date specified in the offer. Buyer claimed that he assumed that his July 15 letter had arrived in time to close the contract, and had expected to receive the goods.

Buyer's reply was dated June 15; the delay in the transmission was obvious. Consequently, under Article 21(2), the failure of the offeror (Seller) to inform the offeree (Buyer) that the offer had lapsed made the late reply "effective as an acceptance." The parties are bound by contract and Seller will be responsible to Buyer for breach of contract.

In common-law systems there has been no occasion to deal with this question since the "dispatch" (or "post-box") rule makes the acceptance effective when it is sent. See Art. 18, *supra* at ¶162. Many civil law codes, with "receipt" rules like Art. 18(2), have legislative provisions similar to Article 21(2) of the Convention."<sup>[3]</sup> [page 198]

## Article 22. Withdrawal of Acceptance

¶177 Under Article 15(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." The present article applies this approach to the acceptance:

### Article 22 [1]

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

The time when acceptance becomes "effective", as specified in Article 18(2), is "the moment the indication of assent *reaches the offeror*".

The discussion of Article 15 (*supra* at [138](#)) applies to Article 22. Indeed, these articles may constitute specific applications of a general principle that a party may withdraw or modify a communication by a second communication that overtakes the first. (See the Commentary to Article 7, *supra* at [96](#).) Schlechtriem, Com. (1998) 157-158. [\[page 199\]](#)

## Article 23. Effect of Acceptance; Time of Conclusion of Contract

[178](#) Article 18(2) (*supra* at [161](#)) in stating when an acceptance becomes "effective" implies that a contract is concluded at that time. This implication is made explicit by the present article.

### Article 23 [\[1\]](#)

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

Several articles of the Convention refer to conditions existing at the time of the conclusion of the contract. (See Arts. 42(1), 55, 68, 74, 79(1), 100(2)). Only rarely will it be important to determine the precise "moment" when the contract was concluded. One exception may be Article 68, *infra*, which provides that risk of loss of goods sold during transit passes to the buyer "from the time of the conclusion of the contract." It has been suggested that the time of the conclusion of the sales contract may be important in the application of domestic fiscal or regulatory laws; this, of course, is a question to be decided in the light of the language and purpose of the domestic legislation. [\[2\]](#) [\[page 200\]](#)

## Article 24. When Communication "Reaches" the Addressee

[179](#) Part II of the Convention provides, in various settings, that a communication becomes effective when it "reaches" the other party. See Article 15(1) (offer), Article 15(2) (withdrawal of offer), Article 16(1) (revocation of offer), Article 17 (rejection), Article 18(2) (acceptance), Article 20(1) (period for acceptance fixed by telephone, telex or other means of instantaneous communication), Article 22 (withdrawal of acceptance).

Practical problems of proof would arise if the applicability of these provisions depended on evidence that a communication came to the personal attention of the addressee. These problems are addressed in the following provision.

### Article 24 [\[1\]](#)

"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."

Under Article 24, the communication "reaches" the addressee when it is delivered "to his place of business or mailing address." This, of course, requires "delivery" to an appropriate "place" [i.e.](#), within the mail-box or mail slot, or by a transfer of possession to an authorized person in the addressee's employ. Leaving a letter or telegram on the door-step or in some other unattended place would not constitute "delivery" to the addressee's "place of business"; one relying on such a communication would need to show that the letter or telegram reached

the addressee or an authorized employee. The usefulness of Article 24 is indicated by the widespread use of the same approach.<sup>[2]</sup> [page 201]

Article 27 (*infra* at ¶188) states a general rule, applicable to Part III of the Convention, that notices and other communications are effective when they are properly dispatched. However, for reasons discussed at ¶¶189-190, this rule is subject to exceptions in Articles 47(2), 48(4), 63(2), 56(1) & (2), and 79(4) provisions which make certain communications effective only when they are received. The definition in Article 24, *supra*, of when a communication "reaches" the addressee applies only to Part II, but there is no indication of a legislative intent to reject the approach of Article 24 in construing the above references to the "receipt" of communications. Indeed, the normal meaning of "receipt" is close to that expressed in Article 24; the widespread use of the approach of Article 24, indicated in note 2, seems to justify the use of this article by analogy.

See, for intensive treatment, Schlechtriem, Com. (1998) 161-171. [page 202]

## Part III.

### SALE OF GOODS (Articles 25-88)

#### Introduction to Part III of the Convention

¶180 Part II of the Convention (Arts. 14-24, *supra*) addresses this question: Is there a contract? When the answer is Yes, Part III governs the rights and obligations of the seller and buyer.

Part III (the "Sales Part") has five chapters. Chapter I (Arts. 25-29) contains general provisions that are applicable throughout Part III of the Convention. Chapter II (Arts. 30-52) deals with the obligations of the seller: what the seller should do (Secs. I & II) and remedies for the seller's failure to perform its obligations (Sec. III). Chapter III (Arts. 53-65), paralleling the structure of Chapter II, states the obligations of the buyer: what the buyer should do (Secs. I and II) and remedies for breach (Sec. III). Chapter IV (Arts. 66-70) is devoted to risk of loss. Chapter V (Arts. 71-88) addresses anticipatory breach (Sec. I), damage-measurement and interest (Secs. II & III), excuse based on serious impediments ("exemptions") (Sec. IV), effects of avoidance (Sec. V), and duties to preserve goods that face loss or deterioration (Sec. VI). [page 203]

## CHAPTER I.

### GENERAL PROVISIONS (Articles 25-29)

#### Article 25. Definition of "Fundamental Breach"

##### ¶181 A. Introduction

The breach of a sales contract by one party gives the other party a right to recover damages, but we are here concerned with more specialized remedies: the buyer's right to reject goods and the seller's right to refuse to deliver. In domestic law these remedies may be called "rejection," "revocation of acceptance," "avoidance," "termination" or "cancellation." In the Convention (Arts. 49 & 64) a party's privilege not to perform the contract because of the other party's breach is called "avoidance of the contract."

In the Convention, as in domestic legal systems, "avoidance" is not available for every breach. As we shall see in examining Articles 49(1)(a) and 64(a)(a), *infra* at ¶¶304, 354, a party may avoid the contract when the other party commits a "fundamental breach" ¶a term that is defined in the present article.

## Article 25 [1]

"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." [page 204]

### ¶181.1 (1) *Domestic usage: a "false friend"*

In English law the concept of "fundamental breach" was developed to deal with a very different problem ¶the effect of a contract provision restricting the buyer's rights when goods are defective. For a time English courts held that a "fundamental breach" of contract by the seller nullified such a contract provision. The rise and fall of this doctrine are described in *Benjamin* ¶¶967-979, cf. ¶¶982-1016. This doctrine was quite different in function and scope from "fundamental breach" in the Sales Convention. Domestic law was not employed in drafting Article 25; its provenance was the definition of "fundamental breach" in CISG. It would, of course, be a mistake to rely on this "false friend" from domestic law in construing the Convention. See, *accord*, Will in *B-B Commentary* 209.

### ¶181.2 (2) *"Fundamental breach" and Contract Avoidance*

As we shall see (¶186, *infra*), the Convention uses the term "fundamental breach" in various settings but it plays its most important roles in Articles 49(1)(a) and 64(1)(a) which state grounds on which the buyer or seller may "avoid" the contract and thereby become free from further contractual obligations ¶e.g., to receive and pay for the goods or to deliver them.

The diverse approaches to this problem in domestic law will be discussed more fully (¶301) in connection with Article 49, which governs the circumstances in which the buyer may refuse to accept the goods when the seller's delivery is delayed or when the goods fail in some respect to conform to the contract. The correlative right of the seller to avoid the contract when the buyer fails to perform one or more of his contractual obligations is set forth in Article 64 and is discussed at ¶¶353-356, *infra*.

"Avoidance" of the contract must be distinguished from a party's right to *suspend* performance under Article 71 (¶¶385-394, *infra*); avoidance *terminates* the right and duty of both parties to proceed further with performance, subject to a claim for damages for breach of contract. See Articles 45(1)(b), 61(1)(b) and especially Article 81(1): "Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due". Thus, in determining the grounds for "avoidance" the issue is not whether a party whose performance is defective [page 205] in some minor respect will escape liability. Every breach, no matter how trivial, calls for compensation in damages (Art. 74, ¶¶403-408, *infra*). Thus, a remedy by damages has a quality of justice lacking in avoidance since the cost to the one who pays and the benefit to the one who receives correspond to the harm caused by the breach.[2] In framing the scope of (e.g.) the buyer's right to avoid the contract the relevant questions are these: Which party is normally in the better position to redispense of goods? Will the buyer's retention of the goods jeopardize effective compensation for damages? Is there justification for reversing the contract's allocation between the parties of rises or declines in market price?

In developing the Convention there was no significant support for extending avoidance to include insubstantial deviations from the contract. Stricter avoidance (or "rejection") rules in some domestic laws failed to take account of the special circumstances of international trade, such as the fact that claims that the goods are defective often are made only after expensive transport to the buyer's place of business when avoidance for immaterial defects might needlessly lead to wasteful reshipment or redispense of the goods in a foreign country. Moreover, the power to avoid the contract for immaterial defects in performance may tempt the seller

(after a price rise) or the buyer (after a price decline) to avoid the contract and thus reverse the allocation of the effect of price changes which the contract contemplated.

Of course, these factors will not always be present and in many cases only avoidance will adequately protect the aggrieved party. In transactions where a party is concerned that Article 25 is too lax or too strict or that a tribunal might improperly apply the law, the contract can provide stricter (or looser) grounds for avoidance (Article 6).

These pragmatic considerations are mentioned because the definition of "fundamental breach" in Article 25 had to be drafted in general terms and could not specify all the circumstances that may be relevant in determining whether a breach will "substantially" deprive a party "of what [page 206] he is entitled to expect under the contract...". Some of these circumstances will be illustrated by concrete examples.

### ❖182 (3) "*Fundamental Breach*" in the 1964 Convention

ULIS (❖10) contained the following definition of "fundamental breach":

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

This definition approached the question of the materiality of the breach by a hypothetical question put to the *party in breach* at the time of the conclusion of the contract: Would the party in breach have predicted that the other party would have "entered into the contract *if he had foreseen* the breach and its effects." Analysis of this provision in UNCITRAL made it clear that "fundamental breach" must be redefined in terms of the materiality of the breach.[3]

### ❖183 (4) *Changes Made by 1980 Convention*

The Convention's definition in Article 25 turns on the degree of the *detriment* resulting from the breach: Is it such "as *substantially* to deprive him of what he is *entitled* to expect under the contract?" This emphasis on "*detriment* to the other party" is more precise than expressions such as "substantial performance" of the contract. Temporal or physical deviations ("one day", ".001 millimeter") have no significance apart from the extent of the loss or detriment they cause to the other party.

The definition of "fundamental breach" in Article 25 has two elements: (1) The detriment to the aggrieved party, A, must "substantially" deprive A of what he is entitled to expect from the contract, and (2) Since the detriment to A may be affected by a wide variety of circumstances peculiar to A, the relevant detriment is limited to what the party in breach, F, foresaw or should have foreseen.

*Vantage-points for foreseeability.* This second element is subject to an ambiguity that has generated a substantial literature: From what vantage [page 207] point in time should F view the possibility of detriment to A? Is the detriment limited to what F foresaw (or could have foreseen) when the contract was made, or may it include detriment that F foresaw (or could have foreseen) at a later time? This issue may not arise often, but the possibility may be illustrated as follows:

*Example 25A.* S agreed to ship 100 bags of rice to B. B's order was on a printed form that specified "new bags". When B prepared to ship he had at hand sound, used bags that he believed were of the same quality as new bags and would be acceptable to B subject to a modest price allowance. However, before S bagged the rice B telexed to S, "Have obtained contract for resale of rice which emphasizes use of new bags. Although sound used bags would usually be acceptable subject to a price allowance, use of new bags for this shipment is very important". S replied, "Shipping in extra high quality used bags". B rejected the shipment and notified S that the contract was avoided because of the danger of rejection by the sub-purchaser.



On the assumption that at the time of contracting the seller could not have foreseen that the detriment to the buyer would be substantial, should the later information be taken into consideration?

The language of Article 25 does not answer this question. In setting forth the first of the two elements, as analyzed above, Article 25 refers to detriment that deprives the aggrieved party, A, of what A "is entitled to expect *under the contract*", but there is no reference to the time of the making of the contract in the second element that was based on the *detriment* that F, the party in breach, foresaw or could have foreseen.

In UNCITRAL and at the 1980 Conference some delegates proposed that this second element be amended to restrict consideration to those circumstances that the party in breach (F) could have foreseen when the contract was made. Both legislative bodies considered the issue and decided that this restriction should not be imposed. Extracts from this legislative history appear in a footnote.[\[4\]](#) **[page 208]**

To return to Example 25A, we may conclude that the information the seller received subsequent to the contract but before shipment gave the seller reason to foresee that the breach of contract would "*substantially*" deprive the buyer of what he was entitled to expect under the contract, and that the buyer's avoidance was justified under Articles 25 and 49(1)(a). However, information that a party receives too late to affect performance seems outside the scope of Article 25, since the foreseeability principle presumably is designed to give F an opportunity to give special attention to minor details of performance the importance of which he could not otherwise have anticipated.[\[5\]](#)

*Burden of proof.* The second element in Article 25, as analyzed above, has generated discussion of yet another refinement: Who has the burden of providing whether the detriment to the aggrieved party, A, was or was not foreseen or foreseeable by the other party, F? Any doubt from the text of the statute (or from practical considerations of allocating burdens of proof) is removed by the legislative history: In UNCITRAL's 1977 review of the Working Group "Sales" draft, attention was drawn to the following language: "A breach...is fundamental..." *if it results in substantial detriment and the party in breach foresaw or had reason to foresee such a result.* The view was suggested that under this language "the burden of proof would be on the innocent party and this could not be the proper solution". To meet this objection the Commission, without objection, replaced the above language by the "unless..." clause that appears in Article 25.[\[6\]](#) **[page 209]**

## **184 B. "Fundamental Breach" in Specific Situations**

### ***(1) The Effect of an Offer to Cure***

To help preserve transactions from technical mishaps, the Convention includes important provisions permitting the seller to "cure" a non-conforming delivery by replacing or repairing defective goods. See Art. 37 (cure until date for delivery[244](#)) and Art. 48 (cure after the date for delivery[292](#)). The relationship between these provisions and "fundamental breach" can be illustrated as follows.

*Example 25B.* On June 1, the date for delivery specified in the contract, Seller delivered to Buyer a large and expensive machine. On June 15, when Buyer put the machine into operation, one essential part of the machine did not function with the result that the machine did not operate. Buyer notified Seller who offered immediately to replace the defective part. Although the brief period required for making this replacement did not interfere with Buyer's plans for using the machine, Buyer did not permit Seller to replace the defective part. Claiming that a defect that prevented the machine from operating was a "fundamental breach" under Article 25, Buyer declared that the contract was avoided (Art. 49(1)(a)) and stated that the seller must remove the machine and refund the price (Art. 81).

Buyer was correct in stating that, without the replacement of the defective part, the seller's breach was clearly "fundamental" and that avoidance would be justified. On the other hand, a rapid replacement of the defective part, even after the agreed date of delivery, would prevent any "substantial" detriment to the buyer; on this assumption, the breach would not be "fundamental" and the contract could not be avoided. As we shall see, Article 48 authorized Seller to replace the defective part under the circumstances described in Example 25B. The question whether the breach was "fundamental" for the purpose of avoidance must be answered in the light of the

effect of a rightful offer to cure, for otherwise Seller's exercise of this right would be futile. When the applicable provisions (Arts. 25, 48, 49) are construed together, Buyer's attempt to avoid the contract should be ineffective. [7] [page 210]

*Cure*. FR. [CA Grenoble](#), [RG 93/4879](#), [26 April 1995](#). *M. Roque v. HMR*. S repaired damage to warehouse delivered to B; because of S's cure, avoidance of contract was denied. UNILEX D. 1995-14, CLOUT 152.

### ◆185 (2) *Refund and Price Adjustment*

Other situations call for evaluating the substantiality of the breach in the light of all of the facts. This point may be illustrated by comparing the two following cases:

*Example 25C*. A contract between Seller and Buyer called for the delivery of 1,000 bags of No. 1 quality sugar; the price was \$20,000 (\$20 per bag). On delivery, inspection showed that the sugar in 970 bags complied with the contract but that the sugar in 30 of the bags was so defective that it could not be used. Other sugar was available in Buyer's market. When the defect in the delivery was discovered, Seller offered not to charge for the 30 bags. (In a documentary transaction, this could be effected by Seller's drawing a draft for \$19,400 instead of \$20,000.)

*Example 25D*. The facts are the same as in Example 25C, except that Seller refused to permit the delivery of any sugar except for the full price of \$20,000.

These examples suggest that the question of how "substantially" a party has been deprived of "what he is entitled to expect under the contract" (Art. 25) cannot be answered simply by looking at the goods. In Example 25C, buyer has been deprived of very little; the tender of the goods accompanied by the price adjustment would probably not constitute a "fundamental breach." In Example 25D, the tender of the same goods, without the price adjustment, should constitute a "fundamental breach." Recovery of money paid for the defective goods, at the very least, would involve the delays, expenses and uncertainties of pressing a claim. If Seller is far from Buyer and is of questionable financial responsibility, the test of "fundamental breach" in Article 25 is even more clearly established. The relevance of this approach is recognized by Article 48(1), *infra* at ◆293, by providing that the seller may not remedy (e.g., repair) a failure of performance if there is "uncertainty of reimbursement by the seller of expenses advanced by the buyer." [8] [page 211]

### ◆186 (3) *"Fundamental Breach" in Context*

There are other significant applications of Article 25 but these can be best be explored in connection with the articles that use "fundamental breach" as a basis for avoidance of the contract (Article 49 (avoidance by buyer) and Article 64) avoidance by the seller). (Avoidance under the Convention is compared with the approach of various systems of domestic law in the Commentary to Art. 49, *infra* at ◆301.) "Fundamental breach" is also used to deal with avoidance in special situations: in Art. 51(2) on avoidance of an entire contract based on defective performance of a part of the contract, in Art. 72 on anticipatory breach, and in Art. 73 on deliveries by installments. This concept is also used in Article 46(2) to limit the remedy of specific performance: the buyer "may require delivery" of goods to substitute for nonconforming goods "only if the lack of conformity constitutes a fundamental breach of contract." Avoidance for fundamental breach can also affect risk of loss e.g. the responsibility for casualty during transit. See Art. 70, ◆◆379◆383, *infra*. Applications of Article 25 are illustrated by the following decisions.

*Strict Standards for Avoidance*: (1) GER. [BGH \(Sup.Ct.\)](#), [VIII ZR 51/95](#), [3 April 1996](#): Avoidance a "last resort", breach must "substantially deprive party of what he was entitled to expect"; B could use defective goods or resell; avoidance denied. (S to be reimbursed by damages. See Arts. 45(1)(b) and 74, *infra*.) CLOUT 171, UNILEX D.1996.4. (2) GER. [OLG Frankfurt a. M.](#) [5 U 15/93](#), [18 January 1994](#); goods must be unfit for use, B could readily resell, though at a discount. Avoidance denied. CLOUT 79, UNILEX D.4. (3) SWITZ, [HG Zürich](#), [920670](#), [26 April 1995](#); B could repair leaky tank. UNILEX D. 1995-15.1.

*Avoidance Granted:* (1) AUSTRALIA, [Fed. Ct. S.Aus. 57 FCR 216, 28 April 1995](#). Financial failure B could not pay. For right to recover goods see CISG 81(2). Here, S's claim to recover goods was supported by Romalpa clause in contract. UNILEX D.1995-15.1.1. (2) IT. [Pr. di Parma, 77/89, 24 November 1989](#); S's delay in shipping supported avoidance. CLOUT 90, UNILEX D. 1989 7.

*Violation of resale restrictions:* (1) GER. [OLG Frankfurt a. M., 5 U 164/90, 17 September 1991](#) (wrongful use of S's trade-mark), CLOUT 2, UNILEX D. 1991 9. (2) FR. [CA Grenoble, RG 3275, 22 February 1995](#) (sale in area prohibited by contract), CLOUT 154, UNILEX D. 1995 7. (3) But cf. GER. [OLG München, 7 U 4419/93, 2 March 1994](#). UNILEX D. 1994 7.

*Comments:* Bonnell/Ligouri, ULR (1996 2) 364 370 (includes cases of avoidance under CISG 49(1)(a) & 64(1)(a), *infra*); Schlechtriem, Com. (1998) 173 185. [page 212]

## Article 26. Notice of Avoidance

187 The discussion of Article 25 referred to the right of either party to avoid the contract in the circumstances defined in Articles 49, 51, 64, 72, and 73. Article 26, applicable to all of the provisions on avoidance, marks one of the significant advances of the 1980 Convention over the 1964 Hague Convention.

### Article 26 [1]

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

### 187.1 A. Departure from ULIS; Need for Notification

At various points ULIS provided a remedy called *ipso facto* avoidance; this type of avoidance (unlike a second type of avoidance which required a "declaration") occurred automatically; the party who relied on this remedy need not have notified the other (ULIS 25, 26(1)). Consequently, a party might be led to perform in ignorance of the other party's decision to refuse the performance.

At the 1964 Hague Conference attempts were made to eliminate *ipso facto* avoidance but this concept was such an integral part of the structure of the draft that the necessary changes were not feasible.[2]

In the UNCITRAL proceedings, it was possible to remove the complex and elusive doctrine of *ipso facto* avoidance; the result was the above simple rule of Article 26.[3] Requiring that notice be given of a remedy as drastic as avoidance is strongly supported by domestic law. See (U.S.A.) UCC 2-602(1) (notice of rejection), 2-608(2) (notice of revocation of acceptance); *Treitel, Remedies (Int. Enc.)* 148 (requirement in [page 213] French law of a formal notice *somation* even when the contract states that it shall terminate by operation of law).

A careful student of the 1964 Sales Convention has noted that *ipso facto* avoidance was useful to prevent a party from claiming specific performance after a price rise and thereby speculate at the other party's expense.[4] Such conduct is clearly intolerable, but *ipso facto* avoidance proved to be an awkward and overbroad remedy; resources in the 1980 Convention for dealing with the problem of taking advantage of market changes after a delay are explored elsewhere in this Commentary. See Art. 7, *supra* at 95, Art. 28, *infra* at 193, Art. 46, *infra* at 285, Art. 77, *infra* at 416.

### 187.2 B. The Notice: Content, Transmission

What must a notice say to constitute an effective "declaration of avoidance" under Article 26? As we shall see, under Article 39(1), 254 259, a buyer who wishes "to rely on a lack of conformity of the goods" must "give notice to the seller specifying the lack of conformity". A notice specifying a "lack of conformity" in accordance with Article 39 would not, without more, constitute a "declaration of avoidance" under Article 26. A

buyer who specifies nonconformity (Art. 39) may, and often does, choose to retain the goods and claim a reduction in the price or other damages to compensate for the deficiency. Avoidance of the contract is a different and much more drastic remedy. In the setting of the tender or delivery of defective goods "avoidance of the contract" by the buyer means that the buyer will not accept or keep the goods, and that the seller has the responsibility to take over their disposition.<sup>[5]</sup> A buyer's declaration of *avoidance*, to be effective under Article 26, must inform the seller that the buyer will not accept or keep the goods.<sup>[6]</sup> Conversely, a seller's declaration of avoidance must inform the buyer that the seller will not deliver the goods or, if the goods have been delivered, that **[page 214]** the seller demands their return. See Article 81(2) and 84, <sup>◆◆</sup>439<sup>◆</sup>444, 450<sup>◆</sup>452, *infra*.

The notice required by Article 26 is effective if it is properly "dispatched" pursuant to Article 27. As we shall see, the principle underlying this rule and its exceptions is that transmission risks should fall on the party in breach rather than on an aggrieved party who, in this setting, is exercising a right to avoid the contract.<sup>[7]</sup>

*Notice Adequate:* (1) ARB. [ICC \(Paris\), 8128/1995](#). S did not deliver an installment of goods within the time specified in contract. B, in writing, demanded that S specify when S would deliver; if S failed to do so the contract would be avoided. S did not give the assurance requested. B's communication, above, was an effective avoidance of the contract. (Other issues in this case, e.g., interest under Art. 78, are noted *infra*.) UNILEX D. 1995<sup>◆</sup>34. (2) See also GER. [LG Berlin 52 S 247/94, 15 September 1994](#). UNILEX 1994<sup>◆</sup>22.1.

*Notice Not Adequate:* (1) GER. [AG Zweibrücken, 1 C 216/92, 14 October 1992](#). B's notice in the alternative was not effective. UNILEX D. 1992<sup>◆</sup>23. (2) GER. [LG Frankfurt a.M., 3/11 O 3/91, 16 September 1991](#). CLOUT 6, UNILEX 1991-8. See: Schlechtriem, Com. (1998) 188<sup>◆</sup>192.

Article 26 does not require that the notice be given in writing but to avoid dispute a prompt written confirmation of an oral declaration seems advisable.<sup>[8]</sup>

*Requirement of Writing.* Eight States, including China, made declarations under Article 96 rejecting provisions of CISG that allowed effective notification in form other than writing<sup>◆</sup>e.g. Articles 11, 12, 96. (See lists of adherences and reservations in Appendix.) Note, on Chinese rules, Tanner, 16 JLC 166 & n.65 (1996).**[page 215]**

## Article 27. Delay or Error in Communications

<sup>◆</sup>188 Under Article 26, *supra*, avoidance of a contract is effected "by notice" and in other settings communications have important consequences. *E.g.*, Arts. 39(1) (notice of lack of conformity) and 43 (notice of right or claim of third party). The present article addresses the problems that arise when a notice is sent but, because of a mishap in transmission, is delayed, garbled or lost.

### Article 27 <sup>[1]</sup>

"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."

### <sup>◆</sup>189 A. Reasons for the "Dispatch" Principle

In examining the Convention's rules in Part II (Formation of the Contract) we saw that an offeree's acceptance was not effective unless it "reached" the offeror within the specified time; this rule placed the risks of transmission on the sender. See Art. 18, *supra* at <sup>◆</sup>161. The examination of the rules on acceptance in Article 18 indicated that it was a close question whether acceptance should be effective on "dispatch" or on "receipt." Article 27, with which we are now concerned, applies only to the communication of notices made in accordance with Part III since they present problems that are different from communications involved in contract formation



(Part II). For instance, a mishap transmitting a buyer's notice that the goods were defective (Art. 39) could, under the "receipt" approach, deprive the innocent party of "the right to rely" on the lack of conformity, [page 216] and the buyer must pay the seller the full price for defective goods. In this and in similar situations it seemed advisable to provide that the appropriate dispatch of a communication satisfied the notice requirement.

As Professor Schlechtriem has noted (1986 *Commentary* 61), ULIS 14 and ULF 12(2) provided that communications shall be made "by the means *usual* in the circumstances", while Article 27 substitutes "appropriate" for "usual" a change that gives the sender a somewhat wider choice of media. On the effect of an unintelligible oral communication (e.g., by telephone), see *id.* 62. See: Schlechtriem, *Com.* (1998) 191-197.

### 190 (I) Exceptions Where "Receipt" is Required

This general rule making notices effective on dispatch is subject to specific exceptions in Articles 47(2), 48(4), 63(2), 65(1) & (2) and 79(4). Nearly all of these provisions involve a communication by a party who is in breach of contract; the "receipt" principle was used so that a mishap in transmission would not add to the burdens of the aggrieved party. [2]

Domestic rules on the effect of a mishap in communication are not uniform and often are unclear, but there is support for the approach of Article 27 of the Convention. [3] [page 217]

## Article 28. Requiring Performance and the Rules of the Forum

### 191 A. Introduction

Article 28 brings to the foreground the basic distinction between (I) the *obligation* (or *duty*) that one party (D) owes to the other party (C) and (II) the *remedy* given to C for D's breach. The Convention is built around this distinction. The *seller's obligations* to the buyer are set forth in Chapter II Sections I & II (arts. 31-44); *remedies* given the buyer for the seller's breach of its obligations appear in Section III (Arts. 45-52). Following the same structure, the *buyer's obligations* to the seller are set forth in Chapter III, Sections I & II (Arts. 53-60); *remedies* given the seller for the buyer's breach of its obligations appear in Section II (Arts. 61-65). Supplemental rules on remedies applicable to both parties are stated in Chapter V (Arts. 71-84).

Examination of the above provisions will show that here, as elsewhere in the law, stating D's duties to C is simpler than stating C's remedies when D fails to perform. In most situations there is only one right way for D to perform its contract; on the other hand, D's deviations from the contract can occur in a wide variety of circumstances and degrees of harm to C and therefore call for alternative remedial provisions: avoidance of the contract (Arts. 25, 49, 64, 72), damages (Arts. 50, 74-78), and judicial "requirement" of performance (Arts. 28, 46, 62), a type of remedy that in "common law" may be implemented by a judicial decree ordering "specific" performance.

The scope of the remedy "requiring" (specific) performance was one of the most stubborn issues encountered in the preparation of the uniform rules. Article 28 a compromise that was developed in 1964 at the Hague relaxes general rules on coerced performance that appear later in the Convention; before examining the compromise we need to look quickly at the general rules which Article 28 modifies. (Art. 28 is quoted *infra* at 194.) [page 218]

### 192 B. The Convention's Basic Rules on Requiring Performance

#### (1) The Premise: Enforced Performance

The Convention's system of remedies includes general rules that a party in breach may be compelled to perform its obligations. When the seller deviates from any of his contractual duties (Art. 45(1)), "the buyer may *require performance* by the seller of his obligations" (Art. 46(1)). Similarly, when the buyer fails to perform any



of his obligations, "the seller may *require* the buyer to pay the price, take delivery or perform his other obligations..." (Art. 62).

The Convention does not specify the measures that courts shall employ to enforce remedies. Remedial provisions that establish claims for damages (e.g. Arts. 74-78) do not specify measures for (e.g.) the seizure and sale of the defendant's assets to satisfy a money judgment. Similarly, the Convention does not specify what measures courts shall employ to "require" the performance of the contract. All such matters, without detailed discussion, are necessarily left to the general procedures of the *forum*.

In framing the Convention, Article 28 was accepted as a legacy from 1964 Hague Sales Convention (Art. VII(1), ULIS 16). In preparing the 1964 Convention, without discussing the extent and means whereby various civil law procedural systems coerced performance, deference to procedural rules of the *forum* was usually regarded as a concession to the special procedural approach of legal systems based on English law.<sup>[1]</sup> However, comparative law studies have shown that on this point the supposed contrast between common law and civil law and the homogeneity of "civil law" procedures are not as great as had been supposed.

It is true that systems that stem from English law have special restrictions and procedures that other systems do not share. Competition between the "common-law" courts and the separate Courts of Chancery (or [page 219] "Equity") led to a compromise whereby the "Equity" courts would not intervene unless the remedy "at law" was not adequate.<sup>[2]</sup> The "Equity" courts, drawing on their ecclesiastical background, issued their decisions in the form of "decrees" ordering a defendant to do (or to refrain from doing) specified acts; to enforce these decrees the court could commit a recalcitrant defendant to prison for "contempt of court" until he obeyed the court's decree.

Other legal systems did not inherit these procedures for enforcement or the restrictions on "requiring" (specific) performance. However, comparative studies show that there are significant differences among civil law approaches to enforcing contractual promises. Thus, in some civil law systems "requiring" performance in some situations means that substitute performance will be purchased at the expense of the debtor—a remedy that to common-law eyes resembles an action concretely to fix the defendant's damages.<sup>[3]</sup>

As we shall see, the divergent domestic approaches to requiring performance raise important questions concerning the application of Article 28 of the Convention.

### ❖ 193 (2) *Exceptions and Restrictions*

Article 46(1), in providing that the buyer "may require performance by the seller of his obligations," immediately provides exceptions from this general rule: When goods have been delivered that 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*" (Art. 46(2)), and may require the seller to repair the goods "unless this is unreasonable, having regard to all the circumstances" (Art. 46(3)).<sup>[page 220]</sup> On the other hand, the rule of Article 62 that the seller may "require" the buyer to perform his obligations does not include any exceptions; it is unclear that the seller's right (Art. 62) to "require the buyer to pay the price" calls for remedial measures that are different from the enforcement of money judgments such as the right "to claim damages" (Arts. 45(1)(b), 61(1)(b)). See the discussion of Article 62, <sup>❖345</sup> *infra*. The relationship between Article 28 and the specific rules on requiring performance in Articles 46(2) and (3) is discussed at <sup>❖285.1</sup> *infra*.

Exceptions applicable to both parties do result indirectly from rules in Articles 85, 86, and 88 that, in some circumstances, place the burden of disposing of unwanted goods on the party who is in a better position to perform this function—even when this lightens the duties of a party in breach. For example, when "the buyer is in delay in taking delivery" the seller may be required not only to take steps "to preserve" the goods (Art. 85) but also, if the goods "are subject to rapid deterioration or their preservation would involve unreasonable expense," the seller "must take reasonable measures to sell them" (Art. 88(2)). In practical effect, these provisions limit the power of the seller under Article 62 to "require the buyer to pay the price" for the significant feature of the remedy of price recovery (as contrasted with damages) is to force the buyer to take possession of the goods.

The power to compel performance may also be curtailed by Article 77 which states that "a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss...." In examining this provision, *infra* at [416](#), we shall need to consider questions such as these: If a buyer notifies the seller that he cannot use the goods he has ordered may the seller thereafter lay out labor and materials in manufacturing goods to the buyer's specifications or incur heavy expenses by shipping the goods to the buyer? If not, the seller's remedy must be damages rather than an action for the full price.

Finally, if a party may choose to compel performance after a change in the market he may be in a position to speculate at the defendant's expense. This abuse may be controlled by application of the above requirement of mitigation, construed (as Article 7(1) requires) in order to promote the "observance of good faith in international trade"[\[4\]](#) or by concluding that the action to "require performance" was not taken with the required promptness. See Arts. 49(2), 64(2) [4306](#) [307](#), [355](#), *infra*.[\[page 221\]](#)

### [193.1](#) (3) *Functional Consequences of "Requiring Performance"*

In many settings "requiring" performance involves more than procedure; important functional and practical consequences are at stake.

When a buyer has *received* the goods and fails to pay for them there will usually be little or no practical difference between "requiring" the buyer to pay the price (Art. 62) and recovering damages for breach (Arts. 61(b), 74, 78). However, when the buyer has *not* received the goods, requiring the buyer to pay the full price (see [193 supra](#)) in effect compels the buyer to continue with the transaction. Sometimes such coerced performance involves heavy costs for the buyer without corresponding gains to the seller.

*Example 28A. Seller, a Stockholm furniture manufacturer, and Buyer, a furniture distributor in Buenos Aires, made a contract for Seller to ship 500 of its standard coffee-tables to Buyer. Before Seller shipped, Buyer learned that customers in Buyer's area did not care for these items. Buyer telexed these facts to Seller, requested cancellation of the shipment, and offered to compensate Seller for any loss on the transaction. Seller replied, "Shipping as ordered. Require you to pay the agreed price".*

As we shall note ([199](#), *infra*), Seller's reaction seems abnormal. Seller, the manufacturer, is regularly engaged in selling this item in large quantities and can resell the item more efficiently than Buyer. Moreover, continuing with the transaction requires substantial costs in shipping the goods to an area where they are not wanted. Unnecessary waste may also result from forcing the consummation of a transaction (as contrasted with payment of damages) when a seller encounters production difficulties that fall short of exemption under Art. 79, [423](#) [435](#), *infra*, cf. *force majeure*. In this and similar situations the substantial transportation costs common in international sales can augment the waste involved in forcing the completion of an unwanted transaction.[\[page 222\]](#)

### [194](#) C. General Concession to the Domestic Law: Article 28

Even with the restrictions just mentioned, the Convention grants specific performance on a wider scale than does the common law, which works from the premise that performance will be compelled only when damages do not provide an adequate remedy. (See *infra* at [196](#).) In response to the differences among domestic approaches to "requiring" performance, the Convention includes the following:

#### Article 28 [\[6\]](#)

"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."

### [195](#) (1) *Law of the Forum or Proper Law of the Contract*

Under Article 28, rules of domestic law on requiring performance can prevail over the rules of the Convention. In multistate transactions, which jurisdiction will supply the applicable rule?

Questions that fall outside the scope of the Convention normally would be governed by the domestic rules of the jurisdiction that is selected by principles of private international law. See, e.g., Arts. 4 and 7(2), *supra* at ¶¶ 61 and 85. However, Article 28 refers the court to "its *own* law in respect of similar contracts of sale not governed by this Convention." Does this language invoke the domestic law of the *forum* on requiring performance or does it call for the rules applicable under rules of private international law? [7]

The question may be illustrated as follows: When a domestic sale in State A is litigated in State F, assume that the *forum* in State F would consider [page 223] that a request for specific performance was a matter of "substance" to be decided in accordance with the proper law of the contract—the law of State A. Bearing in mind this rule of State F, suppose that State F provides the forum for an international sale between parties in States A and F, both of which have adhered to the Convention. If the plaintiff demands specific performance, does Article 28 refer to the *whole* law of State F, including its rules of private international law that might invoke the rules on specific performance of State A? The diplomatic conference of 1980 did not focus its attention on the question but an answer can be found in the legislative history of the comparable provision in the 1964 Hague Convention. [8]

Article 28 of the 1980 Convention was based on substantially identical provisions in the 1964 Sales Convention. The 1964 Convention was clearly understood to invoke the rules on specific performance of the *forum*. The 1956 Draft, on which this action at the 1964 Conference was based, provided (Art. 27) that the buyer's right to specific performance depended on whether this was "possible and permitted by the *municipal* law of the Court *in which the action is brought*." Article 72 used similar language with respect to price recovery by the seller. The Special Commission that prepared this draft, in responding to comments by governments, emphasized that the draft referred to *lex fori*—the rules in force in the country "where performance is sought." The virtual identity on this point of the 1964 and 1980 Conventions indicates that the reference in Article 28 to what the court "would do...under *its own* law" refers, as indeed the language suggests, to the domestic rules of the *forum*. [9]

Article 28 states that a court "*is not bound* to enter a judgment for specific performance unless the court would do so under its own law." The phrase "is not bound" indicates that a court that would not "require" performance under its own law is free either to "require" performance or to apply other remedies provided by the Convention such as awarding damages under Article 74, ¶¶ 403–408, *infra*. Professor Kastely suggests (n. 5, *supra*, 639–640) that such a court may "require performance" to effectuate [page 224] the reasonable expectations of the foreign party (Arts. 6, 8) or to promote uniformity in the application of the Convention. (Cf. ¶ 233 *supra*). Response to these suggestions, although not required by the Convention, would be consistent with the view that domestic law should be sensitive to the special needs of international transactions. See C. Schmitthoff, *Selected Essays on International Trade Law* 25–29, and *passim* (1988).

As we shall see more fully in connection with Art. 46, *infra*, Article 28 permits deviation only from rules of the Convention that "*require* performance of any obligation of the other party" and does not affect the Convention's restrictions on specific performance. See ¶ 193 *supra*, and ¶¶ 282–285, *infra*.

### ♦ 196 (2) *Domestic Rules on Specific Performance*

The most that can be done here is to provide a brief introduction to some of the domestic rules on specific performance; references to more thorough studies can be found in the notes.

#### ♦ 197 (a) *Common Law and the UCC*

##### (i) (U.K.) *Sale of Goods Act (1893)*

*Buyer's Action to Compel Delivery of Goods.* The (U.K.) *Sale of Goods Act (1893)*, widely followed in the common law world, provides that a court "if it thinks fit" may enter a judgment or decree for the specific

performance of contracts "to deliver specific or ascertained goods." It is difficult to conclude that goods are "specific or ascertained" when a seller promises to manufacture or procure (or set aside) generic goods and fails to do so. The Ontario Law Reform Commission found this rule inadequate and proposed that these technical restrictions be removed, but that specific performance remain discretionary.[\[10\]](#)

*Seller's Action to Recover the Price.* When the buyer has not received and accepted the goods, giving the seller the right to recover the full price (as contrasted with damages) provides, in substance, for the specific performance of the contract. The provisions of the (U.K.) Sale of Goods Act on recovery of the price are complicated by the "property" concept and **[page 225]** in other respects are technical and inadequate; the Ontario Law Reform Commission proposed substantial revision.[\[11\]](#)

### **198** (ii) *The (U.S.A.) Uniform Commercial Code*

*Buyer's Action to Compel Delivery.* The UCC (unlike the SGA, *supra*) does not restrict specific performance to contracts that call for "specific or ascertained" goods. UCC 2-716 addresses two remedies for the recovery of goods: (1) Specific performance, which may lead to a coercive decree enforceable by punishment for contempt and (2) Replevin (in some jurisdictions called "detinue" or "claim and delivery") which authorizes a sheriff to seize the goods and deliver them to the plaintiff:

#### *Section 2-716. Buyer's Right to Specific Performance or Replevin.*


"(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

"(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

"(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered."

N.B. The UCC Sales Article (2A) is in a late stage of revision.

Neither remedy is automatically available for breach of contract but the right to decree specific performance in "proper circumstances" is sufficiently flexible to permit courts to grant this remedy in cases of need. Whether specific performance should be available as a matter of course recently has become a subject for debate. The most significant argument for limiting the remedy is that this permits a party who is in breach of contract to escape from overly-rigid advance planning and to reallocate resources for maximum productivity.[\[12\]](#)

*Seller's Action to Recover the Price.* As has been mentioned, seller's recovery of the full price for goods the buyer has not received, in effect, compels full performance of the contract. The UCC ( 2-709) of course calls for the recovery of the full price when the buyer has "accepted" the goods. However, the Code's restrained approach to this remedy is illustrated by the provision of UCC 2-709(1)(b) that the seller may recover **[page 226]** the price "of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing."[\[13\]](#)

UCC 2-716 and 2-709 will be applicable when a party to a sale governed by the Convention sues in court in the United States to compel delivery of the goods or to recover the full price for goods the buyer has not received.

### **199** (b) *Civil Law Systems*

Articles 46 and 62 of the Convention provide that each party may "require performance" by the other. These broad rules reflected the delegates' understanding of the remedies provided by some civil law systems.[\[14\]](#) It is not feasible to probe the extent to which these general rules accurately reflect the actual operation of those systems; it must suffice to refer to studies that suggest that the concession to the common law provided by

Article 28 of the Convention may also permit civil law tribunals to continue a nuanced and realistic approach of their domestic law on the extent to which courts will "require performance" of contracts.[\[15\]](#)

In view of the uncertainties inherent in this delicate compromise, it is fortunate that attempts to compel performance play a minor role in the life of commerce. Legal action to coerce performance takes time even when the breach is admitted. But the defendant often will be able to present evidence and argument to justify non-performance by alleging a breach by the plaintiff or impediments that provide an excuse. (See Art. 79, *infra*.) During the protracted course of litigation the buyer's commercial needs for the goods are not met; and a seller who insists on compelling acceptance of goods must hold the goods until the buyer can be **[page 227]** compelled to pay the full price. Usually it is more efficient for an aggrieved buyer promptly to purchase substitute goods or for an aggrieved seller to resell rejected goods; in this manner productive activity can continue while an aggrieved party pursues a claim for damages. In both the common law and civil law worlds, the parties are more interested in efficiency than in legal theory. In civil law settings (as at common law) remedies to coerce performance are seldom employed even in domestic commerce.

One might be tempted to dismiss this area as a non-problem except for the (possibly remote) possibility that in a setting of commercial ill-will a party might be tempted to demand a remedy that is wasteful to the other party as a negotiating weapon to exact a settlement out of proportion to the loss resulting from the breach. See Art. 7(1) ("good faith") [94](#)[95](#), *supra*.

### **199.1 (3) Conclusion**

Article 28, properly understood in the setting of domestic procedural systems, can mitigate the appearance of rigidity of the Convention's general rules on "requiring performance". Certainly it would be wrong to assume that there are only two rules: (1) Rigid rules of the civil law world, embodied in Articles 46(1) and 62, that call for coerced performance; (2) A more flexible approach under Article 28 applicable only to actions before "common-law" courts. The flexibility permitted under Article 28 is not confined to the procedural approach of one legal system. As Professor Treitel has shown, remedial law in many legal systems is less rigid than the "require performance" rule of the Convention.[\[16\]](#) In sum, domestic rules mitigating the harshness and the dangers of abuse from demands for coerced performance are available in any *forum* where the Convention is in force.**[page 228]**

## **Article 29. Modification of Contract; Requirement of a Writing**

### **200 Agreements of Modification**

Article 29 addresses questions that arise when the parties agree to modify their contract. Will the agreement be effective although nothing additional is given to satisfy common law requirements with respect to "consideration?" Some contracts provide that modifications must be in writing: Will these agreements nullify modifications that are made orally?

#### **Article 29 [1]**

"(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."

### **201 A. Modification or Termination by "Mere Agreement"**



Paragraph (1) is addressed to a problem presented by the traditional common-law doctrine of "consideration." When an agreement to modify a contract merely increases or reduces the obligations of one of the parties, the agreement may be ineffective since it is not supported by "consideration" i.e., by an act or promise given in exchange for the new promise. This restriction on the parties' ability to adapt their transaction [page 229] to new circumstances has generated pressure for modifications of the traditional rule.[2]

The (U.S.A.) Uniform Commercial Code swept aside this common-law rule by this brief statement (209(1)): "An agreement modifying a contract within this Article needs no consideration to be binding." Article 29(1) of the Convention achieves the same result by stating that a contract may be modified or terminated "by the mere agreement" of the parties.[3] "Agreement" need not be explicit but may be based on conduct (Art. 18(3), 163, 164, *supra*), or on practices established by the parties or usage of trade (Art. 9, 112, 122, *supra*).

## 202 B. Contract Restrictions on Modification

The fact that the sales contract is in writing does not bar oral modification. Arts. 11, 29(2). However, contracts sometimes provide that they may be modified only in writing. Article 29(2) gives effect to these private "statutes of frauds." What is the effect of a contract term that requires formalities for modification other than a "writing?" Suppose the initial contract permits modification only by a writing "signed by the parties" or requires the "approval in writing by the managing director." [4]

Under Article 6, the parties may "vary the effect of any " of the Convention's provisions; the parties, by a written agreement, may broaden the scope of Article 29.[5]

### 204 (1) Conduct Precluding Reliance on Formal Requirement

The role of the second sentence of Article 29(2) may be illustrated as follows:[page 230]

*Example 29A. A written contract called for Seller to manufacture 10,000 units of a product according to specifications that were supplied by Buyer and set forth in the contract. The contract provided: "This contract may only be modified by a writing signed by the parties." Before Seller started production, the parties by telephone agreed on a change in the specifications. Seller produces 2,000 units in accordance with the new specifications; Buyer refused to accept these units on the ground that they did not conform to the specifications in the written contract.*

Because of the contract provision, under Article 29(2) the oral agreement to the change in specifications, by itself, was ineffective to modify the contract. However, Buyer's oral agreement could be held to constitute "conduct" that would preclude him from invoking the contract clause "to the extent that the other party has relied on that conduct"; Seller's production of the 2,000 units in accordance with the oral agreement could constitute such reliance. However, Buyer is precluded only "to the extent" of the reliance; he should be able to insist on the original specifications for further production.[6]

Under this view, Article 29(2) reliance may be based on "conduct" such as a statement by one party that it would accept a shipment made a week later than the date specified in the contract followed by a shipment made in accordance with this assurance.

It may be argued that a "no oral modification" clause means: "This contract may be modified only by written agreement, and may not be modified by an oral agreement or other conduct regardless of reliance thereon". This construction of a "no oral modification clause", or an express contract provision in terms just quoted, raises a difficult question on the relationship between Article 29(2) (last sentence) and Article 6 (74, 77, *supra*). Article 6 states: "The parties may...derogate from or vary the effect of any of [the Convention's] provisions". Under one view Article 6 would authorize the parties to override the "reliance" provision of Article 29(2). However, the "reliance" provision addresses a specific problem of *abuse* of a "no-modification" clause rather than the general effectiveness of the clause. Consequently, it may be suggested that Article 6 should not be construed to authorize contracting to nullify the narrow protection [page 231] against abuse of contracting in

Article 29(2). In further support is the mandate of Article 7(1) that, in interpreting the Convention, "regard is to be had to...the need to promote... *the observance of good faith* in international trade". See: Schlechtriem, Com. (1998) 214-216.

If, contrary to this suggestion, the protective rule of Article 29(2) may be nullified by contract, the party prejudiced by such a contract term may invoke applicable domestic rules on "unconscionability", "good faith" or other rules invalidating such a contract provisions. As we have seen, domestic rules on the validity of contract terms are preserved by Article 4(a). See ¶¶64-67, *supra*. [7]

*Conduct Modifying Writing: Decisions.* (1) GER. [LG Hamburg, 5 O 543 26 September 1990](#). Agreed payment date extended by accepting bill of exchange. CLOUT 5, UNILEX D.1990 ¶6. (2) GER. [OLG Köln, 22 U 202/93, 22 February 1994](#). S's offer to terminate was made effective by B's silence and conduct. CLOUT 120, UNILEX D.1994 ¶16.

*Agreement Requiring Writing Enforced.* USA [S. Dist. NY, 22 September 1994. Graves v. Chilewich](#), 1994 Westlaw 5/9996. Written agreement requiring writing was enforced. CLOUT 86, UNILEX D.1994 ¶23. See: [Hillman, R., 21 Cornell Int. L.J. 449-466 \(1988\)](#).

*Reservations under Articles 12 & 96: Oral Modification of Agreements:* See discussion, *supra*, at Article 12, ¶129, including BELGIUM [Rechtbank van Koophandel, A.R. 1849/94, 2 May 1995](#). UNILEX D. 1995-15.1.2.

## ¶204.1 C. The Convention and Common-law "Consideration"

Does the Convention abolish the common-law doctrine of "consideration"? This question, sometimes posed by concerned jurists, is reminiscent of questions concocted by clever, mischievous students to test their professor's mettle. The question is interesting but calls for a slightly narrower focus: Can a problem of common-law "consideration" arise within the area governed by the Convention?

Let us recall the Convention's scope. Article 4 states: "This Convention governs only" (1) "the formation of the contract" (Part II of the Convention [page 232]) and (2) "the rights and obligations arising" therefrom (Part III of the Convention).

### ¶204.2 (1) *Formation of the Contract (Part II of the Convention)*

Lawyers who have never met a problem of "consideration" in practice will still recall that at classical common law a promise might not be enforceable unless the promisee gave something in exchange: a promise or an act—possibly only a peppercorn. Perhaps the doctrine's principal significance has been to deny enforcement to promises to make a gift—a type of open-handedness that does not plague commercial practice. However, as we have seen, problems of "consideration" can arise when an offeror, without receiving anything in exchange, promises not to revoke the offer (¶140 *supra*). However, Article 16(2) of the Convention provides that such an offer "cannot be revoked" (¶¶139-142 *supra*).

Our clever student, however, may exclaim: "Haven't you overlooked Article 4 which states that the Convention is not concerned with (a) the *validity* of the contract? Our contract law states that consideration is necessary for *validity*. Hence our rules on consideration are in force in spite of the Convention." This question raises a basic issue of construing the Convention that can occur in an untold number of contexts and deserves an answer.

First, a few self-evident but essential points: Article 4 defines the scope of the uniform law of the Convention; interpreting the words in Article 4 is an interpretation of the *Convention* and not of domestic law. Thus, the statement that the Convention "is not concerned with...the *validity* of the contract" must be read in relation to other provisions that show the issues with which the Convention *is* concerned. One of the issues with which the Convention *is* concerned is the revocability of offers. Indeed this is one of the important provisions of Part II on formation of the contract; there was never any question but that, subject to permitted reservations [10], this and the other rules of the Convention were *uniform* rules displacing domestic law, regardless of their label.

None of the other provisions of Part II on Formation seems to collide with domestic rules on consideration. If such a problem should arise the answer should be developed in conformity with the principles suggested above. [page 233]

### ❖204.3 (2) *Rights under the Contract (Part III of the Convention)*

The rules of Article 29 permitting modification of the contract by "mere agreement", as we have seen, also collide with traditional common-law rules on "consideration" (❖201 *supra*). Here, too, domestic law must yield to the uniform rule of the Convention. There are a few other provisions of the Convention that might be regarded as involving a readjustment of the parties' agreement. See Arts. 47(2) and 63(2) (effect of a notice fixing an additional period for performance), Art. 48(2) (effect of a request that a buyer make known whether it will accept delayed performance), Art. 65(1) (effect of a request to make specifications). If any of these provisions should collide with domestic rules on "consideration" the domestic rule is superseded by the uniform international rule permitting readjustment of the contract by "mere agreement".

### ❖ 204.4 (3) *Conclusion regarding "Consideration" and the Convention*

It is difficult to envisage cases in which common-law rules on "consideration" would have vitality within the area governed by the Convention. In Part II (Formation), except for promises not to revoke an offer governed by Article 16, the formation of sales agreements does not present a problem of "consideration" since each party's promise is made in exchange for the other party's promise or (in rare instances) performance.

In Part III (Obligations under the Contract) it is difficult to think of a promise made after the initial making of the contract that is not made binding either by Article 29 ("A contract may be modified or terminated by *mere agreement*") or by one of the above-mentioned provisions facilitating readjustment of the parties' obligations.

Agreements settling disputed claims seldom present problems of "consideration" since each party usually yields some aspect of its claims. Settlement agreements probably are governed by the Convention since (Art. 4) they involve "the rights and obligations of the seller and buyer arising from" the international contract. The Convention does not state that such agreements do not require common-law "consideration"; one can imagine the drafting problem of knocking out common-law consideration for every possible application. However, on each occasion when this question came to the fore (Arts. 16, 29) the Convention rejected "consideration" as a barrier to enforcing the agreement. This policy consequently seems to qualify as one of the "general principles" on which the Convention is based and therefore should be given effect under Article 7(2) (❖❖96❖102 *supra*). Finally, and most important: the legal systems in much of the world have no doctrine comparable to common-law "consideration." See *Zweigert & Kötz II* (1987), *supra* note 2. Subjecting some international sales governed by the Convention to this arcane doctrine would be inconsistent with the mandate of Article 7(1) (❖❖85❖87 *supra*) to interpret the Convention with regard "to its *international* character and the need to promote *uniformity in its application*." [page 235]

## CHAPTER II.

### OBLIGATIONS OF THE SELLER (Articles 30❖52)

#### Introduction to Chapter II

❖ 205 Chapter II opens with a brief statement giving the essence of the seller's obligations (Art. 30). The remaining articles of the Chapter are grouped in three sections. Two sections define the seller's most important duties: The time and place for delivering the goods (Sec. I, Arts. 31❖34) and the quality of the goods and their freedom from third-party claims (Sec. II, Arts. 34❖44). The final section sets forth the basic remedies that are given to the buyer when the seller fails to perform its duties under the contract (Sec. III, Arts. 45❖52).

These remedies for breach by the seller and comparable remedies in Chapter III for breach by the buyer (Arts. 61-65) are supplemented in Chapter V by remedial provisions applicable to both parties (Arts. 71-84). [page 236]

---

## Article 30. Summary of Seller's Obligations

206 Article 30 introduces the reader to the scope of Chapter II and draws attention to the principal topics dealt with in the Chapter and the order of their presentation. (Chapter III Obligations of the Buyer has a similar chapeau (Art. 53).)

### Article 30 [1]

"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."

This introductory article is significant for its explicit statement of the central and unitary role that the Convention gives to the contract. The issue of a fragmented versus a unitary approach to the contract was introduced in the Overview (Ch. 2, *supra* at 24), and will be explored further under Article 31 at 207 and in connection with the Convention's remedial system. (See the Introduction to Sec. III of this Chapter *infra* at 272; Art. 44 *infra* at 255.) The relation between the Contract and the Convention has been examined in the Overview (Ch. 1, *supra* at 2) and in the Commentary to Article 6, *supra* at 75.2]

The fact that the Convention applies fully to sales of goods to be consummated by the delivery of documents is made explicit here in Article 30. See also Article 34, 217-219, *infra*. [page 237]

---

## SECTION I.

### Delivery of the Goods and Handing Over of Documents (Articles 31-34)

#### Article 31. Place for Delivery

207 When the contract (interpreted in the light of practices and usages) does not state where the seller should deliver the goods, the question is answered by the present article.

The place for delivery, in addition to determining the duties of the parties, in several jurisdictions may also provide a basis for jurisdiction: E.g., the EC Convention on Jurisdiction and the Enforcement of Judgments (Brussels, 1968).

### Article 31 [1]

"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." [page 238]

## 208 A. Place for Delivery in Specific Settings

### (1) Contracts Involving Carriage

All sales involve movement of goods, at the very least by the buyer's removal of the goods he has purchased. Article 31(a), however, is applicable only to contracts that involve "carriage." This refers to transport by a "carrier" to which the seller "hands the goods over" for "transmission to the buyer." This language shows that "carrier" does not include transport facilities, such as delivery trucks, operated by the parties. (This point is developed further in connection with rules on risk of loss. See Art. 67, *infra* at 368.)

Normally the contract will refer to the use of a carrier; in other cases the distance that separates the parties and their practices will often show that the contract involves the use of a "carrier." In these transactions, paragraph (a) applies and the seller completes its contractual obligation with respect to delivery by "handing the goods over to the first carrier for transmission to the buyer."

As we shall see (*infra* at 210), the question whether a party has complied with its contractual obligation is distinct from the allocation of loss from fire, theft or other casualty. However, when the seller dispatches the goods by carrier the rules on contract performance correspond closely to the Convention's rules on risk of loss. Thus, Article 67(1) provides: "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...*"

These rules reflect mercantile practice. As we shall see in greater detail in the commentary to the rules on risk of loss in Chapter IV (Arts. 66-77, *infra* at 360-419), even when the seller undertakes to pay the freight costs to destination under "C.I.F." and "C. & F." ("CFR") quotations, it has long been settled that the seller both completes his delivery duties and transfers risk to the buyer when the goods are (at the latest) loaded on the carrier. And the 1990 version of *Incoterms* reflects modern transport practices by providing that even though the seller undertakes to bear transport costs under a quotation "Carriage Paid to..." ("CPT"), the seller completes its duties as to delivery (and transfers risk to the buyer) when the seller delivers the goods "into the custody of the first carrier." A similar approach is reflected in the definition of the important term "Free Carrier...(named place)" ("FCA"). [2] [page 239]

Practical considerations underlie these rules. Damage in transit usually is discovered only when the goods arrive and are unpacked; at this point the buyer (especially in international shipments) is in a better position than the seller to salvage the goods and to file a claim against the carrier or the insurer. [3] The provision that the seller's responsibility is not discharged until he has "handed over" the goods to the carrier (as contrasted with leaving the goods on an unattended dock pending arrival of the carrier) means that the seller remains responsible until the carrier has taken possession of the goods and thereby has assumed some responsibility for them. [4]

These basic rules are also embodied in the Uniform Commercial Code. Under UCC 2-509(1):

"(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505)..."

### 209 (2) Sales Not Involving Carriage

Paragraphs (b) and (c) of Article 31 apply to a small minority of international sales—sales that do not "involve carriage" and where "the seller is not bound to deliver the goods at any particular place." These provisions are most likely to apply when the seller and buyer are relatively near each other and the buyer operates trucks that



can conveniently come to (b) where the goods are or (c) to the seller's place of business. When the contract calls for the buyer to come for the goods, the seller completes its contractual duties with respect to delivery by "placing the goods at the buyer's disposal." [5] [page 240]

*Decisions: Place for Delivery: (1) Delivery to First Carrier:* (1) FR. [CA Grenoble #156, 29 March 1995, Camara v. Magaron](#). Place for delivery decisive under EC Convention on Jurisdiction (Brussels 1968) (see above).

(2) *Delivery to Buyer:* GER. [OLG Karlsruhe, 15 U 29/92, 20 November 1992](#). Evidence of receipt not clear; S was denied price recovery. UNILEX D.1992♦28.

(3) *Buyer to Come for the Goods.* GER. [LG Aachen, 43 O 136/92, 14 May 1993](#). Buyer to receive goods at place of manufacture. CLOUT 47, UNILEX D. 1993♦16.

See also: Feltham, J.D., CIF, FOB Contracts and CISG, 43 J. Bus. L. (Lon.) 413♦425 (1991); Schlechtriem, Com. (1998) 226♦230, 234♦240.

## ♦ 210 B. "Délivrance" in ULIS and the Contractual Approach

Article 31 of the Convention marks a change from the approach of ULIS that, at first glance, seems merely a change in theory but, in fact, affects the clarity and workability of the two versions.

In ULIS the concept of "*délivrance*" dominated the draft's approach to several problems, including risk of loss and the time for payment of the price. This approach could have been successful in some of these settings if the draft had used a simple definition of "delivery" ♦ the handing over of the goods. Instead, under ULIS 19(1) *délivrance* "consists in the handing over of goods which conform with the contract." [6] This was a very plausible approach to the question whether the seller had performed his contractual duties but it complicated the drafting in other settings, such as risk of loss, and made this central concept so abstract (in French, *délivrance* as contrasted with *remise*) that no appropriate term could be found in English and in various other languages. ULIS was drafted in French. When, at a late stage, an English text was prepared, there was no escape from rendering *délivrance* as "delivery," although this led to the curious result that if the goods had a defect they were never "delivered" to the buyer while he used or even consumed the goods. More important, the use of *délivrance* produced untoward consequences with respect to risk of loss and payment of the price. Efforts to correct this problem were made [page 241] at the 1964 conference but *délivrance* was such an integral part of the draft's structure that repairs were not feasible. [7]

In UNCITRAL it was possible to deal with this problem. The Working Group at an early stage decided that the problems of risk and payment of the price should be disentangled from *délivrance*, and should be handled as separate problems. [8] In addition, the provisions on Obligations of the Seller with which we are now concerned (Art. 31 and succeeding articles in the present Chapter) are stated in terms of whether the seller had performed his "obligation" with respect to delivery. The seller fails to perform his obligations if he *tenders* defective goods; with regard to this contractual issue it does not matter whether the buyer rejects the goods (no "handing over" or "delivery") or whether the buyer takes possession of and uses the goods, subject to a damage claim to compensate for the breach.

Thus, the Convention has no provision like that of ULIS 19(1): "Delivery *consists in*..." The contractual approach of the Convention is typified by the introduction to Article 31: the seller's "obligation to deliver consists" in performing specified acts, regardless of whether "delivery" takes place. The same contractual approach is used in Chapter III ♦ *Obligations of the Buyer*. E.g., Art. 60 (the buyer's obligation to take delivery consists...).

The point deserves emphasis. Assume that the contract calls for the seller to place the goods at the buyer's disposition at the seller's plant by May 1 for removal by the buyer by the end of the month. If the seller on May 1 places the goods at buyer's disposition Article 31 provides that the seller has fulfilled his "obligation to

deliver" the goods. This provision does not state (and for the purposes of the Convention does not need to state) that the seller has "*delivered*" the goods, nor does Article 31 determine when the risk of loss passes to the buyer, for this issue is governed by the rules on risk of loss in Chapter IV. As we shall see at [374](#) [page 242] (Examples 69A and 69B), Article 69 provides that in the above situation risk of loss rests on the seller until the buyer "takes over" the goods; the result is different if the buyer "commits a breach of contract by failing to take delivery. *E.g.* If the buyer fails, as agreed, to come for the goods by May 30 risk passes to the buyer on June 1.

In short, Article 31 and the other provisions in this Chapter deal with the *contractual obligations* of the parties; problems such as allocation of risk are dealt with by provisions addressed directly to those problems.

## 211 C. The Role of General Rules on Place and Time

Article 31, in addressing the question whether the seller has performed his contractual duties with respect to delivery, plays a modest role. In most cases, questions as to "place" and "time" will merge into a single issue: Did the goods get to the agreed place on time? Art. 33, *infra* at [216](#), is concerned with the time for delivery. But in most situations the combined place-time question will be answered by the contract, either in specific terms or by the meaning supplied by the circumstances mentioned in Article 8(3), by the parties' practices (Art. 9(1)) or by commercial usage (Art. 9(2)).[\[9\]](#)

*Export Licenses and Taxes.* The rules on the place for delivery can also be useful, when the contract is silent, in allocating responsibility for matters such as export licenses and export taxes. For example, assume that the contract provides that the seller will place the goods at the buyer's disposal at the seller's place of business. Under Article 31(b) the seller fulfills his obligation to deliver at his own factory or warehouse; the buyer has the responsibility to remove the goods and to make any arrangements for exportation. *Incoterms (1990)* reflects a similar approach: Under a sale *Ex Works* "B. The buyer must...B2. Obtain at his own risk and expense any export or import license or other official authorization and carry out all customs formalities for the exportation and importation of the goods...".[\[10\]](#) On the other hand, the seller must bear [\[page 243\]](#) these costs when the contract requires the seller to deliver the goods in the buyer's country.[\[11\]](#)

When the contract calls for the seller to dispatch the goods by carrier (Art. 31(a), allocating responsibility for export licenses and taxes is less clear-cut. Modern transport procedures call for expedited carriage as soon as the carrier receives the goods; these procedures have led to practices placing the responsibility for export clearances on the seller. Thus, *Incoterms (1990)* provides that under the modern quotation "Free Carrier...(named place)," " (FCA)" even when the designated point is inland, "A. The seller must...A2 Obtain at his own risk and expense any export license or other official authorization and carry out all customary formalities necessary for the exportation of the goods". The same result follows under the quotation "Carriage Paid to..." ("CPT") and also under the traditional quotations "C&F" (now abbreviated "CFR") and "CIF". On the other hand, *Incoterms* allocates export problems to the buyer under quotations "F.A.S.", "F.O.B." and "CFR" (Cost and Freight...named port of destination).

In short, the "delivery" concept does not avoid doubt over who has the responsibility for export licenses and export taxes; the parties should deal specifically with this question in the contract.[\[12\]](#) When the contract is silent, modern practices governing export sales often indicate that the seller's responsibility to dispatch goods to a foreign destination calls for him to deal with export licenses and export taxes.[\[13\]](#) [\[page 244\]](#)

## Article 32. Shipping Arrangements

212 As we have just seen, in international sales the seller usually completes his obligations with respect to delivery of the goods by "handing over the goods to the first carrier for transmission to the buyer." Art. 31, *supra* at [208](#). Any provision of the agreement (including usage and any practice between the parties) is decisive; to the extent that there is no agreement with respect to shipping arrangements, Article 32 applies.

### Article 32 [\[1\]](#)

"(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.

## 213 A. Identification of the Shipment

The specific goods (*e.g.*, specific bags of sugar) that will be supplied are usually not identified when the contract is made; the seller may supply any goods that conform to the agreed qualities and characteristics. In these situations it is sometimes said that the contract calls for "generic" goods or that the goods are "unascertained" or "unidentified." [page 245]

At some stage in the performance of each sales contract, specific goods will be designated or "identified" as those which are provided pursuant to that contract. As we shall see in examining the rules on risk in Chapter IV (Arts. 67(2) and 69(3)), casualty loss will not fall on the buyer unless (at the very least) the goods have been "identified" to the buyer's contract.

Article 32(1) deals with a different question—the obligation of a seller who ships goods to provide the buyer with information that he needs. Often the contract (especially when the seller is to be paid on presentation of documents specified in a letter of credit) provides that the seller will arrange for insurance, and will transfer a policy or certificate of insurance to the buyer (or to the buyer's bank) when payment is made. Occasionally, however, the buyer will need to take out insurance on goods in transit; even if the buyer has general coverage under a "blanket" policy, it is important to be clear as to which goods are in transit to him.

This identification usually is effected by naming the buyer in the documents issued by the carrier—the consignment note or bill of lading; where possession of the shipping document controls the delivery of the goods (*e.g.*, the shipping document is an "order" or "negotiable" bill of lading) the document will normally give the buyer's name as the person the carrier is to notify concerning arrival of the shipment. Even if the shipping document does not connect the buyer and the goods, this may be done by identifying marks on the goods. If the goods are not clearly identified in one of these ways, under Article 32(1) "the seller must give the buyer notice of the consignment specifying the goods." [2]

What are the consequences of failure by the seller to give such a timely notice of the consignment? If the goods are lost or damaged before the goods are identified to the contract, the consequences can be serious by virtue of the rules on risk of loss in Chapter IV. (See Arts. 67(2) and 69(3), *infra* at 363 and 373.) The seller's failure to comply with the identification or notice provisions of the contract or of Article 32(1) will, of course, constitute a breach of contract. The remedies for the breach depend on its seriousness. In any event, the seller will be liable to the buyer for damages that result (Arts. 45 and 74); if the seller's breach is "fundamental" (Art. 25, *supra*), the buyer may be able to "avoid the contract" (Art. 49) *i.e.*, he may reject the goods. [3] [page 246]

## 214 B. Transportation Arrangements

Paragraph (2) applies whenever "the seller is bound to arrange for carriage of the goods." The contract may call for the seller to make shipping arrangements even though, under the contract, the buyer bears the risk of increase in freight rates or of the unavailability of shipping space. Article 32(2) merely articulates the seller's duty to make appropriate "arrangements"—arrangements for the type and means of transport and the terms of the contract with the carrier. As was noted with respect to paragraph (1), above, failure to perform these duties is a

breach of contract; the remedy depends on the seriousness of the breach.<sup>[4]</sup> Unless the contract or usage (Art. 9) provides otherwise the seller's duty to "arrange" for shipping does not make the seller liable if space or facilities for carriage are unavailable.

## ❖ 215 C. Information Necessary for Insurance

Paragraph (3) articulates a duty of cooperation that, in most cases, probably could be established as an aspect of applicable usages or practices. *Cf.* (U.S.A.) UCC 2-311; Options and Cooperation Respecting Performance; UCC 2-319(1)(c) and (3) (buyer's duty to give needed instructions to seller); (U.K.) SGA (1893) 32(3).<sup>[5]</sup> [page 247]

## Article 33. Time for Delivery

### ❖ 216 Article 33 [1]

"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."

The statement in paragraph (a) that the seller must act in conformity with the contract reinforces the general rules of Articles 6 and 30, *supra* at §§ 74 and 206. Most articles of the Convention do not reiterate the parties' obligation to comply with the contract but in a few places where detailed provision is made for points that are usually covered by contract it seemed advisable to underscore the dominant role of the contract. (Arts. 34, 35(1), 41.) The number of these references was minimized to avoid giving the impression that the contract controls only when it is specifically invoked.<sup>[2]</sup>

Subparagraph (b) applies when contracts provide a *period* within which delivery shall occur but do not state whether the seller or the buyer has the choice as to the precise time within the period. The presumption that the seller may choose the date reflects the seller's more complex duties of procurement or production, packaging and other arrangements for delivery. We have just seen illustrations in Article 32 of shipping arrangements that may need to be made by the seller.<sup>[3]</sup> The buyer's duty to take delivery is governed by Articles 53 and 60, §§ 322, 341-343, *infra*. [page 248]

## Article 34. Documents Relating to the Goods

### ❖ 217 A. The Commercial Setting

When the seller lacks sufficient knowledge of the buyer to justify a delivery on credit, an exchange of goods for the price can be efficiently arranged by the use of a document that controls delivery of the goods, such as a negotiable or "order" bill of lading. See Art. 58, *infra* at § 333. Such documentary exchanges are accepted by standard statements of trade practice and by domestic law.<sup>[1]</sup> Even when the seller delivers on credit, the contract (including practices or usage) may require the delivery of additional documents such as an insurance policy and invoices.

### ❖ 218 B. The Convention

The above commercial practices provide the setting for the following provision:

## Article 34 [2]

"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." [page 249]

### ❖ 219 (1) *A Drafting Problem: Documents and Goods*

In the preparation of ULIS and in UNCITRAL this question arose: When the law refers to the delivery or handing over of "goods," should the law also refer to delivery effected by "documents of title?" It was found this would have called for many references to delivery by documents; the first sentence of the present article was included to provide a simpler and less cluttered text. This sentence merely states that the seller must perform the contract❖ a statement that would have been unnecessary but for the drafting problem arising from references to delivery of "goods." [3]

### ❖ 220 (2) *Cure of Non-Conforming Documents*

The second and third sentences of Article 34 were added at the 1980 Diplomatic Conference to make clear that the seller❖s right to "cure" a defective delivery of goods extended to the delivery of documents. As we shall see (Art. 37, *infra* at ❖244), a seller who has made a defective delivery before the date of delivery may deliver a "missing part" or "make up any deficiency in the quantity of the goods" or "deliver goods in replacement" or "remedy" (repair) the lack of conformity. This language dealt so specifically with the special problems of "goods" that it seemed hazardous to rely on the assumption that references to delivery of "goods" extended to "documents." The second and third sentences of Article 34 were modelled closely on the "cure" provisions of Article 37. The discussion of Article 37, *infra* at ❖244, will be generally applicable to the provisions of Article 34 with respect to "cure" of defects in documents. [4] Cure of documents after the date for delivery is considered at Article 48, ❖295, *infra*. [page 250]

## Section II.

### Conformity of the Goods and Third Party Claims (Articles 35❖44)

#### ❖ 221 Introduction to Section II

Articles 35 and 36 define the seller❖s obligations with respect to the quality of the goods. The next four articles (37❖40) describe procedures that apply when goods are defective❖ the seller❖s privilege to cure defects in the goods (Art. 37) and the buyer❖s obligation to examine the goods and notify the seller of nonconformity (Arts. 38❖40). Articles 41 and 42 define the rights of the buyer when the goods are subject to third-party claims❖ of ownership (Art. 41) and of rights based on patents, trademarks or other types of intellectual property (Art. 42). Article 43 requires the buyer to notify the seller of these claims; the concluding article (Art. 44) gives grounds for excusing a failure to notify the seller.

## Article 35. Conformity of the Goods

### ❖ 222 A. The Role of Rules about Quality

Most sales controversies grow out of disputes over whether the goods conform to the contract. In many cases these disputes present only a question of fact: What was the condition of the goods? Disputes over quality,



however, cannot always be resolved simply by measuring the goods against the specific terms of the contract. When an order is routine and calls for speedy shipment the parties may not even attempt to articulate the expectations that are associated with transactions in such goods. Even a carefully prepared contract will often fail to express the most basic expectations that a machine will operate or that a steel girder will be structurally sound because the parties assume that these points are so obvious that they "go without saying." (Compare the implied obligation that the seller will deliver goods that "are free from any right or claim of a third party," Art. 41, [262](#) [266](#), *infra*.) Consequently, courts and codifiers have had to try to describe, in general terms, those understandings that would have been written into the contract if the parties had drafted a contract provision to deal specifically with the question that led to dispute.[\[1\]](#)

Domestic legal systems address this problem in various ways. In United States law, the seller's obligations as to quality are referred to as "warranties", and are dealt with under three headings: (1) "express warranties", (UCC [2-313](#)); (2) an implied warranty of merchantable quality (UCC [2-314](#)); and (3) an implied warranty of fitness for a particular purpose (UCC [2-315](#)). The (U.K.) Sale of Goods Act (1893), in general, leaves the parties to express statements to the general law of contracts but in Sec. 14 establishes implied "conditions" and "warranties" of quality [\[page 252\]](#) and fitness.[\[2\]](#) Other legal systems use different concepts. Codes based on the French pattern tend to deal with questions of quality with a light touch that is directed to the distinction between latent defects (*vices cachés*) and apparent defects (*vices apparentes*). This brief approach has been supplemented by other doctrines such as *erreur*; students of the civil law report that the result is complex and unclear.[\[3\]](#)

## 223 B. The Convention

Article 35 presents a unified approach to the seller's contractual obligations with respect to the goods:

### Article 35 [\[4\]](#)

"(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 [\[page 253\]](#) 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.

### 224 (1) *Quality Required by the Contract: Paragraph (1)*

Paragraph (1) emphasizes a point that could go without saying: the parties must comply with their contract. (See the discussion of Art. 33(a), *supra* at [216](#); and Arts. 6 and 30, *supra* at [274](#) and [206](#).) [\[5\]](#) The Sales Article of the (U.S.A.) Uniform Commercial Code also emphasizes the importance of the contract. Section [2-313](#) (Express Warranties by Affirmation, Promise, Description, Sample) carried forward a provision, drafted by Professor Williston for the Uniform Sales Act (1906), that was designed to nullify decisions that had hesitated to give contractual effect to the seller's "representations" and "affirmations" (as contrasted with "promises")

and also to overturn decisions that had insisted on evidence that the seller "intended to be bound" by statements concerning the quality of the goods.<sup>[6]</sup>

The technical distinctions in these early cases have been softened by more recent case law.<sup>[7]</sup> In any event, these distinctions are not useful in deciding what quality is "required by the contract" under Article 35(1). As we shall see, Article 35(2)(a) gives effect to the expectations latent in any "description" of the goods. And the basic rules on contract interpretation in Article 8 do not draw any technical distinction between different [page 254]types of "statements" and emphasize the "understanding" that statements produce in a reasonable person. (See Art. 8, *supra* at ¶105 and ¶109.)<sup>[8]</sup>

## ¶225 (2) *Presumed Implications from the Contract: Paragraph (2)*

### (a) *Description and Ordinary Purposes*

Paragraph (2)(a) embodies the clearest ideas that have been developed for defining the seller's responsibility for quality. These ideas are both subtle and fundamental. Commercial law does not impose standards of quality: it accommodates sales of cars for scrap as well as sales of new cars for resale to consumers. Often, detailed specifications in the contract will resolve any question as to quality but in routine transactions the parties would think it needless and a bit absurd to say things that "go without saying." In these situations interpretation of the contract, calls for finding the full meaning of the contract description in the light of the expectations that have developed for such sales.

The Convention builds on these assumptions and goes a step further. Things are bought for use raw materials are bought for processing; machinery is bought for use in production; commodities are bought for resale and use. Legislators could not develop detailed, technical specifications for such goods; hence, paragraph (2)(a) asks whether the goods "are fit for the *purposes* for which goods of the same description would *ordinarily* be used." (Fitness for a *particular* purpose is dealt with in paragraph (2)(b).)

The basic standard in paragraph (2)(a) is similar to the warranty of "merchantable quality" developed in early English case law incorporated in the Sale of Goods Act (1893). However, the meaning of "merchantable quality" was left to case law. The basic ideas developed by the cases were [page 255] used by the (U.S.A.) Uniform Commercial Code in defining "merchantable quality." Under Section 2-314(2), "goods to be merchantable" must "(a) pass without objection in the trade under the contract *description*" and "(c) are fit for the *ordinary* purposes for which *such* goods are used."<sup>[9]</sup>

Some writers have felt that it is necessary to give a general answer to the following question: Does subparagraph (2)(a) refer to the understanding of the contract description of the goods that prevails at the seller's place of business or at the place where the buyer intends to use the goods? Writers have disagreed over the choice between these two places.<sup>[10]</sup>

It should not be necessary to answer this question if one accepts the view, suggested above (¶222), that the role of Article 35(2) is to aid in *construing the agreement of the parties*. The question is this: What was the parties' understanding of the contract provision describing the goods? More precisely (in the language of Article 35(2)) what was their understanding of the "purposes for which goods of the same *description* would ordinarily be used"? Since the problem concerns fitness for the "ordinary" use of goods described in the contract, serious misunderstandings should be infrequent; in domestic law disputes under this test usually arise out of a question of fact: Were the goods subject to defects that were abnormal for goods sold under the description?

If the parties do have different understandings of the connotations of the agreed description, the problem needs to be resolved pursuant to the Convention's rules for interpreting sales contracts. These rules are set forth in Article 8, ¶¶104-111, supplemented by the practices of the parties and trade usages Article 9, ¶¶112-222. Under these rules the relevant facts are: Which party drafted the description? (This may be either the seller or buyer.) What, under Article 8(2), would be "the understanding [page 256] that a reasonable person of the same kind as the other party would have had in the same circumstances"? To ascertain this understanding Article 8(3)

directs attention to all relevant circumstances including "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

In sum, under the Convention problems of contract interpretation are to be solved on the basis of the *facts of each transaction* and not under a general legal rule specifying that the seller's (or buyer's) region controls the parties' understanding.

*Decisions; Conformity: Standards in Buyer's State; Compliance Required:* (1) FR. CA Montpellier, 15 April 1993. Excessive sugar basis for rejection; confirmed: [C. de Cass. \(Sup.Ct.\) 173P. 23 January 1996](#), CLOUT 150, UNILEX D. 1996♦2. (2) FR. [CA Grenoble, 48992, 13 September 1995](#), Ciato v. SFF. S knew that the cheese was to be resold in France; French standards were required. UNILEX D. 1994♦24, CLOUT 202. (3) GER. [LG Ellwangen, 1 KfH O 32/95, 21 August 1995](#). Paprika from Spain did not conform to German food standards; B avoided contract. UNILEX D. 1995♦20. (4) FR. [C. de Cass. \(Sup. Ct.\), Ceramique v. Musgrave, 2205D, 17 December 1996](#). C. de Cass. reversed lower courts because, inter alia, French rules on *vice cache* were applied in stead of CISG 35(2)(a). UNILEX D. 1996♦11. *See also:* MEX. [ARB: COMPROMEX, M/21/95, 29 April 1996](#). S (Argentine via Chile) shipped defective canned fruit. Deterioration in transit was S's responsibility. UNILEX D. 1996♦3.5.

*Compliance with Standards Satisfied or not Required.* GER. [OLG Frankfurt a M., 13 U 51/93, 20 April 1994](#), confirmed by [BGH \(Sup. Ct.\), VIII ZR 159/94, 8 March 1995](#). Claim that calcium of shellfish exceeded German standards; claim rejected. S can not be expected to observe standards or regulations in B's State unless they are the same as in S's State or B has informed S. CLOUT 84, UNILEX D. 1994♦10, D. 1995♦9 (BGH).

*Comments:* Veneziano, A., Current Case Law, 1 Int. Bus. L. J. 39♦65 (1997); Goto, K., Warranties, 3 Studies in L. & Econ. (Kyushu Int. U. Assn. L. & Econ. 40 (1991); Zamir, 52 La. L. Rev. 1♦90 (1991); Bonell/Liguiri, ULR (1997♦3) 590♦592, n.91♦102 (numerous cases); Schlechtriem, Com. (1998) 276♦284 (Schwenzer).

## ♦226 (b) *Fitness for Particular Purpose*

The role of Article 35(2)(b) may be illustrated as follows:

*Example 35A. Buyer wrote as follows to Seller, a manufacturer of drills. "Please ship me a set of drills [giving sizes] for drilling holes in plates of carbon steel." Seller shipped the Buyer a set of drills that were [page 257] of the size designated by Buyer. The drills were satisfactory for drilling holes in ordinary steel, but were not sufficiently hard for carbon steel.*

*Relationship to Contract.* In this example, as in most (perhaps all) of the sales that fall within paragraph (2)(b), it would be possible to conclude that the shipment of the drills created an "understanding" (Art. 8(2) & 8(3)) that the drills would meet the standards specified in Buyer's order; conformity of the goods with this understanding would be required by Article 35(1) although Seller had said nothing about whether the drills would cut through carbon steel. Thus, paragraph (2)(b) of Article 35 may not have been necessary, but may help to reduce uncertainty over whether a seller may be responsible for an understanding to which he was a party but which he did not articulate.

*Reliance on Seller's Skill and Judgment.* The structure of paragraph (2)(b) may lead tribunals to conclude that the buyer makes a *prima facie* case by showing that the seller knew of the buyer's particular purpose at the time of the conclusion of the contract and that the goods were unfit for that purpose; the seller then has the burden to show that "the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment." [11]

In Example 35A, Seller would find it difficult to disprove reliance by Buyer. Seller, the manufacturer of the drills, would know more about their cutting qualities than Buyer, and Buyer relied on the Seller to select a drill that would cut through carbon steel, or inform Buyer that Seller had no such drill. Indeed, the crux of Article

35(2)(b) is the buyer's known reliance on the seller to select and furnish a commodity that will satisfy a stated purpose.[\[12\]](#)

*Decision; Fitness for Purpose.* FR. [CA Grenoble, RG 93/4879, 26 April 1995, M. Roque v. SARL](#). Purpose of hangar made known to S (Art. 31(b)); S was responsible for repairs . . . UNILEX 1995<sup>14</sup>, CLOUT 152.

### ❖ 227 (c) *Goods Held Out as Sample or Model*

Where the seller has "held out" goods to the buyer "as a sample or model" he has created an "understanding" (Art. 8) that the goods would conform to the sample or **[page 258]** model. Thus, paragraph (2)(c) of Article 35, even more clearly than paragraph (2)(b), articulates contractual understandings that are given effect by paragraph (1). Such is the approach of Section 2<sup>313</sup>(1)(c) of the (U.S.A.) Uniform Commercial Code: "Any sample or model which is made part of the basis of the bargain creates an *express* warranty that the whole of the goods shall conform to the sample or model." See also the (U.K.) Sale of Goods Act Sec. 15. All of these provisions are of modest value to a tribunal that is equipped to give full effect to the contract made by the parties.[\[13\]](#)

### ❖ 228 (d) *Packaging*

On occasion advocates for sellers have gone so far as to argue that implied obligations ("warranties") with respect to the quality of "goods" do not extend to the container or package. Whether the packaging is part of the goods is a false issue; the relevant question is whether the seller's contractual duty extends to packaging. This question is answered by Article 35(2)(d): The goods shall be "contained or packaged in a manner *usual for such goods*...." The reference to what is "usual" gives effect to reasonable expectations, and is consistent with the approach of Article 35(2)(a) (ordinary use) and the Convention's general rules for interpretation of the contract. See Articles 8(3) and 9(2), *supra* at <sup>104</sup> and <sup>112</sup>.

The corresponding provision of the 1978 Draft Convention did not include the concluding clause: "or, where there is no such manner, in a manner adequate to preserve and protect the goods." At the Diplomatic Conference it was suggested that the Draft failed to deal with contracts for new types of commodity for which no "usual" manner of packaging had yet developed; language was added to assure that in such cases packaging should be "adequate." In considering this proposal it was noted that this new language should not be construed to require packaging where packaging was not usual (*e.g.*, new cars; bulk shipments of coal or ore). Nor was it contemplated that packaging must be able to withstand unprecedented shocks and hazards; what is required is the degree of protection that is usual for goods of comparable fragility.[\[14\]](#) **[page 259]**

### ❖ 229 (3) *Buyer's Knowledge of Condition of Goods at the Time of Contracting*

#### (a) *The Scope and Role of Paragraph (3)*

The case that will fall most clearly within paragraph (3) is the sale of a specific, "identified" object (*e.g.*, a secondhand lathe) that the buyer inspects and then agrees to purchase. Paragraph (3) provides that in such cases the seller is not liable under the implied obligations of paragraph (2) for those facts of which "the buyer knew or could not have been unaware." Paragraph (3) does not affect the obligations "required by the contract" under paragraph (1).[\[15\]](#)

"*Could not have been unaware.*" Paragraph (3) is applicable when the buyer "could not have been unaware" of the condition of the goods when he made the contract. Is this different from knowledge?

The Convention differentiates among: (A) facts that a party "knows" or of which he is "aware"; (B) facts of which a party "could not have been unaware"; and (C) facts that a party knew or "ought to have known."[\[16\]](#)

The facts one "ought to have known" include those facts that would be disclosed by an investigation or inquiry that the party should make. But an obligation based on facts of which one "could not have been unaware" does not impose a duty to investigate—these are the facts that are before the eyes of one who can see. This expression is used at various places in the Conventions slightly to lighten the burden of proving that facts that were before



the eyes reached the mind. However, since a tribunal would normally draw this inference, there is little practical difference between the provisions that refer to facts that a party "knows" and provisions that refer to facts of which a party "could not have been unaware." [17] This [page 260] choice of language significantly narrows the impact of paragraph (3) on the buyer's protection afforded by paragraph (2).

### ❖ 238 (C) Domestic Rules Based on Innocent Misrepresentation as to Quality; "Mistake"

We now meet another significant question concerning the boundary-line between domestic rules and the uniform law of the Convention. Under Article 5, ❖❖72❖73 *supra*, we met this question in relation to domestic rules, such as "product liability", that apply to the same facts as those governed by the Convention but under a label such as "tort" rather than "contract". The commentary to Article 4, *supra* at ❖64, noted that domestic remedies for international fraud would remain in full force but that further attention would be given to domestic remedies for innocent but erroneous statements regarding the quality of the goods.

It is not feasible to describe the various rules of domestic law that might be encountered under headings such as "rescission for innocent misrepresentation" or "mistake" (*erreur*). Instead, our discussion will address a concrete factual situation in which such domestic remedies might arguably be applicable.

*Example 35B. Seller made the following offer: "I have purchased a cargo of 200 bales of No. 1 quality Manilla hemp now en route from Singapore to Liverpool. I offer you this cargo ex ship Liverpool, at ❖100 per bale." Buyer accepted this offer and paid the agreed price. When the hemp arrived in Liverpool it was discovered that, prior to the shipment from Singapore and prior to the sale to Seller, the hemp had been so seriously damaged by water that it graded No. 6 rather than No. 1 and was unfit for the purposes for which Manilla hemp was normally used. [25] Seller did not know and could not have known of the poor condition of the hemp.*

Assume that the sale was subject to the Convention but that under domestic law, selected by conflicts rules, the buyer's only remedy is to rescind the contract for innocent misrepresentation or for "mistake" (*erreur*). [26] [page 261]

### ❖ 240 (1) The Issue Posed by the Convention

One should not hastily decide to apply a dividing line like that suggested by the above domestic statutes to international sales governed by the Convention. [28] It is true that one of the objectives of these domestic statutes was to provide uniform law, and that this is the dominant purpose of the Convention. But each of these domestic laws was prepared with an eye to domestic rules that were familiar to the domestic parties and their advisors.

The unifying role of the Convention is more dominant and more difficult; as we have seen in various settings, this role would be crippled by domestic rules that govern the same situations and issues as those governed by the Convention. [29] To cope with this problem it is necessary to ask a pointed question: Does the Convention address the situation presented by Example 35B?

In Example 35B, the seller made an innocent but important misstatement that the hemp was "No. 1 quality." This statement must be regarded as part of his contract with the buyer for reasons discussed *supra* at ❖224. In addition, this statement was a "description" which, under Article 35(1) and (2)(a), is given legal effect as part of the seller's contract. Indeed, such statements are indistinguishable from the other aspects of the seller's obligation as to quality specified in Article 35.

When (as in Example 35B) the goods do not conform to the contract, the Convention provides a full battery of powerful remedies prepared specifically for international sales. See Articles 45❖50, ❖❖272❖313, *infra*. Hence the buyer's rights resulting from innocent misrepresentation of the type presented in Example 35B should be derived only from the Convention. [30] Of course, other types of representations by the seller [page 262] (such as his identity and similar statements by the buyer) may not be addressed by the Convention; in this event the line of analysis suggested above may call for the application of domestic law. The important point is to focus on whether the Convention addresses the situation in question; if so, the uniform international rules should not be displaced merely because of the labels attached to various doctrines of domestic law. [31] [page 263]



## Article 36. Damage to Goods: Effect on Conformity

❖ **241** Goods arrive in poor condition because of damage in transit. Does it follow that they fail to conform to the contract? Paragraph (1) of Article 36 sets forth a general rule; paragraph (2) deals with modifications of that rule that result from breach of the seller's obligations.

### Article 36 [1]

"(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."

### ❖ **242 A. Conformity as of Time When Risk Passes**

The general rule set forth in Paragraph (1) may be illustrated as follows:

*Example 36A. A contract called for Seller (located in Seattle) to ship No. 1 quality white wheat flour to Buyer, "F.O.B. Seattle." The F.O.B. term ❖ as well as Article 67(1), in the absence of an inconsistent contractual provision ❖ places the risk of loss in transit on Buyer. Seller shipped flour that conformed with the contract but during the shipment the flour was damaged by water so that when it reached Buyer (located in Bombay) the quality was "No. 4" rather than "No. 1." Buyer claimed that the goods did not conform to the quality required by the contract.*

By virtue of Article 36(1), Seller complied with the contract since the goods conformed to the contract when risk passed to the Buyer. On the [page 264] other hand, if the contract had placed transit risks on Seller (e.g., "Ex Ship Bombay") Buyer's claim based on non-conformity of the goods would have been correct.[2]

Provisions similar to Article 36(1) appear in some Continental statutes; under common law formulations the result is the same as a necessary implication of the rules on risk of loss.[3]

The language of paragraph (1), making the seller responsible "even though the lack of conformity becomes apparent only after" the time when risk passes, would protect the buyer when a latent defect appears at a later date, including a failure to comply with the requirement of Article 35(2)(a) that the goods be "fit for the purposes for which goods of the same description would ordinarily be used." This interpretation is supported by the action at the 1980 Conference to delete "express" from paragraph (2) (of draft Article 34) and thus to give effect to expectations of durability implied under Article 35(2) of the Convention.[4] Stale claims may, however, be barred by applicable rules on limitation or prescription of actions. The UNCITRAL Convention on the Limitation Period in the International Sale of Goods is introduced at ❖❖ [254.2](#) and [261.1](#), *infra*.

### ❖ **243 B. Effect of Contractual Guarantee**

Paragraph (2) reflects the fact that some warranties include undertakings that extend after delivery. Examples include a contract to service the goods for a designated period, or a guarantee that the goods will perform for a specified period ❖ e.g., two years, 10,000 miles, or the like. Under some of these warranties, the buyer would not be required to prove that there was a non-conformity when risk passed (e.g., on shipment of the goods or delivery to the buyer). However, the effect of paragraph (2) depends on the contract. One would not expect to find a guarantee that protects a buyer from his failure to maintain and protect the goods; thus, in [page 265] substance, the guaranty applies only when a failure of performance results from a defect in materials or

workmanship. Compare Article 80, *infra* at [◆436](#) (failure of performance by one party caused by the other party's act or omission).

