THE VIENNA CONVENTION ON INTERNATIONAL SALES CONTRACTS AND MEXICAN LAW: A COMPARATIVE STUDY

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FACULTY ADVISOR'S INTRODUCTION

The development of international trade has always been hindered by the lack of uniform regulation. In an effort to encourage uniformity and create an international convention acceptable to developing and socialist countries as well as highly industrialized capitalist countries,[1] the United Nations Commission on International Trade Law (UNCITRAL) sponsored a conference in Vienna, between March 10 and April 11, 1980, at which the text of the United Nations Convention on Contracts for the International Sale of Goods (the Convention)[2] was adopted and opened for signature and accession. It was the hope of the draftsmen that adoption of these uniform rules governing contracts for the international sale of goods would contribute to the removal of important legal barriers in international trade and promote its development.

In general, the Convention applies to any international contract for the sale of goods between two parties whose places of business are in

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1. Reczei, *The Area of Operation of the International Sales Conventions*, 29 AM. J. COMP. L. 513 (1981). An earlier convention had been drafted on the international sale of goods, the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (ULIS). But, due to the inacceptability of the ULIS to socialist and developing nations, UNCITRAL sought its revision. *Id.* at 513. For a definitive treatment of the Convention see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION. (1982).

2. United Nations Convention on Contracts for the International Sale of Goods, U.N. General Assembly, U.N. Doc. A/CONF. 97/18 (1980) *reprinted in* 19 INT'L LEGAL MAT. 668 (1980) [hereinafter cited as Convention]. The Vienna Convention is effective on the first day of the month following the expiration of twelve months after the date of deposit of the instrument of ratification, acceptance, approval or accession by the tenth nation. *Id.* art. 99(1).

two different countries which have ratified the Convention.[3] If the forum is in a noncontracting country, the Convention only applies if the conflicts rule of the forum provides for application of the law of a signatory country.[4] The parties must know at the time of contracting that the other's place of business is in a foreign country in order for the Convention to apply.[5] The Convention applies to all international sales except those of personal goods (unless before or at the time of contracting the seller neither knew, nor had any reason to know, that the goods were bought for such use),[6] stocks, shares, investment securities, negotiable instruments or money,[7] ships, vessels, hovercraft or aircraft,[8] electricity,[9] personal labor or services,[10] goods sold on execution or by authority of law,[11] and those sold by auction.[12] Contracts for the supply of goods to be manufactured or produced are considered sales unless the buyer supplies a substantial part of the materials necessary for manufacture or production.[13] The Convention does not concern the validity of the contract nor the effect which the contract may have on the title to the goods sold, but "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from the contract."[14]

The following article presents a comparison of the Convention to Mexican laws dealing with the sale of goods. In order to justify the importance and appropriateness of ratification of the Vienna Convention by the Mexican legislature, the broad scope of this comparative study by the Chairman offers reasons for ratification of the Vienna Convention by all nations involved in international trade, including the United States, not yet a signatory country. In addition, it allows students of Mexican sales law the opportunity to familiarize themselves with the views of one of it's most authorized exponents. Professor Barrera Graf therefore has given the reader the rare opportunity to obtain, in outline fashion, an authoritative view of both the draft of the Vienna Convention and of the Mexican law of sales.

—Boris Kozolchyk

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3. Convention art. 1(1), *supra* note 2, at 672; Reczei, *supra* note 1, at 518.
4. Convention art. 1(1)(b), *supra* note 2, at 672; Reczei, *supra* note 1, at 518.
5. Convention art. 1(2), *supra* note 2, at 672; Reczei *supra* note 1, at 521-22.
6. Convention art. 2(a), *supra* note 2, at 672.
7. *Id.* art. 2(d), at 672.
8. *Id.* art. 2(e), at 672.
9. *Id.* art. 2(f), at 672.
10. *Id.* art. 3(2), at 672.
11. *Id.* art. 2(c), at 672.
12. *Id.* art. 2(b), at 672.
13. *Id.* art. 3(1), at 672.
14. *Id.* art. 4, at 673. Trans. note: Where the author has quoted a portion of the Convention, the translator will employ the respective wording of the official English version of that document. *See supra* note 2.

Resumen

En un esfuerzo tendiente a promover el desarrollo del comercio internacional a través de una regulación uniforme que elimine cualquier tipo de barrera legal local y sea aceptable, tanto a los países en vía de desarrollo, como a los socialistas y a los capitalistas altamente industrializados, la Comisión sobre derecho comercial internacional de las Naciones Unidas (United Nations Commission on International Trade Law – UNCITRAL), patrocionó una conferencia diplomática en Viena en 1.980, en la cual se adoptó y dejó abierta para su firma o adherencia, la Convención de las Naciones Unidas sobre Compra-ventas Internacionales de bienes. En general, la Convención se aplica a cualquier contrato internacional de compra-venta entre dos partes cuyos centros de negocios se encuentren en diferentes países ratificantes de ella. Si el "forum" está en un país no participante, la Convención se aplica sólo si las reglas sobre conflictos de leyes del país, prevén la posibilidad de aplicación de la ley de un país firmante de la misma. La Convención regula únicamente la formación de los contratos de compraventa y los derechos y obligaciones que de él surgen, tanto para el comprador como para el vendedor. No regula lo referente a la validez o al efecto que el contrato pueda tener sobre la titularidad de los bienes vendidos. Con el fin de justificar la importancia y oportunidad de ratificar la Convención, concretamente por México, este articulo hace una comparación entre la Convención y las leyes mexicanas sobre compraventa. La amplia perspectiva del estudio presenta al lector la justificación para la ratificación de la Convención por todas las naciones implicadas en el comercio internacional, incluidos los Estados Unidos de Norteamérica, no firmantes de ella hasta la fecha. Adicionalmente, el enfoque comparativo le posibilita al lector conocer la legislación mexicana sobre la compraventa. Más aún, el escritor, en su calidad de autor del borrador sobre el cual se basa la Convención, aporta al escrito esa experiencia y conocimiento. Una mayor diferencia entre los dos cuerpos de leyes consiste en que mientras la Convención no distingue entre compraventa civil y comercial, la ley mexicana si lo hace, reservando a cada división política de la federación de estados mexicanos, la regulación de la compraventa civil y al código de Comercio y otras leyes comerciales, tales como la de navegación y comercio marítimo y la ley de protección del consumidor, la regulación de las compraventas comerciales. La necesidad de caracterizar una compraventa como comercial o civil, conduce a confusión e incertidumbre en las transacciones comerciales, tanto nacionales como internacionales, de acuerdo con la ley mexicana. Sinembargo, la incorporación de un

nuevo cuerpo de ley, tal como la Convención, no aumentará la confusión. En su lugar reemplazará la confución interna en la solución del problema, con la regulación más sistemática de la Convención, exclusivamente en el campo del comercio internacional. El actual estado de incertidumbre a nivel doméstico subsistirá. Adicionalmente, el moderno texto de la Convención podría servir como modelo para la preparación de una nueva ley nacional sobre el tema. La comparación presentada en este articulo es breve y limitada, dirigida a ilustrar los defectos y omisiones de la actual legislación mexicana y los méritos de la Convención, con la especial consideración que ella le da a varios problemas y situaciones. Este análisis demuestra que la Convención le otorga una mayor protección a los intereses mexicanos en el comercio internacional y ofrece precisas reglas para la prevención y resolución de conflictos. Esta comparación considera las soluciones, tanto de la Convención como de la ley mexicana, en la regulación de la formación del contrato; deberes del comprador y vendedor; acciones en caso de incumplimiento del contrato, tanto para ambas partes, o solo para una de ellas; riesgo de pérdida debida a deterioro o fuerza mayor y las obligaciones de custodia de los bienes. La ley mexicana básicamente impone tres deberes al vendedor: entregar el bien, garantizar su calidad y grantizar el titulo. La Convención, a su vez, establece tres deberes para el vendedor: entregar los bienes, entregar los documentos referentes a ellos y transferir el titulo. Las obligaciones del vendedor en cuanto a la entrega de los bienes están particularmente reguladas en la Convención, en cuanto a lugar y fecha de la entrega y los bienes que deben entregarse. El código Civil del Distrito Federal le impone al comprador la obligación de pagar el precio de los bienes, cumpliendo con los requisitos referentes a tiempo, lugar y modo de pago. La Convención agrega el deber para el comprador de recibir los bienes, tal como el contrato y la Convención lo establecen. En general, la Convención otorga a cada parte el derecho de demandar el cumplimiento de la otra o el de pedir la resolución si el incumplimiento es substancial, más daños en ambos casos. La ley mexicana otorga las acciones de ejecución forzosa o la resolución (con algunas excepciones), más daños, y ofrece el derecho adicional de terminar el contrato, si su cumplimiento se hace imposible.

