

### 3. Commentary on the draft Convention on the International Sale of Goods (A/CN.9/116, annex II)\*

#### CONTENTS

<i>Chapter</i>		<i>Articles</i>
	PART I. SUBSTANTIVE PROVISIONS	
I.	SPHERE OF APPLICATION .....	1-7
II.	GENERAL PROVISIONS .....	8-13
III.	OBLIGATIONS OF THE SELLER .....	14-33
	Section I. Delivery of the goods and handing over of documents .....	15-18
	Section II. Conformity of the goods .....	19-25
	Section III. Remedies for breach of contract by the seller .....	26-33
IV.	OBLIGATIONS OF THE BUYER .....	34-46
	Section I. Payment of the price .....	35-40
	Section II. Taking delivery .....	41
	Section III. Remedies for breach of contract by the buyer .....	42-46
V.	PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER .....	47-63
	Section I. Anticipatory breach .....	47-49
	Section II. Exemptions .....	50
	Section III. Effects of avoidance .....	51-54
	Section IV. Damages .....	55-59
	Section V. Preservation of the goods .....	60-63
VI.	PASSING OF RISK .....	64-67

#### Part I. Substantive provisions

##### CHAPTER I. SPHERE OF APPLICATION

###### Article 1

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

(a) When the States are Contracting States; or

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

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

###### PRIOR UNIFORM LAW

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

\* 17 March 1976.

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

#### Commentary

1. This article states the general rules for determining whether this convention is applicable to a contract of sale of goods.

#### Basic criterion, paragraph (1)

2. Article 1 (1) states that the basic criterion for the application of this convention to a contract of sale of goods is that the places of business of the parties are in different States.<sup>1</sup>

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

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

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

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

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

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

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

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

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

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

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

8. A further application of this principle is that if two parties from different States have designated the law of a Contracting State as the law of the contract,

<sup>1</sup>If a party has places of business in more than one State, the relevant place of business is determined by article 6 (a).

this convention is applicable even though the parties have not specifically mentioned the convention.

#### Awareness of situation, paragraph (2)

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

#### Article 2\*

This Convention does not apply to sales:

(a) Of goods bought for personal, family or household use, unless the seller, at the time of the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;

(b) By auction;

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

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

(e) Of ships, vessels or aircraft;

(f) Of electricity.

#### PRIOR UNIFORM LAW

ULIS, article 5.

Prescription Convention, article 4.

#### Commentary

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

#### Exclusion of consumer sales, subparagraph (a)

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

3. The rationale for excluding consumer sales from the convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order

\* Norway expressed a reservation in respect of article 2 (e) and (f).

to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this convention. In addition, most consumer sales are domestic transactions and it was felt that the convention should not apply to the relatively few cases where consumer sales were international transactions, e.g., because the buyer was a tourist with his habitual residence in another country<sup>2</sup> or that the goods were ordered by mail.

4. Even if the goods were purchased for personal, family or household use, the convention applies if "the seller, at the time of the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use". The seller might have no reason to know that the goods were purchased for such use if the quantity of goods purchased, the address to which they were to be sent or other aspects of the transaction were those not normal in a consumer sale.

*Exclusion of sales by auction, subparagraph (b)*

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

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

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

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

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

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

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

9. This subparagraph excludes from the scope of the convention all sales of ships, vessels and aircraft. In some legal systems, there may be a question whether ships, vessels and aircraft are "goods". In most legal systems at least some ships, vessels and aircraft are subject to special registration requirements. The rules

specifying which ones must be registered differ widely. Since the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded in order to make uniform the application of this convention.

*Exclusion of sales of electricity, subparagraph (f)*

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

*Article 3*

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

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

*PRIOR UNIFORM LAW*

ULIS, article 6.

Prescription Convention, article 6.

*Commentary*

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

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

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

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether the seller's obligations relating to the sale of goods and those relating to the supply of labour or other services can be considered as two separate contracts (under what is sometimes called the doctrine of "severability" of contracts), will be resolved in accordance with the applicable national law.

*Supply of materials by the buyer, paragraph (2)*

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

5. However, the concluding phrase in this paragraph "unless the party who orders the goods undertakes

<sup>2</sup> See article 6 (b).

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

#### Article 4

This Convention also applies where it has been chosen as the law of the contract by the parties.

#### PRIOR UNIFORM LAW

ULIS, article 4.