A special provision on express guarantees might not have been necessary in view of the general rule of the Convention giving effect to the agreement of the parties. Article 36(2) underscores the importance of the contract and may avoid doubt concerning the seller's responsibility under the Convention when the seller's failure properly to service the goods causes damage or deterioration.

See: Schlechtriem, Com. (1998) 290◆299 (Schwenzer).[page 266]

## Article 37. Right to Cure Up to the Date for Delivery

◆244 Destruction of contract rights involves hardship and economic waste. Suppose that the seller has manufactured a complex machine to meet the buyer's special requirements and there is a minor or correctable defect in the goods: May the buyer "avoid" the contract? In the Commentary to Article 25, *supra* at [◆181](#), we saw that in most situations "avoidance of the contract" (Arts. 49, 51, 64) must be based on a "fundamental breach." "Avoidance" may also be prevented by curing a defect in performance. The Convention has two "cure" provisions. Article 37 permits cure until the date for delivery; Article 48, *infra* at [◆292](#), in limited circumstances authorizes cure after the date for delivery.

### Article 37 [1]

"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."

## ◆245 A. Types of Non-Conformity Subject to Cure

### (1) *Non-conformity of documents and goods*

As we have seen, Article 34, [◆220](#), in language similar to Article 37, gives the seller the right to cure any lack of conformity in documents.

Article 37 applies to various types of non-conformity in the goods. For example, the seller may supply missing goods, including a missing part [page 267] of a machine. Non-conformity of the goods may be cured by "replacement" or by "remedying" the lack of conformity by repairing a defective part. None of these measures is available when cure would "cause the buyer unreasonable inconvenience or unreasonable expense." For example, the buyer should be able to reject a proposal to repair a machine in its place in the buyer's assembly line when that would seriously interfere with assembly operations; in these circumstances only a prompt replacement of the machine might be permitted. Of course, when the buyer has immediately reshipped an early delivery, cure under Article 37 would usually be impractical; however, under these circumstances it may be possible to cure pursuant to Article 48, [◆292](#) *infra*.

"Date for Delivery". Contracts often provide a period (*e.g.*, "during June") within which the seller may deliver. Suppose the seller delivers on June 10: Does Article 37 permit cure (*e.g.*) on June 20 if (as Article 37 requires) this "does not cause the buyer unreasonable inconvenience or unreasonable expense"? The answer should be Yes: In Article 37 "date for delivery" refers to the date after which delivery becomes a breach of contract◆ in this case, June 30. The more strict rules of Article 48 governing cure "even *after* the date for delivery," with liability for damages, refer to cure after (*e.g.*) June 30. There must, of course, be no gap in the periods covered by these two interlocking provisions.

## ◆245.1 (2) *Cure in analogous situations: Third-party claims*

There are situations in addition to those specified in Articles 34, 37 or 48 in which cure may be useful. In connection with Article 41, ◆226 *infra*, attention is drawn to the awkward problems that may arise in an international sale when a third party claims an ownership interest in the goods. Similar problems may arise under Article 42, ◆◆267◆270 *infra*, from a third-party claim based on intellectual property such as a patent, copyright or trademark. When the buyer notifies the seller of the claim (Art. 43(a)) the seller may be able promptly to solve the problem by satisfying an outstanding lien or other security interest, by settling with a patent or trademark claimant, or by obtaining an injunction against pressing a groundless claim.

There is no indication that providing for cure of defective documents (Art. 34) and non-conforming goods (Arts. 37 and 48) was intended to foreclose the seller's opportunity to use this efficient remedy in analogous situations. If such a gap had been suggested during the legislative process it is unlikely that the framers would have chosen either to (1) reject [page 268] the possibility of cure or (2) remit the problem to the vagaries of domestic law. See the provision in Article 7(2) for settling matters "in conformity with the general principles on which [the Convention] is based...", ◆◆96◆102, *supra*.<sup>[2]</sup> This approach is supported not only by the provision for cure in Articles 34, 37 and 48, but also by the emphasis in the Convention's remedial provisions on avoiding the waste that results from needless destruction of the contract. See Art. 25, ◆◆181◆186: definition of "fundamental breach"; Arts. 49 and 64, ◆◆301◆308, 353◆356: avoidance of contract by buyer and seller; Art. 77, ◆◆416◆419; mitigation of damages; and Chapter VI, Preservation of the goods, Arts. 85◆88, ◆◆453◆457.

## ◆246 B. Effect of Cure on Avoidance

### (1) *Avoidance for Fundamental Breach*

The above-mentioned provision concerning unreasonable inconvenience or expense is the only restriction on the seller's right to cure defects before the date for delivery. The right to cure extends to serious deficiencies or defects that (in the absence of cure) would constitute a "fundamental breach." Consequently, unless it is clear that the seller will not cure, the buyer may not effectively avoid the contract until the date for delivery has passed.<sup>[3]</sup> (This question will be explored more fully in connection with Article 48 in the more complex situation in which the buyer, after the date for delivery, notifies the buyer of avoidance. See ◆296, *infra*.)

### ◆ 247 (2) *The Slightly Imperfect "Cure"*

Does the right to "deliver goods in replacement of any nonconforming goods" depend on perfect conformity of the second delivery? This question [page 269] may arise in any of the various types of cure envisaged by Article 37; the basic issue may be illustrated as follows:

*Example 37A. A contract called for the delivery by June 1 of 100 bags of No. 1 white, granulated sugar. On May 15 Seller delivered to Buyer, a sugar dealer, 100 bags of sugar that had been so contaminated by mildew that it could not be resold. Buyer immediately notified Seller; on May 25 Seller tendered to Buyer a second delivery of 100 bags in exchange for the 100 bags delivered 10 days earlier. In the second delivery, 99 bags complied fully with the contract; one bag graded No. 2 and could be resold by Buyer but at a 15% discount. Buyer refused to accept any of the sugar tendered on May 25 on the ground that it did not comply perfectly with the contract.*

On the assumption that the non-conformity of the one bag was not a "fundamental" breach Buyer could not have rejected the entire shipment ("avoided the contract" under Art. 49) if this had been the initial tender. See Art. 51(2) ◆317, *infra*. On the other hand, if the May 25 delivery could have been rejected (the contract "avoided") as an initial tender there would be no doubt as to Buyer's right to reject such goods when delivered as a "cure."

The language of Article 37 and its legislative history do not clearly answer the question whether the cure must be perfect. However, the sweeping language of the Article allowing the seller to remedy "any" deficiency or lack of conformity unless this causes "unreasonable" inconvenience or expense, and the last sentence of the Article

preserving the buyer's right to claim damages, indicate that perfection with respect to the second tender may not be required.

Any inconvenience in receiving the May 15 delivery and in exchanging that shipment for the May 20 delivery and any burden of disposing of (or rejecting) the one bag of No. 2 sugar will be relevant in determining whether the cure will "cause the buyer unreasonable inconvenience or unreasonable expense." But if this restriction does not apply, it seems that Article 37 empowers Seller to make the second delivery described in Example 37A.<sup>[4]</sup> Of course, Buyer has the right to recover damages for any expense in making the exchange and for the non-conformity of the one bag of sugar.<sup>[5]</sup> See also: Schlechtriem, Com. (1998) 295-299 (Schwenzer).<sup>[page 270]</sup>

## Article 38. Time for Examining the Goods

### 249 A. Significance of the Time for Examination

Article 38 provides rules on how soon the buyer "must examine" the goods. These rules are given legal effect by other provisions: Article 39(1) cuts off the buyer's rights if it fails to notify the seller of a non-conformity within a reasonable time after the buyer "ought to have discovered" it. (Cf. Art. 44, *infra* at 254.) Under Article 49(2)(b) the buyer loses its right to avoid the contract a reasonable time after it "knew or *ought to have known* of the breach." Under these provisions Article 38 is important in fixing the time when the buyer ought to have discovered the defect.

#### Article 38 [1]

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

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

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

### 250 B. Legislative Background: ULIS

The 1964 Hague Convention on Sales (ULIS 38) stated rules on the time for examination that proved to be too rigid. Their most serious flaw was the requirement that the buyer must examine the goods at the place of "destination" unless the goods were redispached "without transshipment." When a buyer purchases goods in sealed cans or cartons for resale in chain transactions employing containerized transport and, in general, whenever efficient <sup>[page 271]</sup> distribution calls for rapid transshipment of large quantities of goods, there would be no practical opportunity to inspect the goods (as ULIS required) at the initial terminal. As a result, the buyer's time for giving notice of defects could expire and the buyer could be deprived of its rights before it had a fair opportunity to discover the defect. Efforts were made at the 1964 Hague Conference to correct the problem but to no avail. In the UNCITRAL proceedings it was possible to make the rules on examination of goods more flexible and consistent with current commercial practices.<sup>[2]</sup>

### 251 C. Time for Examination under Article 38

#### (1) Redispach

The heart of the change made in preparing the 1980 Convention was to delay the time for inspection (and the running of the time for notice) during the time consumed in transportation following the "redirection in transit"

or "redispatch," if the seller knew (or ought to have known) of this "possibility."

### ❖ 252 (2) *Examination that is "Practicable In the Circumstances"*

All of Article 38 is subject to the standard set forth in paragraph (1): The examination must be made "within as short a period as is practicable in the circumstances." This standard was designed to stress the importance of timely inspection, a necessary step towards the timely notification of defects required by Article 39, *infra*. Timely notice may be needed to enable the seller to take samples or take other steps to preserve evidence of the condition of the goods. In some cases timely notice may enable the seller to cure defects (Arts. 37, 48) or make a price allowance or other adjustment to meet the buyer's complaint. See also ❖255, *infra*.

The phrase "as short a period as is practicable in the circumstances" embodies nuanced responses to the interests of both parties. ULIS 38(1) stated that the buyer "shall examine the goods... promptly" ❖a standard that might not permit consideration of circumstances that would require delay. (See ❖250, *supra*, and the legislative history collected in [page 272] notes 2 and 5.) On the other hand, it was concluded that the need for inspection called for greater urgency than was suggested by the "reasonable" time standard established in many other provisions. See Arts. 33(c), 39(1), 43(1), 47(1), 48(2), 49(2), 63(1), 64(2)(b), 65, 75, 79(4), 88(1). Where extreme urgency is required and is feasible the Convention calls for "immediate" action: Under Art. 71(1) a party suspending performance "must immediately" give notice of the suspension. Setting a rigid time limit for inspection (6 days, 2 weeks) is, of course, impractical; the most that a law can do is to call for action "within as short a period as is practical in the circumstances".

*Local standards.* Another step towards flexibility was the omission of ULIS 38(4) which stated that, in the absence of agreement, methods of examination were governed "by the law or usage of the place where the examination is to be effected." This provision was omitted because of concern that it might invoke practices designed for local transactions in contrast to practices and usages applicable to international trade. See Article 9, ❖❖112❖122, *supra*: "usage...in international trade".[3]

*Example 38A.* A sales contract called for the delivery to Buyer of 500 gallon cans of chlorine in sealed metal containers; when the seal is broken the chlorine must be used promptly or it will evaporate. On June 1 a shipment under this contract was delivered to Buyer. Buyer stored the containers in his warehouse without counting the number of cans or testing the contents. On September 1 Buyer notified Seller that he had just opened the containers to use the chlorine in his chemical processes, and found that there were only 400 containers, and that 200 contained chlorine that did not meet the contract specifications.

In these circumstances, one might well conclude that Buyer failed to check the *number* of cans within the required period but that the *contents* were examined as soon as "was practicable in the circumstances." [4]

The general standard of practicability set forth in paragraph (1) remains applicable under paragraph (2) when the contract involves carriage of the goods. The fact that in such transactions the risk of loss normally shifts to the buyer under Article 67(1) "when the goods are [page 273] handed over to the first carrier" (❖❖363❖367 *infra*) is irrelevant; in the absence of agreement to the contrary (Art. 6), Article 38(2) defers the examination "until after the goods have arrived at their destination". The basic rule of "practicality" in Article 38(1), the language of Article 38(2) and the legislative history all reject rules that turn on risk in transit and technical concepts such as an "agency" status of the carrier.[5]

*Decisions on Timeliness:* Examination was Timely. (1) GER. [LG Düsseldorf, 31 O 231/94, 23 June 1994](#). Delay in examination and notice was reasonable, since machinery had to be set up for testing. UNILEX D.1994-16. (2) Redispatch: GER. [OLG Köln, 22 U 202/93, 22 February 1994](#). Delay reasonable since redispatch before examination was expected. UNILEX 1994-6, CLOUT 120.

*Examination not Timely: B's Claim of Non-conformity Rejected.* (1) GER. [LG Duisburg, 14 \(19\) O 80/94, 17 April 1996](#). Examination and notice of defects in textiles: not in as short a time as was available. UNILEX D. 1996-5. (2) NETH. [Rb Roermond, U-1991-14, 19 December 1991](#). Although cheese was frozen, sample could have been thawed for inspection. UNILEX D. 1991-14. (3) SWITZ. [Pr. Locarno, 6252, 27 April 1992](#). Defects



in furniture easy to discover; inspection should have been made on delivery. UNILEX D.1992-10. (4) GER. [OLG Saarbrücken, 1 U 69/92, 13 January 1993](#). B's storing goods in warehouse for resale does not invoke redispach exception under Art. 38(3); claim of defects rejected. UNILEX D. 1993-2.1. (5) SWITZ. OG [Luzern, 11 95 123/357, 8 January 1997](#). Delay in inspection and notification based on redispach of medical devices (Arts. 38(3), 39) led to loss of claim for defects; B had redispached only a small quantity of delivered goods. The court noted the variations in the periods for notification allowed in different jurisdictions: German short, e.g., eight days after discovery, compared with Anglo-American and Dutch sometimes several months. The court settled on a compromise: one month after delivery. UNILEX D.1997-2, CLOUT 192.

*See also:* Bonell/Ligouri, ULR (1996-2) 360-362, (1997-3) 592-593; Schlechtriem, Com. (1998) 303-308. [page 274]

## Article 39. Notice of Lack of Conformity

## Article 40. Seller's Knowledge of Non-Conformity

## Article 44. Excuse for Failure to Notify

### 254 A. Introduction: Notice Requirements in Two Settings

We now face a complex problem of organization and presentation. Perhaps a brief preview will help.

The Convention requires buyers to notify sellers of breach of contract in two different settings: (1) Articles 39, 40, and 44 establish (and limit) buyers' obligation to notify sellers of lack of conformity of *goods*; (2) Article 43 requires buyers to notify sellers of *third party claims* to the goods. (For buyers' protection against such claims see Articles 41 and 42, *infra*.)

In preparing the Convention attention (and policy conflicts) centered on the first type of notification lack of conformity of the goods. Articles 39, 40 and 44 dealing with this question are so interrelated that they need to be examined as a group. However, one of these three provisions Article 44, granting a limited "excuse" for failing to notify also applies to notification of the second type: *third-party claims*.

In presenting these interlocking provisions we shall first examine Articles 39, 40 and 44 requiring buyers to give notice of *non-conformity in the goods*.

#### 254.1 (1) *The Package of Three Related Articles*

The Commentary on Article 38, *supra* at 249, showed that the period within which the buyer must examine the goods is closely related to the buyer's obligation to notify the seller of nonconformity an obligation that is governed by Articles 39, 40 and 44. Article 39 states general rules on the time for notification and the consequences of failure to comply with this requirement. Articles 40 and 44 contain special exceptions from the general rules of Article 39. [page 275]

These three articles embody a delicate compromise of views that were vigorously pressed during the UNCITRAL proceedings and at the 1980 Diplomatic Conference. Indeed, this is one of the few points where perceptions of differing regional and economic interests came to the fore. Representatives of several industrial States, primarily of the Continent of Europe, stressed the importance of maintaining the strict notice requirements embodied in their domestic rules. This position was opposed primarily by representatives of developing States. This opposition reflected fears that defects in heavy machinery might appear long after the machinery is delivered and put into use and that purchasers might be unaware of the drastic effects of delay in giving notice. The evolution of provisions designed to reconcile these views will be described *infra* at 256-261.

## ❖ 254.2 (a) *Notice Requirements and Limitations for Legal Proceedings*

We need to distinguish two types of rules that relate to delay: (1) Rules, like Articles 39, 40 and 44, requiring timely *notice* to the other party, and (2) Rules setting time limits for *bringing legal action*. Rules of the second type are not included in the Sales Convention and are the subject of a closely-related Convention on the Limitation Period in the International Sale of Goods (1974 and 1980 Protocol of amendment). The Limitation Convention will be introduced at ❖[261.1](#), *infra*.

Following are the three articles (Arts. 39, 40, 44) of the first type❖rules requiring *notice* to the other party of lack of conformity of the goods.

### 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.[page 276]

### Article 40

"The seller is not entitled to rely on the provisions of article 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.

### Article 44 [\[1\]](#)

"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."

## ❖ 255 B. Seller❖s Need for Notice; Domestic Rules

Let us assume that the buyer receives goods and, without objection, retains the goods and uses or resells them, but later declines to pay or claims damages on the ground that the goods were defective. If the seller learns of the claim after the goods have been used or after a period during which the goods could have deteriorated, it will be difficult to ascertain whether the buyer❖s claim is just. The seller❖s responsibility was to provide goods that conformed to the contract when the risk of loss passed to the buyer (Art. 36(1), *supra* ❖normally when the seller shipped or when the buyer received the goods. Art. 66❖70, *infra* at ❖❖[360](#)❖[383](#)). If the buyer notifies the seller promptly, the seller can inspect and test the goods to ascertain whether a claim is justified. Moreover, when the inspection shows that the goods are defective, the seller may be able to exercise [page 277] its right to cure the defect (Art. 37, *supra* at ❖[244](#); Art. 48, *infra* at ❖[292](#)).[2]

## ❖ 256 C. The Occasion, Time and Contents of Notice

### (1) "*Lack of Conformity*"

The buyer must notify the seller of "lack of conformity." The area embraced by this concept is defined in Article 35, and includes quantity, quality, description and packaging.

Do these notice requirements apply to defects in documents, such as a misdescription in a bill of lading, inspection certificate or invoice? Article 39 refers to a lack of conformity "of the goods." However, the Convention is drafted on the assumption that goods will often be delivered by way of documents; in such

deliveries supplying the correct documents is part of the seller's obligation to deliver the goods. (See Art. 34, *supra* at ¶217.) Moreover, the provision in Article 34 allowing the seller to cure a defect in documents would be of little value unless the seller is notified of the defect.<sup>[3.]</sup>

### (a) *Specificity*

Article 39(1) states that the buyer must give notice "specifying the nature of the lack of conformity". Questions as to what the notice must say should be answered with regard for the functions served by the notice. As was noted at ¶255, the principal functions are to give the seller an opportunity to obtain and preserve evidence of the condition of the goods and [page 278] to cure the deficiency (Arts. 37 and 48). See the Secretariat Commentary on draft Art. 37 (para. 4), O.R. 35, *Docy. Hist.* 425. A notice that said no more than "goods defective" usually would not give the seller all the information the seller needs for the above purposes and (as Article 39(1) requires) would not specify "the nature of the lack of conformity". (In an age of electronic communication, a seller who wanted to know more might be expected to inquire.)

*Decisions on Specificity: Inadequate:* (1) GER. [OLG Frankfurt a M., 5 U 261/90, 13 June 1991](#): Failure to specify precise defects in textiles. CLOUT 1, UNILEX 1991-5. (2) GER. LG [München, 17 HK 03726/89, 3 July 1989](#). B's notice: shoes had bad fit and workmanship, was not sufficiently detailed. CLOUT 3, UNILEX D.1989-2. (3) GER. [OLG München, 7 U 2070/97, 9 July 1997](#). Notice that the goods "did not conform to our specifications and cannot be sold to customers" and "250 items were badly stamped" were not sufficiently specific under CISG 39(1). UNILEX D. 1997-11. (Other German decisions to similar effect.) (4) Cf. [Switz. T. Can. Valais, CI 97-167, 28 October 1997](#). Inadequate notice. CLOUT 219.

*Query.* Do the decisions give adequate weight to the language of Article 39(1) which calls for "specifying the nature of the lack of conformity"? If S is in doubt about the precise nature of B's complaint, would S normally ask B for more details? See: Bonell/Ligouri, ULR (1997-3) 595 n. 14¶16; Schlechtriem, Com. (1998) 314¶316.

### ♦ 256.1 (b) *Delivery of "Different" Goods (Aliud)*

Suppose that in a contract calling for cans of soybean oil the buyer discovers that the cans contain mineral oil or fish oil or some other liquid quite different from that specified in the contract. Does Article 39 require the buyer to notify the seller of "a lack of conformity of the goods"?

This question would only occur to one whose domestic law draws a distinction between "non-conforming" goods and "different" goods (sometimes called an "aliud"). The Convention does not draw this distinction. As has been noted, ¶¶222-223, *supra*, Article 35 deals with the question of non-conformity in broad terms: The issue is whether the seller's delivery conforms to the contract. Article 35(1) states: "The seller must deliver goods which are of the quantity, quality and description required by the contract...".

In short, the delivery of goods that are totally different from the "description required by the contract" is a breach of Article 35 on conformity of the goods and invokes the requirement of Article 39 that the [page 279] buyer notify the seller of "a lack of conformity of the goods" as a foundation for the remedies afforded the buyer (Arts. 45-52) for breach of contract.

The German Bundesgerichtshof (Sup. Ct.) rejected the "aliud" concept in the setting of the Sales Convention. [VIII ZR 51/95, 3 April 1996](#). UNILEX D.1996-4.

### ♦ 257 (2) *Time*

#### (a) *"Reasonable Time"*

Article 39(1) requires that notice be given "within a reasonable time after [the buyer] has discovered [a lack of conformity] or ought to have discovered it." Article 38, in fixing the time when the buyer must inspect the goods, is useful in determining when the buyer "ought to" discover a non-conformity. Of course, the buyer is bound

only to discover those defects that a normal examination would reveal. (See Art. 38 and Example 38A, *supra* at [◆252](#).) Thus, examination at the point of destination would normally show the number of containers and the apparent condition of goods that are open to inspection, but the contents of sealed containers and the inner workings of machinery may not be discoverable until later. The determination of the "reasonable period" for notice following the time when the buyer discovers (or ought to have discovered) the non-conformity would be influenced by a wide range of factors. Considerations indicating the need for speed include the perishable nature of the goods, the need for impartial sampling or testing, and the possibility of cure by the seller.[\[4\]](#)

*Decisions: Claim Barred by Delay in Notice:* (1) NETH. [Rb Roermond, 920150, 6 May 1993](#). B lost claim for delay of three months after discovering defects in electric kettles; "reasonable time" means "as soon as possible". UNILEX D. 1993◆14. (2) SWITZ. [HG Zürich, HG930/38, 9 September 1993](#), excessive delay in giving notice of defects in furniture. CLOUT 97, UNILEX D.1993◆22. (3) ITALY. [TC di Cuneo, S.H.Culet v.L et F.45/96, 31 January 1996](#). Because of easy discovery of defects in sporting clothes, notice 22 days after delivery was excessive. UNILEX D. 1996◆3. (4) HUNG. [ARB. C. of Comm. 5 December 1995](#). Excessive delay in notice; repainting of waste containers. UNILEX D.1995◆29. (5) GER. [OLG München, 7 U 3758/94, 8 February 1995](#). Delay of 2 months in reporting **[page 280]** defects in chemicals; 8 days a normal limit. UNILEX D.1995◆29. (Many more German cases: delay in B's notice barred recovery.)

*See also:* Bonell/Ligouri, ULR (1996◆2) 362◆363, (1997◆3) 593-594 (citing cases); Schlechtriem, Com. (1998) 319.

## ◆ 258 (b) *The Two-Year Limit*

Some legal systems simply require notice within a "reasonable time" and do not specify an outer time-limit. (See (U.S.A.) UCC 2-607(3), Art. 38, *supra* at [◆253](#).) Others specify cut-off periods of one year or less. ULIS 49(1) set a cut-off limit of one year. The two-year period in paragraph (2) Article 39 was part of an overall compromise.

Paragraph (2) opens with the phrase "in any event"; the notice must be given within the two-year period even though a defect is discovered subsequent to that period, and even though a later notice would satisfy the general standards of Article 39(1) and Article 44.

The exception at the end of paragraph (2), for cases where the two-year limit "is inconsistent with a contractual period of guarantee", meets a problem that could arise, in rare instances, when the contract guarantees performance for a period of two years or longer. (See Art. 36(2), *supra* at [◆243](#)). Suppose that a contract guarantees performance for a period of two years, and the goods break down at the very end of the two-year period. In this situation the two-year cut-off could be "inconsistent with [the] contractual period of guarantee" so that a later notice would be effective.

The cut-off period of paragraph (2) starts to run only when the goods are "actually handed over to the buyer." This emphatic reference to the physical act of *actually* handing over the goods to the buyer was designed to prevent transit-time from eating into the two-year period, regardless of whether the buyer bore the risk of loss during carriage.[\[5\]](#) The 1964 Convention on the Limitation Period in the International Sale of Goods similarly provides (Art. 10(2)) that the 4-year limitation period for a claim arising from lack of conformity commences when the goods "are actually handed over to, or their tender refused by the buyer." This language was also selected to avoid shortening the period while goods are in transit.[\[6\]](#) **[page 281]**

## ◆ 259 D. Consequence of Failure to Give Notice

### (1) *The Basic Rule of Article 39*

Article 39 states that if the buyer fails to notify the seller within the prescribed period he "loses the right to rely" on the non-conformity. This language, standing alone (but see Art. 44, [◆261](#) *infra*), would bar the full range of remedies: a claim for damages (Art. 45(1)(b) and 74◆77), requiring performance by the seller (Art. 46),

avoidance of the contract (Art. 49) and reduction of the price (Art. 50). Under this language a seller's action to recover the price would not be subject to a set-off or counterclaim based on a defect which the buyer knew or ought to have discovered if the buyer fails to notify the seller within the periods stated in Article 39.<sup>[7]</sup> However this rigorous rule is subject to exceptions, to which we now turn.

## ❖ 260 (2) *Exceptions*

### (a) *Knowledge of Seller: Article 40*

Article 40, quoted *supra* at ❖254, relieves the buyer of these notice requirements when a lack of conformity relates to facts of which the seller "knew or could not have been unaware." Such a rule appears in ULIS (Art. 38) and calls for little comment.<sup>[8]</sup>

*Decision on Knowledge*; See, e.g., GER. [LG Trier, 7 HO 78/95, 12 October 1995](#). S could not object to B's delay in giving notice since S "could not have been unaware" of watering of wine. UNILEX D.1993-28. See: Schlechtriem, Com. (1998) 321❖323.

### ❖ 261 (b) *Excuse for Failure to Notify: Article 44*

There was no provision like Article 44 in the 1978 Draft Convention that was submitted to the Diplomatic Conference. Efforts to relax the notice requirements of Article 39 had failed by narrow margins and it seemed that the question [page 282] had been resolved. Thereafter, informal discussions revealed that some developing countries were seriously dissatisfied by this result; representatives of industrial countries that had strongly resisted relaxation of the notice requirements proposed that the issue be reopened so that a compromise solution could be developed. This led to the addition of Article 44, quoted *supra* at ❖254.<sup>[9]</sup>

Article 44 relieves the buyer of some of the consequences of failing to give notice within a "reasonable time" under Article 39(1) when the buyer "has a *reasonable excuse* for failing to give the required notice." (It is important to note that this excuse is limited to failure to comply with *paragraph (1)* of Article 39 and does not affect the two-year cut-off period of Article 39(2).)

The "reasonable excuse" for a failure to give notice in conformity with Article 39(1) needs to be understood and applied in the light of its legislative history. At the Diplomatic Conference several representatives, primarily from developing States, objected that consequences imposed by Article 39(1) were too drastic: The provision that "the buyer loses the right to rely on a lack of conformity of the goods" means (*inter alia*) that one could be required to pay the full price for defective goods. Concern was also expressed that it would be especially difficult to ascertain defects in complex industrial machinery typical of imports to developing areas, and that their importers might be unaware of the Convention's notice requirement and the drastic consequences of failure to comply.

Against this background the use of the expression "reasonable *excuse* " indicates the applicability of more individualized considerations than would otherwise be relevant under Article 39(1). Thus, Article 44 might countenance difficulties encountered by the individual importer, or at least by importers of the region, that might not be relevant under the more objective standard of Article 39(1).<sup>[10]</sup>

The "excuse" provisions of Article 44 do not preserve all of the buyer's remedies—only reduction of the price (Art. 50) and recovery of [page 283] damages other than loss of profit (Art. 74). Consequently, a buyer who fails to give notice within a "reasonable time" (Art. 39(1)) may not require performance (Art. 46), avoid the contract (Arts. 49 and 73; cf. Arts. 75❖76) or rely on the non-conformity as a basis for delaying the passage of risk of loss (Art. 70).<sup>[11]</sup>

Professor Schlechtriem raises interesting questions concerning problems that may arise when a buyer qualifies for the limited "excuse" provided by Article 44. Suppose that the seller would have been able to cure the lack of conformity (Arts. 37, 48) and thereby avoid damages if the buyer had notified the seller of the non-conformity within the "reasonable time" required by Article 39(1). Under these circumstances may the seller invoke Article



77 calling for measures to mitigate loss (416419) *infra*) and thereby reduce the buyer's claim for damages? A second query: Article 44 states that the buyer may "claim damages" when excused from the notice requirement of *Article 39(1)* but provides no excuse from *Article 38* regarding timely *inspection*; failure to comply with Article 39(1) might give the seller a damage claim.<sup>[12]</sup>

This writer sees force in the suggestion concerning mitigation of avoidable damages based on Article 77 but is concerned lest other suggestions undermine the hard-fought "excuse" provided by Article 44. Surely the seller may not claim damages for the lack of notice that Article 44 excuses. Suppose that a buyer does not inspect within the period specified in Article 38 but by some other means learns that the goods are defective and notifies the seller within the "reasonable time" specified in Article 39; only unusual circumstances would justify a claim against the buyer for breach of an independent duty to inspect.

The "excuse" provision of Article 44 was drafted hastily at a late stage of the Diplomatic Conference and consequently is not well integrated with the notice provisions developed in UNCITRAL, but the problems it poses for sellers can easily be overstated. The sanction imposed by Article 39(1) that the "buyer loses the right to rely on a lack of conformity of the goods" is severe and significant sanctions are preserved against even a buyer who qualifies for "excuse" under Article 44. Consequently buyers are not likely to refrain from making a prompt complaint when they [page 284] receive defective goods.<sup>[13]</sup> In any event, an undue delay in asserting a defect will continue to militate against the credibility of the claim. Moreover, even in areas with stern rules like Article 39(1), contracts often include precise rules on timely notification of defects; as we have seen (Art. 6, 7481, *supra*) the Convention does not interfere with the parties' freedom to make their own rules.<sup>[14]</sup>

*Decisions on Excuse:* (1) GER. [OLG München, 7 U 3758/94, 8 February 1995](#). B delayed 2 months in notifying S of defects in chemicals. B's claim for excuse under Art. 44 was rejected. The court noted that the normal limit for durable goods was 8 days. B's business was fast-paced; it would be easier to allow excuse to a "single trader or artisan". UNILEX D. 19954. (2) Cf. ARB. [ICC \(Paris\) 7331/1994 \(1994\)](#). B delayed 30 or more days in notifying S of defect. B's plea for excuse under Article 44 was rejected. UNILEX D. 199433. On excuse (Art. 44): Schlechtriem, Com. (1998) 348354.

## 261.1 E. Time Limits for Legal Proceedings Statutes of "Limitation" or "Prescription"

Technically distinct from notice requirements are limits on the time for instituting legal proceedings. Such domestic rules on "Limitation" or "Prescription" vary widely on the length of time limits for legal action and also on whether these limits are rules of "procedure" or of "substantive" law—a difference in theory that leads to divergent rules of private international law. These difficulties led to an early decision by UNCITRAL to prepare uniform rules that were finalized in the Convention on the Limitation Period in the International Sale of Goods (New York, [page 285] 1974).<sup>[15]</sup> The Convention entered into force on August 1, 1988 and (as of writing) is in force in twenty-three States.<sup>[16]</sup>

The 1974 Convention sets a general limitation period of four years (Art. 8) from "the date on which the claim accrues" (Art. 91). A claim for lack of conformity of goods accrues when "the goods are actually handed over to, or their tender is refused by, the buyer" (Art. 102).

The Limitation Convention (Art. 11) does "not affect" time limits for giving notice, such as those imposed by CISG 39 or 43, *supra*. Consequently, a buyer who fails to comply with these requirements for giving notice will have lost "the right to rely" on the provisions of CISG 35, 41 or 42 relating to defects in the goods or third-party claims even though the limitation period for instituting legal action has not expired. Conversely, a buyer who has promptly notified the seller may be barred from instituting judicial or arbitral proceedings after expiration of the four-year period provided by the 1974 Limitation Convention.<sup>[page 286]</sup>

## Article 41. Third-Party Claims to Goods

### 262 A. Scope of the Article: Buyer's Rights Against Seller

One of the limits on the scope of the Convention is set by Article 4: "...this Convention...is not concerned with... (b) the effect which the contract may have on the property in the goods sold." Suppose that a third person claims to own goods that B purchased from S: The question whether the buyer is protected, as a *bona fide* purchaser, against that third-party claim is not governed by the Convention but is left to applicable domestic law.<sup>[1]</sup>

The Convention addresses this question: When the seller supplies goods that are subject to a third-party claim, what are the rights of the buyer *against the seller*? This question is treated in Article 41; related questions that arise when a third-party claim is "based on industrial property or other intellectual property" (e.g., a patent or copyright) are dealt with in Article 42, *infra* at [267](#).

## Article 41 <sup>[2]</sup>

"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 [page 287] industrial property or other intellectual property, the seller's obligation is governed by Article 42."

Under this article (as under Art. 35, [223 supra](#)) the seller "must deliver" goods that meet the prescribed standard; the seller's knowledge of the defect is irrelevant. (Contrast Art. 42, [269 infra](#).) The buyer's obligation to notify the seller of a third-party right or claim under Articles 41 and 42 is dealt with in Articles 43 and 44, *infra*.

*Decision on Third-party Claim:* AUSTRIA, [OGH \(Sup. Ct.\) 10 Ob 518/95, 6 February 1996](#). B (Germany) claimed damages for failure of S (Austria) to deliver propane gas. One of S's defenses was that S's supplier had prohibited exportation to Benelux countries. The court rejected this argument, noting that under CISG 41 the "seller must deliver goods that are free from any right or claim of a third party", unless "the buyer agreed". B had not agreed to this restriction; B's damage claim was sustained. UNILEX D. 1996-3.1. See: Schlechtriem, Com. (1998) 326-333.

## [264](#) C. The Contested Third-Party Claim

*Example 41A.* After Buyer received goods from Seller, Claimant brought an action to recover the goods from Buyer and asserted that Claimant, rather than Seller, was the owner.<sup>[4]</sup> Buyer immediately informed Seller of the claim; Seller replied that Claimant's assertions were false. Claimant, however, brought legal proceedings to recover the goods. Buyer successfully defended the action but suffered losses of \$5,000 because the litigation prevented the prompt use of the goods. In addition, Buyer had to pay \$1,000 in legal fees which were not recoverable from Claimant. Has Buyer any redress against Seller?

## [265](#) (1) The Convention

The Convention provides that the seller has an obligation to deliver goods that are free from "any right or claim of a third party" language that should protect the normal expectation of a buyer that he is not purchasing a lawsuit.<sup>[6]</sup> In international sales, the third-party claim is likely to [page 288] involve the domestic rule of the State where the seller has its place of business; it would often be difficult and costly for the buyer to evaluate and contest such a claim.

A third-party claim contested by the seller can present awkward problems but they can be minimized by careful handling. Article 43(1), *infra* at [271](#), requires the buyer to notify the seller of a third-party claim "within a reasonable time."<sup>[7]</sup> When the claim is petty, such as an encumbrance to secure a small debt owed by the seller, one could expect the seller quickly to remove the encumbrance. When the claim is frivolous, such as one based on an encumbrance for a debt that has been paid but not discharged in the public records, the seller could often immediately secure clarification of the record. When the defense of the claim calls for substantial litigation and the buyer desires to keep the goods, effective protection for the buyer would require the seller to take over the defense of the action.

The seller would be obliged to reimburse the buyer for any expense or loss caused by the claim.<sup>[8]</sup> But if the seller quickly and effectively resolves the problem, the seller's breach may not be "fundamental" (Art. 25, *supra* at <sup>◆◆</sup>181) and the buyer could not avoid the contract (Art. 49(1)(a), *infra* at <sup>◆◆</sup>301). But a third-party claim might well involve such detriment to the buyer that would authorize avoidance, and the threat of this drastic remedy should stimulate the seller to take effective action.<sup>[9]</sup> [page 289] The seller's obligation to take over defense of the claim will be explored further in connection with Article 42, <sup>◆◆</sup>270.1 *infra*.

## ◆ 266 D. "Nullity" of the Contract under Domestic Law

Suppose that domestic law states that the sale of goods the seller does not own is "void" and gives the buyer remedies that are different from those provided by the Convention.<sup>[10]</sup> The Convention (Art. 4, <sup>◆◆</sup>64 *supra*) states that it "is not concerned with (a) the *validity* of the contract...". Does it follow that, in an international sale otherwise subject to the Convention, a rule of domestic law that the sale is "void" will displace the rights given the buyer by Article 41 and the rules of the Convention that implement this provision?<sup>[11]</sup>

Examples of the Convention's rules in the area include: the buyer's obligation to notify the seller, Arts. 43 and 44 (<sup>◆◆</sup>261, 271); the buyer's right under Article 46 (<sup>◆◆</sup>279<sup>◆◆</sup>285) "to require performance by the seller of his obligations..." including its obligation under Article 41 to "deliver goods which are free from any right or claim of a third party (e.g. by removing the defect in title or delivering substitute goods); the buyer's right under Article 45(1)(b), when the seller breaches any of his obligations, to "claim damages as provided in articles 74 to 77" including the right under Article 74 to recover "the loss, including loss of profit, suffered as a consequence of the breach".

The suggestion for displacing the provisions of the Convention should be rejected. As we have seen in connection with Articles 4 and 5 (<sup>◆◆</sup>66, 72<sup>◆◆</sup>73), *supra*), giving effect to the labels that are attached to domestic rules could undermine the rules of the Convention which Contracting States have engaged to apply in lieu of the diverse rules of domestic law. The purport of Article 4(a) is to prevent the Convention from *authorizing* transactions and contract provisions that domestic law *prohibits*. Here the Convention and domestic law have the same objective: to provide a remedy when the seller fails to transfer ownership to the buyer; however, the Convention provides a battery of remedies that are appropriate for international commercial transactions and, more particularly, are designed to achieve uniformity in international trade.<sup>[12]</sup> [page 290]

The legal issue, of course, is the proper interpretation of the *Convention*. When Article 4(a) is read in the content of the Convention as a whole the statement in Article 4(a) that the Convention "is *not concerned* with (a) the validity of the contract" can not be read to mean that the Convention is not concerned with problems (like the seller's lack of title) that the Convention *does* directly address in Article 41.<sup>[13]</sup> [page 291]

## Article 42. Third-Party Claims Based on a Patent or Other Intellectual Property

### ◆ 267 A. Infringement Claims in Multi-State Settings Patent Claims

In international trade, claims based on patents, copyrights and trademarks can generate problems of considerable complexity. The examination of Article 42 (quoted *infra* at <sup>◆◆</sup>269) may be aided by first considering the following illustration:

*Example 42A. Seller is located in State S and Buyer in State B. After Buyer purchased goods from Seller, Claimant notified Buyer that use or resale of the goods would infringe Claimant's patent rights.*

In international trade the problem is complicated by the variety of geographical (and legal) settings in which claims based on industrial or other intellectual property may arise. Distinct problems arise in the four settings that follow:

- (1) Buyer proposes to use or resell the goods in Seller's State (State S) and the infringement claim arises under a patent registered in that State.
- (2) Buyer proposes to use or resell the goods in its State (State B) and the infringement claim is asserted under a patent registered in that State.
- (3) Buyer proposes to use or resell the goods in a third State (State T) and the infringement claim is asserted under a patent registered in that State.
- (4) The above three situations involve an infringement claim based on a patent *registered* in the state of use or resale. However, in the setting described at (2) above, the patent on which Claimant relies may have been registered initially in Seller's State (State S) (or in a third State (State T)) but claims under the patent may be recognized by the courts of the Buyer's State (State B) based on rules of private international law or on a treaty providing for the international recognition of patent rights.<sup>[1]</sup> [page 292]

## ❖ 268 B. Evolution of Article 42

### (1) *The 1964 Sales Convention: ULIS*

The 1964 Sales Convention (ULIS) did not address these questions. Article 52 of ULIS (placed in a section entitled "Transfer of Property") gave the buyer protection where "the goods are subject to a right or claim of a third person." Although this language would appear to apply to a "right or claim" based on patents or other types of intellectual property, the preparatory papers and Prof. Tunc's commentary discuss this provision in terms of third-party *ownership* claims; on the other hand it has been concluded that an injunction preventing use of the goods violates the buyer's right under ULIS 33(1)(d) that the goods "possess the qualities necessary for their ordinary or commercial use."<sup>[2]</sup> However, if infringement claims were decided under such rules relating to the conformity of the goods, whimsical results would flow from the provision of ULIS 35(1) that conformity is to be decided by the condition of the goods "at the time when risk passes." If the goods are subject to a patent restriction only in Buyer's state (State B), Seller would seem to be responsible under terms quoted "Ex Ship," but not under terms quoted "F.O.B. Port of Loading."

In short, the 1964 uniform law did not face problems of considerable importance and difficulty. Certainly the drafters did not consider the problems that could arise (as in paragraph (3), *supra* at ❖267) if the buyer takes the goods to a third State (State T) and encounters difficulties under a patent registered only in that State.

### ❖ 269 (2) *Legislative Process in UNCITRAL*

These problems were confronted at a late stage in UNCITRAL's work. In 1976 the Working Group tentatively excluded from the Convention problems arising from "rights or claims which relate to industrial or intellectual [page 293] property or the like."<sup>[3]</sup> The Comments and proposals that were submitted to UNCITRAL's tenth session (1977) called for further attention to the problem <sup>[4]</sup> and a special working group was appointed to deal with the problem. A consensus developed that the ULIS approach was not adequate and that the problem was too important to be left to diverse national rules and to the uncertainties of private international law.<sup>[5]</sup> A draft prepared during UNCITRAL's tenth session led to the following provision of the Convention:

#### Article 42 <sup>[6]</sup>

"(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." [page 294]

## 270 C. Responsibility of Seller

### (1) Knowledge; Locale of claim

The seller's responsibility is limited by this general rule: Under Article 42(1) the buyer is protected with respect to only those rights or claims of which "the seller knew or could not have been unaware" when the contract was concluded. [7] "Could not have been unaware" seems to set a standard close to actual knowledge, in contrast to "ought to have known" which can imply a duty to inquire. (See the fuller discussion of these standards at 229, *supra*.) [8] The seller's responsibility for defects in the goods under Article 35 (223 225 *supra*) and for third party claims to the property under Article 41 (262 *supra*) is subject to no comparable restriction: Under these articles the seller's lack of knowledge of the defect in the goods or of the third-party claim is irrelevant.

The protection that Article 42 affords to buyers is also restricted since the seller may only be responsible for rights or claims that are based on the law of specified places. Under paragraph (1)(a), if the parties contemplated that the goods would be resold or otherwise used in a specified State the seller may be responsible only for a right or claim asserted under the law of that State. If the transaction did not contemplate where the resale or other use would occur, under paragraph (1)(b) the seller may be responsible only for a right or claim asserted under the law of the State where buyer has its place of business. In the usual (but possible) situation in which the parties contemplate that a foreign buyer will resell or otherwise use the goods in the seller's State, limiting the seller's responsibility to claims of which "the seller *knew or could not be unaware*" seems surprising and, in view of the unusual nature of the case, may have been unintended.

Paragraph (2) adds further restrictions but these are of less importance. Sub-paragraph (2)(a), denying protection to a buyer "who knew or could [page 295] not have been unaware of the right or claim", is similar to Article 35(3), *supra* at 222. Sub-paragraph (2)(b), relieving the seller of responsibility where the buyer furnishes the specifications, is of limited scope and calls for little comment. A similar restriction appears in (U.S.A.) UCC 2-312(3). A statutory provision of reasonable length can scarcely deal adequately with claims based on the various types of industrial or intellectual property in all of the legal settings that may arise in an international sale. In situations where patent, copyright, or trademark claims can be expected, the parties would be well advised to provide specific answers to the problem in the contract.

Article 42, like Article 41 (264 266, *supra*) provides that the buyer is entitled to receive goods that "are free from any right or *claim* of a third party", and thus protects the buyer from both rightful and contested claims. Litigation problems in connection with contested ownership claims (Art. 41) were considered *supra* at 266. Similar problems are generated by third-party claims based on patents or other types of intellectual property.

As has been noted (266), when the buyer does not find it desirable or practicable to escape from the difficulty by avoiding the contract, the only effective protection for the buyer will be for the seller to take over the responsibility and expense of resisting the claim. The seller may voluntarily do this because of its interest in the further salability of its product. If the seller should fail to respond the buyer will need to consider the resources provided by the remedial provisions of the Convention and by domestic procedural law.

A strong premise for effective legal action is provided by CISG 46(1): "The buyer *may require performance* by the seller of his obligations...". As has been noted, vindication of the buyer's right to protection from third-



party claims may require defense of the claim by the seller. The buyer would hope that the seller has sufficient commercial contacts with the State of the *forum* in which the third party claim is brought so that this *forum* has jurisdiction to require the seller to defend the action. If jurisdiction may not be based on such contacts the buyer will wish to explore whether the *forum* has rules like those developed by common law courts to deal with similar problems presented by the large number of separate jurisdictions in the United States.<sup>[9]</sup> This common-law procedure was broadened and codified by the Uniform Commercial Code, Section 2-607:**[page 296]**

"(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does not come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred."

In important transactions in which third-party claims are possible, the buyer should insist on contract provisions that clearly state the protection that the seller provides in the case of third-party claims (for the limitations on this protection see 270, *supra*), including the responsibility to defend (or "hold the buyer harmless" from) such claims. See the Annotated Export Contract, Art. 10 Patent Indemnity, *Kritzer Guide* 570 (also gives buyer stronger substantive protection than Article 42 of the Convention. See also *Kritzer Manual*, Ch. 12 (explanation and alternative forms).

*Decision on Intellectual Property: (semble):* NETH. [Arr. Rb. Zwolle, HA ZA 92-1180, 1 March 1995](#). Claim by Dutch B v. Italian S, based on suit by third party (T) against B, claiming that textiles S had delivered to B violated T's copyright on the design of the textiles. The court: CISG 42 required that B prove that S "knew or could not have been unaware" of T's intellectual property rights. (Basis not clear.) UNILEX D.19957.1.

See: Schlechtriem, Com.(1998) 334343 (Schwenzer).**[page 297]**

## Article 43. Notice of Third-Party Claim

**271** Article 39 required the buyer to notify the seller of "a lack of conformity of the goods." (See Arts. 39, 40 and 44, *supra* at 256.) Under Article 43 the buyer must also notify the seller of third-party claims for which the seller may be responsible under Articles 41 and 42, *supra*.

### Article 43 [1] Remedies of Breach

"(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."

The notice requirement under paragraph (1) is comparable to the "reasonable time" requirement in Article 39(1); no cut-off period is specified comparable to the two-year limit set in Article 39(2).

Paragraph (2) dispenses with the notice requirement if the seller "knew" of the right or claim. This corresponds to Article 40, except that the present article omits the phrase "or could not have been unaware and which he did not disclose to the buyer." Article 43(2) needs to be considered in relation to Article 41, which denies protection to a buyer who "agreed to take the goods subject to" a third-party claim of ownership, and also Article 42(2)(a) which denies protection with respect to third-party claims based on intellectual property where the buyer "knew or could not have been unaware of the right or claim."

See: Schlechtriem, Com.(1998) 343-347 (Schwenzer).[page 298]

---

## Article 44. Excuse for Failure to Notify

Discussed with Arts. 39 and 40, *supra* at [261](#).

---

## Section III.

### Remedies for Breach of Contract by the Seller (Articles 45-52)

#### Introduction to Section III

##### 272 A. A Bird's Eye View of the Section

The first two sections of Chapter II (Arts. 30-44) defined the seller's duties; this section (Arts. 45-52) sets forth remedies given the buyer when the seller fails to perform those duties.

Section III opens (Art. 45) with a general overview of the remedial system and indicates the relationship of different remedies to each other. Article 46 states the buyer's right to compel performance by the seller.

Three articles (Arts. 47-49) address the buyer's right to "avoid" the contract, a concept that includes the rejection of goods. Article 47 empowers the buyer to fix an additional final period for the seller's delivery of the goods—a step that clarifies the buyer's right to avoid the contract for delay in delivery. Article 48 empowers the seller to "cure" defects in performance and thus forestall avoidance of the contract. Article 49 states the grounds on which the buyer may avoid the contract.

The section closes with three articles dealing with special situations—buyer's right to reduce the price (Art. 50), the applicability of remedies to only part of the goods (Art. 51) and deliveries that are early or excessive in quantity (Art. 52).

##### 273 B. Relationship to Other Parts of the Convention

Section III of the present chapter provides remedies that apply only to breach by the seller; Section III of Chapter III (Arts. 60-65) provides comparable remedies for breach by the buyer. These two sections are supplemented by remedial provision in Chapter V that apply to both parties—e.g., anticipatory breach (Sec. I), the measurement of damages, and interest (Secs. II and III), "exemption" from damages (Sec. IV) and the effects of avoidance of the contract (Sec. V).[page 299]

##### 274 C. The Remedial System of ULIS: Criticism and Reform

Among the features of the 1964 Sales Convention (ULIS) that stood in the way of widespread adoption were length and complexity—problems that resulted primarily from fragmenting the rules on remedies for breach. For example, performance by the seller was divided into five categories and a separate remedial system was provided

for each. This approach was designed to make the remedial system clear but the distinctions between the five categories of performance were so artificial that the system produced ambiguity, complexity and unnecessary length.

Some of the delegates to the 1964 Hague Conference (including the present writer) were concerned lest the complexity of the rules on remedies would stand in the way of adoption of the 1964 Convention but it was not feasible to recast the basic structure of the law during the three-week diplomatic conference.<sup>[1]</sup>

UNCITRAL was able to deal with this question. A report of the Secretary-General analyzed the problems that resulted from this fragmentation and proposed a plan for a unified remedial system which the Working Group implemented—a step that simplified the law and reduced its length by one-fourth.<sup>[2]</sup> In addition, a unified remedial system strengthened the Convention's unitary approach centering on the contract. (See the Overview, Ch. 2, *supra* at <sup>◆</sup>24.)<sup>[page 300]</sup>

## Article 45. A Round-up of Remedies Available to Buyer

◆ 275 Article 45 sums up the remedies granted to the buyer in various parts of the Convention and indicates the relationship between them.

### Article 45 <sup>[1]</sup>

"(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."

### ◆ 276 A. The Range of Remedies

Paragraph (1)(a) of Article 45 draws attention to the buyer's remedies that appear in this Section, while paragraph (1)(b) makes available the rules on damages applicable to both parties that appear in Chapter V.

Paragraph 1 serves as a useful index to the Convention's remedial provisions but it does a bit more. The opening language: "If the seller *fails to perform any of his obligations under the contract and this Convention, the buyer may ...*" has legal bite. Some of the cited articles do not expressly state that they are available for breach; articles 74–77 state how damages are to be measured but do not expressly state that damages are to be awarded. Article 45 also emphasizes the unitary approach and strength of the remedies for breach of contract. (See Arts. 30 and 31, *supra* at <sup>◆</sup>206 and <sup>◆</sup>210.)

This approach is emphasized by paragraph (1)(b), which announces a principle that is more important than may be evident at first sight: the buyer may "claim damages" if the seller "fails to perform any of his <sup>[page 301]</sup> obligations under the contract or this Convention." By this language the Convention rejects the view that one who fails to perform his contract is not responsible in damages unless he has been negligent—an approach with an uneasy history in domestic law. Some legal systems that have espoused this doctrine have seen the principle become eroded and unclear. Other legal systems reject the "negligence" principle. In preparing uniform rules for

international trade it was important to make a clear choice among these divergent approaches; that choice is expressed in the above-quoted language of Article 45(1)(b).<sup>[2]</sup>

## ❖ 277 B. Cumulation v. "Election" of Remedies

### (1) *Loss of the Right to Recover Damages*

In domestic law the question whether recourse to one remedy excludes others has also been haunted by confusion. Case law and statutory rules in the common law world at an early stage denied the buyer compensation for damages if it rescinded the contract❖ e.g., by requiring the seller to take back defective goods. This approach may have been useful to defeat "rescission" (or rejection) based on a trivial grounds. But when the seller❖s breach was serious, the buyer had to choose between forfeiting the right to damages or bearing the burden of disposing of seriously defective goods❖a choice that in some cases pressed towards the rejection of goods which the buyer could salvage more efficiently than a distant seller. The early rules imposing such choices have been eroded or abandoned.<sup>[3]</sup>

The Convention❖s approach is stated in paragraph (2) of Article 45: "The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." Thus, a buyer who requires the [page 302] seller to perform (Art. 46) may also recover damages (Art. 74) for the loss resulting from the delay or other deficiency in the seller❖s performance. Similarly, a buyer who avoids the contract (Art. 49) may also claim damages (Art. 74) for the loss suffered as a consequence of the breach.<sup>[4]</sup>

## ❖ 278 C. Grace Period Granted by Tribunal

Article 45(3) (and a parallel provision in Article 61(3)) bars recourse to tribunals for a "period of grace" for performance. Judicial intervention to provide a "period of grace," available in some jurisdictions,<sup>[5]</sup> was rejected as impractical for international trade. In the Convention protection against destruction of the contract on insubstantial grounds is provided by the opportunity to "cure" defects (Arts. 34, 37, 48) and by rules governing avoidance of the contract (Arts. 49, 64). See also Art. 51 (avoidance as to the nonconforming part of a delivery). [page 303]

## Article 46. Buyer❖s Right to Compel Performance

❖ 279 As we have seen (Art. 28, *supra* at ❖196), domestic legal systems follow varying practices concerning "requiring performance" (in common law parlance, "specific performance"). The result has been a series of delicate adjustments and compromises. We have already seen a concession to domestic practice in Article 28 which carves out an exception from the right to "require performance" that is given to the buyer in Article 46 and to the seller in Article 62. The general rule on the buyer❖s right to require performance is as follows:

### Article 46 [1] Specific Performance

"(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with 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." [page 304]

## ❖ 280 A. The General Rule for "Requiring" Performance

Paragraph (1) of Article 46 lays down the general rule that the buyer may "require performance" by the seller; the seller's package of remedies (Ch. III, Sec. III) has a parallel rule (Art. 62) that the seller may "require the buyer to pay the price." Both articles reflect the principle, embedded in civil law theory, that an aggrieved party may "require" the other party specifically to perform its contractual obligations.<sup>[2]</sup>

The rule of paragraph (1) that the buyer may require the seller to perform its "obligations" may be invoked in a wide variety of circumstances. The most common example is when the seller fails to procure or produce the goods or to deliver them at the place (Art. 31) or date (Art. 33) provided by the contract. In addition, subject to restrictions stated in Article 46(1) & (2) (❖❖283❖284 *infra*), a buyer may require the seller to deliver goods that are in conformity with the contract (Art. 35). Under Article 46(1) the seller may also require the seller to perform its obligations under Articles 41 and 42 to deliver goods free from any right or claim of a third party; we have considered (❖270.1 *supra*) the use of Article 46 to require the seller to remove such claims or to defend them on behalf of the buyer. It is not possible to itemize all of the applications of Article 46 (or of the seller's parallel remedy under Article 62) since these provisions apply generally to the parties' "obligations" under the Convention and the contract (Arts. 6, 30, 53).

## ❖ 281 B. The Concession to the Rules of the Forum: Article 28

Article 28, *supra* at ❖194, states that even though the Convention's general rules provide that a "party is entitled to require performance," a court "is not bound to enter a judgment 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." As was noted under Article 28 (❖❖191, 195, *supra*), this concession to the procedures of the *forum* was granted by ULIS (1964) in response to the objection that common-law systems compelled ("specific") performance only when alternative remedies (e.g., damages) were not adequate. Comparative research also revealed that some civil law systems would not always compel [page 305] performance by the coercive measures, such as imprisonment for contempt, that may be available in "common law" systems; as a consequence flexibility based on Article 28 is not confined to common law jurisdictions.

### ❖ 281.1 [(1)] *Requiring Performance by the Seller at Common Law*

"Common law" restrictions on requiring (specific) performances of sellers' obligations are sometimes exaggerated. It is true that common law courts will not ordinarily compel a seller to deliver goods that the buyer can readily acquire; common examples are standard raw materials—wheat, cotton or the like. In these cases the courts usually find that the buyer's only loss is the added cost of purchasing the goods—a loss that can readily be ascertained and compensated by awarding damages. However, if substitute goods can not readily be obtained because of shortages or their unique character the buyer's loss may not be readily measured or compensated by a damage-award. Other examples include a seller's repudiation of a long-term contract; in this and similar situations the buyer's loss may be difficult to ascertain. In these and many other situations where damages do not fully compensate the buyer one may expect a favorable response to an action to require ("specific") performance.<sup>[3]</sup>

## ❖ 282 C. Limits on Compelling Performance Under Article 46

### (1) *Resort to Inconsistent Remedies*

Paragraph (1) of Article 46 withdraws the right to compel performance when "the buyer has resorted to a remedy that is inconsistent with this requirement." For example, the buyer loses the right to compel delivery when the buyer takes the position that it will not accept the goods—e.g., by declaring the contract avoided (Art. 49(1)). The basic inconsistency between these remedies is made explicit in Article 81, *infra* at ❖439:[page 306] Avoidance "releases both parties from their obligations under [the contract] subject to any damages that may be due."



## ❖ 282.1 (a) *Inconsistency: Form and Substance*

Inconsistency between avoidance and requiring performance is evident when the buyer declares the contract avoided (*E.g.* "I avoid: Don't ship the goods") and later demands performance: "Ship the goods". Indeed, the rule of Article 46(1) that a buyer may not "require performance" if it "has resorted to a remedy that is inconsistent with this requirement" serves a policy that is deeper than the logic (or esthetics) of inconsistency—the likelihood of reliance on the buyer's declaration by stopping production, reselling the goods, or canceling the reservation of shipping space.

In examining the Convention's rules on risk of loss (Article 70, ❖382.1, *infra*) it may be relevant to consider whether a buyer who has received seriously defective goods may *concurrently*: (A) under Article 49(1)(a) declare the contract avoided ("I avoid: Take back the goods") *and also* (B) under Article 46(2) require the seller to deliver substitute goods. Whether the remedies are inconsistent calls for comparing their impact in specific situations. Both call for the buyer to return the goods. Article 82(1) (❖❖445❖448, *infra*) provides: "(1) The buyer loses the right to *declare the contract avoided* or to require the seller *to deliver substitute goods* " if the buyer can not return the goods. The remedies are consistent in other respects such as requirements of notification (Arts. 46(2), 49(2)(b)) and recovery of damages (Arts. 45, 74, 81(1)).

In sum, the two remedies do not violate Article 46(1)'s prohibition of "inconsistent" remedies when they are exercised concurrently; indeed, a buyer's reference to "avoidance" in connection with a demand under Article 46(2) for substitute goods is redundant since it repeats one aspect of the buyer's rights under Article 46(2)—the buyer's right to require the seller to take back the defective goods. On the other hand, inconsistency may arise if the buyer declares that the contract is avoided under Article 49(1) or 46(2).

It is not feasible here to explore questions of inconsistency of remedies in the various settings in which they may arise. This discussion is designed to suggest that applying the rule prohibiting inconsistent remedies calls for attention to their impact in specific situations.

## ❖ 283 (2) *Compelling Delivery of Substitute Goods*

Paragraph (2) of Article 46 governs the scope of specific performance when the seller tenders goods that do not conform to the contract. When [page 307] the non-conformity is unimportant, compelling a second delivery may impose burdens that are out of proportion to the buyer's needs; hence this remedy is available "only if the lack of conformity constitutes a fundamental breach of contract...." [4]

*Example 46A. Seller delivered goods that were seriously defective i.e., a "fundamental breach" under Article 25. Buyer telexed, "Rejecting shipment for the following serious defects [specifying them]. Demand prompt delivery in conformity with the contract". Seller replied, "Your rejection of the goods avoided the contract which (CISG 81) releases both of us from our obligations under the contract".*

Seller's point based on Article 81 ("avoidance...releases both parties from their obligations...") is, of course, in error for it fails to note that Article 46(2) makes a special and narrow exception from the general rule on avoidance in Article 81; both provisions must be given effect whereas Seller's argument would nullify Article 46(1).

Could Seller have invoked the above rule on avoidance in Article 81 if Buyer had telexed: "Avoid contract for the following serious defects... Demand prompt delivery...(etc.)". The ill-advised use of words referring to "avoidance" should not prejudice the buyer: Under Article 46(2) the buyer was entitled to refuse the goods for fundamental breach and demand substitute goods; the buyer's position was clear in spite of the improper language. (The above example may help to expose the snares concealed in the phrase "avoidance of the contract". The implications of the "avoidance" remedy are articulated in Articles 47❖49, 51, 72, 73, 81 and 82.)

*Example 46B. A contract called for a shipment of 100 X-type machines. Seller shipped the 100 machines but inspection on arrival showed that 10 were defective. This defect was so serious that if all of the machines had*

been subject to this defect there would have been a "fundamental breach" of the contract: Buyer could have rejected the entire shipment (Arts. 25 and 49(1)(a), ¶304 *infra*). However, the defect in the ten machines did not interfere with Buyer's use or marketing of the other 90 machines. Under Article 46(2) may Buyer, by appropriate notice, require Seller to deliver (a) ten conforming machines to substitute for the defective ones or (b) a new shipment of one hundred conforming machines?

As we shall see, Article 51 addresses this question (¶¶316-317 *infra*). Article 51(1) states that "if only part of the goods delivered is in conformity [page 308] with the contract, articles 46 to 50 apply in respect of the part ...which does not conform." Thus, the answer to the first question is Yes: By virtue of Articles 46(2) and 51(1) Buyer may require Seller to substitute ten conforming machines for the defective units. Under Article 51(2) (¶317 *infra*) the answer to the second question is probably No: If it is feasible to deal separately with the conforming and non-conforming units and the defects in the ten machines are not a "fundamental breach" of the entire contract, Buyer may not require Seller to deliver an entirely new shipment. (See [Flechtner, Pittsburgh Symposium 53, 86-87.](#))

### ♦ 284 (3) Repair

Under paragraph (3) the buyer's right to "require the seller to remedy the lack of conformity by repair" is slightly stronger than the buyer's right under paragraph (2) to require "delivery of substitute goods." Requiring the delivery of substitute goods—a new shipment of a raw commodity or the substitution of a new machine—might involve transportation costs that would be unreasonably onerous when the non-conformity is insubstantial. Repair of the goods—which might merely involve a mechanical adjustment or replacing a defective part—usually is more efficient; the buyer may require the seller to "repair" even when the breach is not fundamental. However, repair may not be required when this remedy would be "unreasonable having regard to all the circumstances." At the Diplomatic Conference in the course of framing paragraph (3) it was noted that some minor repairs could be made more readily by the buyer, particularly when the seller's facilities for repair are in a distant country. The statutory language was designed to encourage a reasonable and flexible approach to such cases.<sup>[5]</sup>

### ♦ 285 D. Limits Set by Other Parts of the Convention

The discussion of Article 28, *supra* at ¶193, mentioned other provisions of the Convention that, in some situations, would restrict actions to compel performance. The Convention's rules on the obligation to preserve and dispose of goods (Arts. 85, 86, 88(2)), and on the duty to mitigate loss (Art. 77) in some settings may bar specific performance; the reasons will be examined in the commentaries to these articles. As was mentioned in discussing the "good faith" principle of Article 7, *supra* at [page 309] ¶95, that principle may call for a restrained interpretation of the Convention's provisions on compelling performance when a party seeks this remedy only after a delay that permits him to speculate at the expense of the other party—as when a buyer seeks to compel delivery (rather than damages) only after a sharp rise in the market, or when a seller seeks to require specific performance (rather than damages) only after a market collapse.<sup>[6]</sup>

#### ♦ 285.1 (1) Special Rules on Requiring Performance and Domestic Law (Article 28)

As we have seen, Article 46(2) provides that in specified circumstances the buyer may require the seller to deliver "substitute goods" (¶183, *supra*) and Article 46(3) specifies the circumstances in which the buyer may require the seller to "repair" defective goods (¶184, *supra*). Do domestic rules of the *forum* accepted by Article 28 supersede those of Article 46(2) or (3)? <sup>[7]</sup>

The problem needs to be broken apart. Suppose that a buyer, invoking the law of the *forum*, seeks to require a seller to deliver substitute goods even though the lack of conformity is not a fundamental breach as required by Article 46(2). Or suppose that a buyer, invoking the law of the *forum*, seeks to require the seller to repair the goods even though, pursuant to Article 46(3), under "all the circumstances" requiring the seller to repair "is unreasonable". In these cases the buyer's attempt to invoke domestic law is untenable: Article 28 applies only when the buyer "is entitled to performance" in "accordance with the provisions of this Convention". A less

technical but more substantial reason is that the international community decided that it would be appropriate to require substitute delivery and repair only under the conditions specified in Article 46(2) and (3).

Now let us suppose that domestic law of the forum would *not* require the seller to deliver substitute goods or repair non-conforming goods in [page 310] cases where the conditions specified in Article 46(2) and (3) were *satisfied*. Does Article 28 authorize the court to apply its domestic rules in place of those of the Convention?

Article 28, standing alone, seems to say that domestic law will prevail but this conclusion would overlook the specificity and nuanced character of the rules of Article 46(2) and (3) governing these precise situations. In the absence of evidence that UNCITRAL and the Diplomatic Conference faced this problem and evidenced a decision to give an unqualified reading to Article 28, Articles 46(2) and (3) should be regarded as *lex specialis* qualifying the general provisions of Article 28. Indeed, it seems out of keeping with the spirit of fairness that was characteristic of UNCITRAL and the Diplomatic Conference to conclude that, in facing these specific cases, the law-makers would decide to restrict the grounds for relief in some jurisdictions without requiring liberalization of the grounds in others.[8]

## ◆ 286 E. Evaluation

It would be easy to over-estimate the importance of the Convention's rules on "requiring" performance. Buyers seldom need to coerce sellers to replace or repair defective goods (Arts. 46(2) & (3)). Replacement and repair are opportunities sought by sellers to preserve good will, reduce damage liability and avoid the drastic remedy of avoidance of the contract. In the infrequent instances where sellers are unwilling to perform, coercing performance is seldom so speedy and effective as purchasing substitute goods. The delays inherent in obtaining coerced performance usually render this remedy impractical even for domestic transactions and are magnified when the parties are far apart. Active participants in commerce and their legal advisors who are familiar with the practical problems of coercing action usually choose to supply their needs elsewhere and proceed with business subject to compensation for damages after the cumbersome processes of litigation have taken their course.

It is true that meager returns can be expected from a damage claim against a seller who faces financial failure or is in the course of liquidation [page 311] or reorganization. Theoretically, the buyer's position would be improved by forcing the seller to perform the contract. However, the recovery of penalties, like damages, would be subject to similar difficulties of collection. Can this problem be solved by harsher penalties such as committing the seller to prison for contempt of court? Domestic rules on bankruptcy and creditors' rights may well bar the draconian allocation of the scarce resources of a failing debtor to a single creditor. And such domestic rules would not be supplanted by the Convention's rules on "requiring performance": The rights of third parties are at stake while the Convention's rules are confined to "the rights and obligations of the seller and the buyer" (see Art. 4, *supra* at ◆70).[9]

See: Schlechtriem, Com.(1998) 376◆393 (Huber).[page 312]

## Article 47. Buyer's Notice Fixing Additional Final Period for Performance

### ◆ 287 A. Relationship to Rules on Avoidance of Contract

As we shall see more fully in examining Article 49, *infra* at ◆301, that article provides two grounds for avoiding the contract (1) when the seller commits a "fundamental breach of contract" (Art. 25, *supra* at ◆181) and (2) when the seller fails to deliver the goods "within the additional period of time fixed by the buyer in accordance with paragraph (1) of Article 47...." The provision for fixing an additional final period for delivery is as follows:

#### Article 47 [1]

"(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."

## ◆ 288 B. Notice as a Step Toward Avoidance

### (1) *Restriction to Non-Delivery*

Article 47(1), read in isolation, seems to empower the buyer to fix an additional final period for the seller to perform any of its obligations. However, the only teeth for the provision are those provided by Article 49(1)(b): "(b) in case of *non-delivery*, if the seller *does not deliver the goods ...*" within the time fixed by the buyer under Article 47, the buyer may declare the contract avoided. The notice-avoidance procedure thus applies only to non-delivery.[\[2\]](#) [\[page 313\]](#)

In UNCITRAL and at the Diplomatic Conference proposals were made to extend the notice-avoidance procedure to cases where the seller delivers goods that fail to conform to the contract. UNCITRAL rejected these proposals on the ground that the notice-avoidance procedure could be abused to convert a trivial breach into a ground for avoidance. For instance, a buyer who wishes to escape from his contractual obligations◆e.g., after a price-collapse◆might notify the seller that it has a specified time to correct specified minor defects in the goods although the distance separating the parties makes it impractical for the seller to comply with the notice. This understanding of the decisions taken by UNCITRAL was confirmed at the Diplomatic Conference by the rejection of proposals to broaden the scope of notice-avoidance to include non-conformity; in addition, to avoid any possible misunderstanding, the Diplomatic Conference added the words "in case of *non-delivery*" at the beginning of the notice-avoidance provision in Article 49(1)(b).[\[3\]](#)

### ◆ 289 (2) *Content of the Notice*

What type of notice will provide a basis for avoidance of the contract?

*Example 47A. A contract called for Seller to manufacture and deliver a complex stamping machine to Buyer by June 1. Seller was late in making delivery and on June 2 Buyer wired Seller: "We are anxious to receive machine. Hope very much that it can arrive by July 1." Seller delivered the machine on July 3, but Buyer refused the machine and declared that the contract was avoided for failure to comply with the July 1 delivery date set forth in its wire of June 2. Buyer was not prepared to show that the delay in delivery from June 1 to July 3 constituted a "fundamental breach" (Art. 25) and relied solely on the notice-avoidance rules of Articles 47(1) and 49(1)(b).[\[page 314\]](#)*

A notice like that sent by Buyer on June 2 should not be held to "fix an additional period of time...for performance," and should not provide the basis of avoidance under Article 49(1)(b). Such a notice gives no warning that a deadline has been "fixed." Indeed, a communication that invites performance without making clear that a final deadline has been set could mislead the seller into an attempt at substantial performance. An effective notice under Article 47(1) should make clear that the additional period sets a fixed and final limit on the date for delivery: E.g., "The last date when we can accept delivery will be July 1."[\[4\]](#)

Suppose that the buyer sends the seller the following ominous notice: "Your delivery is late. We shall be forced to reject the goods and avoid the contract if they do not arrive promptly." This notice does not comply with Article 47(1) since it does not "fix" a "period." The consequences of the notice avoidance remedy are serious; unless the buyer sends a notice of the clarity required by Article 47(1) avoidance must be based on fundamental breach.[\[5\]](#)

The notice under Article 47(1) must fix an additional period "of reasonable length."[\[6\]](#) The Convention uses flexible language; different periods of time could be "reasonable." Within this leeway the choice is given to the

buyer the innocent party who faces breach by the seller. Indeed, respect must be given to the buyer's discretion in setting the "reasonable" period if the notice-avoidance procedure is to serve its purpose reducing uncertainty concerning the right to avoid the contract. (The risk of delay or loss of the notice is discussed under Article 63 at 352, n. 2, *infra*.)

In determining whether the period the buyer fixes is "reasonable" the dominant consideration is the buyer's need for delivery of the goods without further delay. (Impediments that prevent or delay performance are dealt with in Article 79, *infra* 423, 435: temporary impediment.) On the other hand, since the seller's failure to comply with the period fixed by the buyer empowers the buyer to avoid the contract (Art. 49(1)(a), 305 *infra*), the reasonableness of this period should be considered in the light of the basic policy decision, embodied in Articles 25, 49 and 64, that contracts should not be avoided on insubstantial grounds. [page 315]

*Relation between "Nachfrist" Notice and Avoidance:* GER. OLG Celle. 20 U 76/94, 24 May 1995. S delivered only 3 of 6 contracted items of printing machinery. After the expiration date for delivery of these items, B fixed an additional period of eleven days for delivery of the missing machines. On S's failure to comply with this "Nachfrist" notice made under Art. 47(1), B declared the balance of the contract avoided, pursuant to Art. 49(1)(b). The court sustained B's action. CLOUT 136, UNILEX D.1995-16. See: Schlechtriem, Com. (1998) 394-400 (Huber).

*Query:* Have some courts overlooked the independence of the two grounds for avoidance under Article 49? E.g.: (I) Avoidance under Article 49(1)(a) for fundamental breach, as defined in Article 25, *supra*; and (II) Avoidance under Article 49(1)(b) for failure to comply with the "Nachfrist" notice provided in Article 47(1).

## 290 C. The Role of Notice-Avoidance: Analogies in Domestic Law

Domestic legal systems have not developed clear or uniform rules on whether a delay in performance empowers the other party to reject performance. (The issue is expressed in many different ways rescission, repudiation, cancellation, avoidance.) Sometimes the rule is put in terms of whether time is "of the essence." The (U.K.) Sale of Goods Act states that unless a different intention appears, the time of payment is not "of the essence"; as concerns delay in delivery: "Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract." [7]

The notice-avoidance approach of Articles 47 and 49(1)(b) of the Convention was inspired by a provision of German law that, on default by one party:

"the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after the expiration of the period."

If performance is not made in due time, the person who gave the above notice (often termed a *Nachfrist*) may "withdraw from the contract." [8] [page 316]

Other aspects of the German *Nachfrist* were not employed in the Convention. As has been noted, under the Convention when the seller commits a breach that is fundamental the buyer may declare the contract avoided (Art. 49(1)(b)) without giving the seller an "additional period of time of reasonable length." However, the opportunity by advance notice to clarify the situation for both parties has received widespread international approval; the basic utility of this legal tool was never seriously questioned in the UNCITRAL proceeding or at the Diplomatic Conference.

## 291 D. Obligation to Accept Requested Performance

Paragraph (2) of Article 47 reflects a principle that might have "gone without saying": A party may not refuse performance that he has invited. The other party can be expected to rely on the invitation; domestic law would bind a party to accept the requested performance by doctrines such as waiver, estoppel or election. Paragraph (2) avoids the uncertainties of recourse to domestic law. (In addition, paragraph (2) may provide an instance of a "general principle" that, by virtue of Art. 7, could be applicable in other similar situations. See *supra* at 96.)



Paragraph (2) also provides that the buyer's demand that the seller perform within a fixed period does not relieve the seller of responsibility for damage resulting from the late performance, including damages resulting from delay during the "additional period" fixed in the notice. This result is consistent with the general rule of Article 45(2), *supra* at ¶275, that preserves the buyer's right to recover damages when (for example) he compels performance under Article 46. (The scope of the "election" principle was discussed under Article 45 *supra* at ¶277.) Thus, a notice under Article 47(1) can foreclose an argument that the buyer has agreed to a modification of the contract or has waived or otherwise forfeited a claim for damages resulting from late delivery.

These modest consequences based solely on Article 47 apply generally to a notice fixing an additional period for the seller's performance "of his obligations". On the other hand, the more serious consequence of *avoidance* under Article 49(1)(b) based on an Article 47 notice is restricted to cases of "non-delivery" (¶¶288, 305). [page 317]

## Article 48. Cure After Date for Delivery; Requests for Clarification

### ¶292 A. Tools for Cooperation

A sales transaction may be regarded (at the extremes) either as a duel fought with deadly weapons or as a relationship calling for cooperation and accommodation. The latter, of course, is the attitude of persons engaged in commerce; this approach is reflected in several provisions of the Convention.

### ¶293 (1) *The Convention*

Two articles deal with the cure of defective performance. Article 37, *supra* at ¶245, gives the seller the right to cure defective performance up to the date for delivery; the present Article gives the seller a more restricted right to cure defects in performance after the date for delivery.

#### Article 48 [1]

"(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 [page 318] 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."

### ¶295 B. Cure and Delay in Delivery

Paragraph (1) provides that "even after the date for delivery" the seller may remedy "any failure to perform his obligations." This language is broad enough to include a defect in documents. *Cf.* Art. 34, ¶220, *supra*. If the seller tenders delivery either (a) after a delay that constitutes a fundamental breach or (b) after the expiration of a period fixed by the buyer under Article 47 (*supra* at ¶287) the buyer may "declare the contract avoided" under Article 49(1), *infra* at ¶303. Time that has passed cannot be recalled; "remedy" is intrinsically impossible. On

the other hand, if the seller's delay in delivery does not fall under either (a) or (b), above, the buyer must accept the delivery; there is no need for "cure."

In sum, paragraph (1) addresses the seller's right to remedy defects or deficiencies in goods that have been tendered by substituting conforming goods for defective goods or by repairing (or replacing) a defective component part. (As we shall see, paragraphs (2)-(4) are not so limited and apply to a seller's inquiry as to whether the buyer will accept a late delivery. See *infra* at [297](#).)

## 296 C. Cure and Advance for Fundamental Breach

The relationship between cure and remedies based on "fundamental breach" has already been introduced in connection with the definition of "fundamental breach." (See Article 25, *supra* at [184](#).) The issue is important and merits attention in the present setting; the following illustration will recall Example 25A, *supra* at [184](#).

*Example 48A. Seller delivered a machine to Buyer. When Buyer tested the machine a defect in one of the component parts prevented the machine from operating. Only Seller had replacement parts for the machine. Buyer notified Seller that the machine had failed to operate. Seller offered immediately to replace the defective part but Buyer refused this offer [page 319] and declared that the contract was avoided. The time required for replacing the defective part was not important to Buyer; his contention was that the machine had failed to function and that this constituted a fundamental breach of the sales contract (Art. 25) empowering him to avoid the contract (Art. 49(1)(a)).*

In the 1978 Draft Convention, the provision allowing a seller to cure after the date for delivery (Art. 44(1) which became Art. 48(1) in the Convention) opened with these words: "Unless the buyer has declared the contract avoided in accordance with article 45 [now article 49]...." At the Diplomatic Conference several delegates expressed their concern that, in situations like Example 48A, this "Unless" clause might be construed to authorize avoidance of the contract that would frustrate the seller's right to cure. There was widespread agreement that whether a breach is fundamental should be decided in the light of the seller's offer to cure (Art. 25, *supra* at [184](#)) and that the buyer's right to avoid the contract (Art. 49(1)) should not nullify the seller's right to cure (Art. 48(1)). However, it was difficult to find language that would clearly express the proper relationship between avoidance and cure. Finally, the Conference adopted a joint proposal prepared by delegates who had been anxious to protect the seller's right to cure. Under this proposal, the "Unless..." clause of the 1978 Draft was deleted and replaced by the present cross-reference to Article 49.[\[5\]](#)

In cases like Example 48A, the seller's right to cure could not have been frustrated even under the 1978 version that included the "Unless" clause; any other result would have nullified the Convention's narrow and specific provision authorizing cure.[\[6\]](#)

The amendment to Article 48(1) leaves little room for doubt. The [\[page 320\]](#) seller's right to cure should also be protected if, in cases like Example 48A, where cure is feasible, the buyer hastily declares the contract avoided before the seller has an opportunity to cure the defect. As was noted under Article 25, *supra* at [181](#), whether a breach is "fundamental" should be decided in the light of *all* of the circumstances. In cases like Example 48A, where cure is feasible and where an offer of cure can be expected, one cannot conclude that the breach is "fundamental" until one knows the answer to this question: Will the seller cure?

Professor Will in an incisive analysis of this problem (*B-B Commentary* 349-352) rightly emphasizes the buyer's need for a prompt and clear answer to the above question: "Will the seller cure?" Will suggests (p. 351) that the buyer should not be required to delay avoidance of the contract unless the answer to the above question is "Yes" based on the buyer's "actual knowledge (good experience with the seller, and *ad hoc* commitment, the underlying conditions of sale)....". Fortunately, the parties can avoid doubt by communicating with each other.

The first step normally must be taken by the buyer since the defect usually comes to light during inspection or testing at the end of transport. Let us suppose that, in a case like Example 48A, on June 1, shortly after arrival of the goods, Buyer telexed: "Machine does not operate apparently because of a defect in Part X. Will you remedy

the defect? Must have machine in working order by June 20 or will be forced to avoid contract and obtain machine elsewhere. Need to know by June 10 what you plan to do with respect to arrival of your engineer and plans for repair."

Such a telex would respond to the parties' normal commercial interests to maintain a productive business relationship. In addition, the telex lays the foundation for protecting Buyer's legal rights if (contrary to normal practice) Seller should fail to cooperate: (1) The telex satisfies the buyer's obligation under Article 39 to notify the seller of the lack of conformity. (2) Since the seller has the "obligation" to supply the buyer with goods that conform to the contract (Art. 35), the telex constitutes a *Nachfrist* notice under Article 47 fixing "an additional time of reasonable length for performance by the seller of his obligations"; until the seller refuses or the fixed time expires the time does not run on the period within which the buyer may take further steps such as avoidance for fundamental breach. (Art. 49(2)(b)(ii)). (3) This advanced stage of the relationship between the parties, with the buyer in possession of defective goods shipped by the seller, leads to the conclusion that the seller also has the "obligation" to respond to the buyer's request for early information regarding the seller's plans concerning cure. (See ¶100 *supra*, on the "general principle" (Art. 7(2)) to communicate information needed by [page 321] the other party derived (*e.g.*) from Articles 19(2), 21(2), 26, 39(1) and, in a closely-related setting, Articles 47(2) and 48(2).) On this assumption the buyer's request for early (June 10) information about the seller's plans may also be supported by the notice-avoidance provisions of Articles 47(1) and 49(1)(b).

The buyer's inquiry need not follow the style or approach of the above example. Moreover, in normal business relationships the Convention's sanctions for failing to reply to the buyer's inquiry will be irrelevant: When cure of a defect is feasible the seller will be anxious to effect the cure to preserve good business relationships and also to minimize the loss resulting from avoidance of the contract. The point of the above example is to suggest that the buyer need not be consumed by doubt over whether the seller will cure the defect; a simple inquiry will provide the answer.

*Decisions: Examples of "Cure":* (1) FR. [CA Grenoble, RG 93/4879, 26 April 1995, Roque v. Sarl](#). B claimed that hangar delivered by S was defective; S's repairs barred B's attempt to avoid contract. CLOUT 152, UNILEX D. 1995-14. (2) SWITZ. [Pr. Locarno-C., 6252, 27 April 1992](#). S delivered furniture to B, who claimed that the cushions were defective. S offered to replace the cushions. B rejected S's offer and claimed avoidance of the contract. Held: Under Art. 48, B should have accepted S's offer to cure. UNILEX D. 1992-10. (3) GER. [OLG Koblenz, 2 U 31/96, 31 January 1997](#). B notified S that acrylic blankets S delivered did not conform to contract. S offered to remedy the non-conformity; B rejected the offer and declared avoidance of the contract. Held: S's offer to cure made the breach not fundamental, as required for avoidance. UNILEX D.1997-4. (Note also the relation between cure and avoidance in ¶295, *supra*.)

*Comments on Cure:* Ahdar, R.J., *Cure by Seller*, (1990) (Lloyd's) M. & C. Comm. L. Q. 364-382; Schneider, E.C., 7 *Ariz. J. Int. & Comp. L.* 69-103 (1989); Schlechtriem, *Com.* (1998) 402-413 (Huber).

## ♦ 297 D. Requests for Clarification

As was suggested *supra* at ¶292, a modern sale involves a relationship that may require cooperation. This calls for open lines of communication between the parties so that each knows what to expect from the other. In business practice this is taken for granted; paragraphs (2)♦(4) of Article 48 give legal effect to this expectation. We shall first examine a proposal to cure a failure of performance under paragraph (1) and then consider the applicability of paragraphs (2)♦(4) in other situations.[page 322]

### ♦298 (1) Proposal to Cure by Repair

*Example 48B. The facts are like those in Example 48A: Seller delivered a machine to Buyer; Buyer notified Seller that it failed to operate. Seller thereupon wired Buyer, "My mechanics will arrive within one week to put the machine in operation." Buyer did not reply. At the time stated in Seller's wire his mechanics arrived to repair the machine but Buyer refused to admit them on the ground that the machine was too defective for repair.*

Buyer acted wrongfully in refusing to permit the mechanics to make the repair. Seller's notice complied with Article 48(2) and (3). The notice did not expressly request Buyer "to make known whether he will accept performance" (Art. 48(2)) but, by virtue of paragraph (3), the seller's notice "that he will perform" is assumed to include a request "that the buyer make known his decision." Consequently, "the seller may perform within the time indicated in his request."

We must assume that paragraph (2) of this article does not merely duplicate paragraph (1). Hence, the rule of paragraph (2) that when the buyer fails to respond "the seller may perform within the time indicated in his request" is not confined to the circumstances for cure stated in paragraph (1). For example, if the seller's request proposes to cure the defect within two weeks, the buyer who fails to respond may not contend that cure within the two-week period is barred as an "unreasonable delay" under paragraph (1). Here, again, the Convention gives effect to the parties' duty to communicate in this setting to prevent avoidable expense. See §§100, 292, and 296, *supra*.

### §299 (2) *Proposal to Make a Late Delivery*

As was noted at §295, the provision on cure in paragraph (1) extends to "any failure" by a seller to perform its obligations—language that literally includes a late delivery, although it is difficult to envisage a way to "remedy" a delay that has occurred. This difficulty, however, does not extend to the provisions on communications in paragraphs (2) and (4).

*Example 48C. The contract for the sale of a machine called for delivery to Buyer on June 1. Seller fell behind schedule and on May 31 he sent Buyer the following wire: "Regret cannot deliver machine until June 10. Will you accept delivery on that date?" Buyer did not respond; Seller delivered the machine on June 10. Buyer refused to accept the delivery and [page 323] declared the contract avoided on the ground that the delay in delivery constituted a fundamental breach.*

Seller's inquiry of May 31 was authorized by Article 48(2): the wire requested Buyer to "make known" whether he would "accept performance." Seller needed this information before laying out the funds necessary to complete the machine and transport it to Buyer. Buyer had a duty to respond; as a result of his failure "the seller may perform within the time indicated in his request." In short, Buyer lost any right he might have had to avoid the contract because of the delay specified in Seller's communication of May 31. (Of course, Seller is liable for any damages. Art. 48(1).)[7]

### §300 (3) *Failure to Receive the Notice*

Article 27 laid down the general rule that a party discharges its duty to notify by dispatching a notice "by means appropriate in the circumstances"; under this rule the risks of delay or non-transmission fall on the addressee. Paragraph (4) reverses this rule for communications under paragraphs (2) and (3). Here the one giving the notice is in breach of contract; a seller who has deviated from the contract may not impose on the buyer a duty to respond to an inquiry that he did not receive. (See Art. 27, *supra* at §190.) On the other hand, if the aggrieved buyer dispatches an objection to the proposed cure and the message fails to arrive, Article 27 provides that such a failure of transmission "does not deprive [the buyer] of the right to rely on the communication." In sum, the exception to the general "dispatch" rule carved out by Article 48(4) applies only to the request by the seller—the party who is in breach of contract. See *Secretariat Commentary Art. 44, para. 15* O.R. 41, *Docy. Hist.* 431.[page 324]

## Article 49. Buyer's Right to Avoid the Contract

### §301 A. The Problem of Avoidance in Domestic Law Avoidance of Contract

When does a breach of contract by one party release the other party from its contractual obligations? Attempts to answer this question have produced rules of domestic law of unusual technicality and uncertainty.

The common law initially found it difficult to release a party (Party A) from its promise because of breach by the other party (B), unless the promises of the two parties were linked by some verbal formula such as: "A promises *in exchange* for B's delivery of first-quality hemp, to pay..." Late in the eighteenth century this technical approach was relaxed by the judicial creation of rules that performance by B could be an implied "condition" of A's duty of performance; under some of the case law, whether B's breach released A depended on questions of degree such as the seriousness of the breach.<sup>[1]</sup>

However, some of the more technical case law was frozen into statutory form in the (U.K.) Sale of Goods Act. These technicalities were criticized by the Ontario Law Reform Commission, which proposed that the question whether the buyer had the right to reject should be answered in terms of one general standard: Was the seller's breach "substantial?"<sup>[2]</sup>

The (U.S.A.) Uniform Commercial Code created a somewhat different set of distinctions. In an earlier study, this writer found these provisions to be casuistic and unresponsive to commercial practice and the significant interests of the parties.<sup>[3]</sup> **[page 325]**

## ❖302 B. The Convention's Rules on Avoidance for Breach

We have encountered the Convention's rules on avoidance of the contract in connection with several provisions: the definition of "fundamental breach" (Art. 25); the rule that a declaration of avoidance is effective "only if made by notice to the other party" (Art. 26), an approach that rejected the ULIS system of *ipso facto* avoidance (❖187 *et seq.*, *supra*); the right of the seller to cure defects in performance (Arts. 37 and 48); and the buyer's power to fix an additional final period for performance (the *Nachfrist* notice; Art. 47). All of these provisions relate to the following general basic rules on avoidance of the contract:

### 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."**[page 326]**

## ❖303 (1) Grounds for Avoidance



Paragraph (1) of Article 49 states two grounds on which buyers may avoid the contract; (a) when a failure by the seller to perform "any of his obligations" amounts to a "fundamental breach of contract"; and (b) "in case of non-delivery, if the seller does not deliver the goods" within an additional period of time fixed by a *Nachfrist* notice under Article 47.

The aggrieved party need not apply to a court for relief from the obligation of the contract. Avoidance is effected by a "declaration" which (Art. 26) is made "by notice to the other party." Of course, the attempt to avoid is ineffective if it is not authorized by the Convention. The essential point is that the transfer of responsibility is not delayed pending litigation—a process that could be particularly awkward in international transactions.

### ❖304 (a) *Avoidance for Fundamental Breach of Contract*

The Convention avoids the distinction that the (U.K.) Sale of Goods Act (1893) made between conditions and warranties—a distinction that is softened by the broad scope given to "conditions" and by modern case-law.<sup>[4]</sup> One general rule applies to non-performance by the seller of "any of his obligations." The buyer may avoid the contract if the seller's breach is "fundamental." The application of this rule was explored in discussing the Convention's definition of "fundamental breach" (Art. 25, *supra* at ❖183).<sup>[5]</sup>

In brief, a breach of contract by one party (A) is "fundamental" if it results in such "detriment" to the other party (B) as to "substantially" deprive B of what B is entitled to expect under the contract. The framing of this text was based on the conclusion that international contracts usually are of a complexity and importance to the parties that avoidance should not be available for trivial departures that may readily be redressed by damages (Art. 74).

The rejection of trivial grounds for avoidance necessarily led to a test that is based on degree. Application of this test requires attention to the aggrieved party's need for this remedy in the light of all the facts. Situations that were discussed under the definition in Article 25 included the [page 327] effect of an offer to cure (❖184, *supra*) and the adequacy and assured availability of an adjustment of the price or other compensation (❖185).

*Decisions on Avoidance for Fundamental Breach.* (1) FR., [C. de Cass. \(Sup.Ct.\) 173 P/B 93-16.542, 23 January 1996](#). S's wine was adulterated by excess sugar, increasing the degree of alcohol. B's avoidance by lower court was affirmed. UNILEX D. 1966-2. (2) IT. [Pr. di Parma-Fidenza, 77/87, 24 November 1987](#). S did not deliver goods by the contract date. B repeatedly requested delivery, without response. B's cancellation of order and avoidance: sustained. UNILEX D.1987❖7, CLOUT 90. (3) GER. [OLG. Frankfurt a M., 5 U 164/90, 17 September 1991](#). S exhibited shoes with restricted trade-mark, contrary to contract. Avoidance sustained. CLOUT 2, UNILEX D.1991❖9. (4) *Strict Standard*: GER. [BGH \(Sup.Ct.\) VIII ZR 51/95, 3 April 1996](#). Cobalt sulphate, contracted to be of British origin, did not meet specifications and originated in South Africa. Avoidance of contract denied: B failed to show that the material was substantially different from what was contracted; B can resell in Germany or abroad, or use the material. CLOUT 171, UNILEX D. 1996❖4.

*Comments:* [Speidel, R.E., B's Rights of Rejection and Cancellation, CISG & UCC, 6 J. Contract L., 91❖140 \(1993\)](#); [Minter, F.A., B's Right of Rejection, 13 Georgia L. R. 805❖898 \(1997\)](#); [Reitz, J.C., "Cut-off Rules", History & CISG, 36 Am. J. Comp. L. 437❖472 \(1998\)](#); [Schlechtriem, Com. \(1998\) 416❖421](#).

#### ❖304.1 (i) *Avoidance as to Part of the Goods*

The buyer's remedy of avoidance is made more flexible by Article 51, ❖❖314❖317, *infra*. Article 51(1) states that if "the seller delivers only a part of the goods" or if only "a part of the goods" conforms to the contract, "articles 46 to 50" (note the inclusion of Article 49) "apply in respect of the *part* which is *missing* or which *does not conform*". See ❖❖314❖316 *infra*.

