*The Hague Conventions of 1964 and The Unification of the Law of International Sale of Goods**

I

The second half of the twentieth century has seen a rapid growth in international commerce as a result of unparalled progress in science and technology and the consequent increased production of goods and their improved means of distribution. Standards of living have risen everywhere and world trade has expanded. One of the most serious obstacles to the development of this international trade is the existence of divergent national laws applicable to the international sales of goods, with their wide differences of approach, both practical and philosophical, giving rise to great difficulties in the interpretation of sales contracts. It is often quite uncertain which national law is applicable to a contract of sale, and although the problem is resolved according to the rules of conflict of laws, these rules are applied quite differently in different countries. Allied to that is the unfamiliarity of merchants with the commercial practices in vogue in other parts of the world. As a result, traders have been uncertain of their rights and in many cases have felt aggrieved at what they consider is the injustice they have received at the hands of a particular national court or tribunal[1].

The obvious solution to this problem is the creation of a uniform law to deal with the international sale of goods, and a proposal to formulate such a law was mooted by Rabel to the International Institute for the Unification of Private Law in Rome (the so-called "Rome Institute") as far back as 1929. As a result of his efforts, the Institute set up a drafting committee, comprising experts from Sweden, France, Germany and the United Kingdom, who worked on the text of a uniform law and produced a draft in 1935. This draft was circulated to States who were members of the Institute, and a second draft was promulgated in 1939 in the light of the comments received. The project remained in abeyance until after the Second World War, and it was not until 1951 that the revised draft was considered at a diplomatic conference held at the Hague in conjunction with the first post-war session of the Hague Conference on Private International Law[2]. That conference, attended by representatives from more than 20 States, approved the general principles of the 1939 draft but set up a special commission to consider certain modifications to it that had been suggested. This revised draft was completed in 1956 and circulated to member States, a revised text was produced in 1963 as a result, and a second diplomatic conference was called to consider it.[3] That conference, attended by representatives of 28 States (in-

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1. Allied to this has been the necessity for the trader to be familiar with and use a multiplicity of sales contracts with their concomitant documentation. The result has been embarrassment to the trader and a hindrance to international commodity sales.
2. This, the 7th Session of the Hague Conference on Private International Law produced the Hague Convention of 1955 on the Law Applicable to the International Sales of Goods. See the text of the draft convention set out in (1952) 1 Am.Jo.Comp.L.275. The convention is essentially an attempt at unification of conflicts of laws rules.
3. See Ellwood "The Hague Uniform Laws Governing International Sale of Goods" in (1964) I. & C.L.Q. Suppl. Publication No. 9. ("Some Comparative Aspects of Law Relating to Sale of Goods") 38, 39–40.

cluding Japan)[4], met at the Hague in 1964 and produced a convention relating to a uniform law on the international sale of goods, with a uniform law as an appendix[5].

It is perhaps worthy of note that even before the conference met, it was clear that the 1956 draft was unsatisfactory to a number of States, that some including the U.S.A., had not been involved in the preparation of the draft, and that the three weeks available for its detailed consideration were not long enough. Indeed, at the conference itself, work was rushed through in extraordinary haste, the prevailing mood being that this was the last chance to bring to fruition the work of more than 30 years, and that an agreement, defective though it might be in certain respects, was better than no agreement at all[6]. It would at least improve the sorry legal situation confronting international trade, where merchants found themselves battling with national laws "antique and unsuited to international transactions, unintelligible to traders from different legal and linguistic backgrounds, and subject to the vagaries of the conflict of laws"[7].

At the same time as the special commission set up in 1951 had been working on the revised draft on international sales, the Rome Institute had been preparing a revised version of its draft uniform law on the formation of contracts for international sales first developed prior to World War II[8], and in 1958 it issued the revised version which was circulated to member States for their comments[9]. This proposed uniform law formed the basis of the second convention which emerged from the deliberations of the Hague Conference in 1964. It dealt with the formation of contracts for the international sale of goods and had appended to it a uniform law on that topic[10]. This convention did not suffer quite so much from the haste and frenzied activity associated with the birth of its twin, as its comparative brevity enabled the conference to pay more attention to the final drafting and to turn out a more finished product.

The two conventions have been signed by the United Kingdom, the six Common Market countries, and Greece, Israel, Vatican City and San Marino;

4. The composition of the conference was broad-based and included Hungary, Bulgaria, Yugoslavia, Turkey, Israel, the United Arab Republic, Colombia, Japan and U.S.A. as well as 19 states from Western Europe.
5. This uniform law will hereinafter be referred to as "U.L.I.S.".
6. See Honnold: "The Uniform Law for the International Sale of Goods: the Hague Convention of 1964" in (1965) 30 Law & Contemp. Prob. 326, 328–32; Nadelmann "Uniform Legislation versus International Conventions Revisited" in (1968) 16 Am. Jo. Comp.L.28, 36–37.
7. Honnold, *loc. cit.*, p. 332. It should be pointed out that the last twenty years have seen the formulation of rules of international commerce in authoritative texts as to practices and usages compiled by such organisations as International Chamber of Commerce with its "Incoterms 1953". There have also been established regional trading blocs such as the Common Market and Comecon of Eastern Europe and organisations such as the Economic Commission for Europe and the Council for Mutual Economic Aid.
8. A draft Uniform Law on the formation of contracts had been drawn up in 1936 but no steps were taken to implement it. In 1956 a new committee was set up by the Rome Institute and a draft Uniform Law was published in 1958 which differed considerably from the earlier draft. It was this 1958 Uniform Law which was submitted to the 1964 Hague Conference, where it was radically altered. In particular, the final product of the 1964 conference contained no provisions on a matter which was earlier considered of paramount importance, namely the moment and place at which a contract is concluded. See Schmidt: "The International Contract Law in the Context of some of its Sources" in (1965) 14 Am. J. Comp. L. 1–3. This particular problem is considered further in Section II of this paper.
9. See Farnsworth "Formation of International Sales Contracts: Three Attempts at Unification" in (1962) 110 Un. Pa. L. R. 305, 306–7.
10. This Uniform Law will hereinafter be referred to as "U.L.F.".

but signature is not of course ratification, and by September 1969 only three States had ratified the conventions[11]. The United Kingdom acceded to both conventions in August 1967 with the reservations that the U.L.I.S. was applicable only (a) where the parties carried on business or resided in different *contracting* States i.e., both States must have acceded to the convention on sales;[12] and (b) where the parties had chosen that Uniform Law as the law of the contract[13]. The Uniform Laws on International Sales Act 1967 (U.K.) was enacted as a result[13a]. Belgium and San Marino followed suit in 1968, each with similar reservations, although Belgium acceded only to the Convention on Sales and not to that on Formation[14].

So far as other States are concerned, Australia[15], along with such countries as Colombia, West Germany, France, Gambia, Greece, Israel, Mexico and the Netherlands[16], originally indicated its interest in ratifying the conventions (with similar reservations to those insisted upon by the United Kingdom), but the march of events appears to have overtaken the Governments concerned. As mentioned below, the whole problem of the unification of the law of international trade has since been taken up by the United Nations, and it would appear that Australia and the other States referred to have adopted a policy of procrastination until the outcome of the current investigation by the international organisation is known. Other States which have indicated that they are considering the question of ratification, including Denmark, Finland, Hungary, Ireland, Japan, Korea, Norway, Pakistan, Roumania, Sweden, Switzerland and Togo[17], may well be having second thoughts for the same reason. On the other hand, countries like Austria, China, Jordan, Laos, South Africa, United Arab Republic, the U.S.S.R. and the U.S.A. have indicated that they do not intend to accede to the conventions[18]. Five ratifications are required to put the conventions into effect[19], and a resolution adopted at the Hague Conference in 1964 provided that if these five ratifications had not been achieved by May 1968, the Rome Institute was to appoint a committee of representatives of interested States to investigate what could be done to promote the unification of the law of international sales.[20]

As far as can be ascertained, no such a committee has been set up, but what is a matter of record is that the problem of the unification of the law of international trade has been taken up by the United Nations, which has established a commission on international trade law called "Uncitral", to attempt to achieve

11. Further ratifications may have occurred since September 1969. Both France and Italy submitted the question of ratification to their legislatures early in 1970.
12. See Article III of the Convention on Sales which allows this derogation.
13. See Article V of the Convention on Sales and Article 4 of U.L.I.S.
13a. The Act is not yet in force, no Orders in Council having been issued under ss. 1(6) and 2(3) of the Act.
14. See Analysis of Studies and Comments by Governments on the Hague Conventions of 1964 (Uncitral A/C.N. 9/31) (September 1969), p. 7.
15. *Ibid.*, p. 8. The Trade Committee of the Law Council of Australia in a report to the Commonwealth Solicitor-General on whether Australia should accede to the Convention on Sales recommended accession with the reservation that the convention should apply only where adopted by the parties. See Law Council Newsletter, July 1970, p. 4.
16. Analysis of Studies and Comments etc. (A/C.N. 9/31) (September 1969), p. 8.
17. *Ibid.*, p. 9. Scandinavia may make use of the reservations provided for in Article II (I), III and IV in the Convention on Sales. *Id.*
18. *Ibid.*, p. 10.
19. U.L.I.S. Convention Article X (I); U.L.F. Convention Article VIII (i).
20. Final Act of Diplomatic Conference on Unification of Law Governing the International Sale of Goods. Recommendation No. II (2). See Nadelmann, *loc. cit.*, (note 6) p. 41.

uniformity in this area. The commission became operative on 1st January 1968 and it gave a first priority to the promotion of a wider acceptance of existing formulations for the unification and harmonization of the law of international sale of goods[21]. The reasons for the establishment of such a body as Uncitral have been canvassed by Schmitthof[22] who points out that the existing organisations engaged in the unification of international trade law all had a limited aim and a restricted membership. They were of limited appeal so far as countries of centrally planned economy and the developing states were concerned, and they were regional rather than global in operation. There was a need for an international agency of the highest order, global in its perspective, which would coordinate the various activities of the existing formulating agencies and assist in the development of the law.