Abstract

In an effort to promote the development of international trade through uniform regulation, which removes local legal barriers and is acceptable to developing and socialist countries as well as highly

industrialized capitalist countries, the United Nations Commission on International Trade Law (UNCITRAL) sponsored a diplomatic conference in Vienna, in 1980, at which the text of the United Nations Convention on Contracts for the International Sale of Goods (the Convention) was adopted and opened for signature and accession. In general, the Convention applies to any international contract for the sale of goods between two parties whose places of business are in two different countries which have ratified the Convention. If the forum is in a noncontracting country, the Convention applies only if the conflicts rule of the forum provides for application of the law of a signatory country. The Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from the contract. It does not concern the validity of the contract nor the effect which the contract may have on title to the goods sold. In order to justify the importance and appropriateness of ratification of the Convention by, specifically, the Mexican legislature, this article presents a comparision of the Convention to Mexican laws dealing with the sale of goods. The broad scope of this study presents to the reader the rationale for the ratification of the Convention by all nations involved in international trade, including the United States which, like Mexico is not yet a signatory country. In addition, the comparative approach enables the reader to become familiar with current Mexican legal regulation of the sale of goods. Furthermore, the author, as head drafter of the draft convention on which the Convention was based, brings a unique expertise to the discussion. One major difference between the two bodies of law is that, while the Convention does not distinguish between civil and commercial sales, Mexican law does make such a distinction, reserving to each of the political divisions of the Mexican Federation the regulation of civil sales and reserving to the province of federal commercial legislation, e.g., the Commercial Code and statutes such as the Law of Navigation and Maritime Commerce and the Consumer Protection Law, the regulation of commercial sales. The necessity to characterize a sale as civil or commercial in nature leads to confusion and uncertainty in international and national business transactions under Mexican law. However, the addition of a new body of law, such as the Convention, would not increase the confusion. It would instead replace the confused domestic approach with the more systematic provisions of the Convention exclusively in the realm of international commerce. The present state of uncertainty in the domestic context would subsist. In addition, the Convention's modern text could serve as a model for the preparation of new

domestic laws dealing with similar concerns. The comparison presented in this article is brief and abridged, directed towards the end of illustrating the defects and omissions of the present laws of Mexico and the merits of the Convention and the special consideration given by it to various problems and situations. This analysis demonstrates that the treatment by the Convention affords better protection in international commerce for Mexican trade interests in the world market and offers precise rules for the prevention and resolution of conflicts. This comparison considers the approaches of both the Convention and Mexican law toward the regulation of the formation of the contract; duties of the seller; duties of the buyer; remedies for breach of the contract, respecting both actions available to either of the two contracting parties or only to one or the other of the parties; allocation of risk in the event of loss due to deterioration or force majeure *and the obligation for the preservation of the goods. Mexican law generally imposes three basic duties on the seller: he must deliver the goods, warrant their quality and warrant their title; little further explication is made. The Convention, in turn, establishes three duties on the seller: delivery of the goods, delivery of the documents relating to those goods and transfer of title. The seller's obligations as to delivery of the goods is specifically regulated, in the Convention, as to place of delivery, date of delivery and the goods to be delivered. The Mexican Federal District Civil Code imposes the duty on the buyer to pay the price for the goods, complying with the appropriate requisites concerning time, place and manner of payment. The Convention adds the duty that the buyer must take delivery of the goods as required by the contract and the Convention. In general, the Convention grants either party the right to demand performance of the other or the right to rescind if the breach is fundamental, plus damages in both cases. Mexican law affords the remedies of specific performance or rescission, with some exceptions, plus damages, and offers the additional right to cancel the contract if the performance proves to be impossible.*

SCOPE

Domestic and Foreign Regulation of Sales

Although both the International Convention law and Mexican domestic regulation of sales apply to the same types of agreement, they differ substantially in their scope. For example, the Vienna Convention covers only international sales dealing with merchandise.[15] Furthermore, only certain aspects of the sales agreement and certain types of merchandise are included.[16] In contrast, the Mexican law of sales applies to sales in general irrespective of the nature of the goods and of the place of execution (national or international). Mexican law also applies to all of the issues and relations involved in the transaction.[17]

While the Convention does not distinguish between civil and commercial sales,[18] Mexican law does make such a distinction by reserving to the respective states and the Federal District the regulation of civil sales.[19]

SOURCES

As indicated above, Mexico has multiple sources of sales law. There are thirty-two state civil codes which regulate sales contracts, both national and international. These codes may be applicable to commercial transactions when there are gaps or omission in commercial statutory law.[20] Also, there are commercial law rules which apply to civil contracts or to certain specified types of contracts,[21] such as maritime sales.[22] This multiplicity of laws presents serious problems in determining the applicable civil law, i.e. the local state civil code or the Civil Code of the Federal District (hereinafter Civil

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15. *See id.* arts. 1-3, at 672.

16. *See id.* art. 4, at 673.

17. *See* CODIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES [C. CIV. D.F.] arts. 2248-2326 (México 1928); CODIGO DE COMERCIO [C. Co.] arts. 371-787 (México, D.F. 1890).

18. Convention art. 1(3), *supra* note 2, at 672.

19. The states regulate civil sales through their respective civil codes and the federal jurisdiction regulates commercial sales through the federal Commercial Code (C. Co., *supra* note 18) and other statutes such as the Law of Navigation and Maritime Commerce (LEY DE NAVEGACION Y COMERCIO MARITIMO [L.N. Y C.M.] (México, D.F. 1975) and the Consumer Protection Law (LEY DE PROTECCION AL CONSUMIDOR [L.P.C.]) 5a ed. (Porrua, 1979).

20. The thirty-two civil codes represent the civil legislation of the thirty-one states and the federal district of Mexico.

21. C. Co. arts. 371-87, *supra* note 17.

22. L.N. Y C.M. arts. 210-21, *supra* note 19. Maritime sales are regulated by the LEY DE NAVEGACIÓN Y COMERCIO MARITIMO.

Code).[23] It also requires the vexing determination of the civil or commercial nature of the contract. For example, is the contract civil or commercial for both of the contracting parties, as in consumer sales, or is such a characterization applicable to only one of the parties, i.e., is it a commercial contract for one party and a civil contract for the other? These are complex questions and their resolution requires consideration of diverse factors such as the tenor of the applicable statutory law, e.g., the Commercial Code or the Consumer Protection Law. In addition one must consider the status of the contracting parties, i.e., whether or not they are merchants, banks, etc.; the subject matter, i.e., goods or a negotiable instrument and even the purpose of the transaction, i.e., whether it is for profit or speculation or whether it concerns the operation of an enterprise. Businessmen and their contracting parties regard the multiplicity of laws as a source of uncertainty and doubt, since they foster ignorance of the law and of the protection that the law affords. And, as if these problems were not enough, the difficulties are compounded by the age of the Commercial Code (1890)[24] and of the Civil Code(1928).[25] As a result of their ages and of the development of sales law including the growth of commercial business, state regulation and consumer protection, these codes are replete with omissions. Thus, it would seem that to add a new set of rules such as the Vienna Convention, if ratified by the Mexican Government, to the several applicable bodies of law would only increase the confusion and uncertainty. Such would not be the result, however.

The Convention applies only to international trade, an area in which, as a consequence, domestic law would merely cease to be applied. In the domestic context, the present confused and chaotic situation no doubt will subsist as long as the Mexican federal legislature fails to enact new laws suited to present-day needs. Such an enactment would necessitate studied consideration of the issues and a revamping of almost all of the commercial laws, but out of it could emerge a truly modern domestic law to operate side by side with the Convention. Moreover, given the dispersion, insufficiency and antiquity[26] of almost all of the present Mexican sales law provisions, a

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23. C. Civ. D.F., *supra* note 17.

24. Codigo de Comercio (México, D.F. 1890).

25. Codigo Civil para el Distrito y Territorio Federales (México 1928). The complexity of the situation is compounded by the civil codes of the states, which are to a greater or lesser extent copies of the aforementioned code.

26. Mexican commercial legislation is quite old, as is Mexican civil law, for both are based upon ancient sources. The Mexican Commercial Code is based on its Spanish and French namesakes of 1829 and 1808, respectively, and the Mexican Civil Code of 1928 finds some of its inspiration on the Mexican Civil Code of 1884, which, in turn, copied many provisions from the Napoleonic Code of 1804.

modern text such as the Convention can serve as a model for the drafting of new rules dealing with some of the problems treated in the Convention. It would be highly advisable therefore for the Mexican legislature to ratify the Convention.

In order to further justify the importance and appropriateness of such a decision this article will compare the Convention with the Mexican law applicable to the sale of goods. Such a comparison will be brief and will be aimed at illustrating the defects and omissions of Mexican law and the merits of the Convention. This analysis will also demonstrate that the Convention affords better protection for Mexican international trade interests in the world markets.

REGULATION OF THE FORMATION OF THE CONTRACT

Mexican civil[27] and commercial statutory law inadequately protects the formation of the sales contract. In addition, the rules pertaining to the moment of execution of contracts between parties contracting at a distance are different if not conflicting. In civil sales contracts "the contract is perfected at the moment the offeror receives acceptance," (a rule derived from the so-called reception theory).[28] Commercial contracts, on the other hand, are considered executed from the moment that the offeree responds affirmatively, accepting the offeror's proposition (a rule derived from the so-called dispatch theory.)[29] This discrepancy becomes exceptionally troublesome when dealing with "mixed-contracts," i.e., those which are civil for one party, generally the buyer and commercial for the other party; a type of contract which is by no means foreign to international trade.

The Convention rule provides that contracts "are concluded when an acceptance of an offer becomes effective in accordance with the provisions of the Convention."[30] According to article 18 the contract

27. The Federal District Civil Code, C. Civ. D.F., *supra* note 17, will be referred to exclusively throughout this article, due as much to the fact that the Code has been copied by the states as to the extensive practice, which the author considered legally unsupported, of regarding it as the only body of civil law which supplements commercial legislation.

28. C. Civ. D.F. art. 1807, *supra* note 17.

29. C. Co. art 80, *supra* note 17. Both the Civil and the Commercial Codes have preserved a notoriously archaic rule with respect to telegraphic and telex communications. To wit, the rule holds that this manner of giving expression to one's intent will effect an obligation only when the parties have previously, in writing, agreed that such methods are appropriate and, then, only given that the telegrams include the conditions or conventional signals that the parties have established. C. Civ. D.F. art. 1811, *supra* note 17; C. Co. art. 80, *supra* note 17.