*Example 49A.* In a contract for 1,000 computers 980 conformed with the contract but 20 were seriously defective. The defects of the 20 did not suggest that similar problems might develop with the other computers. Arrangements for payment, the circumstances of use or resale or other factors with respect to the buyer's needs

*did not require that all 1,000 computers be handled as a unit; as a consequence we may assume that the defects in the 20 did not constitute a fundamental breach of the contract as a whole (Arts. 25, 51(2)).*

Under these circumstances Buyer may avoid as to the 20 defective computers (Art. 51(1)) and, of course, also recover damages (Arts 45, [page 328] 74♦76, 81(1)). Article 51 opens up other remedies. For example, on these facts the breach with respect to the defective computers was "fundamental"; under Article 46(2) the buyer "may require delivery of substitute goods" to replace the defective computers. (Combining (A) avoidance (Art. 49) and (B) requiring delivery of substitute goods (Art. 46(2), was examined at ♦282.1.)

### ♦305 (b) *Non-delivery within Time Fixed by Nachfrist Notice*

This second ground for avoidance has been examined in the setting of Article 47(1), which authorized the buyer to "fix an additional period of time of reasonable length for the performance by the seller of his obligations" (♦287). This "Nachfrist" notice provides a basis for avoidance without proof that delay beyond the "additional period" fixed in the notice constitutes a "fundamental breach." The point that deserves emphasis here is that the seller's failure to comply with this notice is a basis for avoidance only when the seller has failed to deliver the goods. This point was reemphasized at the diplomatic conference by adding at the outset of Article 49(1)(b) the words "in case of non-delivery." When buyer sets an additional final period "of reasonable length" this (in common law parlance) makes this period of time "of the essence." Of course, if the circumstances make any delay in delivery a fundamental breach (as when prices for the goods are subject to sharp fluctuations) the buyer may avoid the contract under paragraph (1)(a) without giving additional time to the seller. The reasons for limiting avoidance under paragraph (1)(b) to late delivery were explained in the debates at the Diplomatic Conference. *O.R.* 354♦356, *Docy. Hist.* 575♦577. See also UNCITRAL (1977) VII Y.B. 46, *Docy. Hist.* 339. These debates showed adherence to UNCITRAL's decision that the special circumstances of international trade (the importance of the typical contract and the waste resulting from reshipment and redispotion after shipment abroad) called for limiting avoidance of the contract to substantial breach. See also Article 51, *infra*, and Example 46B, ♦283, *supra*.

*Decision on Nachfrist and Avoidance.* GER. [OLG Celle, 20 U 76/94, 24 May 1995](#). Seller failed to deliver part of the printing machinery called for in the contract. B notified S that the missing machinery must be delivered within eleven days. On S's failure to comply with B's notice, B declared the contract avoided. Held: B's notice was effective; the contract was avoided. UNILEX D.1995-16, CLOUT 130. See: Schlechtriem, Com. (1998) 421♦426 (Huber). [page 329]

### ♦306 (2) *Limits on Time for Avoidance*

#### (a) *Reasons for Limiting the Time; Domestic Law*

Avoidance of the contract has important practical consequences with respect to responsibility for the care and redispotion of the goods. Assume that a buyer learns that the goods have arrived at their destination in a nearby seaport or rail siding and proposes to avoid the contract: If the buyer delays its declaration of avoidance, demurrage and warehouse costs will accrue, the goods will be subject to unnecessary risks of damage or loss, and the market price may fall. In the alternative, assume that the buyer receives the goods and proposes to avoid the contract because of non-conformity of the goods (Arts. 35, 49(1)(a)). A delay in the buyer's declaration of avoidance will delay the seller's opportunity to repair or redispote of the goods and will enhance expense and risk.

Because of these problems, domestic law limits the time within which the buyer may avoid the contract. Under the (U.S.A.) Uniform Commercial Code (♦2-602(1)) rejection of goods must take place "within a *reasonable time* after their delivery or tender" and is "ineffective unless the buyer *seasonably* notifies the seller." Similarly, under UCC 2-608(2) "revocation of acceptance must occur with a *reasonable time* after the buyer discovers or should have discovered the ground for it."

### ♦307 (b) *The Convention's Rule on Time*

(i) *Non-Delivery*

Under Article 49(2) the time for avoidance begins to run only when "the seller *has delivered* the goods." A buyer who is awaiting a delayed delivery need not try to estimate when the delay is sufficient to constitute a "fundamental breach" and thereupon notify the seller that the contract is avoided. The buyer may await delivery; after the buyer "has become aware that delivery has been made" (para. (1)(a)) he may decide to accept the goods or (if the delay is a fundamental breach or if the seller has failed to comply with a *Nachfrist* notice under Article 47(1)) the buyer may reject the goods by a declaration of avoidance.

The fact that the buyer *may* defer avoidance for late delivery until after delivery (Art. 49(2)(a)) does not, of course, prevent a waiting buyer from avoiding more promptly. When the delay constitutes a fundamental breach the buyer may thereupon declare the contract avoided (Art. 49(1)(a)). If the buyer is uncertain as to whether the breach is fundamental, or if the buyer wishes to give the seller a last chance to deliver, the buyer may give the seller a *Nachfrist* notice under Article 47(1); if the [page 330] seller fails to deliver within the reasonable additional period set in the buyer's notice the buyer may thereupon declare avoidance under Article 49(1)(b) (305, *supra*).

A seller who finds that his delivery will be late may need to know whether to lay out funds for packing and shipping. Uncertainty over whether the buyer will accept usually can be removed by communications between the parties. And any danger that the buyer would refuse to clarify his position until the goods have arrived is met by Article 48(2)-(3), *supra* at 292, which gives the buyer a duty to reply to a request that he "make known whether he will accept performance" within a specified time; if the buyer fails to respond "the seller may perform within the time indicated in the request."

### 308 (ii) *Delivery of Non-Conforming Goods*

Paragraph (2)(b) of Article 49 applies "in respect of any breach other than late delivery" typically the arrival of goods that fail to conform to the contract. The basic rule is that avoidance must occur "within a reasonable time (i) after [the buyer] knew or ought to have known of the breach." The time when the buyer *ought* to know of the breach would be influenced by Article 38, *supra* at 249, which governs the period within which the buyer "must examine the goods." The length of a "reasonable time" for declaring an avoidance is necessarily determined by a wide variety of circumstances such as whether the goods are perishable or are subject to price fluctuations.

The remainder of Article 49, perhaps unnecessarily, spells out the effect of certain important communications between the parties. For example, let us assume that a buyer, pursuant to Article 47(1), informs the seller that the goods are defective but that within one month the seller may cure the defect by replacement or repair. Article 49(2)(b)(ii) provides that the buyer's time for declaring avoidance does not start to run until the one-month period expires. Paragraph (2)(b)(iii) gives similar effect to a seller's request under Article 48(2) that the buyer "make known" whether he will accept a cure of a defect in the goods. [6] [page 331]

Decision: Time Limits for Avoidance. (1) SWITZ. [HG Zürich, HG 920670, 26 April 1995](#). Four weeks after delivery of tank, B discovered leaks, and four weeks later declared the contract avoided. Held, both avoidance and damage claim (Art. 39(1)) were too late. UNILEX D.1995-15.1 [See cases on delay at 256, 257 261, *supra*.] See: Schlechtriem, Com. (1998) 426 435 (Huber).

### 308.1 (iii) *Effect of Seller's Knowledge of Defect*

Interesting questions arise concerning the extent to which the Convention's requirements that a buyer notify the seller (e.g.) of defects in the goods apply to the buyer's right to avoid the contract.

As we have seen, notice requirements are imposed in two settings. (1) Article 39(1) provides that the buyer "loses the right to rely on a *lack of conformity* of the goods" if the buyer does not give the seller notice of the lack of conformity within a specified period. See the combined discussion of Articles 39, 40 and 44,

❖❖254❖261, *supra*. (2) In a different setting, Article 43(1) provides that the buyer "loses the right to rely on the provisions of Article 41 or 42" protecting the buyer against *third-party claims* if the buyer fails to give the seller notice of the claim within a specified period (❖271, *supra*). Both of these drastic rules nullifying the buyer's substantive rights are subject to exceptions, one of which is that a seller may not rely on these provisions if the seller knew of the defect of which the buyer was otherwise required to give notice.

Suppose that a seller knows of the defect of which the buyer would otherwise be required to give notice: Does the seller's knowledge excuse the buyer from the provisions of Article 49(2) that the buyer "loses the right to declare the contract avoided: unless the buyer avoids the contract within "a reasonable time"? Professor Will, in his excellent analysis of Article 49, suggested that the seller's knowledge of the non-conformity or the third-party claim removes the time limits with respect to avoidance of the contract. Although the exemptions based on the seller's knowledge (Articles 40 and 43(2)) refer only to the requirement that the buyer notify the seller of the *non-conformity* (as contrasted with the decision to *avoid* the contract), it was suggested that it would be "absurd" to permit such a seller to invoke the limits on *avoidance* stated in Article 49(2), *supra*.<sup>[7]</sup>

The present writer has some hesitation about this conclusion. The problem is complex and may not arise often. However, the question may [page 332] be worth discussing to explore the differences between the two distinct remedies—damages and avoidance. As was noted (❖255 *supra*) the seller needs to know of a claim of defects in the goods so he can take samples or inspect the goods to ascertain the facts before the evidence is lost; the seller also needs prompt notice of a claim in order to exercise his rights to cure the defect (Arts. 37, 48). However, Articles 40 and 43(2) recognize that it would be monstrous to apply these drastic sanctions (loss of all substantive rights) because a buyer fails to give the seller *facts* that the seller *already knew*.

Requiring a buyer to communicate its decision to *avoid the contract* within "a reasonable time" is based on different reasons than requiring *notice of defects*. As has been noted (❖306, *supra*), undue delay in declaring avoidance of the goods creates risks of needless cost and risk with respect to the care and return of the goods and, when the goods are subject to market fluctuations, may give the buyer a chance to speculate at the seller's risk. Unless the "reasonable time" limit of Article 49(2) is preserved a buyer presumably could delay a decision on avoidance for the full limits of the period of limitation (prescription) which, under some domestic system can be a decade or more and under the 1974 U.N. Convention on the Limitation Period in the International Sale of Goods is four years.

The rules on notice of defects differ from the rules on time for avoidance (Art. 49(2) in yet another respect; a buyer who waits beyond a "reasonable time" in declaring avoidance is not deprived of other remedies, such as the right to damages (Arts. 45(2), 81(1); a buyer who fails to give the required notice of defects, unless excused (Arts. 40, 43(2), 44), *loses all substantive and procedural rights*. The Convention recognizes this difference: Article 44 provides that a buyer who has "a reasonable excuse for failing to give" the notice of defects required by Articles 39(1) and 43(1) can still reduce the price (Art. 50) or claim damages (Art. 74); Article 44 does not extend this excuse to restrictions on avoidance of the contract.

In sum, it seems difficult to conclude that the seller's knowledge of a defect in the goods removes the "reasonable time" limit on avoidance set forth in Article 59(2).

### ❖308.2 (3) *Avoidance Against Party Exempt from Damages*

Article 49 bases the right to avoid the contract on a failure by the other party "to perform" its "obligations under the contract"; avoidance does not depend on liability to *pay damages* for breach. As we shall see, Article [page 333] 79 in specified circumstances (*cf. force majeure*) provides that a party is exempt from *damages* for "failure to perform" its obligations and adds (paragraph (5)): "Nothing in this article prevents either party from exercising any right *other than to claim damages* under this Convention". In other words, exempting a party from damages does not prejudice the other party's right to avoid the contract. The underlying reason is compelling: a buyer is not required to pay for goods the seller can not deliver. Indeed, when Article 79 exempts a party from damages for failure to perform, the appropriate remedy is usually avoidance of the contract. See ❖423 *infra*. [page 334]



## Article 50. Reduction of the Price

❖309 This article's special role is to determine how much the buyer owes the seller for non-conforming goods when special circumstances relieve the seller of liability for "damages."

### Article 50 [1]

"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 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."

### ❖310 A. The Special Role of "Price-Reduction"

The issues presented by Article 50 are subtle and complex; an example may help.

*Example 50A. On April 1 Seller contracted to sell a \$100,000 cargo of No. 1 quality Edam cheese to Buyer, a food processor, with delivery by June 1 "Ex Ship" at a port in Buyer's country. (Under this delivery term, transit risks were assumed by Seller.) Seller dispatched cheese that conformed to the contract; the time of dispatch and other shipping arrangements would have led, under normal conditions, to timely and safe arrival of the shipment. However, unexpected hostilities led to the interning of the ship for two months during its transit through a canal. Normal refrigeration facilities on the ship could not cope with the hot climate in the canal area; when the ship finally arrived on August 1 the cheese was moldy and graded at only No. 4 quality but the cheese could be used, with [page 335] trimming and other treatment. The price level for No. 1 Edam cheese was the same on August 1 as when the contract was made; the moldy cheese was worth \$20,000, one-fifth of the contract price of \$100,000. Buyer needed the cheese for its food processing and elected to keep the cheese; the delay in arrival and the added time required to prepare the cheese for processing led to a shut-down of Buyer's processing plant, with a loss of \$15,000.*

### ❖311 (1) Seller's Exemption from "Damages"

Article 79, *infra* at ❖424, provides that a party is excused from liability for "damages" when his failure to perform is "due to an impediment beyond his control." (Under domestic law the grounds for exemption may be referred to as "impossibility," "force majeure" or "Act of God.") In the circumstances described in the example, we may assume that the unexpected hostilities constituted an "impediment" that excused Seller from "damages." (See ❖433 n. 17.) Buyer could have avoided the contract (Arts. 25, 49(1), 79(5)) but he elected to accept the cheese. How much must he pay?

### ❖312 (2) The Price-Reduction Formula

In Example 50A, the goods did not "conform with the contract." Although Buyer may not recover "damages," under Article 50 he 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." The No. 4 quality cheese delivered to Buyer had one-fifth the value of conforming goods. Buyer must pay Seller one-fifth of the price*—i.e.*, \$20,000.

The above formula is more significant when the price-level changes between the making of the contract and the delivery of the goods.

*Example 50B. The facts are the same as in Example 50A except that, as a result of shortages produced by the hostilities, the price for all grades of this type of cheese doubled between April and August. Consequently, the No. 4 cheese would have sold for \$40,000 and No. 1 cheese for \$200,000.*



Under Article 50 Buyer may reduce "the price" (\$100,000) by the prescribed "proportion." Since the No. 4 quality cheese that was delivered was worth one-fifth of the value "that conforming goods would have had [page 336] at that time," Buyer must pay Seller one-fifth of the "price" of \$100,000 or \$20,000.

Paying only \$20,000 for cheese that was worth \$40,000 might seem to give Buyer a windfall. However, this advantage to Buyer reflects a portion of the protection that performance would have provided. If the ship had not been interned, Buyer would have received cheese that had increased in value to \$200,000 but would have paid \$100,000. For reasons noted *supra* at ¶311, in Examples 50A and 50B the impediment that prevented performance by Seller exempts it from paying damages; Buyer must bear its shutdown expenses and other consequential damages.

These examples illustrate the narrow scope of Article 50. The price-reduction formula applies only when the buyer accepts and retains non-conforming goods, and plays an important role only when the seller is not liable for the non-conformity. This combination of circumstances is rare. A supervening "impediment" (*force majeure*) usually prevents the production or delivery of the goods; and in the rare case where the "impediment" causes serious non-conformity of goods that reach their destination, the buyer is not likely to accept the defective goods. (It was not easy to find a plausible example to illustrate the scope of this article.)

*Example 50C. The facts are the same as in Example 50A except that by August 1, the market price for all grades of Edam cheese, instead of rising, had dropped to one-half; on August 1, Grade No. 4 sold for \$10,000 and Grade No. 1 sold for \$50,000.*

If Buyer accepts the cheese, under Article 50 he may reduce the price "in the same proportion as the value that the goods actually delivered had at the time of delivery [\$10,000] bears to the value that conforming goods would have had at that time [\$50,000]." This proportion  $\frac{1}{5}$  would call for the Buyer to pay Seller \$20,000 for the moldy cheese the same amount as in Examples 50A and 50B. However, in this case Buyer would probably avoid the contract (reject the moldy cheese) if he could obtain substitute cheese at the low market level prevailing on August 1.

In all three cases we are assuming that under Article 79, *infra* at ¶423, the impediment that prevented the delivery of No. 1 quality cheese excused Seller from liability for "damages" for breach of contract. For reasons that will be explained more fully, *infra* at ¶313, "price reduction" under Article 50 has its principal significance when the buyer accepts defective goods under circumstances in which (as in Examples 50A-50C) the seller is not liable for "damages." However, Article 50 does not confine "price reduction" to cases where sellers are excused from liability for damages, and in some cases buyers who accept defective goods may [page 337] have a choice between two remedies  $\frac{1}{2}$  price reduction under Article 50 and a claim for damages under Article 74, *infra* at ¶403.

It is difficult at this point to compare results under Articles 50 and 74. In brief, if buyer suffers "no consequential" damages (such as shutdown losses), the allowance for defects in the goods will normally be the same under Articles 50 and 74 when (as in Example 50A) there is no change in the market level.

When the price-level rises (as in Example 50B), a buyer normally will claim damages under Article 74, since this approach protects his contractual "expectation interest." Thus, in Example 50B, the right to damages under Article 74 protects the buyer's right to receive No. 1 cheese that, on the market was worth \$200,000 at the time for delivery. Since in Example 50B he received cheese worth only \$40,000, a claim for damages might amount to \$160,000 a much more favorable result than the price-reduction of \$80,000 to \$20,000 allowed by Article 50.

The situation is quite different when the price-level falls. As has been noted, in cases like Example 50C the buyer would seldom accept the goods and hence could not use the price-reduction formula of Article 50. However, if he should accept the goods, price-reduction under Article 50, in some situations, would provide more compensation for the non-conformity than would damages under Article 74. As we have seen, in Example 50C the buyer could reduce the price from \$100,000 to \$20,000, a reduction of \$80,000. Under Article 74, the

difference between the value of conforming goods at the low price-level (\$50,000) and the value of the goods received (\$10,000) would give buyer a damage claim of \$40,000, which is less favorable than the price-reduction of \$80,000 allowed by Article 50. However, if the buyer has also suffered "consequential" loss (such as a plant shutdown), he may find it more advantageous after all to claim damages under Article 74. (As we have seen, there is no provision for "damages" in the price-reduction approach of Article 50.)

Difficult problems can arise in integrating price-reduction under Article 50 with the general rule on damage-measurement in Article 74, [403](#)[408](#), *infra*. Suppose that a buyer notifies the seller of price-reduction under Article 50 and later seeks to prove a more generous measure of the loss available under Article 74. (See Example 50B and the favorable protection under Article 74 for the buyer's "expectation interest" when the market price rises between the making of the contract and delivery of the goods). The Convention does not seem to deal with this question of election of remedies. Article 45(a) and (b) does indicate that "rights provided in articles 46 to 52" (note the inclusion of article 50) do not bar damages under Article 74. On this basis the buyer could claim [\[page 338\]](#) both price reduction and consequential losses *e.g.* delays in production because of defects in the goods. See Nicholas, 105 L.Q.R. 201, 226 (1989). In any event, Article 45 should not be construed to permit double recovery based on the reduced value of the goods. Perhaps the buyer should be held to have elected the price-reduction formula of Article 50 only if this had been part of an agreement to settle damages or if the seller had changed its position relying on the seller's notification.

### [313](#) B. Genesis and Evolution of "Price-Reduction"

One can only appreciate Article 50 when it is seen in historical perspective *as* a vestige of an important tool designed to cope with a traditional civil law doctrine (eroded but not abandoned) that a seller is liable for "damages" caused by defective goods only when he is guilty of fault or fraud. However, at an early stage in the development of the civil law it was decided that even though the seller was not liable for the buyer's damages it would be unjust for the seller to receive the full price for defective goods; such is said to be the basis in Roman law for the buyer's right to reduce the price to the degree of the deficiency *the actio quanti minoris*.[\[2\]](#)

The traditional role of this special price-reduction mechanism was removed by the Convention's adoption of a unitary contractual approach. Under Article 45(1), *supra*, "If the seller fails to perform *any of his obligations* under the contract or this Convention, the buyer may...(b) *claim damages* as provided in Articles 74 to 77." Common law observers saw little reason to retain this venerable legal tool. The lack of such a provision in their statutes had not led to difficulties; in rare cases like Example 50A, where *force majeure* relieves the seller from damages for the delivery of defective goods, the question of how much the buyer should pay if it retains the defective goods could be handled under domestic rules providing for restitution to avoid unjust enrichment (*cf.* Art. 81(2), *infra* at [439](#)). Ernst Rabel, writing in 1952, doubted the current utility of the *actio quanti minoris*, but in the Hague and UNCITRAL proceedings most representatives from civil law systems insisted on retaining this feature [\[page 339\]](#) of their legal heritage.[\[3\]](#) And a common lawyer must concede that Article 50, by providing a solution for cases like the above examples, will avoid the uncertainty and disunity of recourse to domestic rules on restitution.

In the 1978 Draft, as in ULIS 46, the formula for price-reduction was based on the ratio between the value of non-conforming and of conforming goods "at the time of the *conclusion of the contract*." At the Diplomatic Conference the reference-point was changed to the time for *delivery*. This change avoided constructing a theoretical value for defective goods that might not exist at the time of the contract.[\[4\]](#)

The work in UNCITRAL on "price-reduction" was complicated by a failure to appreciate the traditional role of this legal tool.[\[5\]](#) Until 1976 the draft lacked the phrase "whether or not the price has already been paid"; until this lack was corrected in 1976, the provision that "the buyer may reduce the price" was understood by some to be addressed to the amount that the buyer should remit to the seller as a result of set-off.[\[6\]](#)

The final sentence of Article 50, in denying price-reduction to a buyer who refuses to allow the seller to exercise his right to cure, underscores the pervasive significance of the duty to mitigate damages. (See the discussion of

"general principles" under Art. 7, *supra* at [◆101](#) and Art. 77, *infra* at [◆418](#).) See also [Schlechtriem, 1986 Commentary 79](#).

*Decisions: Examples of Price-Reduction.* (1) HUNG. [ARB. C of Com., VB/94131, 5 December 1995](#). S contracted to produce and deliver waste-containers to B. Two of the containers were not water-tight. S offered to repair the containers on B's payment of the price. S insisted that the price must be paid first; B then obtained repairs from another firm. Held: B's refusal [\[page 340\]](#) to accept repair on S's terms did not bar reduction of the price, which was granted in proportion to B's expenses for repair. UNILEX D. 1995-29. (2) SWITZ. [Pr. de Locarno, 6252, 27 April 1992](#). B received furniture from S that needed, and received, repair. Under Art. 50 the price was reduced in proportion to the cost of repair. UNILEX D. 1992-10. (3) GER. [OLG München, 7 U 4419, 2 March 1994](#). S delivered coal to a third party (T) designated by B. T's complaints of poor quality were promptly relayed by B to S. S sued for the price; B requested price reduction under Art. 50. This request was denied: B had not made a "declaration" on price reduction. [Note, at [◆313.2](#), deletion from Article 50 of language requiring a declaration.] UNILEX D. 1994-7. See: Schlechtriem, Com. (1998) 439-444.

### ◆313.1 C. Field of Application

#### (1) Possible Application beyond Non-Conformity of Goods

Article 50 states that price-reduction is available when the "goods do not conform with the contract"◆an area which the Convention distinguishes from other types of breach such as the place and time for delivery of goods and documents (Arts. 31◆34), existence of third-party claims (Art. 41, 42) and other obligations imposed by contract (Art. 30).[\[7\]](#) Nevertheless, questions have been raised as to whether price-reduction under Article 50 (as contrasted with the rules governing "damages" in Article 74, [◆◆403◆408, infra](#)) applies to other types of non-performance such as delay, delivery at the wrong place, defects in documents and the like. At the Diplomatic Conference Norway proposed an amendment that the right of price-reduction should apply when the goods are subject to third-party rights or claims. The proposal attracted conflicting views; Norway withdrew the proposal. [\[8\]](#) On the other hand, Article 44, a compromise developed late in the Diplomatic Conference to meet objections to the notice requirements of Article 39(1) (conformity of goods), includes references to the notice requirements of Article 43(1), and adds that these requirements do not prejudice the buyer's rights to various remedies, including [\[page 341\]](#) Article 50.[\[9\]](#) However, nothing in the legislative history indicated that Article 44 was understood to amend Article 50. Indeed, the debate that led to the failure of the Norwegian proposal (note 8 *supra*) recognized the difficulty of applying the price-reduction formula of Article 50 outside of its stated sphere◆claims of non-conformity. Nor is there need to stretch Article 50 beyond its stated scope. As we shall see, Article 74's general provisions on the measurement of damages provide a flexible measure of the buyer's loss in diverse circumstances ([◆◆404◆408, infra](#)) and in most situations are more appropriate than the formula stated in Article 50. (Recourse to Article 50 is, of course, optional.)

#### ◆313.2 (2) Misapprehensions regarding Article 50

Language in earlier versions of Article 50 ("the buyer *may declare* the price to be reduced") might have been construed to give special weight to the buyer's declaration. (Contrast the *Nachfrist* notice under Article 47, [◆289 supra](#).) To prevent this interpretation the Diplomatic Conference deleted the above language.[\[10\]](#)

May a buyer who receives non-conforming goods reduce payment of the price only by virtue of Article 50? Does the buyer have a similar right under Articles 45(1)(b) and 74? The answer depends on rules such as set-off and counterclaim. Under procedural systems with which this writer is familiar a buyer with a damage claim based on non-conformity of the goods will have an opportunity to establish that claim as a set-off or counterclaim to an action for the price; payment and settlement practices reflect this legal right.[\[11\]](#) [\[page 342\]](#)

## Article 51. Non-conformity of Part of the Goods

The problems addressed by Article 51 can be exposed by a simple illustration:

*Example 51A. A sales contract calls for the delivery of 100 bales of cotton. On delivery, 10 of the 100 bales prove to be so seriously defective that they cannot be used.*

There are two distinct problems: (1) May the buyer reject the 10 defective bales and accept the rest? (In legal language ♦ May the buyer "avoid the contract" as to only some units?) (2) May the buyer reject the delivery of 100 ("avoid" the entire contract) when only 10 units are defective? (Similar problems arise when the seller delivers only 90 bales instead of 100.)

## Article 51 [1]

"(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."

Paragraph (1) of Article 51 addresses the first question that was stated under Example 51A: May the buyer reject only the defective goods? Paragraph (2) addresses the second question: May the buyer reject all of the goods when only a part of the goods are defective? It may help to apply these provisions in the light of the reasons for Article 51.

## ♦315 A. Rules About "Goods" v. "Avoidance" of Contract

Attempts to answer the two problems posed by Example 51A have been encumbered by using overly-abstract concepts such as "rescission" or "avoidance" of the contract. Merchants ordinarily do not think in [page 343] terms of *avoiding a contract*; they think about what they may do with particular *goods*. It is no compliment to legal science to discover that the merchants' ♦ mode of thought is more precise. The concept of "avoidance" is misleading: "avoidance" does not destroy the contract: the party whose breach leads to "avoidance" remains contractually liable to compensate the aggrieved party for its loss. (See Art. 81(1), *infra* at ♦439.)

In most parts of the Convention the necessity to draft in terms that could be translated and understood in different linguistic and legal settings produced down-to-earth language that was clearer than that of the traditional domestic codes; here tradition was too strong to permit a fresh start. Article 49, *supra* at ♦302, provides that a buyer who encounters serious non-performance "may declare *the contract* avoided." When the seller's ♦ breach involves only part of the goods this broad rule has to be refined; this is done in Article 51.

## ♦316 (1) Remedies Applicable to a Non-conforming Part

The first question raised by Example 51A is this: What may Buyer do with respect to the 10 defective bales? Article 51(1) provides that the battery of remedies set forth in Articles 46 to 50 may be applied to the "part" of the delivery that fails to conform to the contract. Consequently, Article 51(1) gives Buyer these options ♦ he may (i) require the seller to deliver substitute goods (Art. 46(2)), or (ii) "avoid the contract" (i.e., reject) with respect to the defective units (Art. 49(1)(a)), or (iii) accept the defective goods and reduce their price (Art. 50) or claim damages (Art. 74). Article 51(1) also assures Seller of the right to cure under Article 48 (♦♦292♦300, *supra*) with respect to the 10 defective bales.

Assume that in this contract for 100 bales Seller delivered only 90 bales, all of which conformed to the contract. If Buyer fixes "an additional period of time of reasonable length" for delivery of the 10 bales (Art. 47(1)) and Seller fails to comply with this demand, or if any delay in delivering the missing bales constitutes a fundamental breach, Buyer may "declare the contract avoided" with respect to the 10 missing bales (Art. 49(1)(a) & (b).); in other words, Buyer's ♦ duty to accept the remaining units has come to an end.[2]



*Decision: Avoidance of Part.* (1) ARB. [ICC \(Paris\), 8128 \(1995\)](#). In a contract for chemical fertilizer to be delivered in installments, [page 344] S was unable to assure B that a conforming first installment would be delivered by the time for B's resale of the materials. Avoidance by B for this installment was sustained pursuant to Articles 53(1) and 73(1) (contracts for delivery by installments); see Art. 73, *infra*. UNILEX D. 1995-34. (2) ARB. [ICC \(Paris\), 7660/JK, 23 August 1994](#). In a contract for delivery of 3 pieces of assembly-line machinery, B declared avoidance of one piece that was defective. B's avoidance was sustained since the lack of conformity related to an independent part of the delivery, and was replaceable without prejudice to the working of the other machines. UNILEX D. 1994-20. (3) GER. [LG Berlin, 52 S 247/94, 15 September 1995](#). Non-conforming part of delivery of tiles made the entire shipment unusable. Avoidance of the entire shipment was granted. CLOUT 50, UNILEX D. 1991 7. See: Schlechtriem, Com. (1998) 445 448.

### 317 (2) *Avoidance as to the Entire Contract*

One of the purposes of paragraph (2) of Article 51 is to make clear that paragraph (1) does not force the buyer to sort out the non-conforming goods for separate handling. The buyer may "avoid" (reject) as to the entire delivery if the breach as to part causes detriment that is so substantial as to constitute a "fundamental breach" of the contract as a whole. The definition of "fundamental breach" in Article 25, *supra* at 181, calls for close examination of the facts of the case in relation to the policies served by avoidance. One factor of special significance with respect to a partial avoidance is whether the nonconformity of some of the goods interferes with the use or salability of the remainder.[3]

Subsection (2) makes an additional point in stating that avoidance of the entire contract may "only" be based on fundamental breach. Let us suppose that in Example 51A, above, only 90 bales were delivered and the buyer makes a *Nachfrist* demand that the seller deliver missing units within a fixed additional period (Art. 47(1), *supra* at 287) and the seller fails to comply. As we saw at 316, the seller's failure to comply with the notice empowers the buyer to avoid as to the missing units; the buyer need not show that the breach was fundamental (Art. 49(1)(b)). However, the buyer may not base avoidance of the entire contract on the failure to [page 345] comply with the *Nachfrist* notice, but must show that the breach was fundamental as to the entire contract (Arts. 49(1)(a), 51(2)).[4]

To sum up with respect to Buyer's right to avoid the entire contract: Under Article 51(2) Buyer may "declare the contract avoided in its entirety" (all 100 bales) only if the breach was "fundamental" with respect to the contract *as a whole*. Factors that bear on this issue include: (1) A timely offer by Seller to "cure" (Arts. 37, 48) by replacing the 10 defective bales; (2) The feasibility of separate action with respect to the 10 defective bales; (3) If separate avoidance of the 10 bales is not feasible, does acceptance of the entire shipment and redispotion of the 10 defective bales (subject to a claim for damages for the deficiency) (Art. 25) "substantially...deprive [the buyer] of what he is entitled to expect under the contract..."? As has been noted under Article 25, at 185, *supra*, Buyer probably needs the remedy of total avoidance if Seller demands the full price in exchange for the delivery; Buyer's need for avoidance would be reduced if Seller offers to reduce the sum Buyer must pay by an amount adequate to compensate Buyer for the reduced value of the 10 bales and any other loss (Art. 74) resulting from the breach of contract.[page 346]

## Article 52. Early Delivery; Excess Quantity

Paragraph (1) of this article deals with a situation that seldom causes serious difficulty the enthusiastic seller who delivers too soon; paragraph (2) addresses the more complex consequences of delivering an excess quantity.

### Article 52 [1]

"(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."

### ❖319 A. Early Delivery

Applying paragraph (1) may call for interpretation of the contract. If the contract calls for delivery "not later than June 1," a delivery on May 20 would not necessarily occur "before the date fixed." The option given the buyer to "refuse to take delivery" would apply only if the date of delivery was inconsistent with the contract, as where the contract permitted delivery "between May 25 and June 1."

The buyer's option to refuse an early delivery need not be based on a showing of inconvenience or "fundamental breach" (Art. 25). However, the buyer could gain little by an unreasonable refusal to take an early delivery. The option that Article 52(1) gives the buyer is not avoidance of the contract but the right to refuse the early delivery; the seller may retender the goods at a date that is authorized by the contract. (Similarly, under Article 37 the seller may cure defects in delivery "up to" the date for delivery.) [2] [page 347]

### ❖320 B. Excess Quantity

When the market falls after the making of the contract, the seller may be tempted to take advantage of the high contract price and deliver a larger quantity than the contract specified; if the buyer "takes delivery of all or part of the excess quantity, he must pay for it at the *contract rate* (Art. 52(2)), unless the parties agree otherwise (Art. 6). Under paragraph (2) the buyer may "refuse to take delivery of the excess quantity." Questions of interpretation may arise if the seller's tender does not give the buyer the opportunity to accept the quantity specified in the contract and refuse the rest.

*Example 52A. A contract called for the shipment of 1,000 bags of sugar at \$50 per bag, a total of \$50,000. Seller shipped an excess quantity, 1,200 bags. All of the sugar was shipped under a single negotiable bill of lading. Seller (through a correspondent bank) tendered his bill of lading in exchange for payment of a sight draft for \$60,000 the price for 1,200 bags.*

Under these circumstances the seller's demand for cash outlay of more than that called for by the contract would probably be a "fundamental breach." Payment of \$60,000 followed by a rejection of the 200 excess bags and a claim for the refund of 10,000 may subject the buyer to hazards with respect to the seller's financial responsibility and the burdens and delays of litigation. See Art. 25, *supra* at ❖181.[3] On the other hand, the buyer may be obliged to accept the tender when the excess in quantity is trivial or is consistent with the practices established by the parties or usage (Art. 9), or when the seller does not demand full payment in exchange for delivery.

Of course, parties who are acting in good faith can normally make an arrangement that would meet the needs of both. The seller could wire authorization for reduction in the draft or for delivery to an intermediary (*e.g.*, a sugar dealer at the point of destination) who, after satisfying the bank's interest in the draft, could take delivery of the shipment and permit the buyer to take the agreed quantity in exchange for the appropriate payment. A seller's refusal to make a reasonable arrangement would give the buyer reason for concern about a prompt refund and would be an added reason supporting rejection of the entire shipment.[page 348]

## CHAPTER III.

### OBLIGATIONS OF THE BUYER (Articles 53❖65)

#### Introduction to Chapter III

❖**321** The structure of Chapter III is similar to that of the preceding chapter on Obligations of the Seller. Two sections state the buyer's duties: to pay the price (Sec. I, Arts. 53❖59) and to take delivery (Sec. II, Art. 60). The final section defines the remedies that are available to the seller when the buyer fails to perform these duties (Sec. III, Arts. 61❖65). These remedies given the seller (like those given the buyer (Arts. 45❖52) in Chapter II) are supplemented by general rules on remedies in Chapter V (Arts. 71❖88).

The buyer's obligations are as vital as those of the seller but are less complex; Chapter III is shorter than Chapter II but poses some unique and challenging problems. See generally [Tallon, \*Parker Collog. Ch. 7\*](#); [Sevón, \*Dubrovnik Lectures ch. 6\*](#); [Maskow, \*B-B Commentary Ch. 3\*](#); Niggerman, 1 Int. Bus. L. J. 27 (1988).**[page 349]**

## Article 53. Summary of Buyer's Obligations

❖**322** Chapter II opened with a brief summary of the seller's obligations. The present chapter opens with a similar summary of the buyer's obligations.

### Article 53

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

Article 53, like Article 30, emphasizes the role of the contract in defining the parties' obligations a point that was discussed under Article 30 at ❖[206](#) and need not be repeated here.**[page 350]**

## Section I. Payment of the Price (Articles 54❖59)

### Article 54. Enabling Steps

❖**323** The Convention at many points responds to the fact that consummating an international sale calls for cooperation; each party must take steps that are related to corresponding steps by the other.[\[1\]](#) The present article reflects the importance of preliminary steps by the buyer that are necessary for timely payment of the price, such as arranging for the issuance of a letter of credit and applying for governmental authorization to transmit funds to the seller.

### Article 54 [\[2\]](#)

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

The above steps are a part of the buyer's "obligation to pay the price." This language is important. Under Article 63(1), *infra* at ❖[350](#), the seller "may fix an additional period of time of reasonable length for performance by the buyer of *his obligations*" the seller's corollary of the buyer's *Nachfrist* notice (Art. 47(1), *supra* at ❖[288](#)). Under Article 64(1)(b), *infra* at ❖[353](#), if the buyer does not "perform his obligation to pay the price" within the additional period fixed by the seller's notice the seller may declare the contract avoided. Consequently, if the seller gives the buyer an appropriate notice providing a final additional period for taking one of the required steps for price payment such as obtaining the issuance of a letter of credit by a specified date (Art. 54), avoidance by **[page 351]** the seller need not be based on proof that the buyer's failure to comply is a "fundamental breach" (Arts. 25 and 64 (1)(a)).

In addition, the failure to take one of the required steps "to enable payment to be made" (Art. 54) itself constitutes a breach of contract (Arts. 53 and 54). If the seller can show that this breach is "fundamental" he may

declare the contract avoided (Arts. 25 and 64(1)(a)) without first giving a *Nachfrist* notice fixing "an additional period of time." [3]

Article 71, *infra* at ¶385, authorizes a party under some circumstances to suspend performance if "it becomes apparent that the other party *will not* perform a substantial part of his obligations." This authorization applies even when the other party has not yet committed a breach of contract; consequently the grounds for suspension are circumscribed. (See the discussion under Art. 71, *infra* at ¶385.) Under Article 71, "a serious deficiency" in the buyer's "ability to perform" may, in some circumstances, authorize the seller to "suspend" his own performance. In contrast, as we have seen, the buyer's failure to take one of the steps required by Article 54 is a *breach*; the seller need not rely on the "suspension" provisions of Article 71 and may employ the remedies provided for breach of contract—the *Nachfrist*-avoidance remedy (Arts. 63(1) and 64(1)(b)) and avoidance for fundamental breach (Arts. 25 and 64(1)(a)). These remedies respond to the expenses a seller may need to incur in preparation for delivery (e.g., producing, procuring or packing the goods) expenses that, as a practical matter, the seller may not be able to recoup or recover when the buyer is derelict in making arrangements for payment.

*Decision: Steps to Assure Payment.* RUSS. FED. [Arb., Trib. of Internat. Comm., 123/1992, 17 October 1995](#). S delivered equipment to B, who failed to pay because of bank's lack of convertible currency. Held: B was obligated to pay since, *inter alia*, under Art. 54 B should have taken measures to assure payment. CLOUT 142, UNILEX D. 1995 ¶28.1. (See also cases under Arts. 64(1)(b), 71, 72, and 73: B's failure to provide security for payment, by bank guarantee or letter of credit, and Art. 79 (claims for excuse because of lack of convertible currency). See: Schlechtriem, *Com.* (1998) 456 ¶459 (Hager). [page 352]

## Article 55. Open-Price Contracts

### ¶324 A. Interplay of Rules on Formation and on Price-Determination

We have already considered open-price contracts in examining the criteria for an offer stated in Article 14; there we met conflicting views over whether the parties may make a contract without determining the price. At the Diplomatic Conference, the final decisions on this issue involved both Article 14 and Article 55. For this reason, both Articles were considered in detail in connection with Article 14, *supra* at ¶¶134 ¶137.6; that discussion is a necessary part of the present examination of Article 55.

The relevant provisions are as follows:

#### 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.

[The full text of Article 14, including paragraph (2), is set forth *supra* under Article 14 at ¶133.]

#### Article 55 [1]

"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." [page 353]

### ¶325 B. Proposals and Agreements that do not State the Price

In examining the relationship between Articles 14(1) and 55 we need to recall the central points of the discussion of Article 14(1), at [132.1](#), [133](#) and [137.4](#), *supra*. That discussion is summarized under headings (1) and (2), which follow.

### ❖325.1 (1) *Evidence of Formation Limited to Two Communications*

The Introduction to Part II ❖Formation ([132.1](#) *supra*) noted that the Convention's rules on "offer" and "acceptance" are addressed to situations in which the only relevant facts are two communications: one that may (or may not) be an "offer" and a reply that may (or may not) be an "acceptance". While situations with this limited setting are not typical of contract-formation in international trade the offer-acceptance rules are useful; serious problems develop only if one leaps to the conclusion that no contract is formed if an "offer" and "acceptance" cannot be isolated from a flow of communications that mature into agreement, or if the parties' decision to make a contract becomes clear only as a result of conduct such as the shipment of goods and their acceptance.

The discussion ([170](#), *supra*) of Article 19 had to face a similar issue: Delivery and acceptance of goods often follow the exchange of forms that include material inconsistencies; after the transaction has been consummated the question is not "Was there a contract?" but "What were its *terms*?" On the other hand, when the only basis for finding a contract is the exchange of communications, the rules on contract formation are (and should be) strict. The following example provides one of many possible illustrations.

*Example 55A. On June 1, Buyer telexed Seller, "Can you ship me 1,000 bales of No. 1 Cotton?" Seller replied, "Accept your offer. Cotton at \$110 per bale will be shipped July 1". Buyer responded, "My telex was only an inquiry: Cannot agree to your terms". Seller answered, "Accepted your offer and will hold you to the contract."*

The parties are not bound by contract. Under Article 14(1) Buyer's "proposal" may not be construed as an "offer": it was not "sufficiently definite" because it did not "expressly or implicitly" fix or make "provision for determining...the price".

The reasons for this strict rule for construing proposals were explored in discussing Article 14 and Example 14A, [137.4](#) *supra*. [page 354]

### ❖325.2 (2) *Article 14(1) as Rule of Contract Validity*

Is the provision on price in Article 14(1) a rule for the construction of "proposals" or is it a rule of validity that nullifies an agreement in which the parties show that they intend to be bound? Reasons for the former conclusion were developed in discussing Article 14 at [137.5](#), *supra*. This question of validity *under Article 14* (unlike the question of validity *under domestic law* to be discussed next) is of great importance; at stake is the freedom to contract in all international sales governed by Part II of the Convention; also at stake is the applicability of the uniform substantive rules of Part III. The dimensions of the problem were explored in greater detail under Article 14 at [137.5](#) and [137.6](#).

### ❖325.3 (3) *Article 55 and Domestic Rules on "Validity"*

We turn now from Article 14 to Article 55 (quoted at [324](#)) and, more particularly, to the opening phrase: "When a contract has been *validly* concluded..."

This language emerged during UNCITRAL's 1977 review of the Working Group's "Sales" Draft (VIII YB 48-49, *Docy. Hist.* 341-342) and responded to concerns of some delegates that the Convention should not disturb the rule of their domestic law that provision for the price in an agreement was a requisite for a valid contract.<sup>[2]</sup> This concern was aggravated by the fact that the draft then provided that, in the absence of agreement, the buyer must pay "the price generally charged by the seller", a provision that could be abused by the seller.<sup>[3]</sup> This view persisted and, at [page 355] the Diplomatic Conference the reference to "the price charged by the seller" was replaced by "the price *generally* charged."<sup>[4]</sup>

A second aspect of this 1977 review was the addition of the reference to "validity" to the opening phrase of Article 55. The legislative history shows that this amendment was designed (in the words of the Commission's decision quoted more fully in note 2, *supra*) to restrict the scope of the article "to agreements that were *valid by the applicable law*" i.e. domestic law applicable under rules of private international law. See Article 14, *supra*, at ¶137.6.

This departure from uniformity is unfortunate but is of acceptable proportions. The rule of "validity" is rejected by the (U.K.) Sale of Goods Act (the pattern for most of the common-law world), by the (U.S.A.) Uniform Commercial Code, and also by many code systems that on this point do not follow French law.<sup>[5]</sup> The practical consequence of the Convention's concession to domestic law is that, in making agreements with parties with places of business in States that retain the strict "validity" rule, the parties must exercise no less (and no more) care than formerly to comply with this feature of domestic law. (The serious consequences, including total loss of protection under the Convention, were analyzed under Article 14, *supra*, at ¶137.7.)

As we have seen, some domestic "validity" rules responded to concern that, in the absence of a contract provision, the seller would set the price. In view of the deletion of the reference in the UNCITRAL draft to "the price generally charged by the *seller*..." in favor of the reference in Article 55 to "the price *generally* charged",<sup>[6]</sup> some domestic systems may wish to consider whether their traditional rule has become unnecessary for international trade. See *e.g.*, Fortier, *supra* n.3 at 387-388.

Some delegates from Eastern European countries with planned economies also noted that a contract that did not state the price would be inconsistent with the formality of their foreign trade agreements. (This outlook had also generated objections to Article 11 which rejected domestic formal requirements; to meet this concern Articles 12 and 96 authorized reservations to Article 11. The "validity" exception in Article 55 seems functionally similar to the provision allowing a reservation to Article 11.) In any event, these formal foreign trade agreements are not [page 356] likely to fail to provide for the price, and will avoid the question posed by Articles 14 and 55.<sup>[7]</sup>

*Definiteness of Price; Validity.* Decisions on these issues were collected in the combined consideration of Articles 14 and 55 at ¶¶137.4-137.8. Attention was paid to redrafting CISG at the Diplomatic Conference to establish rules of validity concerning definiteness of the price, with special reference to French law. Against this background, the following decision, although not definitive, may be of interest.

*Decision:* FRANCE, [CA \(Paris\), 22 April 1992](#), affirmed by the [Cour de Cassation \(Sup. Ct.\) 4 January 1995, S. Faube F.FDIS v. Fujitsu](#). A French buyer ordered electric components from a German seller. The parties exchanged messages on price, subject to later increases or decreases in market price. S shipped goods which B rejected on the ground that a fixed price had not been determined. Both the Court of Appeal and the Cour de Cassation rejected this ground for rejection, and required B to pay for the goods. UNILEX D.1992-9.1, D.1995-1, CLOUT 158.

*Comments:* Adami, F., "Open Price", 2 Int. Bus. L.J. 103-120 (1993); [Amato, P., 13 JLC 1-29 \(1993\)](#); Murray, D.E., "Open Price": Worldwide Setting, 89 Comp. L. J. 491-800 (1984); Schlechtriem, Com. (1998) 460-462 (Hager). See also references and cases at Article 14.<sup>[page 357]</sup>

## Article 56. Net Weight

### ¶328 Article 56 [1]

"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."

This Article, inherited from ULIS, is unimportant, but on occasion may be useful to help determine the price in the absence of evidence as to the practices of the parties or usage of trade (Art. 9). The express statement that the rule applies only "in case of doubt" emphasized its subordinate role.<sup>[2]</sup> [page 358]



## Article 57. Place of Payment

❖329 This is the first of three articles addressed to the manner of payment. The modalities for payment include *place* (the present Article) and *time* (Arts. 58 & 59).

### ❖330 A. Significance of Place for Payment

In many countries it is impossible to export funds without a license; payment made in such countries may be of little value to a seller from a different country. By the same token, buyers in "soft currency" countries may find it difficult to pay in "hard currency" countries. The parties will usually be keenly aware of this problem so that the contract will specify the place for payment and the currency of payment; the Convention, of course, gives effect to the parties' agreement, which includes the practices they have established (Arts. 6, 9(1)). When the contract fails to provide an answer the present article fills the gap.

### ❖331 B. The Convention; Policy Considerations

#### Article 57 [1]

"(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." [page 359]

Paragraph (1)(a) points to the "seller's place of business," [2] a choice that responds to the fact that in some circumstances payment at the buyer's place of business would be of little value to the seller. The buyer is entitled to goods that are usable (Art. 35(2)(a)); the present Article gives the seller similar protection with respect to the price. [3] The rule that, when the parties have not agreed otherwise, the buyer must pay at the seller's place of business is consistent with standard contract practices applicable to international trade. [4]

Decisions: Applications of Art. 57(1)(a). AUSTRIA, [OGH \(Sup. Ct.\), 2 Ob 547/93, 10 November 1994](#). In the absence of agreement, the price was to be paid at seller's place of business. CLOUT 106, UNILEX D.1994-29. See: Schlechtriem, Com. (1998) 464-469.

*Application to Overcharge*. FR. [CA. Grenoble, 23 October 1996, SCEA Gaec...v. Teso](#). A French buyer of industrial equipment sued in France to recover an overcharge paid to a German seller. Although CISG Art. 57(1)(a) called for payment at the seller's place of business, the *underlying principle* was that payment should be made at the *creditor's* place of business, in this case the place of business of the French buyer. UNILEX D. 1996-10. (On jurisdiction for suit, see ❖332, *infra*.) See: Schlechtriem, Com. (1998) 466-467 and notes 21-27.

Under Article 57, the only exception from the norm calling for payment at the seller's place of business is that of subparagraph (1)(b). This exception applies only "if the payment *is to be made* against the handing [page 360] over of the goods or of documents." If, pursuant to the contract, the seller ships the goods to the buyer and in the buyer's country tenders documents controlling the goods, this contractual arrangement overrides the general rule of paragraph (1)(a) that the buyer must pay "at the seller's place of business." Accord: [Maskow, B & B Commentary 413](#).

Article 58, *infra*, in defining the time for payment, provides in paragraph (2) that "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." As we shall see, this provision permits but does not require the seller to arrange for the payment only after arrival of the goods. See Art. 58, *infra* at [336](#) [337](#).

### **331.1 (1) Delivery and Payment Procedures**

Whether a transport document (bill of lading, waybill or the like) controls disposition of the goods depends on its terms: Does the carrier contract to deliver to the seller, to the order of the seller or to the buyer ([336](#), *infra*)? Similar principles govern delivery of goods by handing over a warehouse receipt or similar document evidencing possession by a third party.

When the contract does not specify the place (or other arrangements) for payment, the seller's expectations will usually be indicated by the invoice that the seller sends to the buyer at the time the seller ships the goods; in many cases the buyer's subsequent communications or conduct will show its assent to this term (Arts. 8(3), 18, 29). If there is no indication of the buyer's assent the invoice will *authorize* the buyer to pay in accordance with the terms of the invoice but will not *require* the buyer to pay in a manner inconsistent with the contract or the provisions of the Convention. See [Sevón, Dubrovnik Lectures 212](#).

When payment is to be made by a letter of credit the contract may (and the letter of credit almost certainly will) refer to the I.C.C. Uniform Customs and Practice for Documentary Credits (I.C.C. Brochure No. 400, 1984; where payment is to be made through banks the contract may refer to the I.C.C. Uniform Rules for Collections. See [Maskow, B-B Commentary 416](#) [418](#); [Schmitthoff's Essays 449](#) [467](#). Note: UNCITRAL Model Law on International Credit Transfers (1992) and UNCITRAL Model Law on Electronic Commerce (1996). Cf. (U.S.A.) Uniform Commercial Code, Article 4A, Funds Transfers (1989).[page 361]

### **332 (2) The Convention and Jurisdiction for Suit**

Concern has been expressed lest the Convention's rule calling for payment at the seller's place of business might, under some procedural systems, also determine the place where suit must be brought a result that might be impractical since the seller usually needs to sue for the price at the buyer's place of business.[5]

Article 4 states that (apart from formation of the contract) the Convention "governs only...the rights and obligations of the seller and the buyer" under the sales contract. This language hardly supports the extension of the Convention to procedural and jurisdictional matters, and the legislative history gave no indication that the Convention was designed to deal with these issues.[6] In United States law there is no necessary connection between the place for payment and the place for suit. Construing the Convention to produce this result would broaden the Convention's scope beyond that provided in Article 4, [61](#) [70](#), *supra*; inferring a rule on jurisdiction in some Contracting States would be inconsistent with Article 7(1) which calls for interpretation of the Convention "to promote uniformity in its application."

As was noted at Article 31, *supra*, jurisdiction for suit may be controlled by important Conventions, such as the EC Convention on Jurisdiction...(Brussels, 1968) and the 1988 Lugano Convention on Jurisdiction and Enforcement of Judgments. An example of the latter: SWITZ. [SBG \(Sup. Ct.\), 18 January 1996](#). A Swiss seller sued an Italian buyer to recover the price of an antipollution device. To determine its jurisdiction, the court invoked CISG Art. 57(1)(a) (payment at S's place of business) rather than Art. 57(1)(b) (payment against delivery of goods or documents). This decision supported jurisdiction in S's country (Switzerland) under the 1988 Lugano Convention. UNILEX D. 1996 [0.1](#), CLOUT 194.[page 362]

## **Article 58. Time for Payment; Inspection of the Goods**

### **333 A. Questions Concerning Payment**

Article 58 addressees these questions: When must the buyer pay for the goods? Must he pay before he receives the goods? Is the seller obliged to surrender the goods before he is paid? How may the goods be exchanged for the price when (as is usual in international sales) the contract calls for carriage of the goods? May the seller require the buyer to pay before the buyer has an opportunity to examine the goods?

Procedures for payment are of concern to the parties and usually are dealt with in the contract; Article 58 provides answers only when the contract is silent (Art. 6). As we shall see, Article 58 is designed to minimize risks for both parties—risk to the seller from delivery before payment and risk to the buyer from payment for defective goods.

## ◆ 334 B. The Convention

### Article 58 [1]

"(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 [page 363]payment agreed upon by the parties are inconsistent with his having such an opportunity."

### ◆ 335 (1) *Exchange of Goods for Price*

Paragraph (1) makes two points: (i) The buyer is not obliged to pay the price until the seller places the goods at the buyer's disposal; (ii) The seller is not obliged to hand over the goods until the buyer pays the price. In short, goods are to be exchanged for the price.[2]

*Decision: Time for Payment.* (1) SWITZ. [Tr. C. Valais, M. Graniti v. Nichini SA Pierres, 20 December 1994](#). S delivered blocks of stone to B. B did not pay; S sued for the price. Held: Under CISG 58(1) and 59, the price was due when S placed the goods "at the buyer's disposal". UNILEX D. 1994◆29.2. (2) Cf. SWITZ. [Kan. St. Gallen, 3 ZK 96-145, 12 August 1997](#). CLOUT 216, See: Schlechtriem, Com. (1998) 471◆475 (Hager).

### ◆ 336 (2) *Contracts Involving Carriage*

Paragraph (2) of Article 58 builds on the principle, stated in paragraph (1), that when the contract is silent there is to be a concurrent exchange of goods for the price. When (as in most international sales) the contract calls for carriage of the goods, paragraph (2) authorizes the seller to deliver the goods to the carrier in exchange for a document "controlling [the] disposition" of the goods—usually a bill of lading providing that the goods will only be delivered in exchange for the surrender of the document.[3] Alternatively, under streamlined delivery systems, the carrier (e.g., an air carrier) may collect the price when the buyer receives the goods. (Electronic processes are speeding the transmission of funds and documents. See ◆331.1, *supra*, and note 3, below.)

### ◆ 337 (a) *The Place for the Documentary Exchange*

Exchanging the goods for the price brings two provisions into confluence: (i) The present [page 364]Article dealing with the *time* for payment and (ii) Article 57, *supra* at ◆329, on the *place* for payment. Under Article 57(1), unless the contract provides otherwise, the buyer must pay the price "(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." The contract will usually state the place for the documentary exchange;

when the contract is silent we face a question of interpretation that will require us to bring into focus several provisions of the Convention.

*Example 58A. Seller in State A and Buyer in State B contracted for Seller to ship specified goods to Buyer. The contract said nothing about the place or other conditions for payment. Where and under what circumstances should Seller surrender the goods and Buyer pay the price?*

It may help to recall the following points: (1) Seller may require the buyer to pay at the seller's place of business (Art. 57(1)(a)); (2) Seller may not require Buyer to pay the price before he receives the goods (Art. 58(1)); (3) Buyer may not require surrender of the goods prior to payment (Art. 58(1)); (4) Seller may ship the goods and hold a shipping document that controls delivery of the goods until the buyer pays the price (Art. 58(2); cf. (Art. 57(1)(b))).

Certainly Seller may elect to tender the documents for payment in State B where Buyer has his place of business. Buyer would not object: The time for payment would be delayed; payment in Buyer's country would be more convenient and would minimize problems with exchange controls. Moreover, it would be easier for Buyer to inspect the goods before it pays.

Such an arrangement is common where the seller and the buyer are located in the same State and the cost of shipment is not unusually high.<sup>[4]</sup> But when the seller delivers in another State following extended and expensive transport the seller runs substantial risk. If the buyer fails to pay, it may be difficult for the seller to redispense of the goods; if payment is made, currency restrictions may block removal of the funds. These considerations have led to the common arrangement in which the seller will not deliver the goods to the carrier until the buyer has arranged for the issuance (or confirmation) of a letter of credit by a bank that is near the seller; the seller is then assured of payment by a local bank when the seller presents the documents specified in the letter of credit.<sup>[5]</sup> [page 365]

In Example 58A, may Seller require Buyer to arrange for the issuance (or confirmation) of a letter of credit by a bank near Seller, so that the documentary exchange may take place at that point? The Convention does not refer to the use of letters of credit. However, as we have seen, Article 57(1)(a) provides that the buyer must pay the price to the seller "at the seller's place of business." Arranging for a documentary exchange in the seller's locale would usually be the cheapest and safest way for the buyer to exchange funds for the goods in the vicinity of the seller's place of business (Art. 57(1)(a)).<sup>[6]</sup> However, special arrangements may be necessary when it is important for the buyer to examine the goods before he pays; these will be considered under (3), below.

### ♦338 (3) *Examination Before Payment*

#### (a) *The Place for the Examination*

Paragraph (3) states the general rule that the buyer "is not bound to pay the price until he has had an opportunity to examine the goods." When the transaction calls for the buyer to send for the goods (cf. a sale "ex works") or when the seller delivers the goods in its own trucks, inspection before payment may be quite feasible. When the seller dispatches the goods by carrier and provides for a documentary exchange at destination, the seller may delay the presentation of the documents until after the goods arrived and are unloaded, and may instruct the carrier to allow the buyer to inspect the goods before the buyer has received the bill of lading. However, for reasons that have been outlined above at ♦337, it may be risky for the seller to defer the time for payment until the goods reach the buyer. The Convention does not require the seller to run these risks. Article 57(1)(a), *supra*, regulates the place for payment, and states that the buyer must pay the price to the seller "(a) at the seller's place of business."<sup>[7]</sup> [page 366]

When the seller and the buyer are far from each other, distance enhances the practical problems of exchanging goods for price. The seller faces greater hazards if the buyer fails to pay after the goods arrive, while the buyer faces added inconvenience if he must inspect the goods before they are shipped.<sup>[8]</sup> Is the convenience to the buyer so great that it denies him the "opportunity to examine the goods" before payment? If so, it might be argued that Article 58(3), in allowing the buyer to defer payment until it has an opportunity to inspect the goods,

modifies the basic rule on the place for payment stated in Article 57(1)(a). However, a buyer who is concerned that the seller might ship defective goods can usually arrange for a commercial inspection agency to act on its behalf in inspecting the goods before they are loaded on the carrier—a step that normally is less onerous than for the seller to dispose of goods that the buyer has wrongfully rejected after they have arrived in his country. These policies have been recognized and reconciled by arrangements that the documents the seller must tender for payment by letter of credit shall include a certificate of quality by an independent inspection agency.<sup>[9]</sup> As an alternative, the buyer could reasonably demand the opportunity, personally or through an agent, to inspect the goods before they are shipped.

In short, it is possible to satisfy the standards of Article 58 for a mutually safe exchange of the goods and the price in a manner that is consistent with the rule of Article 57(1)(a) on the place for payment.

### ❖339 (b) *Agreed Procedures Inconsistent with Inspection*

Under Article 58(3) the buyer has no right to examine the goods before he pays when "the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."

*Example 58B. A contract called for Seller to ship goods to Buyer on June 1 on the "S.S. North Star" which (as the parties knew) was scheduled to dock at Buyer's city on or about July 15. The contract further provided that on June 10 Seller would present a sight draft, with accompanying bill of lading, to Buyer for the full price.*

These agreed terms are inconsistent with inspection before payment. The crucial question is the provision in the contract. If the contract has no such provision bearing on the time for payment, Seller's presentation of [page 367] the documents for payment while the goods were at sea would be inconsistent with Buyer's right of inspection conferred by Art. 58(3). If the Seller insisted on such "blind" payment, Buyer could reject the tender and avoid the contract. (See Art. 25, *supra* at ❖185.)

### ❖339.1 (c) *Inspection Rules*

One must not confuse two very different rules on inspection of the goods. Article 38 (❖❖249❖253, *supra*) establishes a *duty* to inspect: "(1) The buyer *must* examine the goods...within as short a period as is practicable..."❖a preface to Article 39 whereby a buyer may lose the right to rely on lack of conformity of the goods by failure to notify the seller within a "reasonable time". (The seller's need for notice that prompted this requirement is discussed at ❖255, *supra*.) In sharp contrast, Article 58(3) gives the buyer a *privilege* to inspect before payment❖a privilege that the buyer may forego without violating any obligation to the seller. True, the extent of any opportunity to inspect is relevant to the time for notifying the seller pursuant to Article 39 but inspecting in connection with payment may not provide adequate opportunity to discover defects in the goods (Arts. 38, 39). See Maskow, *B-B Commentary* 425.

### ❖339.2 (d) *Step-by-Step Performance*

The concurrent exchange of the goods for the price (the central theme of Article 58) can best be illustrated in the setting of a typical international sale involving payment by letter of credit.

The numerous steps in the making and performance of such a transaction have been summarized elsewhere (❖132.1, *supra*).<sup>[10]</sup> For simplicity let us consider only these four steps: (1) Following preliminary correspondence the seller transmits to the buyer a *pro forma* invoice that, *inter alia*, describes the goods, the quantity, the price and the date when the goods will be available for shipment. (2) The buyer, through its local bank ("Firstbank") arranges for the issuance of a letter of credit for the price and its confirmation by a bank near the seller ("Secondbank"). (3) The seller ships the goods to the buyer and obtains various documents including a policy of insurance and a bill of lading that calls for delivery of the goods to the "order of Secondbank". (4) The seller presents documents, including the invoice, policy of insurance and bill of lading, to Secondbank and receives the price.[page 368]



One will note that these steps need to be taken separately and in the above sequence. Step (1) must precede Step (2) since the letter of credit needs to be written in terms of the description of the transaction provided by the *pro forma* invoice. Step (2) must precede Step (3) since the seller needs assurance of payment by the letter of credit before shipping the goods to a foreign destination. Step (3) must precede Step (4) since the seller needs the documents that result from shipment (*e.g.*, the bill of lading) to comply with the conditions for payment prescribed in the letter of credit. In sum, a transaction designed for the exchange of the goods and the price calls for a series of separate steps; the concurrent exchange occurs only at Step (4). (In some transactions additional preliminary steps are required.)

As one turns from the facts of the transaction to legal analysis one notes that at each step a party's duties do not arise until the other party has taken the preceding step. This results simply from the interpretation of the agreement in the light of basic commercial facts; legal rules are available (Arts. 57, 58, 71, 72, 80) but in this concrete setting they speak less eloquently than the internal logic of the parties' plans for delivery and payment.<sup>[11]</sup> Indeed, as we have seen in connection with Article 14, 19 and 55 (137.4, 170, 325.1, *supra*), in routine transactions that lack a formal "Contract of Sale" the parties may not be bound by contract until the final step when goods are exchanged for the price. However, if the parties are bound by contract and one fails to proceed with the agreed steps for performance the other party has a wide range of remedies to require performance (Arts. 46, 62), avoid the contract (Arts. 47, 49, 63, 64) and claim damages (Arts. 45(1), 61(1), 74(77)) remedies that are examined more fully elsewhere in this book.<sup>[page 369]</sup>

## Article 59. Payment Due Without Request

### 340 Article 59 [1]

"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."

This provision was inherited from ULIS 60, which was designed to overturn the rule of some Continental legal systems that a party may not recover damages for delay unless he has given an advance warning or protest directed at delay.<sup>[2]</sup> The purpose of Article 59 is to eliminate unnecessary formalities or delays in payment when the date for payment is "fixed by or determinable from" the contract and the Convention. Implicit in this language is the policy that liability for delay in performance should arise only when the date for performance is fixed or determinable. As we shall see, the Convention's general rules on the obligations of the parties are consistent with this policy.

Article 59 may be applied without difficulty when the seller has delivered the goods on credit; in this case the price will be due on a fixed date and should be remitted by the buyer on that date "without the need for any request or the compliance with any formality on the part of the seller." Normally a delay in payment will not result in damages other than an obligation to pay interest on any "sum that is *in arrears*." See Art. 78, *infra* at 420. In any event, in connection with the delivery the seller will normally send the buyer an invoice that would be understood as a request for payment.

In documentary exchanges, the statement in Article 59 that the buyer must pay without "any request" calls for interpreting Article 58, *supra* at 333. Article 58(1) states that the buyer must pay the price when the seller places the goods "at the buyer's disposal." Before the seller can place the goods at the buyer's "disposal" he must complete a series of operations that may include procurement or production of the goods, packaging (Art. 35(2)(d)) and arrangements for carriage (Art. 32) and <sup>[page 370]</sup> documentation (Art. 58). The contract normally allows the seller to complete these operations within a specified period or prior to a specified date. Only the seller knows when all these steps have been completed; this requires the seller to take the lead. Consequently, the seller does not place the goods "at the buyer's disposal" (Art. 58(1)) until it informs the buyer that the goods are ready. At this point, the buyer will know that it has the next move, and that its duty to pay the price has matured. At this point Article 59 makes it clear that the buyer must pay without any "request or...formality."<sup>[3]</sup>

In a helpful analysis of Article 59, Professor Tallon supports interpreting the Convention so that liability for delay in performance will not arise until the date for performing is fixed or determinable.<sup>[4]</sup> Tallon also raises this interesting point: Article 59 rejects domestic formal demands for payment of the price whereas the French Civil Code, Art. 1139, requires a formal demand (*mise en demeure*) for every kind of obligation. Does this suggest that the Convention preserves such domestic formal requirements for all obligations other than payment of the price?

It seems difficult to reconcile such domestic formalities with Articles 30, 33 and 45 (obligations of the seller) and 53 and 61 (obligations of the buyer). Each set of provisions states that the party "must" perform the duties "required by the contract and this Convention" (Arts. 30, 53), and adds that when a party "fails to perform any of his obligations under the contract or this Convention" the other party "may exercise" the full battery of remedies that the Convention provides for breach (Arts. 45, 61). There is no indication in the legislative history that Article 59 on payment of the price carried a negative implication that domestic formalities in other settings could postpone the obligations and remedies established by the Convention in Articles 30, 53, 45 and 61. (Cf. Arts. 45(3) and 61(3) barring application for a "period of grace".) The draft that became Article 59 attracted little attention in UNCITRAL and the Diplomatic Conference: discussion was limited, on one hand, to suggestions that the provision was unnecessary and, on the other, to comments that it was found in ULIS and might be "useful".<sup>[5]</sup> [page 371]

In sum, Article 59 embodies two principles: (1) Domestic formalities such as *mise en demeure* may not interfere with obligations and remedies established by the Convention. (2) liability for delay must be based on failure to comply with a date or performance that is fixed or determinable. Both principles can be implemented through proper interpretation of the contract and the Convention without subjecting international sales to domestic formalities.[page 372]

## Section II. Taking Delivery (Article 60)

### Article 60. Buyer's Obligation to Take Delivery

♦341 Article 53, in opening this chapter on the obligations of the buyer (♦322), stated that the buyer must "take delivery" of the goods.

#### Article 60 [1]

"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."

#### ♦341.1 A. Supplying and Receiving Goods: Correlative Contractual Obligations

As we have seen (♦210 *supra*) many of the rules of ULIS (1964) turned on an artificial concept (*délivrance*) which defied adequate translation and, because of its complexity, led to unintended and impractical consequences. At an early session UNCITRAL decided to replace this approach with rules that addressed the parties' contractual obligations with respect to the specific problem at hand. For example, Article 31 (♦♦207♦211 *supra*) speaks of the seller's "obligation to deliver" and one will note that Article 60 similarly speaks of the buyer's "obligation to take delivery". We can now examine the application of this contractual approach to the commercial process of supplying and receiving goods.

Sales contracts normally call upon the seller to take the initiative in procuring or manufacturing goods and in placing them at the buyer's disposition (¶340, *supra*). Usually the contract states what the seller should do to make the goods available to the buyer; if not, Article 31 in three detailed [page 373] paragraphs fills the gaps. The brevity of Article 60 results from the fact that the buyer's obligation to take the goods does not arise until the seller makes the goods available.

Under Article 58 (¶339.1, *supra*) we examined contractual arrangements for documentary transfers in which the seller performs its "obligation to deliver" (Art. 31) concurrently with the buyer's obligation to "take delivery". However, in other settings the parties' contractual duties arise at different times. When "the contract of sale involves carriage of the goods" Article 31(a) states that the seller's "obligation to deliver consists...in handing the goods over to the first carrier"; in this setting the buyer's "obligation to take delivery" can not arise until after the goods reach their destination. When the contract does not call for transport the seller's obligation consists (Art. 31(b)) in "placing the goods at the buyer's disposal" at specified places; however, the buyer's obligation to "take over" the goods (Art. 60(a)) need not be performed until the expiration of an agreed or reasonable time to collect the goods (*cf.* Art. 33). Similarly, in these situations risk of loss does not pass to the buyer until (Art. 69(1), ¶¶373-377 *infra*) the buyer actually "takes over" the goods or, at the latest, "from the time the goods are placed at his disposal and he commits a breach of contract by failing to take delivery."

In short, the Convention does not attempt to define an abstract concept of "delivery" (*délivrance*). Instead, Article 60 asks this question: Has the buyer broken his *contractual obligation* to "take over" the goods?

If the answer is Yes, the legal consequences of breach of this and other obligations of the buyer are set forth in Section II (Arts. 61-65; ¶¶344-357, *infra*).

## ¶342 B. Cooperation With the Seller

Paragraph (a) provides yet another instance of the Convention's recognition of the importance of cooperation in carrying out the interlocking steps of an international sales transaction.[2] Action by the buyer that "could reasonably be expected...to enable the seller to make "delivery" might include designation of the precise place to which the seller [page 374] should send the goods, having personnel on hand to receive the goods, making the arrangements for carriage required under trade terms such as *Incoterms* (1990) "F.O.B." (B-3) and "Free Carrier" ("FCA") (B-3), and other aspects of cooperation that are too detailed for listing in the Convention.

Article 60(a)'s statement that the above "enabling" steps are part of the buyer's "obligation to take delivery" broadens the seller's right under Article 64(1)(b) to avoid the contract. The interlocking relationship between these provisions can be seen clearly in the setting of Article 64, *infra* at ¶¶353-356. For now it must suffice to note that if the seller gives the buyer a *Nachfrist* notice (Art. 63(1)) that fixes an additional reasonable period for performing the "enabling" steps described in Article 60(a) and the buyer fails to comply, the seller may avoid the contract based on the buyer's failure to perform this aspect of the buyer's "obligation to take delivery". The significant point is that, by qualifying for avoidance under Article 64(1)(b), the seller need not show that the buyer's breach was "fundamental" (Art. 25).[3]

## ¶343 C. Taking Delivery

The seller's primary interest is to receive the price for the goods (Arts. 54-59, *supra*) but the buyer's obligation to take delivery, expressed in Article 60(b), is not without significance. When the seller makes the contract with the carrier (Art. 32(2)) the seller will be interested in the buyer's prompt removal of the goods from the carrier's possession, for the seller may be liable to the carrier for freight and demurrage if the buyer fails to pay.

Delay in taking over the goods may also have significant consequences when the goods are lost or damaged during the period of delay. See Ch. IV, Arts. 66-70, *infra*. When the contract does not involve carriage, risk normally passes to the buyer when he "takes over the goods" (Art. 69) but the risk may shift when the buyer "commits a breach of contract by *failing to take delivery*." Under the present Article (Art. 60) the buyer's

failure to perform its obligations with respect to "taking over the [page 375] goods" is a breach of contract and thus invokes the above rule making this buyer responsible for casualty to the goods, and also may provide a ground for the seller to avoid the contract (Arts. 63 & 64, *infra* at ¶¶350, 353). However, the buyer's liability for casualty to the goods may be reduced by the seller's responsibility under Article 85 (¶454, *infra*) to take reasonable steps to preserve the goods and, under some circumstances, to sell them for the buyer's account (Art. 88(2) ¶457 *infra*). [page 376]

---

## Section III. Remedies for Breach of Contract by the Buyer (Arts. 61-65)

### Article 61. Remedies Available to Seller

¶344 Section III (Arts. 61-65), stating the seller's remedies for breach by the buyer, follows the same pattern as Section III of the preceding chapter (Arts. 45-52). Both sets of rules are supplemented in Chapter V (Arts. 71-82) by remedial provisions applicable to both parties.

The present section opens with an article that sums up the remedial system and indicates the relationship among the various remedies. (*Cf.* Art. 45, *supra* at ¶275.)

#### Article 61 [1]

"(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."

The analysis of Article 45- the comparable provision in the preceding chapter - is applicable here; it should suffice to refer to the discussion under Article 45, *supra* at ¶277, of the extent to which the choice of one remedy excludes others. [page 377]

---

### Article 62. Seller's Right to Compel Performance

#### ¶345 A. Factual Settings

The buyer's duty (or "obligation") to pay the price was defined in Articles 53 to 59. This duty may, of course, be broken after the buyer receives the goods but the more difficult questions concern the seller's remedy to force the buyer to pay the price when the buyer has not received the goods and claims that it is not obliged to proceed with the contract.

#### Article 62 [1]

"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."

Article 62 states that the seller "may *require* the buyer to pay the price [and] take delivery." This remedy given to the seller is similar to the buyer's remedy under Article 46 to "*require* performance by the seller." Much of the discussion under Article 46 (♦♦279♦♦286, *supra*) will be relevant here although the commercial settings are different.

When the buyer has received and retains the goods, enforcing the buyer's obligation to pay the price does not create the practical problems that arise from attempts to force an unwilling party to deliver goods.[2] When the buyer has accepted the goods the seller's legal remedy to recover the price normally resembles an action to collect a debt implemented by execution on the debtor's property. In addition, in some legal systems (other than common law) the failure by a buyer to pay may give the seller the right to recover the goods. This remedy is granted by Article 81(2), ♦444, *infra*, but may be ineffective when the rights of the buyer's creditors intervene.[3] [page 378]

When a buyer refuses to receive the goods the seller's action under Article 62 to require the buyer "to pay the price" and "take delivery" resembles a buyer's action under Article 46 to require the seller to deliver goods but has this difference of substance: the seller is not seeking possession of a commodity (raw materials, machinery) that the seller needs in its current operations. Nonetheless, both are remedies to "require" performance and hence are subject to the concession to domestic law provided by Article 28 (♦♦191♦♦199). The impact of Article 28 will be considered at ♦348, *infra*.

## ♦346 B. Domestic Rules

The (U.S.A.) Uniform Commercial Code states:

### *Section 2♦709 Action for the Price*

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

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

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

[NB: The Sales Article (2A) of the UCC is in a late stage of revision.]

The most common situation qualifying for an action for the price falls under UCC 2♦709(1)(a): the buyer has "accepted" the goods, usually after their receipt and inspection (UCC 2♦606). Price recovery in this setting is of the first type just mentioned (♦345)♦a remedy that resembles the collection of a debt rather than a remedy that compels the consummation of a transaction including receipt of the goods.

This second type of remedy is provided by UCC 2♦709(1)(b) when the seller is "unable after reasonable efforts to resell [the goods] at a reasonable price..."♦a rule that reflects the principle that it is usually more efficient for a seller in possession of the goods to resell the goods and claim for any resulting loss than to use the processes of the law to force goods on an unwilling buyer. However, the second type of action for the price would be available when the seller has manufactured goods to the buyer's special specifications (*White & Summers* ♦7♦5, pp. 298♦299) or, [page 379] especially in international sales, when a buyer wrongfully rejects goods after their arrival at a distant port where the seller lacks facilities for sale.[4]

The seller may also have recourse to the "principles of law and *equity*" (UCC 1♦103); this latter body of remedial law authorizes an equity decree for specific performance when recovery of damages (the usual remedy "at law") is not adequate. Assume that a buyer repudiates a long-term contract for purchase of the seller's output or for supplying the buyer's requirements; in these settings a claim for damages may not provide an



adequate remedy because of difficulty in assessing the seller's loss in future months or years.<sup>[5]</sup> One will note that the grounds for compelling a buyer to receive and pay for goods are not as broad as the seller's right under UCC 2-716 to compel the seller to deliver the goods <sup>[6]</sup> a difference that reflects a judgment that a buyer's need to obtain goods not readily obtainable elsewhere is greater than a seller's need to force goods on an unwilling buyer.

As was noted under Articles 28 and 46, *supra*, in civil law legal theory one may "require" the performance of obligations. However, as Professor Treitel observes, courts seldom physically coerce the performance of obligations, and the principle that performance may be "required" is subject to exceptions that in practice "are far more important than the general rule." Indeed, when a buyer refuses to accept goods held by the seller, the "enforcement" of the buyer's obligation to pay the price may consist of the resale of the goods for the buyer's account, supplemented by an action to recover any deficiency action that hardly "requires" the buyer to "take delivery" and "pay the price."<sup>[7]</sup> Under Article 75 of the Convention, if the seller avoids the contract (as he may and normally would do when the buyer refuses to accept and pay for the goods) the seller may resell the goods and "recover the difference between the contract price and the price in the substitute transaction" plus any additional damages he has suffered. A similar remedy is provided in (U.S.A.) UCC [page 380] 2-706 as an alternative means for measuring the seller's damages and not as a device to "require" the buyer to pay the price.

### 347 C. Compulsory Price Payment Under the Convention

When the buyer has received and accepted the goods, Article 62 of the Convention will apply with full force: "The seller may require the buyer to pay the price..." But when the seller is in possession of the goods, other provisions of the Convention may bear on the question whether the seller may force the buyer to "take delivery" and "pay the price."

#### 348 (1) *Applicability of Limits of Domestic Law: Article 28*

Under Article 28 (<sup>192</sup><sup>199</sup>, *supra*) a court "is not bound to enter a judgement for specific performance unless the court would do so under its own law". At <sup>281</sup> we examined the impact of Article 28 on the buyer's right under Article 46 to "require performance by the seller"; we now face the impact of Article 28 on Article 62.

Article 28, above, is written in terms of whether a court is "bound to enter a judgement of *specific performance*".

Legal systems that stem from English law do not refer to an action to recover the full price from the buyer as "specific performance"; this terminology is normally reserved for orders that resemble the decrees that were traditionally issued by courts of equity decrees that could be enforced by various penalties, including imprisonment for "contempt of court." Requiring a seller to deliver goods (Art. 46) would be described as requiring "specific performance".<sup>[8]</sup>

When the buyer has not received or accepted the goods and does not wish to receive or accept them, recovering the full price is functionally the equivalent of compelling the buyer to consummate the transaction; this is the approach of the Convention. As was noted above, the statement in Art. 62 that the seller "may *require* the buyer to pay the price [and] take delivery" parallels the statement in Article 46 that the buyer may "*require* [page 381] performance by the seller." Both remedies are subject to the concession to domestic law set forth in Article 28: Although, under provisions of the Convention, "one party is entitled to *require performance*" by the other, the restrictions on this remedy under the domestic law of the *forum* will apply. See the discussion of Art. 28 at <sup>194</sup><sup>195</sup>.

The point is important: When a seller seeks to force an unwilling buyer to receive goods by an action under Art. 62 to "require the buyer to pay the price," the limitations on this remedy under the domestic law of the *forum* may be decisive. And, as careful students of the civil law have shown, these limitations are not confined to the common law. As has just been noted, jurists of common law persuasion do not think of an action to recover the price as comparable to an action to require delivery of the goods. But one cannot be tied to local terminology in

construing the Convention. See Art. 7, *supra* at [§87](#). The significance of the parallel language of Articles 46 and 62, just mentioned, is confirmed by the Convention's structure and its legislative history, discussed in a note." [\[9\]](#) In all legal systems an action under Article 62 to "require the buyer to pay the price" is subject to the concession to the domestic rules of the forum provided by Article 28.

### [§349](#) (2) *Other Limiting Provisions*

The discussion of Article 28, *supra* at [§193](#), and Article 46, *supra* at [§285](#), referred to other provisions of the Convention that restrict coercion [\[page 382\]](#) of performance. Two of these, Articles 85 and [88] ([§§454, 457, infra](#)) have special relevance if a seller, who is in possession of goods, should seek to hold the goods indefinitely at the buyer's risk and expense. Under Article 85, "If the buyer is in delay in taking delivery" (which would include delay after a refusal to accept the goods) a seller who has possession or control of the goods "must take such steps as are reasonable in the circumstances to preserve them." This leads into an important provision in Article 88(2): when such goods "are subject to loss or rapid deterioration or their preservation would involve unreasonable expense" the seller "must take reasonable measures to *sell them*." It would seem that even when "deterioration" would not be "rapid," prolonged retention would inevitably involve "loss" through wasteful storage costs.

For reasons suggested in discussing the buyer's remedy to "require performance", Article 46, *supra* at [§286](#), sellers will not frequently seek to use the broad language of Article 62 to force goods on an unwilling buyer. Compelling payment calls for holding the goods until the processes of the law finally force the buyer to accept and pay for the goods. Mounting storage costs and dangers of obsolescence and loss make this a risky remedy. Only in legal theory are legal "rights" fully realized; when litigation to force the buyer to accept and pay finally reaches its end (and litigation may be particularly protracted in an international setting) the seller may find that the reluctant buyer is in bankruptcy and the seller has only obsolete goods on his hands. In most cases, sellers can be expected promptly to reduce the amount at risk by reselling the goods (Art. 75); when loss results the seller may, of course, recover damages (Arts. 74, 76, 78, *infra*).[\[page 383\]](#)

## Article 63. Seller's Notice Fixing Additional Final Period for Performance

[§350](#) This article gives the seller the same remedial tool that Article 47 gives the buyer the power to "fix an additional period of time of reasonable length for performance." If the buyer fails to perform within this additional period, Article 64(1)(b), *infra* at [§353](#), provides that the seller may declare the contract avoided without proving that the buyer's breach was "fundamental."

### Article 63 [\[1\]](#)

"(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."

### [§351](#) A. Notice as a Basis for Avoidance

In examining Articles 47 and 49(1)(b) we saw that the buyer's *Nachfrist* notice provide a basis for avoidance only in a limited area—failure by the seller to deliver the goods. Similarly, the seller's *Nachfrist* notice under Article 63 provides a basis for avoidance under Article 64(1)(b) only when the buyer fails, within the specified period, to perform his obligation to "pay the price or take delivery of the goods." Article 54 states that the buyer's "obligation to pay the price" includes enabling steps required by the contract; thus, failure to establish a letter of credit may provide the basis for a *Nachfrist* notice under the present article ([§323 supra](#)). In any event, the notice-avoidance remedy applies only to the most important of the buyer's obligations; his failure in other

areas (such as specifying features of the goods, Art. 65) constitutes a breach of contract but the seller may avoid the contract only if the breach is fundamental (Arts. 25, 64(1)(a)).[page 384]

The discussion of the seller's *Nachfrist* notice (Art. 47, *supra* at ¶289) concluded that the notice can serve as a basis for avoidance only if it states that the other party has an additional and *final* period for performance, and that the reasonableness of the period should be decided in conformity with the Convention's general policy against the avoidance of contracts on insubstantial grounds. That discussion is equally applicable here.[2]

### ¶352 B. Obligation to Accept the Performance Invited in the Notice

Paragraph (1) states that the seller may fix an additional period for the buyer's performance "of his obligations"; the notice may be given with respect to defaults that do not invoke the notice-avoidance remedy of Article 64(1)(b). In this larger area the notice has the consequences that are stated in paragraph (2) the seller is obliged to accept the performance it has invited but is not deprived of the right to claim damages for delay, including delay during the "additional period" fixed in the notice. Knapp in *B-B Commentary* 459 ¶2.5 (See the discussion under Article 47(2), *supra* at ¶291.[3] [page 385]

## Article 64. Seller's Right to Avoid the Contract

### ¶353 A. The Significance of Avoidance of Contract

Avoidance by the seller is usually based on delay by the buyer in paying the price. The seller normally may delay handing over the goods until the buyer pays (Arts. 58(1), 71) but avoidance has more far-reaching consequences a seller who avoids the contract need not ever deliver the goods. Article 49, *supra* at ¶302, defined the buyer's right to avoid the contract; the present Article on the seller's right to avoidance is a mirror image of Article 49.[1]

#### 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." [page 386]

### ¶354 B. Means and Grounds for Avoidance

Avoidance by the seller, like avoidance by the buyer (Art. 49), is made by a "declaration" which (Art. 26) "is effective only if made by notice to the other party". If the notice is dispatched by "means appropriate to the circumstances" the notice is effective in spite of "delay or error" in transmission (Art. 27, [§§188-190](#), *supra*).

Paragraph (1) of Article 64 (like Article 49(1)) states two alternative grounds for seller's avoidance: (a) Fundamental breach of contract by the buyer; and (b) Failure by the buyer "to pay the price or take delivery" within an additional final period fixed by the seller under Article 63(1) [§](#) the *Nachfrist* notice. The first ground for avoidance was explored in connection with the definition of "fundamental breach" (Art. 25 at [§184](#)). The second ground, based on a *Nachfrist* notice, was introduced under Article 63, but one point bears emphasis: failure to comply with the *Nachfrist* notice provides a basis for avoidance only when the notice calls for performance of the buyer's basic obligations "to pay the price or to take delivery of the goods" (Art. 64(1)(b)). However, the buyer's "obligation to pay the price" includes the required steps "to enable payment to be made" (Art. 54, *supra* at [§323](#)); for example, the notice-avoidance remedy (Arts. 63(1), 64(1)(b)) may be employed if the buyer fails to comply with his obligation to establish a letter of credit.

As we have seen, avoidance by the buyer based on the seller's failure to comply with a *Nachfrist* notice (as contrasted with establishing "fundamental breach" under Art. 49(1)(a)) is limited to "non-delivery" (Art. 49(1)(b)). Avoidance based on a *Nachfrist*-notice is restricted to the seller's failure to perform its basic obligation to deliver the goods, to avoid erosion of the general principle that contracts should not be destroyed on trivial grounds. See [§288](#), *supra*.

A problem of consistency with this principle is presented by Article 64(1)(b), whereby, the *seller* may avoid the contract based on a buyer's failure to comply with a *Nachfrist* notice "to pay the price *or take delivery* of the goods". Avoidance based on a failure to comply with a *Nachfrist* notice to pay the price (or to pay the price *and* take delivery) would be consistent with the approach of Article 49(1)(b); the problem of consistency arises when the buyer has paid the price, if avoidance could be based solely on failure to comply with a notice to take delivery within a fixed period.

A seller who has been paid is not likely to avoid the contract since a seller who avoids the contract must repay the price (Art. 81(2)). Moreover, a buyer who has paid for the goods will make every effort to take [\[page 387\]](#) delivery within the additional period fixed by the seller. However, it is conceivable that a sharp increase in the value of the goods might tempt a seller to try to escape from the contract by sending the buyer a *Nachfrist* notice fixing a short, final period for taking delivery.

The Convention is not without resources to deal with this problem. Article 63(1) (like Article 47(1)) requires that the *Nachfrist* notice fix "an additional period of time of *reasonable length*...". As was suggested at [§351](#), *supra*, the reasonableness of the period set in the notice should be decided in conformity with the Convention's general policy against the avoidance of the contract on insubstantial grounds. A seller who has received the price would seldom face irreparable loss from the buyer's delay in taking delivery. The buyer would be responsible for the seller's expenses, such as storage, and the seller (Article 85, [§454](#), *infra*) "is entitled to retain [the goods] until he has been reimbursed his reasonable expenses by the buyer". Moreover, in situations where there is danger of abuse, the requirement that the period fixed by the seller be of "reasonable length" (Art. 63(1)) should be construed (Article 7(1)) "to promote...the observance of *good faith* in international trade." See [§§94-95](#), *supra*.

### [§355](#) C. Limits on Time for Avoidance

Paragraph (2) sets time limits for avoidance. Practical considerations that bar excessive delay by the buyer were considered under Article 49, *supra* at [§306](#); some of these considerations apply to late avoidance by the seller.

#### [§356](#) (1) *Buyer has Paid the Price*

The time limits set by paragraph (2) apply only to avoidance by the seller "in cases where the buyer has paid the price." Getting paid is usually the seller's principal concern; after the buyer has paid a seller would rarely seek

(or have adequate grounds) to avoid the contract. At ¶354 we considered the narrow circumstances in which a *Nachfrist* notice calling on the buyer to take delivery might provide a basis for avoidance. Conceivably, avoidance for fundamental breach might be based on the buyer's unexcused failure to obtain an import license or by a failure to comply with obligations to establish a distributorship and develop a program for promoting sale of the goods. In any event, a seller who has been [page 388] paid and who seeks to avoid the contract must comply with the strict time limits of paragraph (2).<sup>[2]</sup>

### ¶356.1 (2) *Buyer has not Paid the Price*

Article 64 does not state a time limit for avoidance when the buyer has *not* paid the price. This may seem anomalous unless one considers the awkward position of the seller as he waits for the buyer to pay. If a time limit on avoidance is running, the seller is in danger of declaring avoidance either (a) too early ¶ on the ground that the delay is not yet a "fundamental" breach, or (b) too late ¶ on the ground that he waited too long after that indefinite point was reached. Article 64(2) relieves the aggrieved seller of such hazardous navigation between Scylla and Charybdis.<sup>[3]</sup>

If the buyer has not received the goods and the price is due only in exchange for delivery (Art. 58(1)), the seller may choose to take advantage of the opportunity that Article 64 affords for delaying a decision about avoidance while the buyer solves its "cash-flow" problem; while the seller delays this decision the buyer, of course, has the right to pay for and receive the goods.

If the seller wishes to avoid the contract and is in doubt over whether the buyer's delay constitutes a "fundamental breach" (Arts. 25, 64(1)(a)), the seller can clarify the situation by giving the buyer a *Nachfrist* notice (Art. 63(1)) prior to declaring avoidance (Art. 64(1)(b)).

If the buyer has received the goods and fails to pay the price when it is due, the seller would be well advised to avoid the contract only under unusual circumstances. Avoidance will nullify the seller's right to recover the price (Art. 81(1)). True, Article [page 389] 81(2) states that the seller "may claim restitution from the [buyer] of whatever [the seller] has supplied...". However, when the buyer fails to pay this seller, other creditors may have levied execution on the goods; whether the seller's right under Article 81(2) to reclaim the goods from the buyer is effective against third persons will be determined by domestic law. See Art. 4(a), ¶70, *supra* and Art. 81(2), ¶444, *infra*. Moreover, the goods may have been used or damaged, and their value may deteriorate during the period required for reclamation.

A seller who has not avoided the contract may exercise legal remedies to collect the full price (Art. 62) plus damages and interest for delay (Arts. 74 and 84, ¶¶403-404, 420-422, *infra*). In addition, since the goods have been received (and presumably accepted) by the buyer, the common law restrictions on "specific performance" do not apply (Art. 28; Art. 62, ¶¶347-349, *supra*).

Additional provisions on avoidance, applicable to both buyer and seller, appear in Articles 72 (anticipatory breach), 73 (delivery by installments) and 81-82 (effects of avoidance).

*Decisions:* (1) AUSTRALIA, [Fed. Ct. S. Aus. Dist., Adelaide, 57 FC R216, 28 April 1995, Roder Zelt v. Rosedown Pk. S.](#), a German manufacturer, sold and delivered aluminum tents and related material to B (Australian). B fell behind in paying installments on the price, and was placed in administration. Held: S had effectively avoided the contract. On S's right to recover the goods, under CISG and a Romalpa clause in the contract, see Art. 81, *infra*. UNILEX D.1995-15.1.1. (2) GER. [OLG Düsseldorf, 17 U 146/93, 14 January 1994](#). S, a shoe manufacturer, notified B that if B did not pay for shoes B had received, S would avoid the contract and resell shoes S had produced for B. On B's failure to respond, S effectively avoided the entire contract and recovered damages. UNILEX D.1994-1.

*Comments:* Haddad, H.A., Unpaid S's Avoidance, Amman L. & Arb. Center, 128-214 (1985); Kirnon, G., (Commonwealth Caribbean Trade Law), 38 McGill L.J. 1120 (1992-1993); Schlechtriem, Com. (1998) 490-495. On Chinese statutory (FECL) rules on avoidance, see Tanner, 16 JCL (Pitt.) (1996). [page 390]



## Article 65. Seller's Notice Supplying Missing Specifications

357 The present article deals with a special type of "gap" in the contract's specifications for the goods which the buyer fails to supply.

### Article 65 [1]

"(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 difference 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."

Article 65 was designed to prevent a buyer from escaping from its obligations by refusing to supply missing specifications.<sup>[2]</sup> Supplying the missing specification by the procedure provided in Article 65 forestalls the contention that the contract is too vague for the measurement of damages (Art. 74) and permits the seller to establish the amount of damages by reselling the goods (Art. 75). When the contract states a fixed price, rather than a "cost-plus" or similar formula, the parties probably would not intend that the buyer's specifications should substantially affect the cost. Similarly, the parties probably would not intend that the seller could have wide discretion to decide the characteristics of the buyer's goods. Consequently, references in the contract and in Article 65 to "the form,<sup>[page 391]</sup> measurements or other features of the goods" should be construed with sufficient strictness to avoid these problems.