As constituted, Uncitral consists of 29 States, comprising 7 from Africa, 5 from Asia, 4 from Eastern Europe, 5 from Latin America, and 8 from Western Europe. The object of this grouping was "primarily to evoke the interest of the developing countries in the subject of unification of international trade law and to involve them in its future development"[23]. Australia, India, Japan and Thailand were among the States elected to sit on the commission, the first for 6 years and the remainder for 3 years as from 1st January 1968[24].

At its first session Uncitral decided to go about its task by taking stock of the attitude of States towards the Hague Conventions of 1964 and also the Hague Convention of 1955, and to this end arranged for questionnaires to be sent to States so that they could indicate where they stood on the matter. The attitude of the commission was apparently that, while it was not circumscribed in any way in the steps it could take to achieve the harmonization and unification of international trade law, the appropriate course was to take full account of the work already accomplished in this field and to ascertain the extent to which the conventions were substantially acceptable to States[25].

In March 1969 the commission set up a working group of fourteen members (which included representatives from India, Japan and the U.S.A.)[26] to consider the replies received from States and to report on what modifications of existing texts would be required to render them capable of wider acceptance by countries of differing legal, social and economic systems, or what other steps might be taken to further the harmonization and unification of the law of international sale of goods.

From the replies and comments received from over forty States, the following facts have emerged. There is a marked divergence of opinion amongst States as to the merits of the 1964 Hague Conventions, countries like Belgium, West Germany, Norway, Hungary, and the United Kingdom regarding them as an

21. Report of 1st Session of Uncitral (February 1968). Suppl. No. 16 (A/7216) pp. 12–19.
22. "The Unification of the Law Of International Trade" in (1968) J.Bus.L. 105, 113–116.
23. *Ibid.*, p. 117.
24. Report 1st Session Uncitral Suppl. No. 16 (A/7216) pp. 2–3.
25. Report 2nd Session Uncitral (March 1969) Suppl. No. 18 (A/7218) p. 7. Two opposing views emerged at the commission's discussions: one that the 1964 conventions were suitable and practicable and a significant contribution towards unification and no revision should be attempted until they were tested in actual practice; and the other that these conventions did not correspond to present needs and realities but were drawn up by only 28 States, none of which were developing countries. The interests of these developing countries had not been taken into account in drafting the conventions and they contained legal concepts of an artificial character which it was difficult for some States to accept. It was therefore desirable to review the conventions at an early date. *Ibid.*, p. 8.
26. Other members are Brazil, France, Ghana, Hungary, Iran, Kenya, Mexico, Norway, Tunisia, the U.S.S.R. and the U.K.

important contribution to the unification of private law in a sphere which was essential to the development of international trade, while States such as the U.S.S.R., Austria, Sweden and the U.S.A. consider that the conventions do not meet the requirements which are demanded from international instruments of this kind. Objections have been raised to the complexity of the U.L.I.S., to the use of abstract, artificial and vague concepts which could result in ambiguity and error, to the alleged fact that the Uniform Law was directed to the regulation of regional rather than global trade, and took little account of the problems of developing countries. The Uniform Laws it was felt, were not yet ready for adoption—further work on them was needed before they came into force[27].

The working group has begun a study of the substantive issues raised by the studies and comments of States on the 1964 Hague Conventions, and in April 1970 at the third session of Uncitral, it submitted a progress report based on its deliberations held in January 1970.[28] There the matter rests for the moment. What will eventually emerge from the deliberations of Uncitral and its working group remains to be seen.

This paper will primarily be concerned with a detailed study of the provisions of the Uniform Law on the Formation of Contracts for International Sale of Goods (the "U.L.F.") and only brief reference will be made in Section III of this paper to some of the salient features of the U.L.I.S. Any detailed analysis of the provisions of the U.L.I.S. would only result in further increasing the size of what is already an overlong paper, and must be left to some other occasion.

II

The U.L.F. is a complementary provision to the U.L.I.S. and is intended to be applied in conjunction with it. Logically, it should be considered first, because it is limited to the type of sales transaction covered by the U.L.I.S. and it qualifies the latter, resolving a number of preliminary problems which condition the applicability of the Uniform Sales Law. Obviously, if no contract is formed to start with, the rules of the U.L.I.S. cannot be applied. In theory the two Uniform Laws should have been combined, but there was apparently at one time, considerable doubt as to whether any agreement could ever be reached on the problems of formation and the U.L.I.S. was drafted so as to operate independently of the U.L.F.[1]

The U.L.F. is sometimes referred to as the law on offer and acceptance, and it sets out in some thirteen Articles, a number of rules to be applied in determining whether or not a contract for the sale of goods has been formed in the situation where the contracting parties have their places of business or habitual residence in the territories of different States[2]. The rules will apply

27. Analysis of Studies and Comments by Governments on Hague Conventions of 1964 (12th September 1969) (A/C.N. 9/31) pp. 11–14.
28. A/C.N. 9/35. The replies received from States included in many instances detailed studies and comments on numerous provisions of the U.L.I.S. and the U.L.I.F.
1. See Ellwood "The Hague Uniform Laws Governing International Sale of Goods" in I. & C.L.O. Supp. Pub. No. 9 (1964) 38, 56.
2. Provision is made for any two or more States to declare that they do not consider themselves as "different States" for the purpose of the requirements as to the place of business or habitual residence. This may be done where such States apply the same or closely related legal rules to international sales of goods, as for instance, in Scandinavia. See Article II of Convention on Formation and Article 1(5) of U.L.F.

only where the goods will be carried from State A to State B, or where the offer and acceptance are effected in the territories of different States, or where delivery is to be made in State B and the offer and acceptance are effected in State A[3]. There must be either a movement of the goods themselves across frontiers, or an exchange of agreements across frontiers, or at least the delivery of goods in a country other than that in which the exchange of agreements took place.

Obviously, Article I defining the scope of the U.L.F., is the most fundamental of the whole thirteen, and it will be noted that for an international sales contract to come within the purview of the Uniform Law, it must satisfy tests based on the situation of the parties themselves and on the circumstances surrounding the contract.

The Article seeks to limit the scope of the U.L.F. further by attempting some sort of definition of a sale of goods. It provides that the Uniform Law has no application to the formation of contracts for the sale of stocks, shares investment securities, money etc.; any ship or aircraft, electricity, or any sale by authority of law on execution or distress[4]. On the other hand, contracts for the supply of goods to be manufactured or produced will come within the U.L.F. unless the buyer is to supply an essential and substantial part of the materials necessary for production[5]. This is narrower than the definition of "goods" contained in e.g., S. 5(1) SGA 1923 (N.S.W.) as explained by the decisions, for ships, aircraft, electricity, and goods to be manufactured or produced (even where a substantial part of the materials are supplied by the buyer) are within the SGA[6]. The position of emblements, and things attached to the land which are to be removed before or under the contract of sale, is left in doubt, as is the distinction between contracts for the sale of goods and those for work done and material supplied[7].

On the other hand, the Uniform Law appears to apply to the formation of credit sales and hire-purchase transactions, although the latter are technically not "sales". The corresponding provision in the U.L.I.S. contains an express reservation that the U.L.I.S. is not to affect the application of any mandatory provision of national law for the protection of a party to a contract who contemplates the purchase of goods by instalments but a similar restriction is not spelt out in the U.L.F. probably because it was thought to be unnecessary[8].

It should be pointed out at this stage that the provisions of the U.L.F. as to the character of an international sale of goods caught by the Uniform Law, and the scope of that Law, are almost identical with those contained in the

3. Article 1(1). Offer and acceptance are deemed to be effected in the one State only if the letters, telegrams and other communications containing them are sent and received in that one State. Article 1(4). Presumably this means that the communications must have been both sent and received in the one State.
4. Article 1(6).
5. Article 1(7).
6. See Sutton *Law of Sale of Goods in Australia and New Zealand* (1967) pp. 29–30 and the authorities there cited. It may well be that the provisions of the U.L.F. will, by analogy, extend beyond contracts for the international sale of goods, and in time will apply to contracts generally, as has been the case in the U.S.A. with Article 2 of the Uniform Commercial Code (hereinafter referred to as the U.C.C.").
7. The distinction is of importance in the SGA mainly because of the formalities required by S. 9. See Sutton, *op. cit.*, pp. 32–33. Under Article 3 U.L.F. (which is similar to Article 15 U.L.I.S.) there is no requirement as to form in international sales—a position which now obtains in England and New Zealand but not in Australia or the U.S.A.
8. Article 5(2) U.L.I.S. See Graveson, Cohn and Graveson *The Uniform Laws on International Sales Act 1967 (U.K.)* (1968) p. 52.

U.L.I.S.[9]. So much so, that Article I of the U.L.F. is in two forms, one for adoption by States who are prepared to ratify the convention relating to formation only, and the other for adoption by States who accede to both the convention on formation and that on sales[10]. The first version of Article I discussed above expressly incorporates the relevant U.L.I.S. provisions, while the second version incorporates those provisions by reference, by providing simply that the U.L.F. applies to the formation of contracts for the sale of goods which, if they were concluded, would be governed by the U.L.I.S.

One further point should be made before the detailed rules as to offer and acceptance contained in the U.L.F. are considered. The Uniform Law has no application to the formation of contracts for the rescission, discharge, or modification of a contract for the international sale of goods, but only to the creation of the sales contract itself. Further, even in the cases where the Uniform Law does apply, the parties are at liberty to exclude its provisions, and this exclusion may be effected either expressly, or by implication, or by reference to the practices or usage which the parties have established between themselves[11]. Hence, the preliminary negotiations of the parties, or the incorporation of particular conditions of business containing a reference to a specific national law or rules dealing differently with matters covered by the U.L.F., may be held to show the intention of the parties to exclude the provisions of the Uniform Law.

The detailed provisions of the U.L.F. as to offer and acceptance must now be examined. In both the common law and civil law systems, the concept of mutual agreement is the basis of the law of contract, with a contract being formed by the acceptance of an offer which is intended to create legal relations. The principles of the law of contract and of commercial law operating in Asia are based either on the common law or on the civil law[12] so that in this area the various national legal systems are agreed on these basic elements as necessary for formation. Despite this measure of agreement, there are differences of approach to the elements of offer and acceptance to be found in the various legal systems, as the fact that it was found necessary to formulate a unified code on the formation of contracts at the international level will testify. In this detailed study of the U.L.F., the course that will be adopted will be to state the rules as set out in the Uniform Law and to contrast those rules with the position obtaining under the appropriate common law and civil law systems.