30. Convention art. 23, *supra* note 2, at 676.

is perfected when, in an application of the reception theory, "the indication of assent reaches the offeror," within the period stipulated by the offeror or, absent such stipulation, within a reasonable time, as determined according to the circumstances of the case at hand.[31] This "assent" may consist of either a statement, written or verbal, or of an act undertaken by the offeree, e.g., payment of the price or shipment of the goods;[32] mere silence, however, can never constitute acceptance.[33]

In contrast to Mexican law, which is remiss in this area, the Convention expressly governs the following issues of contract formation:

(a) elements of an offer and acceptance;[34]
(b) the irrevocability of the offer from the moment that it reaches the offeree, unless it is simultaneously withdrawn or has been withdrawn beforehand,[35] and the binding effect of the acceptance which perfects the contract, unless it is withdrawn prior to or simultaneously with the moment of effectiveness;[36]
(c) the possibility of revocation of an offer;[37]
(d) instances where the offer is irrevocable;[38]
(e) the validity of an acceptance which contains changes that do not differ materially from the terms of the offer, where the offeror does not make timely objections to the disparities;[39]
(f) the duration of the period for acceptance in relation to the various means of communications employed;[40]
(g) the binding effect of late acceptances;[41]

OBLIGATIONS OF THE SELLER

Article 2283 of the Civil Code imposes three basic obligations on the seller; he must deliver the goods, warrant their quality and warrant

31. *Id.* art. 18(2), at. 675.
32. *Id.* art. 18(3), at 675.
33. *Id.* art. 18(1), at 675.
34. *Id.* arts. 14, 18, at 674-75.
35. *Id.* art. 15, at 675.
36. *Id.* art. 22, at 676. Article 1808 of the Civil Code states that: "The offer shall be considered as not made if the author withdraws it and the addressee receives the withdrawal before the offer. The same rule applies to the case where the aceptance is withdrawn." C. Civ. D.F. art. 1808, *supra* note 17.
37. Convention art. 16(1), *supra* note 2, at 675.
38. *Id.* art. 16(2), at 675.
39. *Id.* art. 19, at 675-76.
40. *Id.* art. 20, at 676.
41. *Id.* art. 21, at 676.

their title.[42] The Commercial Code also refers to these obligations, although not as explicitly or directly.[43]

In maritime sales contracts, the Law of Navigation and Maritime Commerce of 1963 adds to the seller's duties the obligation to remit to the buyer the documents of title and "any other documents stipulated by the contract or established through common use."[44] Finally, the Consumer Protection Law, limited as it is to the transactions within its scope, i.e., the production, distribution and commercialization of goods or the rendering of services to consumers,[45] sets forth a series of obligations regarding the seller's representations to the public and warranty of the goods.

The Convention establishes three obligations of the seller: delivery of the goods, delivery of the documents relating to those goods and transfer of title.[46]

Delivery of Goods

In contrast to Mexican statutory law, which is at times totally lacking and at others incomplete, the Convention addresses the obligations of the seller in a detailed and systematic fashion. These concern the place and date of delivery and a determination of the goods to be delivered.

Place of Delivery

The seller's place of business, as of the time the contract is concluded, is designated as the place of delivery[47] unless:

(1) the contract specified another location,[48]
(2) the contract involves the use of transport, in which case the goods shall be surrendered to the carrier,[49]
(3) the contract concerns unidentified goods or goods of a general kind, or goods which are to be manufactured in the future, in which case the delivery shall be effected at that place where such goods may be located.[50]

Article 2291 of the Civil Code, the only rule which concerns place of delivery in the sales agreements in this Code, provides that where

42. C. Civ. D.F. art. 2283, *supra* note 17.
43. C. Co. arts. 379, 383, 384, *supra* note 17.
44. L.N. y C.M. art. 210, *supra* note 19.
45. L.P.C. art. 2, *supra* note 19.
46. *Id.* art. 30, at 678.
47. *Id.* art. 31(c), at 678.
48. *Id.* arts. 6, 30, at 673, 678.
49. *Id.* art. 31(a), at 678.
50. *Id.* art. 31(b), at 678.

the contract does not stipulate the place of delivery, delivery shall be effected where the goods were located at the time of sale.[51] Another Civil Code provision, relating to payment and satisfaction of obligations in general, establishes that where the contract fails to specify the place of delivery, delivery shall be made at the domicile of the debtor unless a contrary disposition follows by virtue of the circumstances, the nature of the obligation or the law."[52] Thus, there are two distinct rules: according to the first principle the place where the goods were sold is looked to for determining effective delivery, whereas the domicile of the debtor is the determinant according to the second principle. The rule which is especially pertinent to sales is article 2291 and as such it should govern, prevailing over the more general rule in article 2082. However both rules, and especially the former, are ambiguous and unsuitable for dealings in the international sphere.

In the case of commercial sales, which would surely constitute the vast majority of international sales, article 86 of the Commercial Code provides that, absent any agreement to the contrary, the obligation should be discharged at the place which, by virtue of the nature of the business or the intention of the parties, should be regarded as most suitable to the purpose of the transaction as inferred from the parties' agreement or as determined by judicial decision.[53] Clearly, this principle, far from resolving any problem, renders matters more cumbersome and confused.

Finally, with regard to maritime sales, the Mexican Law of Navigation and Maritime Commerce recognizes principles adopted in international commerce, i.e., INCOTERMS,[54] concerning rules with respect to FOB (free on board), FAS (free along side) and CIF (cost insurance freight) sales. These same rules, based as they are upon uniform usage and practices, are recognized by the Convention but are not themselves subject to specific Convention provisions.[55]

Date of Delivery

The Convention, as does Mexican law,[56] holds that the agreement itself will control as to the date of delivery; if the latter is silent, delivery should be made "within a reasonable time after the conclusion of the contract."[57]

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51. C. Civ. D.F. art. 2291, *supra* note 17.
52. Id. art. 2082.
53. C. Co. art. 86, *supra* note 17.
54. International Chamber of Commerce, Guide to Incoterms, I.C.C. Publ. No. 354 (1980).
55. *See* Convention arts. 7, 9, 22(2), *supra* note 2, at 673, 674, 676.
56. C. Civ. D.F. art. 2079, *supra* note 17; C. Co. art. 86, *supra* note 17.
57. Convention art. 33, *supra* note 2, at 678-79.

Neither the Mexican Civil nor Commercial Code sets forth any rule applicable to the case in which the contract is silent on a delivery date. However, both the Civil Code, in dealing generally with the "performance of the duties,"[58] and the Commercial Code, in dealing with "commercial contracts in general,"[59] set certain guidelines. The Civil Code states that "the creditor may not require payment until thirty days have passed since payment was requested."[60] The Commercial Code states that delivery is ordinarily due "ten days after the stipulated date or on the same day if the contract is one which may be enforced by summary judgement *(ejecución)*."[61] Clearly, these two rules are inappropriate when dealing with sales between different countries and with parties at a considerable distance from each other. In contrast, the Convention's formula, which introduces the concept of *reasonableness,* a subjective and little explored concept in Mexican law, is flexible insofar as it is applicable to different types of classes of sales agreements and varying circumstances of place and time.

The Goods to be Delivered

The seller in the Convention must deliver Convention goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner stipulated in the contract.[62] Thus, the conformity of the goods is an obligation placed upon the seller, derived from his duty to effect delivery.

The Convention enumerates several cases in which the seller's duty to deliver goods in conformity to the contract is discharged. Such conformity obtains, absent any contract provision to the contrary, where the goods:

(1) are "fit for the purposes for which goods of the same description would ordinarily be used,'
(2) are "fit for any particular purpose...made known to the seller at the time of conclusion of the contract,"
(3) possess the qualities of the model or sample which the seller has held out to the buyer, and
(4) are packaged in the manner usual for such goods.[63]

Corresponding to the seller's duty to deliver goods conforming to the agreement as to quantity, quality and description is the right of the

58. C. Civ. D.F., *supra* note 17.
59. C. Co., *supra* note 17.
60. C. Civ. D.F. art. 2080, *supra* note 17.
61. C. Co. art. 83, *supra* note 17. Trans. note: *See infra* note 150.
62. Convention art. 35(1), *supra* note 2, at 679.
63. *Id*

buyer to inspect the goods[64] and his duty to give notice to the seller regarding any lack of conformity. Such notice must be given within a reasonable time after the buyer has discovered the nonconformity, but in no case later than two years after delivery. Again, this duty obtains unless it is at odds with a contractual period of guarantee.[65]

Furthermore, the goods to be delivered must be free from any rights or claims of a third party, except those which are based on industrial or intellectual property.[66] Even in the latter case, if the seller ought to have been aware of any such rights or claims at the time of the conclusion of the contract, he is bound to deliver goods unencumbered by such right or claim.[67]

Mexican Law

The insurance of conformity of the goods which are the object of the contract to the agreement is not an express duty of the seller in Mexican law. Rather, it is inferred, as Mexican legal tradition has it, from article 2283(II) of the Civil Code, which sets forth the obligation to "guarantee the quality of the goods."[68] With regard to commercial legislation, the duty of conformity may find analogical support in article 373 of the Commercial Code which refers to cases of "disagreement between the contracting parties" as to the conformity of the merchandise sold by samples to the binding determination of two or three merchants.[69] Finally, in the Consumer Protection Law the obligation to provide conforming goods derives, again indirectly, from the seller's liability upon breach of contract as seen in articles 31 and 32.[70]

Under Mexican law, as is the rule in continental European law, the duty to guarantee affords protection against defects in quality, quantity and description. Such protection is directed against hidden defects, delivery of goods other than those agreed upon *(aliud pro alio)* and unfitness or nonconformity of goods in the case of a contract for fungible goods or goods sold in bulk. Protection is also evidenced by the duty imposed on the seller to ensure warranty of title and right of possession in the goods.