Article [65] can readily be applied where the contract calls for the selection of goods that the seller has in stock, or even for the manufacture of goods to buyer's specifications where such goods are readily resalable. More difficult problems may arise when the contract calls for the manufacture of goods to specifications that are so unique that they cannot be resold and the buyer notifies the seller that it can no longer use the goods. If the seller thereafter supplies specifications and manufactures goods that have no substantial value, the seller's action to recover damages or the full contract price may collide with the rules on mitigation of loss in Article 77, *infra* at 416. (One who engages in such wasteful production faces commercial and legal hazards that are so serious that extreme cases are unlikely to arise.)

When the buyer fails to supply the missing information the seller "may" but need not act for the buyer. The refusal by the buyer to comply with this requirement of the contract would seem sufficiently serious to authorize the seller to avoid the contract (Arts. 25, 64(1)(a)).<sup>[3]</sup> The seller also may recover damages which could include "loss of profit" (Art. 74) such as the contribution to the seller's overhead costs that would have resulted from performance. See 415, *infra*.<sup>[page 392]</sup>

## CHAPTER IV.

### PASSING OF RISK

(Articles 66-70)

#### Introduction to Chapter IV

358 Casualty to the goods (e.g., theft or fire) may occur in various settings while the seller holds the goods before delivering them to a carrier or to the buyer, while the goods are in transit, while the buyer is examining

the goods, while the buyer holds the goods after rejecting them. Usually the loss will be covered by insurance. Allocating the risk of loss between seller and buyer should reflect considerations such as these: Which party is in a better position to evaluate the loss and press a claim against the insurer and to salvage or dispose of damaged goods? Who can insure the good at the least cost? Who is more likely to carry insurance under standard commercial practice? What rules on risk will minimize litigation over negligence in the care and custody of the goods?

### ◆359 A. The 1964 and 1980 Conventions

ULIS approached the problem of risk in a manner that in general took account of the above considerations of policy and was consistent with modern sales law. However, as we have seen (Art. 31, *supra* at ◆210), the rules on risk (and other issues) were complicated by the role given to the concept of *délivrance*. In the UNCITRAL proceedings the concept of *délivrance* was abandoned; instead, the Convention speaks of physical acts of transfer of possession◆the "handing over" of the goods to a carrier or to the buyer.[1]

The most important provisions in this chapter (Arts. 66◆70) are in Articles 67, 69 and 70. Article 67 applies when the contract involves carriage of goods; Article 69 applies when the buyer is to come for the goods. Article 70 deals with the effect of serious breach by the seller. Article 68 deals with a specialized and troublesome situation◆the sale of goods while they are in transit

## Article 66. Loss or Damage After Risk Has Passed to Buyer

◆360 Article 36(1), *supra* at ◆241, laid down the basic and possibly self-evident principle that questions concerning conformity of the goods to the contract are determined as of the time when risk passes to the buyer; deterioration prior to that time is the responsibility of the seller. Article 66 is a corollary of that proposition.

### Article 66 [1]

"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."

### ◆361 A. Destruction of the Goods and the Duty to Pay

*Example 66A. A contract called for Seller to send 10 bales of No. 1 quality cotton to Buyer; the terms were F.O.B. Seller's city. Buyer agreed to pay in exchange for shipping documents that were to be presented after arrival of the goods. The F.O.B. term (alternatively, the Convention's rules on risk◆Art. 67(1)) placed transit risks on the buyer. Seller loaded the 10 bales of No. 1 quality but during carriage the cotton was so charred by fire as to be worthless. Buyer exercised his right to inspect the goods before payment (Art. 58(3)) and refused to pay for the goods because they were not "No. 1" quality as required by the contract.*

Article 36(1), *supra* at ◆241, answers the buyer's contention that the goods were not "No. 1" quality; the goods did conform to the contract when the risk of loss passed to the buyer. And Article 66 states, in effect, that the damage or destruction of the goods after risk passed to the buyer does not relieve the buyer of his obligation to pay the price.[2] [page 394]

A buyer who is asked to pay for goods that have been destroyed (Example 66A) may well feel that something has gone terribly wrong and wonder whether the Convention's general provision on excuse (Art. 79 ◆423, *infra*) might apply. These are two answers to the buyer's query about relief based on general principles of exemption (excuse).

The first is that any general rule on excuse is excluded by the specific rule of Article 66. This article deals narrowly and solely with the effect of "loss of...the goods" after risk has passed to the buyer, and provides that when this occurs the buyer must pay the price. At first glance the result may seem harsh but the result responds

to pragmatic considerations. It is feasible and customary for transit loss to be covered by insurance. Moreover, loss or damage is usually discovered at the end of the carriage; the buyer usually is in a better position than the seller to assess the damage, make a claim against the insurer and salvage the usable goods.<sup>[3]</sup> A second and equally compelling answer calls for examination of the Convention's provision on exemption (or excuse) in Article 79, <sup>423</sup>435, *infra*. In brief, Article 79 provides exemption only when performance is prevented by an "impediment beyond [the party's] control"; no impediment prevents payment of the price. A more substantive answer is that exemption does not apply when a party could "have avoided or overcome [the impediment] or its consequences"; it is possible (and customary) for a party bearing transit risk to "overcome" the "consequences" by insurance.

### **362 B. Damage Due to Seller's Act or Omission**

Under the last clause of Article 66, even after risk has passed to the buyer the seller is responsible for loss or damage that is due to its "act of omission."

*Example 66B. A contract called for Seller to ship 5,000 pounds of No. 1 quality rice in new hemp bags "F.O.B. Seller's City." The contract term (alternatively, the Convention's rules on risk Art. 67(1)) places transit risk on Buyer. Seller shipped 100 bags of No. 1 quality rice but [page 395] one of the bags was old and so weak that it broke open during transit and the rice was lost.*

Did the fact that the seller broke its contract by failing to pack all of the rice in new bags prevent transit risk from passing to the buyer? As we shall see, under Article 70, *infra* at <sup>380</sup>, the answer is No if we assume (as seems plausible) that the use of one second-hand bag did not constitute a "fundamental breach of contract." See also Nicholas, *B-B Commentary* <sup>1.2</sup>. (This point becomes especially important when casualty to the goods results from a cause unrelated to a defect in the goods. See *infra* at <sup>380</sup>.)

We may now return to Example 66B. Although risk of casualty to the goods had passed to Buyer, Article 66 makes Seller responsible for the loss of the bag of rice that resulted from Seller's breach of contract.<sup>[4]</sup> A similar example suggested by Nicholas, *B-B Commentary* <sup>1.2</sup>: Seller loads fruit or other perishable goods that conform with the contract. Seller, however, is in breach of contract by delaying the shipment; because of the delay the goods deteriorate. Under these circumstances, as in Example 66A, Seller is responsible for the loss during transit that results from the breach of contract.

One may ask: What rules or standards decide what "acts or omissions" will make the seller responsible for loss or damage after risk has passed to the buyer? See Sevón, *Lausanne Colloq.* 196<sup>197</sup> and notes 13<sup>16</sup>. Example 66B presented no difficulty for the damage resulted from the seller's breach of contract. This example also illustrated the linkage between "act" and "omission": It would be difficult to decide whether the loss of the rice resulted from an "act" (shipment in an old, weak bag) or an "omission" (failure to ship in new bags). The linking of these two concepts and the nebulous dimensions of "omission" show that the seller's liability must be derived from the violation of some binding standard.

To avoid the vagaries and inappropriateness for international trade of scraps of domestic law (Art. 7(1)), the primary standard for the parties' obligations should be (Arts. 30 & 53) the requirements established by "the contract and this Convention", including (Art. 9) the parties' practices and trade usage. However, UNCITRAL in 1977 rejected a proposal to amend Article 66 (then draft article 64) to limit the "act or omission" to a breach of contract (VIII YB 63, para. 531, *Docy. Hist.* 356). Sevón, *supra*, at 196; Nicholas, *B-B Commentary* <sup>2.2</sup> This decision not to restrict the scope of Article 66 seems wise since the seller, by a wrongful seizure of the goods or abuse of legal process, might cause damage to the goods under circumstances [page 396] that might not constitute a breach of contract. The standard established by the phrase "act or omission" is considered more fully in connection with the use of this phrase in Article 82, <sup>448</sup> *infra*.

*Decision: S's Failure to Provide Protection during Shipment.* CHINA: ARB., Int. Ec. & Tr. Arbn. Comm. (CIETAC) (1995). S and B contracted for S to ship jasminal CIF to NY. B warned S that jasminal would be destroyed by heat, must be stored in a cool place and sent to NY by a direct line. Evidence showed that, instead

of a direct line, S shipped via Hong Kong, and that cool storage was not provided. On arrival in NY, most of the jasminal had melted. S was held liable for the loss to B. UNILEX D.1995♦36.

See Law YB of China (Peking) 1995, p. 922♦26; Schlechtriem, Com. (1998) 500♦505 (Hager). See also Art. 67 at ♦362, *infra*. [page 397]

## Article 67. Risk When the Contract Involves Carriage

### ♦363 A. Risk and the Contract

Nearly all international sales call for carriage of the goods but the type of transport reflects varying geographical settings, types of goods and needs of the parties. In recent decades transport arrangements have been profoundly influenced by the "container revolution" which, in turn, has encouraged multimodal transport in which the container is sealed at an inland point and carried to (or near) the buyer by a series of different modes of transport such as truck, rail, and ship. However, the parties to even an international sale sometimes can use simple one-stage transport by trucks operated by the seller, the buyer or an independent carrier. Bulk goods (e.g., grain, ores, oil) often move from port to port in ships chartered by one of the parties. Before or after an international carriage local transport often will be needed to take the goods from the seller♦s warehouse to a rail terminal or to an ocean carrier♦s warehouse or dock and may also be needed when the goods reach a point near the buyer. This local transport may be handled by the trucks of the seller or buyer or by transport agencies engaged by or affiliated with one of the parties.

No statute can adequately define when risk passes in all these circumstances, any more than a statute can define the characteristics and quality of the goods. Fortunately, the parties to an international sale usually appreciate this fact and provide in the contract for the point at which risk passes. This may be done by an explicit provision on risk, or by referring (*e.g.*) to *Incoterms* (1990) and its definition of a specified trade term♦ "Ex works," "FCA": Free Carrier (...named place)♦ in *Incoterms* 1990 applicable to all modes of transport, including intermodal, and replacing the more specialized terms FOR (rail) and FOT (truck); "FAS"; "CIF" etc. As we have seen (Art. 6, ♦♦74♦76, *supra*), contract provisions prevail over rules of the Convention.[1] [page 398]

### ♦364 B. The Convention and Transit Risk

The Convention♦s general rule on risk in transit is stated in Article 67; in brief, when the goods are handed over to the carrier risk passes to the buyer.

#### Article 67 [2]

"(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."

Article 67 and Article 69 (♦♦373♦378, *infra*) need to be read together since situations not governed by Article 67 fall automatically into Article 69.[3] One will note that Article 67 states rules on the transfer of risk only for cases where the seller "hands over" goods to a "carrier". Contractual arrangements that are *not* governed by Article 67 and therefore *are* governed by Article 69 include: (1) The buyer is to come for the goods; Article 67(1) does not apply since the seller does not hand over the goods to a "carrier" but to the buyer. (2) Article 67(1) is also inapplicable when the seller, instead of "handing over" the goods to a "carrier", transports the goods

to the buyer in the seller's own vehicles (369.1, *infra*). The point at which risk passes in these cases is discussed in connection with Article 69, 373-378, *infra*. [page 399]

### 365 (1) *The Basic Rule: Underlying Considerations*

Article 67 reflects the dominant approach of domestic law and commercial practice to risk of loss during carriage.

#### 366 (a) *Domestic Law*

The approach to transit risk in the Convention is similar to that of the (USA) Uniform Commercial Code:

*Section 2-509. Risk of Loss in the Absence of Breach*

"(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505);"

Other rules of domestic law also operate from the baseline that, unless the parties agree to the contrary, transit risks fall on the buyer.

#### 367 (b) *Commercial Practice*

There are practical considerations that support these norms. As has been noted (361, *supra*), damage during carriage usually is discovered only when the goods reach the buyer. In international transactions the seller is likely to be far from the damaged goods; the buyer is in a better position to assess the damage and to make a claim against the carrier or the insurer. In many transactions, before the seller ships the buyer will arrange for the issuance (or confirmation) of a letter of credit by a bank near the seller. The seller, in exchange for the payment, will surrender a negotiable bill of lading and an insurance policy which the bank will forward to the buyer. The buyer will have these documents in hand when he examines the goods and discovers the damage facts that make it particularly efficient for the buyer to deal with the damage claim. [4]

Standard trade definitions respond to these considerations. Under the traditional "C.I.F." term, although the seller is responsible for the cost of carriage to the stated destination the buyer bears transit risks. Similarly, under the *Incoterms* (1990) definition "CPT," Carriage Paid to...(named place of destination)," the buyer bears all risks for goods after they are "delivered into the custody of the...first carrier" (A4, B5). And under the important definition, "CIP", "Carriage and Insurance paid to...(named place of destination)" a quotation that also responds to modern transport practices such as containerization, and is expected to [page 400] be used in place of the older quotations the buyer must bear all risks of the goods from the time they have been delivered "into the custody of the...first carrier..." (A4, B5).

### 368 (2) *Response to Current Practices*

#### 368.1 (a) *Loading "On Board" or Delivery to Carrier*

Under some of the older trade definitions (F.O.B., C & F, C.I.F.) risk passes only when the goods are put "on board" or "pass the ship's rail"; on the other hand, as we have just seen, modern trade definitions make risk pass when the goods are delivered into the "custody" or "charge" of the carrier. Article 67 follows the more recent practice in providing that risk passes when the goods are "handed over" to the carrier. [5] When the carrier is in a position to accept custody prior to loading it is difficult to determine whether damage discovered at destination occurred before, during or after loading. In some cases, as when the seller has facilities for dockside loading (e.g., grains or other bulk commodities) the seller will not "hand over" the goods to the carrier until they



enter the ship's hold; when the seller delivers the goods to an intermediary at the port or to a port authority it will be especially important for the contract to specify the point at which risk passes.

*Decisions:* (1) [CHINA. Xiamen Int. People's Court, 5 September 1994](#). S (Hong Kong) contracted to ship fish powder to B (China), C&F, B to obtain risk insurance. The contract called for fish powder free of living insects. B claimed that the fish powder on arrival contained many living insects. S produced inspection certificates showing no living insects at loading. S prevailed. UNILEX :D.1994-21.1. (2) ARGENTINA, [Cam. Nac. de Apel en lo. Com., 47448, 31 October 1995](#). S contracted to sell and ship (C&F) dried mushrooms to B. B obtained an insurance policy covering transportation risks. B claimed defects caused deterioration during transit. However, no error by S was proved. Risk fell on B. UNILEX D. 28.1.1, CLOUT 191. (3) MEX. ARB: [COMPROMEX, M/21/95, 29 April 1996](#) (also noted under Article 35, supra). Shipment of canned fruit, by Argentine seller (S) (by Chilean intermediary), to Mexican buyer. Goods arrived damaged. Transit damage fell on S, since the canned fruit was defective at shipment. UNILEX D.1996-3.5 (4) GER [OLG Karlsruhe, 15 U 29/92, 20 November 1992](#). S contracted to send goods to B "franco [page 401] domicile" ("frei haus"). B claimed loss in transport and non-delivery. Held: The above terms placed risk on S's derogation (Art. 6) from Arts. 31(a) and 67(1). UNILEX D.1992-28. [Also see Art. 66, supra.]

*Comments on Risk:* DeVries, H., Passing of Risk, 17 Eur. Trans. L. 495-528 (1982); Goodfriend, D.E., 22 Colum. J. Trans. L. 575-606 (1984); Feltham, J.D., CIF, FOB & CISG, 34 JBL (London, 1991) 413-425; Murray, D.E., CISG and 1990 Incoterms, 23 U. Miami Inter-Am. L. Rev. 93-131 (1991); Schlechtriem, Com. (1998) 505-508 (Hager).

### ❖368.2 (b) "Hi-tech" Goods and Contract Drafting

The practical considerations that led to the general rules placing transit risk on the buyer are strongest in sales of goods that the buyer can salvage or repair. Only the parties are in a position to decide whether these prevailing rules of domestic law on which Article 67 is based are appropriate for their contract: all that is feasible here is to raise a *caveat* as to whether the Convention's norm is appropriate for high-technology equipment that only the seller can repair or adjust. In such cases the parties may wish to consider whether it would be efficient to provide that, after arrival of the equipment, the parties will supervise a test run for a specified period and the seller will have the responsibility to see that the equipment is in working order.<sup>[6]</sup> Fortunately, the Convention (Art. 6) gives the parties a free hand for fine-tuning to meet their needs.

### ❖369 (3) Other Applications of Article 67(1)

As was noted briefly at ❖364, Article 67(1) provides for transfer of risk only when the seller "hands over" the goods to a "carrier". We can now deal with the application of Article 67(1) to specific situations.<sup>[page 402]</sup>

#### ❖369.1 (a) Use of Seller's Own Transport

Does Article 67(1) apply when in the sales contract the seller engages to transport the goods to the buyer in the seller's own trucks or other transport vehicles? In some contracts this intent will be expressed by language such as "We are quoting you a delivered price and engage to deliver the goods to your place of business in our own transport vehicles". When the seller agrees to deliver the goods but an understanding as to risk is not made clear by the contract, including the parties' practices or trade usage, the issue in terms of Article 67(1) is this: "When the seller loads the goods in its own trucks does the seller 'hand over' the goods to a 'carrier'?"<sup>[page 403]</sup>

The answer is No. "Hand over" is used deliberately here and at many places in the Convention to denote a transfer of possession. This does not occur when the seller employs its own means of transport.<sup>[7]</sup>

There are practical reasons for holding risk on the seller when it is also the transporter, for damage at this stage is likely to generate a claim that the seller failed to exercise due care; litigation and related transaction costs are reduced by the Convention's rule that the seller does not perform its contractual obligation to deliver conforming goods (Arts. 31(a), 35, 36(1)) until the seller has completed its own duties with respect to the goods.

Moreover, when the seller engages to deliver the goods in its own transport facilities the price will normally reflect the cost of transportation, including the cost of insuring the vehicles and their contents—a risk that can be underwritten most efficiently for the operator of the vehicles.

The approach of Article 69(1) is consistent with that of *Incoterms (1990)*. As was noted at ¶367, the important modern trade term "Carriage Paid to...(named place of destination)" "CPT" transfers risk to the buyer when the goods are delivered "into the charge of the carrier" which is defined as follows: "Carrier means any person who in a contract of a carriage" undertakes to perform or procure the carriage.[8] The emphasized language referring to a "contract of carriage" of course excludes carriage in the seller's own facilities. The *Incoterms Guide* noted that a "carrier" would include an enterprise (including a freight forwarder) that does not own or operate transport equipment if the enterprise "undertakes a liability for the transport as a so-called contract carrier."

In sum: When the seller engages to deliver the goods in its own transport facilities, Article 69(1) does not apply and transit risk remains on the seller. Consequently, transfer of risk is governed by Article 69. As we shall see, under Article 69(2) risk passes when (in brief) "the goods are placed at [the buyer's] disposal" at the place where the buyer "is bound to take over the goods" (¶377, *infra*).

### ¶369.2 (b) *Transport by Successive Carriers*

We now face problems of risk in two specialized situations.

#### (i) *Transport to a "Particular Place" Named in the Contract.*

. The first sentence of Article 67(1) commences as follows: "If the contract of sale involves carriage of the goods and the seller *is not bound to hand them over to a particular place...*". This exception to the scope of the first sentence leads into the second sentence: "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". What situations are governed by these provisions?

*Example 67A. A contract between Seller, located in the inland French city of Lyon, and Buyer, of New York City, states: "Seller will deliver the goods to the North Star Line in Marseille". The goods are damaged during transport to Marseille either (a) in Seller's own trucks or (b) in the trucks of a transport company engaged by Seller.*

In either case Seller is responsible for transit damage between Lyon and Marseille; under the second sentence of Article 67(1) risk does not pass "until the goods are handed over to the carrier" at the "particular place" designated in the contract. True, in alternative (b), this result is inconsistent with the general principle of Article 67 that the buyer bears transport risks. However on this point (as so often) the statute reflects a judgment as to the probable intent of the contract term designating a "particular place" for handing over the goods.[9] If a contrary intent as to risk had been expressed in the contract that, of course, would govern. Indeed, if a modular container is to be packed and sealed in Lyon the seller [page 404] would be well advised to propose a contract provision stating that risk passes to the buyer in Lyon when the container is sealed.

#### (ii) *Transshipment*

Example 67A illustrated a contract in which (Art. 67(1), second sentence) "the seller is bound to hand the goods over to a carrier *at a particular place*" and the seller engaged a carrier to take the goods to the designated place. It is important to distinguish this case from contracts that do not designate a "particular place" when two carriers are used to carry the goods from the seller to the buyer.

*Example 67B. A contract between Seller in Savannah (on the south-east coast of the U.S.A.) called for shipment to Buyer in Le Havre (on the north coast of France). The contract failed to designate the point for transfer of risk, or designate the route for shipment. (This omission is abnormal but could occur; when shipping arrangements are left open, under Article 32(2), ¶214 supra, the seller "must make such contracts as are*

*necessary for carriage to the place fixed by means of transportation appropriate in the circumstances..."). Seller found that no carrier operated between Savannah and Le Havre and, following standard practice, arranged for transport by Carrier A from Savannah to New York, and for Carrier A to deliver the goods to Carrier B for carriage to Le Havre. Inspection in Le Havre showed that the goods had been damaged in transit.*

In this case risk of loss passed to the buyer when the goods (Art. 67(1), first sentence) were "handed over to the *first* carrier for transmission to the buyer...". The exception to this rule that controlled Example 67A does not apply since the seller was not "bound" to "hand over" the goods to a carrier at any place other than at the seller's port city of Savannah. The result is driven home by the statement in the first sentence that risk passes when the goods are handed over to the "*first* carrier." The Convention thus rejects the view that in sales requiring two carriers risk does not pass until the goods are delivered to the second carrier. Such splitting of transit risks is inconsistent with modern practices for multimodal transport and presents practical problems of determining where the damage occurred.<sup>[10]</sup> The parties may, by agreement, split transit risks but this is not the norm provided by the Convention.

### ❖369.3 (c) *Minor Deviations and Risk*

The first sentence of Article 67(1) closes with [page 405] the phrase, "for transmission to the buyer *in accordance with the contract of sale*." Suppose that the goods or the arrangements for shipment deviate from the contract in some minor respect: Does this make risk of loss remain on the seller? The answer is controlled by Article 70, ❖❖379❖383, *infra*, which provides that the rules on risk in articles 67, 68 and 69 yield to the remedies given "the buyer on account of *fundamental breach*" ❖in short, the rules on risk are not overturned by minor deviations that do not satisfy the standards of Article 25. The phrase in Article 67(1) "for transmission to the buyer in accordance with the contract of sale" consequently imposes the condition that the contract authorized the seller *to ship*. See *Ont. L. Ref. Com.*, Sales I 269❖70. The buyer, of course, may recover for the loss that results from the seller's deviation from the contract: Arts. 45(1) and 74; see also Art. 66 and Example 66B, ❖362 *supra*.

### ❖370 (4) *Retention of Documents Controlling Disposal of the Goods*

Paragraph (1) closes with this important provision: "The fact that the seller is authorized to retain documents controlling disposition of the goods does not affect the passage of the risk." This rule is useful to avoid unintended upset of the basic rule on risk and is consistent with commercial practice. In arranging for a documentary transfer the parties are concerned with payment of the price rather than damage in transit. Moreover, the contract may call for payment in exchange for documents at a time when the goods are on the way ❖on a truck or railcar, or on a ship in mid-ocean. In many situations (e.g., water seepage, shifting of cargo) it would be impossible to determine when the damage occurred; a rule that makes risk pass when the documents are handed over is difficult to apply.<sup>[11]</sup>

The (U.S.A.) Uniform Commercial Code 2❖509(1)(a) responds to these policies: Risk passes to the buyer when the goods are delivered to the carrier "even though the shipment is under reservation (Section 2❖505)." The (U.K.) Sale of Goods Act (1893) is to the contrary: The rule quoted above (❖18 Rule 5(2)) on "appropriation" (and thus the transfer of "property" and risk) is inapplicable when the seller "reserves the right of disposal." This provision, with its overtones of the "property" approach, has led to litigation and uncertainty; representatives from the countries that have adopted this rule of the Sale of Goods Act did not press for its [page 406] use in the Convention. Article 67(1) and UCC 2❖509(1)(a) were followed on this point in the Ontario draft Revised Sale of Goods Act ❖7.8, *Ont. L. Ref. Com.*, Sales III 45❖46 and in the Draft Uniform Sale of Goods Act ❖7.8(1) approved by the Uniform Law Conference of Canada, Proceedings (1981) 275❖276.

### ❖371 (5) *Identification of Goods to the Contract*

Paragraph (2) states that risk does not pass to the buyer "until the goods are clearly identified to the contract." The concluding language "whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise" shows that a wide range of acts will suffice to provide the necessary identification. The

goods are usually identified with a specified buyer even when the carrier issues a negotiable bill of lading made out to the order of the seller; in such a bill of lading the buyer or his bank or other agent is usually identified as the party to be "notified" on arrival of the goods. In any event, the invoice or correspondence will usually link the shipment with the buyer. The identification requirement is designed to prevent a seller from claiming falsely, after goods have suffered casualty, that these were the goods purchased by the buyer. Any identification that would forestall this abuse should be sufficient under paragraph (2).[\[12\]](#)

The question may arise: Is notification to the buyer necessary for "identification"? The range of alternative means for identification listed in the above language of paragraph (2), and the closing phrase "by *notice* given to the buyer or *otherwise*" shows that notice is only one means of identifying goods to the contract. This is fortunate since it may not be practical to notify the buyer of the shipment until after the goods are on their way. A common cause of transit damage is seepage of water into the cargo hold; in many cases it would be difficult to establish whether damage occurred before or after the giving of notice. Even if there is no indication in the shipping documents and no markings on the goods, the place stated for off-delivery and the relationship between the type and [\[page 407\]](#) quantity of the goods and the contract description will usually leave no doubt of their "identification" to this contract under Article 67(2).[\[13\]](#)

### **(a) Undivided shares of fungible goods**

In discussing the scope of the Convention (Art. 2 at [§56.3](#), *supra*) we saw that the Convention applies to an important type of transaction—contracts for the sale of fungible goods (e.g., grade #2 heating oil) in terms of quantities or shares of the contents of an identified "bulk"—e.g., the tanker North Star sailing June 1; oil tank #17. Can these contracts satisfy the "identification" requirement of Article 67(2)? Cf. Art. 69(3), [§378](#), *infra*.

When the "bulk" is not identified the answer is No. The first step in solving risk problems requires one to answer the question: Risk in *what*? This question, however, can be answered when the parties agree on a sale to Buyer A of one-half of the No. 2 heating oil loaded on the tanker North Star and the sale of the other half to Party B. (Such a contract would normally state the price per unit (e.g., barrel) and the approximate total quantity). If the contract provides that risk in transit falls equally on Buyer A and Buyer B, nothing in the Convention invalidates the agreement.[\[14\]](#) Because of the complications inherent in such arrangements the requirement of Article 67 that the goods be "clearly identified" indicates that the buyers should not be held to have agreed to loss sharing in an identified bulk unless this result is clearly indicated by the contract.[\[page 408\]](#)

## **Article 68. Sale of Goods During Transit**

[§372](#) This article addresses a special type of transaction that may be illustrated as follows:

*Example 68A. Middleman, in the U.K., owned a cargo of 1,000 bales of No. 1 long-staple cotton that had been shipped from India on June 1 for arrival in the U.K. on July 1. On June 15, Middleman informed Buyer that the cotton was en route and the parties agreed on a contract for the sale of the cotton to Buyer. Inspection of the goods on arrival showed that, during the ocean passage, the cotton had been damaged by sea-water. Who bears this risk?*

Article 67(1) does not apply since the goods were not handed over to the carrier "for transmission to the buyer." The problem calls for a special provision:

### **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."

### 372.1 A. Debate and Compromise

The 1978 UNCITRAL draft (draft article 80) had no provision like the first sentence of Article 68: under the 1978 draft "the risk is assumed by the buyer *from the time the goods were handed over* to the carrier..." (like the second sentence of Article 68), followed by a provision on the effect of seller's knowledge (like the third sentence of the present draft).<sup>[1]</sup> [page 409]

In the First Committee of the 1980 Conference some delegates objected to the retroactive assumption of risk by the buyer; some stressed that this was unfair to buyers in developing countries and inconsistent with a recommendation by the Asian-African Legal Consultative Committee. Other delegates noted that the UNCITRAL draft was based on commercial practice that had been designed to avoid controversy over the time when transit damage occurred; the First Committee approved an amendment to clarify the draft and approved the provision.<sup>[2]</sup> However, on review by the Conference Plenary the article did not receive the two-thirds majority that, at this stage, was required for approval, and the Plenary voted to reconsider the article. A group representing divergent views then developed a draft that received the necessary majority. The compromise provision added the first sentence making risk pass "from the time of the conclusion of the contract", and retained the next two sentences (in substance the UNCITRAL draft) for application when "the circumstances so indicate" a provision that, as we shall see, has special application when the contract of sale calls for the transfer to the buyer of the policy of cargo insurance.<sup>[3]</sup>

### 372.2 B. "Circumstances" Invoking the Original Rule

As has been noted, the UNCITRAL draft making risk pass "from the time the goods were *handed over to the carrier*" was designed to avoid controversy over the time when transit loss occurred. This problem is less serious when damage results from an identifiable event a fire, a storm at sea, a train wreck or a truck collision, but is difficult when damage results from water seepage, overheating or the like.<sup>[4]</sup>

The parties can avoid this problem by an express agreement that risk passes either at the beginning or the end of the transit (Art. 6). In addition, Article 68 refers to "circumstances" that "indicate" that "the risk is assumed from the time the goods are handed over to the carrier." Suppose that in Example 68A the parties consummated the sale by transferring to [page 410] the buyer the standard package of documents covering the shipment, including a policy of insurance payable (*e.g.*) "to the order of the Assured," and endorsed by Middleman (the assured) to Buyer. The endorsement would make Buyer the only person who could claim under the policy and would clearly evidence an intent to transfer to Buyer the total risk of the voyage. This conclusion is aided by the fact that Article 68 refers to "circumstances" that "indicate" that the buyer assumed the risk; express agreement is not required. It would be difficult to find clearer indicative circumstances than taking over the seller's policy of insurance. See also [von Hoffmann, Dubrovnik Lectures 294](#).

Of course, the opportunity to press a claim under an insurance policy is not the equivalent of the receipt of sound goods. If the seller knew (or ought to have known) that the goods had been damaged he should have communicated this fact to the Buyer so the Buyer could decide whether to buy into such a situation. Under the last sentence of Article 68 if the seller fails to disclose the loss or damage "the loss or damage is at the risk of the seller".

Does this mean that the seller bears only the loss or damage it failed to disclose? This reading probably would have been required under UNCITRAL draft, which referred to "*such* loss or damage";<sup>[5]</sup> at the Conference this phrase was changed to "*the* loss or damage" which leaves the meaning open to interpretation. Nicholas, on the basis of a careful review of suggestive but inconclusive legislative history, concludes that when the seller fails to disclose loss or damage that had occurred before the making of the contract the seller would be liable not only for the loss or damage that the seller knew or should have known but also for all the damage that had occurred when the contract was made and for all subsequent damage "which is causally connected with the original



damage". Nicholas noted that this interpretation "has the advantage of avoiding a splitting of the transit risks, with the attendant difficulties of proof...".[6]

The present writer warmly supports this approach insofar as it supports holding transit loss on the seller but is doubtful about the basis and advisability of a "causally connected" limitation. As has been suggested, [page 411] under the final version of Article 68 the provision concerning the effect of seller's knowledge relates only to the second sentence in which retroactive passing of risk depends on "circumstances" indicating that result usually the transfer to the buyer of the shipping documents, including a policy of cargo insurance.[7] Under these circumstances dividing the loss involves complications in sharing responsibility for salvage and in sharing claims under one policy of insurance. When a seller knows of the loss and does not disclose this to the buyer the seller's conduct constitutes (or closely approximates) fraud; non-disclosure when the seller "ought to have known" of the loss is a serious breach of the seller obligations. Conduct of this character should not inflict on the buyer the complications of loss-sharing.

Under the Convention's system of remedies the seller, at the very least, has committed a serious breach which, apart from the rules on risk, should empower the buyer (Arts. 25, 49(1)(a)) to avoid the contract *i.e.*, return of the goods (or bill of lading) and insurance policy to the seller in exchange for any part of the price the buyer has paid. See Art. 70 379 382, *infra*, preserving the buyer's remedies for fundamental breach. (In practice this strong remedy could assist the buyer in negotiating an appropriate settlement with the seller.)

*Comments:* Grewal S., Comparative Study: CISG, UCC, British Sale of Goods Act, Sales during Transit, 14 Loyola L.A. Int. & Comp. L.J. 93 119 (1991); Schlechtriem, Com. (1998) 510 511 (Hager).[page 412]

## Article 69. General Residual Rules on Risk

373 This article governs "cases not within Article 67 and 68". In view of this approach to defining the scope of Article 69 we need to recall that Article 67 governs contracts in which the seller hands the goods over to a "carrier" for transmission to the buyer and that Article 68 also governs contracts in which goods have been handed over to a "carrier". In sum, Article 69 applies to all contracts that do not involve carriage of goods by a "carrier".

### Article 69 [1]

"(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."

Paragraph (1) of Article 69 applies when the contract calls for the buyer to come for the goods at the seller's place of business, often called a sale "ex works". (This scope for paragraph (1) results from the fact that paragraph (2) carves out an exception from paragraph (1) for cases where "the buyer is bound to take over the goods at a place *other than* a place of business of the seller".)

Paragraph (2) of Article 69 governs all other transactions *not* within Articles 67, 68 or paragraph (1) of Article 69 in other words Article 69(2) applies when the contract does *not* call for transport by a "carrier" (Articles 67 and 68) and the buyer is *not* to take over the goods at the seller's place of business. Happily, at long last we can now speak affirmatively of types of transactions that *do* fall, by default, into paragraph [page 413] (2) of Article

69: (1) Contracts that call for the seller to deliver the goods to the buyer in (*e.g.*) the seller's trucks or by some other means of transport for which the seller is responsible, (*e.g.*) delivery to the buyer "ex ship". (2) Contracts that call for the buyer to take over the goods "at a place other than a place of business of the seller" *e.g.*, goods in storage at a public warehouse.

### ♦374 A. Taking Over Goods at Seller's Place of Business

As we have just seen, by a tortuous process of exclusion paragraph (1) applies only when the buyer is bound to take over the goods at seller's place of business. The scope and effect of paragraph (1) can be shown by two examples:

*Example 69A. A contract called for Seller to produce and pack goods and hold them at his place of business for Buyer by May 1; the contract stated that Buyer would take the goods away, by his own transport, at any time during the month of May. On May 1, Seller had the goods packed and ready for delivery. On May 10 the goods were destroyed by a fire in Seller's warehouse.*

Since the contract permitted the buyer to take the goods at any time during May, Buyer had not committed a "breach of contract by failing to take delivery." In such cases, under paragraph (1) risk passes to the buyer "when he takes over the goods." In Example 69A, Seller was still in possession of the goods at the time of the fire and bears the risk of loss.

*Example 69B. The facts are the same as in Example 69A except that Buyer failed to take the goods during May, and the fire destroyed the goods on June 2.*

Here Buyer bears the risk since his breach of contract in failing to take the goods during May left the goods with Seller at the time of the fire. There is no indication that Seller notified Buyer that the goods were ready for delivery. In this case a notice should not be necessary since the contract provided that Seller would have the goods ready by May 1 and Seller did so. Buyer had no reason to suppose that Seller had not complied with the contract.

Assume that the contract merely stated, "Buyer will remove the goods within thirty days after they are ready for delivery". On these facts the goods would not be at Buyer's "disposal" until Seller notifies Buyer that the goods are ready; otherwise Buyer would need to make daily inquiries to discover where things stood. (The discussion of gap-filling under Article 7(2) suggested (♦100 *supra*) that one of the Convention's "general [page 414] principles" was a duty to communicate information needed by the other party. See also Art. 69(2); "aware of the fact...".)

### ♦375 (1) Policies Affecting Risk; Insurance

Policies relevant to the allocation of risk were mentioned in the introduction to this chapter, *supra* at ♦358. The Convention responds to the view that the risk of casualty (in the absence of breach of contract or an applicable agreement) should be allocated to the party who is in the better position to care for the goods and to cover the risk by insurance. In Example 69A, the seller, pursuant to the agreement, had possession and control of the goods. If the seller asks the buyer to pay for goods that burned while they were held by the seller, the buyer is likely to claim that the loss was a result of the seller's failure to exercise due care; settling or litigating such claims involve expense and uncertainty for both parties. Moreover, cost-efficient insurance rating calls for information as to the conditions of storage *e.g.*, whether the building is made of metal or wood and whether it is equipped with an automatic sprinkler. Consequently, it is customary to carry insurance for "building and contents"; the policy usually covers goods that await delivery following a contract of sale since the seller cannot be sure he will be paid, particularly if the goods are destroyed.<sup>[2]</sup>

### ♦376 (2) Domestic Law

These policies on the allocation of risk are reflected in the (U.S.A.) Uniform Commercial Code. In non-shipment cases like Example 69A, when the seller is a merchant (as in that Example) risk passes to the buyer "on his

receipt of the goods" (UCC 2-509(3)); the result is the same as that of the Convention. When the buyer is in breach, as in Example 69B, the UCC gives weight to both the breach and to the availability of insurance: "the seller may to the extent of the deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable period" (UCC 2-510(3)).

The Convention's approach to the problem of risk is more direct and clear-cut than those domestic rules (like the U.K. SGA (1893)) that, unless [page 415] modified by case-law on international trade, invoke concepts such as "property" and "appropriation." [3]

### 377 B. Taking Over Other Than at Seller's Place of Business

Paragraph (2) states a separate rule on risk when "the buyer is bound to take over the goods at a place *other than* a place of business of the seller." No such provision appeared in ULIS; the Commission's discussion of this provision was directed to the sale of goods held at a public warehouse and reflected the possibility that the buyer might leave the goods in the warehouse for a substantial period after the goods were made available. [4]

Under paragraph (1) risk passes to the buyer when he "takes over the goods." Under paragraph (2) risk passes at an earlier point "when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal" at the designated place.

*Example 69C. A sales contract involved goods known by both parties to be held in a warehouse operated by a third person. When Seller deposited the goods in the warehouse Seller received a warehouse receipt stating that the goods would be released to Seller or to any person who held a delivery order executed by Seller. On May 1, at the time of the contract, Seller gave Buyer a delivery order directing the warehouseman to deliver the goods to Buyer. [5]. On May 2 a fire in the warehouse destroyed the goods.*

Under Article 69(2), risk passed to Buyer on May 1, since delivery was then due and the buyer knew that the goods were at his disposal.

Paragraph (2) also applies when the seller or a carrier makes the goods available to the buyer at the end of transit or at the buyer's place of business. For example, in a quotation "*Ex Ship* Buyer's port," risk passes when the goods are placed at the buyer's disposal, even though the "free [page 416] time" for taking over the goods has not expired. Under paragraph (2), unlike paragraph (1), the goods are not at the seller's place of business and the practical considerations involving insurance practices, mentioned above, do not apply fully; there is no reason for risk to remain on the seller. This result is consistent with commercial practice embodied in *Incoterms* (1990): Under a sale "Delivered Ex Ship" risk passes to the buyer when the goods are "placed at the disposal" of the buyer (A4, A5, B5). Similarly, under (U.S.A.) Uniform Commercial Code 2-509(1)(b), when the contract requires the seller "to deliver [the goods] at a particular destination" risk passes "when the goods are there duly so tendered as to enable the buyer to take delivery." See: Schlechtriem, Com. (1998) 512-516 (Hager).

### 378 (1) Identification

Paragraph (3) requires that goods be "clearly identified to the contract" before risk can pass to the buyer. A similar provision in Article 67(3) was discussed at 371. The question of "identification" in sales of shares of an identified bulk (e.g., grain in a specified warehouse, oil in an identified tank) was discussed in connection with Article 67(2) at 371, *supra*. See also 56.3, *supra* (applicability of the Convention to such sales). [page 417]

## Article 70. Risk When Seller is in Breach

379 In Article 69(1) we saw that when the *buyer* "commits a breach of contract by failing to take delivery" this breach may transfer risk to the buyer. Article 70 addresses the question whether a breach of contract by the *seller* (e.g., by dispatching non-conforming goods) will prevent the risk from passing to the buyer.

## Article 70 [1]

"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."

### ◆380 A. Effect of Non-Conformity of Goods on Risk in Transit

Article 70 applies only when "the seller has committed a fundamental breach of contract." To see the significance of this provision we need to consider the effect of breach that is not "fundamental."

*Example 70A. Seller and Buyer made a contract calling for Seller to ship to Buyer 1,000 bags of No. 1 quality soybeans. The contract did not require Seller to bear the risk during transit. (Hence, under the general rule of Article 67(1), supra at ◆363, risk would pass to Buyer "when the goods are handed over to the first carrier for transmission to the buyer.") Seller shipped 1,000 bags of soybeans; 999 bags conformed to the contract but one bag was graded "No. 2" rather than "No. 1." (Let us assume that this non-conformity was not a "fundamental breach" under Article 25. On this assumption, Buyer could not avoid the contract under Article 49(1)(a)). However, during the shipment to Buyer, 500 bags of beans were ruined by sea-water. May Buyer claim damages (or reduce the price) because of the failure of the 500 bags to grade No. 1 at arrival? May Buyer reject the shipment ("avoid the contract") on the ground that the 500 worthless bags constituted a "fundamental breach"?*

In this case Article 70 is inapplicable because (by hypothesis) the breach with respect to the one bag was not "fundamental." It follows that [page 418] the general rule on risk in transit (Art. 67(1), supra at ◆363) governs the case, and transit risk passed to Buyer. Under Article 36(1), supra at ◆241, the seller is only responsible for a "lack of conformity which exists at the time when risk passes to the buyer." Consequently, Seller is not responsible for the poor quality of the 500 bags that resulted from the casualty in transit. Of course, Seller is responsible in damages for the bag that graded No. 2 rather than No. 1; since (by hypothesis) this deviation was not a "fundamental breach" Buyer may not avoid the contract (i.e., reject the shipment).

### ◆381 (1) Fundamental Breach and Risk in Transit

*Example 70B. This case is like Example 70A except that the beans shipped by Seller were seriously defective: 600 bags were worthless for any purpose other than cattle feed. (We may assume that this constituted a "fundamental breach" of the contract as a whole.) Of the 400 bags that conformed to the contract on shipment, 150 were seriously damaged in transit by sea-water. May Buyer claim damages (or reduce the price) based on the failure of this part of the shipment to grade No. 1? May Buyer reject all the goods ("avoid the contract") because of the fundamental breach at the time of delivery to the carrier? Or would the Buyer be barred from "avoidance" on the ground that, under the contract, loss in transit was his responsibility, and he cannot return the goods in substantially the same condition as when they were shipped? (Cf. Art. 82(2)(a), infra at ◆445.)*

Again we start with the basic rule of Article 67(1) that, apart from breach, risk of loss would pass to the Buyer when the goods were handed over to the carrier. But here the serious nonconformity of the 600 bags constituted a "fundamental breach" of the contract as a whole; Buyer may avoid the contract under Art. 49(1)(a).

Do other provisions create barriers to avoidance? We may assume that the buyer notified the seller of avoidance promptly after the arrival of the goods and thereby complied with Article 49(2)(b). As we shall see, Article 82, infra at ◆445, establishes an additional barrier to avoidance: Under paragraph (1) A Buyer loses his "right to declare the contract avoided...if it is impossible for him to make restitution of the goods substantially in the condition [page 419] in which he received them." However, Buyer had not "received" the goods when they were damaged during transit. Cf. Arts. 21 & 60(b). In any event, the requirement of Article 82(1) that the goods be returned in the same condition as when received is subject to an exception in paragraph (2)(a) when the change in the condition of the goods was "not due to [the buyer's] act or omission." In our case, the change in condition of the goods was not due to an "act or omission" of the buyer but resulted from a transit casualty.

In short, when a serious breach of contract by the seller gives the buyer the right to reject goods ("avoid the contract"), this right is not lost because of damage to the goods during transit.[2]

This same result protecting the buyer's right to reject is embodied in the (U.S.A.) Uniform Commercial Code:

*Section 2-510. Effect of Breach on Risk of Loss*

"(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance..."

Under this language, a trivial breach that does not give a right of rejection ("avoidance") as in Example 70A does not overturn the risk provisions of the contract or the general statutory rules on risk. But when as in Example 70B the breach is so serious "as to give a right of rejection" ("avoidance") the defective delivery to the carrier is not effective to transfer transit risks to the buyer, and his right to reject because of the breach is preserved.<sup>[3]</sup>

**(a) Partial avoidance**

In Example 70B Buyer, if it chooses, need not avoid (reject) with respect to the entire shipment. Article 51(1), <sup>304</sup> *supra*, provides that if "only a part of the goods" conforms to the contract "articles 46 to 50 apply in respect of the part...which does not conform". Consequently, Buyer may effect a partial avoidance limited to the 600 bags that were seriously defective when they were shipped, and keep the 250 bags that arrived in good condition and the 150 bags that were seriously damaged during transit.

One might argue that although the language of Article 51 seems to limit partial avoidance to the goods that were defective when shipped (see also Articles 36(1) and 66), its overall purpose is to give an option to an aggrieved party to limit avoidance of the contract: When a buyer has the power to avoid the contract as a whole the theory that "the whole includes its parts" suggests that the buyer, instead of exercising its right to avoid as to the entire shipment of 1,000 bags, can elect to avoid as to only **[page 420]** 750 and keep only the 250 that arrived in good condition. The seller is not in a worse position than if the buyer had avoided as to the 1,000 bags; indeed, both parties probably are in a better position since the buyer can use the 250 good bags and the seller will be paid for them and its burden of redispotion, to this extent, will be lightened. It is difficult to predict a tribunal's reaction to laying such a heavy hand on the language of Article 51; counsel for the buyer might be well advised to inform the seller of the buyer's right to avoid the contract as a whole and suggest that it would be to the advantage of both parties to agree on a less drastic course.

**382 (b) Damages Based on Transit Casualty**

We return to Example 70B the shipment of seriously defective soybeans that were subject to damage in transit. Of the 1,000 bags, 600 were defective when the seller delivered the goods to the carrier. Of the remaining 400 bags, 150 were damaged in transit and 250 arrived in good condition. Let us assume that the buyer needed the soybeans and accepted the shipment, but immediately notified the seller of the poor condition of the goods (Art. 39). May the buyer recover damages not only for the 600 bags that were defective at the time of shipment but also for the poor condition of the 150 bags that resulted from damage in transit? (For the sake of completeness we here face a problem that will seldom arise. When the goods are subject to two serious difficulties non-conformity at shipment that is "fundamental" plus damage in transit the buyer would often exercise its right to avoid the contract.)

A buyer who accepts the goods probably may recover damages from the seller only for the non-conformity at the time of shipment; for the damage in transit the buyer must look to the carrier or the insurer. Article 70 merely provides that the seller's fundamental breach does not "impair the remedies available to the buyer on account of the breach." This language (unlike U.C.C. 2-510(1), quoted *supra*) does not modify the Convention's rules on passage of risk. Risk in this case passed to the buyer (Art. 67(1)) "when the goods were handed over to the first carrier"; Article 70 says merely that when the seller has committed a fundamental breach, the articles on risk of loss (Arts. 67, 68 and 69) do "not impair the remedies available to the buyer on account of the breach." Prior to the transit damage the buyer had the right to avoid the contract. Article 70 preserves the buyer's right of *avoidance* with full recovery of the price, a remedy that the buyer, surprisingly, did not invoke. When a buyer



chooses to accept a shipment that is doubly defective (seriously defective at shipment and damaged further during transit) it is difficult to conclude [page 421] that Article 70 enlarges the buyer's damage claim to include the damage that resulted after risk passed to the buyer.

The result that flows from a literal reading of Article 70 may be unfortunate in encouraging the buyer to reject ("avoid") rather than to salvage the shipment and claim damages. However, as we noted above, the buyer will rarely choose to take responsibility for the goods when they are so seriously defective. If the buyer does choose to accept the goods, his responsibility for transit casualty may be justified since a buyer in possession of the goods at the end of an international shipment is usually in a better position than the seller to claim for transit damage against the carrier and insurer.[4]

### ❖382.1 (c) *Requiring Delivery of Substitute Goods*

When the seller commits a fundamental breach Article 70 preserves not only the buyer's right to avoid but also the right (Art. 46(2)) to require the delivery of substitute goods.

*Example 70C. Seller contracted to ship 100 machines to Buyer. As in the preceding examples, under Article 67(1) risk passed to the buyer when the seller handed over the goods to the carrier. On arrival of the goods, inspection showed that in all the machines a vital component "X" was defective at shipment. (Let us assume that this defect was a fundamental breach.) In addition, sea-water had seriously damaged component "Y" in 30 of the machines. Only Seller made this type of machine and Buyer wanted to receive the machines despite the delay that would result from a second shipment. May Buyer require Seller to "deliver substitute goods" pursuant to Article 46(2) for all 100 of the machines in spite of the transit damage to 30 that occurred after risk passed to Buyer?*

The answer is Yes. As we saw from Example 70B, Article 70 provides that "when the seller has committed a fundamental breach of contract" the Convention's rules on risk (Arts. 67, 68, and 69) "do not impair the remedies available to the buyer on account of the breach". Avoidance calls for return of the goods to the seller which, in effect, transfers the loss from transit damage back to the seller. The same is true when a buyer exercises its right under Article 46(2) in the event of fundamental breach to "require delivery of substitute goods". See Art. 46 at ❖283, *supra*, and [page 422] Art. 82(1) ❖446, *infra* (both avoidance and requiring substitute goods calls for return of the defective goods).

The above example gives us an opportunity to bring into focus a wider range of principles dealing with risk of loss and remedies. If component "X" constituted only part of the machine and was readily replaceable, the defect in this component might not constitute a "fundamental breach" (Arts. 25 & 49(1)(a)); Buyer by avoidance could not make transit risk fall on Seller (Art. 70). In this situation, in normal commercial practice Seller would offer to replace component "X". (Sellers may have this right under the "cure" provisions of Articles 37 and 48; if, contrary to normal practice, Seller does not offer to repair Buyer probably could require this repair under Article 46(3).) If the defect in component "X" was not a "fundamental breach" Buyer would bear the cost of repairing the transit damage to component "Y". However, Seller might well agree to bear this cost as part of a settlement of Buyer's claim based on the defect in component "X". (Seller might feel that a generous settlement, following a defective shipment, would help to maintain, or restore, good commercial relations with Buyer.)

### ❖383 B. Casualty to Non-Conforming Goods After Receipt by Buyer

*Example 70D. On June 1 Seller handed over goods to Buyer. Buyer's inspection on June 2 disclosed that the goods were not in conformity with the contract. On June 3 a fire in Buyer's warehouse damaged the goods. Buyer did not declare the contract avoided but claimed damages from Seller for the non-conformity at the time of delivery and also for the damage resulting from the fire.*

Buyer, of course, may recover damages for the non-conformity at the time of delivery, but he has no claim for the damage to the goods resulting from the fire. Under Article 69, risk passed to Buyer when he "took over" the goods. Where the buyer does not declare the contract avoided, the risk of loss passes to him when he takes over the goods regardless of the seriousness of the nonconformity.

*Example 70E. The facts are the same as in Example 70D, except that the non-conformity was so substantial as to constitute a "fundamental breach," and on June 4 Buyer declared the contract avoided.*

The result here is like that in Example 70C, above, and Buyer may avoid the contract even though the goods returned to the seller will be subject to two types of defect: (i) the initial serious nonconformity; and [page 423] (ii) the damage caused by the fire. Article 70 provides that if the seller commits a fundamental breach of contract, Articles 67, 68 and 69 [on transfer of risk] "*do not impair* the remedies available to the buyer on account of the breach." One of these remedies, when the goods are seriously defective, is avoidance of the contract (Arts. 25 and 49(1)(a)). This result is consistent with Article 82(2)(a), discussed *supra*, at ¶381. See the further discussion of Art. 82, *infra* at ¶445.

Problems of policy are presented if the seller must bear the risk of loss while the buyer holds goods in his possession for extended periods of time.[5] But under Article 49(2), "where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:...(b)...within a reasonable time: (i) after he knew or ought to have known of the breach." [6] Because of practical problems that result from divorcing risk from possession, the "reasonable" period should not be long.[7] See, in general, Schlechtriem, Com. (1998) 517-520 (Hager).[page 424]

## CHAPTER V.

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

(Articles 71-88)

#### Introduction to Chapter V

¶384 Remedies specially applicable to breach of contract by the seller were provided in Chapter II (Arts. 45-52) and corresponding remedies for breach by the buyer were set forth in Chapter III (Arts. 61-65). The present chapter addresses remedial problems that may be faced by either party.

Section I, Anticipatory Breach and Installment Contracts (Arts. 71-73), is concerned primarily with protection against impending breach. A party who faces this problem may, in some circumstances, suspend performance (Art. 71) or avoid the contract (Art. 72). Article 73 deals with similar problems that arise in contracts for the delivery of goods by installments.

Section II (Arts. 74-77) provides rules for measuring damages. Section III consists of a brief provision (Art. 78) concerning interest on sums in arrears. Section IV, Exemptions (Arts. 79-80), confronts the difficult question of excuse from liability when performance is prevented by an impediment (*e.g.*, *force majeure*). Section V, Effects of Avoidance (Arts. 81-84), includes provisions on the restitution of benefits received under a contract that has been avoided. Section VI, Preservation of the Goods (Arts. 85-88), is designed to prevent the waste or deterioration of goods that have been rejected.[page 425]

#### Section I. Anticipatory Breach and Instalment Contracts (Articles 71-73)

##### Article 71. Suspension of Performance

###### ¶385 A. Introduction

This article addresses problems like these: (1) A seller has agreed to deliver goods on credit but, prior to the time for delivery, the buyer becomes insolvent or otherwise has manifested an inability to pay for the goods. (2) A buyer has agreed to pay before receiving the goods but, prior to the time for payment, the seller's insolvency or some other circumstance makes it apparent that the seller will not deliver the goods.

Does the law afford protection for the party who is threatened with a failure of performance by the other party? May the party facing this threat suspend its own performance? (Avoidance prior to the date for performance is governed by Article 72, *infra*.)

## Article 71 [1]

"(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 [page 426] 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."

Paragraph (1) applies to a threat of non-performance by either party. Paragraph (2) applies to a specialized situation—a threat of non-payment that becomes apparent while goods are in transit.

## 386 B. Suspension of Performance Under Paragraph (1)

### (1) Types of Performance Subject to Suspension

In limited circumstances (examined *infra* at 387), paragraph (1) authorizes a party to suspend the performance of obligations such as delivery of the goods (Arts. 31–34) or payment of the price (Arts. 54–59). Article 71(1) also has a broader reach. For instance, the contract may require the seller to procure or manufacture goods described in the contract; when it is apparent that the buyer will not be able to accept delivery and pay for the goods, the seller may suspend procurement or production. Similarly, when it appears that the seller will not be able to deliver the goods, the buyer may suspend required steps leading toward payment, such as the establishment of a letter of credit (Art. 54).

The contract and the Convention may require other preliminary steps leading to final performance. See, e.g., Art. 32 (shipping arrangements), Art. 34 (handing over of documents), Art. 54 (required steps such as establishing a letter of credit), Art. 65 (supplying specifications for goods). Failure to take these steps may constitute a breach of contract, not merely a portent of a future breach; in some cases the breach may be sufficiently serious to justify avoidance (Arts. 49(1)(a), 64(1)(a)) or a *Nachfrist* notice (Arts. 47(1), 63(1); see 323, *supra*). However, if the aggrieved party is hopeful of obtaining performance or if grounds for avoidance are not clear, the aggrieved party will prefer a less drastic approach such as suspension of its own performance.

Article 71 does not authorize a seller to dispose of goods held for the buyer nor does it authorize a buyer to purchase goods to replace goods to be supplied by the seller; under Article 75, *infra*, these remedies apply [page 427] only when the contract is avoided. The point is significant since *avoidance* of the contract by one party because of prospective failure of performance by the other (Art. 72, *infra* at 395) is subject to standards that are more strict than the standards that Article 71 applies to *suspension* of performance.

## ◆387 (2) *Grounds for Suspension*

Grounds for suspension provided by the 1978 Draft Convention were revised by the Diplomatic Conference. The revised language presents delicate problems of interpretation; a review of the legislative history seems advisable.

### ◆388 (a) *Legislative History of Article 71(1)*

The 1978 Draft Convention, (Art. 62(1)) suggested that suspension could not be based on facts existing at the time of contracting that indicated the inability by one party to perform even though these facts were not known by the other party. The Diplomatic Conference revised this language to state that suspension could be based on preexisting facts that *became apparent* only after contracting.[2]

The more important change in the 1978 Draft narrowed the grounds for suspension. This draft authorized suspension of performance by a party who has "good grounds to conclude that the other party will not perform a substantial part of his obligations." At the Diplomatic Conference the representative of Egypt, Professor Mohsen Chafik, criticized this language on the ground that it gave excessive effect to the subjective view of one party. To meet this problem Professor Chafik proposed that provisions of the article on *suspension* (then Art. 62, now Art. 71) and the following article on *avoidance* for anticipatory breach (then Art. 63, now [page 428] Art. 72) should be combined. Under this proposal, if it "becomes apparent that one of the parties [Party A] will commit a fundamental breach of contract," the other party [Party B] may give notice that he intends to suspend performance if Party A fails "to provide adequate assurances...of properly performing his obligations"; if Party A does not provide this assurance, Party B "may declare the contract avoided." This restriction of the right to suspend performance received substantial support on the ground that it was important for the protection of developing countries but, on an equally divided vote, failed to be adopted. Concern lest this decision might impede adherence to the Convention led to the appointment of an *ad hoc* working group of ten countries to develop a compromise solution. A revised text developed by this group became Article 71 of the Convention.[3]

When a party proposes to suspend performance what degree of certainty is required by the phrase "it becomes apparent that the other party will not perform a substantial part of his obligations?" Certainly the new language meets the objection that the 1978 Draft authorized suspension based on mere subjective fear. Does Article 71(1) restrict suspension to cases where there is objective certainty that the other party will not perform?

This latter construction is subject to two objections. In the first place, the conference rejected the proposal to assimilate suspension under Article 71 with avoidance of the contract under Article 72, and took pains to preserve different language authorizing these different remedies. Suspension under Article 71 is permitted when "it becomes apparent" that a party will not "perform a substantial part of his obligations"; avoidance under Article 72 is authorized only when "it is clear" that a party will commit a fundamental breach of contract.[4] [page 429]

A second objection derives from Article 71(3). As we shall see (*infra* at ◆391) a party suspending performance must notify the other party of the suspension "and must continue with performance if the other party *provides adequate assurance of his performance*." Thus, circumstances that make it "apparent" that the other party will not perform need not establish a certainty of non-performance since the initial appearance may be modified by clarification of the situation or by the removal of the initial barriers to performance.[5]

In sum, under Article 71(1) subjective fear will not justify suspension; there must be objective grounds showing substantial probability of non-performance.

*Decisions: Grounds for Suspension.* (1) HUNG. [Arb. C. of C., VB 94124, 17 November 1995](#). S contracted to make successive deliveries of mushrooms to B. B, contrary to contract, failed to establish a bank guarantee or pay for the initial delivery. Held: Under Art. 71(1)(b), S was entitled to suspend further deliveries and sue for the price of delivered goods. UNILEX D. 1995◆28.2. (2) BELG. [Tr. de Comm. Bruxelles, RG 4.825/91, 13 November 1992](#). S delivered clothes to B; B refused to pay the price. S refused to deliver further clothes to B. Held: S's non-delivery was justified. UNILEX D. 1992◆25.1. (See similar case at Art. 72(1).) (3) BELG.

[Rechtbk v. K., Hasselt, A.R. 3641/94, 1 March 1995](#), J.P.S. v K.M. (similar to above cases). UNILEX D. 1995-7.0. See: Schlechtriem, Com. (1998) 522-531 (Leser).

### ❖389 (b) *Suspension of Performance Under Domestic Law*

The Convention's authorization to suspend performance may become clearer in comparison with some of the domestic legislation that deals with this question.

The (U.K.) Sale of Goods Act (1893) §41(1) provides that even though a seller has agreed to deliver the goods before the buyer pays, the seller may "retain possession...(c) Where the buyer becomes insolvent." This, in effect, authorizes suspension of performance because of prospective non-performance by the other party. However, the right to suspend is given only to the seller and arises only in one narrowly-defined circumstance. The Ontario Law Reform Commission concluded [page 430] that this provision was too narrow, and proposed a liberal provision on suspension based on the (U.S.A.) Uniform Commercial Code which provides:[6]

#### *Section 2-609. Right to Adequate Assurance of Performance.*

"(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return...

"(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."

The UCC's provision on suspension resembles Article 71 in that it protects both sellers and buyers, but the grounds for suspension are broader than in the Convention since UCC 2-609(1) protects a party's "expectation" of receiving due performance and applies when "reasonable grounds for insecurity arise." [7]

The German Civil Code §321 also provides for suspension in a seminal provision that has influenced legislation elsewhere:

"If a person is obliged by a mutual contract to perform his part first, he may, if after the conclusion of the contract a significant deterioration in the financial position of the other party occurs whereby the claim for the counter-performance is endangered, refuse to perform his part until the counterperformance is made or security is given for it." [8]

The above provision resembles Article 71(1) of the Convention and UCC 2-609 in that it can protect either the seller or the buyer but is narrower in two respects. It applies only when one person is obliged to "perform his part first" and thus might not authorize suspension of manufacturing when the contract provided for concurrent exchange of goods for the price.[9] Moreover, the right to suspension arises only on [page 431] "deterioration in the financial position of the other party"; the Convention and UCC 2-609 do not so limit the circumstances that give rise to insecurity.[10]

### ❖390 C. *Stoppage of Goods in Transit*

Unlike paragraph (1) which is available to both parties, paragraph (2) addresses a special problem that is of concern only to sellers—a threat to payment that becomes evident after the goods have been dispatched. Paragraph (2) provides that in specified circumstances the seller may prevent the carrier from handing over the goods to the buyer.

This right is available without regard to whether risk of loss has passed to the buyer: Transit risk normally passes to the buyer when the goods are delivered to the carrier (Art. 67(1), §§364-365, *supra*) so that the



Convention's rules on risk of loss would virtually nullify its rules on stoppage; in addition, Articles 67(1) and 71(2) address problems that are functionally distinct. For similar reasons domestic rules that "property" or "title" has passed to the buyer may not undermine the narrow and specific rights conferred by Article 71(2). The Convention has rejected the use of such general concepts in determining the mutual rights and obligations of the seller and buyer (Art. 4(b), ¶¶ 28, 70, 358); on the other hand, Article 71(2) (last sentence) provides that the seller's right to stop delivery to the buyer does not impair the rights of third persons.

Paragraph (2) will be useful only in an unusual combination of circumstances: (1) The threat of non-payment is discovered after the goods are dispatched and before they are handed over, and (2) The seller has not retained control over the goods, as by the retention of a negotiable bill of lading (Art. 58(2)). Comparable provisions on stoppage in transit are contained in domestic legislation.<sup>[11]</sup>

The provisions on stoppage in transit in Article 71(2) of the Convention reflect a substantial revision of ULIS 73(2) and (3). ULIS attempted to deal with the effect of stoppage in transit on the rights of a third person who is a "lawful holder" of a document of title. This attempt proved to be inadequate; instead, Article 71(2) of the Convention provides that it "relates only to the rights in the goods as between the buyer and the [page 432] seller." Whether a third person has acquired rights in the goods that would override the seller's right to prevent delivery to the buyer would depend on applicable domestic law, akin to the rules protecting the property rights of good faith purchasers. As we have seen, Article 4(b) excludes such issues from the scope of the Convention.<sup>[12]</sup>

The fact that Article 71(2)'s rules on stoppage relate only to rights "as between the buyer and the seller" does not make this provision as feeble as might be supposed. *Cf.* Bennett, *B-B Commentary* 520-521. True, the Convention does not state that when Article 71(2) applies the carrier must deliver the goods to the seller; the carrier needs protection lest some third party in good faith might have purchased the goods (or documents representing them) and thereby acquired rights to the goods that are protected by applicable domestic law. On the other hand, Article 71(2) states that the seller may stop delivery "even though the buyer holds a document that entitles him to obtain them"; under this language the seller may stop delivery even though the buyer holds a negotiable bill of lading or other document controlling delivery.<sup>[13]</sup> In this case, to protect the carrier, the seller by an appropriate proceeding should require the buyer to deliver the documents to the seller or to the carrier. See Arts. 62, 71(2).

Even a third party who holds documents that control delivery may not have rights under domestic law that would cut off the seller's right to the goods. The essential point is that domestic law can be expected to honor the seller's rights against the buyer established by Article 71(2) and give the seller as much protection against third persons as domestic law accords to other persons in the seller's position. The carrier, of course, can have no objection to delivering the goods to the person who is entitled to them if the procedures suggested above protect the carrier against third-party claims. (In any case the carrier is normally entitled to receive any unpaid freight before delivering the goods.)

A seller's right to stop delivery is not limited to "suspension" of performance under Article 71(2). Assume that a buyer commits a fundamental breach (failure to pay; repudiation) while the goods are in transit. The seller may thereupon avoid the contract (Art. 72, *infra*, Art. 64, ¶¶ 353-356, *supra*) and may reclaim the goods to enforce the right (Art. 81(2), ¶ 444, *infra*) to "claim restitution" of what has been supplied under [page 433] the contract. Here, as under Article 71, the seller may be subject to the rights of third parties based, *e.g.*, on good faith purchase.

### ♦391 D. Continuation of Performance on Receipt of Adequate Assurance

As we have seen (*supra* at ¶ 386), under Article 71(3) a party who has suspended performance "must continue with performance if the other party provides adequate assurance of performance."

#### ♦392 (1) Examples of "Adequate Assurance" of Performance

Reassuring words alone cannot provide "adequate assurance" of performance: under paragraph (3) a party notified of suspension must provide evidence of concrete facts or action that removes the threat that he "will not perform a substantial part of his obligation" (Art. 71(1)).

Threats of non-performance may develop under a wide variety of circumstances; the range of remedial steps can only be suggested. For example, where a buyer has suspended payment of his current obligations adequate assurance of performance may, in some circumstances, be provided by proof that the buyer has reestablished current payments; in other circumstances "adequate assurance" may call for the issuance by a bank of an irrevocable letter of credit. Threats to continued performance by the seller resulting from a strike or the loss of a source of necessary materials may be removed by showing that the strike has been settled or that a new source of materials has been obtained. Developing an adequate solution to such problems calls for good faith consultation between the parties.<sup>[14]</sup>

Must a party who is subject to suspension provide assurance of perfect performance? Suppose that the assurance shows that full performance will occur but after a slight delay. Continued suspension of performance is closely akin to avoidance of the contract; the answer to the above question should be consistent with the principles on avoidance in Article 25, 49, 64 and with the rule of Article 71(1) authorizing suspension only **[page 434]** when there is a threat of nonperformance by the other party of "a *substantial* part of his obligations." An assurance under Article 71(3) should be "adequate" even if it involves an insubstantial nonconformity in performance. *Accord*: Bennett, *B-B Commentary* 523; Strub, *supra* n.3, at 496. Of course, a party in breach must compensate the other party for damages (Art. 74); the likelihood of even minor damages may well call for adequate assurance for the payment of the damages. See Art. 25, *supra* at **184**.

### **393 (2) Extension of Time Because of Suspension**

Assume that a party, aggrieved by a threat of non-performance, justifiably suspended performance. The other party then provided "adequate assurance" of performance so that the aggrieved party became obliged to resume performance. Is the aggrieved party held to the initial time-schedule specified in the contract?

The Convention and the rules of domestic law set forth, *supra* at **384**, do not address this question. It seems that, at least in some circumstances, the right to "suspend" performance must carry with it an extension of the time for continued performance. Suppose that a contract made on June 1 requires the seller to manufacture goods to the buyer's specifications and deliver them on September 1. On July 1, before the seller has had time to manufacture the goods, the seller is entitled under Article 71(1) to suspend performance. The seller immediately notifies the buyer of the suspension but the buyer does not provide adequate assurance of his performance until August 15. If completion of manufacture would require a month the right of "suspension" would be nullified if the seller must deliver the goods by September 1. The problem calls for a reasonable adjustment to the new situation.<sup>[15]</sup> The seller may not always need an extension of time that is equivalent to the period of the suspension; helpful suggestions for solving these problems are available in domestic legislation.<sup>[16]</sup> **[page 435]**

### **394 E. Consequences of Failure to Provide Adequate Assurance**

Assume that Party A is aggrieved by a threat of non-performance by B and properly suspends performance but B fails to provide adequate assurance. A may continue to suspend performance but how will the contract relationships finally be resolved?

When the time for B's performance passes and B still fails to perform, in most cases A may avoid the contract and claim damages for non-performance. Arts. 25, 49, 64 and 81. However, A may not need to wait for the time specified in the contract for performance; B's failure to respond with assurances of performance may make it "clear" that B will commit a fundamental breach of contract <sup>[17]</sup> a ground for avoiding the contract under Article 72, which follows. **[page 436]**

---

## **Article 72. Avoidance Prior to the Date for Performance**

❖395 Articles 49 and 64, *supra* at ❖301 and ❖353, govern the right of an aggrieved party (A) to avoid the contract when the other party (B) has committed a breach of contract by defective performance or by failing to perform by the date required under the contract. In contrast, Articles 71 and 72 are concerned with situations where breach by B is threatened prior to the date for performance. Article 71 merely permits A to "suspend the performance of his obligations"; A is liberated from its obligation to perform or to accept performance only by avoiding the contract❖(a) after B *has committed* a fundamental breach of contract (Arts. 49 or 64) or (b) under Article 72, below, when "it is clear" that B "*will commit* a fundamental breach." avoidance of contract

## Article 72 [1]

"(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."

## ❖396 A. Grounds for Avoidance; Hazards

In examining the right to suspend performance (Art. 71, *supra* at ❖387) we saw that standards for suspension are less rigorous than the standards for avoidance under Article 72. Article 72 authorizes an aggrieved party (A) to avoid the contract prior to the date for performance only when "it is *clear*" that the other party (B) "will commit a fundamental [page 437] breach of contract." Unless B has declared that he will not perform (para. (3)), A❖s attempt to avoid the contract in advance of the time for performance may overstep the limits set by Article 72. In this event, A still has a duty to accept performance by B. Moreover, A❖s wrongful declaration of avoidance may constitute a repudiation giving B the right to avoid the contract under Article 72(1).[2]

What circumstances make it "clear" that a party "will commit a fundamental breach of contract"? Paragraph (3) shows that a party❖s declaration "that he will not perform his obligations" empowers the aggrieved party to declare the contract avoided, even though such a declaration does not make it absolutely "clear" that the repudiating party will not change his mind and perform by the due date.[3] Schlechtriem notes that "the frequent cases in which a demand for new terms or alleged contract violations by the other side are used as a pretext for not performing one's own obligations" provide "in most cases" a basis for immediate avoidance. 1986 *Commentary* 95. This proposition was probably intended to govern situations in which one party (A) demands new terms from B coupled with an unconditional declaration that A "will not perform" its obligations. Avoidance by B should not be triggered if A informs B of the need to negotiate a modification of their agreement (*cf.* Art. 29). In any event, a response by B that goes beyond a notice of suspension of B❖s counterperformance and a request for assurance (Art. 71, *supra*) may be hazardous since it may provide grounds for A to avoid the contract on the ground that B has repudiated under Art. 72(1). *Cf. White & Summers* ❖6❖2; *Farnsworth, Contracts* 634. Actions may be the equivalent to a repudiation❖e.g., the wrongful resale to a third person of the goods that the seller had contracted to deliver to the buyer, or the sale of the manufacturing plant at which the seller had agreed to produce goods for the buyer. Of course, these are only a few of the circumstances that might invoke this article.[4] [page 438]

## ❖397 B. Advantages; Consequences

We have just noted some of the hazards of Article 72 avoidance. Are there advantages of early avoidance? Where A❖s avoidance responds to B❖s wrongful repudiation and therefore is clearly justified (Art. 72(3)), A❖s declaration of avoidance makes it possible for A to resell (or repurchase) the goods called for by the initial contract; A need not be concerned lest B change its mind and tender performance. In addition, by virtue of Article 75, *infra* at ❖409, a reasonably prompt resale or repurchase (even prior to the date for performance) may fix the damages for which the repudiating party will be liable. May A bring legal action before the date for B❖s

performance? Such haste in instituting legal proceedings is seldom of practical value but Articles 75 and 76, *infra* at [409](#), seem to authorize action immediately on avoidance.[\[5\]](#)

The effects of avoidance in various settings (Arts. 49, 64, and 72) are prescribed in Ch. V, Sec. V (Arts. 81-85) *infra*; these include the right to recover damages (Arts. 81(1)) and to claim restitution of whatever the avoiding party has supplied or paid under the contract (Art. 81(2)).

*Decisions: Probability of Breach.* (1) GER. [LG Berlin, 99 O 123/92, 30 September 1992](#). S contracted to deliver shoes to B, a retailer; payment could be delayed until 60 days from invoice. Before the date for performing this contract, B failed to pay S under a prior ("first") contract. S then asked B to provide security for payment under the "second" contract because of doubts of B's solvency. B refused to provide the requested security, claiming that the shoes S delivered under the "first" contract were defective. S declared the "second" contract avoided and resold, at a loss, the shoes that would have been delivered under this contract. Held: S's action for damages from the "second" contract was sustained. For avoidance, the probability of future breach must be very high, but does not require almost complete certainty. Here the probability of future breach justified avoidance. UNILEX D.1992-21. (2) See also: GER. [OLG Düsseldorf, 17 U 146/93, 14 January 1994](#). CLOUT 130, UNILEX D.1994-2.[\[page 439\]](#)

*Commentary:* Bonell/Ligouri, ULR (1996-2) 359 at 368-369; Strub, M.G., Anticipatory Breach and Developing Countries, 38 Int. & Comp. L. Q. 475-501 (1989); Schlechtriem, Com. (1998) 533-541 (Leser).

### **398 C. The Requirement of Advance Notice**

Paragraphs (2) and (3) were added to this article at the Diplomatic Conference. The discussion of Article 71, *supra* at [388](#), referred to the concern, primarily on behalf of developing countries, that the power of suspension might be abused. Similar concerns were expressed with respect to avoidance under Article 72; the addition of paragraphs (2) and (3) was part of the compromise developed by an *ad hoc* working group with respect to both Articles 71 and 72.[\[6\]](#)

The addition of paragraphs (2) and (3) to Article 72 appears to have been useful. Under paragraph (2) advance notice of avoidance must be given only "if time allows." Modern methods of communication would normally permit such a notice without unduly hampering the aggrieved party's freedom of action. In any event, advance notice "if time allows" would be consistent with good faith and normal commercial practice and, indeed, would reduce the hazards of making a declaration of avoidance.[\[7\]](#) [\[page 440\]](#)

## **Article 73. Avoidance in Instalment Contracts**

**399** A sales contract calls for deliveries in January, February, and March. Article 73, in three paragraphs, addresses seriatim the following three questions: (1) The January delivery is seriously defective—may the buyer refuse to accept that delivery? (2) As in (1), the January delivery is seriously defective—May the buyer not only refuse that delivery but also the deliveries scheduled for February and March? (3) The buyer receives and accepts the January delivery, but the February delivery is seriously defective—May the buyer not only refuse the February delivery but also return the goods that he received in January and refuse the delivery scheduled for March?

Paragraphs (1) and (2) of Article 73 apply to breach of contract by either the seller or the buyer; examples (1) and (2), above, could be rephrased in terms of failure by the buyer to pay for an instalment.

### **Article 73 [1]**

"(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, [page 441] those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

## 400 A. Refusal of the Defective Instalment

As was indicated above, paragraph (1) is directed to the problems that are presented when either party fails to perform his obligations with respect to one instalment of a larger contract. In example (1) described in 399, when the goods delivered in January are defective, may the buyer reject the January delivery? Or if the buyer fails to provide for paying for the January delivery, may the seller refuse to tender the January instalment?

The approach established by paragraph (1) makes the rules on avoidance for fundamental breach (Arts. 25, 49 and 64) applicable separately to each instalment.<sup>[2]</sup> The crucial question is this: Was there "a fundamental breach *with respect to that instalment*?" If so, Article 73(1) states that "the other party may declare the contract avoided *with respect to that instalment*."

The approach of Article 73(1) is thus similar to that established in Article 51 when "the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract." In those situations, Article 51 provides that the remedies for breach (including the right to avoid the contract) apply "*in respect of the part* that is missing or which does not conform." As has been noted (Art. 51, *supra* at 315) such explicit provisions are useful to avoid misunderstanding that can result from the concept "avoidance of *the contract*"; when a buyer refuses to receive only a part of the goods covered by the contract he does not avoid *all* of "the contract." Articles 51 and 73 adapt the general concept of "avoidance of the contract" to a narrower issue: What may the aggrieved party do with respect to a specific delivery or a specific payment? Once the issue has been made specific and concrete, the Convention's general rules on avoidance for fundamental breach (Arts. 25, 49 and 64) may be applied without added difficulty. *Cf.* (U.S.A.) UCC 2-612(2).<sup>[3]</sup> [page 442] The policy that underlies both Articles 51 and 73 is to avoid unnecessarily drastic consequences from the failure to perform a separable part of the contract. Those circumstances in which breach with respect to a part invoke more drastic remedies with respect to the rest of the contract are defined in paragraphs (2) and (3) of Article 73.

## 401 B. Refusal of Future Instalments

Paragraph (2) provides that seriously defective performance of one part of the contract may empower the aggrieved party to avoid the contract with respect to future performance. The test is whether the initial breach gives "the other party *good grounds to conclude* that a fundamental breach of contract will occur with respect to future instalments" a standard that is less strict and more subjective than grounds for suspension under Article 71 or for avoidance under Article 72. This may be explained by the fact that in the setting of Article 73(2) (unlike the situations invoking Arts. 71 and 72) a breach of contract has already occurred.<sup>[4]</sup> Under this more flexible standard a series of breaches, none of which would justify avoidance, taken together may give the other party good grounds to conclude that a "fundamental breach" of the remainder of the contract will occur.

[Secretariat Commentary on draft Art. 64\(2\), para. 6, O.R. 54, Docy. Hist. 444.](#)

*Decisions:* (1) FR. [CA Grenoble, RG/3275, 22 February 1995. Sarl v. Pan Af.](#), B assured S that B would resell in So. America, but sold the first instalment in Spain, interfering with S's marketing there. Held: Fundamental breach by B justified S in avoiding the contract for future instalments. CLOUT 154, UNILEX D.1995-7. (2) GER. [LG Ellwangen, 1 KfH O 32/95, 21 August 1995](#). In an instalment contract for paprika, future instalments were avoided because of S's failure to meet standards in B's [page 443] country. UNILEX D.1995-20. (3)



Cf. Switz. [Hg. K. Zürich, HG 950357 \(5 Feb. 1997\)](#). CLOUT 214. (Cf. cases at Articles 71 & 72, supra.) See: Schlechtriem, Com. (1998) 543-551.

## ❖ 402 C. Avoidance of Instalments Based on Interdependence with a Defective Instalment

The situation envisaged by paragraph (3) may be illustrated as follows:

*Example 73A. A sales contract called for Seller to deliver one machine in January, a second in February, and a third in March. The three were designed to perform a series of interrelated production operations; none of the machines was compatible with machines made by other manufacturers. In January, Seller delivered a machine that conformed with the contract but the machine delivered in February was so defective that the Seller could not cure the defect. Replacement with a second machine was not possible.*

We may assume that, pursuant to paragraph (1), Buyer may return ("avoid the contract" with respect to) the machine delivered in February. Pursuant to paragraph (3), Buyer may return ("avoid the contract" with respect to) the machine delivered in January and also may refuse to accept the machine to be delivered in March, since "by reason of their interdependence, those deliveries could not be used for the purposes contemplated by the parties at the time of the conclusion of the contract." "Could not be used..." is even a stricter standard than for fundamental breach (Art. 26) and reflects the fact that here avoidance extends to goods that are free from defect and can apply to goods (e.g. the machine delivered in January) that have been received without objection. In short, avoidance with respect to the January and March instalments is based solely on their interdependence with the defective machine delivered in February.<sup>[5]</sup>

The (U.S.A.) Uniform Commercial Code achieves a similar result by providing (2-608) for the revocation of acceptance of a "commercial unit," which is defined (2-105(6)) as a unit which "by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use."<sup>[6]</sup> [page 444]

## Section II. Damages (Articles 74-77)

### Article 74. General Rule for Measuring Damages

❖ 403 Breach of contract can occur in an almost infinite variety of circumstances; no statute can specify detailed rules for measuring damages in all possible cases. All that can be done, and all that is needed, is to state basic principles to govern compensation for breach of contract. This is the role of the present article.

#### Article 74 [1]

"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."

The standard established by Article 74 is brief but powerful. Damages consist of "the loss, including loss of profit suffered...as a consequence of the breach" ❖ a standard that is designed to place the aggrieved party in as good a position as if the other party had properly performed the contract. See *Treitel, Remedies* (1988) 82 (basic principle of remedies). We shall have occasion to illustrate this principle in several settings.<sup>[2]</sup> Difficulties in applying the legal rules may be minimized or avoided by a [page 445] well-drafted contract provision specifying ("liquidating") damages. See *Kritzer Manual* Ch. 6. But cf. CISG Art. 4(a) & UCC 2-718(1) (unreasonably large "liquidation" may be "void as penalty".)

## ◆404 A. Relation Between Article 74 and Remainder of Section II

The measurement of damages in cases where the contract is avoided can best be considered in the setting of Articles 75 and 76, *infra* at ◆409, since these articles are addressed specifically to this problem. Thus, we shall temporarily put to one side the following situations: (a) The seller fails to deliver the goods on time or delivers goods that are seriously defective and the buyer declares the contract avoided (*i.e.*, the buyer rejects or returns the goods); (b) The buyer fails to take delivery and pay for the goods and the seller declares the contract avoided (*i.e.*, the seller refuses to deliver or recovers the goods). Nevertheless, the general rules of Article 74 on the recovery of damages are applicable to the above situations governed by Articles 75 and 76. For example, a failure of performance leading to avoidance of contract may reduce the volume of business of the aggrieved party and thus lead to loss of profit; under these circumstances the damages specified in Article 75 and 76 may be enhanced by the provision of Article 74 that damages may include "loss of profit". This question will be discussed under Articles 75 and 76 at ◆415.[3]

When the goods are delivered to and retained by the buyer the only breach by the buyer is normally the failure to pay the price. This seldom presents problems of damage-measurement; under Article 62, *supra* at ◆345, the seller "may require the buyer to pay the price", and under Article 78, *infra* at ◆420, the seller "is entitled to interest" for the period that the payment is in arrears.[4] (As we shall see, Article 78 provides generally for interest on any "sum that is in arrears" from either party.)[page 446]

## ◆ 405 B. Damages Caused by Defective Goods and by Delays in Delivery

There remain cases where the buyer receives and uses goods that do not conform to the contract. Machinery may fail to function properly; defective raw materials may cause production problems in the buyer's factory; goods purchased for resale may lead to complaints and claims by sub-purchasers. Similar problems may result from the late delivery of machinery or raw materials. For these cases, the primary rule is that of Article 74: The seller is responsible for "the loss...suffered" by the buyer "as a consequence of the breach".

### ◆406 (1) *Unpredictable Consequential Damages*

Buyers may use or dispose of defective goods in a wide variety of circumstances; in some circumstances the losses resulting from nonconformity of the goods may be extreme and unpredictable. This possibility is dealt with in the second sentence of Article 74 which sets an outer limit◆"the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract...." For example, suppose that the non-conformity (or delay in delivery) of a small item interrupts production in the buyer's factory. The seller, of course, is responsible to the buyer for breach of contract. But if the seller did not know and could not have foreseen at the time of contracting that a defect in the goods or a delay in delivery might cause damages of such magnitude as the shutdown of a factory, the above provision of Article 74 could provide a ground for limiting the recoverable damages.

### ◆ 407 (a) *Sources in Domestic Law*

This approach is well-known in the common-law world as the "foreseeability" or "improbability" test developed in the name of the 1854 English decision of *Hadley v. Baxendale*. [5] [page 447]

The (U.S.A.) Uniform Commercial Code limits the buyer's damages by language derived from the *Hadley* tradition. Where the buyer accepts goods that are non-conforming he may recover "the loss resulting in the ordinary course of events from the seller's breach..." (◆2◆714(1)). The UCC also allows the buyer to recover "incidental" and "consequential" damages; the latter are defined (◆2◆715(2)) with a "foreseeability" limitation that is similar to that of Article 74 of the Convention:[6]

A "foreseeability" limit is also well-known within the domain influenced by French law. The French Civil Code ◆1150 limits damages to those "which were foreseen or which could have been foreseen at the time of the contract", unless the breach was the result of "willfulness." Indeed, in the 1854 *Hadley* opinion, favorable

reference was made to this rule of French law; the extent to which the English court relied on the French approach has been a subject for interesting but inconclusive speculation.[7]

### ◆ 408 (b) *Foreseeable Damages*

*Decisions:* (1) NETH. [Arr-Rb. Roermond, 9201.59, 6 May 1993, G. IMAR v. Horst](#). S delivered 20 electric kettles to B. B did not pay and four months later claimed a set-off on the ground that 4 of the kettles were defective. B's notice and claim of set-off were rejected. S was awarded the price, plus damages based on currency devaluation during B's delay in payment. UNILEX D.1993◆14. (2) But cf: GER. [OLG Düsseldorf, 17 U 146/93, 14 January 1994](#). UNILEX D.1994-1. (Denied augmented damages based on currency devaluation.)

*Comments:* Draetta, U., Consequential Damages, 4 Int. Bus. L.J. 487◆498 (1991); [Darkey, J., Damages \(CISG\), 15 JLC 139◆152 \(1995\)](#), [Murphey, A. G., Foreseeability & Hadley, 23 Geo. Wash. J. Int. L. & Com. 415◆474 \(1989\)](#); [Schlechtriem, Tort & Contract: A New Frontier? 21 Cornell Int. L. J. 467◆478 \(1988\)](#); Schlechtriem, Com. (1998) 553◆572 (Stoll).[page 448]

## Articles 75 and 76. Measurement of Damages When Contract is Avoided

◆409 Articles 75 and 76 state alternative methods for measuring damages that may be recovered by a seller or buyer who avoids the contract. As we have seen (Arts. 49 and 64, *supra* at ◆301 and ◆353), the typical settings for avoidance are these: (a) The seller fails to deliver the goods or delivers seriously defective goods; (b) The buyer fails to pay the price. In these cases the aggrieved party may free itself from duties under the contract by notifying the other party that the contract is avoided (Arts. 26, 81). Thereupon an aggrieved buyer need not accept goods and must return goods that it has received and an aggrieved seller need not deliver goods to the buyer.[1]

The Convention's alternative methods for measuring the damages on avoidance (Arts. 75 and 76) need to be considered together. As we shall see, Article 75 bases damages on a repurchase by the buyer or a resale by the seller while Article 76 looks to the "current" (or market) price for the goods in question.

### ◆410 A. Damages Established by Substitute Transaction: Article 75

#### Article 75 [2]

"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."

The crucial feature of Article 75 is this: Resale by an aggrieved seller or repurchase by an aggrieved buyer *establishes* damages; the aggrieved party "may recover *the difference* between the contract price and the price in the substitute transaction" and need not prove the "current" or [page 449] market price for the goods.[3] Making (and identifying) a substitute transaction will be especially important when the goods have been specially manufactured or for some other reason are so unique that it will be difficult to establish a "current" price under Article 76. See ◆410.1, *infra*.

Professor Treitel summarizes the availability of such "concrete" methods of damage assessment in France, Germany and Switzerland, and notes that in many legal systems this approach constitutes the preferred basis for recovery.[4] Cf. USA, UCC ◆2-706.

#### ◆ 410.1 (1) *Identifying the Substitute Transaction*

As Professor Knapp observes, if the aggrieved party is constantly in the market for goods of the type in question it may be difficult to determine which purchase or sale was the substitute transaction under Article 75. [B-B Commentary 554](#). Since avoidance calls for a declaration made by notice to the other party (Art. 26, [187 supra](#)) the aggrieved party may avoid dispute by including in the notice a statement of plans for a substitute transaction. If this statement is not provided, reference to the aggrieved party's first purchase or sale of comparable goods following the notice of avoidance seems consistent with the concern to avoid delay shown by the "reasonable time" requirement of Article 75.

*Decisions: Substitute Transaction.* (1) RUSS. FED., [Int. Comm. Arbn. Ch. of Comm. 155/1994, 16 March 1995](#). S contracted to deliver chemical products to B, but failed to deliver within the agreed time, or within the time extended by B. (S claimed excuse based on failure of supplier; this aspect of the case appears infra at Art. 79, Case #3.) Because of S's failure to deliver, B avoided the contract and purchased the needed materials at a higher price. B recovered the difference between the substitute purchase and the agreed price. CLOUT 93, UNILEX D.1995-10.0.1. (2) ARB. [Int. Sch., B-k, Vienna, SCH-4366, 15 June 1994](#). B failed to pay S for a substantial part of an order of rolled-metal sheets. S sold the undelivered material at a lower price. S was awarded the loss incurred in the substitute transaction. CLOUT 93, UNILEX D. 1994-14. (3) [page 450] GER. [OLG Düsseldorf, 17 U 146/93, 14 January 1994](#). On B's failure to pay for shoes ordered from S, S avoided the contract and resold the shoes at a lower price. S recovered the difference. CLOUT 130, UNILEX D.1994-1.

### 411 B. Damages Based on Current Price: Article 76

If the aggrieved party does not fix its damages under Article 75 by a substitute transaction damages may be based on "current" (market) price:

#### Article 76 [7]

"(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."

### 412 (1) The Reference-Point as to Time

When an aggrieved party avoids the contract prior to or at the time the goods are handed over, damages are based on "the current price at the *time of avoidance*" (Para. (1) of Art. 76). This reference-point is applicable in the following situations: (a) The contract is avoided based on anticipatory breach (Art. 72); (b) The seller avoids the contract because the buyer fails to pay (or make the required arrangements for payment, *e.g.*, [page 451] by establishing a letter of credit) prior to or at the time for delivery; (c) The buyer avoids the contract on rejecting a tender of seriously defective goods.

#### (a) Avoidance after Taking Over the Goods

Under the second sentence of paragraph (1) damages are not based on the price at the time of avoidance when a party avoids the contract "after taking over the goods". In these cases the reference-point is the current price at a date prior to avoidance when the goods were taken over.

##### (i) Avoidance by the Buyer

The first sentence of Article 76(1) was amended and the second sentence was added in the closing days of the Diplomatic Conference (See note 7, *supra*). Under the UNCITRAL draft, damages were based on the current price at the time the aggrieved party "*first had the right to declare the contract avoided*" a point of reference that many delegates feared would be subject to dispute. Consequently, this language was replaced by a reference to "the time of avoidance". However, there was concern lest this reference-point might be subject to abuse, *e.g.*, by buyers who had received goods and who might be tempted to delay a decision on avoidance to take advantage of changes in the market price.<sup>[8]</sup> In response, a second sentence was added: "If, however, the party claiming damages has avoided the contract *after taking over the goods*" damages would be based on the current price "at the time of such *taking over*" a definite earlier time not subject to unilateral postponement. In cases of avoidance by buyers who have received goods this provision seems clear.

### (ii) Avoidance by the Seller

The special time for measuring damages provided by the second sentence of Article 76(1) will seldom apply to sellers: sellers seldom avoid the contract "*after taking over the goods*". Avoidance by sellers usually occurs while the seller still has possession of the goods when the buyer commits a fundamental breach by failing to pay or (in more cases) failing to establish a letter of credit. If a seller delivers goods to the buyer on credit (*e.g.*, payment due 60 days after delivery) the buyer's failure to pay will empower a seller to avoid the [page 452] contract (Art. 64(1)) and "claim restitution" of the goods (Art. 81(2), <sup>444</sup>, *infra*). However, in these cases the second sentence does not apply since avoidance will occur *before* rather than "*after taking over the goods*". In all these cases damages under Article 76 would be based on "the current price at the *time of avoidance*".<sup>[9]</sup>

### <sup>413</sup> (2) The Reference-Point as to Place

Paragraph (2) of Article 76 points to "the price prevailing at the place where *delivery of the goods* should have been made." This invokes the rules on delivery in Article 31, *supra* at <sup>207</sup>; in the most common international sale this is the place for "handing the goods over to the first carrier for transmission to the buyer"; this is a convenient place for a seller to measure market price when the buyer's repudiation or breach prevents shipment. On the other hand, when a buyer rightfully rejects ("avoids the contract") after arrival and inspection (Arts. 38, 58) it may be awkward and inadequate for the buyer to prove damages based on market levels in the seller's country. Fortunately, in most situations the injured party can avoid these problems by making a substitute purchase or a resale under Article 75.

*Decisions:* Damages based on Market Price. GER. [OLG Hamm, 19 U 97/91, 22 September 1992](#). S and B contracted for the sale to B, in instalments, of 200 tons of bacon. B refused to accept delivery of the last instalment. S resold this instalment at such a low price (25%) that S's damages were based, under Article 76, on the current (higher) market price. UNILEX D. 1992<sup>18</sup>.