The common law draws a distinction between an offer and an "invitation to treat", placing such things as advertisements offering goods for sale in the newspapers, or on radio or television, or through catalogues, price lists and circulars, and the display of articles in shop windows or on shelves as merely invitations to submit offers to buy[13]. This distinction is recognised in the civil law[14], although it would seem that in the French legal system, by virtue of trade usage, the display of goods in shop windows and the sending of catalogue or price lists constitute an offer, while post-war legislation aimed at freedom of competition, makes it an offence for a tradesman to refuse to sell to anyone

9. Cf. Articles 1, 2, 5, 6 & 7 U.L.I.S. with Article 1 U.L.F.
10. See Article 1(3) Convention on U.L.F. Article 4 similarly has two versions to meet the case of States ratifying both conventions.
11. Article 2(1). A corresponding provision is to be found in Article 3 of U.L.I.S. See infra.
12. See *Asian Contract Law* (M.U.P. 1969 ed. Allan) pp. 36–37, 54.
13. See e.g. *Pharmaceutical Society of Gt. Britain* v. *Boots Cash Chemists (Southern) Ltd.* [1953] 1 Q.B. 401.
14. Corman "Formation of Contracts for Sale of Goods" in (1967) 42 Washington L.R. 347, 349–51.

who seeks to purchase from him[15]. Article 4 of U.L.F. defines an offer in a negative way, by stating that a communication to a specific person or persons, made with the object of concluding a contract of sale, shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance, and indicates the intention of the offeror to be bound. If a communication does not satisfy these requirements, then subject to what is said below, it is presumably an invitation to treat.

It follows from this that an offer must be addressed to a specific person, i.e. there can be no general offer addressed to the world at large, and that such offer must be definite. The Article offers little guidance for determining when a communication is sufficiently definite, beyond emphasising in paragraph 2 that reference may be made to preliminary negotiations, established practices between the parties, usage and any applicable legal rules for contracts of sale[16] to assist in interpreting it or filling in any gaps. However, it would seem that the general principle is unexceptionable, and that it is essential that an offer should have the quality of permitting a contract to come into existence without any further activity on the part of the offeror. It should be definite enough to permit assent by acceptance.

The notion that an offer, to be an offer, must be addressed to a specific person is foreign to the common law although it has its counterparts in some of the civil law systems[17]. Article 4 means that, so far as international business sales are concerned, general offers made to the public at large do not come within the purview of the U.L.F. Presumably, such offers may be regarded as no more than invitations to treat. On the other hand, if the U.L.F. has no application to such an offer, the question whether it is a true offer or merely an invitation to treat may well fall to be determined by the law that would otherwise be applicable to the transaction. In other words, the matter is left to the national law of each State and the U.L.F. has no bearing on the problem[18].

If a communication deals with a proposed contract for the international sale of goods as defined in Article I, and if it otherwise satisfies the requirements of Article 4, it will constitute an offer. Article 5(1) of the U.L.F. provides that the offeror is not bound until his offer has been communicated to the offeree, and that the offer will lapse if its withdrawal is communicated to the offeree before or at the same time as the offer. Communication is defined as delivery at the address of the person to whom the offer or withdrawal is directed, presumably by the offeror or his agent[19]. If this is correct, notification of withdrawal from a trustworthy source, as opposed to the offeror, will not suffice, and in this connection the U.L.F. differs from the common law[20].

15. Houin "Sale of Goods in French Law" in I. & C.L.Q. Supp. Pub. No. 9 (1964) 16, 21.
16. For those States who have acceded to both the U.L.I.S. and U.L.F. reference must be made to the U.L.I.S. in place of "any applicable rules for contracts of sale". See Article 1(3) & Annex 11 of Convention on U.L.F.
17. See e.g. *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256. Cf. Uniform Scandinavian Contracts Act and Swiss Code of Obligations discussed by Schmidt "The International Contract Law in the Context of some of its Sources" in (1965) 14 Am.J.Comp.L. 1, 6–7.
18. The question of the public offer evoked considerable discussion at the 1964 Hague Conference, the proposal that a general offer should be regarded as merely an invitation to treat being rejected, while at the same time, it was decided that such an offer should not be governed by the U.L.F. See Schmidt, *loc. cit.*, pp. 7–9.
19. Article 12. The implications of the definition are discussed *infra*.
20. *Dickinson* v. *Dodds* (1876) 2 Ch.D. 463. This decision refers to revocation of an offer rather than its withdrawal. Once the offer is communicated, it can only be revoked, not withdrawn.

The U.L.F. differs from the common law in this area in other respects. It would seem to follow from Article 5(1) that, once the offer has been communicated to the offeree and there has been no withdrawal up to the time of such communication, the offeror is bound and cannot subsequently revoke his offer. However, Article 5(2) proceeds to lay down the rule that an offer may be revoked even after communication, unless the situation is one that comes within certain specified categories. In other words, the U.L.F. recognises the general principle of revocation of an offer before acceptance, but sets out a number of broad exceptions to the general rule. It is clear that the framers of the Uniform Law were faced with a difficult problem in endeavouring to reconcile the conflicting views on the question of revocation of an offer, and in the result Article 5 achieved a compromise between the views of the civilian lawyers and those of their common law brethren.

Under the common law, an offer may be withdrawn at any time before acceptance, provided that such revocation is communicated to the offeree[21], and the fact that the offeror has said he will keep the offer open (or "firm") for a certain period of time does not prevent him from revoking it in the absence of a contract to that effect. The one exception to this rule is to be found in S. 2–205 of the American U.C.C. which provides that a firm offer by a merchant to buy or sell goods may be binding if it is in writing signed by him. In that event, provided the offer by its terms gives assurance that it will be held open, it will not be revocable during the stated time or for a reasonable time if none is stated[22].

At common law the offer can also fail through lapse of time (which in the absence of a stipulated period will be a reasonable time) or through the death of the offeror known to the offeree. The position where the offeree is unaware of the offeror's demise when he accepts is more doubtful, and would seem to depend on the extent to which the offeror's personality is a vital factor in the transaction[23]. Article 11 of the U.L.F. which provides that the formation of a contract is not affected by the death or supervening incapacity of a party unless the intention of the parties, usage, or nature of the transaction shows the contrary, is thus at variance with the common law at least to the extent that a contract may be formed by acceptance of the offer after the death of the offeror is known to the offeree[24] or after he has lost the capacity to contract. However, the U.L.F. provision is in accord with the position in many of the civil law jurisdictions[25], and it does assist in achieving certainty in commercial transactions.

Under the civil law, emphasis is placed on the consent of the parties or "meeting of the minds" in the formation of a contract. Hence, under French law, an offer may be withdrawn before acceptance[26], although notice of re-

21. But in India under the Indian Contract Act 1872 and in those parts of Malaysia in which the Contracts (Malay States) Ordinance 1950 is in force the rules as to revocation are different, the revocation binding the offeror when it is put into a course of transmission, but not the offeree until it comes to his knowledge. See *Asian Contract Law* p. 39.
22. See the discussion in Sutton "The Uniform Commercial Code and the Law of Contract" in (1967) 5 Syd. L.R. 398, 402–5.
23. See Cheshire & Fifoot *Law of Contract* (7th Edn. 1969, Lond. Butterworth) p. 52, and *Carter* v. *Hyde* (1923) 33 C.L.R. 115 (death of offeree before exercise of option by him).
24. The point may be academic as in the international sphere traders are usually companies or firms which remain unaffected by the death of a member.
25. See the survey by Corman, *loc. cit.*, pp. 365–70.
26. See Houin "Sale of Goods in French Law" in (1964) 1. & C.L.Q. Supp. Pub. No. 9, 16, 21.

vocation must normally be received before dispatch of the acceptance[27]. But, if the offeror specifies a period during which the offer will remain open for acceptance, such a "firm" offer is irrevocable during that period[28]. Under German law, the offeror is bound by his offer (unless he has indicated to the contrary by inserting a "without obligation" clause therein, thereby converting his offer into an invitation to treat), and this binding offer remains open until either the specified time limit for acceptance or, in the absence of such stipulation, a reasonable time has elapsed[29].

From this brief outline it will be seen that there is a considerable degree of variation among the various legal systems on the approach to the question whether an offer should be irrevocable for a certain time. The English and German systems have diametrically opposed views, while differences exist within the remaining civil law systems themselves. The solution adopted by the U.L.F. was to draw a distinction between an offer which was "firm" and one which was not, and to regard the former as binding (unless withdrawn before communication) and the latter as revocable[30]. Article 5(2) U.L.F. provides that an offer can be revoked unless:-

(a) the revocation is not made in good faith; or
(b) the revocation is not made in conformity with fair dealing; or
(c) the offer states a fixed time for acceptance or otherwise indicates it is firm or irrevocable.

An indication that an offer is "firm" or irrevocable may be express, or may be implied from the circumstances, the preliminary negotiations, course of dealing between the parties, or usage[31].

Finally, it is provided that a revocation of an offer is only effective if it has been communicated to the offeree before he has dispatched his acceptance, or has done any act treated as acceptance under Article 6(2)[32].

Thus, the U.L.F. adopts the English common law rule and recognises the general principle of the revocability of offers. But the revocation must be timely (i.e. before dispatch of acceptance) and proper. The distinction between a revocation not made in good faith and one not in conformity with fair dealing is not easy to see, but it seems that both rules envisage such notions as "the observance of reasonable commercial standards of fair dealing in the trade" in which the parties were engaged, honesty in fact in the conduct or transaction

27. An exception exists in the case of the Italian Civil Code where the revocation takes effect immediately it is issued. The result is to unduly favour the offeror by allowing him to revoke until the last possible moment, and as a consequence, counter-balancing principles have been established in favour of the offeree. See Articles 1326–1331 and the discussion by Bernini "The Uniform Laws on International Sale" in (1969) 3 J. World Trade L. 671, 676–68. Under the Japanese Civil Code, if notice of revocation is delayed but the offeree knows it has been sent, he must advise the offeror of the delayed arrival. See Article 527(1) and Corman "Formation of Contracts for Sale of Goods" in (1967) 42 Wash.L.R. 347, 354. See too German Civil Code (BGB) Article 149 (delayed arrival of acceptance).
28. See Houin, *loc. cit.*, p. 21. Italian Civil Code Articles 1329(1), 1331.
29. BGB Articles 145–49; Japanese Civil Code Articles 521, 524. The offeror in Japan can reserve the right of revocation by so stipulating in his offer, despite a fixed time for acceptance. See Corman, *loc. cit.*, p. 353. For a resume of the variations to be found in the different civil law system, see Corman, *loc. cit.*, pp. 353–59, and Schmidt *loc. cit.*, pp. 10–11.
30. For the history of this compromise solution see Schmidt, *loc. cit.*, pp. 12–13.
31. Article 5(3). Cf. S.2–205 U.C.C. which requires the formality of writing and an assurance in the terms of the offer that it will be held open.
32. Article 5 (4).

concerned[33], and even perhaps the avoidance of an unconscionable result. The rules may be intended to discharge some of the functions generally performed by the doctrines of estoppel and the like[34], but the inevitable result of the use of such broad language is to make for uncertainty, with courts being given a wide discretion and the way being opened for departures from uniformity of interpretation of the Uniform Law. It may well be that Article 5 will prove to be a source of disputes and difficulties among States in the future.