In other words, in the Mexican system, the seller's obligation to warrant comprises the different warranties set forth in the Con-

64. *Id.* art. 38, at 680.
65. *Id.* art. 39, at 680.
66. *Id.* art. 41, at 680.
67. *Id.* arts. 41-42, at 680-81.
68. C. Civ. D.F. art. 2283(II), *supra* note 17.
69. C. Co. art. 373, *supra* note 17.
70. L.P.C. arts. 31-32, *supra* note 19.

vention. The different hypotheses presented in the Convention are covered by the general obligation that the goods sold be in accordance with the provisions agreed upon in the contract or suited to the purpose for which the goods are destined, as the buyer "expressly or impliedly made known to the seller."[71] The key difference between the two sets of rules lies in the fact that, while the Convention systematizes these seller's duties, the Mexican law disperses such duties among various statutes and parts of the Commercial Code.

Furthermore, the Mexican system contains omissions and deficiencies regarding issues dealt with in an excellent manner by the Convention. Examples of omissions from Mexican legislation include the Convention requirement that the goods be contained or packaged in the manner usual for such goods,[72] a matter of great importance in present international commerce most especially in the area of container transport. Other glaring omissions in Mexican law are the Convention requirement that the goods be "fit for the purposes for which goods of the same description would ordinarily be used;"[73] and the provision imposing liability upon the seller for any nonconformity of the goods, such liability accruing from the time at which the buyer receives the goods[74] or from the time at which the seller hands the goods over to the carrier, if the contract involves the carriage of goods.[75]

Fitness of Goods in Mexican Law

The Civil Code establishes that "the seller must deliver the goods in the condition in which such goods were found at such time as the contract was concluded."[76] Such a requirement is inadequate because, if the contract is concluded by the mere meeting of the minds,[77] the quality of the goods may change from that time up to the moment in which the buyer actually receives them, with the effect that the buyer enjoys no protection for the interim period of time.

With respect to the Convention principle that goods conform with the contract only if they "are fit for the purposes for which goods of the same description would ordinarily be used"[78] or are fit for any special purpose which is made known to the seller at the time of the

71. Convention art. 35(2)(b), *supra* note 2, at 679.
72. *Id.* art. 35(2)(d), at 679.
73. *Id* art. 35(a), at 679.
74. *Id.* arts. 36, 69, at 679, 687.
75. *Id.* arts. 36, 67, 68, at 679, 686-87.
76. C. Civ. D.F. art. 2288, *supra* note 17.
77. *Id.* arts. 2248-49.
78. Convention art. 35(2)(a), *supra* note 2, at 679.

conclusion of the contract,[79] the Civil Code does impose a duty of guaranty which is limited, as previously stated, to "hidden defects." These defects are those which render the goods "unfit for the purposes for which they will be used or diminish their value for such purposes to the extent that had the transferee known of such defects, he would not have sought to acquire the goods or would have paid a lesser price for them."[80] If the defect is not hidden, it would seem that this rule is inapplicable, and, consequently, it would be a matter of indifference to the seller whether or not the goods are fit for their intended purposes.

The Consumer Protection Law extends such guaranty to cases where the defects are not hidden.[81] Of special importance in this law is that liability is imposed upon the manufacturer as well as the seller of the goods. Article 34 imposes *"liability for the product"* for "deficiencies in the manufacture, elaboration, structure, quality or sanitary conditions" which render the goods "unfit for their intended use."[82]

Neither the Civil Code nor the Consumer Protection Law says anything concerning the right of the buyer to examine the goods. An application of article 374 of the Commercial Code, however, would lead to the result that when the buyer has not previously seen the goods, which is generally the case in international dealings between parties at a distance, "the contract shall not be held as concluded until the buyer has examined and accepted the goods."[83] This necessitates viewing such sales as subject to a discretionary condition, that is, the sale itself is contingent upon the buyer's inspection and acceptance of the goods. As is obvious, this principle is inapplicable as a general rule in international trade.

In the three bodies of Mexican law which have been analyzed above, the buyer is afforded the right to make a claim based on any flaws, defects or non-conformity within certain time limits. First, in commercial sales, the buyer is granted the extremely short period of five days after receipt of the goods in which to lodge a complaint concerning the quality or the quantity of the goods.[84] Secondly, the same Commercial Code provision sets forth an equally restrictive period of thirty days within which the buyer may object to "internal defects."[85]

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79. *Id.* art. 35(2)(b), at 679.
80. C. Civ. D.F. art. 2142, *supra* note 17.
81. L.P.C. art. 33(V), *supra* note 19. A preceding article of this law, article 31, refers to this situation explicitly.
82. *Id.* art. 34 (emphasis added).
83. C. Co. art. 374, *supra* note 17.
84. *Id.* art. 383.
85. *Id.*

Thirdly, another restrictive period of eight days is set forth for sales involving maritime transport. Not only must the buyer present his objections as to the quality and quantity of the goods involved within such time constraints, but his right to object to hidden defects is similarly limited,[86] which is patently absurd. Fourthly, the Consumer Protection Law provides the buyer with a protest period of a mere two months.[87] Finally, the Civil Code fixes a period of six months within which the buyer must make a claim of non-conformity.[88] The standards present in Mexican law contrast with those of the Convention which, as has already been indicated, state that the time period should be that which is reasonable and which allows for the passage of two years from the date of delivery before the buyer's right to register a complaint elapses.[89]

It is to be noted that the two most recent pieces of Mexican sales legislation, the Law of Navigation and Maritime Commerce and the Consumer Protection Law (1963 and 1976 respectively), especially the latter, are open to the criticism of being less protective of the rights of the consumer-buyer than the provisions of the Federal District Civil code of 1928.

Delivery of Documents

The Convention covers the duty of the seller to deliver documents in two articles. Article 30, which has been cited previously provides that the seller "must deliver the goods and hand over any documents relating to them,[90] and article 34 provides that, "if the seller is bound to hand over documents relating to the goods," he must do so "at the time and place and in the form required by the contract."[91]

In Mexican law, there is no specific provision concerning the seller's duty to hand over documents, except in the Law of Navigation and Maritime Commerce, which contains certain provisions regarding maritime sales, for example, documentary sales such as CIF and C&F (cost and freight) sales.[92] Article 210, for example, provides that "the seller shall fulfill his duty to deliver the goods by remitting to the buyer the documents of title and any other documents specified in the contract or established by trade usage."[93] As concerns CIF and C&F contracts, articles 217(III) and 220 of the above-mentioned law

86. L.N. y C.M. art. 221, *supra* note 19.
87. L.P.C. art. 34, *supra* note 19.
88. C. Civ. D.F. art. 2149, *supra* note 17.
89. Convention art. 39, *supra* note 2, at 680.
90. *Id.* art. 30, at 678.
91. *Id.* art. 34, at 679.
92. L.N. y C.M. arts. 210, 217 (III), 220, *supra* note 19.
93. *Id.* art. 210.

require the presence of an insurance policy in the former type of contract and require bills of lading for both types.[94]

Clearly, in sales contracts, parties are bound by their contract provisions[95] and, absent any stipulation in the contract, the agreement will be governed by the "usage and custom of the country"[96] or, in maritime affairs, by the usages[97] including international usage.[98]

Furthermore, when the obligation to provide transport is incorporated into the sales contract, as is the case in most international trade transactions, a bill of lading[99] must accompany the contract. Consequently, these documents, at the very least, will always accompany their respective contracts.

Transfer of Title

Concerning the seller's duty to transfer title of the goods which are the subject of the contract, the Convention,[100] in contradistinction to Mexican law (based on the French contractual title transferring tradition),[101] does not regard such transfer as a necessary result of the transaction, but rather as one of its side effects, i.e., a duty of one of the parties.[102]

While it is true that the Convention treats transfer of title as one of the obligations of the seller, it is equally true that nowhere does the

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94. *Id.* arts. 217 (III), 220.

95. C. Co. art. 372, *supra* note 17; C. Civ. D.F. art. 1796, *supra* note 17.

96. C. Civ. D.F. art. 1856, *supra* note 17.

97. In the author's opinion this provision is equally applicable to commercial affairs. While the provisions of the Commercial Code are found in the portion of the code dealing with sales contracts, article 1949 of the Civil Code is located in the section on obligations in general and is thus applicable to any sort of reciprocal or bilateral obligation such as a sale. Nonetheless, the Civil Code contains another provision, article 2300, which specifically confers upon the seller the right to rescind the contract for failure of payment. Consequently, while the seller's right to rescind the contract finds its basis in article 2300, the buyer's right of rescission due to the seller's failure to hand the goods over is grounded in article 1949.

98. By analogy, any and all usages notwithstanding the genre of transport (air, land, etc.) should be applicable, independent of the issue of the national or international character of the transactions.

99. C. Co. art. 583, *supra* note 17.

100. Convention art. 30, *supra* note 2, at 678.

101. The transfer operates as a matter of law unless one is dealing with classes of undifferentiated goods. *Cf.* M. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL t. 2, n. 2440, at 757 (2d ed. 1947).