### <sup>414</sup> C. Election Between Articles 75 and 76

If an aggrieved party does not make a substitute transaction under Article 75 only the "current" (or market) price formula of Article 76 will be available. And the "current" price formula of Article 76 is applicable only if the aggrieved party "has not made a purchase or resale under Article 75" a rule that was designed to add certainty and prevent abuse.

Under Article 75 the substitute transaction determines damages only if it is effected "in a reasonable manner and within a reasonable time after [page 453] avoidance." If the aggrieved party's substitute transaction fails to meet these standards it may be appropriate to adjust the price received to remove the effect of the anomaly. If an adjustment is not feasible damages may be based on the "current price" formula of Article 76; there is no reason to suppose that an aggrieved party who makes an unsuccessful attempt to comply with Article 75 completely loses the right to recover damages.

### <sup>415</sup> D. Recovery of Further Damages: Loss of Profit



Both Article 75 and Article 76 provide that the aggrieved party may also recover "any further damages recoverable under Article 74", i.e., "the loss, *including loss of profit*...suffered...as a consequence of the breach."

A seller's volume of output may be reduced because of the buyer's repudiation, and a buyer's volume of production may be reduced because of the seller's wrongful failure to supply necessary materials. In these situations the reduced level of production may cause loss for which Articles 75 and 76 provide no redress. This problem does not arise when there is ample demand to keep the seller's production at full capacity or when the buyer can procure available supplies elsewhere. In other situations breach of contract may lead to loss of volume which may cause acute loss even when there is little or no change in the level of prices—a setting in which Articles 75 and 76, alone, would not provide adequate redress. Determining the amount of loss of profit may call for accounting procedures to ascertain the contribution that due performance of the contract would have made to the overhead costs of the aggrieved party.

*Decisions: Loss of Profit.* (1) AUSTRIA, [Ob GH \(Sup.Ct.\), Ob 518/95, 6 February 1996](#). S agreed to sell propane gas to B; S failed to deliver. B had contracted to sell the propane to T in a third country at a higher price. Held, under Art. 74, that B could recover this loss of profit from S. UNILEX D. 1996-3.1. (Similar: GER. [ARB., Hamburg, 21 March 1996](#). CLOUT 166, UNILEX 1996-3.4.) (2) USA, [Fed. Dist. Ct., ND.NY, 9 Sept. 1994](#), appealed to [US Ct. of Appeals, 2d Cir., decided 6 December 1995](#). Rotorex v. Delchi Carrier. S contracted to deliver to B 10,800 compressors for air conditioners. The compressors did not conform to specifications; B avoided the contract. Held (Ct. of App.): B could recover, *inter alia*, lost profit for variable costs for labor [page 454] expenses from B's production-line shutdown, caused by defects in the compressors; the case was remanded to determine whether B would have had to pay the labor expenses *regardless of the shut-down*. CLOUT 85, 138, UNILEX D.&E. 1994-22, 1995-31. (71 Fed. 3d 1024, 2d Cir.1995); LEXIS 12820, 1994 Westlaw 495787. (3) GER. [LG Paderborn, 7 O 147/94, 25 June 1996](#). S sold plastic to B; B sold the plastic to manufacturer (M). B became subject to damage claims from M's customers because of defects in the plastic. S was liable to B for damages based, *inter alia*, on B's losses resulting from M's claims. UNILEX D.1996-8. (4) QUERY: Possibly similar, but unclear, decision: CHINA, [Xiamen Int. People's Court, 31 December 1990](#). UNILEX D. 1990-8.

*Comment:* Lookofsky, J., Measuring Damages, A Comparison (of Amer, Scan., CISG), Kobenhavn (Junst-og 1989) 330; [Sutton, J., 50 Ohio St. L. J. 737-752 \(1989\)](#); Schlechtriem, Com. (1998) 574-578, 580-584. [page 455]

## Article 77. Mitigation of Damages

416 This article in some situations modifies the remedies provided by other provisions of the Convention.

### Article 77 [1]

"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."

### 417 A. Varying Concepts of Domestic Law

The principle that a party must mitigate loss that reasonably can be avoided is generally recognized but is expressed in different ways and is applied with varying degrees of emphasis. Many codes do not explicitly speak of a "duty" to "mitigate" loss. Instead, statutory language that a party is responsible for the damage it "causes" often provides a basis for concluding that some of the damage was caused by the plaintiff rather than the party in breach. Similarly, some systems limit the plaintiff's recovery by principles akin to what other legal systems call contributory negligence—e.g., the French doctrine of *faute de la victime*. [2]

As we have seen, in common-law systems one who breaks a contract is responsible for damages without regard to "fault" or "negligence"; in this setting there seems to be a tendency to speak (perhaps imprecisely) of the aggrieved party's "duty" to mitigate loss. Under the Convention, a party is responsible for nonperformance of the contract without regard to fault (Arts. 30, 45(1)(b), 53, 61(1)(b); *cf.* Art. 79); consequently, it is not surprising that the Convention states, with some emphasis, that the other party "must take" measures to "mitigate the loss...resulting from the breach." [3] [page 456]

Mitigation problems arise in a wide variety of circumstances. In Part B we shall consider mitigation by an aggrieved party (Party A) following failure of performance by the other party (X) — a seller's non-delivery, or the delivery of seriously defective goods, or a buyer's failure to receive or pay for goods. In Part C we shall examine the more complex problems of mitigation that arise prior to the time when performance becomes due, as when X repudiates the contract.

## 418 B. Mitigation following Failure of Performance

When breach by X leads to avoidance by A, Articles 75 and 76, *supra* at 409, restrict the time as of when A's damages may be measured. Resale or repurchase by A (Art. 75) must occur "within a reasonable time after avoidance"; the "current price" (Art. 76) must be ascertained as of the "time of avoidance" or (in some circumstances) at the time of "taking over" the goods. These restrictions prevent an avoiding seller from shifting to the buyer the loss resulting from a subsequent drop in the market-price; similarly, an avoiding buyer may not shift a subsequent rise in price to the seller. Thus, claims based on Articles 75 or 76 seldom raise "mitigation" problems under Article 77.

Article 77, enunciating a duty to mitigate loss, becomes important when A relies on the general rule (Art. 74) that damages include loss suffered "as a consequence of the breach." For example, suppose seller X fails to deliver raw materials for use in the buyer A's factory and A fails to purchase substitute materials that are available on the market, with the result that A's production is interrupted. Jurists familiar with the "causation" approach (417, *supra*) might find it more natural to conclude that Article 74 would suffice: the shut-down by buyer A was a "consequence" of A's conduct rather than X's breach; the explicit mitigation principle in Article 77 strengthens results that some could reach by another route. Thus, buyer A could face either the "causation" approach or the mitigation principle when defective materials or machinery cause "consequential" damages. [page 457]

*Decision:* USA, [US Dist.Ct. ND NY](#), appealed to [US Ct. of App., 2d Cir., decided 6 December 1995](#). Rotorex v. Delchi Carrier. [Case also reported at 415 on loss of profit.] B, on discovering that S's air compressors were defective, expedited the shipment of compressors from another source. Held: B could recover from S the costs of this prompt substitute purchase, since this was consistent with B's duty under Art. 77 to mitigate damages. CLOUT 85, 138, UNILEX D. & E. 1944-22, 1995-31. [Further references at 415, *supra*.]

## 419 C. Mitigation prior to Date for Performance

In Part B we examined the relatively simple mitigation problems that faced Party A following seriously defective performance by Party X. We now turn to the more complex problems that arise when difficulty, such as repudiation by X, occurs prior to the time for performance. These problems will be introduced in two commercial settings: (1) Goods purchased for resale and (2) Materials needed for production. Perhaps this discussion will help to distinguish these questions:

I. Must an aggrieved party (A) "accept repudiation" by X? In other words does X's repudiation require A to declare the contract avoided and thereupon take action to establish damages? See Example 77A, 419.1, *infra*.

II. Are there situations in which Article 77 requires A to take steps to mitigate loss prior to the date for performance? See Example 77B, 419.2, *infra*.

### 419.1 (1) Goods Purchased for Resale

*Example 77A. On June 1 A and X made a contract for A to sell and deliver to X on August 1 1,000 bales of cotton at \$50 per bale. Both A and X were merchants engaged in the purchase and resale of cotton. Shortly after June 1 cotton prices fell and on July 1, when the market price was \$40 per bale, buyer X repudiated the contract and requested A to resell the cotton before the market could decline further. A replied that A expected X to receive and pay for the cotton in accordance with the contract; X thereupon repeated its repudiation. By August 1, the agreed delivery date, the price had fallen to \$30; X again refused to receive and pay for the goods. A thereupon declared the contract avoided, resold the goods for \$30 per bale (\$30,000) and claimed damages from X of \$20,000 (\$50,000 - \$30,000). X contended that on July 1, when X repudiated, A should have mitigated loss by selling the cotton at \$40, a step that would have reduced damages from \$20,000 to \$10,000.[page 458]*

The argument for mitigation should be rejected. Under Article 72(1) (395-397, *supra*), on repudiation by one party (X) "the other party may declare the contract avoided"; see also CISG 49(2) and 64(2) (provisions protecting the options of the aggrieved party).

Does the mitigation principle of Article 77 create an exception to the option as to avoidance expressed in Article 72(1)? There is nothing unfair or wasteful in A's refusing to accept X's repudiation. No one knows when a "falling" market has reached bottom; if X was confident that the market would continue to fall X could have made a "forward" sale at \$40 for delivery on August 1. (The same analysis applies when a seller repudiates prior to the date for delivery followed by a rise in the market price.)[4]

In short, the aggrieved party has no general obligation under Article 77 to attempt to mitigate damages by "accepting repudiation" by the other party.

### 419.2 (2) *Materials Needed for Current Production*

*Example 77B. On June 1 A and X made a contract for X to produce and deliver to A 10,000 sheets of steel on August 1 at \$50 per sheet. Buyer A needed the steel for use in manufacturing. On July 1 Seller X notified A that production difficulties in X's steel mill would prevent delivery of the steel by August 1; X also stated that the production difficulties might persist for an unknown period after August 1 and urged A to obtain the steel elsewhere. Comparable steel was available in A's area; the price at all times remained at \$50. For unexplained reasons A did not seek or obtain the steel elsewhere; as a consequence A's production facilities were shut down for the month of August. Buyer A sued X for damages based on shut-down losses (Art. 74, "loss of profit") of \$10,000 per day, or \$300,000. Seller X argued that, under Article 77, A failed to "take [page 459] such measures as are reasonable in the circumstances to mitigate the loss" so that there should be a corresponding reduction in the damages.*

Seller X's claim for damage-reduction based on Article 77 should prevail. Unlike Example 77A, in this case obtaining available alternative supplies was needed and reasonable to avoid certain loss. In this setting Buyer A's option to avoid or not to avoid is irrelevant. The notice by Seller X would relieve A of concern that Seller X might change its mind and deliver the goods; moreover, A could choose to avoid under Article 72 or, if A wished to press for later delivery by X, A could send X a notice of suspension under Article 71(3). (The effect of a right to require ("specific") performance (Arts. 28, 46), to be considered in the following section, is not relevant here since a court order could not overcome X's production difficulties. In any event, delays intrinsic to legal proceedings could not assure delivery in time to keep A in production.)

*Decision:* GER. [OLG München, 7 U 1720/94, 8 February 1995](#). In a contract calling for S's delivery of 11 cars to B, B wrongfully refused to accept delivery. B was entitled to a refund of B's advance payment; S was denied damages for B's breach since S had failed to take reasonable measures, under Art. 77, to mitigate loss. [The court also referred to Arts. 80 & 84.] UNILEX D.1995-3. See: Schlechtriem, Com. (1998) 586-590 (Stoll).

### 419.3 (3) *Mitigation and the Right to Require Performance*

We now meet cases that expose a conflict between two principles: (1) The obligation of an aggrieved party (Party A) to mitigate the loss resulting from breach by the other party (Article 77) and (2) The right of the aggrieved

party to "require performance" (Arts. 46(1) and 62, [§§280, 349](#), *supra*, as restricted by Article 28, [§§191](#) [§199](#), *supra*).

*Example 77C.* A sales contract made on June 1 called for A, a producer of steel, to produce and deliver steel girders to X, a building contractor. The contract called for A to cut the girders to special dimensions provided by X for X's use in erecting a building for Owner. The contract price for the girders was \$50,000. On July 1, before A had started work on the contract, Owner repudiated its contract with X; X immediately informed A of this and requested A not to cut the girders. Nevertheless, A cut the girders to the specifications stated in the contract. X refused to accept the girders. A sued X in a court in X's State to require X to accept the goods and pay the agreed price. X's State is one of the many common-law jurisdictions that, in cases like the present, does not "require performance" [page 460] by compelling acceptance and payment of the price, as contrasted with damages. See Art. 28, [§§191](#) [§199](#), *supra*. The court dismissed A's action for the price and permitted A to prove damages. A thereupon resold the girders but they brought only \$10,000 because they had been cut in unusual lengths. A claimed damages of \$40,000 (the contract price of \$50,000 less \$10,000). In response, X requested that damages be reduced by the amount that the value of the girders had been impaired by cutting them to unusual lengths.

In applying Article 77 we must ask this question: Would it have been "reasonable in the circumstances" for A "to mitigate the loss" by honoring X's request of July 1 not to cut the girders? To determine what is "reasonable in the circumstances" one must consider: What would most sellers have done when it is evident that cutting the girders would seriously impair their value? The answer is clear. A's conduct was inconsistent with normal business conduct and the explicit requirement of Article 77. Indeed, A's conduct was foolhardy even by standards of short-term selfishness in view of litigation delays and risks, which were enhanced by increasing the amount at stake by wasteful conduct.

In the above case Seller A's attempt to force X to receive and pay for the girders was doomed to failure by the fact that the legal rules in X's State (the jurisdiction where A would normally need to sue for effective enforcement of a decree requiring performance) rejected this type of action even apart from the mitigation requirement of Article 77. Should the result be different in other jurisdictions? This question is posed by the following case.

*Example 77D.* The facts are the same as in Example 77C except that the law of X's State generally grants requests to require ("specific") performance of contracts. However, A did not wish to lay out costs for storage of the girders pending litigation; consequently, A resold the girders and requested damages of \$40,000 (\$50,000  $\diamond$  \$10,000). Should the court grant X's request to reduce damages, under Article 77, "in the amount by which the loss should have been mitigated"?

The answer, as in Example 77C, turns on whether A failed to take (Art. 77) "such measures as are reasonable in the circumstances to mitigate the loss". The only difference here is that the rules of X's jurisdiction are more favorable to an action to require ("specific") performance. When a seller sues for *damages* Article 77 explicitly requires a "reduction of damages." See Knapp, *B-B Commentary* 564, [§§3.13.3](#).

*Example 77E.* The facts are the same as Example 77D except that Seller A placed the girders in storage and under Article 62 requested the court to "require X" to pay the price [and] take delivery". Buyer X did [page 461] not object to paying damages but noted that the remedy sought by A would transfer to X the consequences of A's failure to obey the mandate of Article 77 to "take such measures as are reasonable in the circumstances to mitigate the loss...". In the alternative, X claimed that if the court should require X to accept and pay for the girders the court should also award damages to X for the loss (\$40,000) that A caused X by A's conduct that violated the mandate of Article 77.

The above case presents a common problem of statutory construction: Two general rules that in most circumstances are compatible in unusual circumstances come into conflict. The appropriate response is to adopt the solution that does the least violence to either principle. Giving effect to the mitigation principle in unusual situations like Example 77E does not make a serious inroad in the general rule requiring performance of



contracts; on the other hand, failing to give effect to Article 77 in such cases nullifies the mitigation rule when it is specially appropriate. In short, the mitigation rule is *lex specialis* in relation to the general rule requiring ("specific") performance.

In some cases a party's need for requiring ("specific") performance may be so strong as to outweigh the mitigation principle of Article 77. Such a case is most likely to result when a buyer C needs materials that are not available elsewhere. It is difficult to imagine a comparable need when the seller (as in example 77E) sues to force a buyer to accept goods; in these cases the seller usually can be fully compensated by damages.

### ***(a) A Failed Proposal and the Vienna Conference***

The question that remains is whether the above approach to mitigation is foreclosed by the consideration of this provision at the 1980 Conference. The First Committee did not reach this provision (then draft article 73) until the last week of its deliberations. At that stage the Committee took up a suggestion by the present writer prompted by the fact that the first sentence of the article laid down a general rule requiring reasonable steps to mitigate loss while the second sentence mentioned only one sanction—reduction of damages. Out of concern that the article might be construed to exclude application of the mitigation principle to other alternative remedies an amendment was proposed to add at the end of the second sentence "or a corresponding modification or adjustment of any other remedy".<sup>[5]</sup>

Thirteen delegates addressed the question: Five supported the measure <sup>[6]</sup>,<sup>[page 462]</sup> three were opposed;<sup>[7]</sup> five were concerned with the drafting—primarily because of concern that the reference to "any other remedy" was too vague or broad.<sup>[8]</sup> At the conclusion of this discussion a proposal to set up a drafting party to refine the proposal was defeated (24–8).

The above facts present an interesting question concerning the circumstances in which legislative history creates a binding interpretation of the Convention. Some may conclude that the discussion and vote means that in cases like Example 77E a seller's failure to mitigate loss is irrelevant when the seller sues to recover the price in a jurisdiction where domestic law authorizes this broad approach to "requiring performance" (Art. 62). *Schlechtriem, 1986 Commentary* 99 Cf. Knapp, *B-B Commentary* 565–567, but see 3.9(b)–3.13. (nuanced adjustment to carry out the Convention's aim "to encourage mitigation of the loss").

The discussion of Article 7 at <sup>91</sup>, *supra*, supports the use of legislative history when it reveals the prevailing understanding of the delegates. Did the legislative body face and decide the issue posed by Example 77E? The opinions expressed in the discussion dealt with diverse reasons for not adopting the proposed amendment. This writer (although possibly blinded by interest in the issue) does not see adequate grounds for concluding that a substantial number of delegates would have rejected the mitigation principle in cases like Example 77E.

Emerging from this experience is a lesson: Interpretation based on discussions by a large legislative body is more meaningful for decisions of broad issues of policy than for detailed applications. The present writer surely overlooked this principle in inviting consideration (particularly in the closing days of a large diplomatic conference) of complex questions concerning the interplay of competing principles of the Convention—questions that are better left to tribunals for consideration in the light of the precise facts of the case.<sup>[9]</sup> *Ars longa vita brevis*.<sup>[page 463]</sup>

If the verdict of history should be that the mitigation principle is inapplicable to cases like Example 77E one may seek comfort in the hope that few will act like the seller in that case and that, if this should occur, the buyer will be able to show that this conduct is inconsistent with applicable trade usage. See Art. 9(2), <sup>112</sup>–<sup>122</sup>, *supra*.<sup>[page 464]</sup>

---

## **Section III. Interest**

### **Article 78. Interest on Sums in Arrears**



## ◆420 A. Legislative History

In recent decades economic forces, including inflation, have generated sharp increases in interest rates. Uncompensated delay in payment inflicts added loss on the aggrieved party while the party in breach gains from the use of the funds it should have paid. Adequate provision for interest not only compensates the aggrieved party for loss but also encourages voluntary performance.

The most extended delays occur during attempts to reach a settlement and as a result of ponderous judicial processes. Delays in collecting judgments are usually less serious; in any event, post-judgment interest is often provided as part of the forum's general procedural system. We are here concerned with the more serious and intractable problem of pre-judgment interest.

Attempts to develop detailed rules in this area encountered sharp differences of view and reversals of position. The UNCITRAL Working Group's Draft Convention (1976), building on Article 83 of ULIS (1964), provided that if the buyer delays in paying the price the seller is entitled to interest based on a two-factor formula—the higher, in seller's country, of (a) the official discount rate plus 1% or (b) the rate for unsecured short-term credits. The full Commission tried unsuccessfully to develop a simpler formula; technical problems included the lack in some countries of an official discount rate or standard rates for short-term credits. In addition, some countries with mandatory rules limiting or prohibiting the charging of interest were opposed to dealing with the question. Faced with these difficulties the Commission deleted the draft article on interest.

The comments of governments and international organizations submitted to the Diplomatic Conference included proposals to reintroduce a provision dealing with interest. However, the Conference (like the Commission) found it difficult to agree on a formula to set the interest-rate. The Conference finally designated an ad hoc working group to seek a compromise; one of the group's alternative proposals was approved by [page 465] the First Committee but failed in Plenary to receive the necessary two-thirds majority. A second working group then developed a draft establishing in general terms the right to receive interest on sums in arrears; this was approved (30 to 2, with 12 abstentions) and became Article 78 of the Convention.

### 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."

One reason for persisting in the effort that produced Article 78 was concern lest the lack of a provision on interest would lead to unintended divergences in the application of the Convention. In some legal systems compensation for lost interest is regarded as an aspect of damage-assessment; this led to concern lest laying down rules for damages (Arts. 74-77) without providing for interest might be understood as barring the recovery of interest. A similar concern resulted from the provision in Article 84(1), *infra* at ◆450, that a buyer who avoids the contract after paying for the goods may recover interest on the funds that the seller is bound to repay; providing for interest in this one setting might be construed to bar recovery of interest in all other situations.

Unintended intrusions on domestic rules could have been avoided by an express provision that the Convention does not affect any right under domestic law to recover interest. However, such a proposal was not accepted; reasons included the lack of uniformity resulting from the inadequacy or rejection of provision for interest in many countries and the lack of clarity and uniformity of rules of private international law as to which domestic law would be applicable.<sup>[1]</sup> In sum, Article 78 was designed to establish a general rule that would be free from the vagaries of domestic law.<sup>[2]</sup> [page 466]

## ◆421 B. The Rate of Interest

As has just been noted, specific formulas for calculating interest were rejected in favor of a general rule that an aggrieved party "is entitled to interest" on "sums in arrears". The principle underlying this rule is like that of Article 74 which provides for the recovery of "damages...equal to the *loss...suffered* as a consequence of the

breach". In many situations this general rule of Article 74 provides the sole guide for the measurement of damages. However, in some situations Article 74 is supplemented by Articles 75 and 76 which were designed to enhance definiteness in damage measurement. Consideration of these provisions in connection with the present question seems consistent with Article 7(2)'s invitation to settle unresolved questions "in conformity with the general principles" of the Convention (96102, *supra*). Assume that an aggrieved party (A) has been wrongfully deprived of funds by the other party (X) and "in a reasonable manner" (Art. 75) replaces those funds by borrowing; Article 75 suggests that A's loss may appropriately be measured by the cost of the "substitute transaction". In many enterprises, however, there is a constant in-and-out cash flow, supplemented where necessary by a general line of credit or by the diversion of capital; in these settings X's failure to pay may not be matched by a substitute loan. Financial loss from X's failure to pay is none the less real; in these cases the principle underlying Article 76 suggests that A's loss may be measured by the "current price" of credit (*cf.* Art. 76(3)).[3] [page 467]

## 422 C. Situations Calling for Interest

The provisions on interest in ULIS and in the draft Convention approved by the Working Group were confined to cases where the buyer delays paying the price. However, Article 78 of the Convention is cast in broader terms and extends to the failure of either party to pay any "sum that is in arrears".

The mandate of Article 7(1) to construe the Convention to promote "uniformity in its *application*" requires us to seek a principle governing the scope of Article 78 that can be considered as a basis for uniform application of the Convention. To this end let us look for situations that are clearly within, and outside, the purpose of Article 78.

Two specific situations are mentioned in the Convention:

(I) A buyer (X) delays paying the seller (A) for goods A has supplied (Art. 78); (II) A seller (X) delays in refunding to the buyer (A) the price A paid for goods that were so defective as to justify avoidance of the contract (Art. 84(1)).

In both cases the party in breach (X) holds assets for which the aggrieved party (A) has not received the agreed return. In (I) the imbalance results from X's holding goods for which X has not paid; in (II) the imbalance results from X's receipt of funds X should return. In both a sum is "in arrears".

In contrast, assume that a seller (X) on June 1 delivered 100 units of goods to a buyer (A) at an agreed price of \$1,000 which A agreed to pay on July 1. The goods were defective or, alternatively, consisted of only 800 units. A promptly resold the goods under Article 75 for \$800 and paid this sum to X on July 1. Here X was guilty of breach of contract to the extent of \$200 but this did not deprive A of funds to which A was entitled. In the language of Article 78 no sum was "in arrears"; no interest should be imposed.

*"Liquidated" sums and international trade.* Article 78 refers to any "sum" in "arrears". In some jurisdictions interest does not accrue until the amount in arrears has been "liquidated" *i.e.* made certain; other jurisdictions grant interest even though the sum owed is in dispute.[4] [page 468]

Let us consider the effect of a strict "liquidated sum" requirement in the most common situation that falls explicitly within Article 78—the buyer's failure "to pay the price". Deliveries in the large quantities common in international trade often are subject to a shortage in quantity or to a quality defect in a few units. These cases call for a price adjustment; the balance that the buyer must pay is not an agreed or "liquidated" sum. A strict application of a "liquidated sum" requirement would mean that a buyer could delay payment without interest until the precise adjustment is adjudicated; this would create a temptation for intransigence in negotiating an adjustment and dilatory tactics in litigation—a serious impairment of the policies underlying Article 78. On the other hand, it would be reasonable to conclude that no sum is "in arrears" when goods have caused damage that could off-set a substantial and undetermined portion of the price. Tribunals and arbitrators are accustomed and qualified to make judgments on such matters in framing a final judgment or award.

"Simple" or "compound interest. Sharp controversy has developed over whether an award of interest for delayed payment should be compounded at specified intervals (weekly, monthly or yearly) so that interest accumulates on unpaid interest.[5] Fortunately, this problem need not arise under the approach suggested above (421) that the amount of interest should be based on the credit costs faced by the aggrieved party.

One may be tempted to regret the inclusion of a provision on interest that can generate so many questions. These questions, however, were not created by Article 78; questions of even larger dimension (e.g., does *any* interest accrue) are now latent in domestic law, and in international trade are compounded by problems of conflict of laws (P.I.L.).

One might hope to solve these problems by contract (Art. 6) and this may be possible for a detailed contract prepared for a specific transaction; it will require special skill to prepare a standard clause that will not create difficulties (like clauses on applicable law) in closing the contract.[6] [page 469]

*Decisions on the rate of interest:* More decisions have dealt with the rate of interest than with any other issue. The reason: Litigation on many issues concludes with a decision that one party owes the other a sum of money, with interest. The inability, described above, to agree on a formula for computing interest, inevitably led to a variety of approaches. The most that is feasible here is to provide examples of the principal formulae.

(1) *The domestic law of one of the parties based on rules of "conflicts" (PIL).* (A conflicts rule in many States points to the law of the party whose obligations are the most "characteristic" or unique—usually the law of the seller, whose obligations are more specialized—in contrast with the standard duty of the buyer to pay.) E.g.:

GER. [OLG Rostock, 1 U 247/94, 27 July 1995](#). S (Denmark) sold flower-plants to B (Germany), who failed to pay. The court ordered B to pay S, with interest at the rate at the domestic law of the seller (Denmark). UNILEX D. 1995—18.1. In this case, the formula called for the domestic rate in the country of the party deprived of funds. On the other hand, if the buyer had prepaid and the seller had not delivered, the above formula would have required the seller to pay interest at the rate in seller's country, although the buyer was the party deprived of funds. This result would be appropriate if the cost of money were the same in different countries, but this often is not the case. For many cases illustrating the above approach, see UNILEX C.3—78, 2.3.

(2) *Interest determined by the domestic law of the creditor.*

RUSS. FED. [ARB: Int. Comm. Arb., Ch. of Comm., 1/93, 15 April 1994](#). B paid in advance but S did not deliver the goods. S was required to repay B, with interest at the rate in B's country, since B was the party wrongfully deprived of funds. UNILEX D.1994-8.2. Comparable cases, UNILEX C.3—78, 2.1.

(3) *Interest based on international usage.*

ARGENTINA. [Juz. Nac. de Pr. I. Com.#10.56.179, 6 October 1994](#). Interest was based on "international trade usage" (CISG Art.9). UNILEX D.1994—24.2.

(4) *The aggrieved party's cost of borrowing.*

(1) ARB. [ICC. \(Paris\), 8128/1995 \(1995\)](#). B (Swiss) contracted with S (Austrian) for chemical fertilizer. On partial failure of delivery by S, B [page 470] was awarded interest based on the average bank lending rate for prime borrowers in B's country. The tribunal noted that this was based on the solution adopted by the UNIDROIT Principles of International Contracts. (The UNIDROIT Principles, Art. 7.4.9. (1994) state: "The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment...". See: Principles, supra, Art. 4.507.) UNILEX D. 1995—34. (2) GER. [OLG Düsseldorf, 6 U 152/95, 11 July 1996](#). In a contract to buy hydraulic engines, B failed to pay. The court awarded interest "as damages" (See Arts. 74, 78) at the rate charged for bank loans. UNILEX D.1996-9. (3) SWITZ. [HG K Zürich, HG 940513, 10 July 1996](#). On non-payment of the price, S was awarded 9%, the cost of S's bank loan. CLOUT 193 (4) BELG. [Rechtbank v. Kh., Hassalt, A.R., 1970/95, 8 November 1995](#). UNILEX

D.1995♦28.1.2; idem., A.R. 2012/96, 09-10-1996. UNILEX D. 1996-9.1. Additional cases: UNILEX C.3♦78, 2.1.2.

*Comment:* Schlechtriem, Com. (1998) 592♦599, Bonell/Ligouri, ULR (1996-2) 370♦373 (citing many decisions). Some later decisions, especially in arbitrations, seem to prefer alternative (4)♦the aggrieved party♦s cost of borrowing. (For additional signs of bias, readers may detect a resemblance between this approach and that of the present book inherited from the second edition, at Article 78, ♦421, invoking Article 74 on damages.)[page 471]

## Section IV. Exemptions (Articles 79-80)

### Article 79. Impediment Excusing Party From Damages ("Force Majeure")

#### ♦423 A. Introduction

Even in domestic law it has been difficult to provide coherent answers to the problems that arise when unexpected difficulties prevent the performance of a contract. The settings are diverse: war, embargo and other governmental prohibitions, breakdown of transport facilities (e.g., the closing of the Suez Canal), strikes, the shutdown or bankruptcy of a supplier♦these are only points on a continuum of difficulties with varying degrees of scope, severity and unpredictability. The applicable legal doctrines go under assorted labels♦impossibility, Act of God, frustration, *force majeure*, failure of presupposed conditions.

The legal issue is difficult but narrow: Is the non-performing party liable to the disappointed party for breach of contract? Even the clearest grounds for "excuse" do not permit a party to recover (or keep) the price for performance it has not rendered. The issue is whether the party that fails to perform is liable for damages.

#### ♦ 423.1 (1) *Varieties of Loss Allocation*

Article 79 confronts the thorny problem of determining which party bears the burden of an unexpected barrier to performance. Fortunately, the scope of Article 79 is narrowed by specialized rules on definable types of commercial risks.

#### ♦ 423.2 (a) *Loss in Transit*

The Convention♦s rules on loss during transit (Chap. IV, Arts. 66♦70, ♦♦358♦383 *supra*) apply even though the goods are lost as a consequence of unpredictable disasters such as hurricane, war or government seizure♦a point that is relevant to emphasize the line of demarcation between the risk rules of Chapter IV and the exemption [page 472] rules of Article 79. Assume that the Chapter IV rules allocate transit risk to the seller and the goods are lost as the result of a hurricane. This disaster may produce two types of loss: (1) Physical loss of the goods and (2) Loss to the buyer because of a rise in price, or because failure to receive the goods (e.g. machinery) interrupts production. Although the seller bears the first type of loss♦physical loss of the goods♦Article 79 exempts the seller from liability for breach of contract.

Pragmatic reasons underlie these results. Physical loss during transit is readily and customarily covered by insurance. On the other hand, the buyer♦s contractual loss from non-arrival, although not so readily or customarily covered by insurance, can be coped with more readily by the buyer than by the seller through insurance or reserves; the seller and seller♦s insurer will have little or no information about the commercial risks encountered by the various buyers whom the seller supplies.[1]

#### ♦ 423.3 (b) *Defective Goods*

Unknown defects in goods also present problems of allocation of loss. Under the Convention the seller is responsible for these losses. Arts. 35, 45 and 74, [§§223, 276, 405](#), *supra*.<sup>[2]</sup> Loss to the buyer is placed on the seller even when the seller is not at fault, as when a seller resells defective goods, obtained from a responsible supplier in sealed containers, which the seller has no reasonable opportunity to inspect ([§§24, 26, 276](#), *supra*). One pragmatic justification for this result is that the aggrieved buyer (unlike the seller) usually has no practicable recourse against the supplier. As we shall see ([§427](#), *infra*), Article 79 does not reverse these rules.

Unhappily, there are many types of unexpected loss that fall outside these specialized provisions.

### [§423.4](#) (2) *The Convention*

#### Article 79 [\[3\]](#)

"(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 **[page 473]** 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."

One notices that the scope of Article 79 is broad: Exemption may be claimed by either party and may apply to "any" of its "obligations".

Analysis of Article 79 can best commence with paragraphs (1) and (5). (Paragraph (2), (3) and (4) deal with special situations that will be considered *infra* at [§433](#)–[§435](#).)

Paragraph (1) states three elements that must be proved by a non-performing party who seeks to establish that it is not "liable for a failure to perform": (a) The failure was "due to an impediment beyond his control"; (b) At the time of the contract the party "could not reasonably be expected to have taken the impediment into account"; and (c) Subsequent to the contract the party could not reasonably be expected "to have avoided or overcome [the obstacle] or its consequences."

The narrow scope of the statement in paragraph (1) that a party "is not *liable*" for a failure to perform is emphasized in paragraph (5): Nothing in Article 79 "prevents either party from exercising any right *other than to claim damages*...." Confining exemption to "damages" has this important consequence: When one party fails to perform its obligations the other party's right to "avoid the contract" is not impaired. (In non-legal terms, when the seller cannot deliver the buyer need not pay; when the buyer cannot pay the seller need not deliver.) The grounds for avoidance that we have examined (Arts. 25, 47, 49, 63, 64, 72 and 73) remain applicable although the disappointed party may not recover damages. In **[page 474]** addition, the parties are subject to the rules in



Section V, *infra* at ¶437, on "Effects of Avoidance." Thus, each party is entitled (Art. 81(2)) to "restitution" of whatever it "has supplied or paid under the contract." Article 84(2) carries this principle further: a buyer who avoids must "account to the seller" for all benefits the buyer has derived from the goods.

## ¶424 B. Exemption and the Contract

As we have seen, the Convention (Art. 6) gives overriding effect to the agreement of the parties. Contract provisions on impediments to performance have special value since impediments arise in a countless variety of circumstances and involve infinite gradations of difficulty and unpredictability. General legal rules, domestic or international, can scarcely provide clear and satisfactory answers to all these problems. Consequently, in important transactions and in a wide variety of standard contracts explicit provision is made for the consequences of serious impediments to performance. The contracts can (and do) take account of the conditions and needs presented by various types of transactions. When a commodity (such as grain) is subject to market fluctuations both parties rely heavily on the contract for protection; the grounds for exemption tend to be strict and narrow. When the contract involves construction work or a manufacturing process that requires a substantial period of time, the possibility and seriousness of impediments multiply; these facts are reflected in contracts that call for readjustment of the contract to cope with unanticipated problems.<sup>[4]</sup>

Principles of efficiency and fairness can best be distilled from contracts prepared with the cooperation of both sellers and buyers; such cooperation may be achieved by a trade association that includes both interests or through mediation by international organizations such as the U.N. Economic Commission for Europe (ECE).<sup>[5]</sup> The solutions provided by some of these contracts will be quoted *infra* at ¶431 since they may be useful to parties who wish a more definite solution than can be provided by general rules of law; in addition, patterns that emerge from these contracts may provide guidance in applying the general rules of the [page 475] Convention.

## ¶425 C. The Convention and Domestic Law

Domestic rules in this area often bear a family resemblance to each other and to Article 79 of the Convention but a penetrating study by Professor Nicholas exposes the hazards of relying on "superficial harmony which merely mutes a deeper discord."<sup>[6]</sup> The Convention (Art. 7) enjoins us to interpret its provisions "with regard for its international character and...the need to promote uniformity in its application." This goal would be served if we could (as by a draft from Lethe) purge our minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade. In the absence of such innocence, the preconceptions based on domestic law may be minimized by close attention to the differences between domestic law and the Convention. We turn first to the (U.S.A.) Uniform Commercial Code.

### Section 2 ¶615. *Excuse by Failure of Presupposed Conditions*

"Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraph (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."<sup>[page</sup>

The Uniform Commercial Code also has rules on the effect of difficulties in specialized situations: casualty to goods identified when the contract was made ("specific" goods) (UCC 2-613), and failure of agreed means of transportation or payment when a "commercially reasonable" or "substantially equivalent" substitute is available (UCC 2-614).<sup>[7]</sup>

### ❖ 426 (1) *Aspects of Performance Subject to Excuse*

Article 79 of the Convention follows the approach of important civil law systems in extending the rules on excuse to all aspects of a party's performance. Under paragraph (1) *either party* may be excused from liability "for a failure to perform *any* of his obligations." On the other hand, UCC 2-615 provides excuse *only for the seller*, and then only with respect to *two aspects* of performance: "delay in delivery" and "non-delivery."

#### (a) *Defective Goods*

The differing scope of the provisions on exemption in the Convention and in the UCC leads to this question: May a nonnegligent seller be excused from liability when he delivers defective goods? Under the UCC, the answer is No since the situation involves neither "delay" nor "non-delivery." Under the Convention the answer is not so obvious, since exemption may apply to a party's failure to perform *any* of its obligations.

*ULIS*. This issue was sharply contested in the preparation of *ULIS*. At the 1964 Hague Conference, the controversy centered on the choice between two words: "obstacle" v. "circumstances."<sup>[8]</sup> The 1956 Draft that was brought to the Hague Conference provided that the non-performance must result from an "obstacle." A civil law group, led by the Federal Republic of Germany, feared that this test might refer only to supervening and external events, as contrasted with the more personal issue as to the seller's due care or fault, and might bar excuse based on an extreme and [page 477] onerous change in economic circumstances. At the insistence of this group, the "obstacle" concept was eliminated. *ULIS* 74(1) follows:

#### *ULIS Article 74*

"1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended."

The crucial change was to extend exemption to situations where non-performance "was due to *circumstances*..." "Circumstances" could include a drastic change in costs or other economic conditions. In addition it could be argued that a seller could be freed from liability for defects in the goods that did not result from the seller's fault; such was the interpretation given to the drafting change in Professor Tunc's important commentary.<sup>[9]</sup>

*UNCITRAL and Impediments*. *UNCITRAL* faced this issue and replaced "circumstances" by "impediment" a word that (like "obstacles") implies a barrier to performance, such as delivery of the goods or transmission of the price rather than an aspect personal to the seller's performance. This decision that exemption applies only to impediments that *prevent* performance (as contrasted with circumstances that lead to *defective* performance) is supported by the language of paragraph (4): "The party who *fails to perform* must give notice to the other party of the impediment..." a requirement that would be absurd in connection with the delivery of goods with a hidden defect. It is significant that no notice requirement was included in *ULIS* 74 a provision that, as we have seen, was understood to permit exemption for the non-negligent delivery of defective goods. This fundamental point that exemption provided by Article 79 of CISG does not apply to defective performance such as the supply of non-conforming goods was confirmed by the discussions and by decisions taken at the Diplomatic Conference.<sup>[10]</sup> [page 478]

This result is also important to avoid undermining the Convention's contractual approach to the parties' obligations and its unitary approach to the remedies for breach. As we have seen, Article 35(1) provides: "The seller *must deliver* goods which are of the quantity, quality and description required by the contract" and Article 45 provides: "(1) If the seller fails to perform *any* of his obligations under the contract or this Convention" [including, of course, the seller's obligations (Art. 35) to supply conforming goods] "the buyer may...(b) claim damages...." A parallel provision on breach by the buyer appears in Article 61(1)(b). The Convention thus is based on a unitary, contractual obligation to perform the contract and be responsible for damages as contrasted with some legal systems that make liberal use of the idea of fault in dealing with liability for damages for breach of contract.<sup>[11]</sup>

This decision has important practical consequences for buyers who suffer serious damage from defective goods. Deciding whether the defect resulted from "fault" may call for inquiry into the manufacturing processes of the seller or of a remote supplier. Even when a heavy burden of proof is placed on the seller (or the supplier), a final resolution of the issue is expensive and uncertain. The burdens multiply when the product was manufactured by a remote supplier. As we shall see, exemption under Article 79 (as under most domestic rules) must ordinarily be based on events (*e.g.* war, embargo, flood, fire) that are widely known. Exemption based on the care taken in a producer's manufacturing processes is anomalous as well as impractical. In addition, the most plausible claim of non-negligence can be made by a seller who resells complex machinery or goods in sealed containers, in circumstances where inspection and testing is impractical. The buyer (unlike the seller) usually has no contractual relationship with the manufacturer who, in any case, may be remote from the buyer. Under these circumstances the only practicable way to transfer liability to the manufacturer is for the buyer to recover from its seller who can more readily secure redress from its supplier.<sup>[page 479]</sup>

#### ◆ 428 D. The Standard for Exemption for Non-Performance

Under Art. 79(1), a party who seeks exemption from liability for non-performance must establish (*inter alia*) that the failure to perform "was due to an impediment beyond his control." How high and impenetrable must an "impediment" be to justify non-delivery or non-acceptance? We shall address this question at ◆432, *infra*. As background for this issue we now consider (1) The hazards of following diverse domestic law and (2) The possible relevance of contract patterns in international trade.

#### ◆ 429 (1) Domestic Law: Hazards; Comparative Law.

Attention has been drawn, *supra* at ◆425, to the danger that local tribunals may unconsciously read the patterns of their domestic law into the general language of the Convention—an approach that would be inconsistent with the Convention's basic goal of international unification (Art. 7(1)). And deliberate recourse to the exemption rules of a single domestic system would flagrantly violate the Convention. As we have seen, Article 7(2) permits recourse to "the law applicable by virtue of the rules of private international law" only as a last resort—*i.e.*, when questions are "not expressly settled" by the Convention and cannot be "settled in conformity with the general principles on which it is based" (◆102, *supra*). The fact that a provision of the Convention presents problems of application does not authorize recourse to some one system of domestic law since this would undermine the Convention's objective "to promote uniformity in its application" (Art. 7(1)). However, no such difficulty arises from a comparative law approach that seeks guidance from the prevailing patterns and trends of modern domestic law.

To be sure, a comparative law approach will be subject to practical limitations. However, comparative studies, stimulated in part by the Convention, are proceeding apace. Moreover, in time, an international body of case law will develop under this and other articles of the Convention.<sup>[12]</sup>

In seeking guidance from a consensus or "common core" of domestic law, certain standards of relevance will be appropriate. The Convention is <sup>[page 480]</sup> designated for international trade; the most relevant rules of domestic law are those that reflect the practices and problems of international trade or, at least, grow out of domestic transactions that are comparable to those of international trade. And, akin to this, is the special value of legal trends that reflect a careful reworking and modernization of traditional and archaic legal concepts.

[Professor Tallon \(B-B Commentary 595\)](#), responding to the above suggestion in the first edition, was concerned lest tribunals, after comparing the different domestic approaches to exemption, would conclude that their own system was the most modern and appropriate for international trade. The warning needs to be taken seriously and should lead to withdrawal of the above suggestion if one could believe that tribunals would not, in any case, consider and be influenced by the legal system with which they are familiar; perhaps attention to the approaches of other legal systems could serve as a mild antidote for inevitable national bias. Admittedly, it would be wrong to give weight to domestic legal rules on points where the words of the Convention (in their full legislative context) speak with sufficient clarity to dislodge the natural predilection for familiar domestic law. However, this writer at [432.1](#), *infra*, confesses to despair over the power of words to communicate answers to the questions of degree that are intrinsic to our current problem. In this situation we need all the help we can get!

The next section suggests yet another unconventional approach. Is it equally dangerous?

## ❖ 430 E. Modern Contract Practices as a Guide

Reference has been made to the widespread use of contract provisions in this area and to the special value of standard terms prepared, for specific types of international transactions, through the collaboration of sellers and buyers. A few examples of contract clauses on exemption will provide a basis for considering the value of contract patterns in applying the Convention.

### ❖ 431 (1) *Examples of Exemption Clauses*

Over the course of the past decades, the United Nations Economic Commission for Europe (ECE) has supervised and finalized the work of representatives of sellers and buyers and of governmental representatives [page 481] in preparing general conditions of sale (standard contracts) for a wide variety of transactions. All of these contracts contain provisions on exemption from liability when performance has been prevented by a supervening impediment.

One of the important ECE General Conditions covers the Supply of Plant and Machinery for Export (No. 188); this version was prepared for transactions among countries with market economies. The contract terms on exemption (or "reliefs") are as follows:

*General Conditions (ECE) No. 188* [\[13\]](#)

#### "10. RELIEFS

"10.1. The following shall be considered as cases of relief if they intervene after the formation of the Contract and impede its performance: industrial disputes and any other circumstances (e.g., fire mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumstances are beyond the control of the parties.

"10.2. The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay on the intervention and on the cessation thereof.

"10.3 The effects of the said circumstances, so far as they affect the timely performance of their obligations by the parties, are defined in Clauses 7 and 8. Save as provided in paragraphs 7.5., 7.7., and 8.7., if, by reason of any of the said circumstances, the performance of the Contract within a reasonable time becomes impossible, either party shall be entitled to terminate the Contract by notice in writing to the other party without requiring the consent of any Court...."

The above contract includes (❖10.1) a list of specific occurrences that might impede performance, and gives special effect to "industrial disputes."

Helpful examples of exemption clauses also are provided in the *Kritzer Guide* at 520-522 (clauses from 7 national settings) and 566 (model export contract, Art. 6-Excusable Delays) and in the *Kritzer Manual* Ch. 8.

### ◆432 (a) *Use of Contract Patterns in Applying Convention*

The specific provisions of the above General Conditions of Sales and other standard contract terms do not bind the parties unless they have agreed to them. But contracts drafted jointly by sellers and buyers may be useful (along with modern patterns of contract law) to help solve problems of [page 482] interpreting and applying the general standards of the Convention. A pattern of contracting that is "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" may constitute a usage that the parties have "impliedly made applicable to their contract." (See Art. 9, *supra* at ◆113.) In addition, contract patterns may be useful to inform a tribunal with respect to the practicability and suitability of competing interpretations of the Convention. [14] Professor Nicholas notes that a crucial element in Article 79(1) is whether the party claiming exemption could "reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract" and that patterns of contracting in similar transactions can bear on the "reasonable expectations" of the parties. *Parker Colloq.*, 5◆9.

It has not been feasible here to reproduce and analyze a sufficient number of contract terms to provide a basis for suggesting patterns of contract practices for various types of international sales. The above examples, however, may provide suggestive leads for further inquiry by those who face problems in this area.

### ◆432.1 F. "Impediment" ◆How Tough a Barrier?

As we have seen (◆427, *supra*), paragraph 1 of Article 79 embodies a decision that exemption from liability for a "failure to perform" should be confined to situations in which an "impediment" *prevents* performance ◆production or delivery of goods, transfer of funds to pay the price. Paragraph 1 also emphasizes that grounds for excusing failure to perform are strict. Thus, the party seeking exemption must prove that its failure to perform (1) "was due to an impediment *beyond his control*" and that the party (2) "could not reasonably be expected to have *taken the impediment into account*" when the contract was made or (3) "to have *avoided or overcome* [the impediment] or its consequences".

The nub of our problem is this: It is not practicable to enumerate the circumstances that will excuse a failure to perform. Instead, words must [page 483] try to express a dividing point on a continuum between "difficult" and "impossible". Even domestic rules cast in terms of "impossibility" conceal questions of degree. Military blockade and government prohibition provide excuse on the grounds of "impossibility" although it may be possible to run a blockade or evade a law. However, the varying concrete results under diverse formulations of domestic law provide a point of reference. Tallon (*B-B Commentary* 592) on the basis of careful study, suggests that the Convention stands somewhere between the most strict and the most liberal of the domestic systems. See also Nicholas, *Parker Colloq.* (5◆4 to 5◆6: comparison of domestic approaches; 5◆9: emphasis on Article 79(1) ◆s reference to what the party could "reasonably be expected" to take into account in the light of usages and contract practices in the trade concerned).

In spite of strenuous efforts of legislators and scholars we face the likelihood that Article 79 may be the Convention ◆s least successful part of the half-century of work towards international uniformity This prospect calls for careful, detailed contract drafting to provide solutions to fit the commercial situation at hand. (Examples of standard contract provisions were set forth at ◆431.) Those who are not able to solve the problem by contract must await the process of mutual criticism and adjustment by tribunals and scholars in the various jurisdictions. See the current decisions in the following section.

### ◆432.2 (1) *Economic Difficulties and Dislocations*

The Convention, as we have seen, narrowed the grounds for exemption in ULIS 74 by replacing exemption based on "*circumstances*" with a provision that failure to perform must be "due to an *obstacle*" (◆423.3, *supra*). In addition to denying exemption for the delivery of defective goods, this change responded to concerns that the



reference to "circumstances" could be a basis for excuse merely because performance became more difficult or unprofitable.<sup>[15]</sup> However, the language of Article 79(1) seems to leave room for exemptions based on economic dislocations that provide an "impediment" to performance comparable to non-economic barriers that excuse failure of performance.

Assume that the supply of a material needed for performance of a contract unexpectedly becomes so reduced in quantity and inflated in price **[page 484]** that only a minority of producers that need this material can continue in production. This situation clearly constitutes an "impediment" barring performance by most producers whose contracts overlap the onset of the shortage; requiring production by only one (or a minority) unfairly prejudices some in favor of their competitors. Comparable unfairness can result if extreme and unexpected currency dislocations make it impossible for sellers to continue to produce or for buyers to purchase at the monetary values stated in those contracts that overlap the dislocation.

Extreme price and (especially) currency dislocations may be sufficiently widespread to lead to laws or administrative regulations that require contract readjustment. The Convention (Art. 4(a)) does not interfere with such domestic rules on validity.<sup>[16]</sup>

In sum, the application of Article 79 to unanticipated economic difficulties should be consistent with the general principles applicable to this provision: (1) Exemption is confined to barriers to performance (e.g., delivery or payment); (2) An "impediment" to performance may result from general economic difficulties and dislocations only if they constitute a barrier to performance that is comparable to other types of exempting causes.

*Decisions:* (1) ARB. [ICC \(Paris\), 7197/1992 \(1992\)](#). S (Austria) and B (Bulgaria) agreed that B's payment, for goods to be provided by S, would be based on a documentary credit to be opened by B before a specified date. B failed to open the credit within the specified period or an additional period granted by S. S sued for performance and damages. B claimed exemption (Art.79) on the ground that the Bulgarian government had ordered suspension of foreign debts. The tribunal rejected B's claim for exemption; the suspension of credits had occurred before the making of the contract. Moreover, B could have foreseen the difficulties resulting from the government's action. UNILEX D.1992-2.

(2) GER. [ARB: Handelskammer 21 March 1996](#). B contracted with S (Hong Kong) for delivery by S of goods to be produced in P.R.China. S failed to deliver the goods, and claimed exemption under Art.79 based on difficulties of S's supplier in China. B was awarded damages; the **[page 485]** difficulties of S's supplier (Art.79(2)) did not exempt S. CLOUT 166, UNILEX D.1992-2. [NOTE: The Chinese approach to force majeure and related questions is examined in Tanner, 16 ULC (Pitt.) 155 at 165-168 (1996)].

(3) RUSS. FED., [ARB: Int. Com., Ch.of Comm. 123/1992, 17 October 1995](#). S (German) and B (Russian) contracted for S to deliver equipment to B. S delivered the equipment but B did not pay, claiming exemption based on the failure of B's bank to give instructions for payment. Held: B was not exempt since B had failed to take necessary measures to assure payment. CLOUT 142, UNILEX D. 1995-28.1.

*Comments:* [Nicholas, B., Impracticability and Impossibility, Parker Colloq., 1984](#), Ch. 5, 1-23; Silva Ruiz, P., CISG: Exemption, Cranston, R. & Goode, R. eds., Commercial and Consumer Law (Oxford, 1993) 54-59; Declerq, P.J.M., 15 JLC 213-255 (1995); Hudson A.H., McKendrick, ed., Force Majeure, London (Lloyds) 1991, 175-195; Diamond A., id. 165-174; Schlechtriem, Com. (1998) 601-626 (Stoll).

## **433 G. Performance Delegated to Third Party**

Paragraph (2) addresses cases where a party delegates performance to a third party who fails to perform.

*Example 79A. Seller contracted to sell Buyer a machine to be built in accordance with specifications supplied by Buyer. Seller contracted with Electron to manufacture the machine. Electron had a good reputation for efficiency and responsibility but, in this case, mismanaged production so that it was unable to deliver the machine. At the*

time of Electron's default, Seller could not obtain the machine from another supplier and was unable to deliver the machine to Buyer.

Under the general rule in paragraph (1), Seller might be able to contend that Electron's failure constituted an "impediment beyond [Seller's] control," and that Seller would therefore be exempt from liability to Buyer. Paragraph (2) restricts exemption in situations like this in which a party (*e.g.* Seller) has engaged a third person (Electron) "to perform the whole or a part of the contract". The crucial question is posed by paragraph (2)(b): Would the third person (Electron) be exempt from liability to Seller under the rules of paragraph (1)? Here the answer is No. Consequently, Seller cannot be exempt from liability to Buyer. The net effect is that if Seller's default forces it to pay damages to Buyer, Seller must [page 486] look to Electron for reimbursement. (Under modern procedural systems, if Buyer sues Seller, Seller would bring in Electron as a third-party defendant.)

On the other hand, assume that Seller's contract with Electron called for Electron to produce the machine at a specified manufacturing plant, and that, before the date for delivery to Buyer, Electron's plant was destroyed by flood or some other impediment that met the standards of Paragraph (1). Since Electron would be exempt from liability to Seller the barrier to exemption in Paragraph (2)(a) would not apply; Seller could be exempt from liability to Buyer under paragraph (1).

Problems comparable to those posed by Example 79A could also arise if the seller is obliged to deliver the goods to the buyer (as under a quotation *ex ship* Buyer's port) and thus is responsible for transit damage to the goods. If the goods are damaged in transit because of ordinary circumstances (water seepage, improper stowage, or the like), the seller would not only be responsible for the physical damage but also could be liable to the buyer for damages such as production interruption (Art. 74, §§403-408, *supra*). On the other hand, if the goods were lost or seriously damaged as a result of a hurricane, embargo or similar impediment, the seller would bear the loss from physical damage (subject to insurance) but could be exempt from liability for damages to the buyer that resulted from (*e.g.*) interruption of production.[17]

### ◆ 434 (1) *Default by General Supplier*

In Example 79A, *supra*, Seller engaged Electron to manufacture a machine to specifications supplied by Buyer. This case clearly fell within paragraph 2 of Article 79, which applies when a party (P) engages a third person (T) "to perform the whole or a part" of P's contract of sale. The scope of paragraph 2 becomes clearer in the light of its legislative history.

The provision on exemption in ULIS (Art. 74) had no such provision. However, the UNCITRAL Working Group's 1975 draft (para. 2) was substantially the same as CISG 79(2) except for language that described the third person as a "subcontractor".[18] The report of UNCITRAL's 1977 [page 487] review in the Committee of the Whole of this language includes the following: "The Committee decided to delete the word "subcontractor". The term was said to be unknown in some legal systems and in others to refer primarily to relationships in the context of construction contracts. In place of this term the Committee decided to substitute "a person whom [*e.g.*] [the seller] has engaged to perform the whole or a part of the contract". The report continued, "It was noted that it would be clear that a seller would not be exempt from liability...because of the failure of one of his suppliers to perform since a supplier of the seller could not be considered to be a person the seller had engaged to perform any portion of the seller's contract".[19] At the Diplomatic Conference proposals to include exemption based on defaults by a supplier were not accepted and the UNCITRAL draft was adopted. *O.R.* 378-381, 408-412, *Docy. Hist.* 599-602, 629-633. For a summary of the conflicting views see [Schlechtriem, 1986 Commentary 103-104](#).

This legislative history indicates that narrow scope should be given to the phrase "a third person whom [a party] has engaged to perform the whole or part of the contract." In Tallon's words there must be an "organic link" between the main contract and the subcontract.[20] Paragraph (2) would apply, as in Example 79A, §433 *supra*, if P turns over to a third party (T) the performance of P's duty to manufacture goods to buyer's (B's) specifications. The paragraph would also seem to apply if P delegates to T P's duty to procure goods and deliver them to a buyer (B). In both cases P will be exempt from damages for failure to perform the contract only

if T was prevented by an impediment that constitutes an excuse under Article 79(1). In short, if under the standard set in Article 79(1) T [page 488] is liable in damages to P, P should not be excused from liability to B. (Since T contracted only with P and P contracted only with B it would often be difficult or impossible for B to obtain redress directly from T.)[21]

The exclusion of general suppliers from the specialized rule of paragraph (2) does not mean that defaults by a supplier (T) will never lead to exemption for P. Assume that a government embargo prevents suppliers from obtaining or selling materials that P requires to perform P's contract with B; the embargo could constitute an "impediment" under Article 79(1) exempting P from liability to B. However, such occurrences are rare; less rare are the situations that fall within Article 79(2) in which P engages a third party (T) "to perform the whole or a part" of P's contract with B. Finally, as we have seen (*supra* at ¶427) Article 79 does not exempt a seller from liability to the buyer for defects in goods; the seller is responsible although the defective goods came from a general supplier or a party to whom the seller has delegated its duty to deliver the goods.

*Decisions:* (1) ARB. [ICC \(Paris\), 8128/1995 \(1995\)](#). B (Swiss) contracted with S (Austrian) for delivery to B of chemical fertilizer. S failed to deliver, claiming exemption under Art. 79(2): S's supplier had failed to deliver to S. S's defense was rejected; the narrow grounds of exemption for "failure of a third person" of Art. 79(2) were not satisfied. UNILEX D.1995¶34.

(2) RUSS. FED.: [ARB, Int. Comm. Arb., Ch. of Comm., 155/1994, 16 March 1995](#). S (Russian) contracted to supply B (German) with chemical products within a specified period. S failed to deliver, B purchased the material at a higher price and sued S for damages. S claimed exemption under Art. 79(2): The plant manufacturing the material for S had an emergency production stoppage. S's defense was rejected: S should have been able to take "the impediment into account" or to have overcome its consequences. CLOUT 140, UNILEX D.1995¶10.0.1. Cf: RUSS. FED., [ARB., Int. Comm. Arb., Ch. of Comm., 200/1994, 25 April 1995](#). B (Russ.) claimed exemption from accepting and paying for goods because of changes in country's economic conditions; this defense was not accepted. CLOUT 141, UNILEX D.1995¶13.1.

(3) ARB. [Hamburg Handelskammer, 21 March 1996](#). B (German) ordered goods from S (Hong Kong) that were produced in P.R.China. S was unable to deliver, and claimed exemption because S's Chinese supplier was undergoing personal and financial difficulties. S's defense was rejected: Financial problems of a seller's supplier, even when connected [page 489] with public authority in the supplier's country, were deemed generally within the seller's responsibility. CLOUT 166, UNILEX D. 1996-3.4.

## ¶435 H. Temporary and Partial Impediments

### ¶435.1 (1) Temporary Impediments

Paragraph (3) of Article 79 addresses the following situation:

*Example 79B. Seller contracted to deliver goods to Buyer on June 1. Before the time for delivery a government embargo (or some comparable impediment) prevented Seller from complying with the contract. On June 30 the embargo (or other impediment) was removed and it was then possible for Seller to deliver the goods to Buyer.*

Paragraph (3) leads to the following consequences: (a) Seller is relieved of liability for delay in performing during June; (b) Seller is obliged to deliver to Buyer when the impediment is removed.

The more interesting question is this: Must Buyer accept Seller's delivery on July 1? Answering this question calls for close attention to paragraph (5): "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention." In short, Buyer's right to avoid the contract is not affected by Article 79. If the month's delay in delivery constituted a "fundamental breach" (Art. 25), Buyer may avoid the contract (Art. 49). If Buyer duly notified Seller of avoidance Seller would have no right to deliver but would not be liable for damages; Buyer would have no obligation to accept the goods. Of course, as we have seen, not every delay (or other non-conformity) in performance justifies avoidance of the contract (Arts. 25, 49,

64). If the Convention provided that any delay or other deviation justified avoidance, there might be strong reasons for relaxing such a strict rule when a slight delay is caused by an impediment. But in the context of the Convention's limited right of avoidance, there is no justification for a rule that a party awaiting performance is both (a) deprived of compensation for delay and (b) required to accept the late performance.<sup>[22]</sup>

The 1978 Draft provided in paragraph (3) that the exemption "has effect *only* for the period during which the impediment exists." At the diplomatic conference it was proposed to add to paragraph (3) a provision that "the party who fails to perform" (i.e., Seller, in Example 79B) is "permanently exempted" if during the period of temporary exemption [page 490] the circumstances have "so radically changed that it would be manifestly unreasonable to hold him liable." This proposal was rejected but, as an alternative, the word "only" in paragraph (3) was deleted; this change was designed to avoid any impression that paragraph (3) laid down a rigid rule requiring contract relations to resume on the original basis no matter how long the interruption or how great the changes in circumstances.<sup>[23]</sup>

### ❖435.2 (2) *Impediment Preventing Part of Performance*

*Example 79C. A contract called for Seller to manufacture for Buyer 1000 units of an alloy that required specified amounts of scarce metal X. Thereafter, government regulations unexpectedly restricted and rationed the use of X; under these regulations Seller could obtain only enough X to manufacture 600 units of the alloy. Seller immediately notified Buyer that Seller would be unable to deliver 400 units. These questions arise: (1) Does Article 79 exempt Seller from damages for failure to deliver the 400 units? (2) What options are open to Buyer?*

#### (a) *Exemption for Seller*

As Tallon notes, Article 79(3) deals with an impediment for a limited time but makes no provision as to an impediment affecting part of the contract. *B-B Commentary* 588, ❖2.9. Nevertheless, Seller is entitled to exemption as to the 400 units. Unlike some legal systems, Article 79 does not speak of nullity of "the contract" but instead provides that a party is not liable for failure to perform "any" of its "obligations" ❖language that permits exemption to the extent that the impediment applies. Article 51(1), ❖316 *supra*, reflects a policy that is consistent with this result: "(1) If the seller delivers only a part of the goods...articles 46❖50 [provisions on remedies for breach] apply in respect of the part that is missing...". There is no reason to suppose that this policy was rejected for Article 79.

#### (b) *Options Available to Buyer*

Analyzing Buyer's options gives us an opportunity further to explore the applicability of various remedial provisions of the Convention; some of these apply directly and others (like Article 51(1), *supra*) may be helpful as analogies.<sup>[page 491]</sup>

##### (i) *Requiring Performance*

Since Article 79 exempted Seller from only part of its obligations, under Article 46(1) (❖❖279❖286 *cf.* Art. 28, ❖194, *supra*) Buyer may "require performance by the seller" with respect to the 600 units or, if Seller fails to deliver, may avoid the contract pursuant to Article 64(1)(a) or (b) and may also recover damages for Buyer's wrongful failure to deliver the 600 units. See Arts. 74, 75 or 76, ❖❖353❖354, 409❖415, 402❖406, *supra*).

##### (ii) *Avoidance*

Although Buyer may insist on delivery of the 600 units, under some circumstances Buyer may have the option to avoid the contract and refuse to accept any of the units. The Seller, of course, is not liable for damages for failure to deliver the 400 units but exemption from damages does not impair Buyer's right to avoid the contract (Art. 79(5)). Under Article 49(1)(a) Buyer may declare the contract avoided if the seller's failure to perform "any of his obligations....amounts to a *fundamental breach*" as defined in Article 25. If (surprisingly) Seller should refuse



to deliver the 600 units Seller has produced, Seller's repudiation (Art. 72) would unquestionably justify avoidance.

What circumstances would permit Buyer to refuse the 600 units because of the failure to receive the remaining 400? Suppose that Buyer could use or resell the alloy only in 1000-unit quantities. In these circumstances Seller's delivery of "only a part of the goods" (Art. 51(1), quoted *supra*, could cause such serious detriment (Art. 25) that Buyer, under Article 51(2) (317, *supra*) could declare "the contract avoided in its entirety". Giving legal effect to the linkage between the 600 and the 400 units is also reinforced by Article 73(3) on deliveries by installments (402, *supra*): failure with respect to a part authorizes avoidance "in respect of deliveries already made or of future deliveries if, by reason of their *interdependence*" these other deliveries could not be used for their intended purpose.[24]

In sum, the Convention provides ample resources for solving problems posed when only part of performance is prevented by an Article 79 impediment.[page 492]

### 435.3 I. Remedies other than Damages

#### 435.4 (1) Avoidance

Paragraph (5) states: "Nothing in this article prevents either party from exercising any remedy other than to claim damages under this Convention". This provision is important: a party who may not recover damages for failure of performance may still avoid the contract (Art. 79(5), 423.4, 435.5, *supra*) and has the rights granted in Section V, *infra* at 437 on "Effects of Avoidance".

Consider these cases: (1) A seller delivers goods to buyer but exchange restrictions prevent the buyer from paying. (2) A buyer pays in advance for goods but export controls prevent the seller from delivering goods. In each case the party who is prevented from performing may be exempt from liability for damages. However, the party who has performed without receiving the agreed return is entitled to redress. This is provided by the right of avoidance which carries with it (Art. 81(2)) the right to "restitution" of whatever the party "has supplied or paid under the contract" (444, *infra*).

The discussion of paragraph (3) of Article 79 (temporary impediments, 435.5, *supra*) shows the importance of avoidance to resolve the question whether performance may be resumed after a "temporary" impediment. Indeed, interruptions of performance that turn out to be permanent at their onset may appear to be temporary. How long must the other party wait before making alternative arrangements by resale or repurchase? The right of avoidance preserved by Article 79(5) provides a means of resolving this problem. Indeed, without the right of avoidance "temporary" impediments would be unmanageable.[25]

#### 435.5 (2) Specific Performance

The statement in paragraph (5) that nothing in Article 79 affects "any right other than to claim damages" could be read to say that a party who [page 493] is entitled to exemption from damages could nevertheless be "required to perform" (Arts. 28, 46, 62, (Art. 28) 191, 199, 279, 285, 345, 349, *supra*). This conclusion would be inconsistent with the basic provision that a party "is not liable" when performance is barred by an impediment. In many cases an action to "require" performance would call for an impossibility and in other cases the sanctions to compel performance (e.g. money penalties such as *astreinte*) could be at least as onerous as damages. There is no indication that the legislators intended such an absurd result.[26] It seems probable that queries about the overbreadth of paragraph (5) were dismissed on the ground that an absurd construction did not justify the complications of producing a revised text. The legislative background is relegated to a footnote.[27] In short, the broad language of paragraph (5) was retained because of the possibility that remedies other than damages might be needed in special circumstances, such as the ending [page 494] of a temporary impediment or failure to pay the price for goods received when the agreed mode of payment was blocked temporarily (e.g.) by exchange controls. In any event, specific performance in situations excused by Article 79 would be inconsistent with domestic law in many jurisdictions. (This view is not confined to the common law. See note 26, *supra*.)



Consequently, under Article 28 (◆◆194◆199, *supra*) these jurisdictions would be free to follow their own rules on specific performance.[page 495]

## Article 80. Failure of Performance Caused by Other Party

◆436 This second (and last) article in Section IV. *Exemptions* has the seductive charm of a self-evident statement. Our principal problem is to find its appropriate role in the statutory structure: Does Article 80 govern only problems of exemption from liability (Article 79, *supra*) or does it modify all of the remedial provisions of the Convention?

### Article 80 [1]

"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."

### ◆436.1 A. Relationship to Article 79 on Exemptions

The legislative history of Article 80 links it closely to the rules on exemption in Article 79. The idea expressed in Article 80 appeared as part of the article of ULIS (1964) that dealt with exemptions. Article 74(3) of ULIS stated that relief from liability did not exclude avoidance of the contract or reduction of the price "unless the circumstances which entitled the first party to relief were *caused by the act of the other party*...". No such provision was included in the drafts approved by the UNCITRAL Working Group or by the Commission.[2]

The language that had been omitted from ULIS 74(3) reappeared at the Diplomatic Conference in a proposal that the article on exemptions be followed by an article substantially like Article 80.[3] Some delegates stated that the proposal expressed the important general principle that one should not gain by a wrongful act; others noted that such a statement [page 496] was unnecessary and, in any event, followed from the good faith requirement of Art. 7(1), ◆◆94◆95, *supra*. [4] Most delegates seemed to feel that there might be some value and, at any rate, no danger in stating the obvious; the provision was approved. The Conference authorized the Drafting Committee to place the new article either in Ch. V Sec. IV, *Exemptions*, or in Part III, Ch. 1, *General Provisions*; the Drafting Committee chose the former and the provision as so structured was approved by the Plenary.[5] Placing Article 80 in the section entitled "Exemptions" is significant since chapter and section headings were regarded as parts of the Convention and were considered and approved by UNCITRAL and the Diplomatic Conference.[6]

### ◆ 436.2 (1) Article 80 and the Exemption Rules of Article 79

The role of Article 80 in exemption cases can be examined in the following case.

*Example 80A. A contract called for Seller to deliver goods to Buyer in State X. State X required sellers to obtain a license for the importation of such goods. Seller made an appropriate application but Buyer persuaded the officials of State X to deny the license; as a result Seller could not deliver the goods. Buyer, in a remarkable display of nerve, sued Seller for damages for failure to deliver.*[7] [page 497]

The denial of a government license normally would constitute an "impediment" to performance and would exempt Seller from liability for damages (Art. 79(5)). Suppose, however, that Buyer surprisingly (see note 7, *supra*) claims damages for breach of contract on the ground that, under Article 79(1), Seller should have "taken the impediment into account" or should have "avoided or overcome it or its consequences". In these circumstances Seller can invoke Article 80 to bar Buyer's damage claim; the failure to overcome the impediment "was caused by [Buyer's] act or omission" and Seller is excused from damages by Article 79.

### ◆ 436.3 (a) Resources apart from Article 80.

In the above case, Article 80 may not be needed to defeat Buyer's outrageous claim. Article 60(a) (342, 343, *supra*) states that the buyer's obligation to "take delivery" (Art. 53) includes "doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery" a requirement that, at the very least, prevents the buyer from placing obstacles in the seller's path. One might conceive of cases where an obligation not to block the other party's performance is not stated so explicitly in the Convention; however, a comparable obligation may be fairly implied (as in Example 80A) from normal expectations implied from the contract (Art. 8) and from the parties' practices and trade usages (Art. 9), construed with regard (Art. 7(1)) for "the observance of good faith in international trade".

The possibility of achieving the objectives of Article 80 by other provisions of the Convention does not mean that Article 80 is wholly without value; in some situations Article 80 may provide the clearest basis for a just result.

#### 436.4 B. Article 80 as a General Obligation

Article 80, apart from its position in Section IV. *Exemptions*, might be read as a rule of general applicability and, as we have seen (436.1), both supporters and opponents of this provision claimed that it embodied self-evident truth. Does it follow that Article 80 is technically applicable to all of the many provisions on remedies, as if it had been placed in Part III, Chapter 1, *General Provisions* (Arts. 25-29) instead of in Ch. V, Sec. IV, *Exemptions* (Arts. 79-80)? For reasons set forth at 436.1, footnote 6, placing Article 80 in Section IV on Exemptions should be respected in determining whether the article technically has the same general operative effect as the articles in Chapter 1, *General Provisions*. On the other [page 498] hand, the principle expressed in Article 80 and its relationship to other provisions of the Convention that call for cooperation between the parties in the performance of their contract make it suitable for analogical use under Article 7(2) for questions "not expressly settled" by the Convention (96, 102, *supra*).

This approach seems advisable since, as Tallon demonstrates (*B-B Commentary* 2.5, p. 598-599), Article 80 is not well-drafted to serve as an operative rule supplementing or modifying the many remedial rules provided by the Convention a deficiency that should not be surprising since (436.1, *supra*) this provision was prepared in relation to the exemption rules of Article 79. In this setting Article 80 can give a quick answer to an outrageous claim for damages by a party (e.g. Party A) who has prevented performance by Party B. However, in these cases the more important question is this: Can B recover damages from A for the loss A's conduct inflicted on B by preventing B's performance of the contract? The language of Article 80 does not address this question; it merely states that A (who prevented performance by B) "may not rely" on B's failure to perform. Read literally, Article 80 gives B only a shield when B needs a sword.

Fortunately, it is not necessary to distort the language of Article 80 to deal with problems for which it was not designed. As 436.3 indicates, the Convention provides more suitable tools (e.g. Art. 60(a), *supra*) for handling these problems. In addition, these provisions are supplemented (Art. 7(2)) by the "general principles on which [the Convention] is based" i.e., the premises underlying various provisions calling for cooperation in performance including, of course, Article 80.

Finally, the obstructive conduct which Article 80 addresses (albeit inadequately) is governed by this fundamental principle: The making of a contract necessarily implies an expectation of performance; action by one party to prevent performance by the other is clearly inconsistent with their mutual expectations.[8] For such breaches of contract the Convention provides a wide range of remedies: Arts. 45-52, 61-65, 71-78.

[NOTE: The discussion, above, at 436.1-2 suggested that legislative history, and placing Article 80 with Article 79 in Section IV. Exemptions, indicated that Article 80 was related to the problems of "force majeure" introduced by Article 79. However, the following decision, involving many complex issues, employed Article 80 to solve a problem related to Article 79 or Exemptions.][page 499]

*Decision:* AUSTRIA ObGH (Sup. Ct.) 100 b 518/95, 6 February 1996. B ordered propane gas from S; S failed to deliver. B claimed damages, including loss of profit. S's defense included the claim that non-delivery

resulted from B's failure to open a letter of credit. The court, citing Article 80, rejected S's defense: S had failed to provide B with the information needed for establishing the credit. UNILEX D.1996-3.1, CLOUT 176. [page 500]

---

## Section V. Effects of Avoidance (Articles 81-84)

### Introduction to Section V

#### 437 A. Avoidance in Earlier Parts of the Convention

Part III, Chapter II (Obligations of the Seller) stated the grounds for avoidance of the contract by the buyer (Art. 49); Chapter III (Obligations of the Buyer) included corresponding provisions on avoidance by the seller (Art. 64). Chapter IV (Risk of Loss) in Article 70 dealt with the effect of avoidance of the contract on risk. Earlier in the present chapter there were rules on avoidance for anticipatory breach (Art. 72), and for breach in installment contracts (Art. 73). All these provide background for the present section on the effects of avoidance.[1]

#### 438 B. Overview of Section V

Article 81 provides that avoidance does not affect obligations to pay damages or to arbitrate and also specifies that each party must return what it has received under the contract; Article 82 governs whether an aggrieved buyer may avoid the contract when it can not return the goods in the same condition. Articles 83 and 84 are concerned with cleaning up the aftermath of undoing a transaction.[page 501]

---

## Article 81. Effect of Avoidance on Obligations: Arbitration; Restitution

439 As we have just seen, Articles 81-84 assumes that a right of avoidance exists under provisions set forth in earlier parts of the Convention. Article 81 states the basic consequences of avoidance.

### Article 81 [1]

"(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."

#### 440 A. Obligations Terminated by Avoidance

##### 440.1 (1) Avoidance and Performance

Article 81 applies to several types of situations but the most important can be illustrated by a series of four examples. The situations can become complex; we start with the simplest.

*Example 81A. The time for performance by the seller and the buyer arrived and neither had performed when one of the parties (Party X) repudiated its contract with the other party (Party A). This gave the aggrieved party (A) the right to avoid the contract (Art. 72); party A declared avoidance. What are the legal consequences of A's avoidance?*

Article 81(1) states that avoidance "releases both parties" from their contractual obligations "subject to any damages that may be due". Consequently, [page 502] the aggrieved party (A) is released from its obligation to perform the contract and is also released from the obligation to accept performance from the other party (X). As we shall see more fully (◆440.2, *infra*), A also loses the right (Art. 46, 62) to "require" X to perform, but A can recover damages from X for breach of contract (Arts. 74◆76).

*Example 81B. One of the parties (A) has performed. (E.g., the seller has delivered or the buyer has paid.) The other party (X) repudiated the contract or committed a serious breach that empowered A to avoid (Arts. 49, 64); A declared avoidance. What are the legal consequences?*

The effects of avoidance are the same as in Example 81A, with one added feature◆X has received assets (goods or funds) from A. As we shall see (◆◆444◆448, *infra*), under Articles 81(2) and 82, Party A may recover what X received and also any damages caused by X◆s breach of contract. See: Schlechtriem, Com. (1998) 632◆642 (Leser).

### ◆440.2 (2) *Requiring Performance: Substitute Goods; Price Recovery*

*Example 81C. A seller (Party X) delivered goods to a buyer (Party A) that were so defective as to constitute a fundamental breach. Buyer A demands that X accept return of the defective goods. May A also require X to supply substitute goods?*

Is A◆s demand that X accept return of the defective goods an "avoidance"? If so, the statement in Article 81(1) that avoidance "releases both parties from their obligations" under the contract might suggest that A may not require X to deliver substitute goods. However, as we have seen, this specific situation is addressed by Article 46(2) (◆283, *supra*) which provides that when non-conforming goods constitute a fundamental breach the buyer, "may require delivery of substitute goods". This narrow and specific provision excludes any inference that might be drawn from the general language of Article 81(1) that the buyer◆s sole remedy is a claim for damages. (See the fuller discussion under Article 46 at ◆283, *supra*).

*Example 81D. Seller delivered goods that conformed to the contract. Buyer failed to pay for the goods, which Buyer promptly resold. Seller rightfully declared the contract avoided and under Article 81(2) (◆444, *infra*) has the right to "claim restitution" of the goods, but reclamation is not possible since Buyer had resold the goods. What is the impact of avoidance on Seller◆s rights?*

Seller under Article 81(2) may "claim restitution...of whatever [Seller] has supplied" but, because of Buyer◆s resale of the goods there is [page 503] no specific asset to which this remedy can be applied; consequently, Seller probably has no remedy (comparable to Article 46(2) or 62)) to compel (specific) performance.[2] However, under Article 81(1) avoidance releases both parties from their obligations "subject to any damages that may be due". In this setting damages would normally consist of the unpaid price plus interest (Arts. 74 and 78). This result seems comparable to an action under Article 62 to "require the buyer to pay the price" (◆◆345◆349, *supra*) but the "damage" approach set forth in Article 81(1) seems to remit the seller to normal collection procedures by execution of a judgment, rather than the coercive measures available under some domestic systems. In any event, if a tribunal were to conclude that the seller could invoke Article 62 to "require the buyer to pay", domestic rules rejecting coercive enforcement would be applicable by virtue of Article 28 (◆◆191◆199, *supra*).

### ◆441 B. Obligations Not Terminated by Avoidance

The phrase "avoidance of the contract," standing alone, overstates the consequences of this remedy. As we have seen, avoidance does not release a party from the obligation to pay damages for breach of contract (Arts. 74◆76, 81(1)).[3] The consequences of "avoidance" are narrowed further by the second sentence of Paragraph (1), as we shall now see.

### ◆ 442 (1) *Arbitration Clauses*

The sales contract may contain an agreement to arbitrate any dispute that may arise under the contract. Assume that a party to the contract notifies the other party that the contract is avoided and a dispute arises over the justification for the avoidance, or the amount of damages resulting from breach. Does "avoidance of the contract" release either party from the arbitration clause?

In most situations the answer is No: Article 81(1) states: "Avoidance of the contract does not affect any provision of the contract for the *settlement [page 504] of disputes...*". Avoidance (Arts. 49, 64) is a remedy based on breach of contract; agreements to arbitrate are designed to supply a way to resolve such disputes.

The UNCITRAL Arbitration Rules (1976) in Article 21(2) protect this basic function by providing that an arbitration clause, although included in the contract, "shall be treated as an agreement *independent of the other terms* of the contract"; the arbitrators "have the power to determine the *existence or the validity* of the contract of which an arbitration clause forms a part." [4] Complex questions may, however, be posed by claims that a sales contract containing an arbitration clause was executed as a result of fraud. The effect of such a claim on the authority of the arbitrators will depend, in the first instance, on the breadth of the parties' agreement to arbitrate. *e.g.*, by the incorporation of the UNCITRAL Arbitration Rules which includes Article 21, *supra*. A second factor in some jurisdictions is whether the alleged fraud is confined to the sales transaction (*e.g.*, a fraudulent statement as to the quality of the goods or the buyer's solvency) and thus is severable from the agreement to arbitrate. [5] Of course, the validity of the scope of the parties' agreement to arbitrate may be controlled by domestic law (cf. CISG 4(a)).

A current approach to these questions is reflected in the UNCITRAL Model Law on International Commercial Arbitration (1985). [6]

### ◆ 443 (2) *Other Obligations Unaffected by Avoidance*

Paragraph (1) of Article 81 states that avoidance does not affect any "provision of the contract governing the rights and obligations of the contract *consequent upon the avoidance of the contract*" *e.g.*, a contract provision governing the amount of damages or the handling of rejected goods. In addition, Articles 85-88, *infra* at ◆454-457, requiring a [page 505] party who rejects goods to take steps to preserve them, apply regardless of avoidance; as we shall see, these requirements have their most significant applications when a party avoids the contract. [7]

### ◆444 C. Restitution of What Has Been Supplied or Paid

Paragraph (2) has implications that may be surprising to those schooled in the common law.

*Example 81E. A contract called for Seller to deliver goods on June 1; Buyer's payment was due on July 1. The goods were delivered on schedule but Buyer failed to pay on July 1 or thereafter. Seller avoided the contract based on Buyer's fundamental breach and brought an action to require Buyer to return the goods.*

Paragraph (2) states that a seller who avoids a contract "may claim restitution...of whatever [the seller] has supplied...under the contract." The language calls for recovery of goods, and not merely an action for the price—a reading that can invoke the seller's right under Article 62 to "require the buyer to...perform his...obligations".

Some legal systems similarly give effect to the principle of "avoidance" (*résolution*) by permitting a seller to recover the goods when the buyer fails to pay. [8] On the other hand, the common law and the (U.S.A.) Uniform Commercial Code do not carry the concept of "avoidance" or "rescission" this far. When goods have been delivered on credit the unpaid seller has only the general claim of a creditor; in general, recovery of the goods must be based on wrongful (*e.g.*, fraudulent) conduct of the buyer in obtaining the goods, or on his signed agreement that the seller retains a property (or "security") interest in the goods. [9]

The seller's right under the Convention to recover the goods is subject to practical limitations. This remedy is of special importance when the buyer is insolvent; in this setting the rights of creditors are likely to intervene



[page 506] by levy of execution or by the designation of a receiver or trustee in bankruptcy. The Convention will not override the rights of creditors, purchasers and other third persons granted by domestic law; under Article 4, the Convention "governs only...the rights...of the seller and the buyer..."[10]

The Convention (unlike some domestic rules) does not confine the obligation to make restitution to the party in breach; under paragraph (2) each party is entitled to restitution. But if both parties are bound to make restitution "they must do so concurrently".[11]

### ◆ 444.1 (1) *Reclamation based on Contract*

Interesting issues on the interplay between the uniform international rules and domestic law may be explored in the setting of the following case.

*Example 81F. The contract of sale provided that Buyer would pay the price within 30 days after delivery and added that if Buyer failed to pay the price at the agreed time Seller, without further notice, had the right to repossess the goods. Buyer failed to pay and Seller brought an action in Buyer's jurisdiction to recover the goods.*

Buyer might oppose reclamation on the ground that Seller's rights are governed by Article 81 of the Convention, which provides for restitution based on avoidance of the contract; Seller had not declared avoidance by the notice as required by Article 26.

Seller may reply that its action to repossess is asserting a property right in the goods. Under Article 4(a) the Convention "is not concerned" with the effect of the contract on "property in the goods sold" and therefore the Convention's rules on avoidance are not applicable. To support this argument Seller may be able to point to a provision in the contract (often found in sales contracts) that property in the goods is retained by the seller until the price is paid; even if the contract did not include this clause Seller could argue that the contract clause permitting reclamation in substance gives Seller a property interest in the goods.

This argument for excluding the Convention is subject to a strong objection: The Convention in Article 81 *is* "concerned with" reclamation of [page 507] goods when the buyer fails to pay. If the contract had contained no provision for reclamation Seller, with appropriate notice, would have the right under Article 81(2) to recover the goods. To meet the argument that under Article 81(2) recovery of the goods rests on avoidance, Seller could invoke the parties' right under Article 6 to derogate from the Convention's provisions, including the provision that reclamation must be based on a notice of avoidance. In short, the parties have exercised their right under Article 6 to reshape the Convention's rules on remedies for breach. On the basis of this line of reasoning Seller should prevail.

One question remains: Does applicable domestic law invalidate (Art. 4(a)) a contractual provision allowing reclamation of the goods on non-payment? Such a rule of invalidity is conceivable but seems unlikely.[12] However, as we have seen, the Convention's rules are limited (Art. 4) to the rights "of the seller and the buyer" and yield to the rights of third persons such as creditors and purchasers.

*Decisions:* (1) AUSTRALIA, [Fed. Ct., S. Aus., D. Adelaide, 28 April 1995, 57 Fed. Ct. Rep. \(1995\) 216◆240, Roder Z. v Rosedown Pk.](#) S, a German manufacturer, sold and delivered aluminum tent material to B in Australia. B fell behind in payments, and was "placed in administration". The court concluded that the parties had agreed on a "retention of title" clause. In addition, the court concluded that, under Article 81(2), S was entitled to return of the goods to the extent that B had failed to pay. UNILEX D.&E. 1995◆15.1.1. [NOTE: Article 4 provides: the Convention "governs only... the rights and obligations of the seller and the buyer...". Consequently, CISG does not, e.g., intrude on rules of domestic law governing the rights of creditors.]

(2) RUSS. FED., [ARB, Ch. of Comm. 1/93, 15 April 1994.](#) B paid in advance for goods, S failed to deliver. B avoided the contract and, pursuant to Art. 81(2), recovered the price B had paid. UNILEX D.1994-8.2.[page 508]

## Article 82. Buyer's Inability to Return Goods in Same Condition

### 445 A. The Factual Setting for Article 82

The present article addresses the following situation: a buyer receives goods which he discovers are subject to serious defects and elects to avoid the contract (Art. 49(1)(a)) or to require the seller to deliver substitute goods (Art. 46(2)). In either event, the buyer is obliged to return the goods he has received (Art. 81(2)). But suppose that before the buyer avoids the contract, a part (or even all) of the goods have been damaged or have disappeared. Paragraph (1) of Article 82 states the general rule that the two remedies mentioned above are not available if the buyer cannot return the goods "substantially in the condition in which he received them." Paragraph (2) states three exceptions that make deep inroads on this general rule.<sup>[1]</sup>

### 446 B. Effect of Article 82 Deterioration of Goods

#### Article 82 <sup>[2]</sup>

"(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;<sup>[page 509]</sup>

(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."

### 447 (1) *The General Rule Barring Avoidance or Compulsory Substitution*

Paragraph (1) embodies a principle, generally accepted in domestic law, that a transaction may only be "avoided" if assets received under the transaction can be returned in substantially the same condition.<sup>[3]</sup> This restriction does not lead to serious injustice to an aggrieved buyer: Even if the buyer may not avoid the contract or require the seller to deliver substitute goods the buyer may recover damages resulting from the seller's breach of contract (Arts. 74-76).

### 448 (2) *Exceptions to the General Rule*

Paragraph (2) is designed to preserve the remedies of buyers who have received seriously defective goods even when the buyer can not return the goods in "substantially" the same condition. Under subparagraph (2)(b) the buyer's remedies are preserved if a major part (or even all) of the goods have perished as a result of the examination required by Article 38. Sub-paragraph (2)(c) preserves the buyer's remedies when the buyer has sold or consumed the goods as a result that may seem surprising since the buyer may have received benefits from the goods. However, under Article 84(2), *infra* at <sup>450</sup>, the buyer "must account to the seller" for the benefits it has received.

Discussion of Article 82(2)(a) has been deferred since it is more complex. As we have seen, under Article 82(1) the buyer may not avoid the contract or require the seller to deliver substitute goods if the buyer cannot return the goods in "substantially" the same condition. Under Article 82(2)(a) this restriction on the buyer's remedies

does not apply when the change in the condition of the goods is not due to the buyer's "act or omission" a phrase that calls for close attention.[page 510]

### 448.1 (a) "Act or omission"

This phrase also appears in Articles 66 and 80 and in each setting poses this question: What standard governs whether an "act or omission" is wrongful?

Violations of obligations imposed by the contract and the Convention clearly make one responsible for the consequences. In the setting of Article 82, when a buyer has received seriously defective goods does the "act or omission" standard make the seller responsible whenever the goods (*e.g.*) are stolen or are damaged by fire or storm? Can the answer be developed from inferences drawn from the Convention or does domestic tort law apply?

Invoking domestic law can undermine choices that are implicit in Article 82. Suppose, for example, that domestic tort law makes one absolutely responsible for damage to goods while in one's custody or possession. This result may be appropriate for commercial warehouses or operators of motor vehicles but would be inconsistent with decisions of the Convention on the rights of a buyer who has received seriously defective goods. As we have seen, subparagraphs (2)(b) and (2)(c) are based on the premise that the aggrieved buyer's remedies should be strongly protected. This concern is also suggested by the nuanced language of sub-paragraph (2)(a); if the buyer's remedies were to be foreclosed whenever the defective goods are subject to casualty this sweeping result could have been stated simply and clearly. A less strict standard with respect to a buyer's responsibility for defective goods is also evidenced by the closely comparable provision of Article 86(1): "If the buyer has received the goods and intends to exercise any right under the contract or the Convention to reject them, he must take *such steps to preserve them as are reasonable in the circumstances*" a duty of reasonable care but not a standard of absolute liability for loss.

On the other hand, suppose that domestic tort law imposes little or no responsibility for care. This approach may be appropriate when one is asked gratuitously to hold another's goods but is not appropriate to the duties owed to the other party to a consensual transaction especially in an international sale when the party whose goods are at risk is in another country.[4]

Basing the standard on provisions of the Convention rather than domestic tort law supports these values: (1) The solution is more likely to be appropriate to the needs of international sales. (2) In addition, this approach conforms to Article 7(1)'s mandate to interpret the Convention [page 511] with regard "to its international character and to the need to promote uniformity in its application", and responds to Article 7(2)'s invitation to settle questions not expressly settled in the Convention "in conformity with the general principles on which it is based...". (85102, *supra*).

*Decision:* GER. BGH ("Sup. Ct.") VIII ZR 300/96, 25 June 1997. S (Ger.) and B (Swiss) contracted for the sale to B of stainless wire. B notified S that part of the wire was defective ("splinters") and effectively avoided part of the contract. B's processing to ascertain the quality of the wire prevented return of the defective goods. Pursuant to CISG 82(2)(b), this did not bar avoidance by B. UNILEX D. 1997-9. See: Schlechtriem, Com. (1998) 642651 (Leser).

### 448.2 (b) "Avoidance" when the Goods are Gone

In unusual circumstances, paragraph (2) may permit a buyer to "avoid" a contract when the buyer has nothing to return. The major practical justification for avoidance (and similar remedies under domestic law) is to shift the burden of disposing of defective goods to the party who is in breach of contract. When the buyer no longer has the goods in question, one may ask why he would elect to choose "avoidance" rather than recovery of damages (Arts. 7476)

The answer lies in the fact that under Article 81, *supra* at ¶439, avoidance releases the buyer from his obligation to pay the price and entitles him to recover any payments on the price. Recovery of the price may relieve the buyer of the burden of proving the scope of his damages ¶a justifiable protection for the aggrieved party. But in some cases choosing avoidance may be prompted by the fact that the market level has fallen; in this setting the recovery of the agreed price (or freedom paying the price) shifts to the seller the loss of the market decline, although the contract contemplated that this loss would fall on the buyer in exchange for the chance of gain from a rise in price. To minimize speculation by the buyer at the seller's expense it will be important to give full effect to the limits on the time for avoidance set in Article 49(2) ¶an interpretation that would be consistent with the mandate of Article 7(1) that the Convention is to be interpreted with regard to "the need to promote...the observance of good faith in international trade" (see Art. 49, *supra* at ¶308). [page 512]

## Article 83. Preservation of Other Remedies

¶449 This article, like Article 81 (¶444, *supra*), addresses the relationship among different remedies. Article 82, *supra*, dealt with the effect of substantial changes in the condition of goods after their receipt by the buyer, and provided that in specified circumstances these changes made it inappropriate for the buyer to exercise two of the remedies provided by the Convention ¶the right to avoid the contract (Art. 49) and the right to require the seller to deliver substitute goods (Art. 46(2)). Article 83, perhaps unnecessarily, states that Article 82 does not prevent buyers from exercising their other remedies.

### Article 83 [1]

"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."

¶449 Article 83 states that although a buyer loses the two remedies governed by Article 82 (¶¶445 ¶448.2, *supra*), the buyer "retains *all other* remedies under the contract and this Convention". Remedies that are clearly preserved, without regard to changes in the condition of the goods after their receipt, include the buyer's right to recover damages (Arts. 45(1)(b), 74 ¶76) and to reduce the price (Art. 50). The buyer's right to require the seller to "remedy the lack of conformity by repair" (Art. 46(3)) also remains available unless resale, consumption, processing or other change in the condition of the goods makes repair "unreasonable having regard to all the circumstances" (Art. 46(3), first sentence).