So far as the refusal to allow the revocation of a "firm" offer is concerned, this is in accordance with established commercial practice which has been given legal recognition in the common law (at least in the U.S.A.) by S. 2–205 of the U.C.C. already referred to, although the formal requirements there insisted upon show a more rigid attitude in the common law than in the U.L.F. It has been said that the distinction between a "firm" offer and other offers is a fundamental one which should underlie the whole code of rules relating to the formation of contracts, and that it would be impossible for businessmen to carry on business if every day-to-day offer were liable to be revoked at any time[35]. Under the U.L.F. an offer will be regarded as "firm" if a fixed time for acceptance is stated or if the course of dealing between the parties or nature of the transaction indicates that this is so.

The offer must be accepted before the contract is concluded. Under Article 6(1) acceptance "consists of a declaration communicated by any means whatsoever to the offeror" and this may not be quite the truism that it appears to be. In the common law it is generally recognised that the offeror is "master of his offer" and can prescribe the manner in which his offer is to be accepted; the offeree departs from the stipulated method of acceptance at his peril. The same may be true in at least some of the civil law systems[36], although it has been pointed out that in both German and Scandinavian law the notion that the offeror may prescribe some specific mode for acceptance seems unrealistic—all that matters is that there should be a communication by any means whatsoever of the intention of the offeree to accept the offer[37]. It would seem from the terms of Article 6(1) that the U.L.F. denies the right of the offeror to insist on a particular method of acceptance and states instead the principle implicit in the German and Scandinavian law. In this respect the U.L.F. differs from the provisions of S. 2–206(1)(a) of the American U.C.C. which declares that, *unless otherwise unambiguously indicated by the language or circumstances,* an offer is to be contrued as inviting acceptance in any manner and by any medium reasonable in the circumstances[38]. On the other hand, an offeror may rely on Article 2(1) of the U.L.F. and contend that the terms of his offer, stipulating a particular manner of acceptance in the case of a contract for the international sale of goods, indicate that a rule different to Article 6(1) applies.

33. Cf. U.C.C. SS. 1–201(19) and 2–103(1)(b); S.5(2) Sale of Goods Act 1923 (N.S.W.).
34. Graveson, Cohn and Graveson *Uniform Laws on International Sales Act 1967* p. 115, suggest that a revocation may be invalid if the offeree, to the knowledge of the offeror, has already incurred considerable expense in the examination of the offer, or if the offer is made for the purpose of obtaining information from the offeree and with intent to revoke before acceptance.
35. Aubrey "The Formation of International Contracts with Reference to the Uniform Law on Formation" in (1965) 14 I. & C.L.Q. 1011, 1017–18.
36. The comment by Corman *loc. cit.*, p. 370 is that "advanced legal systems uniformly adopt the position that the offeror has the power to control the manner in which his offer is to be accepted".
37. See Schmidt, *loc. cit.*, p. 16.
38. Italics supplied. A similar provision is to be found in S.29(2) Restatement (Second) Contracts (1964).

Article 6(2) provides that acceptance may also consist of the dispatch of goods, or of the price, or of any other act which may be considered as equivalent to the declaration referred to in Article 6(1) by virtue of the offer or as a result of the practices or usage of the parties[39]. To the common lawyer, the two paragraphs of Article 6 would seem to perpetuate the distinction between the bilateral contract (where a promise is exchanged for a promise and the offer is accepted by the promise of the offeree to perform his part) and the unilateral contract (where the offeror requests some act of performance by the offeree in return and the offer is accepted by performing the act)[40]. The civil law knows no such distinction. All contracts of sale are considered to be consensual contracts, which implies that acceptance must have the character of a declaration of intention (or promise) which must be communicated to the offeror. Acceptance by performing an act is an exception to the rule, and Article 6(2) is seen as a "broad exception to the ordinary conceptual pattern necessitated by the needs of international business"[41].

This brings to the fore the question whether notification of acceptance must be communicated to the offeror. As already indicated, under the civil law, communication of the intention to accept is the norm, and any deviation from this principle is recognised only in the light of the necessities of commerce. Article 6(2) would appear to indicate that notification of acceptance, where it consists of performance of an act, is not required, always provided that the nature of the offer or the course of dealing between the parties suggests that acceptance in this way is permissible. The offeror can of course safeguard himself by fixing a time limit for acceptance, or by specifically requiring communication as a term of his offer.

This rule is in accordance with the common law. Decisions like *Carlill* v. *Carbolic Smoke Ball Co.*[42] and *R.* v. *Clarke*[43] show that notice of acceptance is not required, apart from notice that performance has been completed. In the latter case, Isaacs A.C.J. referred to methods of acceptance almost in the terms set out in Article 6(2) when he spoke of acceptance by payment of price or dispatch of goods or anything stipulated expressly or by implication, even by hanging out a flag, and continued:

> "The method indicated by the offeror may be one which either does or does not involve communication to him of the acceptance in order to form the contract and create the obligation, however necessary information of the fact may be required before default in payment, that is, in performance by the offeror, can arise".

39. Cf. S.2–206(1)(b) U.C.C. "Usage" is defined in Article 13 as "any practice or method of dealing which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract."
40. The U.C.C. has in S.2–206 abandoned the distinction between bilateral and unilateral contracts as having little relation to the facts of business life, and states instead the presumption that an offer can be accepted in any manner reasonable in the circumstances. It goes on to elaborate this by providing in S.2–206(1)(b) that an offer to buy goods is to be construed as inviting acceptance either by a promise to ship or by shipment of conforming or *non-conforming* goods. Quaere whether the shipment of *non-conforming* goods constitutes acceptance under Article 6(2) U.L.F. The matter is considered infra. The Restatement (Second) Contracts (1964) also proposed to abolish the distinction between bilateral and unilateral contracts—see Braucher "Offer and Acceptance in the Second Restatement" in (1964) 74 Yale L.J. 302, 304.
41. Schmidt, *loc. cit.*, p. 17 See too BGB. S. 151.
42. [1893] 1 Q.B. 256, 262–63, 269–70.
43. (1927) 40 C.L.R. 227, 233–34. See to *White Trucks Pty. Ltd.* v. *Riley* (1948) 66 W.N. (N.S.W.) 101.

It appears to be implicit in Article 6(2) that a contract is concluded once performance is begun by the offeree, for commencement of performance must be an act equivalent to a declaration of acceptance. Of course, the doctrine of consideration which is at the core of the common law notion of contracts, plays no part in the formation of international contracts for the sale of goods, and the problems which, in theory at any rate[44], can bedevil the common lawyer as to the revocation of an offer where the offeree has partly performed his side of the bargain, do not arise. Under the civil law, in those cases where no notice of acceptance is required, the contract is completed at the time and place of commencement of performance, and some systems stipulate that the offeree must promptly notify the offeror of such commencement or pay damages[45], while the Japanese Civil Code provides that the contract comes into existence at the time when any event takes place which amounts to a declaration of intention to accept[46]. The U.C.C. with its provision that "where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance"[47], impliedly recognises that commencement of performance may amount to acceptance.

In the case of a unilateral contract (i.e. one where the offeror requests performance of an act instead of a return promise of acceptance), the traditional common law view was to regard an offer as not accepted, and hence as capable of withdrawal, until tender of the complete performance requested. Full performance was both acceptance and consideration. Attempts to mitigate the rigour of this rule have been made by finding an acceptance and sufficient consideration in the commencement of performance of the requested act[48] and insofar as this now represents the law, so that commencement of performance will effectively bar revocation of the offer, the position under the U.L.F. and the common law would appear to be similar.

Article 2(2) U.L.F. provides that a term of the offer stipulating that silence on the part of the offeree shall amount to acceptance is invalid; and it would seem that this is one rule which cannot be excluded by the parties under paragraph 1 of that Article, for paragraph 1 refers to the exclusion of "the following Articles", i.e. not something contained in Article 2 itself. The rule prevents the imposition by the offeror of a contract on an unwilling offeree. Mere passive silence in answer to an offer does not as such amount to acceptance. This rule is in accordance with the common law. The wellknown case of *Felthouse* v. *Bindley*[49] indicates that mere passive silence cannot amount to acceptance; if an offeree does not wish to accept an offer it is clearly inequitable to put him to the trouble and expense of refusing it. On the other hand, silence may, in the particular circumstances of the case and taking into account the practices or course of dealing between the parties, amount to acceptance by conduct, as would have

44. See the discussion in Anson *Contracts* (22nd. Edn. 1964 ed. Guest) p. 60.
45. See e.g. Italian Civil Code Article 1327.
46. Article 526(2).
47. S.2–206(2). See Sutton "The Uniform Commercial Code and the Law of Contract" in (1967) 5 Syd.L.R. 398, 406–8.
48. *Abbott* v. *Lance* (1860) 2 Legge 1283 (N.S.W.); *Errington* v. *Errington* [1952] 1 K.B. 290. See too S.45 Restatement of Contracts (U.S.). In S.45 Restatement (Second) Contracts (1964) commencement of performance creates an option contract. The offeror's duty of performance is conditional on completion of performance by the offeree.
49. (1862) 11 C.B.N.S. 869; 142 E.R. 1037. The actual decision is difficult to support, as on the facts it appears that the offeree had accepted the offer by conduct.

been the position in *Boyd* v. *Holmes*[50] had the arrangement there agreed upon been observed.