102. Convention art. 30, *supra* note 2, at 678. A similar principle could perhaps be found in article 2248 of the Civil Code. Article 2248 requires the seller to "transfer title to the goods," in conjunction with the duties imposed by article 2282. This article incidentally permits the sale of goods belonging to another, notwithstanding the categorical language in article 2270 which renders such a sale null and void when the seller obligates himself to acquire those goods subsequent to the sale and then convey the title to the buyer.

convention deal specifically with this subject. Moreover, article 4(b) provides that, in the absence of any contract provision to the contrary, the Convention is not concerned with "the effect which the contract may have on the legal tenure of the goods sold."[103] This does not mean that the buyer is left without a remedy. The Convention clearly provides "remedies for breach of contract by the seller," insofar as the seller fails to carry out his duty to transfer title.[104] In other words, in a situation in which the seller breaches his duty to transfer title, the buyer is entitled to exercise his rights by bringing an action for specific performance[105] or by rescinding the contract[106] and claiming compensation for any damages suffered.[107] It is thus important to perceive the scope of article 4. Article 4 of the Convention claims no application to the question of who might be the true owner of the goods or whether he is entitled to a replevin or other recovery action. It merely applies to remedies related to the sale agreement and against a party to such a contract.

OBLIGATIONS OF THE BUYER

The only obligation that the Civil Code expressly imposes on the buyer is that he "pay the price for the goods, complying with the appropriate requisites of time, place and manner of payment."[108] The Convention, on the other hand, adds the obligation that the buyer must "take delivery of [the goods] as required by the contract and by this Convention."[109]

Taking Delivery of the Goods

The obligation to take delivery of the goods which could be considered as a contractual burden *(onere)* whose correlative is the seller's duty to deliver goods that conform to the contract, is inferred from several provisions of the Civil and Commercial Codes. As with the provisions on conformity of goods, these provisions are neither clear nor complete nor do they always refer to sales agreements.

Article 2292 of the Civil Code is the broadest in scope. It provides that if the buyer has unlawfully delayed taking delivery (*mora*

103. Convention art. 4(b), *supra* note 2, at 673. It would seem advisable to avoid conflict with article 30, that article 4(b) be revised.
104. *See Id.* arts. 45-52, at 681-83.
105. *Id.* art. 46, at 682.
106. *Id.* art. 49, at 682-83.
107. *Id.* arts. 74-77, at 688-89.
108. C. Civ. D.F. art. 2293, *supra* note 17.
109. Convention art. 53, *supra* note 2, at 683.

accipiendi), the seller may deposit the goods at the expense of the buyer.[110] Obviously when he is in default for failure to take delivery the buyer has the duty to take delivery. Article 85 of the Commercial Code provides that

> a party's default as regards the performance of his commercial duties shall be measured as commencing: (I.) the day following the expiration of the time or period in which performance was due, where such time or period was either stipulated in the contract, agreed upon by the parties or prescribed by law....[111]

The duty of the buyer to take delivery under Mexican law finds support in an *a contrario* interpretation of article 2012 of the Civil Code; since the creditor, i.e., the buyer, cannot be forced to accept goods other than those which he contracted, it follows that he is bound to take delivery of the goods which are in fact the subject of the contract.[112]

In both civil and commercial sales contracts, the party who performs his contractual obligations in Mexican law enjoys the remedies of specific performances of rescission, in addition to the claim of damages owed by the party in breach.[113] Article 376 of the Commercial Code provides that such remedies are available with respect to any breach of contract, whereas article 1951 of the Civil Code, which will be discussed shortly, also affords such a protection in any breach save those arising from the non-payment of the purchase price of personal or moveable property.[114]

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110. C. Civ. D.F. art. 2292, *supra* note 17. Other situations concerning the issue of default are covered in articles 2078, 2079 and 2080 of the Civil Code. See article 2206, as regards Italian law, which does contain express provisions. *Cf.* Paolo & Gastone, *Della Vendita, Arts. 1470-1547,* in COMMENTARIO DEL CODICE CIVILE 270 (1966).

111. C. Co. art. 85 (I), *supra* note 17. As with article 2292 of the Civil Code, articles 85 (III) of the Commercial Code and 2098 of the Civil Code authorize the seller to deposit the goods in the hands of the court or in those of another party, the expense of such an action falling upon the buyer. *Cf.* M. PLANIOL, *supra* note 102, t. 2, nn. 2457, 2458, which analyzes article 1264 of the Napoleonic Code (this article corresponds to provisions in Mexican law) and article 1657 (no equivalent in Mexican law), which establishes that if the goods constitute the subject of the contract, the seller's responsibility to deliver the goods terminates, as a matter of law, upon the expiration of the period in which delivery was due [and delivery was not taken]. Article 2900 of the Mexican Civil Code of 1884 granted the right to declare the contract void "before the expiration of the term fixed for delivery of the goods, when the buyer has failed to come forth to take delivery...." CODIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES art 2900 (México 1884). *Cf.* R. ROJINA VILLEGAS, 4 COMPENDIO DE DERECHO CIVIL 138 (1962).

112. C. Civ. D.F. art. 2012, *supra* note 17.

113. *Id.* art. 1949; C. Co. art. 376, *supra* note 17.

114. *See infra* note 138 and text accompanying note, 153.

The Convention, as will be discussed later,[115] covers the duty of preservation of the goods in an express fashion,[116] not only where the buyer refuses or delays in taking delivery of the goods but also where he does take delivery yet does so with the intention of rejecting the goods.

Payment of the Price

The Convention deals with the duty of payment of the purchase price and its subissues regarding the manner of payment, the determination of payment due and the place and time in which to effect payment, in different sections. Each issue will be briefly sketched and a comparison drawn between the Convention rules and those of the Mexican statutory law.

Manner of Payment

Article 54 of the Convention provides that payment, in order to be effectuated, requires the adoption of such measures and the compliance with such formalities as may be necessary under the contract or any laws or pertinent regulations.[117]

Although article 2078 of the Civil Code seems to concern itself solely with the amount of payment, either in a lump sum or in installments it sets forth the principle that "payment shall be effected in the manner agreed to."[118] Similarly articles 380 of the Commercial Code and 2255 of the Civil Code, suggest that the price should be paid as per the terms to which the parties agreed.[119] Furthermore, there are certain general principles with the same effect as those in the Convention. These principles are found in articles 78 and 372 of the Commercial Code and 1796 and 1832 of the Civil Code, which codify the parties' traditional freedom to enter into contracts as they are wont, limited only by unwaivable provisions or requirements.[120]

Determination of the Price

Article 55 of the Convention is devoted to the determination of the price. Its text provoked sharp discussion while being drafted and still does so because of its effects upon substantive aspects of the contract and the abuses to which it could lead. It provides that if a contract has

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115. *See infra* text accompanying notes 222-237.
116. Convention arts. 85-88, *supra* note 2, at 691-92.
117. *Id.* art. 54, at 684. The translation of the Convention into Spanish is not always a happy one. In the English and French versions, this article speaks of "formalities", but corresponds in the Spanish version to *"requisitos,"* an overbroad and imprecise term.
118. C. Civ. D.F. art. 2078, *supra* note 17.
119. C. Co. art. 380, *supra* note 17; C. Civ. D.F. art. 2255, *supra* note 17.
120. *See* C. Civ. D.F. art. 6, *supra* note 17.

been validly executed, yet neither fixes a price nor expressly or implicitly indicates any method by which the price may be determined, and absent any indication to the contrary, the parties are considered to have implicitly made reference to the price generally charged for similar goods sold under similar circumstances in the trade concerned.[121]

In Mexican law the rule is, as has just been indicated, that the price should be that to which the parties have agreed.[122]

In dealing with sales regulated by the Consumer Protection Law, the price is that which is "legally authorized or, when appropriate, the stipulated price."[123] There is no rule for the case foreseen by the Convention, in which the contract is silent to the price to be paid.[124] If the parties are silent as to price, it must be ascertainable[125] or the contract will run the risk of being held as non-existent for lack of an object,[126] or null and void.[127] It may be argued that the criteria used for determining the price is one of those referred to in article 54 of the Convention.[128] Yet it is very doubtful that the necessary certainty of the price could be established on such a basis, even though the determination of the price would not be dependent upon the unilateral determination of either of the parties, which is prohibited in Mexican law.[129] It should be noted that, if it were a mere ambiguity in the contract, which of course the absence of a price is not, custom and usage would guide in the interpretation of the contract.[130]

Place of Payment

With respect to the place in which payment is to be made, the Convention provides that, in the absence of any contract stipulation,

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121. Convention art. 55, *supra* note 2, at 684. The rendition of this provision is very faulty, especially as concerns the Spanish version, since, instead of referring to goods of the same type or comparable to those which would have constituted the object of the contract, the provision speaks of "such goods," "*Même marchandise,*" and "*tales mercaderías.*" Obviously, those goods do not have to be nor can they be the same goods but rather are others, equivalent or similar to those in question.

122. C. Co. art. 380, *supra* note 17; C. Civ. D.F. arts. 2078, 2255, *supra* note 17.

123. L.P.C. art. 30, *supra* note 19.

124. The Consumer Protection Law's position with respect to both credit sales, *Id.* art. 20, and door-to-door sales, *Id.* art. 47(f), is that the price must always be stipulated in the contract. On the other hand, in public offerings, it need only be able to be ascertained. *Id.* art. 15 *in fine.*

125. C. Civ. D.F. art. 1825, *supra* note 17.

126. *Id.* art. 2224.

127. *Id.* art. 2225, 2242.

128. Convention art. 54 states that 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.

129. *Id.* art. 2254.