Is a buyer's right to "require performance by the seller" under Article 46(1) a remedy distinct from the buyer's right under Article 46(2) to "require delivery of substitute goods" when their "lack of conformity constitutes a fundamental breach of contract"? To answer this question we need to examine situations in which Article 82 bars the buyer from requiring the delivery "of substitute goods" (Art. 46(2)). For example, assume that the buyer resells, consumes or otherwise transforms the goods [page 513] *after* the buyer discovers their lack of conformity. Under these circumstances the exception provided by Article 82(2)(c) is inapplicable; consequently, Article 82(1) provides that the buyer has lost its right under Article 46(1) to require the seller to deliver substitute goods. In this setting there are few situations in which the buyer may (Art. 46(1)) "require performance" by the seller without contravening the more specific rules of Article 46(2) and 82 defining the circumstances in which the buyer may *not* require the "delivery of substitute goods". [2]

Of course, the buyer's right under Article 46(1) to "require performance", and the more specific right under Article 46(2) to require the delivery of substitute goods, are unimpaired in the many situations that lie outside the narrow scope of Article 82. (As we have seen, Article 82 preserves these two remedies when the condition of the defective goods has not "substantially" changed after their receipt (Art. 82(1)) and also in the cases described in Article 82(2)(a), (b) and (c).) For example, assume that the buyer has resold, consumed or transformed the goods *before* discovering their lack of conformity; here, as we have seen, Article 82(2)(c) preserves the buyer's right to require the seller to deliver substitute goods. The buyer will not be able to exchange the initial shipment for the "substitute goods" but, under Article 84(2)(b), *infra*, the buyer "must account to the seller for all benefits he

has derived from the goods". Of course, the sum for which the aggrieved buyer must "account" will be reduced or extinguished (Art. 74) by the "loss, including loss of profit, suffered by" the buyer "as a consequence of the breach".<sup>[3]</sup>

See: Schlechtriem, Com. (1998) 652-653 (Leser).**[page 514]**

## Article 84. Restitution of Benefits Received

◆ 450 Under Article 81(2), *supra* at ◆444, a party who has performed by supplying goods or paying under a contract that is later avoided, may recover whatever it "has supplied or paid." Article 84 supplements this provision by requiring compensation for the delay in recovering the price paid or the goods supplied under a contract that is avoided.

### Article 84 [1]

"(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."

### ◆ 451 A. Introduction

Under Article 78, *supra* at ◆420, a party is entitled to interest when the other party "fails to pay the price or any other sum that is in arrears." In that setting, interest is designed to compensate one party for the other's breach of contract—the "failure" to pay a "sum in arrears." Consequently, in considering the rate of interest attention was directed to the loss suffered by the person who should have received the payment. See Art. 78, *supra* at ◆421.

### ◆451.1 (B) Scope of Article 84

Article 84, the final provision in Section V. *Effects of Avoidance*, states obligations that are ancillary to the obligations of each party (Art. 81(2)) **[page 515]** to return whatever it has received. Paragraph (1) of Article 84 provides that when the seller is bound to refund a buyer's price payment, seller must also pay interest; paragraph (2) provides that the buyer not only must return goods received from the seller but also "must account to the seller for all benefits he has derived from the goods..."

In spite of the relatively narrow scope of Article 84 it embraces a surprisingly wide variety of situations. Obligations under *each* of these two paragraphs can arise when there has been a fundamental breach by *either* party (Art. 81(1), *supra*), and under each paragraph either party (or *both* parties) may be obliged to make restitution. It will not be feasible to address all of these permutations but it seems advisable to examine the operation of Article 84 in a few specific cases.

### ◆451.2 (1) Interest on Sums Received by the Seller; Article 84(1)

*Example 84A. Pursuant to the contract Buyer paid for the goods shortly prior to delivery but Seller failed to deliver. Buyer declared the contract avoided and sued to recover the price plus (Art. 84(1)) "interest on it from the date on which the price was paid."*<sup>[2]</sup> How should the tribunal compute the interest owed to the buyer?



As we have seen (Art. 78, ¶421, *supra*), neither UNCITRAL nor the Diplomatic Conference found it feasible to specify the rate of interest; the above discussion of Article 78 suggested that the solution should be derived by analogy to the Convention's rules on compensation for breach of contract (Arts. 74, 75 and 76). *But cf.* Tallon in *B-B Commentary* ¶2.1, p. 612.

A seller's obligation to refund the price usually (as in Example 84A) results from its breach of contract *i.e.*, when the buyer avoids the contract because seller fails to deliver or (more frequently) when the seller delivers goods that are seriously defective. In these cases it seems appropriate to base interest on the loss suffered by the aggrieved buyer rather than on a restitutionary approach to prevent unjust enrichment by the seller.<sup>[3]</sup> The approach based on damage for breach of contract, developed by analogy to the Convention's rules on damage measurement in Articles [page 516] 74, 75 and 76, was discussed under Article 78 (¶421, *supra*) and need not be repeated here. Recovery based on the restitution of benefits received does seem appropriate for claims against a party who is not in breach of contract. This approach will be illustrated *infra* at ¶452 in Example 84C.

### ¶451.3 (2) *Benefits Derived from Goods; Article 84(2)*

We now turn from Article 84(1) ("interest on" the *price*) to Article 84(2) on "benefits derived" from *goods*. To facilitate comparison the following illustration is similar to Example 84A, except that the party in breach is the buyer rather than the seller.

*Example 84B. Seller delivered goods to Buyer under a contract that called for payment 30 days after delivery. Buyer failed to pay and Seller declared the contract avoided. Seller brought an action to reclaim the goods (Art. 81(2) and also demanded (Art. 84(2)) that Buyer "account to the seller for all benefits which he has derived from the goods..."*

Seller will be fortunate if it can reclaim the goods before Buyer resells or consumes them or (in view of Buyer's failure to pay Seller) before Buyer's creditors seize the goods. See the discussion of Article 81(2) at ¶444, *supra*.<sup>[4]</sup> Our concern now is application of Seller's claim under Article 84(2) for the "benefits" Buyer "has derived from the goods".

This claim may be helpful to Seller if Buyer has resold the goods at a higher price.<sup>[5]</sup> However, when (as in this case) the buyer has failed to pay, sellers still face the serious hazards from third-party claims that have just been mentioned.<sup>[6]</sup>

*Decision:* GER. [OLG. Oldenburg, 11 U 64/94, 1 February 1995](#). B purchased furniture from S. After delivery and resale, B avoided the contract [page 517] on the ground that the furniture proved to be unsatisfactory to B's customers. Pursuant to CISG 84(2)(b), B was not required to account to S for benefits received since there was no evidence that B would receive benefits from B's customers. UNILEX D. 1995-1-2.

See: Schlechtriem, Com. (1998) 656 ¶662 (Leser).

### ¶452 (3) *Cross-Claims; Rights of Party in Breach*

Example 84A and Example 84B illustrated the relatively simple situation when only one party performs and that party avoids the contract because of non-performance by the other party. Our final example faces a more complex situation: Both parties have performed at least in part; avoidance in this setting presents a new feature—recovery by a party, who is *in breach of contract*, from the aggrieved party.

*Example 84C. On June 1 Buyer paid one-half of the price for a machine which Seller, in accordance with the contract, delivered on July 1. The balance of the price was due thirty days after delivery but Buyer failed to pay. Seller promptly avoided the contract for fundamental breach and obtained a court order impounding the machine for delivery to Seller. Buyer, invoking Article 81, noted that on avoidance both parties must make concurrent restitution of whatever they have received; consequently, Seller must refund the payment Buyer made*

on June 1. In addition, Buyer noted that under Article 84(1) Buyer was entitled to interest "from the date on which the price was paid".

How should the interest on Buyer's payment be measured? In Example 84A (451.2, *supra*) a buyer claimed interest on a payment from a seller who had committed a fundamental breach by failing to deliver the goods. In that setting it was suggested that interest should be allowed, by analogy to Articles 74, 75 and 76, on the basis of the loss to the aggrieved party. That approach would not be appropriate here since interest is claimed by the party in breach. In this case a restitutionary approach seems more appropriate; recovery should be based on the benefit Seller received from the use of the money. (Of course, Buyer's claim may be reduced or cancelled by Seller's right to recover damages resulting from Buyer's breach.)[page 518]

## Section VI. Preservation of the Goods (Articles 85-88)

### Introduction to the Section

453 This concluding section is designed to prevent the loss or deterioration of goods when a dispute prevents their acceptance or retention by the buyer. To this end, a party who is in the best position to care for the goods is given the responsibility to do so, regardless of whether this party is in breach of contract.

The Convention's provisions on the passing of risk (Ch. IV, Arts. 66-70) were similarly designed to minimize loss by placing responsibility for the safety of the goods on the person who was in the best position to prevent casualty or other loss. (See Art. 67, *supra* at 367 and Art. 69, *supra* at 375.)

In some situations uncertainties about one's legal position may interfere with achieving this ideal. Honest differences may arise over whether the goods fail to conform to the contract, and whether non-conformity of the goods or the conduct of one party frees the other party from its duty to perform the contract. One might imagine that a superhuman Being, omniscient as to both facts and law, would be free from doubt but such an omniscient Being might be disappointed in the positions taken by well-meaning merchants and even by able tribunals.

In response to these practical difficulties, Section VI, in limited circumstances, prescribes duties to care for goods on grounds that do not turn on legal issues such as fundamental breach and avoidance of the contract. Of course, the party in breach is responsible for damages resulting from the breach, including any costs incurred by the other party in preserving the goods.

The seller's duties are defined in Article 85 and the buyer's duties in Article 86. Articles 87 and 88 apply to both parties.[page 519]

### Article 85. Seller's Duty to Preserve Goods

454 The present article applies only when the seller has the goods in its possession or control. For reasons summarized in the Introduction, the seller may have a duty to preserve the goods even though the buyer's failure to take delivery is a breach of contract.

#### Article 85 [1]

"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."

This article has its simplest (but not its most significant) application when the buyer should take delivery at the seller's place of business but fails to come for the goods by the date specified in the contract. Under the rules on risk (Ch. IV, Art. 69, *supra* at [373](#)) the risk of loss passes to the buyer on the date when "he commits a breach of contract by failing to take delivery." Suppose that, after risk has passed to the buyer, the seller leaves perishable goods out in the rain or discontinues necessary refrigeration. In such situations, Article 85 makes the seller responsible for loss to the goods that results from his failure to "take such steps as are reasonable in the circumstances to preserve them." [Secretariat Comm., O.R. 62, Docy. Hist. 452 \(Ex. 74A\)](#); [Barrera Graf in B-B Commentary 616](#).

Another application of Article 85 may be illustrated as follows:

*Example 85A. A sales contract called for Seller to send the goods to Buyer by carrier. The contract did not require Seller to deliver the goods to Buyer on credit, so Seller properly shipped the goods under a bill of lading that called for delivery to "Seller or order" (a "negotiable" or "order" bill of lading); Seller retained possession of this document through banks acting on Seller's behalf and thereby controlled disposition [page 520] of the goods (Art. 58). When the goods reached their destination, Seller (acting through a correspondent bank) offered to deliver the document to Buyer in exchange for payment. Buyer failed to pay. (For purposes of this illustration it does not matter whether Buyer attempted to avoid the contract because of an erroneous view that the goods were seriously defective (Art. 25) or repudiated the contract without any reason). The goods remain in the possession of the carrier. High demurrage charges are accruing and there is danger that the goods will be stolen. Has Seller any duties with respect to the goods?*

Seller would be correct in pointing out that risk of loss had passed to Buyer under the general rules of Chapter IV. In the absence of agreement, and under most trade terms (e.g., F.O.B., C & F, C.I.F.) risk passed to Buyer at the beginning of transit (Art. 67). And even if the contract provided that transit risks fall on Seller (e.g., "delivery *ex ship* Buyer's city") risk passed to Buyer when the goods were placed at its disposal and it failed to take delivery (Art. 69).

Nevertheless, Article 85 may require action by Seller. *Schlechtriem, 1986 Commentary 109*. Since Buyer did not pay, Seller retains control over the negotiable bill of lading and thereby has control over the disposition of the goods. Hence, under Article 85 "the seller must take such steps as are reasonable in the circumstance to preserve" the goods. These steps might well involve depositing the goods in a warehouse (Art. 87) or reselling them (Art. 88).

These duties are of special importance under the Convention because of the broad scope of the seller's right to recover the full price (Art. 62) a remedy that has practical consequences that are very different from liability for damages. Under legal systems influenced by the common law and the (U.K.) Sale of Goods Act (1893), a seller who remains in possession of the goods seldom is entitled to force the goods on the buyer by recovering the full contract price ([346](#), *supra*). Of course, the seller may recover damages for breach of contract but this remedy calls for the seller to dispose of the goods. In the above legal setting, there is little need for rules specifically requiring the seller to protect the goods from damage since the seller cannot transfer this loss to the buyer.[\[2\]](#) [page 521]

A seller's obligation under Article 85 to preserve the goods does not end if the seller brings an action (Art. 62) to require the buyer to pay the price. The seller is not required to hand over the goods before the buyer pays (Art. 58(1)) and, for various reasons, will need to retain control of the goods. Bringing a legal action does not assure payment. The seller's suit may fail the buyer may interpose a defense based on seller's breach; an action to require payment of the price may be rejected by the *forum* (Art. 28 and [197](#), [348](#) [349](#), *supra*). Moreover, at the end of the legal road the buyer may not be able to satisfy a judgment. There are other practical considerations of even greater weight. The seller usually will not wish to maintain control over the goods during the extended time that may be required to bring the case to trial and final judgment. Warehouse costs and deterioration of the goods may substantially reduce the seller's security interest and make it prudent for the seller to dispose of the goods and claim damages for breach of contract. In any event, if substantial warehouse costs and deterioration occur the buyer may claim that the seller failed under Article 88(2), *infra*, to take "reasonable

measures to sell" the goods a specific provision that reinforces the general obligation under Article 77 (416419, *supra*) to "mitigate the loss" resulting from breach.

See: Schlechtriem, Com. (1998) 666669 (Eberstein).[page 522]

## Article 86. Buyer's Duty to Preserve Goods

455 Article 85 dealt with the seller's duty to preserve the goods; the present article is concerned with the duty of the buyer.

### Article 86 [1]

"(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."

The buyer's duty to preserve goods has its clearest application in cases like the following:

*Example 86A. Seller shipped to a distant Buyer; the bill of lading called for delivery to "Buyer", not to "order of Seller" or to "Seller". Thus, Seller did not retain control over the goods by a negotiable bill of lading (contrast Example 85A, *supra* 454). When the goods reached Buyer it rightfully rejected them on the ground that they were seriously defective.*

In such cases Buyer will normally "receive" the goods for inspection (Para. (1)). Even if the goods are still in the possession of the carrier, the goods were consigned to Buyer; he did not need the bill of lading in order to take delivery. Thus, under Para. (2), the goods were at Buyer's "disposal at their destination." If Seller has no agent in or near Buyer's city, Article 86 requires Buyer to take reasonable steps to preserve the [page 523] goods since it is difficult for a seller to preserve and dispose of the goods that have been rejected at a remote destination.

Some of the limits set by this article may be illustrated as follows:

*Example 86B. The transaction called for payment at destination in exchange for a bill of lading made out to the "order of Seller", a document that, as in Example 85A (Article 85 at 454, *supra*), controlled the disposition of the goods. Buyer refused to accept and pay for the goods.*

Example 85A posed the question whether the seller had a duty to preserve the goods. Does Article 86 place such a duty on the buyer? The answer is No. Paragraph (1) is not applicable since the buyer has not "received" the goods. And paragraph (2) is not applicable since the buyer can only get possession by paying the price.

There have been decades of experience with rules similar to Article 86. See, e.g., (U.S.A.) Uniform Commercial Code 2-603.

In the prior example (86A), the duties imposed by Article 86 apply since the rejected goods are in the buyer's "possession or control"; on the other hand, this standard relieves the buyer of duties in Example 86B.[2]

"*Rejection*" of goods. Article 86(1) refers to the buyer's exercise of "any right under the contract or this Convention to *reject*" the goods. The term "reject" has not appeared earlier in the Convention; this broad term is used here to assure that the buyer's duty to preserve the goods will apply whenever the buyer may refuse to accept the goods *i.e.*, "reject" them. Thus, a buyer's declaration that the contract is avoided because of the tender of seriously defective goods (Arts. 25, 26, 49) terminates buyer's obligation to "take delivery" of the goods (Arts. 53, 60(b)); in other words the buyer may "reject" the goods. Similar consequences follow from avoidance after the buyer has received the goods (Art. 81(2)). Under Article 46(2) when non-conformity of the goods constitutes a fundamental breach the buyer may "require delivery of *substitute* goods", a remedy that involves rejection and return of the initial delivery. Pursuant to Article 51 all these remedies that amount to "rejection" may be applied to a "part of the goods".

Article 86 in referring to "any right" to "reject" the goods refers to all these remedies regardless of whether the buyer "has received" the goods (Art. 86(1)), or whether goods, after dispatch to the buyer, have been placed at the buyer's "disposal".

*Intent to reject.* Article 86(1) states that the buyer must protect the goods if the buyer has received the goods "and intends to" reject them. [page 524] This language could be read to mean that there is no duty to protect the goods before the buyer forms an intent to reject *e.g.*, a buyer receives the goods on Monday, leaves them in the rain on Tuesday and forms (and/or declares) an intent to reject them on Wednesday. Cf. [Barrera Graf, B-B Commentary ¶2.3, p. 622](#). In spite of awkward drafting, Article 86(1) probably requires reasonable steps to preserve goods while they are in the buyer's possession during the period leading up to a decision to reject. In any event, under Article 82(1) a buyer loses its right to avoid the contract (Art. 49), or to require the delivery of substitute goods (Art. 46(2)), if the buyer cannot return the goods "in substantially the same condition" as when they were received; as we have seen, inability so to return the goods is not excused by Article 86(2)(c) since the damage to the goods would be due to the buyer's "act or omission". See [Schlechtriem, 1986 Commentary 109](#). This result is reinforced by the Convention's rules on risk of loss. Under nearly all of the situations envisaged in Article 86, risk has passed to the buyer under Articles 67 (handling over the carrier), 68 (making of contract or handling over to carrier), or 69 (buyer's taking over the goods).

*Decision:* FR. [C. de Cass. \("Sup. Ct."\), 4 January 1995](#), Fauba v. Fujitsu. In reviewing a decision of the Court of Appeals, Paris, the Cour de Cassation addressed the duties of a buyer who has received an excess quantity in a shipment by the seller. The court rejected S's claim that B should pay for the excess quantity, noting that, under Art. 86(1), B's duties were confined to preserving the goods. (See, accord, Art. 52.) Articles 86-88 do not require a buyer to bear the expense of redelivering excessive quantities to the seller. CLOUT 155, UNILEX D. 1995.1. [The above decision was also noted at Art. 55, ¶325.3, regarding definiteness of agreement on the price.]

See: Schlechtriem, Com. (1998), 671-675 (Eberstein). [page 525]

## Article 87. Deposit in Warehouse

♦456 Article 85 and 86, *supra*, established a duty "to preserve" goods. Article 87 and 88 authorize two types of action that may fulfill this duty: storage and sale.

### Article 87 [1]

"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."

Deposit of goods in a warehouse is such a common way to "preserve goods" that this article might seem unnecessary, except for doubt as to whether storage by one party would authorize the warehouse to assert a possessory lien for storage charges and recover those charges from the other party to the sales contract. Unless the storage contract provides otherwise, the party who deposits the goods is primarily liable to the warehouse but



may seek reimbursement from the other party to the sales contract, and can stop the accumulation of storage charges by selling the goods, as authorized by Article 88, which follows.[\[2\]](#) **[page 526]**

## Article 88. Sale of the Goods

❖**457** Placing goods in a warehouse (Art. 87) may not be adequate to "preserve" goods that are perishable. Warehouse charges for an extended period may seriously impair or exceed the value of the goods; in some cases the bailor may not be able to recoup these charges from the other party to the sales contract. Consequently, the bailor may need to liquidate the transactions by selling the goods.

### Article 88 [\[1\]](#)

"(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."

*Option to Sell.* Paragraph (1) provides *authority* (not an obligation) to sell. In view of the optional character of this paragraph, the standard is flexible: "unreasonable delay" by the other party in taking appropriate action.

*Duty to Sell.* Paragraph (2) imposes a duty to sell when "the goods are subject to rapid deterioration or their preservation would involve unreasonable expense."**[page 527]**

The present article applies to any party who is "bound to preserve the goods" ❖ a *seller* in possession of goods when the buyer fails to pay (Art. 85) or a *buyer* who receives goods which he has the right to reject (Art. 86). And, as has been noted, paragraph (1) of Article 88 grants a *privilege* to sell while paragraph (2) imposes a *duty* to sell.

A seller's ❖ *duty* to sell goods in its possession (Art. 88(2)) needs to be considered in relationship to the seller's ❖ right under Article 62 to "require the buyer to pay the price." In discussing Article 62 (❖❖[346](#), [348](#), *supra*) we saw that requiring payment by one who has not received the goods is subject under Article 28 to the remedial approach of *fora* in many States where such "specific performance" is compelled only if damages do not provide an adequate remedy (❖❖[194](#)❖[199](#), *supra*). In discussing Article 62 we also noted (❖[349](#)) that Article 88(2), by requiring the seller to resell goods held for the buyer, in substance creates an exception to the rule (Art. 62) that the seller may force acceptance of goods by requiring the buyer to pay the price. However, this exception under Article 88(2), is limited to cases under 85 where the seller is "either in possession of the goods or otherwise able to control their disposition"[\[2\]](#) and, unhappily, does not solve the disputed issue whether a seller may engage in wasteful production, free of the loss-mitigation rule of Article 77, if the seller sues for the price (Art. 62) rather than damages.

*Decision:* [IRAN-US CLAIMS TRIBUNAL, 370 \(429-370-1\), 28 July 1989](#). Iran contracted to buy electronic equipment from the US (S), but failed to pay for the equipment. The Tribunal sustained S's ❖ resale of the equipment to third parties to mitigate damages, as provided in CISG Art. 88. The Tribunal noted that the Convention did not directly govern this case, but that its provisions were "consistent with recognized

international law of commercial contracts". UNILEX D.1989-3. See: Schlechtriem, Com. (1998) 679-684 (Eberstein).[page 528]

---

## Part IV.

### FINAL PROVISIONS (Articles 89-101)

#### Introduction to Part IV of the Convention

##### 458 A. Overview of Part IV

Sellers and buyers will rarely be concerned with some of the articles of Part IV *e.g.* Articles 91 and 99 on procedures for bringing the Convention into force and for making the transition between the 1964 Hague Sales Conventions (ULF & ULIS) and the present Convention. These matters are handled by government officers who have experience with similar provisions in other conventions.

Other provisions have wider applicability. Five articles (92-96) authorize States to declare that they will not be bound by specified provisions. Some of these "declarations" (commonly called "reservations") were considered in connection with the articles which they modify: *E.g.*, Article 1(1)(b) on the Convention's sphere of application subject to reservation under Article 95 (447, *supra*); Article 11 rejecting domestic formal requirements (*e.g.*, Statutes of Frauds) subject to reservation under Article 96 (448-449, *supra*).

Other articles in Part IV need attention here. For example, a few States have invoked Article 92 to exclude Part II on Formation; these reservations, important for parties in States that have made the reservation, also need to be noted by their trading partners (see 467, *infra*). During a limited period following the Convention's entry into force in each Contracting State, sellers and buyers may need to know whether the Convention applies to them and may need help in untangling the compact language of Article 100 (see 473, *infra*). The role of other articles will be examined at 461-474, *infra*.

See: Winship, P., Final Provisions, 24 Int. Lawyer 711-734 (1990); Evans, M., [Preamble, Final Provisions, Bianca & Bonell, Com.](#) (1987) 633-678; Schlechtriem, Com. (1998) 685-705.[page 529]

##### 459 B. Development of Part IV

The Final Provisions (with one exception Article 96) were not developed in UNCITRAL. The General Assembly's resolution providing for the 1980 Diplomatic Conference requested the Secretary General to prepare and circulate a draft of proposed final provisions; this draft appears in the Convention's *Official Records* at 66-70. For reasons explained in Chapter 1, 10, *supra*, the Conference did most of its work in two "committees": While the First Committee prepared Parts I-III of the Convention the Second Committee prepared the Final Provisions.[1]

##### 460 (3) Method of Presentation

The full texts of most of the articles of Part IV will not be reproduced here; these articles appear in [[Texts of the Convention](#)], *infra*, at Articles 89-101. In addition, the crucial language of these articles will be quoted in the discussion which follows.

##### 461 C. Discussion of Salient Provisions

###### (1) Article 89: Depositary

Designating the Secretary-General of the United Nations as depositary is customary for conventions prepared by the United Nations. Except for one brief reference in Article 99(6), Part IV does not set forth the duties of a depositary. A detailed list of these duties appears in Article 77(1) of the Vienna Treaty on Treaties (1969) and presumably is generally applicable to this Convention. See [Evans, B-B Commentary 634](#). Under Article 77(1)(a) of the Vienna Treaty these duties include "preparing certified copies of the original" ♦ a service that may be important to parties engaged in litigation.

The Secretary-General ♦s depositary functions are performed by the following office: Depositary Functions of the Treaty Section, Office of Legal Affairs, United Nations, New York, 10017. This Office is not able [page 530] to answer telephone inquiries concerning the masses of treaties in its charge. This information is available by Internet: <http://www.UN.ORG/Depts/Treaty>. See also, *supra*, at OVERVIEW, B(i)(c)Internet.

### ♦462 (2) Article 90: Relation to Other Conventions

This article is important and deserves quotation:

#### Article 90 [2]

"This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement."

### ♦463 (a) Basis for Future Amendment

The present Convention does not contain any provision that expressly provides for amendment. However, under the Vienna Treaty on Treaties (1969) (Arts. 40(4), 41(1)(b)) the lack of an express provision for amendment does not bar amendment ♦ and an amendment will be effective for the parties who agree without the concurrence of all parties to the original treaty.[3] Article 90 of CSIG, by providing that it "does not prevail over any international agreement which...*may be entered into* and which contains provisions concerning *the matters governed by the Convention*", should avoid any doubt that this Convention is subject to amendment by the flexible procedures provided by the Vienna Treaty on Treaties. This is fortunate since amendment by denunciation (Article 101, *infra*) and readoption would be difficult for a widely-adopted treaty like the Sales Convention; in the absence of extraordinary precautions the cumbersome character of adoption procedures coupled, with the preoccupation or neglect by officials and legislatures, could produce unintended gaps in the applicability of [page 531] the uniform law.[4] It should also be reassuring to note that the 1974 Convention on the Limitation Period in the International Sale of Goods, containing a provision substantially the same as CISG 90 and no other provision relating to amendment, was amended without objection or mishap by a Protocol approved at the 1980 Conference that finalized the Sales Convention.[5]

### ♦464 (b) Relation to Past Conventions

Article 90 states that the Sales Convention does not prevail over any international agreement "which *already has been* or may be entered into...". Since Article 1 of the Convention contains rules governing its applicability we need to consider the relationship between the 1980 Sales Convention and the 1955 Hague Convention on the Law Applicable [P.I.L.] to International Sales of Goods ("1955 Hague P.I.L. Convention") [6] ♦ a Convention that has been adopted by some States that have adopted the 1980 Convention.[7] Article 1(1)(b) of the Sales Convention (CISG) and the 1955 Hague P.I.L. Convention are complementary rather than in conflict. CISG 1(1)(b) (♦47, *supra*) provides that the Sales Convention is applicable "when the rules of private international law lead to the application of the law of a Contracting State", and thus invite the use of "conflicts" (P.I.L.) rules of the 1955 Hague Convention or any other applicable convention.

A more interesting question is presented by CISG 1(1)(a), which provides an additional basis for applicability when the places of business of the seller and buyer are in different "Contracting States". Under unusual circumstances (*e.g.* contracting and performance do not take place in the States of either the seller or buyer but in

a third-non-Contracting State) Article 1(1)(a) could call for applicability of the Convention although the [page 532] forum's rules of private international law designate the law of a non-Contracting State.

Happily, such a conflict with the 1955 Hague P.I.L. Convention will be rare. The general P.I.L. rules in Article 3 of the 1955 Convention designate the law of the State where the seller has its residence subject to a narrow exception designating the State where the buyer has its residence. Thus, in the cases to which CISG 1(1)(a) applies (seller and buyer are in different Contracting States), both CISG and Article 3 of the 1955 Hague Convention point to the Convention. In unusual cases where law under the Convention on the point in controversy is different in these two States (*e.g.* because only one has exercised a permitted reservation or there is an irreconcilable conflict in interpreting a relevant provision of the Convention) the rule of the Contracting State designated by Article 3 of 1955 Hague P.I.L. would be applicable.

#### ◆ 464.1 (i) CISG Rules on Inspection and Notification

Another provision of the 1955 Hague P.I.L. Convention, while narrow in scope, raises significant questions concerning the application of Article 90 to conventions on private international law ("conflicts"). Article 4, as an exception to the above general rules of Article 3, provides that "...the domestic law of the country in which inspection of goods delivered pursuant to a sale is to take place shall apply in respect of...*the periods within which the inspection shall take place, the notifications concerning the inspection and the measures to be taken in case of refusal of the goods*".<sup>[8]</sup> This problem can be illustrated as follows:

*Example 90A. Seller and Buyer have their places of business, respectively, in States A and B. Both States have adopted the Sales Convention and the 1955 Hague P.I.L. Convention. A contract made by the parties called for delivery of a machine to Buyer in State C; this State had not adopted the Sales Convention. The domestic law of State C provides that a buyer may not recover for loss or damage resulting from defects in the goods if the buyer fails to notify the seller of the defects within six months following delivery with no exception when latent defects are discovered at a later date. The machine delivered to Buyer had a serious latent defect that Buyer, in spite of appropriate inspection, did not discover until [page 533] eight months following delivery. Buyer immediately notified Seller and made a claim for damages. Seller rejected the claim, relying on the above rules of State C, the place of delivery. Buyer brings an action against Seller in State A, a Contracting State.*

Deciding which law applies touches sensitive nerves. Time limits for inspection of goods and notification of defects are of great practical importance and were the subject of extended debate and hard-fought compromises embodied in Articles 39 and 44, ◆◆254◆261, *supra*. Happily, as we shall see, conflicts between domestic rules designated by Article 4 of the Hague P.I.L. Convention and the substantive rules of the Sales Convention (CISG) can arise only in unusual circumstances.

#### ◆ 464.2 (ii) The Scope of the Problem

One factor limiting the scope of the problem results from the provision of CISG 90 that the Sales Convention yields to another convention (*e.g.* the Hague Convention) only when the seller and buyer "have their places of business" in different States both of which are parties to the Hague Convention. A second limitation on the scope of our problem results from the fact that conflict between the two conventions can arise only when an international sale subject to the Sales Convention calls for delivery in a non-contracting State. As we have seen, the Hague Convention (Art. 4) states that the law applicable to inspection and notification is that of the place of delivery; when the place of delivery is in a Contracting State the law of that State for a contract governed by the Sales Convention is, of course, the law of the Convention, including its rules on inspection and notification.

In view of these practical limitations one may well wonder whether the problem is worth the bother; however, working with this issue in one specific setting may make it easier to cope with similar problems in other settings.  
[9]

#### ◆ 464.3 (ii) Does CISG yield to Hague (1955)?

Example 90A posed this question: Which rules on inspection and notification apply the rules of non-contracting State C *via* Hague (Art. 4) or the rules of the Sales Convention (Arts. 39 & 44)? Since this sale is in general governed by the Sales Convention the application of other rules depends on the interpretation of Article 90.<sup>[10]</sup> The crucial language of Article 90 is this: The **[page 534]** Sales Convention yields only to another treaty "which *contains provisions concerning the matters governed by this Convention*". The Hague Convention, of course, does not "contain provisions" on inspection, notification and related rules of the law of sales (note 8, *supra*). The only possible overlap could be between the P.I.L. rules of Hague Article 4 and the rules of CISG 1(1) that govern the applicability of the Convention.

Both of these provisions address the general question of the applicability of law. However, we can conclude that Hague Article 4 governs the same "matter" as Article 1 of the Sales Convention only if we forget that Article 1 is an integral part of a Convention to unify a large and inter-connected body of substantive law. Article 1(1) states that it determines when "this Convention applies" this means *all* of the Convention subject only to those reservations specified in Articles 92-96.<sup>[11]</sup>

Whether Article 90 was intended to yield to another treaty in the setting of Example 90A can be tested by asking: Suppose that a delegate to the Vienna Sales Conference had proposed an amendment that the Convention's provisions on inspection of the goods, notification of defects and related provisions (note 8 *supra*) would not apply when a contract governed by the Convention called for delivery in a non-Contracting State. This participant in the legislative process has no doubt that any such proposal would have been rejected out of hand. If this is correct, it seems difficult to construe Article 90 so broadly as to reach this unacceptable result.

#### ◆ 464.4 (iii) CISG and Hague (1986)

In any event, the problem posed by Example 90A will become moot under the 1986 Hague Convention on the Law Applicable [P.I.L.] to Contracts for the International Sale of Goods (15 Int. Leg. Mat. 1575). Article 23 provides: "This Convention does not prejudice the application of the U.N. Convention on contracts for the international sale of goods". Similar deference to the 1980 Sales Convention results from Articles 8(5) and 22(1). The specificity on these points of the 1986 Hague convention compared with the generality of CISG 90 avoids any impasse between the two Conventions based on Alphonse-Gaston *politesse*.**[page 535]**

#### ◆ 466 (3) Article 91: Signature, Ratification and Accession

Article 91(1) provided that the Convention would be "open for signature" from the conclusion of the Vienna Conference (April 11, 1980) "until September 1981". Within this eighteen-month period twenty-one States signed the Convention.<sup>[12]</sup>

What is the significance, if any, of "signature" of the Convention? Article 91(2) provides that signature "is subject to ratification, acceptance or approval" (herein termed "ratification") and that only after this second step does a State become a Contracting State. See also the Vienna Treaty on Treaties (1969) Arts. 12, 14(1)(a). The obligations if any, undertaken by signature are unclear;<sup>[13]</sup> the practical significance of the signature process is to provide a convenient means by which States can learn from each other whether there is sufficient interest in the Convention to justify launching the cumbersome legislative processes required for final adoption.

The other provisions of Article 91 are self-evident.

#### ◆ 467 (4) Article 92: Reservation to Exclude Part II or Part III of the Convention

In 1964 separate conventions were adopted on formation of contracts for international sales (ULF) and on obligations under the contract (ULIS). Following this pattern, the UNCITRAL Working Group prepared separate draft conventions. However, the full Commission in 1978 merged the two drafts into a single draft convention but provided (Article 92) that Contracting States may declare that they will not be bound by Part II (Formation) or by Part III (Obligations under the contract).<sup>[14]</sup>



Interest in this option was shown primarily by the Scandinavian States, based on their satisfaction with their uniform law on contract formation. In fact, Denmark, Finland, Norway and Sweden have all ratified the Convention subject to a declaration under Article 92 not to be bound [page 536] by Part II: Formation of the Contract. As of 1998 no other State has made a declaration under Article 92.

The application of Article 92 in most situations presents little difficulty. However, it may be useful to illustrate the interplay of a reservation excluding Part II and the alternative grounds for applicability in Article 1(1)(a) and (b).

*Example 92A. Seller (in State A) and Buyer (in State B) communicated with each other in a manner that raised a question as to whether they had made a contract. Both States had adopted the Convention but State B had also made declaration under Article 92 excluding Part II of the Convention on formation of the contract. Under what circumstances will Part II apply to this question?*

This question calls for an application of Article 1 of the Convention (◆◆44◆47, *supra*). Applicability cannot be based on Article 1(1)(a). Under Article 92(2) "in respect of the matters governed by" Part II, State B "is not to be considered a Contracting State" within Article 1(1). Consequently, with respect to Part II on Formation the places of business of *both* parties are *not* in "Contracting States". Under Article 1(1)(b), Part II will apply if "the rules of private international law lead to the application of the law of State A but not if the P.I.L. rules point to State B. See [Evans, B-B Commentary 643](#).

#### ◆468 (5) Article 93: Application to Part of a State

Article 93 is of interest to relatively few States◆federal systems where the central government lacks treaty power to establish uniform law for international sales. The United States, fortunately, is not in this position. On the other hand e.g., Canada◆s treaty power was crippled by a 1937 decision of the (British) Privy Council, a restriction that now is moot.[15] Article 93 responds to this difficulty by providing that a State may declare that the Convention will apply "only to one or more" of its territorial units◆an option that permits a State to adopt the Convention with its applicability limited to those units (*e.g.* Provinces) that have enacted legislation to implement the Convention.[16] The effect of a declaration under Article 93 may be illustrated as follows:[page 537]

*Example 93A. State C ratified the Convention subject to a declaration under Article 93 that the Convention will apply to its territorial unit Y but not to territorial unit Z. Seller A, whose place of business is in Y, and also Seller B, whose place of business is in Z, make sales contracts with Buyer, whose place of business is in State D, a Contracting State that has made no such reservation.*

Article 93(3) provides that only the contract made by Seller A, located in territorial unit Y, will be governed by the Convention. If Seller had multiple places of business, some in Y and some in Z, the contracts subject to the Convention will those in which Seller◆s place of business in Y (rather than Z) "has the closest relationship to the contract and its performance". See Art. 10(a), ◆◆42, 123◆124, *supra* (In some cases the Convention may apply to international sales involving parties with places of business in Z when the forum◆s rules on conflicts (P.I.L.) designate the law of a Contracting State.)

#### ◆469 (6) Article 94. States With the Same or Closely Related Law

The Nordic States have a long and successful history of cooperation in developing the same or similar laws for sales of goods and many other subjects. Article 94 authorizes such States to declare that the Convention will not apply to contracts between parties who "have their places of business in those States". Denmark, Finland, Norway and Sweden, in ratifying the Convention, have made the declaration authorized by Article 94.[17]

#### ◆470 (7) Article 95: Exclusion of Article 1(1)(b)

Article 95 permits a State to declare "that it will not be bound by subparagraph (1)(b) of article 1...". Article 1(1) provides for two cumulative grounds for applicability: Sub(1)(a)◆when the places of business of the parties are

in different Contracting States, and Sub(1)(b) "when the rules of private international law lead to the application of the law of [page 538] a Contracting State". Data on reservations and adherences are set forth in [\[Table of Contracting States\]](#), infra.

### ◆471 (8) *Article 96: Preservation of Domestic Rule requiring a Writing or other Formalities*

Article 96 permits a declaration excluding article 11 a provision that rejects domestic requirements as to form, often called Statutes of Frauds. This reservation was discussed in connection with Articles 11 and 12 at ◆◆126◆129. Data on reservations and adherences are set forth in [\[Table of Contracting States\]](#).

### ◆472 (9) *Article 97: Formalities and Effective Date for Declaration Effecting Reservations; Article 98: No Reservations Permitted except those Expressly Authorized; Article 99: Initial Entry into Force and Transition Procedures involving the 1964 Hague Convention (ULF and ULIS).*

These three articles govern in detail formal matters of concern primarily to Foreign Ministries who have had extensive experience with these questions. For discussion of these articles see [Evans, B-B Commentary 661◆671](#).

In connection with Article 99(1) it may be noted that the Convention entered into force among the first eleven Contracting States on January 1, 1988. [For] further information on adherence [and] reservations [\[go to Table of Contracting States.\] \[page 539\]](#)

### ◆473 (10) *Article 100: Effective Date as to Offers and Contracts*

The Convention does not have retroactive effect. Under Article 100(1) the rules on formation of the contract (Parts I and II of the Convention) are applicable only when "the proposal for concluding the contract" is made on or after the Convention enters into force for the relevant Contracting State or States. Under Article 100(2) the rules governing the rights and obligations under contracts (Parts I and III of the Convention) are applicable "only to contracts concluded after the date when the Convention enters into force" for the relevant Contracting State or States.

Paragraphs (1) and (2) both refer to entry into force "in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1." The effect of this dense language can be understood with the help of an example suggested by the helpful discussion by [Evans in B-B Commentary 673◆674](#).

*Example 100A. The Convention entered into force for State A on March 1, 1990 and for State B on May 1, 1990. (These dates reflect the twelve-month period following the deposit of the instrument of adoption specified in Article 99). On April 20 Seller in State A by telex made a "proposal" (which for the present we shall assume was an "offer") for a sales contract to Buyer in State B. On May 10 Buyer by telex transmitted an "acceptance" to Seller. Does the Convention (Parts I and II) govern the question whether these communications concluded a contract?*

The problem is complex since Article 100(1) provides that applicability may be derived from *either* (A) Article 1(1)(a) ("Sub(1)(a)" or (B) Article 1(1)(b) ("Sub(1)(b)").

(A) Can applicability of the Convention be *based on Sub(1)(a)*? The answer is No since the Convention had not entered into force "in respect of the Contracting States referred to" in Sub(1)(a). Sub(1)(a) makes the Convention applicable only when the States of *both* parties "are Contracting States"; at the time of the offer the Convention was effective only in State A. [\[18\]](#)

(B) However, the Formation rules of the Convention may yet apply if the Convention was in force on April 20 (the date of the offer) "in the Contracting State referred to" in Sub(1)(b) i.e., the Contracting State designated by "the rules of private international law". If these rules designate State B the answer is still No, since the

Convention became effective in State B only on May 1; if the rules designate State A (effective date March 1) the Convention applies.[\[19\]](#)

Paragraph (2) of Article 100 on the effective date for obligations under the contract (Part III of the Convention) uses the same approach as paragraph (1) on formation; the above illustrations based on paragraph (1) apply to paragraph (2), *mutatis mutandis*.[\[page 540\]](#)

### ❖ 474 (11) Article 101. Denunciation

The language of this article seems clear. In any event, denunciation would be handled by a foreign ministry which should be familiar with this process. The Secretary-General as depositary can be expected to notify Contracting States of important acts such as a denunciation. See Vienna Treaty on Treaties (1969) Article 77(1) (e).

### ❖ 475 D. Postscript: The Preamble

This postscript is out of order but (as a lame excuse) so was preparation of the Preamble. UNCITRAL did not prepare a preamble nor was this matter considered by the committees of the Vienna Conference that considered the Convention's substantive provisions (See [❖10](#), *supra*). Instead, a preamble was first considered and prepared by the Drafting Committee on April 9, two days before adjournment of the Conference (*O.R.* 154); by this time discussion of the Convention's substantive provisions had been completed. On April 10 the Drafting Committee's proposal was adopted by the Conference Plenary without substantive discussion (*O.R.* 219❖220, 231). At this point only formalities remained and the Conference adjourned on April 11.

Under these circumstances the Preamble serves as a hortatory statement of reasons for accepting the uniform law but can hardly be given weight in construing its provisions. The Convention sets forth the rules for interpreting its provisions (Art. 7, [❖❖85❖103.1](#), *supra*). Article 7 and the other provisions of the Convention were discussed at length in UNCITRAL and at the Diplomatic Conference; the Preamble scarcely provides a basis for modifying the understandings embodied in the Convention's provisions.[\[page 541\]](#)

## FOOTNOTES: Chapter 1 (Brief Introduction)

1. G. Gilmore, *Death of Contract* (1974). As we shall see, tort-like solutions in domestic law for problems that arise from contracts create difficult questions as to the scope of the Convention (CISG). See CISG 4 & 5 and [❖❖69](#), [72❖75](#), *infra*.

2. A connected presentation of the topics covered by the Convention, with references to the more significant issues, may be gained by reading *seriatim* the following: The Introductions to Parts I, II, III and IV of the Convention, *infra* at [❖❖36](#), [131](#), [180](#) and [458](#).

3. *David, Unification*, Int. Encyc. Comp. L., Vol. 2, Ch. 5.

4. The development of the 1964 Hague Conventions on Sales is examined more fully in articles by the present writer, a participant in the 1964 Hague Conference. A Uniform Law for International Sales, 107 U. Pa. L. Rev. 299, 302, 304, (1959); ULIS: The Hague Convention of 1964, 30 Law & Contemp. Pr. 326 (1965), and [The Draft Convention on Contracts for the International Sale of Goods: An Overview](#), 27 Am. J. Comp. L. 223 (1979). The latter is part of a symposium issue cited here as *AJCL UNCITRAL Symposium*, see n. 6, *infra*. (This and other abbreviations of works frequently cited are given in the Bibliographic Notes.)

5. Symposium: UNCITRAL's First Decade, 27 Am. J. Comp. L. 201❖563 (1979) (cited as *AJCL UNCITRAL Symposium*).

The records of this work appear in the UNCITRAL *Yearbooks*, *Docy. Hist.* 7. The *Yearbooks* also contain bibliographic material on the various aspects of UNCITRAL's works. See, e.g. Vol. XVII at 399❖408. For

general information about UNCITRAL, including the texts of conventions and other international rules, see UNCITRAL (U.N.N.Y 1986, ISBN 92-1-133284-2). See also Pfund, 22 Int. Law. 1157 (1988) (annual report on international unification of private law).

6. The basic charter for UNCITRAL is General Assembly Resolution 2205 (XXI) of 17 December 1966, I *Yearbook* 65. The membership, initially set at 29, in 1973 was enlarged to 36. General Assembly Resolution 3108 (XXVIII) of 12 December 1973, V *Yearbook* 10♦12. See the writer♦s more detailed study, [UNCITRAL: Mission and Methods, in \*AJCL UNCITRAL Symposium\* 201, 207♦211.](#)

7. The Commission♦s working methods were analyzed more fully by the present writer in *AJCL UNCITRAL Symposium* 201, 208♦211. See also: Farnsworth, *Developing International Trade Law*, 9 Calif. W. Int. L. J. 461 (1979); Suy, *Achievements of the UNCITRAL*, 15 Int. Lawyer 139 (1981); Goldman, *Travaux de CNUDCI*, 106.4 J.D.I. 747 (1979).

8. This discussion is based on this writer♦s study in [AJCL UNCITRAL Symposium](#) 201, 209♦210. In that study (210 n.28) the writer, tearing off the veil of anonymity that usually conceals the Secretariat, paid individual tribute to the contributions made by his colleagues.

9. An analysis of these replies, organized by Articles of the Convention, is in the *Rep. S. G. "Analysis of Replies"* I *Yearbook* 159♦176. Of the 28 states at the 1964 Hague Conference, 19 were from Western Europe. From Eastern Europe♦Bulgaria, Hungary and Yugoslavia (the absence of the USSR proved to be significant); from Latin America♦only Colombia (a representative from the local embassy); from Asia♦only Japan (the absence of India and Pakistan was significant); from Africa♦only the U.A.R. See also the writer♦s discussion in [AJCL UNCITRAL Symposium](#) 223 at 225♦226, on which the above paragraphs are based. An examination of the objections to the 1964 Conventions by the U.S. is given in Ziontz, *A New Uniform for the International Sale of Goods*, 2 NW. J. Int. L. & Bus. 129 (1980).

10. A more detailed picture of these successive drafts is given in *Docy. Hist.* 13♦380. The initial members of the Working Group were Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, U.S.S.R., U.K. and U.S.A. Later the membership was increased to 15; new members were Austria, Czechoslovakia, the Philippines and Sierra Leone. The Working Group also profited from the participation, as observers, of several international organizations, including UNIDROIT, the Hague Conference on Private International Law, ICC, ECE, CMEA and OAS.

11. The 62 States included all countries with significant commercial interests. The international organizations were World Bank, Bank for International Settlements, Central Office for International Railway Transport, Council of Europe, European Economic Community, Hague Conference on Private International Law, UNIDROIT, and ICC.

12. Significant substantive changes included: Art. 7(2) (filling gaps by reference to "general principles"); Art. 55 (price not stated in contract); Art. 68 (risk of loss as to goods sold during transit); Art. 71 (suspension of performance by one party because of danger of breach by the other); Art. 78 (recovery of interest for delay in payment of sums due).

13. The States elected to the Drafting Committee were Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libya, Republic of Korea, Singapore, U.S.S.R., U.K., U.S.A. and Zaire. The Chairman was Mr. Warren Khoo (Singapore).

14. The text of the Protocol is Annex II to the *Final Act* of the 1980 Conference. On the 1974 Limitation Convention see *infra* at ♦♦254.2 and 261.1; [AJCL UNCITRAL Symposium](#) 203♦204, 351♦352 (bibliography); [Smit, UNCITRAL♦s First Born](#), 23 *Am. J. Comp. L.* 337 (1975); Sono, 35 *La. L. Rev.* 1127 (1975); Krapp, 19 *J. World Trade L.* 343 (1985). The 1974 Limitation Convention went into force on August 1, 1988, among ten States. By 1998, 23 States had adhered to the Limitation Convention.



## FOOTNOTES: Chapter 2 (Salient features of the CISG)

1. J. Ramberg, *The New Swedish Sales Law*, 28 *Saggi* (1997). Sevón, *The New Scandinavian Sales Codification and the 1980 Sales Convention*, *Freiburg Colloq.* 343 (1987); Manwaring, *Ottawa Colloque* 139-170. Modern legal developments to protect consumers would need to supplement domestic rules based on the Convention. For the Convention's emphasis on freedom of contract see Art. 6, *infra* at [74](#).
2. ULIS 1, 2. The 1964 Conventions provide that a Contracting State by declaration may choose a narrower approach. E.g., *Hague Sales Convention (1964)* Arts. III, IV; States adhering to the Conventions have made liberal use of these articles.
3. As was noted in Overview, Chap. 1, *supra* at [2](#), the Convention's norms serve a subsidiary role to fill gaps in the contract. See Art. 6, *infra* at [574](#). The role of the contract is discussed in the Commentaries to Arts. 30, 31, 35, 56, 67, 70 and 79. The Convention's flexible rules on ascertaining the intent of the parties are discussed under Art. 8; the practices of the parties and usage, as extensions of the contract, are discussed under Art. 9.
4. Traditional distinctions between types of default are described in *Treitel, Remedies (Int. Enc.)* 75-76; *Treitel, Remedies (1988)* Ch. V. The approach of ULIS is discussed more fully in the Commentaries to Article 45, 46 and 47 and the studies cited therein. For criticism of the 1964 approach to remedies see [Drobnig, Dubrovnik Lectures 317](#).
5. The use of "fault" in some domestic systems to determine liability for breach of contract is discussed in *Treitel, Remedies* 78-81; *II Zweigert & Kötz (1987)* 181-183. See also the Commentary to Arts. 45 and 79.
6. See the Commentary to Art. 79, [423](#), *infra*. Damages of a type that could not have been anticipated are limited in a manner reminiscent of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854); see the Commentary to Art. 74 [403](#), *infra*.
7. Casuistic distinctions between "conditions" and "warranties", perpetuated by the (U.K.) SGA (1893) 11, 13 and 30, are examined in *Benjamin* 740-748; *Ont. Law Ref. Com., II Sales* 444-461. For Civil Law approaches see *Treitel, Remedies (Int. Enc.)* 147-149; *Treitel Remedies (1988)* Ch. VIII and authorities cited in the Commentary to Art. 49 at [301](#), *infra*. The present writer found the relatively modern Uniform Commercial Code marred in this area by technical and insubstantial distinctions. Honnold, *Buyer's Right of Rejection—A Study in the Impact of Codification on a Commercial Problem*, 97 U. Pa. L. Rev. 457 (1949).
8. A general discussion of the Convention's remedial system appears in an introduction to Part III, Ch. II, Sec. III (Arts. 45-52), *infra* at [272](#), the rules on avoidance are discussed under Arts. 25, 34, 47, 49, 51, 63 and 64.
9. Rabel, *The Hague Conference on the Unification of Sales Law*, 1 *Am. J. Comp. L.* 58, 61 (1952). The basic study was Rabel, *Das Recht des Warenkaufs* (v.1, 1936; v.2, 1958).
10. On the difficulties with *délivrance* see the Commentary under Art. 31, *infra* at [210](#). As to *ipso facto* avoidance see the Commentary on Art. 26. This writer dealt further with these concepts in [AJCL UNCITRAL Symposium](#) 223, 228-229. For influences that discouraged the use of jargon in the French and Swiss Codes see *I Zweigert & Kötz (1987)* 85, 93, 177-178.
11. One example of this technique: *Rep. S-G "Risk of Loss"* paras. 64-105, V *Yearbook* 89-94, *Docy. Hist.* 168-173. A ground-breaking use of model fact-situations in comparative legal work is demonstrated in *Schlesinger, Formation*.
12. See [Eörsi, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods, AJCL UNCITRAL Symposium, 311, 319-323 \(1979\)](#). An example of such a compromise is Art. 16 on the revocability of offers.



13. The UNCITRAL Arbitration Rules (Art. 33), after mentioning applicable law, reach the heart of the matter by providing: "3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction." The practice of arbitrators in this regard is discussed in Sanders, *Procedures and Practices under the UNCITRAL Rules*, *AJCL UNCITRAL Symposium*, 453, 464-465 (1979). See also: The text of the Rules, *id.* at 489; Strohbach, *Filling Gaps in Contracts*, *id.* at 479. For comments by Lord Mansfield on the relative value of legal technicalities and common sense in deciding commercial cases, see *Atiyah, Freedom of Contract* 191. See also; [Goldstajn, Dubrovnik Lectures 57](#): Sales Convention crosses political, ideological and judicial barriers.

## FOOTNOTES: Chapter on Article 1

1. This article is substantially the same as Art. 1 of the 1978 Draft Convention. However, as we shall see, *infra* at 47, under Art. 95 Contracting States may reject subparagraph (1)(b). ULIS 1 and 2 had more complex rules on internationality, and set no limits comparable to subparagraphs (1)(a) and (b).

On the Convention's sphere of application see, in general, [Winship, Parker Colloq., Ch. 1 \(1984\)](#); Siehr, 52 *RabelsZ.* 587 (1988); Lacasse, *Ottawa Colloque* 23-42 (1989).

2. Development of Art. 1 in UNCITRAL: II *Yearbook* (herein "YB") 38-43 *Documentary History*, (herein "*Docy. Hist.*") 43-48; 11YB 51-54, 111YB 79, 82-83, VI YB 88-90, 110, 50, IX YB 68-69; *Docy. Hist.* 57-60, 96, 99-100 213-215, 235, 241, 300-301. The YB and *Docy Hist.* citations refer to the same documents, in the same order. See also: P. Kahn, *La Vente Commerciale Internationale* 5 (Paris: Sirey, 1961); Kahn, 33 *Rev. Int. Dr. Comp.* 951, 959 (1981).

3. Although ULIS (1964) had no provision like CISG 10(a), a German court construed "place of business" in ULIS in accord with CISG 10(a). See *Schlechtriem, German Report, 1986 Cong. Comp. L.*, 141-142, citing BGH of June 2, 1982, LM No. 6 on ULIS.

4. [Secretariat Commentary, Art. 9, paras. 7-8](#), official Records of the Diplomatic Conference (herein *O. R.*) 19, *Docy Hist.* 409.

5. Accord, [Schlechtriem, 1986 Commentary 43](#): In German law a "place of business" is "an establishment of some duration and with certain authorized powers." Contract language identifying the place of business: *Kritzer Manual* Ch. 2.

[Editor's note: Footnotes 6 and 7 not present in the text]

8. The provision for a reservation was made only in final review by the Plenary. See *O. R.* 170 (proposal by Czechoslovakia) 229-230, *Docy. Hist.* 728.

[Editor's note: Footnotes 9 and 10 not present in the text]

11. Article 95 was based on a proposal Czechoslovakia made to the Conference Plenary on April 10, 1980. *Official Records* 229-230. For earlier rejection in the Second Committee see *O.R.* 439. For a general discussion see [Schlechtriem \(1986\) 24-27](#); [B-B Commentary 654-657 \(Evans\)](#), Cf. [Réczei, 29 Am. J. Comp. L. 513, 518-521 \(1981\)](#).

12. See [Volken in Dubrovnik Lectures 19, 29 and n. 21](#); [Schlechtriem, 1986 Commentary 24-27](#); [Winship in Parker Colloq.](#), 1.02[4].

13. See the reasons for the Article 95 reservation made by the U.S.A., set forth in Appendix IB to the Message from the President to the United States Senate. Treaty Doc. No. 98-9, quoted in *Parker Colloq.* at App. I-27. This statement is also quoted in *Nicholas, LQR*, (1988) Vol. 105, p. 205 who added that this "reason, it may be thought, would apply to the United Kingdom also." Other States similarly were concerned that traders located in

their States should be protected by a reservation excluding Sub (1)(b). *E.g.*, representatives from Czechoslovakia were concerned about the impact of Sub (1)(b) to deny to their traders the benefit of their codes for international trade. See Winship, *Cornell Symposium* at 508, 525.

14. *But cf.*: Pelichet, 1986 *PIL Convention* 43. Portions of the present text have been stimulated by helpful correspondence with Mr. Pelichet about our approaches to Sub (1)(b) and reservations under Article 95.

The Federal Republic of Germany in ratifying the Convention (21 December 1989) retained Sub (1)(b). The Act of Parliament enacting the Convention provided (Art. 2) that Sub (1)(b) would not apply when the rules of private international law lead to the application of the law of a State that has made a reservation under Article 95. See *vC-S Kommentar* (1990) 762 (Schlechtriem). This action seems to be in accord with the views of the present writer. For a general commentary on Article 1 and the Convention's sphere of applicability see *vC-S Kommentar* 44 (Herber). On Article 95 see *id.* 750.

15. The last seven words of Art. 1(3) were added at the 1980 Convention to avoid the possible implication that these factors would be irrelevant for *all* purposes. See, e.g., Art. 35(2)(b) (reliance on the Seller's "skill and judgment").

16. In rare circumstances, nationality could become relevant under Art. 1(1)(b) when a State uses nationality as a part of its rules on private international law.

Part I of the Convention governs the applicability of the Convention as a whole, including, of course, Part II on Formation of the Contract. Consequently, references in Part I to "contracts" (Arts. 1(1) and 3), in the setting of issues under part II, embrace questions as to whether a contract was formed. See also the Introduction to Part II, *infra* at [131](#).

## FOOTNOTES: Chapter on Article 2

1. This article is substantially the same as Art. 2 of the 1978 Draft. Cf. ULIS 5 (no provision comparable to paragraphs (a) and (b)).

2. W/G2 paras. 51, 57, II YB 55, 56, *Docy. Hist.* 61, 62; *Sec. Commy.* para. 2, *O.R.* 16, *Docy. Hist.* 406.

3. W/G 2 para. 58, II YB 56, *Docy. Hist.* 62. Sales at a commodity exchange are not sales "by auction," but rather rapidfire communication of offers and acceptances. For the special problems typical of auction sales see (U.S.A.) UCC 2-328; (U.K.) SGA (1893) 58; *Ont. L. Ref. Com.*, I Sales 86-90.





4. W/G 2 para. 54, II YB 56, *Docy. Hist.* 62. Cf. (U.S.A.) UCC 9-504 (secured party, under specified circumstances, may resell the collateral), UCC 7-210, 7-308 (enforcement at private sale of lien of warehouseman and of carrier). In any event, such sales will usually be made to a buyer with a place of business in the same State as the seller and will fall outside the Convention since they are not international. (See Art. 1(1), *supra* at [39](#).)

5. W/G 2 para. 55, II YB 56, UNCITRAL X (1977) Annex I, paras. 29-32, VIII YB 27; SR. 1 para. (e); SR. 2 paras. 5-16, *Docy. Hist.*, 320.


6. W/G para. 55, II YB 56, UNICTRAL X (1977) Annex I, paras. 29-32, VIII YB 27; *Docy. Hist.* 320.

7. [Schlechtriem, 1986 Commentary 30](#). See also Schlechtriem, *Com.* (1998) 35-37; Winship, *Aircraft and CISG*, 50 *J. Air L. & Commerce* 1053 (1985).










8. A sales contract calling for the delivery of corn, machinery or the like by handing over a bill of lading, warehouse receipt or other similar document is, of course, a contract for the sale of "goods". See Art. 34, [217](#), [220](#), *infra*; *Sec. Commy* para. 8, *O. R.* 16, *Docy Hist.* 406.


9. UNCITRAL X (1977) para. 35, VIII *Yearbook* 27, *Docy Hist.* 320 *Cf. Report, 1985 Hague PIL Convention* 23 n. 22; "Delegates were clear that gas constituted goods.






 Sale of oil is covered. See Skelton, CISG and Crude Oil Traders, 9 *Houston Journ. Int. L.* 101 (1986).

10. See, *accord.*, *Report, Hague 1985 PIL Convention* 23, paras, 3435.













11. See also Von Mehren & Rivkin, *International Sale of Minerals*, 25 *Int. Arb. No.* 3, 49 (1985).




12. *Benjamin* 3439. See also: [Winship in Parker Colloq.](#) 1.02 pp. I24, n. 49, citing Secretariat Studies; *Ont. L. Ref. Com. Sales*, Vol. I p. 65; Proposed Act; 2.6(1) "The price may be paid in money or otherwise". *Accord*: Proposed Uniform Sale of Goods Act for Canada, 11(1): The price may be paid "in money or otherwise". Uniform Law Conference of Canada, 1982 Proceedings, Appendix III p. 538. UCC (U.S.A.) 2304 ("money or otherwise"). *Finnish Sales Act (1987)* Sec. I.

13. Professor Schlechtriem, on the other hand, suggests that barter transactions are not "contracts of sale" under Article 1. [Schlechtriem, 1986 Commentary 24 and n. 41b](#). The present writer would agree that the complexity of some barter or counter-trade arrangements may suggest exclusion of the Convention based on the parties implied intent. See Arts. 6 and 8, *infra*. See Schlechtriem, *Com.* (1998) 2223, n. 30.







14. The question would scarcely be worth mentioning but for the fact that language of the (U. K.) Sale of Goods Act has led to doubt of its applicability to such transactions. *Benjamin* 119. *Contra*: *Ont. L. Ref. Com. I*, 4445; Draft Uniform Sale of Goods Act 8, Uniform Law Conference of Canada (Proceedings, 1982) 537; (U. S. A.) UCC2-105(4), 1201 (definition of "fungible").







### FOOTNOTES: Chapter on Article 3

1. This article was derived, after redrafting, from Art. 3 of the 1978 Draft. These proceedings at the Vienna Conference are recorded in *O. R.* 241245, 270271, 8485; *Docy, Hist.* 462466, 491492, 656657. Cf. ULIS 6, ULF 1(7). Proceedings in UNCITRAL: II YB 41, 5657, VI YB 9091, 110111, 51, VIII YB 28, 38; *Docy. Hist.* 46, 6263, 215216, 235236, 242, 321, 331.

2. The comparable categories in various legal systems are analyzed in Lorenz, *Contracts for Work on Goods and Building Contracts*, VIII *Int. Enc. Comp. L.* Ch. 8 5.

3. ULIS 6 made exclusion from the Law depend on the supply of "an essential and substantial part of the materials." In UNCITRAL the reference to "essential" was deleted. But cf. Kahn, *Rev. Int. Dr. Comp.* 951, 955 (1981). The drafters of the French version had difficulty with the concept of "substantial" and used the phrase "*une part essentielle*." The Spanish version states "*una parte sustancial*." Schlechtriem, *Com.* (1998) 39.

Art. 6 provides that the parties "may exclude the application of the Convention...." The Commentary to Art. 6 considers the converseagreements that the Convention will be *applicable* and concludes that in cases like Example 3B, such an agreement probably would be effective. See Art. 6 *infra* at 78. Cf. [Schlechtriem, 1986 Commentary 36](#): suggests that Article 6 authorizes parties to make CISG applicable although Art. 3(2) would exclude the contract. The discussion of Article 6, 7883, *infra*, suggests a similar result based on applicable domestic law.

4. *W/G* 2 paras. 6167, II YB 5657; UNCITRAL X (1997) Annex, I, para. 43, VIII YB 28; *SR.* 2 paras. 3082; *SR.* 4 paras. 410 *Docy Hist.* 6263, 321. As a result of the basic rule of Art. 3(1), *supra* at 57, labor costs in manufacturing the machinery would be irrelevant; such costs are not the "supply of labour or other services" under Art. 3(2).

5. See UNCITRAL Legal Guide on the Drawing Up of International Contracts for the Construction of Industrial Works. United Nations. U. N. Sales No. E.87. V.10 1988); *Kritzer Manual* Ch. 26.

6. *Honnold, Sales* 137❖146; *Stone, The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 12❖14 (1936).

7. This difference is reflected in both case-law and in Article 2A❖Leases which was added to the UCC in 1987. The 1988 UNIDROIT Convention on International Financing Leasing (Ottawa, May 28, 1988) responded to the special role of institutions that finance leasing transactions.

8. *Cf. Berman, The Law of International Commercial Transactions ( Lex Mercatoria )*, 2 *Emory J. Int. Dispute Resolution* 235, 298❖310 (1988); *B. Goldman, Lex Mercatoria*, 3 *Forum Internationale* (1983). *Cf. Goldstajn in Dubrovnik Lectures* 55, 85❖93. The present writer❖s commitment to the development of international *lex mercatoria* has not yet prepared him to join in proclamations that the New Dispensation has fully arrived. See *Langen, Transnational Commercial Law* (1973).

## FOOTNOTES: Chapter on Article 4

1. This article is substantially the same as Art. 4 of the 1978 Draft. *Cf. ULIS* 8.

2. This development has included importers and similar suppliers as well as manufacturers but, for simplicity, is discussed in terms of manufacturers.

3. *See Benjamin* ❖❖1037❖38 (3d ed. 1987); *White & Summers* ❖11❖7 (3d ed. 1988).

4. *Benjamin*, ❖1035 (3d ed. 1987) citing *Shanklin Pier v. Detel Products*, [1951] 2 K. B. 854; *Ruud* 8 U.C.L.A.L. Rev. 251 (1961).

5. *Ruud, supra*, at 255; *Pritchard v. Liggett & Myers*, 295 F. 2d 292 (3ed Cir. 1961) (explicit promise of quality in mass advertising).

6. The substance of CISG 4(a) appeared in Article 7(1) of the W. G. "Sales" draft and Article 6(b) of the UNCITRAL "Sales" draft, VIII YB 30, 31, *Docy. Hist.* 323, 324. The W. G. 9th Sess. (1977) considered but rejected inclusion of provisions on mistake and duress in a UNIDROIT draft Law on Validity (LUV). VIII YB 105❖109, *Docy. Hist.* 269❖273. For the S-G Report on the UNIDROIT draft see VIII YB 90❖93, 104❖109, *Docy. Hist.* 254❖257, 268❖273.

7. General remedies for fraud are not provided by the "good faith" provision of Art. 7(1), *infra* at ❖87, since this bears only on the interpretation of provisions of the Convention. The range of domestic remedies for fraud is suggested in II *Zweigert & Kötz* 1987) 106❖110, 302, 308, 316; *David, French Law* 197❖198. *Cf. (U.S.A.) UCC* 1❖103 (Code supplemented by principles of fraud as part of general body of common law). See also: UNIDROIT, draft Principles of International Contracts, Ch. IV, Mistake, Fraud, Threat and Gross Disparity (Study L, Doc. 43, UNIDROIT 1989).

8. *Schlechtriem, Com.* (1998) 45; [Khoo, B-B Commentary](#) 47❖48; *Sec. Commy. O. R.* 17, *Docy. Hist.* 407 (para. 2: Convention prevails over domestic rules of "validity").

9. [Nicholas in B-B Commentary](#) 483❖484. See *Schlesinger et al. Comparative Law* (1988) 768❖793, II *Zweigert & Kötz* (1987) Ch. 9; *Conell, The 1983 Geneva Convention on Agency*, 32 *Am. J. Comp. L.* 717 (1984).

10. For other aspects of the relationship between the Convention and domestic law see: Art. 5 at ❖72, Art. 7 at ❖96, Art. 16 at ❖145, Art. 28 at ❖194, Art. 46 at ❖281, Art. 62 at ❖348, and Art. 78 at ❖420.

11. UNIDROIT has prepared a Draft Uniform Law on the Protection of the Bona Fide Purchaser of Corporeal Movables. *UNIDROIT Yearbook*, 1967❖1968, Vol. I, 222. More recent work has concentrated on stolen or illegally exported cultural objects. *UNIDROIT News Bulletin* (N. 81❖82, Jan.❖Ap. 1990).

## FOOTNOTES: Chapter on Article 5

1. There was no comparable provision in the 1978 or earlier UNCITRAL drafts or in ULIS. Art. 5 was adopted at the diplomatic conference; *Com. I, O. R.* 245-246, 423; *Docy. Hist.* 466-467, 644.

[Editor's note: Footnote 2 not present in the text]

3. The application of "product liability" to international sales was explored in Secretariat reports of UNCITRAL: *Rep. S-G, "Liability for Damage"*, VI YB 255-272; *Rep. S-G, "Liability for Damage."* VIII YB 235-269 *Rep. S-G, "Analysis of the Replies of Governments,"* VIII YB 269-287. See also 1977 *UNIDROIT Unif. L. Rev.* Vol I, 192-209; Text: European Convention on Products Liability, Strasbourg 27 January 1977. Under Art. 4, *supra* at 63, attention was given to product liability rules in connection with a very different issue—the applicability of the Convention to a producer's promises to a buyer who purchased the goods from dealer.

4. "Product liability" usually applies to "dangerous" goods which do physical damage to a "consumer" or his property. However, case law on occasion has extended product liability to situations like Example 5A. See *White & Summers* 11-2, discussing *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) (lost profits when truck turned over).

5. We shall have occasion to return to this principle in connection with the Convention's rules on conformity of the goods with the contract. See Art. 35, *infra* at 222. Problems of applying this principle will arise when domestic rules are invoked by facts that are, in varying degrees, similar to the facts that invoke the Convention.

6. [Schlechtriem, The Borderland of Tort and Contract, Cornell Colloq. 467, 469 \(1988\)](#). The article also mentions that an interest in "health", like property, is independent of contractual obligations; this interest seems to present no problem of overlap in view of Article 5's exclusion of "death or physical injury". The same is true of domestic statutes that require a higher standard of quality or a different price than that provided by the contract, or by Article 35, *infra*. cf.: *Schlechtriem, Com. (1998)* 47, 50.

7. *Id.* 473-477. Special mention is made that a tort action would not be bound by the requirement of notice (Art. 39) or the foreseeability limit on damages (Art 74); apparently none of the Convention's rules would be binding. It is not clear whether concurrent tort actions for "property damage" would extend to materials spoiled or defective goods produced by a machine that did not conform to the contract.

8. *Id.* 474. In this discussion reference was made to a "dangerous defect" but it is not clear whether this limits the scope of concurrent tort recovery; perhaps under this approach the Convention's rules would control when perishable commodities (e.g. fruit) are destroyed because they were infected with fungus or disease or were over-ripe.

9. *Id.* 468, 470. B. Nicholas, *French Law of Contract* 53 (1982).

## FOOTNOTES: Chapter on Article 6

1. This article is the same as Art. 5 of the 1978 Draft Convention. Cf. ULIS 3 (reference only to exclusion of the Convention), ULF 2.

2. The UNIDROIT Draft submitted to the 1964 Hague Conference provided (6): "The parties may entirely exclude the application of the present law provided that they indicate the municipal law to be applied to their contract." II *Records, Hague Sales Conference* 213. *Rep. S-G, "Analysis of Governmental Comments on ULIS"* paras. 68-69, I *Yearbook* 168.

3. *W/G* 2 paras. 43-46, II *Yearbook* 55; *UNCITRAL X Annex I*, paras. 56-58, VIII *Yearbook* 29. At the diplomatic conference: *Com. I* Art. 5 para. 3(1), (v)-(vii); *SR. 3*, paras. 35-65; *SR. 4*, paras. 1-95 p. 106 n. 3;



*Docy Hist.*, 61, 657-658, 469-475 (O. R. 248-252). Accord: Schlechtriem, Com. (1998) 54-57.

4. Cf. Hellner, Prospects for the Unification of Sales Law at the Regional or International level: A Scandinavian View, 15 McGill L. J. 83, 92-93 (1969) p. 4; Honnold, Uniform Law and Uniform Trade Terms- Two Approaches to a Common Goal, *Trans-National Law: Bielefeld Colloq.* 161, 171.

5. Apart from the general unclarity and diversity of conflicts rules in various States, doubt about the above assumption that such rules point to State C is accentuated by the specialized Hague Conventions of 1955 and 1986 on the law applicable to international sales. Both Conventions in most situations designate the law of the place of business of the seller or buyer. See, e.g., the 1986 *Hague PIL Convention* Art. 8-1 and 8-2. But cf Arts. 8-3, 5 and 21-1(b). In Example 6A either designation would invoke the Convention rather than the domestic law of State C.

6. [Goldstajn, Dubrovnik Lectures 95 at n. 97.](#)

7. The conflicting views reconciled in Article 7 are reviewed in the Explanatory Report by Professor Arthur von Mehren, Hague Conference on Private International Law (May 1987), pp. 25-27 paras., 45-49.

8. See also Lebedev, The 1977 Optional Clause for Soviet-American Contracts, 27 Am. J. Comp. L. 469 (1979): Arbitrations are to be held in Sweden, with administrative and other services provided by the Stockholm Chamber of Commerce. Where the arbitration clause and the UNCITRAL Rules do not settle matters as to the conduct of the arbitration, Swedish rules may fill gaps with respect to the *conduct of the arbitration* as distinguished from the governing substantive law.

9. W/G2 paras. 36-42, 47-49, II *Yearbook* 54-55, *Docy. Hist.* 60-61. The above-quoted provision was carried forward in subsequent drafts. W/G 6 para. 16 and Annex I, VI *Yearbook* 50, *Docy. Hist.* 241.

10. *UNCITRAL X* (1977) Annex I, paras. 44-52, VIII *Yearbook* 28; *Docy Hist.* 321.

11. Restatement Second, Conflict of Laws -187. Cf. Convention on the Law Applicable to the International Sale of Goods (The Hague, 1955) Arts. 2(1), 6; I *Register* 5. See also, [Schlechtriem, 1986 Commentary 36.](#)

12. von Mehren, *Explanatory Report*, *supra* n. 7. See also: *Pilichet, 1986 PIL Convention*, 105-128. Cf. Cheshire & North, Private International Law 450-457 (11th ed. 1987).

13. The ambiguity of these early drafts is discussed in Honnold, A Uniform Law for International Sales, 107 U. Pa. L. Rev. 299, 309-310 (1959).

14. McLachlan. The New Hague Sales Convention and the Limits on the Choice of Law Process, 102 L Q. Rev. 591 (1986). See *id.* at 592-593 for examples of conflict rules that have responded to special international circumstances. See also Brand, *Pittsburgh Symposium* (1988) 167-170 and 146-166 (choice of forum; importance).

15. See Schlechtriem, Com. (1998) 58.

## FOOTNOTES: Chapter on Article 7

1. Paragraph (1) of Art. 7 is substantially the same as Art. 6 of the 1978 Draft Convention. Paragraph (2) was added at the Diplomatic Conference; see *infra* at -96. ULIS had no provision like paragraph (1); the first part of paragraph (2) is based on ULIS 17, quoted *infra* at -96. Paragraph (1), except for the reference to good faith, duplicates provisions in the other UNCITRAL conventions. United Nations Convention on the Limitation Period in the International Sale of Goods (1974), Art. 7, V *Yearbook* 210; United Nations Convention on the Carriage of Goods by Sea (1978), Art. 3 IX *Yearbook* 212; 27 AJCL UNICITRAL Symposium 421.

2. Sundburg, Uniform Interpretation of Uniform Law, 10 *Scan. Studies* 219, 221; *Giles* 34. See also: [Kastely, Rhetorical Analysis, 8 Nw. J. Int. L. & Bus. 574 \(1988\)](#); Cook, 50 U. Pitt. L.R. I (1988).
3. See *Honnold, General Report, 1986 Comp. L. Cong.*, reproduced in substance in *Freiburg Colloq.* 115♦147.
4. J. Honnold, Documentary History of the Uniform Law for International Sales (Kluwer, 1989, herein, "*Docy. Hist.*"). A Table brings together the author's marginal references for each article. This Table (organizing over a thousand references) is supplemented by an Index that includes references to discussions that were not confined to a single provision.
5. The widespread and important use of legislative history (*travaux préparatoires*, or "historical" interpretation) in civil law systems is summarized, on the basis of national reports to the XIIth International Congress of Comparative Law (1986), in *Honnold, General Report, 1986 Comp. L. Cong., Freiburg Colloq.* 133. See also Schlechtriem in *German National Reports, 1986 Comp. L. Cong.*, 140♦141.
6. *Air France v. Saks*, 470 U.S. 392, 400♦405 (1985) *Cf.* *Chan v. Korean Air Lines*, 109 S.Ct. 1676 (1989). See Patterson, 22 *Stanford J. Int. L.* 263, 278 (1986).
7. Strömholm, Legislative Materials and Construction of Statutes, 10 *Scan. Studies* 173; *Gutteridge* 101; R. & M. Walker, *English Legal System* 92♦93 (1976); R. Eddey, *English Legal System* 113♦117 (1977).
8. *Graveson, C. & G.*, 7, 10 n. 2; The (English) Law Commission, First Annual Report 1965♦1966, no. 107♦112; Renton et al., *The Preparation of Legislation* (1975) (Cmd 6053) 135♦148. The Ontario Law Reform Commission was equally divided on this point, *Ont. L. Ref. Com.*, I Sales 29♦30.
9. [1980] 2 All E. R. 696 (H. L.), [1980] 3 W. L. R. 209. The evolution during the preceding sixty years was summarized in the opinion by Lord Roskill. An important step in this development was the opinion by Lord Denning, M. R., in *James Buchanan & Co. v. Babco Forwarding and Shipping* [1977] Q. B. 208, [1977] 1 All E. R. 518 (C. A.) affirmed on other grounds [1978] A. C. 141 (H. L.). The Act of Parliament involved in the *Fothergill* case implemented the Warsaw Convention of 1929 as amended in 1955 at the Hague.
10. There were differences among some of these four opinions as to the use and weight to be given to these three types of interpretative aids. The fifth opinion, by Lord Fraser of Tullybelton, accepted the use in this case of scholarly writing construing the original French text of the Convention. The Convention, and the Act of Parliament implementing the Convention, provided that in the event of inconsistency between the English and French texts the original French text would prevail.
11. The Vienna Treaty of 1969, although ratified by the U. K., did not govern this case since it came into force subsequent to the Warsaw-Hague provisions that were subject to interpretation. Lord Diplock noted that the Vienna Treaty "does no more than codify the already-existing public international law." The Vienna Treaty will be in force for many States before questions of interpretation arise under the 1980 Sales Convention.
12. Sundberg, *supra* n. 2 at 219, 237; *David, Unification* ♦281.
13. See W. R. Bishin, *The Law Finders, An Essay in Statutory Interpretation*, 38 S. Cal. L. Rev. 1 (1965). Caution about the value of legislative history: *Graveson, C. & G.*, 6; *Giles* 40♦45. For examples of the use of preparatory materials in the United States, Italy and Switzerland, see *Giles* 47♦48.
14. See *Honnold, Gen. Rep. Comp. L. Cong.*, ♦Id. *Freiburg Colloq.*, 121♦124. For civil law systems see, e.g., reports from Quebec, Poland Bulgaria, Netherlands (no explicit use). For Commonwealth practice see reports from Australia, Canada, New Zealand. For England see the *Fothergill* decision *infra*.
15. Holmes, *The Path of the Law*. 10 Harv. L. Rev. 457, 461, (1897). Lord Wilberforce's opinion doubted the value of decisions that were not made by a State's highest court, and also mentioned the inadequate reporting

of decisions in some countries. Ways to facilitate the access to international case law and to evaluate its impact on future cases are considered *infra* at ¶93.

16. Riegert, *The West German Civil Code*, 45 *Tul. L. Rev.* 69 ¶71 (1970); *von Mehren & Gordley* 1135 n. 21, 1156 n. 106 & 108 (France), 1157 n. 109 (Germany); *Merryman & Clark* 560 ¶562 (Colombia), 571 ¶587 (Mexico). For an arresting suggestion that strict adherence to precedent in England responded to the need for certainty created by the lack of a statutory framework ¶a need not felt in codified legal systems ¶see Goodhart, *Precedent in English and Continental Law*, 197 *L. Q. Rev.* 40, 61 ¶63 (1934).

17. [1980] 2 *All E. R.* 696, 715. *Giles* at 35 ¶40 gives examples of reliance on foreign case law in the U. S. A., U. K., Switzerland, and Germany (F. R. G.).

18. See *Honnold, Gen. Rep.*, 1986 *Comp. L. Cong.* ¶: *Freiburg Colloq.* 125 ¶127, citing report by M. Clarke. Varying degrees of flexibility were reported from other parts of the Commonwealth, especially Canada.

19. [1980] 1 *All E. R.* 696, 708. For the reliance on scholarly writing in other countries see *Honnold, General Report*, 1986 *Comp. L. Cong.*, ¶, *id.*, *Freiburg Colloq.* 125 ¶127.

20. From 1956 UNIDROIT published decisions interpreting uniform laws in its *Yearbook*, from 1960 in *Uniform Law Cases*, and from 1973 in UNIDROIT's *Uniform Law Review*. On the importance of such case law see 1 *Zweigert & Kötz* 22. On limited access to foreign case law, see *Giles* 35 ¶36.

21. The channels for gathering the decisions were examined in *Honnold, Gen. Rep.*, *Comp. L. Cong.* ¶, *id.*, *Freiburg Colloq.* 128 ¶129.

22. UNCITRAL, *Report on Twenty-First Session* (1988) (A/43/17), *XIX YB* 15 ¶16, Ch. X, paras. 98 ¶109. The report also noted the difficulty and importance of obtaining arbitral awards and the necessity in some cases to use anonymous extracts. See also the Note by the Secretariat (A/CN.9/312). (A plan similar to that adopted by the Commission was developed in the first edition of this work at ¶93.)

23. *W/G* 9 paras. 70 ¶87, *IX Yearbook* 66 ¶67, *Docy. Hist.* 298 ¶299; *Com. I*, Art. 6; *SR*. 5 (action and discussion at the Diplomatic Conference), *O. R.* 254 ¶259 *Docy. Hist.* 475 ¶480.

24. (U.S.A.) *UCC* ¶1 ¶203. In most parts of the Code "good faith" has the limited meaning of "honesty in fact in the conduct or transaction concerned" (¶1 ¶201 (19)). However, the obligation of "good faith" that is applicable to merchants in sales transactions includes "the observance of reasonable commercial standards of *fair dealing* in the trade" (¶2 ¶103(1)(b)). See Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the UCC*, 30 *U. Chi. L. Rev.* 666 (1963); Summers, "Good Faith" in General Contract Law and the Sales Provisions of the UCC, 54 *Va. L. Rev.* 195 (1968); *Restatement, Second of Contracts* ¶205.

25. *Ont. L. Ref. Com. I Sales* 163 ¶171; *Dawson* 461, 465 ¶466, 475 ¶479; Kessler and Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *Harv. L. Rev.* 401 (1964); *Israeli Sales Law* ¶6; *Draft, Netherlands Civil Code*, Book 6, Ch. 5, Sec. 3, Art. 1 ("Reasonableness and equity").

26. See Bonell, *Some Critical Reflections on the New UNCITRAL Draft Convention*, (1978) II UNIDROIT *Unif. L. Rev.* 2, 10. Cf. Schlesinger, *The Common Core of Legal Systems*, *Yntema Festschrift* 65; Statute of the International Court of Justice, Art. 38(1)(c): the "general principles of law recognized by civilized nations"; Cohn, 23 *Int. & Comp. L. Q.* 520, 521, (1974). Although ULIS did not refer to "good faith" it has been suggested that a similar concept (*Treu and Glauben*) was one of the "general principles" invoked by ULIS 17. *Dölle, Kommentar* (Wahl) Art. 17 at 55 ¶57.

27. See also *Secretariat Commentary*, Art. 6. Para. 3 *O. R.* 18 *Docy. Hist.* 408.

28. [Schlechtriem \(1986\)](#) 39. For references to reasonableness or the reasonable person see Arts. 8(2), 16(b) (reasonable reliance), 18(2) (reasonable time), 34 (unreasonable inconvenience or expense), 38(3) (reasonable opportunity for examination), 39(1) (reasonable time), 48(1) (unreasonable delay, inconvenience or expense), 48(2) (reasonable time), 49(2) (reasonable time), 60(a) (acts reasonably expected), 63(1) (reasonable time), 72 (reasonable time for notice), 75 (reasonable time and manner), 76(2) (reasonable substitute), 79(1) (reasonable expectations), 79(4) (reasonable time), 85 (reasonable steps), 86(1) (same), 86(2) (unreasonable inconvenience or expense), 88(1) (unreasonable delay), 88(2) (unreasonable expense; reasonable measures to sell).

29. See Rabel, 1 Am. J. Comp. L. 58, 60 (1952); *von Mehren & Gordley* 1137 at n. 35.

30. H. Hillman, J. McDonnell & S. Nickles, *Common Law and Equity under the Uniform Commercial Code* (1985) and supplements.

31. *W/G I* paras. 56-72, I *Yearbook* 181-183, *Docy. Hist.* 19-21; *W/G 2* paras. 126-137, II *Yearbook* 62, *Docy. Hist.* 68.

32. *UNCITRAL X Annex I*, paras. 137-147, VIII *Yearbook* 34-35, *Docy. Hist.* 327-328.

33. O. R. 255-257, *Docy. Hist.* 426-428.

34. See *von Mehren & Gordley* 54-56. Portalis's proposal that the Code explicitly provide for application "according to equity...", rejected in France, was adopted in Louisiana. See Stone, *The So-called Unprovided-for Case*, 53 Tul. L. Rev. 93, 94-95 (1978).

35. *Schlesinger, Comparative Law* 602. The most far-reaching provision is Art. 1 of the Swiss Civil Code: In the absence of other specified sources "the judge shall decide...according to the rule which he would establish as legislator." *Id.* at 603; I *Zweigert & Kötz (1987)* 197-182. On the pressure for analogical extension of the code that results from the theory that courts may not develop the law, see Merryman, *The Italian Style III: Interpretation*, 18 Stanf. L. Rev. 583 (1966). For a perspective study of the conflicting "civil law" and "common law" approaches see Nickles, *Problems of Sources of Law Under the UCC*, 31 Ark. L. Rev. At 16-46 (1977), 31 *id.* 171 and 34 *id.* 1 (1980).

36. [1978] A.C. 141 (H.L.) affirming on different grounds [1977] Q.B. 208 (C.A.), [1977] I All E.R. 518. The case involved an Act of Parliament that implemented the CMR Convention on the liability of carriers transporting goods by road.

37. *Cf. David. Unification* 368 (topic outside ULIS 2.)

38. *Cf. Bateson, The Duty to Co-operate*, [1960] J. Bus. L. 187. For the suggestion that cooperation was one of the "general principles" invoked by ULIS 17 see: Riese, 29 *Rabels Z* 1, 66 (1965); *Mertens & Rehbinders Art.* 54 at 13. P. 218; Cohn, 23 *Int. & Comp. L. Q.* 520, 527 (1974)

39. National reports to the 1986 Comparative Law Congress approved most of the above general principles and suggested, in addition, (1) Action in accordance with standards of a reasonable or businesslike person; (2) The protection of reliance and (3) Preservation of the contract. See *Honnold, Gen. Rep. Comp. L. Cong.*, *Freiburg Colloq.* 139-140, and *German National Reports* 121-149 (Schlechtriem). See also Magnus, 53 *Rabels Z* at 142 (1989) (in German).

40. [Hellner, Gap-filling by Analogy, \*Hjerner Festschrift\* 219](#). Leading scholars of statutory interpretation in a common-law setting strongly support analogical reasoning from "instances where the statute unquestionably applies". H. Hart & A. Sacks, *Legal Process* (Ten. ed 1958), quoted in W. Eskridge & P. Frickey, *Legislation* (1988), also citing L. Fuller, 71 *Harv. L. Rev.* 630, 662.

41. On regard for case-law in other Commonwealth jurisdictions see *Honnold, Gen. Rep., Comp. L. Cong.*, *Freiburg Colloq.* 121-122. On the unifying impact of the Restatements see Honnold, *The Life of the Law*, Ch.



4, pp. 145-183 (1964).

42. See *Graveson, C. & G.* 8, quoting Scarman, J.: A code must be the exclusive law within its field or otherwise it is "in danger of failing to develop or reform"; Diamond, Codification of the Law of Contract, 31 Mod. L. Rev. 361, 384 (1968).

43. Vienna Convention on the Law of Treaties (1969), U.N. Doc.A/CONF. 39/27, p.289, reprinted in 63 Am. J. Int. L. 875. The Convention's rules on the interpretation of treaties appear in Part III, Sec. 3; at Arts, 31-33. Art. 31 was quoted *supra* at 90.

44. Art. 7 of the Sales Convention embodies mutual obligations of the Contracting States as to how their tribunals will construe the Convention. Hence, the 1969 Vienna Convention would be pertinent to a question concerning the construction of Art. 7, but the 1969 Convention would not govern the interpretation of the articles dealing with the obligations of the parties to the sales contract, for these articles are to be construed according to the principles (properly construed) of Art. 7. Cf. Lord Diplock in *Fothergill*, [1981] A.C. 251, 282-283.

45. The importance of "purposive" or "teleological" interpretation was stressed in the reports to the Twelfth International Congress of Comparative Law (*supra* 87). See Honnold, *Gen. Rep. Comp. L. Cong.*, *id.*, *Freiburg Colloq.* 138. *National Reports to I.C.L. Cong.*: Schlechtriem, in German National Reports, 1986 Comp. L. Cong. 140, 142; van der Velden, in *Netherlands National Reports, 1986 Comp. L., Cong.* 21-45.

## FOOTNOTES: Chapter on Article 8

1. Art. 8 is substantially the same as Art. 7 of the 1978 Draft Convention, which was closely based on a provision in the Working Group's 1977 "Formation" draft. W/G 8 paras. 155-168 and Annex I (Art. 14), VIII *Yearbook* 86-87, 90, *Docy. Hist.* 287-288, 291; W/G 9 paras 11-47 and Annex (Arts. 4 of Formation Draft), IX *Yearbook* 62-64, *Docy. Hist.* 294-296;. In 1978 the Commission merged the "Formation" and "Sales" drafts, and placed the present provision in Part I of the Convention. As a consequence, the rules on interpretation of the offer and acceptance became applicable to statements and conduct after formation of the contract. *UNCITRAL XI*, Annex I paras. 38-41 (summary of discussion of Art. 4 of Formation Draft, renumbered Art. 7 of the 1978 Draft Convention), IX *Yearbook* 33-34, *Docy. Hist.* 367-368. Cf. ULF 4(2) and 1972 UNIDROIT Draft of a Law on Validity of Contracts (LUV) Arts. 3-5. See VIII *Yearbook*, 104-105 (text of LUV with Secretariat analysis), *Docy. Hist.* 268-269.

2. Some domestic rules for sales of goods were designed to counteract patterns of interpretation that developed under a pre-commercial static economy typified by transactions in land and unusual and important arrangements prepared cautiously and in detail; at that stage, sales of goods involved simple items purchased after inspection. Steps toward relaxing rigid patterns for construing such contracts are found (*e.g.*) in the English Sale of Goods Act 1893, 14 (implied obligations of merchantable quality). See *Benjamin* (3d ed.) 779-790; Llewellyn, 52 Harv. L. Rev. 725 and 873 (1939); *Honnold, Sales* (5th ed. 1984) 33-35.

3. Often an instrument executed by the parties is prepared by one party and, in effect, accepted by the other. In this setting paragraph (2) applies; the party who prepared the instrument is the one who "made" the statement. When both parties participate fully in preparing the instrument, paragraph (2) is not applicable since it distinguishes between one who makes a statement and the one who receives it, but such an instrument is subject to the general rules of interpretation in paragraph (3).

4. Communications mentioned in the Convention include: notification of avoidance (Art. 26, *infra* at 187); modification or termination of an agreement (Art. 29, *infra* at 200); notification that goods are defective or that performance will be interrupted (Arts. 39, 48, 68, 71, 72, 79, 88). Communication that call for interpretation also may occur in settings not mentioned in the Convention.



5. *Corbin* 106; *von Mehren & Gordley* 850-872; Hoff, Error in the Formation of Contracts in Louisiana; A Comparative Analysis, 53 Tul. L. Rev. 329, 335 (1979) (comparison of civil law of Louisiana and France, and of common law).
6. Holmes, The Common Law 242 (Howe ed. 1963). *Corbin* 106 was less unqualified: when a common intent or meaning can be found, it should be given effect. See also Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L.J. 939, 947 (1967). For David Hume's criticism of the "intent" or "will" theory, see *Atiyah, Freedom of Contract* 53.
7. Hoff, *supra* note 4 at 338, 342-353 (error in corpore, error in substantia), 374 (French law may call for compensation of an unerring party for loss based on reliance). "Speaker" refers to one who makes a statement, whether written or oral; "hearer" is the one to whom the statement is made.
8. Ludwig Raiser in The Law of Standard Terms of Business (*Das Recht der ABG*) 284 (1935) as quoted in II *Zweigert & Kötz* (1987) 12. Concern over the danger of meanings unclear to one of the parties underlay UNCITRAL's rejection (118, *infra*) of proposals based on ULIS 9(3) to give binding effect to the meaning "usually" given to expressions "commonly used in the trade concerned".
9. E.g. (U.S.A.) UCC 2-718(1): A term in a sales contract "fixing unreasonably large liquidated damages" for breach of contract "is void as a penalty".
10. (U.S.A.) UCC 2-302, authorizing courts to refuse to enforce "unconscionable" contracts or clauses, is accompanied by an Official Comment that states that the provision is directed at "one-sided" contracts but adds: "The principle is one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power". This lack of clarity has been sharply criticized. Leff, Unconscionability-The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967). Cf. Hillman, 67 Cornell L. Rev. I (1981).
11. As we shall see, the Convention's statement in Article 4(1) that it "is not concerned, with (a) validity" must be construed to avoid conflict with express provisions (such as Article 8(2)) that might otherwise be considered as dealing with questions of "validity".
12. This interpretation of Article 8(2) apparently is not accepted by Farnsworth in *B-B Commentary* 99-100, 2.4-2.5.
13. The problems of interpretation that have arisen under (U.S.A.) UCC 2-202 are discussed in *White & Summers* 2-9-2-12, and in law review articles cited therein. For case law apart from the UCC see *Corbin* 573 *et seq.*; *Treitel, Contract* 150 *et seq.*
14. The English Law Commission has recommended abolition of the parol evidence rule. Law Commission, Working Paper No. 70, Law of Contract, The Parol Evidence Rule (1976). Accord; *Ont. L. Ref. Com.*, I Sales 110-117. For a comparative study see II *Zweigert & Kötz* II (1987) 91-93 (French Civil Code Rule similar to the "parol evidence rule" is inapplicable to commercial transactions; no comparable rule in Germany). For indications of increasing flexibility in American law see *Farnsworth, Contracts* 451-474.
15. See McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 Yale L. J. 365 (1932).
16. *Ont. L. Ref. Com.*, I Sales 117-118, supporting *Friedman* 251 and Lord Denning, M. R., in *Port Soudan Cotton Co. v. Chettiar and Sons* [1977] 2 Ll. Rep. 5, 11 (C.A.).