The position is somewhat different in a number of civil law systems under which silence may, in certain circumstances, amount to acceptance. Thus under Article 509 of the Japanese Commercial Code, a trader who receives an offer from a person with whom he maintains regular business relations must dispatch his notice of rejection without delay or he will be deemed to have accepted the offer—provided it is one to enter into a contract that is within the scope of his business[51].

The acceptance of the offer must be an unqualified one. If it is conditional, or contains additions, limitations or other modifications, then, under Article 7(1) it is a rejection of the offer and constitutes a counter-offer. The one exception to the rule is set out in paragraph 2 whereby an acceptance containing additional or different terms which do not materially alter the terms of the offer, may still amount to an acceptance, unless the offeror promptly objects to the discrepancy.

This rule, that the acceptance must correspond exactly with the offer and that a qualified acceptance is deemed to be a refusal coupled with a counter-offer, is one which is widely recognised in both the common law and the civil law[52]. However, it is a rule which is not in accord with commercial practice. Frequently in the course of complicated negotiations it will be found that the two parties change position again and again, and in the confusion one or both of them may think a contract has been arrived at when, on analysis, the opposite is the case. Again, an offer to buy may be accepted by a seller incorporating in his letter of confirmation a reference to the general conditions of sale insisted on by his firm, thereby reducing the acceptance to the status of a counter-offer. The only instance in which, in the common law at any rate, his qualified acceptance may still constitute an acceptance will be if the additional terms are meaningless and can safely be disregarded, as was the position in *Nicolene Ltd.* v. *Simmonds*[53]. An extreme example of the sort of thing that may occur is provided by *Poel* v. *Brunswick-Balke-Collender Co.*[54] where, in response to the seller's offer, the buyer sent a printed order form containing the conspicuously printed statement that the acceptance of the order must be promptly acknowledged, and it was held that this qualified the acceptance and made it only a counter-offer.

The use of printed forms in the buying and selling of goods is wide-spread today, and in the typical situation there is no one document called a contract but an exchange of forms between the parties. The buyer sends the seller his printed purchase order on which are clearly shown a number of protective clauses most beneficial from the buyer's point of view. The seller responds either with a printed acknowledgement of order form which similarly contains protective terms most beneficial from the seller's point of view, or he stamps on a copy of

50. (1878) 4 V.L.R. (Eq.) 161. S.72 Restatement (Second) Contracts (1964) states that silence and inaction by an offeree operate as an acceptance only in the specific instances there set out. In other words, acceptance by silence is exceptional.
51. See too BGB S.151; Swiss Law of Obligations Article 6; Italian Civil Code Article 1327. Under French law, mere silence is not in general considered as an implied acceptance. Previous business relations may however give rise to such an imputation. See Houin "Sale of Goods in French Law" in (1964) 1. & C.L.Q. Supp.Pub. No. 9. 16, 22.
52. See *Stevenson* v. *McLean* (1880) 5 Q.B.D. 346; Anson *Contracts* (22nd. Edn. 1964 ed. Guest) pp. 51–2; BGB 22. 150(2) 154; Japanese Civil Code Article 528; Amos and Walton *Introduction to French Law* (2nd Edn. 1963) p. 156.
53. [1953] 1 Q.B. 543. See too *Fitzgerald* v. *Masters* (1956) 95 C.L.R. 420.
54. (1915) 216 N.Y. 310; 110 N.E. 619.

the purchase order the words "Accepted subject to our standard terms and conditions of sale" and attaches a copy of these to the purchase order, and forwards both documents to the buyer. The respective clauses are almost inevitably in conflict and the question is which set of terms governs the transaction. At common law there is no contract but simply an offer and counter-offer, although the parties may think that a contract has been made[55]. It was in an endeavour to curb this "battle of the forms" that a provision very similar to Article 7(2) was written into the U.C.C.[56].

S. 2–207 of the U.C.C. abrogates the common law requirement of the precise matching of offer and acceptance, the qualified acceptance operating as an acceptance, with the additional terms being regarded as proposals for addition to the contract. However, the section provides a special rule for dealings between merchants, subsection (2) stating in effect that the additional terms included in the acceptance become part of the contract unless (a) the offer expressly limits acceptance to the terms of the offer; or (b) they materially alter it; or (c) notification of objection to the additional terms has already been given or is given within a reasonable time after notice of them is received. Hence, under both S. 2–207(2) U.C.C. and Article 7(2) U.L.F., as between merchants, the additional or different terms contained in the acceptance become part of the contract (a) if they do not *materially* alter the terms of the offer; and (b) if the offeror does not object promptly to them. If the offeror does object within a reasonable time, then under Article 7(2) the purported acceptance amounts to a counter-offer, while under S. 2–207 the qualified acceptance constitutes a valid acceptance, with the added terms being regarded as proposals for addition to the contract.

It is obvious that the usefulness of Article 7(2) will depend to a large extent on what will be regarded as a material alteration to the terms of the offer. Experience in the U.S.A. would seem to indicate that the operation of the clause will be restricted to those cases where there is agreement on all major points and a contract is thought to exist, but in fact there are minor discrepancies between offer and acceptance[57].

One further point remains to be considered and that is whether the act of shipping non-conforming goods will amount to an acceptance of an offer to buy under Article 6(2) as is the case under the provisions of S. 2–206(1)(b) of the U.C.C. It is of course a situation where acceptance, if it is acceptance, does not correspond in exact terms with the offer, since the goods shipped do not conform to those specified in the offer. The attitude of the framers of the U.C.C. was that the offeree (the seller) should not be able to claim that his shipment of non-conforming goods amounted to a counter-offer which was accepted by the buyer's receipt of tender without objection[58]. Hence, S. 2–206 (1)(b) provided that such shipment is acceptance, unless the seller notifies the buyer that it is offered only as an accommodation. Further, the buyer can reject non-conforming goods on delivery[59] and can, as an offeree, even revoke

55. The subsequent conduct of the parties e.g. by the dispatch and receipt of the goods may bring a contract into existence.
56. See the discussion in Sutton "The Uniform Commercial Code and the Law of Contract" in (1967) 5 Syd.L.R. 398, 408–12.
57. See *Roto-Lith Ltd.* v. *Bartlett and Co. Inc.* (1962) 297 F.2d. 497 and *Application of Doughboy Industries Inc.* (1962) 233 N.Y. S.2d. 488 discussed by Sutton, *loc. cit.*, pp. 410–12. See too Comment 4 to S. 2–207 U.C.C.
58. Cf. Llewellyn "On our Case-law of Contracts: Offer and Acceptance 11" (1939) 48 Yale L.J. 779, 812.
59. S.2–601.

acceptance for non-conformity in certain circumstances[60], while if he decides to keep the goods, he can claim damages on notifying the seller of the breach[61]. The act of shipping non-conforming goods is thus at the same time an acceptance of the offer and also a breach of the contract thereby formed.

The position under the U.L.F. is not clear, but one writer has taken the view that if the offeror (the buyer) reasonably expects that the offeree intended to comply with the offer—either because the offeree believed that the goods were in conformity with the offer or considered the non-conformity as unessential—the buyer is entitled to regard a contract as having been concluded and to make use of the remedies available to him[62]. Unlike the U.C.C. however, the U.L.F. does not confer on the offeree any power to revoke his acceptance for non-conformity of the goods. Under Article 10, acceptance can only be revoked by a revocation communicated to the offeror before or at the same time as acceptance.

The question of revocation of acceptance raises the problem of the time when an acceptance of an offer becomes effective. One major difficulty which faced the framers of the U.L.F. was to reconcile the differences of opinion which existed on this point. The general rule of the common law is that acceptance does not become effective until it is communicated, but that in a particular situation the offeror may waive notification of acceptance. A further qualification of the general principle is provided by the "mail-box" rule under which acceptance is deemed to be communicated and the contract complete from the moment of posting the letter of acceptance, even though it never reaches its destination, provided that it was within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer[63]. This rule has been extended to telegrams[64] but not to the situation where the parties use a system of instantaneous communication, such as teleprinter[65] or telephone[66]. It follows logically from the "mail-box" rule that once the acceptance has been dispatched, it is too late to revoke the acceptance, even though notice of such revocation is received before the letter of acceptance[67].

There is no authority on what the position might be if a letter or telegram of acceptance were to be sent to the offeror after a letter of rejection had been dispatched to him. Obviously, if the acceptance arrives before the rejection, there would be a contract, as the letter of rejection would surely have no effect until receipt. In the converse situation it is submitted that there would be no contract. On principle, the "mail-box" rule should not be extended beyond its limits to meet the situation where an acceptance is posted before, but arrives

60. S. 2–608.
61. S. 2–607(3).
62. Schmidt, *loc. cit.*, pp. 18–19.
63. *Henthorn* v. *Fraser* [1892] 2 Ch. 27; *Household Fire etc. Insurance Co. Ltd.* v. *Grant* (1879) 4 Ex.D. 216. Cf. *Tallerman and Coy. Pty. Ltd.* v. *Nathan's Merchandise (Vic.) Pty. Ltd.* (1957) 98 C.L.R. 93, 111–12.
64. *Cowan* v. *O'Connor* (1880) 20 Q.B.D. 640.
65. *Entores Ltd.* v. *Miles Far East Corpn.* [1955] 2 Q.B. 327.
66. *Hampstead Meats Pty. Ltd.* v. *Emerson and Yates Pty. Ltd.* [1967] S.A.S.R. 109.
67. See *Wenkheim* v. *Arndt* (1873) 1 Jur. 73 (N.Z.); Anson, *op. cit.*, pp. 50–51; Cheshire and Fifoot *Contracts* (7th edn. 1969) pp. 44–45. The matter awaits authoritative determination. The two competing views are (1) that the offeree should not have the best of both worlds and be able to speculate at the offeror's expense, and (2) that it is the offeror who has chosen the post as the medium of negotiation and he must accept the risk of a letter being overtaken by a speedier communication.

after, the rejection is received by the offeror[68].