130. *Id.* art. 1856.

payment shall be effected at the seller's place of business, or at the place where the delivery is to occur if the payment is "against the handing over of the goods or documents."[131]

In Mexican law the agreement controls; however, in the absence of any agreement, the applicable principle is that payment shall be made at the time and place where the goods are delivered.[132] Exactly where such delivery should take place will depend on the nature of the transaction or on the contract provision; if the contract fails to so specify, that place shall be "where the goods were located at the time of sale."[133]

Time of Payment

Finally, in dealing with the issue of the time when payment is to be made, the position of the Convention is that, unless this question is disposed of contractually, payment shall be effected when the seller places the goods or the documents relating to the goods at the buyer's disposal.[134] Article 58(3) of the Convention, however, adds the caveat that the buyer "is not bound to pay the price until he has an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."[135]

Mexican law concerning commercial contracts provides that payment shall be made within ten days after the date of execution of the contract is of the type that would give rise to an "ordinary claim."[136] Payment is due the day following execution of the contract if the contract is of the type that gives rise to a summary action.[137]

If it is a documentary type of sale, article 210 of the Law of Navigation and Maritime Commerce, like the Convention, states that the buyer shall make payment upon delivery of those documents.[138]

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131. Convention art. 57, *supra* note 2, at 684.

132. C. Civ. D.F. arts. 2084, 2294, *supra* note 17.

133. *Id.* art. 2291. See *supra* text accompanying note 52, where the author deals with the different rule of article 2082 of the Civil Code.

134. Convention art. 58(1), *supra* note 2, at 684.

135. *Id.* art. 58(3), at 684.

136. Trans. note: This is as opposed to breaches in contracts which can lead to execution (*que traen aparejada ejecución*). *See* infra note 137.

137. C. Co. art. 83, *supra* note 17. When would a breach result in the possibility of execution (*que traen aparejada ejecución*)? When the contract consists of a notarial deed or when its corresponding formal invoice has been signed and attested to by the debtor, i.e., that the buyer execution, with a corresponding embargo *in limine litis*, is possible. *Id.* art. 1391 (II) & (VII). Such a framework is too cumbersome for international dealings.

138. L.N. y C.M. art. 210, *supra* note 19. This rule corresponds to the position taken by the Convention in art. 58(1), *supra* note 2, at 684.

In the case of civil sales and where the contract is silent, payment must be made within thirty days following the judicial or extra judicial demand for such payment.[139] The Convention, on the other hand, because it deals with international sales where the parties are not face-to-face, provides that the duty to pay is free from "the need for any request or compliance with any formality on the part of the seller."[140]

REMEDIES FOR BREACH OF CONTRACT

This discussion will deal first with the remedies available to either of the two contracting parties and subsequently with those available just to one of the parties.[141]

With both a seller's and a buyer's breach the Convention grants the aggrieved party the right to demand performance of the other, unless the plaintiff "has resorted to a remedy which is inconsistent with this requirement."[142] The aggrieved party may rescind the contract if the breach is fundamental.[143] Moreover, if it is clear that one party will commit a fundamental breach of contract, the other may rescind the contract before the date when performance is due.[144] In any of these instances, the aggrieved party may sue for damages.[145] Furthermore, the buyer or seller is granted the right to "fix an additional period of time of reasonable length for the performance [of the] obligations" of the other party.[146] During this period, the party who has granted such an extension may not "resort to any remedy for breach of contract...unless he has received notice from the [other party] that [the latter] will not perform within the period so fixed."[147] Such language, however, does not deny the party who has granted the extension the right to claim damages for delay in performance.[148]

Mexican law, in both the Civil Code[149] and the Commercial Code,[150] affords the same remedies of specific performance or

139. C. Civ. D.F. art. 2080, *supra* note 17.
140. Convention art. 59, *supra* note 2, at 685.
141. Section 3 of Chapter 2 of the Convention is devoted to seller's breach (articles 45 through 48) and Section 3 of Chapter 3 to the buyer's breach (articles 61 through 65).
142. *Id.* arts. 46(1), 62, at 682, 685.
143. *Id.* arts 49(1)(a), 64(1)(a), at 682, 686.
144. *Id.* art. 72, at 688.
145. *Id.* arts. 45(1)(b), 45(2), 61(1)(b), 61(2), at 681, 685.
146. *Id.* arts. 47(1), 63(1), at 682, 685.
147. *Id.* arts. 47(2), 63(2), at 682, 685.
148. *Id.* The identity of remedies provided for the buyer and seller in the Convention suggests that, from the standpoint of legislative technique, it would be preferable to deal with them in one section.
149. C. Civ. D.F. art. 1949, *supra* note 17.
150. C. Co. art. 376, *supra* note 17.

rescission of the contract and grants the right to sue for damages as well. The Civil Code provision offers the additional right to cancel the contract even after specific performance has been sought, if such performance proves to be impossible.[151]

Civil Code article 1951 seemingly denies the remedy of rescission in sales or movable goods. According to this provision, "as regards movable goods, a contract may not be rescinded save in the cases cited previously concerning sales in which the buyer is authorized to pay installments."[152] The cases referred to as "cited previously,"[153] however, do not rule out the right to rescind but rather negate the rescissory effect as regards acquisitions by third parties acting in good faith. In other words, the exception of the right to rescind is drawn in favor only of good faith third party transferees (purchasers or mortgagees). This interpretation finds support in the fact that the Mexican legislature of 1928 simply forgot to insert in the text of article 1951 the phrase "as against third parties acting in good faith." If inserted, the article's text is suddenly rendered sensible: "As regards movable goods, rescission of a contract will have no effect as against third parties acting in good faith, save in the cases cited previously concerning sales in which the buyer is authorized to pay in installments." The exception would apply to the recording of the rescissory clause in the Public Registry,[154] in which case third party rights would be affected. A literal interpretation of article 1951 therefore should be discarded, for such a reading would not only go against articles 2300 and 1949 but also against Mexico's uniform legislative tradition.[155]

Extensions to Allow Cure

The Convention provides that if the buyer[156] or seller[157] grants the opposing, i.e. the breaching, party an additional period of reasonable

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151. C. Civ. D.F. art. 1949, *supra* note 17.
152. *Id.* art. 1951.
153. *Id.* art. 2310(II)-(III).
154. *Id.* art. 2310(II).
155. *See id.* arts. 1949, 2300, and article 1468 of the Civil Code of 1870, which states that "[A]s regards movable goods, whether or not there exists an explicit provision therefor, cancellation shall never be afforded any effect as against a third party which has acquired the goods in good faith;" Article 1352 of the Civil Code of 1884, is a copy of the preceding. The same provision existed in the Spanish Civil Code of 1865, article 1043 and is presently part of article 1295 (2) of the Spanish Civil Code. Concerning this question, see GARCIA GOYENA, CONCORDANCIAS, MOTIVOS Y COMENTARIOS DEL CODIGO CIVIL ESPANOL: CONCORDADO CON LA LEGISLACION VIGENTE EN LA REPUBLICA MEXICANA t. 3, at 66 (1879).
156. Convention art. 47, *supra* note 2, at 682.
157. *Id.* art. 63, at 685.

length in which to cure, then the party extending such an offer may not take "any action" founded on the breach during that period unless such action is a claim for damages resulting from delay in performance or the breaching party notifies the innocent party that he will not perform during the extension.[158]

Mexican law contains no comparable provision. Nothing, however, prevents the party who has suffered the breach from granting such an extension, but the absence of regulation may raise numerous problems. For example, what happens to the seller's guarantees; will they be deemed to lapse during the extension or does a given cause of action lapse only with the statute of limitations or laches? Similar problems may arise with respect to causation of damages, the loss or waiver of rescissory actions, the possibility of an excuse of performance due to impossibility or frustration and the determination of the time of transfer of the risk, when the goods are placed at the disposal of the buyer during the extension period; all of these may arise during the extension period.

On the other hand, the Convention's rule that a judge or arbiter may not grant any grace periods to the breaching party[159] is mirrored in the Mexican Commercial Code, although this prohibition applies only to commercial contracts.[160]

Excuses for Non-Performance

Article 71 of the Convention provides that there shall be no remedy for breach of contract when, "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 serious deficiency in his ability to perform or in his creditworthiness;"[161] in short, when one party's position is such that the other party can infer that the former will not perform. In such cases the Convention's article 71 allows either party to suspend performance[162] and permits the seller to stop delivery even if the goods have been dispatched *(stoppage in transitu),*[163] provided that the other party does not give adequate assurance of his performance.[164] Nor does the Convention allow for a claim for damages

158. The language of these Convention rules, articles 47(2) and 63(2), is faulty insofar as they state that the performing party may not, during the period extended, *resort to any action for breach of contract. Id.* arts. 47(2), 63(2), at 682, 685. These very provisions, however, expressly do *not* extinguish any right to damages based on delay in performance, a right which is patently derived from the contract's breach.

159. *Id.* arts. 45(3), 61(3), at 681, 685.

160. C. Co. art. 84, *supra* note 17.

161. Convention art. 71(1)(a). *supra* note 2, at 687-88.

162. *Id.* art. 71(1), at 687-88.

163. *Id.* art. 71(2), at 688.