---

## FOOTNOTES: Chapter on Article 9

1. [Goldstajn, Usages of Trade, \*Dubrovnik Lectures\* 55](#); *Id.*, Commercial Usages as the Source of the Law of International Trade, in *Mélanges Fragistas* (Thessaloniki 1967) 391, 400-402 (1967); [Jokela, The Role of Usages in the Uniform Law on International Sales, 10 \*Scan. Studies\* 81](#); [Farnsworth, Usage and Course of Dealing, \*Sauveplanne Festschrift\* 81](#); Thieffry in *Ottawa Colloque* 93-104 (in French; usages and arbitration); David Hume and tacit understandings or "conventions" see *Atiyah, Freedom of Contract* 56.
  2. Art. 9 is the same as Art. 8 of the 1978 Draft Convention, except that at the diplomatic conference, for the sake of clarity, the phrase "or its formation" was added to paragraph (2): *O.R.* 265, *Docy. Hist.* 486. Cf. ULIS Art. 9, ULF Arts. 4(2), 5(3), 6(2), 8(1), 11, 13.
  3. Bonell, The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts, *New Directions* 109 (decisions applying Incoterms cited at n. 72); Eisemann, Incoterms and the British Export Trade, 1965 *J. Bus. L.* 114; Honnold in *Schmitthoff, Sources* 70; Honnold, Uniform Law and Uniform Trade Terms in *Transnational Law* 161.
  4. Allen, *Law in the Making*, Ch. II and 133 (7th ed. 1964) (discussion of whether custom must date from A.D. 1189); Note, 55 *Colum. L. Rev.* 1192, 1199, (1955); Honnold, The Influence of the Law of International Trade on Commercial Law, in *Schmitthoff, Sources* 70, 79.
  5. Rejection of proposals to introduce provisions like ULIS 9(3) on trade terms and standard contracts-UNCITRAL: VIII YB 31, *Docy. Hist.* 324 (paras. 84-86); 1980 Conference: *O.R.* 267-269, 202-203; *Docy. Hist.* 488-490, 737-738. Concern for effect in certain regions: *O.R.* 263, 266, *Docy. Hist.* 484 (para. 73), 487 (para. 26).
- See also: [Bonell, B-B Commentary 1.42, 105-106](#); [Schlechtriem, 1986 Commentary, 42-43 and note 130](#); [Eörsi, Parker Colloq., 2.06, p. 2-21](#); [Goldstajn, Dubrovnik Lectures, 55, 61](#); [Jacubowski, 2 New Directions](#) 549 (1977).
6. (U.K.) SGA (1893) 55 ( *Graveson C. and G.* 54: the comparable provisions of ULIS 9 were "in accordance with English law"); Swedish Sales Act (1905) Art. 1 ("customs of trade or other usages"); Houin, Sale of Goods in French Law, in *Comparative Aspects of Sales (I.C.L.Q.)* 16, 17-18 (1964); Ginsburgs, International Trade Custom, 5 *Journ. Int. L. and Policy* 325, 328-332 (1975) (reliance on trade usage by Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce and Industry); Israeli Contracts Law 26; Israeli Sales Law 5.
  7. Honnold, Letters of Credit, Custom, Missing Documents and the Dixon Case, 53 *Colum. L. Rev.* 504, 508 (1953).
  8. [Jokela, The Role of Usages in the Uniform Law on International Sales, 10 \*Scan. Studies\* 83, 93-94](#). But cf. Berman and Kaufman, The Law of International Commercial Transactions, 19 *Harv. Int. L. J.* 221 (1978) (doubt that Convention admits of local customs).
  9. [Goldstajn, Dubrovnik Lectures, 55, 79](#); [Farnsworth, Sauveplanne Festschrift 81, 83-89](#); Honnold, 53 *Colum. L. Rev.* 504 (1953). But cf. Backus & Harfield, 52 *Colum. L. Rev.* 589 (1952).

Some practices and usages are so basic to the parties' expectations that they can survive a standard "integration" clause stating that the writing executed by the parties comprises the entire agreement between them. See *Farnsworth, Contracts* 513.

10. See, for example, rules derived from usage that a party under specified circumstances who fails to respond to a commercial letter of confirmation will be bound by its contents. [Esser, Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law under the 1980 Sales Convention, 18 \*Georgia J. Int. & Comp. L.\* 427 \(1988\)](#); [Schlechtriem, 1986 Commentary 42 and n. 129](#); Heiz, Validity under CISG and Swiss Contract Law, 20 *Vanderbilt J. Tr. L.* 639 (1987).

11. Many of the rules of (USA) Uniform Commercial Code are supported as consistent with commercial usage.

---

## FOOTNOTES: Chapter on Article 10

1. See e.g., *Records 1980 Conference*, Analysis of Comments and Proposals: (Comment by ICC), O.R. 73, *Docy. Hist.* 394. This problem was discussed under Art. 1, *supra* at [43](#).

2. Consideration of the various official language versions is appropriate to promote the Convention's goal of "uniformity in its application." See Art. 7 *supra* at [86](#). For general background see Hadari, Choice of National Law applicable to the MNE, 1974 Duke L. J. 1 (1974).

3. Art. 10 is substantially the same as Art. 9 of the 1978 Draft. Paragraph (b) follows ULIS 1(2) and ULF 1(2). See *Sec. Comm. O.R.* 19, *Docy. Hist.* 409.

---

## FOOTNOTES: Chapter on Article 11

1. Law Reform (Enforcement of Contracts) Act 1954 (SGA 4 had not been applicable in Scotland). See also: Sutton, Formation of Contract: Unity in International Sales of Goods, 16 U.W. Ont. L. Rev. 113, 148-150 (1977) (Art. 11 approved from Australian perspective); *Ont. L. Ref. Com., I Sales* 107-110. *Zweigert & Kötz II* (1987) 45-60 consider this development as part of a general retreat from formalism.

2. A review of the rules of many countries appears in Cigoj, International Sales, Formation of Contracts, 23 *Neth. Int. L. Rev.* 257, 270-272 (1976); *Zweigert & Kötz II* (1987), *supra*.

3. The Convention on the Law Applicable to International Sale of Goods (The Hague, 15 June 1955) does not apply to "the form of the contract" ([5](#)). I *Register* 5. On the other hand, the *Hague 1986 PIL Convention*, Art. 11, states rules on which law is applicable to formal validity, subject to possible reservation under Art. 21-1(c). Under (U.S.A.) UCC 1-105, the Statute of Frauds ([2](#)[201](#)) is among the provisions that is applicable when the transaction bears "a reasonable relation" to the enacting State.

4. This article is the same as Art. 10 of the 1978 Draft and, in substance, is the same as ULIS 15 and ULF 3. The second sentence responds to the rule in some countries that a contract may be made without formality but must be proved by written evidence e.g., proof by witnesses may be excluded. *Zweigert & Kötz II* (1987) 48-56. The legislative history of Article 11 is presented in connection with Article 12, [128](#)[129](#), *infra*.

5. *Sec. Comm. draft Art. 10*, para. (2) *O.R.* 20, *Docy. Hist.* 410. See Baker, Enforcement of Contracts Violating Foreign Exchange Laws, 3 *Int. Tr. L. J.* 247 (1977), *Giles* 65.

6. *General Conditions (ECE) Plant and Machinery*, No. 188, [2.1 Accord](#): No. 188A, [2.1](#); No. 574, [2.1 Contra](#): *Id.* Potatoes (1980), Fresh Fruit and Vegetables (1979), Dry and Dried Fruit (1979); Art. 7 of all of these general conditions provides that the contract may be "formed orally." See also Cigoj, *supra* n. 2, at 272 and note 67.

7. Turpin, Public Contract, VII *Int. Enc. Comp. L.* Ch. 4, [43](#), note 250.

8. See Turpin, note 7 *supra*, [4](#).

9. J. Whelan, Federal Government contracts 39-56 (1985); Principles of Government Contract Law (Fed. Acq. Inst., Off. Mgt. & Budget, 1980); J. Zenserle & J. McHale (N.Y., Bender, 1985); UNCITRAL, Model Law on Procurement.

10. See works cited by Turpin, note 7, *supra*.

---

## FOOTNOTES: Chapter on Article 12

1. Early discussion in UNCITRAL leading to Articles 11 and 12; II YB 48-49, 60-61, VI YB 96, 111-112, 53-54, VIII YB 94-95, 76; *Docy. Hist.* 53-54; 66-67, 221, 236-237, 244-245, 258-259, 277.
2. This article is substantially the same as Art. 11 of the 1978 Draft. Art. 12, in substance a repetition of Art. 96, was inserted immediately following Art. 11 to draw attention to the fact that Art. 11 might be affected by a reservation. Discussion in UNCITRAL leading to Arts. 12 and 96: IX YB 70-71, VIII YB 33-34, *Docy. Hist.* 302-303, 366-367, 326-327. *The 1980 Conference*: O.R. 74, 20, 271-275, 90-92, *Docy. Hist.* 395, 410, 492-496, 662-664.

## FOOTNOTES: Chapter on Article 13

1. See Arts. 39(1), 43(1), 46(2)&(3), 47(2), 48(2)&(3), 63(1), 67(2), 71(3), 79(4), and 88(1).
2. Cf. Art. 18(2) ("oral" offer must be accepted immediately); Art. 24 (in defining when an offer, acceptance or declaration of assent "reaches" a party, there is a distinction between statements made "orally" and those "delivered").
3. Art. 13 was added at the Diplomatic Conference. O.R. 269, 424, *Docy. Hist.* 490, 645. The discussion emphasized the application of this provision to the modification of agreements by telegram or telex.
4. Ways of meeting this problem are discussed in a thorough study: *The Commercial Use of Electronic Data Interchange—A Report and Model Trading Partner Agreement*, 45 Bus. Law. 1645-1749 (1990). For other recent studies in this field see the Introduction to Part II, Formation of the Contract at [132.1](#), *infra*.

## FOOTNOTES: Introduction to Part II

1. On the interpretation of references to "the contract" in Art. 1 in the setting of Part II of the Convention, see the Commentary to Art. 1, *supra* at [48](#), note 16. As of 1990, the Scandinavian States have ratified the Convention subject to an Article 92 declaration not to be bound by Part II on Formation of the Contract. See [[Table of Contracting States](#)].
  2. See [339.2](#) *infra* and the Prototype Export Transaction in J. Honnold, *Sales & Sales Financing* 310-339 (5th ed. 1984).
  3. [Schlechtriem \(1986\) 48 and references at notes 150-151](#); Eörsi, *Lausanne Colloquium* 43-44, Cf. 1 Schlesinger, *Formation* 1585.
  4. Article 8 is placed in Part I of the Convention and subsequently applies to Part II on Formation as well as to Part III.
  5. In UNCITRAL's 1978 review of the Working Group Draft Convention on Formation an amendment was proposed to articulate the principle stated above. Some objected that in some domestic systems a contract "cannot be formed without the existence of an offer or an acceptance"; others stated that no amendment was needed since the principle "was self-evident". Sponsors then withdrew the proposal "because of the extreme difficulty of formulating an acceptable text" (paras. 103-104). IX YB 38-39, *Docy. Hist.* 372-373. In this writer's view the substance of the proposal had been implicit in Articles 8(3) and 18(3) mentioned above.
- Article 23, *infra*, on the time of completion of the contract, rounds out provisions that address problems that arise from claims that an acceptance is too late (e.g., Art. 18(2)), and does not suggest that a contract cannot exist if it is impossible to determine "the moment" when it was made.

## FOOTNOTES: Chapter on Article 14

1. Art. 14 is the same as Art. 12 of the 1978 Draft Convention. Cf. ULF 4. Legislative history of Arts. 14 and 55; I YB 194, VI YB 73-74, VIII YB 48-49, IX YB 38-39, O.R. 21, 275-277, 292-295; *Docy. Hist.* 32, 151-152, 341-342, 372-373, 411. 496-498, 513-516.

2. The Convention's numerous provisions calling for communications to enable a party to know where the other stands suggest a "general principle" (Art. 7(2), *supra* at [100](#)) that a party may not take advantage of ambiguity when an inquiry could readily remove the doubt. See also the "good faith" provision in Art. 7(1), *supra* at [95](#).

3. I *Schlesinger, Formation* 101-103 (general report); 647-679 reports on the law of U.S.A., Eng., Australia, Can., N.Z., France, Ger., Switz., India, Italy, Poland and Rep. So. Af.). The most famous common law decision is *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256 (C.A.) which gave legal effect to an advertisement offering a specified sum to anyone who caught influenza after using a "smoke ball."

4. I *Schlesinger, Formation* 668 (F.R.G. and Switz.), 678 (So. Af.); *Corbin* 25, 28; Restatement Second of Contracts 26; *Farnsworth, Contracts* 129.

5. W/G 8 paras. 52-54, VIII *Yearbook*, 78; W/G9 paras. 163-173, IX *Yearbook* 73, 74; *UNCITRAL XI Annex I*, paras. 75-78, IX *Yearbook* 37. *Docy. Hist.* 279-280, 305-306, 371.

6. If such a catalogue distribution were held to be "addressed to one or more specific persons," the catalogue may not constitute an offer under the basic "intent to be bound" test of paragraph (1). And even if the catalogue was an "offer," orders for goods listed in the catalogue may not be timely under Art. 18(2), which requires acceptance within a reasonable time, due account being taken of the *circumstances of the transaction....*" See Art. 18, *infra* at [161](#).

7. Weistart, 1973 Duke L. J. 599; *Farnsworth, Contracts* 528-529; (USA) UCC 2-306.

8. See the Prototype Export Transaction, 132.1, note 2, *supra*.

9. The one exception in Article 6 to the principle of freedom of contract involves domestic requirements of form (such as a signed writing) that, under Articles 12 and 96, may be preserved by a reservation obviating the no-formality rule of Article 11.

10. As has been noted ([131](#), *supra*), Article 92 permits a Contracting State to declare that it will not be bound by Part II or Part III. As of the time of writing no State has excluded Part III; the Scandinavian States have excluded Part II.

11. For the full text of the Working Group draft (then draft article 36), the amendment made by UNCITRAL (1977) and the understanding as to its meaning see VIII YB 48-49, *Docy. Hist.* 341-342.

12. For a fuller development see Honnold, *International Sales Law and the Open-Price contract*, II *Barrera-Graf Festschrift* 915. See also *vC-S Kommentar* (1990) Art. 14, pp. 128-136 (Schlechtriem); Art. 55, pp. 519-521 (Hager); Adami, *Open Price Contracts in CISG*, 2 Int. Bus. L. J. 103 (1989) (parallel text English and French); Fortier, *Le prix dans [CISG]*, 117 J. D. I 381 (1990) (French). See also references under Art. 55, *infra*, at [325.3](#), note 5.

---

## FOOTNOTES: Chapter on Article 15

1. Art. 15 is, in substance, the same as Art. 13 of the 1978 Draft Convention. Cf. ULF 5(1).



2. As we shall see in connection with Arts. 16 and 18(2), if the offer had not been irrevocable, Seller could have "revoked" the offer by a communication that reached the Buyer after it received the offer but before acceptance.

## FOOTNOTES: Chapter on Article 16

1. Art. 16 of the Convention is based, with a drafting change in paragraph (1), on Art. 14 of the 1978 Draft Convention. Cf. ULF 5(2) and (3).

2. I *Schlesinger, Formation* 766-767 (Eng.), 768 (Aus., Can., & N.Z.), 747-760 (U.S.A. case law and statutory modification); Corbin 42-44; *Farnsworth, Contracts* 3.17 (free revocability supported by the principle of "mutuality of obligation").

3. I *Schlesinger, Formation* 158-159 (general report); II *id.* 1435-1443 (Eng., Aus., Can. & N.Z.). The most famous cases are *Adams v. Lindsell*, (1818) 1 B. & Ald. 681, 106 E.R. 250 and *Dunlop v. Higgins*, (1848) 1 H.L.C. 381, 9 E.R. 805. See *Corbin* 78-81; *Restatement, Second of Contracts* 63.

4. I *Schlesinger, Formation* 764-765 (Bulg., Hung., Cz., Yugo., and CMEA General Conditions), 769-770 (France), 782 (Ger., Sw., and Austria) 78, 79 (Poland), 862 (Italy); *Ont. L. Com., I Sale II* (Quebec); Schmidt, *The International Contract Law in the Context of Some of its Sources*, 14 *Am. J. Comp. L.* 1, 10 (1965). Cigoj, *International Sales: Formation of Contracts*, 23 *Neth. Int. L. Rev.* 257, 278-281 (1976).

5. Under Art. 11, *supra* at 126, contracts need not be in writing. The Uniform Written Obligation Act, prepared for adoption by states in the U.S.A., enforces promises not to revoke in a signed writing but does not contain the other restrictions found in UCC 2-205.

6. English Law Commission, Working Paper No. 60, *Firm Offers*, paras. 34-38 (1975): a firm offer for a specified period need not be in writing and would be effective for 6 years; the lack of consideration would be irrelevant. *Ont. L. Ref. Com. I Sale* 93-95: express statement that offer will be held open would be effective without a writing or time limit; Law Commission of India, Thirteenth Report (Contract Act) 77-78 (1958) discussed in I *Schlesinger, Formation* 784-786. See also Sutton, *Formation: Unity in International Sales of Goods*, 16 *U.W. Ont. L. Rev.* 113, 134 (1977) (approval of Convention's approach from Australian perspective).

7. Art. 4(2). Art. 7(3) defined the period within which the offeree could accept. II *Records 1964 Conf.* 421-422, 426-427 (report of Special Commission). For caution as to implying irrevocability see Goldstajn, *Formation of the Contract, Unification Symposium 1964* 41, 52. Cf. Lagergren, *id.* 63 (compromise at 1964 Hague Conference).

8. W/G 8 paras. 70-85, VIII *Yearbook* 79-80, 97, *Docy. Hist.* 280-281; W/G 9 paras. 189-196, IX *Yearbook* 75; *Docy. Hist.*, 307; *UNCITRAL XI Annex I* paras. 117-139, IX *Yearbook* 40-41; *Docy. Hist.* 374-375.

9. See report by K. Neumayer on German and Swiss law in I *Schlesinger, Formation* 780; Goldstajn, *The Law of Sales in Yugoslavia*, 14 *E. Eur.* 125, 152. (General Usages: offers without reference to time are binding for period adequate to allow acceptance, but not to exceed 8 days).

10. Sess. No. 8 (Jan. 1977), VIII *YB* 80, paras. 77-85, *Docy. Hist.* 281; Sess. No. 9 (Sept. 1977), IX *YB* 75, paras. 189-196, *Docy. Hist.*, 307.

11. IX *YB* 41, paras. 132-139, *Docy. Hist.*, 375.

12. O.R. 278-280, *Docy. Hist.*, 499-501.

13. See [Schlechtriem \(1986\) 53 note 173](#).

14. See the criticism of (U.S.A.) UCC 2-316(3)(a) in *Honnold, Sales* 81.

15. As we shall see, Art. 18(3) provides that "the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price..." This language refers to acts which relate to the performance of the contract while Art. 16(2)(b) has wider scope. In Example 16B, Builder's use of Supplier's offer in computing Builder's bid was not part of the performance of a contract to buy from Supplier. Bordering on both Art. 16(2)(b) and Art. 18(3) is the beginning of the performance requested by the offeror. See Art. 18, *infra* at 157, 163, 164.

16. I *Schlesinger, Formation* 770, 776 (France; report by P. Bonassies).

17. See Restatement, Second of Contracts 87 and Illustration 6; *Farnsworth, Contracts* 183-186, 3.25 (earlier cases *contra*); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 373, 410 (1937); I *Schlesinger, Formation* 747, 751-760 (report by I. Macneil). This aspect of contract law is not codified in the (U.S.A.) UCC.

18. *Winship*, 17 *Int. Law.* 1, 11 (1983).

19. Kessler and Fine, *Culpa in Contahendo, Bargaining in Good Faith, and Freedom of Contract* A Comparative Study, 77 *Harv. L. Rev.* 407, 420-424 (1964); *Farnsworth, Precontractual Liability and Preliminary Agreements*, 87 *Colum. L. Rev.* 217 (1987); Summers, "Good Faith", 54 *Va. L. Rev.* 195, 220-227 (1968).

20. See Arts. 71-77 and the official headings for the remedial provisions of Part III, Ch. II. Sec. III and Ch. III. Sec. III. But *cf.* Arts. 45 & 61. As to questions of mitigation, see Art. 77, *infra* at 417-419.

21. See *Zweigert & Kötz II* (1987) 39: In French law an offeror has power to withdraw an offer before an agreed period but is liable in damages; Nicholas, *French Law of Contract*, 63-69. Proposals for reform: English Law Commission: Working Paper No. 60, *Firm Offers*, paras. 41-50 (1975) suggests that an offeree must elect between (a) a cause of action for wrongful revocation, and (b) treating the revocation as a nullity. *Cf.* *Ont. L. Ref. Com. I Sales* 95 (would not require election).

22. Filling this gap pursuant to Article 7(2) would be consistent with the policy, underlying Arts. 71 and 72, *infra*, to protect a party threatened with a failure of counter-performance. In this instance, however, Arts. 71 and 72 are not directly applicable since they assume that a contract has been made.

## FOOTNOTES: Chapter on Article 17

1. This Article is the same as Art. 15 of the 1978 Draft Convention. There is no comparable provision in ULF; see note 2, *infra*.

2. In 1964 a proposal that ULF should include a provision like Art. 17 was rejected by the UNIDROIT Commission: "This solution is so evident that it would seem superfluous to state it." II *Records 1964 Conf.* 473, 474.

3. I *Schlesinger, Formation* 127 (general report). Civil law, II *id.* 1013 (various E. Eur. countries), 1018-1020 (France; renunciation of "option" must be unequivocal), 1022-1025 (Austria, Ger. & Sw.), 1035-1036 (Italy; rejection of option contract must be very clear), 1041 (Poland), 1043 (So. Af.). Common law: 1014-1015 (Eng., Aus., Can. & N.Z.), 1029 (India); *Farnsworth, Contracts* 174-175.

4. See MacNeil in II *Schlesinger, Formation* 1005-1008. *Cf.* Restatement, Second of Contracts 37. The UCC does not deal with this question; answers must be developed from relevant common-law principles which, in cases like Example 17A, may include estoppel.

5. The principle that a communication that is *en route* may be nullified by another communication that arrives first is also illustrated in Arts. 15(2) and 22. On "general principles" of the Convention, see Art. 7(2), *supra* at [85](#).

## FOOTNOTES: Chapter on Article 18

1. Art. 18 of the Convention is the same as Art. 16 of the 1978 Draft Convention, except for a drafting change in paragraphs (1) and (2). *Cf.* ULF 2(2), 6 and 8.

2. Sutton, Formation of Contract: Unity in International Sales of Goods, 16 U. W. Ont. L. Rev. 113-121 (1977); Cigoj, International Sales: Formation of Contracts, 23 Neth. Int. L. Rev. 257, 267-268 (1976); Farnsworth, Formation of International Sales Contracts, 110 U. Pa. L. Rev. 305, 324 (1962); Houin, Sale of Goods in French Law, in *Comp. Sales (I.C.L.Q.)* 16, 22; Corbin 72-75; Restatement, Second of Contracts 69. *Cf.* Laufer, Acceptance by Silence: A Critique, 7 Duke Bar Assn. J. 87 (1939).

3. If one of the parties has its place of business in a State that, by a declaration under Article 96, has preserved its domestic rules as to written form (*cf.* Arts. 11 and 12), it would be necessary to consider whether those rules are applicable to the contract and, if so, whether they are satisfied by the written communications set forth in Example 18B. See Art. 12, *supra* at [128](#).

4. See [Esser, Commercial Letters of Confirmation, 18 Ga. J. Int. & Comp. L. 427 \(1988\)](#).

5. An offer by a medium as instantaneous as telex is not "oral", both under the normal understanding of the word and pursuant to Art. 13: "writing" includes telegram and telex." However, under Art. 18(2) "the rapidity of the means of communication employed by the offeror" will bear on what is a "reasonable time" for reply.

6. Domestic law: Farnsworth, *Contracts* 152-155, 3.19; Cigoj, *supra* n.2 at 297; Sutton, *supra* n.2 at 138; Restatement, Second of Contracts 41(1) and (2); Corbin 35-36.

7. Domestic rules dealing with acceptance by an act: Cigoj, *supra* n.2 at 288; Farnsworth, *supra* n.2 at 324; Sutton, *supra* n.2 at 137-139; Schmidt, *supra* n.7 at 15-19; I Schlesinger, *Formation* 141-143 (general report), II *id.* 1203-1296 (individual reports). See ULF 6(2): acceptance may consist of "despatch of the goods or of the price...." ULF appears in Appendix D.

The (U.S.A.) UCC (2-206(1)(b)) states: "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 or by the prompt or current shipment of conforming or nonconforming goods...." This rule on how the offer "shall be construed" provides less leeway for construction of the offer than Art. 18(3) but reaches the same result as the Convention in cases like Example 18D.

8. The importance of communication between the parties is a theme that recurs frequently in the Convention. Examples are given in the discussion of the "general principles" of the Convention in the Commentary to Art. 7, *supra* at [100](#).

9. As was mentioned under Example 18D, *supra* at [163](#), revocation of an offer may be barred under Art. 16(2) (b) by action in reliance on the offer. In any event, sending the goods or the price may constitute the "dispatch" of an acceptance which, under Art. 18(1), cuts off the power of revocation.

10. The importance of the Article 18(2) time limits for acceptance to avoid speculation at the other party's expense has been discussed under Article 16 at [144](#), *supra*.

## FOOTNOTES: Chapter on Article 19

1. Waddams, Research Paper No. II.1, summarized on *Ont. L. Ref. Com.*, I Sale 81 n. 25. This Research Paper reported that as many as 60% of the businesses that responded to a questionnaire had contacts with conflicts between sales and purchase forms. Additional data on the widespread use of such forms in Europe appears in van der Velden, Uniform International Sales Law and the battle of the forms, in *Sauveplanne Festschrift* 233 (study of Dutch practices by F. A. J. Gras). See Symposium, Battle of the Forms, 4 *Canad. Bus. L. J.* 261 (1980); Rawlings, The Battle of the Forms, 42 *Mod. I. Rev.* 715 (1979).

2. A careful review of the legislative history of Article 19 of the Convention appears in Vergne, 33 *Am. J. Comp. L.* 233, 235-238 (1985) (high-lights difference in outlook between East and West).

3. The prevailing rules of domestic law are canvassed in von Mehren, The "Battle of the Forms," 38 *Am. J. Comp. L.* 265 (1990); Cigoj, International Sales: Formation of Contracts, 23 *Neth. Int. L. Rev.* 257, 291-295 (1976). On the binding effect, in German (F. R. G.) law, of silence after receipt of a commercial letter of confirmation, see von Mehren, *supra*, p. 290 n. 77; Esser, *supra* at 1670, n. 4.

4. II *Schlesinger*, formation 969-971 (Eng., Australian, Canadian & New Zealand), 974-976 (France), 978-984 (German, Austrian, Swiss.); Schlechtriem, The Battle of the Forms Under German Law, 23 *Bus. Lawyer* 655 (1968) (case law prior to German Standard Terms Act 1969, discussed at Art. 35, *infra* at 222); Vergne, 33 *Am. J. Comp. L.* 233 (1985); Murray, 8 *J. Law & Comm.* 11 (1988). For comparative study and analysis of 1964 Hague approach see Goldstajn, *Unification Symposium* 1964 52-54, Lagergren, *id.* 67-70; Honnold, *id.* 10-11.

5. It has been suggested that the phrase "are considered" in Article 19(3) indicates that the provision sets up interpretative presumptions or guidelines that may yield to evidence based on the circumstances of the case. *Schlechtriem*, 1986 *Commentary* 55 n. 181; *Secretariat Commentary*, Art. 17 (later 19) No. 7 ("normally to be considered as material"), *Official Records* 24, *Documentary History* 414. The phrases "are considered", "to be considered" and the like appear in Articles 3(1), 9(2), 14(2), 19(3) and 55. This phrase usually refers to a presumed intent of the parties. On the relation between the intent of the parties and the Convention's provisions see Articles 6 and 8.

The phrase "among other things" in Article 19(3) shows that the list is not exclusive so that tribunals must consider whether provisions falling outside the list "alter the terms of the offer materially". This phrase shows that the test is not whether the different term deals with a *subject* that is "material" but whether it materially "alters the terms of the offer".

6. Farnsworth in *B-B Commentary*, 2.2 and 2.8 (Illustration 3) pp. 178, 181; Van der Velden, in *Sauveplanne Festschrift* 233, 237.

7. It might be suggested that when the parties' practices or trade usage call for arbitration an arbitration clause in the reply made no modification of the offer; on this premise the reply closed a contract and the parties are bound to arbitrate even if the offeror promptly objected to the arbitration clause in the reply. This view seems incorrect. The parties were not obliged to continue with trade usage; the offeror's prompt objection to the clause indicated unwillingness to continue with the practice.

8. When R reasonably relies on O's offer, R's reliance interest is protected by barring O's revocation of the offer. Art. 16(1)(b), quoted in note 9, *infra*. See 144, *supra*.

9. Art. 18(1): acceptance may be made by a statement "or other conduct". Art. 16(1): An offer cannot be revoked if it indicates that it is irrevocable or "(b)...the offeree has [reasonably] acted in reliance on the offer." Art. 8(1) 8(2): Interpretation based on "statements made by and other conduct of a party..." Art. 9(1): Parties may be bound by "practices they have established...". Art. 29(2): "...a party may be precluded by his conduct" from asserting a contract provision permitting only written modifications. Thus, the Convention is not subject to Llewellyn's reproach of the "promise for promise" emphasis in classical contract law as an approach that

"binds eyes as ancient China [bound] a lady's little feet". 48 Yale L. J. 1, 32 (1938) quoted in [Kelso, 21 Colum. J. Transn. L. 529, 533 n. 23 \(1983\)](#).

10. Farnsworth in *B-B Commentary* 179-183.

11. One leading seller will not ship until the buyer signs and returns the seller's form. See Murray, 4 Can. Bus. L. J. 290 (1980) (Item III of Panel Discussion). There are, of course, many ways to draw attention to a conflict in terms. See *Kritzer Manual* Ch. 20.

12. See [107](#), [108](#), *supra*.

13. Article 7(1) provides: "In the interpretation of this Convention, regard is to be had to the need to promote...the observance of good faith in international trade."

See Van der Velden in *Sauveplanne Festschrift*, 233, 244 (German doctrine of *Treu and Glauben*), 245 (Dutch new Civil Code rejects "the later reference"), 248.

14. See Van der Velden, *supra*, 241-242, Murray, 39 Vand. L. Rev. 1307, 1369-1371 (1986); Shanker, 4 Can. Bus. L. J. 263, 271 (1980).

15. For issues not explicitly settled see Articles 7(2) and 9, [96](#), [102](#), [112](#), [122](#), *supra*.

## FOOTNOTES: Chapter on Article 20

1. Art. 20 is based on Art. 18 of the 1978 Draft Convention, subject to drafting changes in paragraph (2). Paragraph (1) is similar to ULF 8(2). Paragraph (2) (the effect of holidays) was based on UNCITRAL Arbitration Rules (1976) Art. 2(2), VII *yearbook* 22-27; Cf. Convention on the Limitation Period in the International Sale of Goods (1974) Art. 29 (A/CONF. 63/15), V *Yearbook* 213, 23 Am. J. Comp. L. 356 (1976).

## FOOTNOTES: Chapter on Article 21

1. A late "acceptance" (Example 21A) can be withdrawn until the offeror "dispatches" (Art. 21(1)) his notice that the offer is effective. Withdrawal of a timely acceptance must reach the offeror before or at the same time as the acceptance. Arts. 18(2) and 22. See: Schmidt, *The International Contract Law in the Context of Some of Its Sources*, 14 Am. J. Comp. L. 1, 26-28 (1965); Schlechtriem, *Com.* (1998) 149-156.

2. Courts have strongly resisted attempts by one party to speculate at the expense of another. See the discussion under Arts. 46 and 62, *infra*.

3. Cigoj, *International Sales: Formation of Contracts*, 23 Neth. Int. L. Rev. 257, 302 (1976) quotes somewhat similar provisions from Germany (BGB 149), Switzerland (Code of Obligations 5(3)), the USSR (Civ. Code 67), Czechoslovakia (Int. Comm. Code 111), Hungary (Civ. Code 214) and Yugoslavia (G. U. T. 24).

## FOOTNOTES: Chapter on Article 22

1. This article is the same as Art. 20 of the 1978 Draft Convention and is similar to ULF 10.

## FOOTNOTES: Chapter on Article 23

1. The present article is the same as Art. 21 of the 1978 Draft Convention. There is no comparable provision in ULF.



2. See Schmidt, *The International Contract Law in the Context of Some of Its Sources*, 14 *Am. J. Comp. L.* 1, 29 (1965); Schlechtriem, *Com.* (1998) 159-160.

## FOOTNOTES: Chapter on Article 24

1. This article is substantially the same as Art. 22 of the 1978 Draft and is similar to ULF 12(1): "communicated" means "delivered at the address" of the relevant party.

2. II *Schlesinger, Formation* 1467-1471 (report by W. Lorenz on Austrian, German and Swiss law); Sutton, *The Hague Conventions of 1964 and the Unification of the Law on International Sale of Goods*, 7 *U. Queensland L. J.* 145 at n. 75-76 (1971). For the principle of the German Civil Code (§130) that an acceptance or other declaration is effective when it reaches the addressee's "zone of control," see *Zweigert & Kötz II* (1987) 35; Schmidt, *The International Contract Law in the Context of Some of its Sources*, 14 *Am. L. Comp. L.* 1, 19-23 (1965) (implications of the foregoing *Zugangsprinzip* in various civil law systems).

## FOOTNOTES: Chapter on Article 25

1. This article is based, with drafting changes, on Art. 23. of the 1978 Draft. *Cf.* ULIS 10, quoted *infra*.

2. An early (1956) draft of the Hague (1964) uniform law for international sale provided that the buyer could avoid the contract with respect to goods that did not conform to the contract without regard to the degree of non-conformity (Art. 55). To reduce the harshness of this rule the definition of the seller's basic obligation to supply conforming goods provided (Art. 40) that no "deficiency in quantity" or "absence of any quality...shall be taken into consideration where it is not material to the interests of buyer...". *Records, 1964 Conference*, Vol. II, pp. 13, 15. This lack of "proportionality", in which *no* compensation was provided for minor shortages of quantity or deviations as to quality but a drastic remedy was granted for the slightest deviation from this standard, was abandoned by the 1964 Conference; the approach of the 1964 Convention (ULIS 10, 43) is similar to that of the 1980 Convention.

3. *Graveson, C & G.* 55-57, *Dölle, Kommentar* 49-58 (Huber); Honnold, ULIS: *The Hague Convention of 1964*, 30 *Law & Contemp. Prob.* 326, 344 (1965); Sutton, *The Draft Convention on the International Sale of Goods*, 4 *Austral. Bus. L. Rev.* 269, 285-288 (1976).

4. In UNCITRAL's final (1977) review of the "Sales" provisions, one delegate proposed to limit the time for foreseeability to "the conclusion of the contract". Under another view "it would be fairer to refer to the time at which the breach was committed". The decision was recorded as follows: "The Commission, after deliberation, did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach". UNCITRAL, Report of Tenth (1977) Session, VIII *Yearbook* 31 at 31, para. 90, *Docy. Hist.* 324. See, accord, [Secretariat Commentary, Art. 23](#), ¶5, O.R. 26, *Docy. Hist.* 416. Finally, at the 1980 Diplomatic Conference one delegate (U.K.) proposed a similar amendment. Other delegates spoke in opposition to the proposal and no delegate spoke in support; as a result, the proposal was withdrawn. O.R. 99, *Docy. Hist.* 671 (text of proposal); First Committee deliberations, O.R. 302, *Docy. Hist.* 523.

5. See [Will, in B-B Commentary 221](#), for opposing views. For a conclusion contrary to that suggested above see [Schlechtriem, 1986 Commentary 60](#).

6. VIII *Yearbook* 31, para. 89, *Docy. Hist.* 324. For fuller review of the discussion see [Michida, 27 Am. J. Comp. L. 279, 285 \(1979\)](#) and [Will, B-B Commentary, 216, para. 2.2.1](#). In many legal systems, decisive effect as to burden of proof may be given to the syntax of the sentence. In other systems where syntax is given less weight the same interpretation should be given to this language of Article 25, for the legislative history shows that allocation of burden of proof was the premise for the amendment that produced the final language of the article. Moreover, in these systems the same result can be reached on pragmatic principles of proof-allocation since the party in breach is in a better position to prove what he could have foreseen.

7. At UNCITRAL's 1977 review of the Draft Convention on Sales, there was discussion of whether the definition of fundamental breach (now Art. 25) should be amended to make clear that the definition called for consideration of "all the circumstances, including a reasonable offer to cure." The Commission decided that such an amendment was "unnecessary" and "superfluous." *UNCITRAL X Annex I*, paras. 93-95, VIII *YB* 31-32, *Docy. Hist.* 324-325. [Michida, Cancellation of Contract, \*AJCL UNCITRAL Symposium\* 286-288 \(1979\)](#). See also Art. 41, *infra* at [266](#).

8. Commercial practice and contractual patterns dealing with such problems were examined in Honnold, *Buyer's Right of Rejection, A Study In the Impact of Codification Upon a Commercial Problem*, 97 U. Pa. L. Rev. 457, 468-472 (1949).

## FOOTNOTES: Chapter on Article 26

1. This article is the same as Art. 24 of the 1978 Draft Convention. As is explained more fully *infra*, ULIS had no comparable notice requirement.

2. II *Records, 1964 Conference* 236; Honnold, ULIS: The Hague Convention of 1964, 30 *Law & Contemp. Pr.* 326, 348 (1965).

3. For the studies and discussion on which this decision was based see *Rep. S-G. "Ipso Facto Avoidance in ULIS"*. III *Yearbook* 41-46, *Docy. Hist.* 83-88; W/G/I paras. 92-104, I *Yearbook* 184-185, *Docy. Hist.* 22-23.

4. Hellner, *Ipso Facto Avoidance*, in *Weitnauer Festgabe* 85.

5. General rules on the effects of avoidance are set forth in Articles 81-84, [439-444](#), *infra*. For the situation where rejected goods face rapid deterioration or spoilage, a buyer who has avoided the contract may have the responsibility to take reasonable measures to prevent loss. See Arts. 86-88, [455-457](#), *infra*.

6. Limits on the time for avoidance are set in Articles 49(2) (avoidance by buyer) and 64(2) (avoidance by seller). See [306-308](#), [355-356](#), *infra*. A buyer who fails to give the notice "specifying the nature of the lack of conformity" required by Article 39(1) may "lose the right to rely" on the lack of conformity, and thereby lose the right to avoid the contract for non-conformity of the goods. See [259-261](#), *infra*.

7. See [190](#), *infra*; UNCITRAL, Tenth Session (1977), VIII *Yearbook* 32, para. 98-99, 101, *Docy. Hist.* 325.

8. For unsuccessful attempts to require that the notice be in writing see UNCITRAL, Eighth Session (1977), VIII *Yearbook* 32, para. 102, *Docy. Hist.* 325; [Date-Bah, B-B Commentary 224, para. 3.1](#).

## FOOTNOTES: Chapter on Article 27

1. This article is substantially the same as Art. 25 of the 1978 Draft. ULIS had no general rule on this point. But see Art. 39(3) ("dispatch" rule for notice of non-conformity of goods). The provision that became Art. 27 was added during UNCITRAL's 1977 review of the Draft Convention on Sales. *UNCITRAL X Annex I* paras. 104-114, VIII *Yearbook* 32-33, *Docy. Hist.* 325-326. See also VI *Yearbook* 96 (Report of Secretary-General) paras. 74-75, *Docy. Hist.* 221.

2. See First Committee Deliberations, *O.R.* 303, *Docy. Hist.* 524. Article 24 may be helpful, by analogy, in determining whether a notice has been "received." See [179](#), *supra*.

3. (U.S.A.) UCC-2-607(3)(a) requires the buyer to "notify" the seller of breach or "be barred from any remedy." Under UCC 1-201(26) one "notifies" another "by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." Exceptions from this rule are

made by stating duties that arise on "receipt" of a notification [e.g.](#), [¶2¶616](#). [Schlechtriem, 1986 Commentary 61](#), notes that the "receipt" principle is more widely applicable in German law. But cf. German (F.R.G.) Commercial Code [¶377\(4\)](#).

## FOOTNOTES: Chapter on Article 28

1. For the 1964 background see *Records 1964 Conf.*, Vol. II, 27, 33 (Comm. Rep. on 1956 Draft); Rabel, *The Draft of a Uniform Law (ULIS) in UNIFICATION OF LAW* 57, 63 (1948); Honnold, *Uniform Law for International Sales*, 107 U. Pa. L. Rev. 209, 327-328 (1959).

For the 1980 Convention see WG 2d Sess. (1970), IYB 61-62, *Docy. Hist.* 67; WG 6th Sess. (1975), VIYB 54, *Docy. Hist.* 245; Sec. Comm., O.R. 27, *Docy. Hist.* 417; 1st Cee, O.R. 304, *Docy. Hist.* 525-526 (comment by delegate of Greece that draft article 26, (CISG 28) would be useful in a civil law setting).

2. See F. Maitland, *Equity* 1-10 (1909) reprinted in J. Honnold, *The Life of the Law* 30-37 (1964).

3. Compare UCC2-706 (resale by seller fixing damages) and UCC2-706 (damages fixed by buyer's purchase of substitute goods) with comparable provisions in CISG 75.

For requiring performance in various legal systems see *Treitel, Remedies (Int. Enc.)* ¶9; *Treitel, Remedies (1988)* Ch III, 43-74. See also: *Zweigert & Kötz II* (1987), Ch. 12, part II, p. 163-169. Under German procedure ([¶887 CCP](#)), where an act need not be performed by the defendant personally the court may authorize a third party to perform the act at the expense of the debtor (*vertretbar*); *Zweigert & Kötz, id.*, p. 165: "French law generally admits the issuance of judgments for performance in kind but enforces them in a very grudging manner". But see *id.* 165-169: the *astreinte* (daily monetary penalties).

4. See Art. 7, *supra* at [¶95](#), Art. 28, *infra* at [¶193](#), Art. 46, *infra* at [¶279](#), Art. 77, *infra* at [¶416](#). *Zweigert & Kötz II* (1978) 162-163 (rules of German law controlling such abuses).

5. See [Lando in B-B Commentary 234-238](#). [Farnsworth, Damages and Specific Relief, AJCL UNCITRAL Symposium, 247, 250-251](#), makes a broader argument for limiting specific performance based on the economic efficiency of the parties' freedom to reallocate their resources; R. Posner, *Economic Analysis of Law*, 105, 117 (3d ed. 1986). Contra: [Kastely, The Right to Require Performance in International Sales, 63 Wash. L. Rev. 607, 630-633 \(1988\)](#); Schwartz, *The Case for Specific Performance*, 89 Yale L. J. 271 (1979); Friedmann, *The Efficient Breach Fallacy*, 18 J. Leg. Stud. 1 (1989).

6. Art. 28 is the same as Art. 26 of the 1978 Draft, with a small but significant change: "could" was changed to "would." With this change, Art. 28 corresponds to the 1964 Hague Convention on Sales. See Art. VII(1) of the Convention and Art. 16 of the annexed uniform law (ULIS). Provisions in ULIS 25 and 61(2) that further restricted specific performance do not appear in the 1980 Convention. See Arts. 46 and 62, *infra* at [¶¶279 and 345](#).

7. Rules of private international law have varied as to whether the right to specific performance should be regarded as "substance" or "procedure." Cf. *Restatement, Second of Conflict of Laws* ¶¶130, 131 (1969); *Dicey & Morris* 1175-78 (1980 10th ed.).

8. At the 1980 Conference one representative remarked that the court's "own law" under Article 28 included the rules of private international law. The Conference was not debating this issue; little weight can be given to the fact there was no reply to this comment. See Art. 7, *supra* at [¶91](#).

9. II *Records 1964 Conf.* 11, 18 (Secs. 27 and 72 of the 1956 Draft), 179 (Comments by the Commission that prepared the draft). *Accord* (ULIS): *Zweigert & Drobnig*, 29 *Rabels Z* 146, 165. On the legislative history, *Riese*,

29 *id.* 1, 28♦29. For additional reasons for reference to the domestic law of the forum and not to its choice of law rules see [Kastely, 63 Wash. L. Rev. 607, 637♦638 \(1988\)](#).

10. (U.K.) SGA (1893) 52 on this point was not modified by SGA (1979) 52. *Ont. L. Ref. Com. II Sale* 436♦444. See also *Atiyah* 437, *Benjamin* ♦♦1417♦1421 (modifications in 1979), *Treitel*, *Contract* 785.

11. (U.K.) SGA (1893) 49; *Ont. L. Ref. Com. II Sales* 415♦418. *Cf. Atiyah* 365♦371; *Benjamin* ♦♦1257, 1777, 1901.

12. [Farnsworth, Damages and Specific Relief, 27 Am. J. Comp. L. 247 \(1979\)](#). Contra: *Kastely*, n. 5, *supra*; *Schwartz*, *The Case for Specific Performance*, 89 *Yale L. J.* 271 (1979). *Atiyah*, *Freedom of Contract* 111, 131 refers to the uneconomic effect at early common law of powerful enforcement of future "estates" in land.

13. UCC 2♦709 authorizes price recovery in other limited circumstances. See *White & Summers* ♦♦7♦3♦7♦5.

14. The right to require performance is said to be an axiom of the German legal system. *Sweigert & Kötz II* (1987) 159. The German Civil Code in the very first article of the provisions on obligations (♦241) seems to reflect such an axiom: "The effect of an obligation is that a creditor is entitled to claim performance from the debtor." *Zweigert in Comp. Sales (I.C.L.Q.)* 1.5.

15. *Treitel, Remedies (Int. Enc.)* ♦♦10, 12♦14, 18; *Treitel, Remedies* 51 *et seq.*; Dawson, *Specific Performance in France and Germany*, 57 *Mich. L. Rev.* 495, 523♦525 (France), 530 (Germany) 1959; Von Mehren, *A Comparative View of the Remedies Available to a Party Aggrieved by Non-performance of a Contractual Obligation in Festschrift für Pan J. Zepos*, 434, 444, 450, 457 (Athens: Katsikalis, 1973.); Hellner, *The Draft of a New Swedish Sale of Goods Act*, 22 *Scan. Stud.* 55, 66 (1978) (buyer may not require specific performance that would impose sacrifices which are disproportionate to the buyer's interest in obtaining performance).

16. See *Treitel, Remedies* (1988) Ch. III, 47 *et seq.*

## FOOTNOTES: Chapter on Article 29

1. This article is substantially the same as Art. 27 of the 1978 Draft. The 1964 Hague Conventions had no comparable provisions. The article was initially included in the Formation Draft. For the evolution of the provision, see W/G 8 paras. 36♦47 and Appendix I♦Proposed Art. 3A; VIII *yearbook* 76♦77, 95, *Docy. Hist.* 277♦278, 290; W/G 9 paras. 138♦153 (Art. 3A revised as Art. 13 and later as Art. 18), IX *Yearbook* 72, *Docy. Hist.* 304; *UNCITRAL XI* para. 28 and Annex 1 paras. 187♦194 (summary of deliberations) IX *Yearbook*, 45, *Docy. Hist.* 379; *Com. I* (Art. 27); *SR. 13*, paras 53♦74. O.R. 305♦306, *Docy. Hist.* 526♦527.

2. English Law Revision Commission, Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration) (Cmd. 5449) Recs. 3, 4 and 8; *Ont. L. Ref. Com. I Sale* 96♦102. Civil law systems impose no comparable restriction. *Zweigert & Kötz II* (1987) 71♦82.

3. Domestic rules requiring a writing or other formality may be applicable to the agreement if one of the parties has its place of business in a Contracting State that has made a declaration under Art. 96. See the Commentary to Art. 12, *supra* at ♦129.

4. The Convention's few rules with respect to a "writing" do not require signatures or other formalities. Under Art. 13 "♦writing♦ includes telegram and telex." See Art. 21(2) (letter or other "writing" containing a late acceptance).

5. The requirement of Article 29(2) that restrictions on modification must be contained in a "contract in writing" would *a fortiori* apply to the more elaborate contractual restrictions mentioned in the text. On the effect of a Contracting State's declaration under Art. 96, see note 3, *supra* at [◆201](#), and the Commentary to Art. 12, *supra* at [◆128](#).

6. [Secretariat Commentary Art. 27, para. 9](#), *O.R.* 28, *Docy. Hist.* 418. Comparable provisions in UCC 2-209(4) and (5) are stated in terms of "waiver" the voluntary relinquishment of a known right. See *White & Summers* [◆1◆5](#). Under UCC 2-209(5) a party may "retract the waiver by reasonable notification...that strict performance will be required, unless the retraction would be unjust in view of a material change of position in reliance on the waiver." The second sentence of Article 29(2) of the Convention is less elaborate but seems to reach similar results. *Cf.* the doctrine of promissory estoppel.

[Editor's note: Footnotes 7, 8, and 9 not present in the text]

10. Article 98: "No reservations are permitted except those expressly authorized in this Convention". Article 92 permits a reservation excluding Part II (Formation) or Part III (the substantive law of sales). No reservation permits a State to exclude the rules of Article 16 on the revocability of offers.

## FOOTNOTES: Chapter on Article 30

1. This article is substantially the same as Art. 28 of the 1978 Draft and is similar to ULIS 18.

2. Discussions of the obligations of the seller: [Schlechtriem, Parker Colloq. Ch. 6, 1984](#); Schlechtriem, *Com.* (1998) 217-453; Ghestin, *Les obligations du vendeur selon [CISG]*, 1 I. B. L. J. 5 (1988) (parallel texts, English and French). See also: *Rep. S-G*, "Obligations of the Seller," Annex II, paras, 69-71, IV *Yearbook* 45-46 *Docy. Hist.* 122-123 and the Commentary to Arts. 45 and 61; *infra* at [◆275](#) and [◆344](#).

## FOOTNOTES: Chapter on Article 31

1. Art. 31 is substantially the same as Art. 29 of the 1978 Draft, *O.R.* 8, *Docy. Hist.* 385. *Cf.* ULIS 23. The Convention's rejection of the approach of ULIS 19 is considered *infra* at [◆210](#). See, in general, Schlechtriem, *Com.* (1998) 221-251 (Huber).

2. *Incoterms* (1990) substituted "CPT" for the 1980 term "DCP" and substituted "FCA" for the 1980 term "FRC". These quotations are expected in practice to supersede the older quotations, like C.I.F., C. & F., and F.O.B., which, in some situations, fail to make delivery (and risk) pass on delivery to the carrier.

3. See Honnold, *A Uniform Law for International Sales*, 107 U. Pa. L. Rev. 299, 322-323 (1959).

4. See United Nations Convention on Carriage of Goods by Sea, 1978 (the Hamburg Rules) Art. 4. The United States COGSA implementation of the 1924 Brussels Convention (46 U.S.C. [◆1311](#)) preserves the wider scope of the Harter Act of 1893 (46 U.S.C. [◆190](#)) and thus is closer to the 1978 Hamburg Rules than to the narrow scope of the 1924 Brussels Convention.

5. As has been noted at [◆208](#), the fact that the seller has complied with its contractual obligations does not necessarily mean that risk of loss passes to the buyer. Under Art. 69, when the contract does not involve carriage, risk passes to the buyer only when he "takes over" the goods or "commits a breach of contract by failing to take delivery." This rule becomes important when the contract (e.g.) provides: "Buyer shall remove the goods within thirty days following notification by the seller that the goods are at the buyer's disposal." See the Commentary to Art. 69, *infra* at [◆373](#), *Cf.* (U.S.A.) UCC 2-308(b).

6. See [A. Tunc, Commentary, I. Records, 1964 Conf. 356](#) at [◆371](#) (Col. 2). The use of *délivrance* was designed to avoid difficulties with the civil law concept of "guarantee." *Ibid.*



7. II *Records 1964 Conf.* 236; Honnold, A Uniform Law for International Sales 107 U. Pa. L. Rev. 317-320 (1959) and Honnold, ULIS: The Hague Convention 1964, 30 Law & Contemp. Pr. 326 at 350 (1965). For criticism of ULIS and approval of the UNCITRAL approach see Huber, 43 *Rabels Z* 413, 451 (1979); Tallon in *Rechtsvergleichung* 753, 757-759 (unfortunate) departure from simpler physical (*material*) text of early French law); Lando, *B-B Commentary* 245-246. Similar difficulties resulted from the abstract concept of property in the (U.K.) Sale of Goods Act (1893) and the (U.S.A.) Uniform Sales Act (1906). For similar problems in Continental Law see *Zweigert & Kötz II* (1987), 3-7 (German law: "juristic act"), 8 (French law: "object").

8. *Rep. S-G*, "Delivery in ULIS," III *Yearbook* 31-41, *Docy. Hist.* 73-82; W/G 4 paras. 16-21, IV *Yearbook* 62-63, *Docy. Hist.* 140-141; *Rep. S-G*, "Obligations of the seller" paras. 6-14, IV *Yearbook* 37-38. *Rep. S-G*, "Pending Questions" para. 82, VI *Yearbook* 97, *Docy. Hist.* 114-115, 222.

9. On the artificial nature of the distinction between place and time see the Intro. to Ch. II, Sec. III, *infra* at 274. Cf. *Treitel, Remedies (Int. Enc.)* 75. In a few situations, the place for delivery (set by the contract or, failing guidance from the contract, by Art. 31) will be relevant in measuring damages for breach. See Art. 76(2), *infra* at 409. The Convention's approach is supported in Barrera-Graf, Comparative Study 3(b), *Barrera-Graf Colloquium*.

10. *Accord: Incoterms* (1990) "Delivered ex ship...(named port of destination) (DES)" B2.

11. Where the delivery point is at the water's edge in the buyer's country, as under a sale *Ex Quay*, the seller clearly has responsibility for any export license or tax, but the situation as to import controls and duties is so ambiguous that *Incoterms* provides separately for "Ex Quay" contracts (a) "duty paid...named point" and *Ex Quay* contracts "duties on buyer's account."

12. One way to clarify the issue is for the contract to refer to *Incoterms* and use one of the trade terms defined therein.

13. *Accord: GAFTA* No. 1 14; No. 30 15; No. 119 12; *General Conditions (ECE) Cereals* No. 5B 13. See Article 41, *infra* at 262, which requires that the seller deliver goods that are "free from any right or claim of a third party".

## FOOTNOTES: Chapter on Article 32

1. Art. 32 is the same as Art. 30 of the 1978 Draft except for drafting changes in paragraph (1). Paragraph (1) is based on ULIS 19(3); paragraphs (2) and (3) are based on ULIS 54(1) and (2). See, in general, Schlechtriem, *Com.* (1998) 252-260 (Huber).

2. Cf. *Dölle, Kommentar* (Huber) Art. 19 at 122, p. 184; *Meriens & Reh binder* Art. 19 at 14, p. 150.

3. The statement that the seller "must" give notice is the form of expression used throughout the Convention for expressing a contractual duty. Saying that a party "must" (F. *doit*; Sp. *debera*) do a specified act carries no implication as to the importance of the obligation or the seriousness of failure to perform this duty. The phrase in Article 32(1), "in accordance with the contract or this Convention" also seems to have no special significance, for the seller's duty to identify or notify would not be lightened by his failure to perform some other act "in accordance with" his contractual duties.

4. Art. 32(2) is similar to the rules of domestic law: (U.S.A.) UCC 2-504(a); (U.K.) SGA (1893) 32(2) (first sentence).

5. Other examples of the duty to cooperate by providing needed information are collected in the commentary to Art. 7(2), *supra* at 100.

**FOOTNOTES: Chapter on Article 33**

1. Art. 33 is substantially the same as Art. 31 of the 1978 Draft. Subparagraphs (a), (b) and (c) are based (respectively) on ULIS 20, 21 and 22.
2. A similar concern is reflected in (U.S.A.) UCC 1-102(4): "The presence in certain provisions of this Act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement...."
3. Accord: [Lando in B-B Commentary 261](#); *Incoterms* (1990): the trade terms generally (at A4) authorize the seller to deliver "within the period". The "reasonable time" rule of paragraph (c) is similar to rules of domestic law. See (U.S.A.) UCC 2-309(1); (U.K.) SGA (1893) 29(2). See: Schlechtriem, Com. (1998) 261-268 (Huber).

**FOOTNOTES: Chapter on Article 34**

1. See *Incoterms* (1990) e.g. CFR (formerly C&F), CIF, CPT, CIP *et al.*, description of documents at A8; GAFTA Contract NO. 30 (Grain in Bulk) 13 ("Payment...in exchange for Shipping Documents") 14 (listing of Shipping Documents). (U.S.A.) UCC 2-310(b): "if the seller is authorized to send the goods he may ship them under reservation and may tender the documents of title". Cf. UCC 2-505, 2-507(2); Swedish Sales Act 14:15, 71(2).
2. The first sentence of Art. 34 is the same as Art. 32 of the 1978 Draft, cf. ULIS 50. The second and third sentences were added at the 1980 Diplomatic Conference in the deliberations on draft article 35 that became Art. 37. O.R. 309-340, 426 (Report of Drafting Committee transferring proposal from draft article 35 (Art. 37) to draft article (Art. 34), *Docy. Hist.* 530-531, 647.
3. Rep. S-G, IV YB 39-40, *Docy. Hist.* 116-117; 4th WG, VI YB 64, 70, *Docy. Hist.* 142, 148. See: Schlechtriem, Com. (1998) 269-273 (Huber).
4. At the Diplomatic Conference an amendment to expand the "cure" provisions now in Art. 37 was adopted and referred to the Drafting Committee. S.R. 14 paras. 49-72, O.R. 309-310, 426, *Docy. Hist.* 530-531, 647.

**FOOTNOTES: Chapter on Article 35**

1. Developments of the past century have not advanced beyond (and indeed have only obscured) the insight of L. J. Brett in *Randall v. Newson*, 2 Q.B. 102 (C.A. 1877): "The governing principle...is that the thing offered or delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out." A similar approach to interpretation was suggested by Jeremy Bentham in *A General View of a Complete Code of Laws*, 3 Works of Jeremy Bentham, 157, 191 (Bowring ed. 1843). See also Rebel, *The Nature of the Warranty of Quantity*, 24 Tul. L. Rev. 273 (1950); [Schlechtriem, in Parker Colloq. 6.03 p. 620](#) (approving the above basic principle stated by L. J. Brett, as quoted in the first edition).
2. *Atiyah* 103-153, *Benjamin* 755-853. (U.K.) SGA (1893) 13, 15 (in many cases applies to express contractual provisions).
3. For an illuminating comparison of French, German and common law approaches in relation to CISG see Tallon in *Rechtsvergleichung* 753, 754-757 (French); Nicholas, Fault and Liability, *Freiburg Colloq.* 283 (1987). See also Ghestin, *Les Obligations du Vendeur selon [CISG]*, Int. Bus. L. J. No. 1, 1988, 5, 8-9, 26, Kahn, *La Convention de la Haye*, 17 *Revue Tri. de Dr. Comm.* 689, 712 (1964); *Québec Civ. Code, Rev. n.*, *Sales* 50-55; Durnford, *What is an Apparent Defect In Sale?* 10 McGill L. J. 60, 341 (1964); Tallon, *Erreur sur*

la Substance at Garantie des Vices, *Mélanges Hamel* 435 (Paris: Dalloz, 1961); Rabel, n. 1 *supra* at 271, 283, 286: "utter confusion" in various legal systems; need for a "sound theory." But *cf.* Field, *The Law of Latent Defects in Quebec*, 2 *Can. Bus. L. J.* 209 (1976).

4. Art. 35 closely follows Art. 33 of the 1978 Draft Convention. In paragraph (2)(d), the concluding phrase ("or, where...") was added at the Diplomatic Conference and there were minor drafting changes. *O.R.* 308-309, 315-318, 103-105, *Docy. Hist.* 529-530, 536-539, 675-677. *Cf.* ULIS 33 and 36 and *Rep. S-G*, "Obligations of the Seller" paras. 58-61, *IV Yearbook* 44, *Docy. Hist.* 121.

5. Some sales laws do not articulate this point. E.g., (U.K.) SGA (1983).

6. Uniform Sales Act §12; Williston, *What Constitutes an Express Warranty In the Law of Sales*, 21 *Harv. L. Rev.* 555 (1908); 1 *Williston, Sales* §§194-201. Under UCC 2-313, an "express warranty" may be based on an "affirmation of fact" as well as a "promise" and does not require that the seller use "formal words such as 'warranty' or 'guarantee'" or that the seller "have a specific intention to make a warranty."

7. *Savage v. Blakney* (1970) 119 C.L.R. 435 (H. Ct. of Australia); *Howard Marine v. Ogden* [1978] Q.B. 574. See *Benjamin* §§755-851. *Cf.* New Zealand Contractual Remedies Act 1979.

8. For the evolution of Article 35 see WG3d (1972), III YB 86-87, *Docy. Hist.* 103-104; *Rep. S-G*, IV YB 43-46, *Docy. Hist.* 120-123, WG 4th (1973), VI YB 64-65, *Docy. Hist.* 142-143; UNCITRAL (1977)), VIII YB 36-37, *Docy. Hist.* 329-330; *O.R.* 308, 315-318, 103-105, 207-208, *Docy. Hist.* 529, 536-539, 675-677, 742-743.

Art. 35(2)(a), in referring to the expectations implicit in a "description" of the goods, fortunately avoids the phrase "sale of goods by description," which, in early cases, generated litigation over whether the phrase embraced "sales" of specific goods and goods the buyer has seen. (U.K.) SGA (1893) 13(1); *Benjamin* §§760, 780-781; Feltham, *The Sale by Description of Specific Goods*, (1969) *J. Bus. L.* 16. On the difficulties produced in other legal systems by distinctions based on whether the goods were "specific" see Rabel, n. 1 *supra* at 275-278.

9. A definition of "merchantable quality" was added to the (U.K.) SGA (1893) 62(1A) by the Supply of Goods (Implied Terms) Act 1973. The background for this amendment appears in (English) Law Commission Report No. 24, Scottish Law Commission, Report No. 12, *Exemption Clauses in Contracts*, First Report: Amendments to the Sale of Goods Act 1893, para. 43 (1969). The Ontario Law Reform Commission discussed the concept of "merchantable quality" and proposed a definition based on the U.K. Act. *Ont. L. Ref. Com. I Sales* 210-220. *Cf.* German (F.R.G.) Civil Code 459. On the relevance of fitness for ordinary purpose in the G.D.R. Code of International Commercial Contracts see [Enderlein in Dubrovnik Lectures 157](#).

10. [Bianca in B-B Commentary 274 \(seller's place\)](#); [Schlechtriem in Parker Colloq. §6.03, p. 6-21](#) referred to the country or region in which the buyer intends to use the goods, but did not refer to this issue in his [1986 Commentary](#).

11. The (U.K.) SGA (1893) 14(3), as amended and renumbered by the Supply of Goods (Implied Terms) Act (1973), is similar in substance and structure to Art. 35(2)(b). As to burden of proof, see *Benjamin* §§823-825.

12. The Convention did not lay down a general rule on whether the seller must supply goods that meet with special restrictions or prohibitions in the buyer's country. This question must be decided in each case on the basis of the contract, the practices of the parties and trade usage, Articles 8 and 9, *supra*. See [Bianca in B-B Commentary 282-283](#).

13. *White & Summers* §9-6; *Benjamin* §§838-844.

14. *Com I*; *SR. 15*, paras. 72-89; *O.R. 316-317, Docy. Hist. 537-538*. See (U.S.A.) UCC 2-314(2)(e): To satisfy the implied warranty of merchantable quality the goods must be "adequately contained, packaged and labelled as the agreement may require."

15. When the buyer agrees to purchase goods in conformity with a sample and later objects to a condition that was apparent from the sample, the seller may be able to show that the parties impliedly agreed on the quality exhibited by the sample. *Accord: Bianca in B-B Commentary 2.9.1, p. 279.*

16. Examples of these three forms of expression: (A) "knows" or is "aware" Arts. 43(2), 49(2), 64(2)(a); (B) "could not have been unaware" Arts. 35(3), 40, 42(1), 42(2); (C) knew or "ought to have known" Arts. 38(3), 39(1), 43(1), 49(2)(b)(i), 64(2)(b)(i), 68, 79(4). ULIS 36, which corresponds to Article 35(3), similarly uses the expression "knew or could not have been unaware."

17. *Accord: ULIS 36*. Compare with Art. 35(3); (U.K.) SGA (1893) 14(2)(b) ("defects which that examination ought to reveal"); (U.S.A.) UCC 2-316(3)(b) ("defects which an examination ought in the circumstances to have revealed"). Field, *supra* n.3, examines (212-215) the buyer's obligation under Quebec law to inspect goods when he relies on a "latent" defect, and (224) discusses proposals to lighten that burden.

[Editor's note: Footnotes 18 through 24 not present in the text]

25. Students of English law may recognize a resemblance between this example and *Jones v. Just*, [1868] L.R. 3 Q.B. 197.

26. Tallon, *Erreur sur la substance et garantie des vices dans la vente mobilière*, *Hamel Festschrift* (1961) 435; Hoff, *Error in the Formation of Contracts in Louisiana: A Comparative Analysis*, 53 Tul. L. Rev. 329 (1979) at 351-358 (error in *substantia*); B. Nicholas, *An Introduction to Roman Law* 178 (1962); Lawson, *Error in Substantia*, 62 Law Q. Rev. 79 (1936). This writer does not suggest that these legal systems give only limited relief in Example 35B, which is used for analysis.

[Editor's note: Footnote 27 not present in the text]

28. The (U.K.) SGA does not deal fully with the seller's promises, Contrast (U.S.A.) UCC 2-313. Nevertheless there seems to be doubt as to whether common law rules on "mistake" may supplement the SGA on points where the statutory rules supply an answer. See *Atiyah* 154-159; *Benjamin* 204-205.

29. *E.g.*, Art. 5, *supra* at 71 ("Product liability"); Art. 7 at 99 (gap-filling); Art. 16 at 146 (domestic remedies for revocation); Art. 35 at 230 (domestic rules on warranty disclaimers).

30. *Accord, Schlechtriem, 1986 Commentary 33* (approving the above discussion in the First Edition): Tallon in *Rechtsvergleichung* 753, 755 at n. 6, 759 (confusion in French law between *garantie* and *erreur*; overcome in CISG).

31. *See accord: Heiz*, *Validity of Contracts under CISG and Swiss Contract Law*, 20 Vanderbilt J. Tr. L. 639 (1987) for a brilliant analysis of decisions on mistake under Swiss law in relation to CISG. At 649-651 Heiz discusses the legislative history of the decision by the UNCITRAL Working Group not to include rules on validity and mistake. See WG 9th Sess., IX YB 65-66, *Docy. Hist.* 297-298.

## FOOTNOTES: Chapter on Article 36

1. This article follows Art. 34 of the 1978 Draft, subject to drafting changes in paragraph (2); *O.R.* 105, 312-315, *Docy. Hist.* 533-536, 677. Paragraph (1) carries forward ULIS 35(1) (first sentence). The converse of Art. 36(1) is (perhaps unnecessarily) stated in Chap. IV on Risk of Loss, Art. 66, 360-361, *infra*: the buyer is responsible for the price of the goods although they have been lost or damaged after risk of loss passed to the buyer.

2. See *Rep. S-G*, "Obligations of the Seller" para. 65, IV *Yearbook* 36, 45, *Docy. Hist.* 113, 122. Cf. *Rep. S-G*, "Pending Questions" paras. 94-96, VI *Yearbook* 88, 98-99, *Docy. Hist.* 213, 223-224. On the meaning of the trade terms, *Rep. S-G*, "Pending Questions" paras. 94-96, *Docy. Hist.*, 223-224. For possible exemption of seller from damages (as contrasted with reduction of the price) if the loss or damage of the goods resulted from *force majeure* met by an independent carrier see Art. 79(2) -433, *infra*.

3. Similar to Art. 35(1): Swedish sales Act 44; German (F.R.G.) Civil Code 459. The same rule results by inference from (U.S.A.) UCC 2-509, 2-510 and 2-725(2). Cf. UCC 2-301, 2-312(1)(b).

4. *O.R.* 105 (C.6, proposal of Greece), 312-315 (paras. 30-31), *Docy. Hist.* 677 (text of proposal), 533-536.

## FOOTNOTES: Chapter on Article 37

1. This article is the same as Art. 35 of the 1978 Draft and, in substance, is the same as ULIS 37. See WG III YB 81, S-G, IV YB 46, WG VI YB 65-66, *Docy. Hist.* 98, 123, 143-144; UNCITRAL (1977) VIII YB 38-39, *Docy. Hist.* 331-332; *O.R.*, 33-34, 309-340, 105-106, 159, 208, *Docy. Hist.* 423-424, 530-531, 677-678, 718, 743.

2. See *accord*, [Enderlein, Rights and Obligations of the Seller. Dubrovnik Lectures 133, 164-165](#).

3. Under Art. 52(1) the buyer need not take delivery prior to the contract date. Cf. Art. 86(2). The seller's right to cure pursuant to Art. 37 also restricts avoidance under Art. 72 for anticipatory breach, since Art. 72 provides for avoidance only when "it is clear" that a party will commit a fundamental breach. This restriction would be satisfied by a refusal to cure; on the effect of a seller's failure to respond to a buyer's inquiry as to whether he would cure see Art. 7, *supra* at -85. See also Art. 48, *infra* at -296.

4. *But cf.* [Bianca in B-B Commentary -2.6, p. 293](#).

5. The significance of an offer by the seller to make a price adjustment to compensate for the buyer's damages is discussed under Art. 25, *supra* at -185.

## FOOTNOTES: Chapter on Article 38

1. This article is the same as Art. 36 of the 1978 Draft, except for the addition in paragraph (3) of references to "redirection" of goods in transit. Cf. ULIS 38, discussed *infra* at -250.

2. II *Records 1964 Conf.* 306; Honnold, ULIS: The Hague Convention of 1964, 30 *Law & Contemp. Pr.* 326, 346-347 (1965). *Accord*: [Bianca in B-B Commentary 295](#). The UNCITRAL proceedings: I YB 185-186, *Docy. Hist.* 23-24; *Rep. S-G.*, IV YB 47, *Docy. Hist.* 124.

3. Compare [Schlechtriem, 1986 Commentary 69](#), citing Huber, 43 *Rabels Zeitschrift* 413 at 482 (regretting deletion of ULIS 38(4) with [Bianca, B-B Commentary -2.3, pp. 297-298](#) (approving deletion).

4. This discussion does not address the issue that arises under Art. 39, *infra* at -254: Was the delay of three months in notifying the seller more than a "reasonable time" after Buyer "ought to have discovered" the non-conformity as to quantity (Art. 35(1))? Even if more than a "reasonable time" expired, Art. 44, *infra* at -254, permits the buyer to "reduce the price...or claim damages, except for loss of profit, if he has a reasonable excuse" for failure to give the required notice. The buyer's duty to examine imposed by Art. 38 must, of course, be sharply distinguished from the buyer's privilege to examine the goods before it pays (Art. 58).

5. For the legislative history see: WG: I YB 185-186, 197; S-G IV YB 47; WG VI YB 66, 76; S-G VI YB 99, 112-113; WG VI 55; *Docy. Hist.* 23-24, 35, 124, 144, 154, 224, 237-238, 246. UNCITRAL; VIII YB



39♦40, *Docy. Hist.* 332♦333; *S-G Commy.* O.R. 34, *Docy. Hist.* 424 (risk of loss irrelevant) *DIPL. CONF.: 1st Comm.* O.R. 320, 427, 106♦107, *Docy. Hist.* 541, 648, 678♦679; *Plenary*, O.R. 208, *Docy. Hist.* 743.

## FOOTNOTES: Chapter on Articles 39, 40, 44

1. Arts. 39 and 40 of the Convention are the same as Arts. 37 and 38 of the 1978 Draft and are similar to ULIS 39 and 40. Art. 44 was added during the 1980 Diplomatic Conference. The legislative history of Article 39 is extensive and deserves noting: WG: 1 YB 181, 202, *Docy. Hist.* 19, 40; S-G: 1 YB 195, *Docy. Hist.* 33; WG: III YB 81, 87, *Docy. Hist.* 98, 104; S-G IV YB 47♦49, *Docy. Hist.* 124♦126; WG: V1 YB 66♦67, 76, V YB 54, *Docy. Hist.* 144♦145, 154, 200; S-G: VI YB 99♦101, *Docy. Hist.* 224♦226; WG: VI YB 55, *Docy. Hist.* 246. *UNCITRAL* : VIII YB 25♦26, 40; *Docy. Hist.* 318♦319, 333. *DIPL. CONF. : O.R.* 77, 34♦35 (Secretariat Comm♦y), 320♦324, 427, 107♦108, 159, 208; *Docy. Hist.* 398, 424♦425, 541♦545, 648, 679♦680, 718, 743.

Article 40 did not attract significant discussion.

Article 44 emerged only at the Diplomatic Conference: *O.R.* 108, 323, 427, 159, 170, 208, *Docy. Hist.* 680, 544, 648, 718, 728, 743.

2. The notice requirements of Arts. 39, 40 and 44 have special significance when the buyer retains or resells the goods. If the buyer rejects the goods ("avoids the contract"), the special rules applicable to avoidance require that avoidance (and notice) occur within a "reasonable time" (Arts. 26 & 49(2)).

Some of the domestic rules requiring notice of defects were mentioned under Art. 38, *supra* at ♦249; others will be noted in connection with specific aspects of the present group of three articles. As we shall see, Arts. 39, 40 and 44 are an amalgam and do not reproduce the provisions of any single legal system.

3. Problems of prolonged delay in notification can seldom arise with respect to defects in documents, for when the buyer receives the goods from the carrier the documents will usually become irrelevant. When the buyer rejects the seller's tender because of defects in documents the rules on "avoidance" (Arts. 26, 49(2)) require the buyer to notify the seller within a "reasonable time." See n. 2, *supra*.

4. Analysis of factors bearing on the need for speedy notice under comparable domestic rules may be useful in applying the Convention. See *White & Summers* ♦11♦10.

5. Proposals at the Diplomatic Conference to make the period start on "delivery" were defeated. *Com. I O.R.* 349 paras. 54♦65. *O.R.* 107♦108, *Docy. Hist.* 570, 679♦680. On the ambiguities of the concept of "delivery" see Art. 31, *supra* at ♦210.

6. See the Secretariat Commentary on the Limitation Convention (A/CONF. 63/17), Art. 10, paras. 3♦5, p. 27, X YB 145, 156.

7. UCC 2-607(3): the buyer is "barred from any remedy," quoted under Art. 38, *supra* at ♦253. Cf. the domestic rules cited in n. 5, *supra*.

8. The phrase "could not have been unaware" is discussed under Art. 35, *supra* at ♦229. The notice required by Art. 43(1) (right or claim of a third party) is not applicable when the seller *knew* of the fact in question. See Art. 43(2), *infra* at ♦271. When the seller *knew* of a non-conformity in the goods, domestic rules governing fraud may be applicable. See the rules of Switzerland, Germany, and Sweden, cited in n. 5, *supra*.

9. The move for a compromise was led by Sweden and Finland. These two were joined by Ghana, Kenya, Nigeria, and Pakistan in developing a joint compromise proposal. This was drafted as a third paragraph of Art. 39, but became a separate article (Art. 44) so that it could also apply to the notice requirements in Art. 43(1). *O.R.* 108, 323, *Docy. Hist.* 680, 544; see also ♦254, n. 1, *supra*. As has been noted (♦154, *supra*) "excuse"

under Art. 44 also applies to Article 43, *infra*. See Date-Bah, Problems of Developing Countries, in *Potsdam Colloq.* 39 *et. seq.*, and Date-Bah in 11 Rev. Ghanaian Law 50 (1979).

10. Courts in the United States have given consideration to the problems of the buyer in question in applying a notice provision (UCC 2-607(3)(a)) similar to Article 39(1), even in the absence of an "excuse" provision like Article 44. *White & Summers* ¶11¶10, notes 2 & 10.

11. Barring the buyer from avoiding the contract when he fails to give notice within a "reasonable time" is important to prevent the buyer from speculating *e.g.*, by invoking the breach and avoiding the contract after a drop in the market. *SR.* 16 para. 57. *O.R.* 322, *Docy. Hist.* 543.

12. [\*Schlechtriem, 1986 Commentary\* 71 and n. 271.](#)

13. Under the many sales laws that follow the (U.K.) Sale of Goods Act a failure to give timely notice may bar the buyer from rejecting the goods but does not foreclose a claim for damages. The USA Uniform Sales Act (1906), however, deviated from the UK model by inserting a provision (¶49) that was similar to CISG 39(1); this rule was preserved in UCC 2-607(3)(a). The Ontario Law Reform Commission, in its three-volume study recommending a revised Uniform Sales Act based in large measures on the UCC, recommended that UCC 2-607(3)(a) should be rejected. *Ont. L. Ref. Com. Sales*, Vol. II p. 481. See the Uniform Sale of Goods Act adopted by the Uniform Law Conference of Canada, Report No. 38, Inst. of L. Res. & Ref., Edmonton (1982) ¶8.2, pp. 294¶295. For an intensive study of "cut-off" rules in their historical and comparative context see [J. Reitz, 36 Am. J. Comp. L. 437 \(1988\) \(Part I: CISG\), 37 id. 247 \(1989\) \(Part II\).](#)

14. Contract clauses containing unreasonably short notice periods may be held invalid under domestic law. See Art. 4(a), ¶64 *supra*.

15. United Nations Conference on Prescription (Limitation) in the International Sale of Goods, Official Records (U.N. Doc. A/CONF. 63/16; UN Pubn. E. 74.V.8). See Smit, Convention on the Limitation Period: UNCITRAL's First Born, 23 Am. J. Comp. L. 337 (1975) (text of the Convention at 356); Knapp, 19 J. World Tr. L. 343 (1985); Sono, 35 La. L. Rev. 1127 (1975); Hill, 25 Texas Int. L. J. 1 (1990). Landfermann, 39 *Rabels Z* 253 (1975), Giardina, 1975 *Riv. Dir. Int. Pr. & Proc.* 465; Secretariat Commentary on the 1974 Convention, UNCITRAL Yearbook Vol. 10 pp. 145¶173.

16. The ten initial adoptions were by Argentina, Czechoslovakia\*, Dominican Republic, Egypt, Ghana, Hungary, Mexico, Norway, Yugoslavia and Zambia. Additional adoption include: Belarus, Bosnia & Herzegovina, Cuba, Czech Republic\*, Guinea, Moldova, Poland, Romania, Slovakia, Slovenia, Uganda, Ukraine, USA, Uruguay.

## FOOTNOTES: Chapter on Article 41

1. For work toward unification on the effect of the purchase on third-party claims see Explanatory Report on Draft Uniform Law on the Protection of the Bona Fide Purchaser of Corporeal Moveables (UNIDROIT, 1968) and for more recent developments see UNIDROIT, Uniform Law Review 1982, Vol. 1, p. 7 (reinstating program) and the more recent work towards international protection of cultural property. For unification of conflicts rules see Convention on the Law Applicable to the Transfer of Title in International Sale of Goods, the Hague, 15 April 1958. *I Register*, 13. The Convention has not gone into effect. On reexamination in the U.K., see Law Reform Committee, Twelfth Report, Transfer of Title to Chattels (1966 Cmd. 2958).

2. This article is substantially the same as Art. 39(1) of the 1978 Draft. *Cf. ULIS* 52, which was sharply criticized by the WG, III *YB* 90, *Docy. Hist.* 107, and by the S-G, IV *YB* 50¶51, *Docy. Hist.* 127¶128. Language like the first sentence of Art. 41 was approved at VI *YB* 72¶73, *Docy. Hist.* 150¶151. *UNCITRAL*: VIII *YB* 4-¶41, *Docy. Hist.* 333¶334. *DIPL. CONF.*: *O.R.* 35¶36, 324¶328, 109¶110, 159, 208, *Docy. Hist.* 425¶426, 545¶549, 681¶683, 718, 743.

[Editor's note: Footnote 3 not present in the text]

4. Similar problems would arise if Claimant asserted that it held a property interest in the goods to secure a \$10,000 debt that Seller owed to Claimant.

[Editor's note: Footnote 5 not present in the text]

6. See [Secretariat Commentary Art. 39, para. 3](#), O.R. 36, *Docy. Hist.* 426, but cf. III YB 90, *Docy. Hist.* 107, para. 135 (claim meant *valid* claim); *contra* VI YB 73, *Docy. Hist.* 151. The reference in Article 41 to "right or claim" is rendered, in the French version, as "*droit ou prétention*" and, in the Spanish, as "*derechos o pretensiones*." The requirement that the seller "*deliver goods which are free...*" could be read to exclude claims that are asserted subsequent to delivery; on the other hand, this language could be understood to refer to claims that relate to ownership as of the time of delivery.

7. The notice requirement of Art. 39(1), *supra* at [254](#), is confined to "lack of conformity of the goods."

8. Under Art. 45(1), *infra* at [275](#), the buyer may "claim damages as provided in Articles 74-77" when "the seller fails to perform any of his obligations under the contract or this Convention." Art. 74, *infra* at [403](#), drafted in general terms, would include "loss" resulting from a breach under Art. 41. See *Dölle, Kommentar*, Art. 52 at 17-18, p. 334.

9. Art. 37, *supra* at [244](#), empowers the seller, up to the date for delivery, to cure specified problems; the problems so specified, if read narrowly, might not extend to the removal of third-party claims. However, [245.1](#) *supra*, suggests that cure under Art. 37 should be extended by analogy to third-party claims. In any event, Art. 48(1) states that the seller may "even after the date for delivery, remedy at his own expense *any failure to perform his obligations ...*" subject to restrictions that need not apply to third-party claims. In any event, as was suggested under Art. 25, *supra* at [184](#), whether a breach is fundamental must be considered in the light of all the relevant facts, including the seller's offer promptly and effectively to solve the problem. (Under ULIS 52(1) a buyer could not avoid the contract pending the seller's response to a request to free the goods from the claim or to supply substitute goods.)

10. Cf. Civil Code of France Art. 1599: "The sale of the thing of another is void; it may give rise to damages when the buyer did not know that the thing belonged to another".

11. This question, of course, could arise only if, in the absence of the Convention, the above rule of domestic law would be applicable pursuant to rules of private international law.

12. Supporting this conclusion see [Schlechtriem, 1986 Commentary 73 at n. 280](#).

13. The above principles apply to sales of goods that the seller owns but which are subject to an outstanding pledge or other security interest (a problem also governed by Article 41) and to sales subject to Article 42, [267-270](#) *infra*, in which the seller transfers title to goods that are subject to an outstanding patent, trademark or copyright.

---

## FOOTNOTES: Chapter on Article 42

1. The treaty may provide for (and require) simplified registration in additional states (e.g., State B). See, e.g. International Convention for the Protection of Industrial Property, Paris 1883, and Lisbon Revision of 1958, 13 U.S.T. & D.I.A. T.I.A.S. No. 4931. For a broad definition of "intellectual property" see The Convention Establishing the World Intellectual Property Organization (1967), Art. 2(viii). See also R. Gadbow & T. Richards, *Intellectual Property Rights* (1988); Ladas, *Patents Trademarks and Related Rights, National and International Protection* (1975).

2. [Schlechtriem, 1986 Commentary 73](#) (both ULIS and German Civil Code); (U.K.) SGA (1893) 12; an implied condition of a "right to sell the goods" was violated when sale was enjoined based on a trademark violation resolved by removal of the labels. See *Niblett v. Confectioners' Materials*, [1921] 3 K.B. 387, *Benjamin*

❖❖236, 252. UCC 2❖312(3) gives protection against "the rightful claim of any third person by way of infringement or the like". See *White & Summers*, ❖9❖12; Robertson, 44 Mich. L. Rev. 934 (1946).

3. *W/G* 7, Annex I (Art. 7(2)), VII *Yearbook* 90.

4. *Rep. S-G*, "Analysis of Comments by Governments," Art. 7 paras. 4❖7, VIII *Yearbook* 147. These comments are reproduced in VIII *Yearbook* 110 (Australia), 115 (Finland), 116 (F.R.G.), 120 (Norway), 130 (U.S.S.R.).

5. *UNCITRAL X* paras. 210❖229, VII *Yearbook* 40❖41, *Docy. Hist.* 333❖334. See also the Summary Records of this session of UNCITRAL, A/CN.9(X)/C.1 *SR. II* paras. 32❖33 (appointment of working group) and *SR. 29, 30* and 32.

6. Art. 42 is substantially the same as paragraphs (1) and (2) of Art. 40 of the 1978 Draft. The substance of paragraph (3) of the 1978 Draft, dealing with notice to the seller, became Art. 43(1), *infra*. For action at the Diplomatic Conference see *O.R.* 9, 36❖37, 324❖328, 427, 109❖111, 159, 208; *Docy. Hist.* 386, 426❖427, 398❖399, 545❖549, 648, 681❖683, 718, 743.

7. This restriction on the seller❖s responsibility is criticized in Huber, 43 *Rabels Z* 413, 503 (1979). Under (U.S.A.) UCC 2❖312(3) a merchant seller "warrants that the goods shall be delivered free of any rightful claim of any third person by way of infringement or the like": whether the seller knows of the claim is irrelevant.

8. On the other hand, a duty of inquiry under Article 42 is suggested in the Secretariat Commentary (draft Art. 40 at para 6): The seller is responsible for knowledge "of a patent application or grant which has been published in the country in question". *O.R.* 37, *Docy. Hist.* 427. Perhaps this conclusion is based on a rule of "constructive knowledge" imposed by the statute or treaty. Compare [Schlechtriem, 1986 Commentary 74](#): seller "must inform himself", but citing Huber for a much lighter standard. See also *O.R.* 78 (draft Art. 40 at ❖5), *Docy. Hist.* 399.

9. These rules, called "vouching in the warrantor" were developed at an early day to cope with jurisdictional problems arising from the liability of prior parties to a negotiable (money) instrument, such as the liability of the maker of a note to an endorser who was sued by a holder of the instrument. See *White & Summers* ❖9❖12 at note 12, citing S. Williston, *Contracts* ❖980 (ed. 1964).

## FOOTNOTES: Chapter on Article 43

1. Paragraph (1) of this article is based on Arts. 39(2) and 40(3) of the 1978 Draft Convention. *Cf.* ULIS 52(1), summarized under Art. 41, *supra* at ❖266, n. 9.

## FOOTNOTES: Introduction to Section III

1. Honnold, ULIS: The Hague Convention of 1964, 30 *Law & Contemp. Pr.* 326 at 342❖343 (1965). Specific instances of the fragmentation and duplication of ULIS❖s provisions dealing with remedies of ULIS appear in the comments on Arts. 46 and 47, *infra* at ❖❖279❖291. On the fragmentation of remedies in German law see *Zweigert & Kötz II* (1987) 179❖186. Unification of remedies was recommended in Rabel, *A Specimen of Comparative Law: The Main Remedies for the Seller❖s Breach of Warranty*, 22 *Rev. Jur. Univ. P.R.* 167, 191 (1953).

2. *Rep. S-G* "Obligation of the Seller" paras. 27 *et seq.*, 162❖177, IV *Yearbook* 40❖60, *Docy. Hist.* 117❖137; *W/G* 4 paras. 79❖149, IV *Yearbook* 67❖73, *Docy. Hist.* 145❖152; *Rep. S-G* "Pending Questions with respect to the Revised ULIS," paras. 83❖85, VI *Yearbook* 97, *Docy. Hist.* 222. On the increased clarity resulting from UNCITRAL❖s revision of the system of remedies see Huber, 43 *Rabels Z* 413, 518 (1979).



## FOOTNOTES: Chapter on Article 45

1. This article is the same as Art. 41 of the 1978 Draft. The corresponding provisions of ULIS are scattered among Arts. 24, 41, 51, 52 and 55; see the Introduction of Section III, *supra* at ¶272. See: Schlechtriem, Com. (1998) 356-374 (Huber).
2. Rabel, A Specimen of Comparative Law: The Main Remedies for the Seller's Breach of Warranty, 22 *Revista Jur. Univ. of P.R.* 167, 180-188 (1953): The confusions and exceptions inherent in the "fault" principle prevented its use in unification since "straight-lined rules are necessary to a uniform law"; See also 1952 writing by Rabel (in German) cited by [Will in B-B Commentary 330](#); Zweigert, Aspects of the German Law of Sale, in *Comp. Sales (I.C.L.Q.)* 1, 3-4 (damage liability without fault, although inconsistent with German law, is more appropriate for international trade); Houin, Sale of Goods in French Law, id. 16, 26.
3. For developments in English law see Art. 81, *infra* at n. 2. The choice imposed by the (U.S.A.) Uniform Sales Act (1906) ¶69 was overturned by UCC 2-711(1). The conflicting interests and commercial practices are discussed in Honnold, Buyer's Right of Rejection, A Study in the Impact of Codification Upon a Commercial Problem, 97 *U. Pa. L. Rev.* 457 (1947). For conflicts among European legal systems see Will, *supra* note 2 at 331.
4. This general rule preserving the right to damages on avoidance is reinforced by the rules on damage-measurement in Arts. 75 and 76. The seller's right to damages is protected by Art. 61(2), which parallels Art. 45(2). On the other hand, the right to compel performance (Arts. 46, 62) and to avoid the contract (Arts. 49, 64) may be lost by action that is inconsistent with these special remedies. See Arts. 46(1) and 62, *infra* (specific performance) and Arts. 48(2), 49(2), 63(2) and 64(2), *infra* (avoidance).
5. On French rules allowing a *délai de grâce* see *Treitel, Remedies (Int. Enc.)* ¶¶147-148; *Treitel, Remedies (1988)* 323, 331-332 (other legal systems); *Zweigert & Kötz II* (1987) 187. For rejection of this procedure even in legal systems that are influenced by French law see Will, *supra* note 2 at 332.

## FOOTNOTES: Chapter on Article 46

1. Paragraphs (1) and (2) of Art. 46 are the same as Art. 42 of the 1978 Draft. Paragraph (3) was added at the Diplomatic Conference. ULIS gave the buyer broad grounds to require performance by the seller in Arts. 24(1) (a) (date and place of delivery), 26(1) and 27(1) (date of delivery); 30(1) and 31 (place for delivery); 41(1)(a) (non-conformity of goods); 42 (remediating defects, delivering goods or missing parts); 55(2) (other obligations). However, Art. 25 of ULIS barred specific performance by the buyer when "it is a conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates" and Art. 61(2) similarly restricted the seller's recovery of the price. In addition, ULIS 16 and Art. VII(1) of the 1964 Convention (like Art. 28 of the 1980 Convention) deferred to rules of the *forum* that limited the remedy of specific performance.
2. Dawson, Specific Performance in France and Germany, 57 *Mich. L. Rev.* 495 (1959); *Treitel, Remedies (Int. Enc.)* ¶9; *Treitel, Remedies (1988)* Ch. III; *Benjamin* ¶¶1415-1421; [Farnsworth, Damages and Specific Relief, AJCL UNCITRAL Symposium 247](#).
3. The above examples only suggest judicial responses in jurisdictions with which the writer is familiar. See also: D. Dobbs, *Remedies* ¶12.18, pp. 884-886 (1973); *White & Summers* ¶6-6; *Farnsworth, Contracts* 827-831; *Benjamin* ¶¶1417-1421. As was noted *supra* at ¶270.1, on requiring the seller to take steps to remove or defend third-party claims to the goods, the inadequacy of damages could be expected to invoke specific relief in a common law jurisdiction. There are fewer situations in which a common law court would find that coercing a buyer to accept and pay for the goods would be justified by the inadequacy of a money judgment. See Art. 62, ¶¶345-349 *infra*.