#### Commentary

1. This article constitutes an invitation to business enterprises to make use of this convention, which has been drafted to meet the problems encountered in international trade, even though the convention would not automatically be applicable under the provisions of article 1. This article might be of particular interest to businesses in a contracting State which deal with firms from both non-contracting States (convention generally not applicable under article 1) and from Contracting States (convention applicable under article 1). By the use of an appropriate clause in their contracts, they will be able to assure themselves that the same law will apply to all of their international contracts of sale of goods. Similarly businesses in non-contracting States which do not have a modern law of sales applicable to international contracts of sale may wish to have this convention apply as the law of the contract. Moreover, it may be desired to have this convention apply to some domestic contracts of sale, especially if the contract in question is part of a series of contracts which includes an international sale of goods.

2. The courts of a Contracting State would be required to enforce such a choice of laws clause in a contract which came before them. It would be a matter of the public policy of the State concerned whether the courts of a non-contracting State would enforce such a clause.

3. The choice of this convention as the law of the contract would govern only the obligations of the seller and the buyer arising from the contract of sale. It would not affect any mandatory provisions of national law which would be applicable.<sup>3</sup>

#### Article 5

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

#### PRIOR UNIFORM LAW

ULIS, article 3.

#### Commentary

1. The non-mandatory character of the convention is explicitly stated in article 5. The parties may exclude

<sup>3</sup> See article 7.

its application entirely by choosing a law other than this convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the convention.

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

#### Article 6

For the purposes of this Convention:

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

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

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

#### PRIOR UNIFORM LAW

ULIS, articles 1 (2) and (3), 7.

Prescription Convention, article 2 (c), (d), (e).

#### Commentary

1. This article deals with the determination of the relevant "place of business" of a party and with the effect of the nationality of the parties or of the civil or commercial character of the parties or the contract on the application of this convention to a contract.

#### Place of business, subparagraph (a)

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

3. The first matter is to determine whether this convention applies to the contract. For this convention to apply the contract must have been entered into by parties whose places of business are in different States.<sup>4</sup> Moreover, in most cases those States must be Contracting States.<sup>5</sup> For the purpose of determining whether this convention applies, no problem arises where all the places of business of one party (X) are situated in Contracting States other than the Contracting State in which the other party (Y) has his place of business. Which ever one is designated as the relevant place of business of X, the places of business of X and Y will be in different Contracting States. The problem arises only when one of X's places of business is situated either in the same State as the place of business of Y or in a non-contracting State. In such a case it becomes crucial to determine which of X's different places of business is the relevant place of business within the meaning of article 1.

<sup>4</sup> Article 1 (1). See, however, article 4.

<sup>5</sup> Article 1 (1) (a).

4. The second matter in which it is important to know the relevant place of business is in regard to the seller's obligation under article 15 (c) to deliver the goods to the buyer "at the place where the seller had his place of business at the time of the conclusion of the contract". In this case it may be equally necessary to choose between two places of business within a given State as to choose between places of business in two different States.

5. Subparagraph (a) lays down the criterion for determining the relevant place of business: it is the place of business "which has the closest relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. In determining the place of business which has the "closest relationship", subparagraph (a) states that regard is to be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Factors that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by a head office located in another State, or the foreign origin or final destination of the goods. When these factors are not known to or contemplated by both parties at the time of the conclusion of the contract, they are not to be taken into consideration.

*Habitual residence, subparagraph (b)*

6. Subparagraph (b) deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 2 of this convention. The present provision provides that in this situation, reference is to be made to his habitual residence.

*Nationality of the parties, civil or commercial character of the transaction, subparagraph (c)*

7. Subparagraph (c) provides that neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the applicability of the convention.

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

9. In some legal systems the law relating to contracts of sale of goods is different depending on whether the parties or the contract are characterized as civil or commercial. In other legal systems this distinction is not known. In order to avoid differences in interpretation of the scope of application of the convention, this

subparagraph provides that the convention applies regardless of the civil or commercial character of the parties or contract.

*Article 7*

[(1) This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular, this Convention is not, except as otherwise expressly provided therein, concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

[(2) This Convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims which relate to industrial or intellectual property or the like.]\*

PRIOR UNIFORM LAW

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

*Commentary*

1. Article 7 limits the scope of the convention, unless elsewhere expressly provided in the convention, to governing the rights and obligations of the seller and the buyer arising from a contract of sale.