The U.L.F. does not deal with the effect of a rejection of the offer, but it is submitted that the position is as outlined above. An offer whose rejection has been communicated to the offeror is no longer capable of being accepted, but if an acceptance is communicated to the offeror before the arrival of the rejection, there is a valid contract[69].

The "mail-box" or dispatch rule adopted by the common law in relation to the time at which an acceptance takes effect, is one of expediency, and English law might equally well have adopted the time of receipt as the controlling factor. The time of receipt may mean the time when the acceptance is received at its destination, whether the offeror is actually informed or not; or it may mean the moment when the offeror is actually advised of the acceptance.

In India, under the Indian Contract Act 1872 and in those areas in Malaysia in which the Contracts (Malay States) Ordinance 1950 is in force, the common law rule has been modified to the extent that communication of acceptance is complete *as against the offeror* as soon as it is put in a course of transmission to him, but it is only complete *as against the offeree* when it comes to the knowledge of the offeror. Once the offeree has posted his letter of acceptance, the offeror cannot revoke his proposal, but posting the letter of acceptance does not conclude the contract so far as the offeree is concerned, and he is therefore entitled to revoke his acceptance by a speedier means of communication[70]. As will be seen, this appears to be substantially in accord with the position under the U.L.F.

In the civil law, the approach to the problem of determining the time of conclusion of the contract has varied among the different legal systems. Thus, Switzerland adopts the common law "dispatch" rule[71] as does Japan[72], Egypt, Morocco, and many South American States[73]. France appears to adopt an ambivalent point of view, at one time applying the reception theory (i.e. that the contract is concluded when notice of acceptance reaches the offeror regardless of his personal knowledge) and at another time regarding the moment of dispatch of the acceptance as the crucial point when the contract is established. The current view appears to be that the moment when a contract is concluded is a question of fact depending on the circumstances of the case and the intention of the parties[74]. On the other hand, Germany adopts the time of receipt of the notice of acceptance as the effective time, whether the offeror actually knows of it or not. It is enough if communication is made to the offeror's residence or to an employee who can reasonably be expected to take messages at his place

68. S.39 Restatement of Contracts provides that a letter or telegram of acceptance dispatched after sending a rejection of the offer, is effective only if received by the offeror before he receives the rejection.
69. This is the conclusion reached by Graveson, Cohn and Graveson *Uniform Laws on International Sales Act 1967* (1968) p. 115.
70. See *Asian Contract Law* (1969) pp. 38–39.
71. Article 10. Code of Obligations. But this may refer merely to the retroactive effect of the acceptance.
72. Article 526(1) Civil Code. But note Article 521(2) providing that where the period for acceptance is specified in the offer, notice of acceptance must be *received* within that period. See Corman *loc. cit.* p. 397.
73. See the list set out in Corman, *loc. cit.*, p. 400 n. 227. See too Winfield "Some Aspects of Offer and Acceptance" in (1939) 55 L.Q.R. 499, 507.
74. Houin "Sale of Goods in French Law" in (1964) 1. & C.L.Q. Supp. Pub. No. 9. 16, 22–23. The nature of the offer, previous dealings and trade practice are all factors to be taken into account.

of business[75]. A number of European States, such as Italy, Belgium and Austria, as well as some of the South American countries, apply the requirement that notice of acceptance is not effective until received by the offeror, or, in some cases, until it is brought to his knowledge[76].

From this brief outline of the position under the different legal systems it will be obvious that there is a marked divergence of opinion as to the moment when an acceptance becomes effective and a contract is established. In Article 8 the U.L.F. has endeavoured to achieve some sort of compromise solution but it can hardly be said that this will satisfy the protagonists of the competing views each of which has its advantages and its disadvantages.[77] Paragraph 1 of that Article provides that the acceptance of a written offer is to have effect only if it is communicated to the offeror (a) within the time fixed by him, or (b) if no time is fixed, within a reasonable time. In deciding what is a reasonable time, account must be taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror, and usage. In the case of an oral offer, acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

Several comments can be made on this provision. In the first place, it does not say *when* the acceptance is to take effect, but merely states that it will take effect provided that it has been communicated within the time specified. The U.L.F. has in fact failed to regulate expressly the time when and the place where the contract comes into existence, and its failure in this regard is to be deplored[78]. It would have been preferable for the framers of the Uniform Law to have stated clearly which theory—the dispatch rule or the reception principle—was to be adopted as establishing the time at which acceptance took effect. No doubt it can be implied from Article 8(1) that the acceptance of a written offer is to take effect from the moment of communication, i.e., from the time of delivery to the offeror and hence that the contract is formed at that moment, and this theory is reinforced by the provisions of Article 10 whereby an acceptance cannot be revoked unless the revocation is communicated to the offeror before or at the same time as the acceptance. However, it would have been better if the subsection had expressly stipulated that such was the case.

At this point, it becomes important to ascertain the precise meaning to be given to the expression "communicated to the offeror". Under Article 12, the words "to be communicated" mean "to be delivered at the address of the person to whom the communication is directed." It follows from this that what is communicated must be written, and presumably delivery must be made by or with the consent of the author of the message. Further, it would appear that

75. BGB S.130. Corman, *loc. cit.*, p. 397.
76. See the list set out by Corman, *loc. cit.*, p. 398 n. 214–215. The Spanish Civil Code Article 1262 adopts the "knowledge of the offeror" test but the Spanish Commercial Code Article 54 adopts the time of dispatch theory so far as commercial transactions are concerned, and this is followed in South American States. Corman, *loc. cit.*, p. 400 n. 227.
77. Under the "mail box" rule the offeror is bound even if the acceptance reaches him too late or never arrives at all, and a revocation of the acceptance is ineffective even though it arrives before the acceptance itself. Under the "reception" rule, the offeree will not know if and when the letter of acceptance has been delivered to the offeror and his acceptance can be ineffective if, through no fault of his own, it never reaches the offeror or arrives after revocation of the offer.
78. The 1958 draft Uniform Law on Formation specifically provided that the contract was concluded by the fact of the acceptance being communicated to the offeror but this was deleted as superfluous at the 1964 Hague Conference. See Schmidt, *loc. cit.*, pp. 28–32.

the communication need not be brought to the personal attention of the addressee—it is sufficient if it is delivered to a person at that address who has apparent authority to receive messages[79]. If delivery to the address of the offeror is communication of acceptance, and if the suggestion that the acceptance takes effect only on communication is correct, it would appear that the U.L.F. has adopted the reception theory as to the time of conclusion of the contract.

This principle, that the sender bears the risk of transmission, is similar to the "Zugangsprinzip" of German and Scandinavian law[80], but it is somewhat eroded in the U.L.F. by the provisions of Article 5 read in conjunction with Article 8. As has been seen Article 5 deals with the revocation of offers, and there is a close connection between revocation of an offer and the time when an acceptance takes effect. The interplay of Articles 5 and 8 of the U.L.F. would seem to result in the following principles being established in the Uniform Law.

An offer which states a fixed time for acceptance or is otherwise shown to be "firm", cannot be revoked once it has been communicated to the offeree. (Article 5(2)). A revocation of an offer, i.e., any offer apart from a "firm" offer, is effective only if communicated to the offeree before he has *dispatched* his acceptance or done any act of acceptance. (Article 5(4)). Hence, once a letter of acceptance is posted, it is too late for the offeror to revoke his offer (assuming it was revocable in the first place, i.e. it was not a "firm" offer). But an acceptance of an offer is effective only on communication within the time fixed or a reasonable time if no period is fixed. (Article 8(1)).

An offeror is bound by his "firm" offer. This must be accepted within the time stipulated, the period being presumed[81] to run from the date of the offer (Article 8(2)) and binds the offeree from the moment the acceptance is received, since he cannot revoke his acceptance from that time (Article 10). If no time for acceptance of the "firm" offer is specified, a reasonable time is substituted. (Article 8(1)).

The matter can be put in another way. An offeror can revoke an offer which is not "firm", but only up to the time when the offeree dispatches his acceptance (Article 5(4)), but the offeree is not bound, and can revoke his acceptance, up to the time when the acceptance is received by the offeror. (Article 8(1), Article 10).[82] The acceptance must be received within a reasonable time. (Article 8(1)). If it is not received within a reasonable time, the acceptance is of no effect, but apparently the offeror still cannot revoke his offer if the acceptance has been dispatched. However, Article 9 contains certain provisions

79. See Corman, *loc. cit.*, p. 397; Graveson, Cohn and Graveson, *op. cit.*, p. 120. The latter raise the query whether a message delivered outside normal business hours is to be regarded as communicated at the time of delivery or at the next normal office opening hour. And what is the position concerning delivery to a post-office box address or home address? Presumably both are an address within the meaning of Article 12. Cf. S.1-201(26) U.C.C. Of course, there is always the problem of proving delivery, unless a system of recorded delivery is used.

80. See e.g. BGB S.130 and Corman, *loc. cit.*, p. 397.

81. The presumption can be rebutted. Cf. *Caldwell* v. *Cline* (1930) 156 S.E. 55 (S. Ct. W.Va.) where the period was held to run from the date of receipt of the offer. Under the common law the true test would appear to be what should the offeree reasonably understand by the time stipulation in the light of all the circumstances.

82. Schmidt, *loc. cit.*, pp. 20–22 apparently takes the view that Article 8(1) applies only to "firm" offers, i.e., that acceptance must be communicated within the time there prescribed, and that in the case of "revocable" offers the parties are bound from the moment of dispatch in accordance with Article 5(4) and it matters not that the acceptance is delayed beyond the period prescribed in Article 8(1). The writer can only say that the language of Article 8 gives no warrant for such a restrictive view.

dealing with delayed acceptance by which it would appear that late acceptance entitles the offeror to regard the offer as having lapsed, no doubt through effluxion of time. Under Article 9(1) the offeror is given the option to treat the late acceptance as a valid acceptance by so advising the offeree, while under Article 9(2) a late acceptance is deemed valid if it would have arrived in time had its transmission been normal, provided always that the offeror has not promptly advised the offeree that he regards the offer as having lapsed. Clearly, the risk of delayed or lost acceptance is on the offeree.

If the views outlined above are correct, it follows that there is a period of time (in the case of revocable offers between dispatch and receipt of the acceptance) when the offeror is bound but not the offeree. The close analogy to the position under the Indian Contract Act 1872 and the Contracts (Malay States) Ordinance 1950 referred to earlier will be apparent.