164. *Id.* art. 71(3), at 688.

based on breach of contract when such breach is due to impossibility of performance which could not *reasonably* have been forseen, avoided or corrected at the time that the contract was concluded. Should such an impediment cease to exist, however, this exemption would likewise be inapplicable.[165]

Mexican law is stricter and exempts the seller from his obligation to hand over the goods only in the case of buyer's insolvency.[166] The buyer, in turn, is relieved of his obligation to pay only when "his possession or right to possess the goods is threatened or he justly fears such threat."[167] In either case, should the bond given by the buyer provide sufficient security, the seller's performance may be compelled. In the case of the contract whose performance has not yet been executed, where one party falls into bankruptcy or declares himself unable to meet his debts, the other party "may suspend execution until that time as the trustee in bankruptcy *(síndico)* guarantees performance of the obligation, or himself so performs."[168]

It should be noted that, while the Convention uses the criterion of reasonableness in cases of suspension of performance[169] and exemption from liability to perform,[170] the Civil Code, which deals only with suspension, relies on equity when determining whether the buyer may justly fear that his possession of or right over the goods is jeopardized. With both criteria of reasonableness and equity, the bases for decision are not subjective but rather factual and objective. The Convention is both simpler and wider in scope, for it applies the same reasoning as regards suspension and exemption to both parties and does not limit itself to the issues of the buyer's insolvency or actions by the seller which are inconsistent with the buyer's possession of the goods. Rather, the Convention encompasses the situation where there exists a deterioration in the ability of one of the parties to perform, i.e., where there is a real impossibility of performance of the contract.[171]

Stoppage in Transitu

Mexican law recognizes the seller's right not to deliver goods which are en route *(stoppage in transitu)* to the purchaser who has not yet paid, but only in cases of the latter's bankruptcy or suspension of payments.[172] This remedy is also applicable in transportation con-

165. *Id.* art. 79, at 689-90.
166. C. Civ. D.F. art. 2287, *supra* note 17.
167. *Id.* art 2299.
168. C. Civ. D.F. art. 2287, *supra* note 17.
169. Convention art. 71(1), *supra* note 2, at 687-88.
170. *Id.* art. 79(1), at 689.
171. *Id.* art. 71, at 687-88.
172. Law of Bankruptcy and suspension of payments (*Ley de Quiebras y de suspension de fagos*) art 146 (I) and (II), Diario Oficial, April 20, 1943.

tract law. The consignor has the same right to stop delivery, but is not subject to the same restrictions as article 71(1) of the Convention (requiring insolvency, diminution in the ability to perform and behavior from which future non-performance can be inferred). However, the bill of lading necessary for disposition of the merchandise must be returned to the carrier.[173] The Convention on the other hand, like Mexican Bankruptcy Law, grants to the seller the right to oppose the delivery of the goods to the buyer even if the latter possesses a document enabling him to obtain them.[174] In order to avoid injury to third parties acting in good faith to whom the right to the goods has been transferred by delivery or endorsement of the document of title, article 71(2) of the Convention adds that "[t]he present paragraph relates only to the rights in the goods as between the buyer and the seller." In other words, the paragraph is not applicable to any rights that third parties may have over the goods.[175] The Civil Code has no special provisions on impossibility of performance. Its availability may be invoked as a sequel of the general principle that *ad imposibilia nemo obligatur,* article 2111 exemplifies the use of this principle in providing that "upon the occurrence of some fortuity, no one shall be bound, save if he has in some way caused or contributed to it."[176]

TYPES OF ACTIONABLE BREACH

Under the Convention rescission is based on a breach of contract which is "fundamental,"[177] that is to say a breach which "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."[178] If the

173. C. Co. art. 589(I), *supra* note 17.

174. Convention art. 71, *supra* note 2, at 687-88.

175. *Id.* art. 71(2), at 688.

176. CODIGO CIVIL PARA EL DISTRITO Y TERRITORIO FEDERALES arts. 1943, 1968 & 2111, *supra* note 18.

177. Convention arts. 49(1)(a), 64(1)(a), at 682, 686.

178. *Id.* art. 25, at 677. In the Spanish version, and in contrast to the French and English versions, there is no language to indicate that the deprivation must be substantial, or, in other words, of some importance. At any rate, one has here a confusing or mysterious definition relating to the fundamental character of the breach. If the breaching party foresaw or could have foreseen the subsequent detriment and that he would cause such a substantial privation to befall the other party, the breach is fundamental and from this breach flows the other party's right to rescind. However, if the party which violated the contract neither foresaw nor had reason to foresee the resulting injury and its substantial character, the other party, who by hypothesis is innocent and at odds with the position of the breaching party, is denied the right to rescission and he is not granted any compensation.

breach is not fundamental, it gives rise to no right to rescind; such a breach will afford to the innocent party the right to demand specific performance under general contract law and damage.[179] This formula, which is also applicable to contracts for the delivery of goods by installments,[180] is unjust and may result in inequities. It favors the party which does not perform, for it is the burden of the innocent party to prove that the former foresaw or had reason to have foreseen the substantial detriment that the latter would suffer by reason of the breach.

Mexican law, regrettably, does not distinguish between fundamental and non-fundamental breaches. Whichever type it may be, and regardless of the injury that it occassions, a breach will prompt the right to rescind as well as, of course, the right to demand specific performance or damages. Mexican law is likewise silent vis-à-vis sales contracts which stipulate successive deliveries, such as in supply contracts *(contractos de suministro).*[181] As against a claim of rescission based on a trifling breach, the most likely defense would be the claimant's deceit or bad faith.

According to article 82 of the Convention, the buyer's right to declare the contract rescinded is lost when it becomes impossible for him to make restitution of the goods "substantially in the condition in which he received them," unless (a) the impossibility of so acting is not due to the buyer's act or omission, (b) the goods have perished as the result of the buyer's examination thereof or the goods have been sold or (c) the buyer has consumed or transformed the goods.[182] On the other hand, the buyer does have the right to reduce the sales price *(actio quanti minoris)* if the goods do not conform to the contract, as long as the seller does not cure his defective tender.[183]

The Civil Code grants the buyer the right to rescind the contract and affords him payment of expenses he may have incurred because of such defects, i.e., the right to pay a reduced sum as determined by an appraiser, only when the goods contain hidden or latent defects.[184] The Code establishes a rather short statute of limitations for such claims; six months dating from delivery of the goods.[185] Concerning

179. *Id.* art. 74, at 688.
180. *Id.* art. 73, at 688.
181. Trans. note: A *contrato de suministro* has three distinguishing characteristics: (1) it deals with the supply of goods (or services) over a period of time; (2) the quantity of the goods and their dates of delivery are typically underdetermined rather than precisely specified and (3) either party may rescind the contract at any time, given adequate statutory notice to the other party.
182. Convention art. 82, *supra* note 2, at 690.
183. *Id.* art. 50, at 683.
184. C. Civ. D.F. art. 2144, *supra* note 17.
185. *Id.* art. 2149.

the obligation to make restitution of the goods, article 465 of the Code of Civil Procedure of the Federal District[186] should be applicable and if so it may result in the same requirements for the exercise of rescission as set fourth in article 82(2) of the Convention.[187]

Article 34 *in fine* of the Mexican Consumer Protection Law deals with consumer damages, free repair or, when the latter is not possible, replacement of the goods; when neither repair not replacement are feasible it provides for return of the amount paid for the goods.[188] However, the Consumer Protection Law states that no such claim will arise "if the product has, due to causes attributable to the consumer, suffered *fundamental,* irreparable, and serious damage."[189]

EFFECTS OF RESCISSION AND SPECIFIC PERFORMANCE

Restitution

According to article 81(2) of the Convention, in contracts which have been partially or fully performed the party who has performed "may claim restitution from the other party of whatever the first party has supplied or paid under the contract," and "[i]f both parties are bound to make restitution, they must do so concurrently."[190] The seller obligated to make restitution of the price must in addition pay interest from the due date of payment,[191] but the buyer must account to the seller for all benefits which he has obtained from the use or disposition of the goods.[192]

When the seller fails to hand over the goods which are the object of the contract, the buyer may demand of the seller[193] that he specifically perform his obligation to deliver but only where the law of the court hearing the case permits such a remedy.

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186. CODIGO DE PROCEDIMIENTOS CIVILES PARA EL DISTRITO Y TERRITORIOS FEDERALES, art. 465 (México, D.F. 1939).

187. Convention art. 82(2), *supra* note 2, at 690.

188. L.P.C. art. 34-*in fine, supra* note 219, at 690.

189. *Id.* art. 34 (emphasis added).

190. Convention art. (81(2), *supra* note 2, at 690.

191. *Id.* art. 84(1), at 691. The Convention contains no stipulation regarding the rate of the interest to be paid. Thus, the determination of such a rate must be a matter of local law.

192. *Id.* art. 84(2), at 691 (emphasis added). This duty on the buyer is conditioned upon his obligation to make restitution of the goods or part of them, or when such restitution is impossible or when it is impossible to return the goods in a condition substantially identical to that as when they were received, such a duty is conditioned upon the buyer's declaration that the contract is avoided or demand that the seller deliver substitute goods. *Id.* art. 84(2)(a)-(b), at 691.

193. *Id.* art. 46(1), at 682.

The obligation to make restitution in Mexican law is established by article 2107 of the Civil Code, which states that liability for breach, "aside from requiring the return of the goods or their price, or the return of both requires the payment of damages and loss of profits."[194]

AMOUNT OF DAMAGES

With respect to the amount of damages, the Convention provides that the injured party shall recover to the extent of the loss suffered, including loss of profits which result as a consequence of the breach.[195] However, it is important to note that the Convention establishes that such damages may not exceed the loss which the breaching party foresaw or should have foreseen, at the time of the conclusion of the contract, "taking into consideration the facts he then knew or ought to have known," would result from his breach.[196] In other words, the amount of damages covers the injuries actually suffered insofar as those injuries do not surpass such damages which were foreseen or foreseeable by the breaching party, not by the aggrieved party. This formula, which is as difficult to understand and interpret as article 84 alluded to above,[197] is inadequate. It does not solve the problem of causation or the quantification of damages when the breaching party has not and could not have foreseen the monetary effect that the loss would have on the other party. Moreover, it is reasonable to assume that such a difficulty in foreseeing the other party's damages is the norm in international contracts, in which each party is often unfamiliar with the characteristics of the other's market.