4. "Fundamental breach" is discussed at Art. 25, *supra* at ¶181. The reasons for restricting paragraph (2) to fundamental breach were brought out at the Diplomatic Conference in resisting proposals to eliminate this restriction. *O.R.* 337, *Docy. Hist.* 558.
5. *O.R.* 332-333, *Docy. Hist.* 553-554.
6. Even civil law systems that strongly support specific performance do not permit this remedy to be abused by excessive delay. See *Treitel, Remedies (Int. Enc.)* ¶150, *Treitel, Remedies (1988)* 49.
7. Since Article 46(2) and (3) would require a seller to take action to redress a breach of the seller's obligation to deliver conforming goods, these remedies fall within Article 28 as remedies "to require performance of any obligation of the other party...". *Accord: Kastely, Right to Require Performance, 63 Wash. L. Rev.* 607, 635-636 (1988).
8. See Kastley, n. 7 *supra*, 635-636: The language of Article 28 that "a court is *not bound* " to give specific relief indicates that courts "have discretion to vary from domestic law in order to give effect to the international character of the contract and the need for uniformity...".
9. The United States Bankruptcy Reform Act of 1978, 11 U.S.C. §365 empowers the trustee in bankruptcy to "reject any executory contract." The defendant's inability to satisfy a judgment for damages is a basis for enjoining his commission of a tort but not for specific enforcement of a contract when the plaintiff would gain an unfair advantage over the other creditors. See Walsh, *Equity* 318-321 (1930); Restatement, Second of Contracts §360 Comment d, §365 Comment b.

## FOOTNOTES: Chapter on Article 47

1. Art. 47 is the same as Art. 43 of the 1978 Draft Convention. *Cf.* ULIS 27(2), 31(2), 44(2), 45, 51.
2. The Art. 47 notice followed by avoidance under Art. 49(1)(b) can be used with respect to a failure to deliver only a part of the goods. See Art. 51, *infra* at ¶314. (Under Art. 51(2) avoidance of the *entire* contract based on delivery of only a *part* may only be based on "fundamental breach.")
3. WG: VI YB 69-71, 77, *Docy. Hist.* 147-148, 155; UNCITRAL: VIII YB 46, *Docy. Hist.* 339; DIP. CONF.: O.R. 9-10, 78-79 41 (para. 8), 354-56, 427, 116-17, 160; *Docy. Hist.* 386-87, 399-340, 431 (para. 8), 575-77, 648, 688-89, 719. This decision rejected the contrary approach embodied in ULIS 44(2). Some domestic legal systems have developed the concept that the delivery of goods basically different from those required under the contract was a delivery of a "something else" *aliud* and hence equivalent to complete non-delivery. This concept has proved difficult to apply. Fortunately, delivery of totally different goods is a delivery of non-conforming goods (Art. 35) and, of course, is a fundamental breach empowering the buyer to avoid the contract under Art. 49(1)(a), ¶304, *infra*. See also ¶256.1, *supra* (rejection of *aliud* concept).
4. *Quebec Civ. Code Rev'n. Obligations*: A notice putting a debtor "in default" need not indicate "the right [the creditor] intends to exercise" (Art. 247, pp. 320-321), but if the creditor "wishes to avail himself of *resolution* " he "must *so advise* his debtor." See also German (F.R.G.) Civil Code 326, quoted *infra* at ¶290.
5. *Secretariat Commentary Art. 43, para 7*, O.R. 39, *Docy. Hist.* 429; VIII YB 44, *Docy. Hist.* 337.
6. For analysis of factors bearing on the reasonableness of the time see *Dölle, Kommentar* (Huber), Art. 26 at 34, p. 235. On respect for decisions of the aggrieved party *Cf. Farnsworth, Contracts* ¶12.12, p. 867.
7. (U.K.) SGA (1893) 10 (1). For the case law see *Benjamin* ¶588; *Atiyah* 88. The (U.S.A.) UCC is discussed under Art. 49, *infra* at ¶301.

8. German (F.R.G.) Civil Code 326. *Treitel, Remedies (Int. Enc.)* ¶¶149-151, on which the present discussions relies, helpfully discusses the above provision and similar provisions in other legal systems. See also: *Treitel, Remedies (1988)* Ch. IX, pp. 318-410; *Zweigert & Kötz (1987)* 187-188; *Treitel, Remedies (1988)* 327-334, 338-339 (*Nachfrist* notice under CISG). The (U.S.A.) UCC does not explicitly establish an additional time notice comparable to *Nachfrist*, but the official Comments to UCC 2-309 commend the use of such notices to add certainty to the relationship between the parties. (Comments 3 and 5.)

## FOOTNOTES: Chapter on Article 48

1. Art. 48 was based on Art. 44 of the 1978 Draft. Paragraph (1) was redrafted at the Diplomatic Conference by deleting an opening phrase, "Unless the buyer has declared the contract avoided..." and by deleting (after "obligations") the phrase, "if he can do so without such delays as will amount to a fundamental breach of contract." ULIS 44(1) contains a similar provision permitting cure "after the date fixed for the delivery of the goods."

[Editor's note: Footnotes 2, 3 and 4 not present in the text]

5. The initial proposals: *Com. I* Art. 44, paras. 3(i) & (iii); the group proposal, *id.* para. 6, Alt. II (para. (1)). Discussion and action: *SR* 20 paras. 37-76; *SR*. 22 paras. 5-21 *O.R.* 114-115, 341-343, 351, *Docy. Hist.* 686-687, 562-564, 572. See also *Seciat. Commy. O.R.* 41-42, *Docy. Hist.* 431-432 (paras. 6, 17).

6. Avoidance under Art. 49(1) is applicable to a wide range of circumstances other than cure, whereas the cure provisions of Art. 48(1) could be frustrated by an unqualified application of Art. 49(1). In such situations, a general provision yields to the specific. The same result follows from the conclusion that an offer to cure prevents the breach from being "fundamental." See Art. 25, *supra* at ¶181. See the discussions in UNCITRAL (1977), VIII YB 31 para. 94, *Docy. Hist.* 324. Also supporting the view that the right to cure limits avoidance: Huber, 43 *Rabels Z* 413, 489-491; *Mertens & Rehbinder* Art. 37 at 2, p. 18. See also GDR Int. Comm. Contracts Act. 1976, ¶281, Enderlein, 3 *Dr. et Pr. Comm. Int.* 123, 136 (1977). Cf. [Schlechtriem, 1986 Commentary 78](#). But see [Will, B-B Commentary 348](#): The cross-reference to Art. 49 in Art. 48(1) is "enigmatic" and leaves the relationship to avoidance "open to interpretation".

7. At the Diplomatic Conference the brief discussion of paragraphs (2)-(4) indicated that these provisions could have wider scope than cure under paragraph (1). Thus, a proposal to make a separate article of paras. (2)-(4) was considered merely a matter of drafting and was referred to Drafting Committee. *SR*. 22, paras. 17, 43. *O.R.* 352, 352, *Docy. Hist.* 573, 574.

## FOOTNOTES: Chapter on Article 49

1. An important contribution to this development was made by Lord Mansfield in *Kingston v. Preston*, 99 Eng. Rep 437 (K.B. 1773). See 8 Holdsworth, *History of English Law* 70-88 (2d ed. 1973); Corbin, *Conditions in the Law of Contract*, 28 *Yale L.J.* 739 (1919), reprinted in *Selected Essays in the Law of Contracts* 871 (1939); Patterson, *Constructive Conditions in Contracts*, 42 *Colum. L. Rev.* 903 (1942).

2. *Ont. L. Ref. Com. II Sales* 444-461. This report notes that a similar recommendation was made by Law Reform Commission, New South Wales, Working Paper on Sales of Goods (1975) para. 13.17 Cf. (U.K.) SGA (1979) ¶11(3) (Whether a stipulation is a "condition" depends "on the construction of the contract"); ¶11(4) (modified rule on effect of acceptance; reference to passage of property deleted); ¶13 ("by description"); ¶30(1) & (2) (deviations as to quantity).

3. Honnold, *Buyer's Right of Rejection—A Study in the Impact of Codification on a Commercial Problem*, 97 *U. Pa. L. Rev.* 457 (1949). See also: Priest, *Breach and Remedy for the Tender of Non-conforming Goods under the UCC: An Economic Approach*, 91 *Harv. L. Rev.* 960 (1978) (includes economic analysis of UCC decisions).

4. The Hansa Nord [1976] Q.B. 44 (applied general contract principles on discharge for substantial breach). *Benjamin* 745, 747, 872, 878, 1724, 1733.
5. See Rabel, *The Hague Conference on the Unification of Sales Law*, 1 Am. J. Comp. L. 58, 65 (1952).
6. As we saw in examining Art. 47(1), *supra* at 288, avoidance may be based on failure to comply with a *Nachfrist* notice only in cases of non-delivery. When non-conforming goods are delivered (as in the case just put in the text) the buyer's notice inviting cure empowers the seller to make the requested cure and extends the buyer's time for avoidance but does not establish a *basis* for avoidance; in this setting avoidance must be based on fundamental breach (Arts. 25, 49(1)(a)).
7. [Will, B-B Commentary 366](#). In this discussion Professor Will refers only to the Article 43(2) exemption from notice of *third-party claims*; his comments, however, seem to apply also to the Article 40 exemption with respect to notice of *non-conformity of the goods*.

## FOOTNOTES: Chapter on Article 50

1. Art. 50 resulted from the redrafting, at the Diplomatic Conference, of Art. 46 of the 1978 Draft. *Cf.* ULIS 46. For action in UNCITRAL see III YB 89, IV YB 56, 57, 60, VI YB 71, 77 VIII YB 46; *Docy. Hist.* 106, 133, 134, 137, 149, 155, 339. For action at the Diplomatic Conference see *O.R.* 42, 43, 357, 361; *Docy. Hist.* 432, 438, 578, 582. See generally Will, *B-B Commentary* 368, 376; Schlechtriem, *Com.*(1998) 437, 448 (Huber).
2. *Treitel, Remedies (Int. Enc.)* 67; *Treitel, Remedies* (1988) 107, 109; Honoré, *The History of the Aedilician Actions From Roman to Roman-Dutch Law in Daube, Studies in the Roman Law of Sale*, 132 (1959); German (F.R.G.) Civil Code 462, 472 (reduction "in the proportion which at the time of the sale, the value of the thing in a condition free from defect would have borne to the actual value"); Swedish Sales Act 42, 43 (buyer may claim "such reduction in the price as is proportionate to the defect").
3. Rabel, *A Specimen of Comparative Law: The Main Remedies for the Seller's Breach of Warranty*, 22 *Revista Jur. Univ. P.R.* 167, 191 (1953). The proposed revision of the Quebec Civil Code omits a special "price-reduction" formula. *Quebec Civ. Code Rev'n., Sales* 62, 63: Proposed Article 37: "Damages for non-fulfilment may be claimed by way of reduction of price, or otherwise." The Comment explains: "Under this article, an action *quantum minoris* does not differ from an action for damages."
4. *Com. I* Art. 46, *SR.* 23 paras. 23, 41, *O.R.* 357, 358, *Docy. Hist.* 578, 579.
5. Delay by some (including the present writer) in grasping the special role of the civil law doctrine of "price-reduction" contributed to difficulty in preparing ULIS and in the UNCITRAL proceedings. An interesting account of this background is given by [Bergsten & Miller, The Remedy of Reduction of Price, AJCL UNCITRAL Symposium 255](#). The structure of the Convention helps to clarify the role of Art. 50. Art. 45(1), in introducing the system of remedies, distinguishes between the buyer's privilege to "(a) exercise the rights provided in Articles 46, 52" (requiring performance, avoidance, price reduction) and the buyer's privilege to "(b) claim damages as provided in Articles 74, 77."
6. See Bergsten & Miller, *supra* note 5, at 255.
7. The heading approved by the Diplomatic Conference for Section II (Articles 35, 44) is "Conformity of the Goods and Third Party Claims". Different notice requirements are established for claims of "lack of conformity of the goods" (Arts. 39, 40) and claims that the goods are subject to a "right or claim of a third party" (Arts. 41, 42).

8. The provision on price reduction was then draft Article 46. The proposal: *O.R.* 118, *Docy. Hist.* 690; the discussion: *O.R.* 360-361, *Docy. Hist.* 581-582. The Norwegian sponsor said he withdrew the proposal "on the understanding that it would be up to the courts to decide whether and to what extent" the price reduction provision would apply to third-party claims. No weight should be given to such a statement by an individual delegate in the absence of evidence that the Conference agreed to such an "understanding". See Lord Diplock's properly skeptical response to such an "understanding" at ¶91 *supra*. For helpful discussion see [Will in B-B Commentary 375-376](#); [Schlechtriem, 1986 Commentary 79](#).

9. The significance of this provision was noted by [Will, B-B Commentary, 375-376](#).

10. The text of the U.K. proposal: *O.R.* 118, *Docy. Hist.* 690; the deliberations: *O.R.* 359-360, *Docy. Hist.* 580-581. See para. 61 the buyer's action was "subject to the jurisdiction of courts".

11. The U.N. Convention on the Limitation Period in the International Sale of Goods (1974: A/CONF. 63/14) Art. 25(2) gives protection to the right of set-off "(a) if both claims relate to the same contract or to several contracts concluded in the course of the same transaction". See (U.S.A.) Federal Rules of Civil Procedure, Rules 12 and 13; (U.S.A.) UCC 2-717; "The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any party of the price still due under the contract".

## FOOTNOTES: Chapter on Article 51

1. This article is the same as Art. 47 of the 1978 Draft Convention and Art. 45 of the ULIS. See generally [Flechtner, Pittsburgh Symposium 86-88](#).

2. Under (U.S.A.) UCC 2-601(c) and 2-608(1) remedies may be applied to commercial units that fail to conform.

3. (U.S.A.) UCC 2-601(c) provides that on a defective delivery the buyer may "accept any commercial unit or units and reject the rest." "Commercial unit" is defined (2-105(6)) as a unit the "division of which materially impairs its character or value on the market or in use." This concept serves to bar rejection of part of such a unit, and also to permit rejection of an entire unit when part is defective.

4. Accord: [Flechtner in Pittsburgh Symposium 53, 72-73](#). The approach of Art. 51 is applied to installment contracts in Art. 73, *infra* at ¶399. But cf. ¶400, n. 3.

## FOOTNOTES: Chapter on Article 52

1. This article is the same as Art. 48 of the 1978 Draft. Paragraph (1) is similar to ULIS 29 except for deletion of a provision that a seller who accepts "may reserve" the right to claim damages. Paragraph (2) is similar to ULIS 47.

2. Although the buyer is privileged to refuse an early delivery, if the seller is not present and other conditions specified by Art. 86(2) are met, the buyer may be obliged to take possession of the goods on behalf of the seller. See Ch. V, Sec. VI, Preservation of the Goods, and Art. 86, *infra* at ¶455. For conflicting views on whether the rejection of an early delivery must be reasonable see Will, *B-B Commentary* 380. On buyer's possible claim for storage expenses for early delivery see *id.* 381.

3. See [Secretariat Commentary on draft Art. 48, para. 9](#), *O.R.* 44, *Docy. Hist.* 434.

## FOOTNOTES: Chapter on Article 54

1. *E.g.*, Arts. 19(2), 21(2), 32(2) & (3), 48(2), 58(3), 60(a), 65, 71, 73(2), 79(4), and 85♦88. It may add a bit of romance to commercial law to suggest that the parties♦ inter-related steps resemble old-fashioned ballroom dancing.
2. This article is the same as Art. 50 of the 1978 Draft Convention. ULIS 69 is similar but somewhat more detailed.
3. *Accord*: Huber, 43 RablsZ 413, 511 (1979). Cf. [Hellner, Dubrovnik Lectures 352♦353](#).

## FOOTNOTES: Chapter on Article 55

1. Cf ULIS 57. Art. 51 of the 1978 Draft Convention was substantially revised at the Diplomatic Conference. The legislative history of these changes is examined at notes 2♦4 *infra*.
2. The concern to preserve this rule of domestic law was expressed at different stages of the legislative proceedings. VI YB 73 (para. 153), 74, IV YB 32, IV YB 113 (para. 38) 57, VIII YB 48♦49; *O.R.* 363♦367, 392♦393; *Docy. Hist.* 151, 152, 209, 238, 341♦342, 584♦588, 613♦614. The Commission♦s decision to add the opening phrase to what became Article 55 (then draft article 37) was as follows (Report of Tenth Session, 1977, A/32/17, Annex I): The Commission sitting as the Committee of the Whole "decided to introduce an express statement into the article to make it clear that it applied to agreements which were considered *valid by the applicable law*". (Emphasis added). VII YB 49, *Docy. Hist.* 342, (paras. 329, 340.) On the meaning of "applicable law" see the discussion under Article 14 at ♦137.6, *supra*. See *Docy. Hist.* 341 Para. 328 (applicable *national law*).
3. The language pointing to the seller♦s price was inherited from ULIS (1964) Art. 57. For discussion in UNCITRAL, see: VI YB 73 (para. 152), 74, IV YB 33; *Docy. Hist.* 151 (para. 152), 152, 210. Decisions in France that seem to reflect this view are discussed in [Tallon, Parker Colloq. at 7♦11 & 7♦12](#). See also Fortier, *Le prix dans la Convention de Vienne*, 117 J. D.I. 381 (1990).
4. *O.R.* 392♦393, *Docy. Hist.* 613♦614.
5. (U.K.) SGA (2); (USA) UCC2♦305. See Murray, "Open Price" in a Worldwide Setting, *Comm. L.J.* 491, 496♦499 (Nov. 1984); Niggeman, *Buyer♦s Obligations*, *Int. Bus. L.J.* No. 1, 1988, 27, 31♦33; [Sevón, Dubrovnik Lectures 209](#).
6. 1978 UNCITRAL draft, Art. 51, *O.R.* 10, *Docy. Hist.* 387.
7. The discussion of Article 29, ♦♦204.2♦204.3, *supra*, suggested that the common-law rule requiring "consideration" for the modification of a contract was not preserved by the provision of Article 4(a) that the Convention "is not concerned with: (a) the validity of the contract..." The reason for this conclusion, in brief, was that Article 4(a) could not mean that the Convention was not "concerned" with issues on which it framed a rule♦in that setting the rule of Article 29 that a contract could be modified by "mere agreement of the parties". This principle, of course, does not apply to specific concessions to domestic law such as the opening phrase of Article 55 and the provisions of Articles 12 and 96 allowing reservations excluding Article 11.

## FOOTNOTES: Chapter on Article 56

1. This article is the same as Art. 52 of the 1978 Draft and ULIS 58.
2. Cf. German (F.R.G.) Commercial Code 380(1), Israeli Sales Law 20(b).

## FOOTNOTES: Chapter on Article 57



1. Art. 57 is the same as Art. 53 of the 1978 Draft and is substantially the same as ULIS 59. See V YB 81♦83 (S♦G), 31♦32, VIII YB 49, O.R. 79 (proposals), 45♦46 (Sec. Comm.), 368♦369, 112; *Docy. Hist.* 160♦162, 177♦178, 342, 400, 435♦436, 589♦590, 694.
2. If the seller has two places of business or has no place of business, the reference point is supplied by Art. 10, ♦♦42, [123](#), *supra*.
3. Comparable policies are reflected in the general rule that unless the seller has agreed to extend credit, the buyer must pay at the time he receives control of the goods. See Art. 58(1), *infra* at ♦335; Brand, *Pittsburgh Symposium* (1988) 170♦186.
4. *General Conditions (ECE) Dry and Dried Fruit* (1979) 39(c): "Unless otherwise agreed, the place of payment shall be that where the seller has his principal place of business...." (Other ECE contracts in the series and *General Conditions (ECE) Plant and Machinery* state that payment shall be as "agreed by the parties"): The Asian-African Legal Consultative Committee (AALCC), Standard Form of F.O.B. Contract, Part VII at 3♦5, indicates payment in the seller♦s country by calling for payment by a "confirmed...letter of credit" in exchange for a bill of lading. See Art. 58, *infra* at ♦337.
- Domestic law; *Fridman* 283 at n.33 & 34; German (F.R.G.) Civil Code 270(1): "In case of doubt the debtor shall remit money at his own risk and expense to the residence of the creditor." (U.S.A.) UCC 2♦310(a) and Swedish Sales Act 15 seem to respond to domestic conditions by calling for dispatch of the goods with payment for the goods at the point of receipt (destination).
5. See *e.g.*, Huber, 43 *Rabels Z* 413, 512 (1979). If the plaintiff does not obtain a judgment at the place where the defendant has assets, the plaintiff may face the problem of obtaining recognition of the judgment in a second State.
6. O.R. 368♦369, *Docy. Hist.* 589♦590. But *cf.* [Schlechtriem, 1986 Commentary 82 at note 325](#) (buyers should "seek a more favorable choice-of-forum clause in the contract.")

## FOOTNOTES: Chapter on Article 58

1. Art. 58 is substantially the same as Art. 54 of the 1978 Draft Convention; the "If" clause at the beginning of paragraph (1) was added to conform to the language of Art. 57(1), *supra* at ♦329. Art. 58 is similar to ULIS 71 and 72. There was little difficulty with developing this article. For the evolution from ULIS see V YB 81♦83 (S-G), *Docy. Hist.* 160♦162; O.R. 46♦47 (Sec. Comm.), 369♦370; *Docy. Hist.* 436♦437, 590♦591.
2. (U.K.) SGA (1893) 28: "...delivery of the goods and payment of the price are concurrent conditions..." (unchanged in SGA (1979) 28); (U.S.A.) UCC 2♦310(a), 2♦507(1); Swedish Sales Act (1905) 124; Israeli Sales Law 23; Mexican Commercial Code 380.
3. *Incoterms* (1990) C.I.F., CPT & CIP now call for the seller to provide the "usual transport document" that *may* be a "negotiable bill of lading". See also provisions for replacement by "an equivalent electronic data interchange (EDI) message." (U.S.A.) UCC 2♦310(b) (seller may ship "under reservation"). See also recent UNCITRAL Model Laws at ♦331.1.
4. See (U.S.A.) UCC 2♦310(a): "payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery"; Swedish Sales Act 15.
5. [Sevón, Dubrovnik Lectures 216♦217](#). See *id.*, for the possible abuse by the buyer of inspection after goods have arrived after extensive international carriage.

6. As was mentioned under Art. 57 at n.4, the Asian-African Legal Consultative Committee (AALCC) Standard Form of F.O.B. Contract calls for payment by a "*confirmed* letter of credit" in exchange for a bill of lading. A large number of standard contracts were analyzed in *Rep. S-G*, "General Conditions of Sale and Standard Contracts," II *Yearbook* 66. See para. 30, p. 70: "Most of these provide for payment by letter of credit." The study adds references to the full text of the contracts listed at para. 11 and reproduced in A/CN.9/R.6. See also the arrangements for payment by letter of credit in the Annotated Export Contract, Art. 7, *Kritzer Guide* 567.

7. The *Hague Sales Convention* (1964) was to the same effect. Under ULIS 72(1), where the contract involves carriage "the seller may either *postpone dispatch of the goods until he receives payment* or proceed to dispatch them on terms that reserve to himself the right of disposal of the goods during transit."

8. These problems do not loom large in the numerous cases where the parties have confidence in each other, but rules of law should be designed to minimize hazards when confidence has been misplaced. Although sellers frequently deliver on credit, they need not do so unless the contract so provides (Art. 58(1)).

9. See Goldstajn, *The Contract of Goods Inspection*, 14 *Am.J.Comp.L.* 383 (1965).

10. A Prototype Export Transaction: Ball Bearing for Brazil, is described in detail in *Honnold, Sales* 310-339.

11. If legal rules on the above point are needed, the Convention's basic goal of uniformity (Art. 7) requires that they be derived from the above-cited remedial provisions rather than the diverse common-law doctrines concerning "conditions" or civil law doctrines such as *exceptio non adimpleti contractus*. Cf. Maskow, *supra*, 429.

## FOOTNOTES: Chapter on Article 59

1. This article, except for minor redrafting, is the same as Art. 55 of the 1978 Draft, and is closely patterned on ULIS 60.

2. *Treitel, Remedies* (Int. Enc.) ¶75: France (*mise en demeure*); Germany (*Mahnung*); *Treitel, Remedies* (1988) 129-130, 132; *Nicholas, French Law of Contract* 232-234.

3. *Accord*: Huber, 43 *Rabels Z* 413, 515 (1979).

4. [Tallon, Parker Colloq.](#) 7 ¶14, ¶7.03(b).

5. See V *YB* 31, IV *YB* 34, VIII *YB* 50, *O.R.* 47, 370-371; *Docy. Hist.* 177, 211, 343, 437, 591-592. ULIS included a provision (Art. 20) rejecting formalities as a prelude to the seller's obligation to deliver where "the parties have agreed upon a date for delivery or where such date is fixed by usage..." a provision similar to ULIS 60 on which CISG 59 was based. Language based on ULIS 20 disappeared in the general consolidation and streamlining of ULIS's remedial system; there was no indication that the omission was designed to reestablish domestic formalities. See IV *YB* 40, 51-60, V *YB* 83-84, VI *YB* 67-72; *Docy. Hist.* 117, 128-137, 162-163, 143-150. It is probable that ULIS 20 was considered unnecessary in view of CISG 33 which includes detailed provisions for determining the time when the "seller must deliver the goods".

## FOOTNOTES: Chapter on Article 60

1. This Article is the same as Art. 56 of the 1978 Draft. Cf. ULIS 65.

2. See the discussion under Art. 54 *supra*, and Arts. 19(2), 21(2), 32, 48(2), 58(3), 60(a), 65, 71, 73(2), 79(4) and 85-88. These many instances suggest that providing needed cooperation is one of the "general principles on which [the Convention] is based". See Art. 7(2), *supra* at ¶100.

3. Article 54 (◆323, *supra*) similarly provides that the buyer's obligation "to pay the price" includes steps to "enable payment to be made", with similar broadening of the seller's right, following a *Nachfrist* notice, to avoid the contract under Article 64(1)(b).

## FOOTNOTES: Chapter on Article 61

1. This article is the same as Art. 57 of the 1978 Draft Convention. In ULIS, comparable provisions appear at Arts. 61, 64, 66, 68 and 70.

## FOOTNOTES: Chapter on Article 62

1. This article is the same as Art. 58 of the 1978 Draft. *Cf* ULIS 61 and 62 (payment of price), 70(2) (taking delivery and other obligations of buyer).

2. Avoidance of the contract by either party releases the buyer from its obligation to pay the price (Art. 81, ◆440, *infra*).

3. CISG 4 (◆70, *supra*) limits the Convention's rules to the "rights and obligations of the seller and buyer". Whether the seller's rights to reclaim the goods under Article 81(1) would prevail over creditors depends on the rights of such a claimant against third persons under domestic law. See [Flechtner, Pittsburgh Symposium 67](#).

Under (U.S.A.) U.C.C. in domestic transactions a seller's right to reclaim (absent fraudulent acquisition) must rest on a written security agreement signed by the debtor; effectiveness against creditors depends, in most situations, on public filing. UCC 9◆203(1), 9◆302.

4. The seller's problems of redispotion at a distant port and the possibility of abuse by the buyer of the seller's awkward situation are discussed in Sevón, *Dubrovnik Lectures* 203, 216◆217. See *Atiyah* 370. The above examples are only illustrative.

5. See Schwartz, *The Case for Specific Performance*, 89 Yale L. J. 271, 276 (1979); [Kastely, The Right to Require Performance](#), 63 Wash. L. Rev. 607, 615 (1988); D. Dobbs, *Remedies* 885 n.7 (1973).

6. See the discussion of CISG 46 at ◆◆279◆286, *supra*.

7. *Treitel, Remedies (Int. Enc.)* ◆◆10◆29; *Treitel, Remedies* (1988), Ch. III; *Zweigert & Kötz II* (1987) 157◆169; Dawson, *Specific Performance in France and Germany*, 57 Mich. L. Rev. 495 (1959); *Hager* 141◆169.

8. At "common law," in the narrow sense that excludes law made by the separate courts of equity, recovery of the price would be sought in an action of "debt." This action was restricted to recovery of the price for things of value *received* by the defendant◆more technically, where the defendant had received a *quid pro quo*. The defendant received the *quid pro quo* when he received the goods◆and also when he received "property" in goods that still were in the possession of the seller. This tradition underlies the rule of (U.K.) SGA 49, *supra*, that the seller may recover the price when "the property in the goods has passed to the buyer."

9. Art. 28, invoking the remedial restrictions of the domestic law of the forum is placed in Part I, Chapter I◆General Provisions; if it applied only to requiring performance by the *seller* it would have been placed in Chapter II, Obligations of the Seller, under Section III on the Remedies of the Buyer. This point is confirmed by the drafting history. The concession to the common law was initially incorporated into both of the two parallel remedies to "require performance"◆the buyer's recovery of the goods and the seller's recovery of the price. Later, to avoid duplication, these parallel provisions were consolidated into one provision in Chapter I: General Provisions. W/G 5 para. 50 and Annex I, (text of Art. 42 (buyer's remedy) and Art. 71 (seller's remedy), V

*Yearbook* 34, 56, *Docy. Hist.* 180, 202. The reference in Article 28 to "a judgment for specific performance" should not be limited in common law contexts to an equity decree since the Convention must be given the same functional effect in its various linguistic and legal settings. (In the French version the above language of Art. 28 is rendered "ordonner l'exécution en nature" and in Spanish "ordenar el cumplimiento específico.") Limiting this phrase to an equity decree in actions by the buyer would exclude actions such as *detinue* and *replevin*, and in common law settings would have little meaning in actions by the seller, although this provision was designed primarily as a concession to the common law. For strong support of this view see [Kastely, \*The Right to Require Performance\*, 63 Wash. L. Rev. 607, 634 \(1988\)](#).

## FOOTNOTES: Chapter on Article 63

1. This article is the same as Art. 59 of the 1978 Draft. *Cf.* ULIS 62(2), 66(2).
2. [Knapp in \*B-B Commentary\* 460 ¶2.8](#) suggests that the seller's *Nachfrist* notice does not become effective until it reaches the buyer. Article 27 states that "unless otherwise expressly provided" in the Convention, a communication that is dispatched by appropriate means is effective in spite of "delay or error" in transmission. Knapp suggests that the above rule should not apply because of "the purpose of this notice". However the Convention provides "express exceptions from Article 27 in several situations, but not here. Moreover, most of these exceptions deprive a party in breach of the benefit of the dispatch rule, while the one who sends the *Nachfrist* notice is a party aggrieved by the other party's delay. See ¶190, *supra*.
3. The seller's time for avoiding the contract does not run while he is waiting for a response to his notice. See Art. 64(2)(b)(ii), *infra*, and the discussion of the comparable provision in Art. 49(2)(b)(ii), ¶308, *supra*.

## FOOTNOTES: Chapter on Article 64

1. The effects of avoidance are dealt with in Ch. V, Sec. V (Arts. 81-84). Under Art. 81(1), one who avoids a contract retains his right to damages (Arts. 74-76) but loses the right to compel performance (Arts. 46, 62).
2. The opening phrase of paragraph (2)(b) "in respect of any breach other than late performance by the buyer" is awkwardly drafted. The context shows that paragraph (2)(b) was designed to deal with situations not covered by paragraph (2)(a): "late performance by the buyer". Paragraph (2)(b) might have been expressed more clearly by replacing the italicized words with "any obligation that the buyer has failed to perform" or "any other failure to performance". See the Secretariat Commentary on draft article 60(2)(b), at para. 10. *O.R.* 50, *Docy, Hist.* 440.
3. Similar considerations underlie the rule of Art. 49(2) that the buyer's time for avoidance does not begin to run until the seller "has delivered" the goods. See Art. 49, *supra* at ¶308.

## FOOTNOTES: Chapter on Article 65

1. This article is substantially the same as Article 61 of the 1978 Draft: "within the time so fixed" was inserted in paragraph (2) at the Diplomatic Conference. *SR.* 26, paras. 34-39, *O.R.* 374, *Docy. Hist.* 595. *Cf.* ULIS 67.
2. *SR.* 26 paras. 7-11 *O.R.* 372, *Docy. Hist.* 593. Sec Art. 14: "A proposal is sufficiently definite if it indicates the goods..." See *Dölle, Kommentar* (von Caemmerer) Art. 67 at 9, p. 394 (the provision for supplying missing specifications bars any contention that the contract is void because of incompleteness or vagueness).
3. A contrary view by [Knapp, \*B-B Commentary\* 478 ¶2.6](#), seems to overlook avoidance under Article 64(1)(a). Moreover, the broad statement in Article 60(a) that the "buyer's obligation to take delivery" includes acts to enable the seller to make delivery, ¶342, *supra*, may authorize the seller to give the buyer a *Nachfrist* notice (Art. 63(1)) fixing an additional period for supplying the specifications; if the buyer fails to comply the seller

may be able to avoid the contract under Article 64(1)(b) without proving that the buyer had committed a "fundamental" breach of contract (Art. 25).

## FOOTNOTES: Introduction to Chapter IV

1. *REPS. S-G*: III YB 31❖40, V YB 89❖94, VI YB 108❖110; *Docy. Hist.* 73❖82, 168❖173, 233❖235. *WK. GR*: V YB 47❖50, 60 (revised text); *Docy. Hist.* 193❖196, 206 (revised text). *UNCITRAL*: VIII YB 62❖65; *Docy. Hist.* 355❖357. *S-G*: (Draft arts 78❖82); *O.R.* 63❖66; *Docy. Hist.* 453❖456. See Sevón, *Lausanne Colloq.* 191, 192❖193. Cf. Huber, 43 *Rabels Z* 413, 451, 458 (1979) (approves change in approach); Neumayer in *von Caemmerer Festschrift* (1978) 955, 959.

## FOOTNOTES: Chapter on Article 66

1. This article is the same as Art. 78 of the 1978 Draft, and is substantially the same as ULIS 96. At the Diplomatic Conference the rules on risk of loss in the 1978 Draft (Arts. 78❖82) were moved from the very end of the sales provisions to this earlier position between Chapters III and V; this change was designed to emphasize the close relation between risk of loss and the obligation of the parties to perform their contract (Chs. II and III), as contrasted with the remedies for non-performance (Ch. V); *O.R.* 401❖402, *Docy. Hist.* 622❖623.

2. The general rule of Art. 58(1) that the buyer "is not bound to pay the price" until the seller places the goods at the buyer's disposal is subject to the more specific provision of Art. 66 on risk of loss. Of course, the contract can reverse the Convention's rules on risk (Art. 6) but a term calling for payment in exchange for documents or goods would normally be intended to deal with the time and manner of payment rather than risk.

3. Similar principles apply to claims against the carrier. However, when carriage is by sea the narrow and limited responsibility of ocean carriers under the Hague Rules (1924) makes insurance especially important. But cf. the U.N. Convention on the Carriage of Goods by Sea ("Hamburg Rules", 1978) *ACL UNCITRAL Symposium* 353❖448 (text of Convention at 421); W. Tetley, *Marine Cargo Claims* (2d ed. 1987).

4. Cf. (U.K.) SGA (1893 & 1979) 20(2): *Atiyah* 250.

## FOOTNOTES: Chapter on Article 67

1. The grounds on which a standard trade term may be used in interpreting the contract were discussed under Art. 9 at ❖115. The reasons why the Convention did not attempt to define commercial terms are discussed in Honnold, *ULIS: The Hague Convention of 1964*, 30 *Law & Contemp. Pr.* 326, 339❖341 (1965). *General Conditions (ECE) for Potatoes, for Fresh Fruit and Vegetables and for Dry and Dried Fruit* state separate rules on risk for different trade terms, which the parties must select. The publication *ECE Contracts for the Sale of Cereals* uses separate forms for the different trade terms, and "*C.I.F. (maritime)*" provides eight different contracts for this trade term. UN Pub. 1957. II. E/Mim. 21. See: ICC, *Legal guide to Incoterms* (1990).

2. Article 67 of the Convention is based on Article 79 of the 1978 Draft, but with significant redrafting in both paragraphs. The basic rule on passage of risk in paragraph (1) of Article 67 is similar to the result under ULIS 19(2) and 97(1); paragraph (2) is similar to ULIS 19(3).

3. Article 69 applies to "cases not within Articles 67 and 68". Article 68, ❖❖372 *infra*, deals with a special situation that, for purposes of orientation, can be put to one side.

4. See [Roth, The Passing of Risk, AJCL UNCITRAL Symposium 291 at 296](#), Honnold, *supra* n. 1, at 338. Contra: [von Hoffman, Dubrovnik Lectures 287](#).



5. Ramberg, Incoterms 1980, *Transnational Law: Bielefeld Colloq.* 137, 147 (unsuitability of the "ship's rail"); Honnold, Uniform Law and Uniform Trade Terms, *id.* 161, 165.

6. See Ramberg, *supra* n.7, at 140. Contractual arrangements can take many forms, including bank guarantees for payment (or repayment) based on the results of the test run. See Horn, *Transnational Law: Bielefeld Colloq.* 275. The present writer in *Parker Colloq. Ch. 8, at 84 to 88* discussed some of the considerations that influenced UNCITRAL's choice among (1) following the prevailing rule of domestic law and of 1964 ULIS; (2) reversing the prevailing rules and (3) Attempting to carve out an exception for "high-technology" or some other category of goods. Alternative (3) had to be rejected to meet the requirements of clarity in drafting while alternative (2), overturning the prevailing pattern of domestic law, would have led to difficulties in many lines of trade and might have jeopardized world-wide adoption.

7. Accord: *Nicholas, B-B Commentary* 490, 2.2; *Finnish Sales Act (1987)* Secs. 7, 13.

8. See Ramberg, *supra* n.7, at 141, 146, 387, 409 (definition of "carrier"). See also: 1978 United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules"), Art. 1(1); *Incoterms Guide* (1980) p. 30.

9. The language of Article 67(1) under discussion and its application to Example 67A are consistent with *Incoterms 1990*: FREE CARRIER...(named place). See Ramberg, *supra* n. 7, at 145 and 409 (definition of term). Language in the first edition of this work could be construed to suggest a different conclusion. Professor Nicholas, *B-B Commentary* 491-492, clearly analyzed the problem and cited legislative history that supports his view and that suggested above in connection with Example 67A. See VIII YB 63, *Docy. Hist.* 356, *Secretariat Comm. (draft Article 79)* O.R. 64 *Docy. Hist.* 454 (paras. 6-7).

10. U.N. Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980). See Mankabady, *Int. Contract L. & Fin. Rev.* V. 2, 233 (1981).

11. For the reasons underlying CISG 67(1) See *S-G Rep.* III YB 34-35, *Docy. Hist.* 76-77.

12. Stricter rules for identification in Art. 79 of the Draft Convention were relaxed by an amendment approved at the Diplomatic Conference. O.R. 402, *Docy. Hist.* 623. In ULIS 19(3) a somewhat similar rule was drafted in terms of "appropriation" to the contract. This concept was alien to many legal systems and carried "property" overtones; to avoid these problems the concept of "identification" was used in CISG 32(1) and 67(2). See *S-G Rep.*, V YB 92, *Docy. Hist.* 171, para. 84.

13. Article 32(1) on "notice of the consignment" relates to seller's contractual duties; breach of these duties can lead to a damage claim (Arts. 45(1), 74). However, failure to comply with each contractual duty specified in Articles 30-44 does not shift the risk of loss. See Article 70, 379-383, *infra*.

14. The loss may be allocated in various ways: (1) The quantity the seller must deliver may be defined in terms of "outturn" meaning that the seller would bear the loss at sea; (2) The buyers would pay for the quantity loaded and would share (subject to insurance coverage) the loss during transit. See, generally, *Benjamin* 119, 1546-1557, *Atiyah* 25-26, 321-322 (resistance to part ownership).

---

## FOOTNOTES: Chapter on Article 68

1. For development of the draft in UNCITRAL see V YB 48-49, 60, VIII YB 63, *Docy. Hist.* 194-195, 206, 356. See also the Secretariat Commentary on the UNCITRAL draft, O.R. 65 *Docy. Hist.* 455.

2. O.R. 403-406, *Docy. Hist.* 624-627. The First Committee deleted a confusing reference to documents controlling the goods. O.R. 404, *Docy. Hist.* 625.

3. Initial action by the Conference Plenary O.R. 21-215, *Docy. Hist.* 748-750. Final action by the Plenary: O.R. 215-218, 22-222, *Docy. Hist.* 750-753, 755-756 (the vote 26-12 with 9 abstentions). Similar to

CISG 68: *Finnish Sales Act (1987) Sec. 15.*

4. For case law on this problem, see *Benjamin* 1696-1697 (risk *as from* shipment). See also 22 Colum. J. Transn. L. 575, 589.

5. See [Roth, The Passing of Risk, AJCL Symposium 291, 298](#), commenting on the awkward consequences of splitting transit loss between the parties.

6. [Nicholas, B-B Commentary](#) 2.3, pp. 499-500, citing (*O.R.* 220-221, *Docy. Hist.* 755-756) the rejection in Plenary of a proposal to change "*the* loss or damage" to "*that* loss or damage, to conform to the UNCITRAL language "*such* loss or damage". The reason for the rejection was unclear; one point was that the change to "the loss", presumably made by the Drafting Committee, had changed the meaning of the UNCITRAL text; on the other hand, the French version was the equivalent of "*the* loss or damage".

7. As Nicholas, *id.*, 2.4, p. 500 demonstrates, the third sentence on the seller's failure of disclosure relates only to the second sentence on retroactive passing of risk. As we have seen, these two sentences were linked together in preparing the UNCITRAL draft. Moreover, as Nicholas points out, damage prior to shipment presents a problem of conformity of the goods (Arts. 35, 36(1), 66) rather than risk of loss.

## FOOTNOTES: Chapter on Article 69

1. Art. 69 is the same as Art. 81 of the 1978 Draft. As to Art. 69(1) see ULIS 19(1), 97(1) and 98(1); as to Art. 69(3), see ULIS 98(2).

2. See *Rep. S-G*, V YB 90-93, *Docy. Hist.* 169-172; [Roth, AJCL UNCITRAL Symposium 291, 299-300](#), Honnold. A Uniform Law for International Sales 107 U. Pa. L. Rev. 319 (1959) Honnold, *Sales* 167-169 (includes extracts from standard policies of insurance).

3. See *Atiyah* 246-251; *Benjamin* 394 *et seq.*; *Ont. L. Ref. Com. I Sales* 265-269.

4. *UNCITRAL X*, Annex I paras. 550-552, VIII YB 64 *Docy. Hist.* 357.

5. In the alternative, we may assume that Seller delivered to Buyer a negotiable ("order") warehouse receipt the possession of which controlled delivery of the goods. If the warehouse receipt is not negotiable or does not contain a statement like that mentioned in Example 69C, the question whether the goods have been placed at the buyer's "disposal" (Art. 69(2)) may depend on (1) domestic law governing the warehouse's obligation to deliver to a sub-purchaser or (2) an understanding between the seller and buyer that the seller would authorize delivery on buyer's request.

## FOOTNOTES: Chapter on Article 70

1. Article 70 is substantially the same as Article 82 of the 1978 Draft. *Cf.* ULIS 7(2).

2. See *Rep. S-G*, "Issues Presented by Chapters IV to VI of ULIS," paras. 89-105. V YB 93-94, *Docy. Hist.* 172-173. Huber, 43 *Rabels Z* 413, 457 (1979).

3. For the background of this provision see the writer's analysis and proposal in I Report of the New York Law Revision Commission: Study of the Uniform Commercial Code 494-495 (1955).

4. At the Diplomatic Conference this writer proposed an amendment under which risk in transit would remain with the seller when the goods are so defective as to constitute a fundamental breach. The proposal was rejected; it is not clear whether this action was based on the substance of the proposal or on problems of implementation or drafting. *O.R.* 408, 128 (text of proposal), *Docy. Hist.* 629, 700. See *supra* at 91.

5. See the discussion under Art. 69, *supra* at [§375](#), on policy reasons for placing casualty risk on the possessor. Of course, if the nonconformity of the goods caused the loss (e.g. defective wiring in a machine caused a fire that damaged the machine) this loss must be borne by the seller. (See Art. 74, *infra* at [§403](#).)
6. Avoidance is not barred by Art. 82 for reasons developed in connection with Example 70C, *supra* at [§381](#).
7. For criticism of the 1978 Draft with respect to risk of loss during cure and periods allowed for inspection, see [Roth, The Passing of Risk, AJCL UNCITRAL Symposium 291, 303](#).

## FOOTNOTES: Chapter on Article 71

1. Art. 71 is based on Art. 62 of the 1978 Draft Convention; paragraph (1) was significantly modified at the Diplomatic Conference. See *infra* at [§388](#). Cf. ULIS 73.
2. O.R. 374-376, *Docy. Hist.* 595-597, see [Schlechtriem, 1986 Commentary 92-93](#), for the perceptive observation that this change has the important consequence of excluding domestic rules granting avoidance (*inter alia*) based on mistake about capacity to perform. Schlechtriem also suggests ([Cornell Symposium at 474 n. 23M](#)) that Article 71 excludes domestic remedies for innocent or negligent misstatement as to ability to perform, such as an inaccurate financial statement supplied by one party on which the other party relies in entering into the contract. This latter suggestion may be questioned since the Convention does not address this factual situation. Contrast the discussion at [§239-240](#), *supra*, on the exclusion of domestic remedies for innocent misstatements of quality, which is addressed by Article 35 of the Convention. Moreover, Article 71 allows only *suspension* of performance and is subject to a stricter standard (*inability* to perform) than domestic law may provide for a contract obtained by a misstatement of fact. On the availability of domestic remedies for fraud see [§65](#), *supra*.
3. For the evolution of Art. 71 see O.R. 129-130, *Docy. Hist.* 701-702 (Art. 62) para. 10 (text of proposal by Egypt), para. 12 (rejection of proposal), para. 14 (proposal of working group), paras. 15-17 (oral amendments and adoption by the First Committee of Art. 62, now Art. 71). For the discussion see O.R. 419-420, *Docy. Hist.* 640-641 (statement by Professor Chafik) and O.R. 420-422 *Docy. Hist.* 641-643 (final action by First Committee). The compromise developed by the working group included the addition of paragraphs (2) and (3) to Art. 72, *infra* at [§395](#); these new paragraphs also drew on ideas in the above proposal by Professor Chafik. See, generally, Strub, CISG: Anticipatory Repudiation Provisions and Developing Countries, 38 Int. & Comp. L. Q. 475 (1989).
4. See also the other official language versions: in French "il *apparaît*" (Art. 71) v. "il est *manifeste*" (Art. 72); in Spanish "*manifiesto*" (Art. 71) v. "*patente*" (Art. 72). The intent to distinguish between these terms is shown by O.R. 432, *Docy. Hist.* 653, paras. 104-106 and O.R. 432-433, *Docy. Hist.* 653-654, paras. 3-21. Cohn suggests that "appears" and "evident" in ULIS 73(1)&(2) indicate that the circumstances must be generally known in business circles. 23 Int. & Comp. L. Q. 520, 526 (1974).
5. Accord: [Schlechtriem, 1986 Commentary 93, n. 383a](#); (citing first edition). Art. 72, *infra* at [§395](#), under some circumstances, requires advance notification and an opportunity to provide adequate assurances of performance. Thus, breach may not eventuate even when "it is clear" that a party will commit a fundamental breach of contract.
6. *Ont. L. Ref. Com.*, II Sales 528-531, III *id.* 52 (text of proposed [§8.9](#)). On the Sale of Goods Act see Atiyah 341; Benjamin [§231](#), 644, 1137. On disabling action as repudiation see Art. 72 *infra*, at n. 4.
7. See *White & Summers* [§6-2](#); Restatement, Second of Contracts [§251](#); 6 *Corbin* [§1259](#), 1260.
8. *Treitel, Remedies (Int. Enc.)* [§189](#) also discusses similar provisions of the Swiss Code of Obligations 83. Cf. French Civil Code 1613 (suspension of delivery on credit in event of bankruptcy or insolvency unless buyer

gives security). See also *Treitel, Remedies* (1988) 405-409; Cohn, *The Defence of Uncertainty*, 23 *Int. & Comp. L. Q.* 520 (1974) (careful analysis of ULIS 73); Strub, *supra* n. 3, at 480-489.

9. *Mertens & Rehbinder*, Art. 73 at 2.

10. *Treitel, Remedies (Int. Enc.)* 189, *Treitel, Remedies* (1988) 407. ULIS 73(1) was similarly restricted to the deterioration of "the economic situation" of a party. On the need to suspend preparation for performance see Cohn, *supra* n. 3, at 526-527.

11. (U.K.) SGA (1893) 44-46, preserved in SGA (1979); (U.S.A.) UCC 2-705; China, *Foreign Economic Contract Law* (1985) Art. 17 (temporary suspension pending guarantee).

12. The UNCITRAL revision was based on *Rep. S-G*, "Issues Presented by Chapters IV to VI of ULIS," paras. 59-61, V *YB* 88-89, *Docy. Hist.* 167-168. Action by UNCITRAL: V *YB* 37-39, *Docy. Hist.* 183-185. Difficulties of interpretation of ULIS 73(3) with respect to the rights of third persons are discussed in Cohn, *supra* n. 7, at 536-538.

13. [Flechtner, Symposium \[Pittsburgh\] 97, n. 202.](#)

14. *Accord*: [Bennett, B-B Commentary 519-521](#). Art. 7(1) calls for interpretation of the Convention to promote "the observance of good faith in international trade" and Art. 7(2) invokes the "general principles" on which the Convention is based. As has been suggested (Art. 7, *supra* at 100) numerous specific provisions of the Convention seem to illustrate a general duty to communicate needed information to the other party.

15. Strub, *supra* n.3, at 495.

16. See *Ont. L. Ref. Com.*, II *Sales* 531 and III *id.* 52: 8.9(4) of draft bill. When adequate assurance is provided, the party's obligation to perform is restored "but he is not liable for any delay occasioned by his suspension of performance." Under UCC 2-611(3) if a party repudiates the contract and then retracts the repudiation, the repudiating party's rights are reinstated "with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation." Cf. [Secretariat Commentary Art. 62, para. 9](#), *O.R.* 52 *Docy. Hist.* 442.

17. *Accord*: Strub, *supra* n. 3, at 497 (citing first edition); Flechtner, *supra* n. 13, at 93 (same). The standards of Articles 71 and 72 are different; failure to provide assurances will not always justify avoidance. Cf. [Ziegel, Parker Colloq. 9-35](#); [Schlechtriem, 1986 Commentary 96](#).

## FOOTNOTES: Chapter on Article 72

1. Paragraph (1) of Art. 72 is substantially the same as Art. 63 of the 1978 Draft and ULIS 76. Paragraphs (2) and (3) were added at the Diplomatic Conference; see *infra*, n.6. Other developments at the Diplomatic Conference were linked to Article 71; see 388, *supra* at notes 3 and 4. For earlier action in UNCITRAL see V *YB* 41-42, 57, VI *YB* 72, 106, VIII *YB* 55, *Docy. Hist.* 150, 187-188, 203, 231, 348.

2. A's hazards would be reduced if A, pursuant to Art. 72(2), notifies B of A's intention and thereby gives B an opportunity to provide assurances of performance. See Arts. 71(3) and 72(2). Failure by B to respond effectively to such a notice would make it more difficult for B to challenge a subsequent declaration of avoidance. See also Art. 7(1) (interpretation to promote "the observance of good faith").

3. If the aggrieved party does not respond to repudiation by declaring the contract avoided, he may be obliged to accept performance if the repudiator changes his mind. Cf. Art. 81, *infra Treitel, Contract* 653-654, 661. Cf. *Corbin* 980-981 (retraction of repudiation may be barred by other party's change of position).



4. See Gulotta, Anticipatory Breach ♦ A Comparative Analysis, 50 Tulane L. Rev. 927, 932 (1976); Restatement, Second of Contracts ♦ 250, Comments c and d, *Corbin* ♦ ♦ 984, 1259 *Treitel, Remedies* (1988) 379 ♦ 381. For the approach of German (FRG) law see *Dölle, Kommentar* Art. 76 p. 485 at 11 ♦ 12. On repudiation under CISG see Stoll, 52 *Rabels Z.* 617 (1988) (In German; English summary).

5. The leading English decision authorizing immediate legal action is *Hochster v. De la Tour*, 118 Eng. Rep. 922 (Q.B. 1853). Recovery of damages, of course, does not present the problem of requiring specific performance before the agreed date. See *Corbin* ♦ 961, ♦ 962; Restatement, Second of Contracts ♦ 253.

6. *Com. I Action: O.R.* 130 ♦ 131, *Docy. Hist.* 702 ♦ 703; discussion: *O.R.* 419 ♦ 422, 431 ♦ 433, *Docy. Hist.* 640 ♦ 643, 652 ♦ 654, 702 ♦ 703.

7. See also note 2, *supra*. Accord: [Bennett, B-B Commentary 530](#). The significance of communications between the parties was discussed under Art. 7, *supra* at ♦ 100.

## FOOTNOTES: Chapter on Article 73

1. Art. 73 is the same as Art. 64 of the 1978 Draft Convention. See *O.R.* 54 (*Sec. Com.* on Art. 64), *Docy. Hist.* 444. No objections were raised at the Diplomatic Conference. ULIS 75 also dealt with breach in instalment contracts but was substantially redrafted by the Working Group. *W/G* 5 paras. 1 16 ♦ 127, V *YB* 29, 40 ♦ 41, *Docy. Hist.* 186 ♦ 187. Further refinements were made in the Commission's 1977 review. VIII *YB* 55, *Docy. Hist.* 348. See [Bennett, B-B Commentary 532 ♦ 533](#). For a careful comparison of CISG 73 with (U.S.A.) UCC 2 ♦ 612 see [Flechtner, Pittsburgh Symposium 88 ♦ 92](#).

2. Huber, 43 *Rabels Z.* 413, 506 (1979) (comment on Art. 64 of 1978 Draft).

3. As we have seen in connection with Arts. 47 and 49(1)(b), and the similar provisions in Arts. 63 and 64(1)(b), in some situations avoidance may be based on the failure of the other party to perform in compliance with a notice "fixing an additional period of time of reasonable length" ♦ the *Nachfrist* notice; in these situations the aggrieved party need not show that the breach was "fundamental." However, each paragraph of Art. 73 states that avoidance must be based on "a fundamental breach of contract." The *Nachfrist* avoidance remedy is intrinsically inapplicable to the problems of future performance covered by Art. 73(2) and (3) (*cf.* Art. 72(1)), and also to Art. 73(1) in so far as it applies to the delivery of defective goods. See *supra* at ♦ ♦ 288, 305. It is not so clear that Art. 73(1) excludes the *Nachfrist* notice when (*e.g.*) delivery of an instalment or the establishment of a letter of credit is overdue. Compare the distinction between Art. 51(1) and (2), discussed *supra* at ♦ 317; an analogy to Art. 51(1) suggests that a *Nachfrist* notice should be effective with respect to overdue performance. But *cf.* Flechtner, *supra* n. 1, at 91 ♦ 92, n. 182.

4. A similar rule appears in (U.S.A.) UCC 2 ♦ 612(3). *Cf.* (U.K.) SGA 31(2), which applies where the goods are "to be delivered by stated installments, which are to be *separately paid for*" (a restriction not found in the Convention or in UCC); the test is "whether the breach of contract is a *repudiation* of the whole contract or whether it is a *severable* breach..." For trenchant criticism of this provision see *Ont. L. Ret. Com., II Sales* 541 ♦ 549, and materials there cited, including Williams, *Partial Performance of Entire Contracts*, 57 *L.Q. Rev.* 373, 490 (1941).

5. For examples in which interdependence among deliveries may result from economic factors contemplated by the parties see [Schlechtriem, 1986 Commentary 96 n.392](#), and *O.R.* 54, *Docy. Hist.* 444 (*Sec. Comm.* on draft Art. 64(3), paragraph 8).

6. *Cf.* UCC 2 ♦ 601(c). On rules influenced by (U.K.) SGA (1893), see *Ont. L. Ref. Com., II Sales* 549 ♦ 550; *Atiyah* 383 ♦ 388, *Benjamin* ♦ ♦ 629 ♦ 645.



## FOOTNOTES: Chapter on Article 74

1. Art. 74 is the same as Art. 70 of the 1978 Draft and closely follows ULIS 82. This provision did not provoke significant controversy. See VI YB 107, 62, VIII YB 59, *O.R.* 394, 131, *Docy. Hist.* 232, 253, 352, 615, 703.
2. Art. 74 drives home the Convention's unified approach to the parties' obligations and to remedies for breach. See Ch. 2, *supra* at ¶26. Intro. to Ch. II, Sec. III at ¶274. For the fragmented approach of some legal systems see *Treitel, Remedies (Int. Enc.)* ¶75; *Treitel, Remedies (1988)* Ch. V, 129-131.
3. [Knapp, B-B Commentary 539](#). The provision in Art. 74 on unpredictable consequential damages, discussed *infra* at ¶406, may also apply to damages following avoidance of the contract.
4. Problems invoking the general rules of Art. 74 can arise from changes in exchange rates subsequent to the date when the buyer should have paid. See Hellner, *The Limits of Contractual Damages in the Scandinavian Law of Sales*, 10 *Scan. Stud.* 37, 60; Ziegel, *Parker Colloq.* 9-36, 9-38. For a 1978 German decision under ULIS 82 and 83 awarding damages for loss from changes in exchange rates during delay see UNIDROIT, 1979 *Uniform Law Review*, No. I, 344-348, citing *Neue Juristische Wochenschrift* 1979, 2480.
5. (1854) 9 Ex. 341, 156 Eng. Rep. 145, discussed in its historical setting in Danzig, 4 *J. Legal Studies* 249 (1975). See *Benjamin* ¶1277-1282; *Atiyah*, 417-418; *Farnsworth, Contracts* 873-881; *Bridge, Sale* 743-746; *Murphey*, 23 *Geo. Wash. J. Int. L. & Econ.* 415 (1989). Curiously, neither the *Hadley* judgment nor (U.K.) SGA (1893) explicitly states the rule in terms of "foreseeability", SGA 50(2), 51(2) and 53(2) all refer to "loss *directly and naturally* resulting in the ordinary course of events" from the breach. For a thorough review of rules in the common-law world and an analysis of civil law developments see *Treitel, Remedies (Int. Enc.)* ¶84 et seq. See also: *Treitel, Remedies (1988)* 150-173; *Treitel, Contract*, 744-753; Nicholas, *French Law of Contract* 223-226 (1982).
6. For case law under the UCC see *White & Summers* ¶10-4. See also 5 *Corbin* ¶1007-1014.
7. For a careful analysis and critique of the use of German concepts in Scandinavia, see Hellner, *The Limits of Contractual Damages in the Scandinavian Law of Sales* 10 *Scan. Stud.* 37, 40-79; the author suggests, *inter alia*, wider judicial discretion to limit "consequential" damages. See also: Cooke, *Remoteness of Damage and Judicial Discretion*, [1978] *Camb. L.J.* 288.

---

## FOOTNOTES: Chapter on Articles 75 and 76

1. As we have seen, avoidance is also possible in more specialized situations. See Art. 72; (anticipatory breach) and Art. 73 (breach with respect to an instalment).
2. Art. 75 is the same as Art. 71 of the 1978 Draft and is similar to ULIS 85.
3. Prices that were available on the market may be relevant if a dispute arises as to whether the substitute transaction was effected "in a reasonable manner."
4. *Treitel, Remedies (Int. Enc.)* ¶69, *Treitel, Remedies (1988)* 115-122. A "concrete" method based on actual loss is distinguished from an "abstract" measurement based on market price (Art. 76). In some systems, the "concrete" approach (e.g., the buyer acquires substitute goods at the expense of the seller) is regarded as a species of specific enforcement. See Arts. 28, 46, 62, *supra*.

[Editor's note: Footnotes 5 and 6 not present in the text]

7. Cf. ULIS 84. Article 76 was based on Article 72 of the 1978 Draft. However, at the Diplomatic Conference changes of substance were made in paragraph (1): A reference to the time the aggrieved party "first had the *right to declare* the contract avoided" was replaced by "the time of avoidance" and the second sentence was added.

Proposals to amend draft Article 72 were rejected by the First Committee. *O.R.* 132-133, 394-396, *Docy. Hist.* 704-705, 615-617. Later, in Plenary, a modified amendment, leading to the present text, was approved. *O.R.* 172, 222-223, *Docy. Hist.* 730, 757-758.

8. [Knapp, B-B Commentary 556](#). A drop in the market might tempt a buyer to avoid in order to re-purchase goods for less than the contract price; however, the buyer would recover little or no damages under Article 76 by a reference to the later low price. A rise in the market would augment a buyer's damage claim but avoidance would deprive the buyer of goods purchased at a lower price. Unnecessary delay could nullify avoidance under the time limits set by Article 49(2)(b)(i).

9. [Flechtner, Pittsburgh Symposium, 99, n. 213](#), notes that the second sentence could apply to a seller whose goods were wrongfully rejected by the buyer and who took over the goods before avoiding the contract. Favoring damage measurement as of the time of avoidance: Hellner, 22 *Scan. Stud.* 53, 74-75.

## FOOTNOTES: Chapter on Article 77

1. This article is the same as Art. 73 of the 1978 Draft and is substantially the same as ULIS 88. References to the legislative history appear in notes 7-9, *infra*.

2. See *Treitel, Remedies* (1988) 179 and references cited n.3, *infra*.

3. *Treitel, Remedies (Int. Enc.)* 102-106 and *Treitel, Remedies* (1988) 179-192 give an illuminating comparison of the approaches of different legal systems. For discussion of English law see Schmitthoff, *The Duty to Mitigate*, 1961; *J. Bus. L.* 361; *Benjamin* 1283-1286; *Treitel, Contract* 754-758. For U.S.A. rules see UCC 2-704(2), 2-715(2)(a); *White & Summers* 6-7, p. 285, 7-15, 10-4, pp. 451-453; *Farnsworth, Contracts* 858-873.

4. In the United States there is conflict in the case-law and academic writing over whether the aggrieved party has a duty to accept repudiation and to resell (or repurchase) in cases like Example 77A. Favoring this duty: Jackson, 31 *Stanford L. Rev.* 69, 75 et. seq. (1978); *Farnsworth, Contracts* 862. *Contra*: *White & Summers* 6-7 at pp. 278-283. English case-law seems to reject such a duty. *Treitel, Contract* 655 at n. 75; *Benjamin* 1341-1344, 1755, 1894. This latter position is often put in terms of the aggrieved party's right to press for performance—an approach that is more consistent with a party's right to "require performance" under CISG 46 and 62; cf. CISG 28. An aggrieved party who does not respond to repudiation by avoidance places itself in an uncertain position since the repudiating party may still perform. This possibility, *inter alia*, discourages temptation by the aggrieved party to delay a decision as to avoidance in order to speculate, at the other party's expense, on possible changes in the market price.

5. Text of the proposal, *O.R.* 133, *Docy. Hist.* 705; discussion in the First Committee, *O.R.* 396-398, *Docy. Hist.* 617-619.

6. *O.R.* 396, *Docy. Hist.* 617; paras. 55 (U.S.A.), 56 (U.K.), 61 (Ireland: but the principle of the first sentence was sufficiently broad to permit other remedies), *O.R.* 397, *Docy. Hist.* 618; paras. 69 (Australia), 71 (Netherlands: "something must be done" but more detail needed).

7. *O.R.* 397, *Docy. Hist.* 618; paras. 64-65 (Canada), 66 (Sweden); 67 (Mexico).

8. *O.R.* 396, *Docy. Hist.* 617; paras. 57 (amendment in wrong section, should not be in section on "Damages"), 60 (useful in theory but reference to "any other remedy" was vague); *O.R.* 397, *Docy. Hist.* 618, paras. 68 (vague), 69 (same), 73 (too broad).

9. The three concrete cases used as a vehicle for the above discussion were not adequate to expose the factual variations that can be relevant. As was noted above, a party's need for compelling ("specific") performance

may be so strong as to override the competing principle calling for mitigation of loss.

Practical problems faced by delegates in obtaining authorization to support changes in a draft in the closing days of a diplomatic conference were discussed under Article 7, [91](#), *supra*.

## FOOTNOTES: Chapter on Article 78

1. Proposal: *O.R.* I38, *Docy. Hist.* 710. Discussion in First Committees: *O.R.* 388-392, *O.R.* 415-419, 429-430, *Docy. Hist.* 609-613, 636-640, 650-651 (included discussion of working group alternatives providing formulas for calculating interest, one of which was accepted). Compare the proposal for a reservation by Arab countries, *O.R.* 418, *Docy. Hist.* 639. No such provision was made.

2. [Nicholas, B-B Commentary 570, 2.1](#) agrees that, under Article 78, one is entitled to interest even if applicable domestic law makes no provision for interest but adds that domestic law applies if it provides "a relevant formula for calculating interest". The latter suggestion seems difficult to apply when domestic law, through obsolescence or hostility, provides relief that is derisory in relation to the loss of the aggrieved party; in these cases deference to domestic law also seems inconsistent with the policy underlying Article 78 and other articles of the Convention designed to provide compensation for loss resulting from breach of contract.

3. Articles 75 and 76 strictly apply only when the contract is avoided but they apply to losses that are similar to those where interest is due under Article 78. This is illustrated by Article 84 which provides that, when the contract is avoided, "If the seller is bound to refund the price, he must also *pay interest* on it...". The reason for this express provision for interest is that the buyer has suffered a loss (the use-value of the funds) which was not part of an agreed exchange. The same is true when a buyer fails to pay the price when it is due (Art. 78). Indeed, as we shall see at [422](#), *infra*, such an imbalance resulting from the lack of an agreed exchange provides grounds for interest on a "sum in arrears" (Art. 78). Consequently, the loss suffered by a buyer who rightfully avoids the contract and purchases substitute goods at a higher price (Art. 75) is comparable to the loss of a seller who fails to receive the price when it is due. In other words, in situations where interest is due, avoidance is irrelevant since the lost value of the funds is not part of an agreed exchange.

4. Restatement Second of Contracts (U.S.A.) [354](#). *Interest as Damages*, Paragraph(1), provides that interest is recoverable not only for failure to pay "a definite sum in money" but also for failure to "render a performance with fixed or *ascertainable* monetary value". See Comment C on Paragraph(1): interest is recoverable even though the amount of performance is in dispute and must be proved by evidence extrinsic to the contract. Paragraph (2) provides for allowance of interest in other cases "as justice provides...". Under Comment d, this recovery may extend to interest on consequential loss. For the flexible approach in sales cases in the U.K. since legislation in 1934 see *Benjamin, Sales* [1246-1248](#).

5. Contrast the (English) Law Commission, Working Paper No. 80 (1981), discussed in Bowles & Whelan, 45 Mod. L. Rev. 434 (1982) with Law Reform Commission of British Columbia, Working Paper No. 49, discussed in Bowles & Whelan, 64 Can. Bar Rev. 142 (1986). See also Bowles & Whelan, 1 Int. Rev. L. & Ec. III (1981).

6. A seller with strong bargaining power might propose: "The buyer shall pay interest at [%](#) *per annum* on delay in paying for the goods. In no other situation will either party be liable for interest." Questions that remain might include the reaction of buyers and, under domestic law, challenges to validity. See Art. 4(a), *supra*.

## FOOTNOTES: Chapter on Article 79

1. On commercial losses and insurance see: R. Keeton & A. Widiss, *Insurance Law* (1988); R. Holtom, *Underwriting, Principles and Practices* (3d ed. 1987).

2. The scope of damages is limited by the "foreseeability" rule of Article 74, [406](#), *supra*, and often is restricted by contract.

3. Art. 79 is substantially the same as Art. 65 of the 1978 Draft except that, in paragraph (3), the word "only" that had followed "effect" was deleted. See [435](#), *infra*. Cf. ULIS 74, discussed *infra* at [427](#).

4. UNCITRAL, Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Ch XXI (U.N. 1988).

5. The pioneering work of the ECE is described in Benjamin. The ECE General Conditions of Sale and Standard Forms of Contract, [1961] J. Bus. L. 113; II *Unidroit Yearbook: 1956* 251, 258-67. On the adaptations of the E.C.E. General Conditions to impediments in different contractual settings, see *Force Majeure (I.A.L.S.)* 249-250 (P. I. Benjamin), 305-306 (L. Kopelmanas).

6. [Nicholas, Force Majeure and Frustration, in 27 Am. J. Comp. L. 231 \(1979\) \(AJCL UNCITRAL Symposium\)](#). Other comparative studies: *Zweigert & Kötz II* (1987) 179-183; *Treitel Remedies* (1988) 24-42; Nicholas, French Law of Contract (1982) 193-204; Hellner, the Influence of the German Doctrine of Impossibility on Swedish Sales Law in *Rheinsteinst Festschrift*, 705; *Force Majeure (I.A.L.S.)*.

7. UCC 2-614 requires the disappointed party to accept the substituted performance, and thus is more akin to rules that bar rejection (or "avoidance") for insubstantial breach. See Arts. 49 and 64, *supra* at [301](#) and [353](#).

For criticism of English rules on frustration, and a recommendation for reform based on the UCC, see Ont. Law Ref. Com., 11 Sales 365-385.

8. See [Nicholas AJCL UNCITRAL Symposium, 237 et seq.](#) The development of the exemption provision (Art. 74) at the 1964 Hague Conference is discussed in Riese, 29 *RabelsZ.* 79-81 (1965). See also W. Lee, 8 Dickinson J. Int. L. 375 (1990).

9. I *Records 1964 Conf.* 357 at 384; *Dölle Kommentar* Art. 74(1) p. 456 at 101 (Stoll): Exemption even for defect in goods existing when the contract is made; regretted deviation from Rabel's broad view of contractual liability and unclear scope of provision.

10. The basic change narrowing the area of exemption provided by ULIS 74 was taken in UNCITRAL: The Working Group: (1974) V YB 39-40, 58, *Docy. Hist.* 185-186 204; (1975) VI YB 60-61, *Docy. Hist.* 251-252; The Commission: VIII YB 56-57, *Docy. Hist.* 349-350; Diplomatic Conference: O.R. 80, 55-56, 378-386, 408-412, 430, 134-136, 227, *Docy. Hist.* 401, 445-446, 599-607, 629-633, 651, 705-708, 762 (adoption by Plenary 42-0). An authoritative analysis of the decision to deny exemption with respect to defects in goods by Professor Nicholas, chairman of the Drafting Party on exemption, appears in [Parker Colloq. Ch. 5 at 5.02\[2\], pp. 5-10-5-14](#). Accord: [Tallon, B-B Commentary at 580](#), Honnold's explanation at the Vienna Conference, O.R. 410-411, *Docy. Hist.* 631-632. But cf. [Schlechtriem 1986 Commentary 101 n. 416a](#).

11. See Art. 45, *supra* at [276](#); *Treitel Remedies (Int. Enc.)* 78-79; *Treitel Remedies* (1988) Ch. II.

12. Examples of a developing international outlook for international cases are cited under Art. 7, *supra* at [92](#). And, as was there noted, measures are under way to disseminate the case law and scholarly writing that develop under the Convention. This material would have relatively little value if (in violation of Art. 7(2)) tribunals were to resolve ambiguities in the Convention by referring to their own domestic law or to some other legal system indicated by the rules of private international law.

13. *General Conditions For the Supply of (ECE) Plant and Machinery* No. 188 (1953) (U.N. Pub. ME 188 bix 58) is reprinted in Sources at 90-97. *General Condition (ECE)* No. 188A: Supply and Erection of Plant and Machinery for Import and Export (1957)(U.N. Pub. 1957, II.E Mim3) is reprinted in Sources at 98-108. An approach similar to that of ECE No. 188 is followed in General Conditions for the Supply of Machinery and other Mechanical and Electrical Appliances within and between Denmark, Finland, Norway and Sweden 32. (This set of general conditions is reprinted in Sources at 212, 215, 216.)



14. See Berman, Excuse for Nonperformance in the Light of Contract Practices in International Trade, 63 Colum. L. Rev. 1413 (1963) and the proceedings of the I.A.L.S. (1960) Helsinki colloquium, *Force Majeure* (I.A.L.S.) 24❖29 (Affolter), 37❖41 (Berman), 68❖81 (Dölle); 145❖155 (Schmitthoff). The above approach is supported by the view, which this writer shares, that where the terms of the contract give no guidance, the court should consider what the parties would have provided if they had addressed the question. See Smit, 58 Colum. L. Rev. 287, 313 (1958), *cf.* Restatement. Second of Contracts. Intro. to Ch. 11.

15. See V YB 38, *Docy. Hist.* 185 (para. 108).

16. Schlechtriem makes this significant observation: "It is imperative....to treat radically changed circumstances as "impediments" under Article 79 in exceptional cases in order to avoid the danger that courts will find a gap in the Convention and invoke domestic laws with their widely divergent solutions". [1986 Commentary 102 n. 422a](#). Domestic rules may not modify CISG provisions dealing with the same problem merely by calling them rules of "validity". See ❖❖234, [240](#), *supra*. CISG 4(a) should apply only to rules of "validity" in the sense that agreement is barred no matter how clearly it is stated. See ❖234, *supra*.

17. Relief of a seller from liability for consequential damages when a ship was interned was illustrated in the setting of Art. 50, *supra* at ❖310. *cf.* Restatement, Second of Contracts ❖261, comment e.

18. Paragraph (2) of the text approved in 1975 by the Working group (VI YB 60 61, *Docy. Hist.* 251❖252) provided: "2. Where the non-performance of the seller is due to nonperformance by a subcontractor, the seller shall be exempt from liability only if he is exempt under the provisions of the preceding paragraph and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him."

This language, based on a draft developed at the 1974 session. V YB 39❖40, *Docy. Hist.* 185❖186, responded to views that ULIS 74 provided an area of exemption that was too broad. See *id.* at para. 108.

19. VIII YB 56, *Docy. Hist.* 349 (paras. 448❖449). The language resulting from UNCITRAL's 1977 review became Article 65(2) of the 1978 UNCITRAL draft and in substance was approved as Article 79(2) of the Convention. The Secretariat Commentary on Article 65(2) of the 1978 Draft stated: "The third person must be someone who has engaged to perform the whole or part of the contract. It does not include suppliers of the goods or of raw materials to the seller". O.R. 56, *Docy. Hist.* 446 (para. 12).

20. [B-B Commentary 585](#). Tallon also suggests that T "should know that his action is a means of performing the main contract" and "must relate only" to the performance of the main contract. But *cf.* [Nicholas, Parker Colloq. 5❖22 to 23](#); [Schlechtriem, 1986 Commentary 104](#).

21. [Tallon, B-B Commentary 584❖585](#).

22. For a similar handling of delay see (U.S.A.) UCC 2❖615(1)(a) quoted *supra* at ❖425.

23. See *Com. I* Art. 65, para. (3)(i) *Norway*, O.R. 134, *Docy. Hist.* 706; SK. 27 paras. 52❖53, O.R. 381, *Docy. Hist.* 602. It may be hoped that this added flexibility will be useful in some of the situations posed by [Nicholas in AJCL UNCITRAL Symposium 231 at 242❖244](#).

24. The second basis for avoidance based on a *Nachfrist* notice (Arts. 47(1) and 49 (1)(b), ❖305 *supra* should not be available for non-delivery of the 400 units subject to exemption. This remedy depends on a notice under Article 47(1) fixing an additional period "of reasonable length for performance"; it would be inconsistent with the language and spirit of this provision for the buyer to fix a deadline for performance when the performance demanded is exempt under Article 79.

25. [Tallon, B-B Commentary at 589❖590, ❖2.10.2](#), must have been referring to an unusual situation in which delayed performance was impossible and restitutionary problems were absent in referring to avoidance as "useless". Indeed, the view that in some Article 79 situations the contract would "disappear" (an echo of ULIS



*ipso fact* avoidance discarded in CISG (Art. 26, ¶187.1, *supra*) is not helpful to parties who need to know what to do following an impediment.

26. *Accord*; Tallon, *B-B Commentary* 590, ¶2.10.2; Schlechtriem, *1986 Commentary* 103: A general belief at the Diplomatic Conference that a judgment for specific performance would neither be sought nor obtained. In any event a German court would deny relief under Article 28. In French procedure the penalty payments to coerce performance (*astreint*) go to the plaintiff—a result that in substance resembles damages which are barred by Art. 79(5). See Zweigert & Kötz II (1987) 165.

27. ULIS 74(3) stated that exemption "shall not exclude the avoidance of the contract" or the right of the other party "to reduce the price". This latter alternative reflects the understanding that under ULIS 74(1) lack of fault could exempt the seller from *damages* for defects in the goods, but did not entitle the seller to recover the full price.

The UNCITRAL Working Party draft provided that an exempt party "shall not be liable in *damages*" but included no provision like ULIS 74(3) or CISG 79(5). V YB 39 ¶40, *Docy. Hist.* 185 ¶86; VI YB 60 ¶61, *Docy. Hist.* 251 ¶52. The language that became CISG 79(5) was prepared during UNCITRAL's 1977 review (in a Committee of the Whole) of the Working Group Draft. There was "general agreement that" [under this provision the party expecting performance] "should have the right to avoid the contract if the failure to perform amounted to a fundamental breach" and that "he should have the right to reduce the price in appropriate circumstances". (This right would be appropriate if the seller, after an excused delay, delivered defective goods.) In response to an objection that paragraph (5) might authorize specific performance and that "the law should not purport to give the expecting party a right which he could not exercise" it was noted that "a temporary impediment would cease and at such time a right to specific performance should not be precluded" VIII YB 56 ¶57, *Docy. Hist.* 349 ¶350 at para. 455a.

A similar discussion occurred at the Diplomatic Conference. O.R. 383 ¶385, *Docy. Hist.* 604 ¶606. Proposals to exclude specific performance (O.R. 134 ¶135, *Docy. Hist.* 706 ¶707) were rejected in response to concerns that the proposed language might bar remedies to require payment for goods received (USSR, para. 23) or to require performance after the termination of a temporary impediment (Sweden, para. 25). Analysis of these comments show that they do not support coerced performance of the acts for which exemption is provided by Article 79(1).

## FOOTNOTES: Chapter on Article 80

1. The 1978 Draft had no provision like Art. 80; this article resulted from an amendment proposed at the Diplomatic Conference. Cf. ULIS 74(3) (final clause.).

2. W. G. Sess. No. 5, Jan. 1974: V YB 39 ¶40, 58 *Docy. Hist.* 185 ¶86, 204 (draft article 74). The omitted language did appear in an alternative proposal submitted by an observer. W. G. Sess. No. 6, Jan. 1975: VI YB 60 ¶61, *Docy. Hist.* 251 ¶252.

3. The proposal (by G.D.R.) was labelled Article 65 *bis*. Text of the proposal: O.R. 135 ¶136 *Docy. Hist.* 707 ¶708. First Committee Deliberations: O.R. 386 ¶387, 393 *Docy. Hist.* 607 ¶608, 614.

4. *In support*: O.R. 386 ¶387, *Docy. Hist.* 607 ¶608, at paras. 50, 52, 53, 54, 56, 61, *Opposed*: *Id.* at paras. 55, 57, 60.

5. *First Committee*: O.R. 393, *Docy. Hist.* 614. *Plenary*: O.R. 227, *Docy. Hist.* 762. The Title of, Sec. III, *Exemptions*, containing Articles 79 and 80 (then 65 and 65 *bis*) appeared in the draft that was submitted to the Plenary but, unlike some of the headings, was not the subject of a separate vote.

6. The Drafting Committee was generally not authorized to make substantive decisions. However, the First Committee in this case authorized the Drafting Committee to decide where the new article should be placed and this decision was not challenged when the Conference reviewed the final text including the titles of sections and

chapters. The names for individual articles in this book were supplied by the present writer for ease of identification and, like the names of articles in the Secretary's Commentary, have no legislative significance. See *O.R.* 14, note 1, *Docy. Hist.* 404.

7. The example is abnormal in several respects. It would be more usual for the buyer to obtain the import license. In such cases a buyer who regrets making the contract might well either make a feeble attempt to obtain the license or induce its government to deny the license. In this setting, as in the above example, a buyer who regrets making the contract would usually be satisfied to be rid of the contract and would not sue for damages; apart from loss of good-will and the danger of a defense exposing the buyer's machinations, it would be difficult to prove damages from the loss of undesired performance. The difficulty in finding a more normal example lets one hope that Article 80 will seldom be needed.

8. Cf. *Farnsworth, Contracts*, 610-611 at n. 23; *Treitel, Remedies* (1988) 296.

## FOOTNOTES: Introduction to Section V

1. See also Art. 25 (definition of fundamental breach). Art. 26 (avoidance requires notice to the other party), Arts. 51-52 (remedies applicable with respect to defective part).

## FOOTNOTES: Chapter on Article 81

1. This article is substantially the same as Art. 66 of the 1978 Draft Convention, and is similar to Art. 78 of ULIS except that the latter does not contain the provision on settlement of disputes in Art. 81(1) (second sentence).

2. If Buyer resold the goods for more than the price owed to Seller, Seller's right to recover the goods may justify recovery of the larger sum that Buyer received. If the proceeds of the resale can be traced *i.e.*, if the price for the resale has not been paid, Seller's specific right to recover the goods might be transferred to a specific right to recover the asset that Buyer wrongfully obtained. Cf. *Friedmann*, 104 L.Q.R. 383, 388 (1988).

3. For domestic law approaches see *Treitel, Remedies* (1988) 392-396. In the United States, barriers to damages were removed by the UCC 2-711(1), 2-720.

4. For the text of the UNCITRAL Arbitration Rules see *AJCL UNCITRAL Symposium*, 27 Am.J.Comp.L. 489, 496; VII YB 22. Art. 21(1) of the Rules: "The arbitral tribunal shall have the power to rule on objections...with respect to the *existence or validity* of the arbitration clause or the separate arbitration agreement."

5. See *Sanders, AJCL UNCITRAL Symposium, supra*, at 462-463.

6. See H. Holtzmann & I. Neuhaus, *Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1989) 478-480. Art. 16(1) of the Model Law is similar to Art. 21(1) & (2) of the UNCITRAL Rules, *supra*. To permit a unified and uninterrupted arbitral proceeding the arbitrators may have jurisdiction to decide basic questions like the existence and validity of the agreement to arbitrate even though these questions, unlike the merits of the award, may be subject to judicial review. On CISG and Arbitration see Carbonneau & Firestone, I Emory J. Int'l. Dispute Res. 51 (1986).

7. See *Secretariat Commentary* Art. 66 para. 6, *O.R.* 57, *Docy. Hist.* 447.

8. See Houin, *Sale of Goods in French law. Comp. Sales (I.C.I.Q.)* 16, 28, *Vaisse, Rights and Remedies* available to an Unpaid Seller under French Law, 4 Int. Bus. Lawyer 379 (1976). Cf. *Kjelstrup, The Unpaid Seller Under Norwegian Law id.* at 375. Cf. *Quebec Civ. Code Revn., Obligations* p. 343, Art. 267 (restoration "in kind"): German (FRG) Civil Code 346.

9. *Honnold, Sales* 343-345. Cf. UCC 2-702 (recovery within 10 days when buyer "has received goods on credit while insolvent"); UCC 9-203(1)(a) (security interest against debtor in possession must be based on a "security agreement" signed by debtor). A similar approach is proposed in Hellner 22 *Scan. Stud.* 53.69. See also Hellner. *Contracts and Sales, Intro. Swedish L.* 201, 217.

10. For protection of third parties under French law see Houin, *supra* n. 8, at 29: *Quebec Civ. Code Revn., Obligations* p. 343, Art. 268.

11. Accord: (U.S.A.) UCC 2-711(3) (a buyer who rejects or revokes acceptance has a "security interest" in goods in his possession to protect his right to recover payments of the price and reimbursement for expenses); German (F.R.G.) Civil Code 348.

12. See, e.g., (U.S.A.) UCC 9-503: A "secured party has on default the right to take possession of the collateral". A seller's interest in the goods after delivery is limited to a "security interest" (UCC 1-201(37)) and is not enforceable unless the debtor (here, the buyer) "has signed a security agreement".

## FOOTNOTES: Chapter on Article 82

1. As has been noted under Art. 47 at 288 and under Art. 49 at 305, when the seller has delivered the goods the buyer may avoid only in the event of a fundamental breach; avoidance based on failure to comply with a *Nachfrist* notice applies only to non-delivery. Similarly, the buyer may compel the seller to deliver substitute goods (Art. 46(2)) only "if the lack of conformity constitutes a fundamental breach of contract."

2. This article is the same as Art. 67 of the 1978 Draft and is similar to ULIS 79.

3. Treitel, *Remedies (Int. Enc.)* 181; (U.S.A.) UCC 2-608(2) (revocation of acceptance).

4. [Tallon, B-B Commentary 608](#), states that if the goods "disappear owing to the buyer's negligence" the buyer can not avoid the contract.

## FOOTNOTES: Chapter on Article 83

1. This article is substantially the same as Art. 68 of the 1978 Draft and ULIS 80.

2. Assume that a buyer has processed or sold goods after knowledge of a third-party claim of ownership (Art. 41) or infringement of intellectual property (Art. 42). Article 82(2)(c) may bar the buyer from avoiding the contract or requiring the seller to deliver substitute goods but should not bar the buyer from "requiring performance" by the seller (Art. 46(1)) of an implied obligation under Articles 41 or 42 to remove or defend the third-party claim. See 270.1, *supra*.

3. The right to recover damages for breach of contract under Article 74 when the buyer requires the delivery of substitute goods (Art. 46(1)) is preserved by the general language of Article 83; the obligation to account for benefits received from goods under Article 84 is made specifically applicable (subparagraph (2)(b)) when the buyer has "declared the contract avoided or required the seller to deliver substitute goods". Avoidance of the contract and requiring the delivery of substitute goods present similar problems and are expressly linked in Articles 82(1), 83 and 84(2)(b).

## FOOTNOTES: Chapter on Article 84

1. This article is the same as Art. 69 of the 1978 Draft Convention and is substantially the same as ULIS 81.

2. Buyer under Article 74 could also claim damages resulting from the failure to receive the goods when promised (*e.g.*, interruption of production) and at the agreed price (*e.g.*, the effect of a rise in the market price).
3. The reference in Article 81(2) to "restitution of what a party has *supplied* or *paid*" seems to refer to the *payment* or the *goods* that must be returned rather than to interest. The term "restitution" is not used in Article 84(1) in providing for the recovery of interest; on the other hand, Article 84(2) calls for a restitutionary approach in requiring a buyer "to account" for "benefits" derived from the goods. In this latter setting there seems to be no practicable alternative to restitution. See [451.3](#), *infra*.
4. In view of the hazards confronting an attempt to recover the goods, the seller should demand, as alternative relief, that Buyer pay the price (Art. 62).
5. Presumably, the buyer could deduct the cost of redispotion; a similar adjustment would be appropriate when the goods have been processed.
6. When the buyer has resold the goods to a customer who has not yet paid for them the seller will find it useful to ascertain whether applicable domestic law defers the claims of creditors to the seller's right to recover the goods (*cf.* (U.S.A) UCC 2-402(1)) and also whether a right to recover goods extends to specific proceeds like the customer's unpaid debt for the goods. See also Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 L. Q. Rev. 383 (1988).

#### FOOTNOTES: Chapter on Article 85

1. This article is substantially the same as Art. 74 of the 1978 Draft. The addition of the "or where payment..." phrase in paragraph (1) was a clarifying amendment. See *O.R.* 398, *Docy. Hist.* 619. *Cf.* ULIS 91.
2. *Atiyah* 365-371 (the remedy is complicated by use of the "properly" concept): *Benjamin* 1241-1257 *Bridge, Sale* 719-727. See (U.S.A.) UCC 2-709(1)(a): Seller may recover the price of goods the buyer has "accepted"; *cf.* 2-709(1)(b) (price recovery "if the seller is unable after reasonable effort" to resell the goods). *Cf. Ont. Law Ref. Com., II Sales* 415-418 (criticism of SGA rules on price recovery, with recommendation based on UCC 2-709).

#### FOOTNOTES: Chapter on Article 86

1. This article is substantially the same as Article 75 of the 1978 Draft. The last sentence of paragraph (2) was added for clarity. *O.R.* 399-400, *Docy. Hist.* 620-621. *Cf.* ULIS 92.
2. *White & Summers* S3 at pp. 365-366 reviews the case law under UCC 2-603. *Ont. Law Ref. Com., II Sales* 476-477 recommended adoption of rules based on the UCC.

#### FOOTNOTES: Chapter on Article 87

1. This article is the same as Art. 76 of the 1978 Draft. *Cf.* ULIS 93.
2. UCC 2-604 similarly gives a rejecting buyer the option to "store the rejected goods for the seller's account." UCC 7-209 gives the warehouseman a lien against (sub (1)) "the bailor" and (sub (3)) certain third persons.

#### FOOTNOTES: Chapter on Article 88

1. This article is closely based on Art. 77 of the 1978 Draft. In paragraph (1) "the price or" was inserted to conform to the addition of a reference to the price in Art. 85, *supra* at ¶454. In addition, in paragraph (1) "reasonable" was inserted before "notice." *O.R.* 413-414, *Docy. Hist.* 634-635. *Cf.* ULIS 94, 95.

2. The language just quoted limits the scope of the seller's obligation under Article 85 to take steps to preserve the goods and thereby also limits the situations in which Article 88(2) requires the seller to take reasonable measures to sell the goods.

## FOOTNOTES: Chapter on Final Provisions

1. The Second Committee's deliberations are recorded in the *Official Records (O.R.)* at pp. 434-474 and 479; the resulting draft as reviewed by the Drafting Committee appears at *O.R.* 165-167, *Docy. Hist.* 165-167. This draft was then submitted to the Plenary Conference for final action; the deliberations and decisions (at this stage requiring a two-thirds majority) are recorded at *O.R.* 228-230. A careful study by Professor Winship of the final provisions of the UNCITRAL Conventions appears in 24 *Int. Law.* 711 (1990).

2. Article 90 is substantially the same as Article 37 of the 1974 Convention on the Limitation Period in the International Sale of Goods (A/Conf. 63/15). There was little discussion of Article 90 at the 1980 Vienna Conference. See *O.R.* 439-440, 479.

3. I. Sinclair, *The Vienna Convention on the Law of Treaties* 106-109 (2d ed. 1984). Article 40(2) & (3) of the Vienna Treaty on Treaties prescribes procedures for amending a multinational treaty *e.g.*, all parties to the treaty must be notified of the proposal to amend and have the right to take part in the decision on whether to amend.

4. CISG 101(2) provides that a denunciation may provide a longer delay before effectiveness than the twelve-month delay specified in this article. Delicate handling of this provision could minimize the danger of gaps but it would be hazardous to rely on inclusion of the same flexible period in the instruments of denunciation filed by all Contracting States.

5. The Protocol amended the 1974 provisions on sphere of application to conform to the approach that had developed in preparing the 1980 Convention. The Protocol appears in the *Official Records* of the 1980 Conference at p. 191. The 1974 Limitation Convention, as amended, entered into force on August 1, 1988. See also Winship, n. 1, *supra* at 731-732.

6. U.N. Treaty Series, vol. 510, p. 149, No. 7411 (1964); UNCITRAL *Register*, Vol. I, p. 5. Detailed procedures for replacement of the 1964 Hague Conventions on Sales (ULF & ULIS) are specified in CISG Article 99(3)-(6). The text of Article 99 appears in Appendix A, *infra*.

7. The question whether CISG yields to the Hague PIL Convention when the Hague PIL rules conflict with the rules of applicability in CISG is deferred to ¶¶464.3-464.5 so that the question can be considered in a setting where such a conflict may occur.

8. For simplicity, the impact of this provision on CISG is discussed in terms of its rules in inspection and notification. However, the reference in Hague Article 4 to "measures to be taken in case of refusal of the goods" could supersede Articles 85-88 that deal specifically with this question and, to an uncertain extent, the applicability of general rules on rejection and avoidance with respect to defective goods (Arts. 49, 81-84).

9. Sinclair, *supra* note 3, 93, describes this area as a "particularly obscure aspect" of treaty law. Nothing that follows contradicts this view.

10. Article 30 of the Vienna Treaty on Treaties provides that when successive treaties have incompatible provisions the earlier treaty yields (para. 3) unless the later treaty provides otherwise (para. 2) *i.e.*, the 1955 Hague Convention would yield to the 1980 Sales Convention.



11. The 1955 Hague P.I.L. Convention was not designed to intrude on a Convention establishing uniform law for sales; the first such convention (ULIS) was adopted in 1964. The care taken to avoid such intrusion in the 1986 Hague P.I.L. Convention is described *infra* at [464.4](#).

12. For simplicity "ratification" herein includes acceptance and approval. All three terms (Art. 91(2)) refer to domestic constitutional procedures by which signatory States adopt the Convention.

13. See the Vienna Treaty on Treaties (1969) Art. 18: Signature subject to ratification creates an obligation "to refrain from acts which would defeat the object and purpose of the treaty". It is sometimes said that such signature implies an obligation to submit the treaty to the ratification process. By analogy to the courting customs of this writer's youth, signature implies less than engagement and perhaps is similar to "going steady" or a promise to "think it over".

14. See [9](#), *supra* and UNCITRAL, Report of the Eleventh Session (1978) paras. 20-22, IX Y.B. 13-14.

15. See Ziegel, 12 Can. Bus. L. J. 366, 368-369 (1986-87). For the treaty power of the United States in relation a convention establishing uniform law for international sales see Honnold, 107 U. Pa L. Rev. 207, 304-319 (1959).

16. Canada's role in securing adoption of such a provision is described in Leal, 8 Dalh. L.J. 257 (1984).

17. These declarations also stated that the Convention will not apply when one party has its place of business in one of these four States and the other party's place of business is in Iceland.

18. If the States in question had made a declaration under Article 95 excluding Sub(1)(b) the answer could end here.

19. In Example 100A the communications were transmitted by telex. If the communications (*e.g.*) went by post and were subject to delay it may be necessary to refer to Article 15(1) (an offer "becomes effective when it *reaches* the offeree") and Article 18(2) (an acceptance becomes effective when it "*reaches* the offeror". Although these rules may lead to the conclusion that the Convention does not apply it seems necessary to use the Convention's own rules to apply its rules on applicability.

---

©Pace Law School Institute of International Commercial Law - Last updated February 23, 2005

---

[Go to Database Directory](#) || [Go to Table of Contents to Annotated Text of CISG](#) || [Go to Database Bibliography](#)