It has been pointed out that the weakness of the provisions in the U.L.F. dealing with acceptance, is that they fail to reinforce the distinction made between "firm" and other offers, and the suggestion has been made that different rules should apply in each case, with all offers other than "firm" offers, being regarded as provisional. The acceptance by the offeree would then be treated as an order which was open for acceptance or rejection by the offeror, with the proviso that the onus would be on the offeror to communicate his revocation to the offeree within a specific period or else be bound. The contract would date from the receipt of the order by the offeror but would remain inchoate for a short period thereafter to enable the offeror to avoid the contract if he wished[83]. The suggestion is not so novel as might at first' appear. Legislation is in force in various States in Australia, for example, enabling an offeree who has accepted an offer to resile from the contract within a specified period should he so desire[84].

Some further comments must be made on the provisions of Article 9, already adverted to, concerning late acceptance. The effect of subsection (1) appears to be that, where the acceptance arrives after the prescribed or a reasonable time, the offeror has the option to take or reject the acceptance. It differs from the rule in German and Scandinavian law that such an acceptance constitutes a counter-offer, in that the delayed acceptance has still to be considered as an acceptance and the parties do not have to start all over again, with the roles of offeror and offeree reversed and the original offeror given further time for contemplation.[85] The effect of subsection (2) appears to be that where acceptance is delayed, the offeror has to examine the date when the letter was posted, calculate the length of time delivery should have taken, and if he thinks it would have arrived in time had transmission been normal, he must promptly advise the offeree that he regards the offer as having lapsed, otherwise he will be bound. The rule is substantially in accord with the German and Scandinavian law[86], but it seems that every businessman will in future be required to have an expert knowledge of the workings of the international postal system and that any error by him in his assessment of the position may well involve him in serious consequences[87]. On the other hand, the rule does allow the offeror to speculate

83. Aubrey "Formation of International Contracts, with Reference to Uniform Law on Formation" in (1965) 14 1. & C.L.Q. 1011, 1019–20.
84. See e.g. S.4 Door-to-Door Sales Act 1967 (NSW). Cf. S.12 Hire Purchase Act 1960 (NSW) and the General Conditions of Sale adopted by the E.C.E. referred to by Aubrey, *ibid.*
85. See Schmidt, *loc. cit.*, pp. 26–27.
86. BGB S.149; Uniform Scandinavian Contract Act Article 4(2).
87. Aubrey, *loc. cit.*, pp. 1020–21.

on fluctuations in the market between the time when the acceptance is dispatched and the time when the offeror must decide whether to regard it as an acceptance or not.

The answer may lie in the increased use of international telephonic communication to establish contracts. It should be borne in mind that the above rules as to acceptance do not apply to oral offers, which must be accepted immediately, unless the circumstances show that the offeree is to have time to consider the matter[88]. An offer made by cable or by teleprinter is however, not an oral offer[89]. Again, the above rules do not apply to an act of acceptance coming within Article 6(2) such as the dispatch of goods or payment of the price[90]. In such a case, the act of acceptance will have effect only if done within the period stipulated by Article 8(1), i.e. the time fixed or a reasonable time if no period fixed[91].

It cannot be said that the treatment by the U.L.F. of the time when an acceptance takes effect is altogether a happy one. It illustrates the point that the Uniform Law is a conglomerate of rules of diverse origins, and that the uncertainties, ambiguities and equivocations that are to be found within its thirteen Articles are the result of the need to compromise, to avoid "the traps of taking a position on the important questions which would have rendered the approval of the various interested countries quite problematical"[92]. The faults in the U.L.F. are the inevitable result of the necessity to achieve an acceptable compromise amongst divergent views.

The question might be asked whether there is any need to provide specifically for the precise time and place for formation of the contract. This is relevant only to the mutual rights and duties of the parties i.e., the buyer and seller in a contract for the international sale of goods. Provided it can be clearly established that a contract has been entered into, the U.L.I.S. will be the controlling factor so far as the relations between the parties are concerned, and in the U.L.I.S. the rights and duties of buyer and seller turn to a large extent on the concept of delivery, defined as an act by which goods conforming to the contract are handed over to the buyer[93]. Further, the U.L.I.S., like the U.L.F., contains detailed provisions as to the "proper law" governing the contract which do not depend on the place where the contract is made.

It is to the provisions of the U.L.I.S. in conjunction with which the U.L.F. is designed to operate that attention must now be drawn.

88. Article 8(1). A written offer, orally accepted, comes within Article 8(1) but not within Article 9(2) as in the latter case the late acceptance must be contained within a document. The distinction between offers made inter praesentes and those made inter absentes is well-known to the civil law. See e.g. Japanese Civil Code Article 507, 508(1). BGB Article 147.
89. Graveson, Cohn and Graveson, *op. cit.*, p. 117.
90. This accords with the common law. As pointed out earlier in this paper, the communication of acceptance is not required in the case of umilateral contracts.
91. Article 8(3).
92. Bernini "The Uniform Laws on International Sale" in (1969) 3 Jo. World Trade L. 671 - 682.
93. Article 19(1).

III.

Considerably more attention has been paid to the U.L.I.S. than has been accorded the U.L.F. despite the close connection between the two, and this is understandable in view of the importance of the Uniform Law in regulating the contract of sale after its formation and the complexities involved in and the problems raised by its numerous provisions. Problems which have arisen in relation to the Law include (a) the character of a contract for the international sale of goods and hence the scope of the U.L.I.S. (e.g. the position where one of the contracting parties carries on business in a ratifying State and the other carries on business in a State which has not ratified the conventions[1]); (b) the question of the choice of law in international sales and the continuing need for uniform rules on the *choice* of law in spite of the adoption of uniform rules on the substantive law relating to international sales—in other words, the relationship between the Hague Convention of 1955 spelling out uniform rules to determine the "proper law" of the contract[2] and the Hague Conventions of 1964[3]; (c) the difficulties involved in the recourse to "general principles on which the present Law is based" in instances not expressly settled by the Uniform Law[4], and the binding effect given to general usage[5]; and (d) the use of abstract and complex legal concepts in the drafting of the U.L.I.S., especially such terms as "ipso facto avoidance" "delivery" and "fundamental breach of contract".

Space does not permit a detailed consideration of the provisions of the U.L.I.S. nor, indeed, of even a limited discussion of the problems listed above. In this paper, reference can be made to only one or two salient features of the Uniform Law. It should be noted at the outset that the Law governs only the obligations *as between* buyer and seller deriving from a sale contract, and has no reference to the validity of the contract, questions of capacity, mistake, agency transfer of title and the rights of third parties etc.[6]. These latter aspects of contract will be governed by the "proper law" of the contract as ascertained by the relevant conflict of laws rules. Hence in any given case there may be two different sets of rules applicable to different aspects of the one transaction.

Secondly, the principle of freedom of contract applies, and the parties are allowed to exclude the application of the Uniform Law to their contract of

1. See Graveson, Cohn and Graveson, *op. cit.*, p. 14. Under Article 1(1) the U.L.I.S. applies where the parties are in different states, *not* it will be noted, different *contracting* states. Article III of the Convention permits the ratifying state to restrict the operation of the Law to parties in different contracting states. As has been seen, the United Kingdom has, for instance, so restricted the Uniform Law.
2. This Convention has been ratified by seven states—Begium, Denmark, Finland, France, Italy, Norway and Sweden. See Report of Uncitral (1st Session 1968) Suppl. No. 16 (A/7216) p. 19.
3. Note the reservation in favour of the 1955 Hague Convention allowed by Article IV of Convention on Sales. Apart from this, the question remains whether there is a contradiction between the 1955 Hague Convention and Article 2 of U.L.I.S. which excludes the rules of conflict of laws. See the discussion in Graveson, Cohn and Graveson *op. cit.*, p. 11 *et seq.* See too the Report of Working Group of Uncitral on International Sale of Goods (A/C.N.9/35) (27th January 1970), pp. 6–9.
4. Article 17 U.L.I.S.
5. Article 9 U.L.I.S.
6. Article 8. But although the U.L.I.S. does not deal with the effect of the contract on the transfer of property it deals with matters closely connected therewith, such as the duty of the seller to transfer ownership of the goods free from claims of third parties (Articles 18, 52, 53) and the transfer of risk (Articles 96–101).

sale either entirely or partially. Such exclusion may be either express or implied[7]. The purpose of this provision may be to prevent the disruption of international trade by the sudden introduction of new legal standards in this sphere, but the effect has been to relegate the U.L.I.S. to the level of a supplementary provision applicable only if the parties do not otherwise determine[8].

The U.L.I.S. also provides that the Uniform Law shall apply where it has been *chosen* as the law of the contract by the parties, whether or not they satisfy the requirements of Article 1: i.e. whether or not they carry on business or reside in different States, and whether or not such States have ratified the convention. There is one qualification, that the parties cannot affect the application of any mandatory provisions of law which would otherwise have been applicable to their contract[9]. Hence, the parties may either exclude the application of the U.L.I.S. where it would otherwise be applicable, the implication being that unless this is done the Uniform Law will apply[10]; or, conversely, they may expressly declare that the Law will govern the transaction where otherwise it would not be applicable. Thus, parties of non-ratifying States may agree with parties of ratifying States on the application of the U.L.I.S. to contracts made between them. It may not be too fanciful to envisage that in time, merchants in different countries will evolve standardised forms of contract incorporating by reference the provisions of the U.L.I.S., irrespective of the necessity of ratification by the countries concerned. On the other hand, it may be a more realistic assessment of the position to forecast the greatly increased use of standardised forms of contract at the international trade level, with the main legal issues governed by the standard terms, and with the provisions of the U.L.I.S. existing as supplementary terms to meet any contingencies unprovided for.