The Civil Code provides that, in instances of loss or serious damage, the owner should be compensated to the "full extent of the legitimate value of the goods."[198] This minimal award is paralleled in article 2113, which states that "if the damage is less severe, upon restitution of the goods the amount payable to the owner shall be only that caused by such damage..."[199] Civil Code article 2114, however, does set forth a more objective rule by allowing proof by the aggrieved party as well as the party in breach. The rule provides that "the price of the goods shall be that which the goods would have at the moment of

194. C. Civ. D.F. art. 2107, *supra* note 17 (emphasis added). Please note that this is the instance in which the Convention establishes that both parties are obligated to make restitution. See Convention article 81(2), *supra* note 2 at 690.

195. This provision corresponds to the Mexican notion of loss of *perjuicio* found in C. Civ. D.F. art. 2109, *supra* note 17.

196. Convention art. 74, *supra* note 2, at 688.

197. *See supra* text accompanying notes 193-94.

198. C. Civ. D.F. art. 2112, *supra* note 17.

199. *Id.* art. 2113.

their return to the owner."[200] And, where the payment of the price is concerned, the rule is perfectly clear although at the present time unjust to the aggrieved party. The rule provides that "damages which result from non-performance may not exceed the legal rate of interest, absent any agreement to the contrary."[201] As mentioned earlier, the Civil Code fixes the legal rate at nine per cent per annum for civil obligations[202] and the Commercial Code at six per cent for commercial contracts.[203] Both rates are, thus, extremely low given present-day conditions.[204]

Articles 75 and 76 of the Convention set forth two other rules which have no counterpart in Mexican law. First, after the contract has been rescinded if the buyer acquires substitute or replacement goods or if the seller resells goods which have been returned to him, the party claiming damages may obtain the difference between the price stipulated in the contract and the price stipulated in the substitute transaction, taking into account the previously discussed limitation of article 74.[205] Secondly, upon rescission of the contract, if there is a current price for the goods the party claiming damages may recover the difference between the contract price and the market price current at the time of rescission provided that the claiming party has not engaged in a substitute transaction.[206] The result of these rules may be arrived at in Mexico through the concept of damages as set out in the Civil Code, where the limitation is established that such damages must always "flow as a direct and immediate consequence of the breach."[207]

ALLOCATION OF THE RISK

Where the goods perish or suffer injury or diminution in value due to an act of God or *force majeure,* the Convention distinguishes between transactions which involve the carriage of goods[208] and those which do not.[209] In the former case, if "the seller is not bound to hand

200 *Id.* art. 2114.
201. *Id.* art 2117(2).
202. *Id.* art. 2394.
203. C. Co. art. 362, *supra* note 17.
204. Trans. note: To more fully appreciate the disparity between such legal rates of interest and the prevailing market rates, it is perhaps instructive to note, for example, that the mortgage rates at Banamex, Hermosillo, Sonora, Mexico, for the first trimester of 1982 amounted to 38.86% per annum.
205. Convention art. 75, *supra* note 2, at 689. For a discussion of article 74, see *supra* text accompanying notes 179-181.
206. Convention art. 76, *supra* note 2, at 689.
207. C. Civ. D.F. arts. 2108, 2109, *supra* note 17.
208. *See id.* arts. 67-68, at 686-87.
209. *See id.* art. 69, at 687.

[the goods] over at a particular place," the risk will pass to the buyer "when the goods are handed over to the first carrier for transmission to the buyer."[210] In the second case, the passage of the risk is effectuated "when [the buyer] 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."[211]

The Civil Code lays down the same rule as Convention article 69; "losses, damages, and diminution in value suffered by goods which have been sold shall be assessed against the buyer *if such goods have been delivered to the buyer,* either as a matter of fact, as a matter of effect or as a matter of law[212] and if such delivery has not been effectuated [such loss, etc.] shall be assessed against the seller."[213] On the other hand, if the sale is civil in nature, the transfer of the risk is concomitant with the transfer of title[214] which takes effect as of the moment of the agreement,[215] unless actual delivery of the goods is required for such transfer.[216]

Furthermore, when the sales contract is accompanied by documents of title article 67 of the Convention provides that the risk shall not be passed to the buyer "until the goods are clearly identified... by shipping documents...,"[217] and article 68 sets forth that "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."[218]

The principle of article 68 of the Convention corresponds to article 212 of the Law of Navigation and Maritime Commerce,[219] and, while this Law refers only to maritime transport, it is without a doubt applicable to land transport as well.

On the other hand, the principle of article 67 of the Convention is not expressly articulated in Mexican law. Moreover, since the

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210. *Id.* art. 67(1), at 686-87.
211. *Id.* art. 69(1), at 687.
212. Trans. note: The translator employs the terms "delivery in fact," "in effect" and "in law" to translate *"entrega real," "entrega virtual"* and *"entrega juridica,"* respectively. An *entrega real* is effected through actual delivery of the material goods or their legal title in the case of a right; an *entrega virtual* takes place when the buyer accedes to the proposition that the good lie at his disposal (although they may not have been actually received by him); and an *entrega juridica* obtains where the law implies receipt by the buyer. C. Civ. D.F. art. 2284, *supra* note 17.
213. *Id.* art. 377 (emphasis added).
214. *Id.* arts. 2017(V), 2022.
215. *Id.* arts. 2248.
216. *Id.* arts. 2249.
217. Convention art. 67, *supra* note 2, at 686-87.
218. *Id.* art. 68, at 687.
219. L.N. y C.M. art. 212, *supra* note 19.

documents of title to the goods, such as bills of lading, grant to their holder (who at the time of delivery of goods is usually the seller) "the exclusive right to dispose of such goods"[220] and to rightful possession, it would seem that, in contrast to the position embodied in the Convention, risks are not passed to the buyer, but rather rest with the seller while he has possession of the documents. Such an interpretation is doubtful, and it is the writer's opinion that the risks would indeed pass to the buyer, given the assumption expressed in the Convention rule–that the seller's holding of the documents is due to the buyer's authorization. In any case, obviously it is better to have a text in which the problem is explicitly resolved rather than relying on a questionable interpretation of the local law.

PRESERVATION OF THE GOODS

Articles 85 through 88 of the Convention, which are the last ones to deal with sales contracts, regulate the obligation of the parties to take appropriate means to preserve the goods, both in the event that the buyer delays in receiving them[221] and where the buyer, having received the goods, intends to reject them because of supposed breach by the seller.[222] Article 88 allows the party responsible for the preservation of goods the right to sell the goods if the other party delays excessively in their receipt or in payment of the price.[223] However, the party who wishes to dispose of the goods for such reasons is obliged to notify the other party of his intention to sell.[224] Such notice must be "reasonable notice."[225] If the goods are subject to rapid deterioration or if their preservation would involve unreasonable expense, the party charged with their preservation must "take reasonable measures to sell them."[226] That party is entitled "to retain out of the proceeds of the sale an amount equal to the reasonable expenses of preserving the goods and selling them."[227]

Under Mexican law, the duty to preserve goods which have been sold, whether it relates to the seller when the buyer "delays in his receipt thereof"[228] or to the buyer when the seller sends him goods

220. LEY DE TITULOS OPERACIONES DE CREDITO [L.T.O.C.] art. 19, 24a ed. (Porrua, 1979). Article 20 also states that the holder of documents of title is also given the legal recovery of the goods and any legal right to their disposition.
221. Convention art. 85, *supra* note 2, at 691.
222. *Id.* art. 86, at 691.
223. *Id.* art. 88, at 692.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* art. 85, at 691.

which he rejects,[229] is imposed only upon the seller and then only in a vague and indirect fashion. Articles 378 of the Commercial Code and 2284(3) of the Civil Code provide that, when "the buyer accepts that the goods sold lie at his disposal," he shall be considered as a depositary in effective receipt of them[230] and will "have only the rights and obligations of a depositary."[231] In other words, the buyer is permitted and bound to "preserve the goods... as he receives them."[232] In addition, article 2292 of the Civil Code imposes upon the buyer who has delayed in receiving the goods the duty to pay the seller costs of "renting warehouses, graineries or other storage facilities in which the goods are kept and the *seller shall be discharged of the duty to exercise ordinary care as towards the preservation of the goods.*"[233]

The Civil Code provides, as has been discussed, that if the creditor, without just cause, refuses to accept the performance of a duty owed him, the debtor may be relieved of his obligation by depositing the thing owed with another[234] and, if such is done within the bounds of law, "all such expenses shall be chargeable against the creditor."[235] Yet, where the bailee is a general warehouse he is to sell the merchandise involved and even destroy it if the merchandise is likely to deteriorate in such a manner as to affect the safety or sanitation of his warehouse.[236]

229. *Id.* art. 86(1), at 691.
230. Trans. note: see "delivery in effect" definition, *supra* note 212.
231. C. Co. art. 378, *supra* note 17; C. Civ. D.F. art. 2284(3), *supra* note 17.
232. C. Co. art. 335, *supra* note 17; C. Civ. D.F. art. 2522, *supra* note 17.
233. C. Civ. D.F. art. 2292, *supra* note 17 (emphasis added).
234. *Id.* art. 2098.
235. *Id.* art. 2103.
236. L.T.O.C. art. 282, *supra* note 220.