The main chapters of the U.L.I.S. deal with the obligations of the seller (covering such matters as delivery of the goods, the supply of non-conforming goods, the handing over of documents and the transfer of property free of the claims of third parties); the obligations of the buyer (including payment of the price, taking delivery and other obligations); certain provisions common to the obligations of both the seller and the buyer; and provisions as to the passing of the risk.[11] In addition, there are general provisions dealing with such matters as the binding effect of usage, the abrogation of any requirements as to form, and the settlement of questions within the purview of the U.L.I.S. (but which are not expressly met by the terms of the Uniform Law), by reference to the general principles on which the law is based. This last provision gives a wide and general power to fill gaps, and to avoid restrictive interpretations and an inflexibility of approach, which is unusual in the common law, although the general provisions of the American Uniform Commercial Code go some distance

7. Article 3.
8. Bernini "The Uniform Laws on International Sale" In (1969) 3 Jo.W.Tr.L 671, 686.
9. Article 4. This implements the right given in Article V of the Convention for a ratifying state to restrict the operation of the U.L.I.S. to the situation where the parties have chosen that law.
10. But under the United Kingdom reservation, the U.L.I.S. will only apply if the parties have expressly said that it will apply. In other words, silence will not mean that the U.L.I.S. is applicable by default as it were.
11. The basic rule as to the incidence of risk adopted by the Uniform Law is the same as that recognised by the U.C.C., viz. that delivery in accordance with the contract is the determining factor. See Articles 97–99 and U.C.C. SS. 2–509–510 and the discussion in Sutton "Reform of the Law of Sales" in (1969) 7 Alta L.R. 130, 174–75.

in this direction[12]. The danger is that the provision will give rise to ambiguity and uncertainty which will have a detrimental effect on the basic aim of the U.L.I.S. of uniformity of rule and of interpretation.

There remains to be considered the system of sanctions provided by the U.L.I.S. for breach of a contractual obligation. There are three main sanctions provided for under the Uniform Law—avoidance of the contract; specific performance; and the recovery of damages and/or reduction of the price. So far as avoidance is concerned, the Uniform Law does not employ the condition/warranty dichotomy of the common law but uses instead the concept of fundamental breach of contract, a basic notion which occurs over and over again in the text of the U.L.I.S. It is therefore of some importance to discover what is meant by this concept.

Fundamental breach is defined in Article 10 as existing "wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects". Remedies for the breach of some obligations are specifically set out in the Uniform Law, but apart from these instances, the general approach adopted is that in the case of a fundamental breach the innocent party can elect either to avoid the contract and claim damages, or treat the contract as still on foot and claim damages only. In the case of a non-fundamental breach, his remedy is limited to damages.[13]

This definition of fundamental breach is a somewhat complex one. An objective test is applied to the state of mind of the guilty party at the time he entered into the contract—the test of what should have been known to a reasonable person in the same situation as himself[14]. Hence, if a person of average intelligence in the particular situation of the party in breach and using due diligence would have had expert or specialist knowledge, this will be imputed to the guilty party. Secondly, an objective test is applied to the state of mind of the innocent party at the time he entered into the contract—would a reasonable person in the same situation as the innocent party, i.e., one possessing average intelligence and using the diligence generally expected of a person in that situation, have entered into the contract if he had foreseen (which ex hypothesi he did not) not only the breach, but also its *actual* effects (which might not be the normally expected effects of the breach). The test of a fundamental breach of contract comes down, therefore, to this. If a reasonable man in breach of contract would have known, at the time he entered into the contract, that the other party to the contract, as a reasonable man, would not have entered into the contract if he had foreseen at that time the future breach and its actual effects, the breach will be a fundamental one.

This seems to be an impossible feat of speculation and it may be doubted whether the definition is capable of any real application. It has been described as possessing little merit and as "perhaps the least successful of all the attempts on the part of the draftsmen to achieve a reasonable compromise from the proposals of the various legal systems"[15]. The point has been made that in times of a buyer's market any breach on the part of the seller will be fundamental, as in such a situation no reasonable buyer will purchase from a seller if he foresees

12. See e.g. SS. 1–102, 1–203, 1–205.
13. Articles 55, 70.
14. See Article 13.
15. Graveson, Cohn and Graveson, *op. cit.*, p. 55.

even the slightest breach, and every seller ought to be aware of this fact. The converse will be true in times of a seller's market. But if there has been a change between the time of conclusion of the contract and the breach (as is usually the case in sale of goods) so that the buyer's market becomes a seller's market or vice versa, the matter becomes highly complex.[16]

As has been pointed out,[17] a lively imagination is needed to suppose that the various ingredients in the definition in Article 10 will be useful in deciding cases, for the *realistic* considerations are very different, and include such factors as whether monetary compensation for any breach will fully compensate the wronged party; whether the amount of compensation is subject to dispute; and whether payment of such compensation is assured. It must be remembered that the parties in an international transaction are separated by time and space making it unprofitable and uneconomic, at least for the seller, to insist too strongly on his strict legal rights in any dispute. Again if the innocent party is assured of adequate compensation he will not normally seek to avoid the contract—always assuming that the change in the market has not been so catastrophic that it makes sound business sense for him to take advantage of the breach to end an unprofitable transaction.

It has been suggested[18] that the test of fundamental breach posed in Article 10 is sufficiently "airy" to permit consideration of all relevant factors and to enable a flexible approach to be made to the particular problem. In the light of the criticisms voiced above, it may be pertinent to ask whether the Courts, faced with the problem of deciding whether a breach is fundamental or not, should not by-pass the actual test of Article 10 and apply the simple formula proposed in the United Kingdom's Donaldson Report on the U.L.I.S. viz. that "a breach of contract shall be deemed to be fundamental wherever the performance of the contract is by reason of the breach rendered radically different from that for which the parties contracted"[19].

This test has a familiar ring to the common lawyer and is reminiscent of the language sometimes used to distinguish a breach of a condition (or vital term) from a breach of a warranty (or minor term) in English law. The distinction is based on the presumed intention of the parties, when they entered into the contract, as to the importance of the term that is broken, and the test of whether a particular stipulation goes to the root of the matter is whether failure to perform it renders the performance of the rest of the contract a thing different in substance from what was stipulated for[20]. The test suggested above is however, more objective in that it does not depend on any *a priori* classification by the parties themselves, but looks to the effect of the breach, an approach which commended itself to Diplock and Upjohn L.JJ. in *Hong Kong Fir Shipping Co. Ltd.* v. *Kawasaki Kishen Kaisha Ltd.*[21] Indeed, the U.L.I.S. itself, by its emphasis on the actual effect of the breach, appears to have given support to the views advanced by their Lordships in that case. If this test were to be adopted, it would

16. *Ibid.*, pp. 55–56. The authors' criticism of the whole concept of fundamental breach as defined in Article 10 repays careful study.
17. Honnold "The Uniform Law for International Sale of Goods: The Hague Convention of 1964" in (1965) 30 Law and Contemp. Problems 326, 344.
18. *Ibid.*
19. Graveson, Cohn & Graveson, *op. cit.*, pp. 56–57. Cf. Art. 74 (2) U.L.I.S.
20. See e.g. *Associated Newspapers Ltd.* v. *Bancks* (1951) 83 C.L.R. 322.
21. [1962] 2 Q.B. 26, 64, 66, 69–72. The close analogy to the currently accepted test of the common law as to when a contract is frustrated, will be apparent. See e.g. *The Eugenia* [1964] 2 Q.B. 226; *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 729.

probably amount to deciding whether it was reasonable in the circumstances to allow the innocent party, after the event and in the light of the effects of the breach, to cancel the contract.

Another issue where the principles of the common law appear to have been preferred to those of the civil law relates to the remedy of specific performance. The civil law systems, especially German law[22], are far more ready to countenance an action for specific performance in the case of a sale of goods than is the common law, and the theoretical gap between the common law and the civil law on this point can be measured by saying that under the former, specific performance is a subsidiary remedy which will only be invoked where an award of damages would be inadequate, while under the latter the reverse is the case. Damages will only be awarded where specific performance is impossible.

The draftsmen of the U.L.I.S. found themselves unable to resolve this conflict through any sort of compromise solution and recognised instead the impossibility of finding any basis for unification on this point. Specific performance is provided as one of the normal remedies available to the buyer[23], but it is then hedged about with limitations, the buyer being unable to invoke the remedy if, for instance, it is in conformity with usage and reasonably possible for him to purchase goods to replace those to which the contract relates[24]. It is further provided in effect that even where the remedy of specific performance is available under the Uniform Law, whether or not in fact such remedy will be granted is a matter left to the discretion of the Court in the State where the action is brought[25]. In other words, the U.L.I.S. has deferred to the domestic law of the individual States on this matter.

So far as the principles for the assessment of damages are concerned it is clear that they bear a close resemblance to the rules of the common law on this topic[26].

The foregoing comments on some aspects of the U.L.I.S., while far too brief to be, in any sense of the word, an evaluation of the Uniform Law, may serve to indicate the difficulties and complexities that must be faced in any consideration of its provisions. It has on the one hand a logicality of construction and a choice of language which, on the whole, makes it easier to understand than that other recent codification of the law of sales—Article 2 of the American Uniform Commercial Code. It can be easy to follow in its treatment of certain aspects of international sales, but on the other hand it can be baffling in the complexity of its handling of other aspects of the topic. This is partly due to fundamental differences in the concepts underlying the Uniform Law, differences which stem from its diverse origins in common law and civil law principles that defy amalgamation. Yet there is much to be found within the U.L.I.S. which is familiar to the common lawyer, and this may be due to the fact that the United Kingdom, as one of the great trading nations of the 19th century, paid special attention through its law merchant to the needs to trade and commerce.

22. Under Articles 241–42 BGB, the duty to perform specifically is considered to be the very essence of the contractual relationship and damages are only a secondary remedy. But in practice this primary duty is not always insisted upon. See Zweigert "Aspects of the German Law of Sale" I. & C.L. Suppl., Pub. No. 9 (1964) 1, 5.
23. Articles 24 (1) and 41(1).
24. Article 25. This accords with the common law.
25. Article VII(I) Convention on Sales; Article 16.
26. Articles 82–89.

The U.L.I.S. contains questionable decisions of policy, it is silent on many problems that arise in practice, it is extremely technical in its use of some terms that are crucial to its whole structure, and it is of European design. The big question, which so far remains unanswered, is whether it will be acceptable to the majority of States as it stands, or whether re-examination and re-drafting will be required. Only time will provide the answer to this, but with the refusal of both the U.S.A. and the U.S.S.R. to ratify it, the future of the U.L.I.S. seems in doubt. One thing however is clear, the U.L.I.S. as it stands, represents a great advance on the chaos existing at the moment in the field of international trade law.

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