*Formation and validity, paragraph (1)*

2. The only article in this convention which deals with formation or validity is article 11, which provides that a contract of sale of goods need not be in writing and is not subject to any other requirements as to form. Article 11 was included because, although it relates to the formation of the contract and may be considered to relate to the validity of the contract, it also relates to the proof of the terms of the contract and was, therefore, considered important for this convention.

3. Among the provisions in the convention which article 7 makes clear do not confer validity is article 36, in respect of the determination of a price which is not fixed or determinable. If the law of a relevant State does not recognize the validity of a contract where the price is neither fixed nor determinable, article 36 does not confer validity.

*Passing of property, paragraph (1)*

4. Paragraph (1) makes it clear that the convention does not govern the passing of property in the goods sold. In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so since rules are provided in the convention for several questions linked, at least in certain legal systems, to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person not accepted by the buyer;<sup>6</sup> the obligation of the buyer to

\* The Working Group left this paragraph in square brackets to indicate that it was a matter which it considered should be decided by the Commission. See also the reservation of Norway to article 25.

<sup>6</sup> Article 25.

pay the price;<sup>7</sup> the passing of the risk of loss or damage to the goods;<sup>8</sup> the obligation to preserve the goods.<sup>9</sup>

## CHAPTER II. GENERAL PROVISIONS

### Article 8

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

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

#### PRIOR UNIFORM LAW

ULIS, article 9.

#### Commentary

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

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

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

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

5. Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy.<sup>10</sup> Therefore, the provision in ULIS article 9, paragraph 2, that in the event of conflict between an applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, a provision regarded to be in conflict with the constitutional principles of some States and against public policy in others, has been eliminated as unnecessary.

6. This article does not provide any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade

and for which the parties have given no interpretation. In some cases such an expression, provision or form of contract may be considered to be a usage or practice between the parties, in which case this article would be applied.

### Article 9

A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result.

#### PRIOR UNIFORM LAW

ULIS, article 10.

#### Commentary

1. Article 9 defines "fundamental breach".

2. The definition of fundamental breach is important because various remedies of buyer and seller,<sup>11</sup> as well as some aspects of the passing of the risk,<sup>12</sup> rest upon it.

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

4. In addition to this basic criterion which looks to the harm to the injured party, a breach is fundamental only if "the party in breach foresaw or had reason to foresee such a result", i.e., the result which did occur. It should be noted that it is not necessary that the party in breach did in fact foresee the result.

### Article 10

(1) Notices provided for by this Convention must be made by the means appropriate in the circumstances.

(2) A declaration of avoidance of the contract is effective only if notice is given to the other party.

(3) If a notice of avoidance or any notice required by article 23 is sent by appropriate means within the required time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice.

#### PRIOR UNIFORM LAW

ULIS, articles 14 and 39, paragraph 3.

#### Commentary

1. Article 10 provides the rules in respect of notices required by this Convention.

*Obligation to use appropriate means, paragraph (1)*

2. Paragraph (1) makes it clear that a party who is required by the convention to send a notice must use the means appropriate in the circumstances. There may be more than one means of communication which is appropriate in the circumstances. In such a case the

<sup>7</sup> Article 39.

<sup>8</sup> Articles 64-67.

<sup>9</sup> Articles 60-63.

<sup>10</sup> Article 5.

<sup>11</sup> See articles 27 (2), 29 (1), 30 (1) (a), 32 (2), 45 (1) (a), 48 (1) and 49.

<sup>12</sup> See article 67.

sender may use the one which is the most convenient for him.

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

*Notice of avoidance, paragraph (2)*

4. Paragraph (2) provides that any declaration of avoidance of a contract under this convention<sup>13</sup> is effective only if notice is given to the other party.

*Risk in transmission, paragraph (3)*

5. Paragraph (3) states that if a party has sent a notice of avoidance of the contract or a notice that the goods do not conform to the contract as required by article 23 by an appropriate means within the required time, "the fact that the notice fails to arrive or fails to arrive within [the required] time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice". Therefore, the risk of the loss or delay in or the defective transmission of the notice falls on the addressee.

6. Paragraph (3) does not apply to the other notices required by this convention<sup>14</sup> and no rule on the risk of transmission is given as to those notices. It should be noted, however, that paragraph (1) requires all notices to be made by the means appropriate in the circumstances.

[*Article 11\**

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

PRIOR UNIFORM LAW

ULIS, article 15.

Uniform Law on the Formation of Contracts, article 3.

*Commentary*

1. Article 11 provides that a contract of sale need not be evidenced by writing and is not subject to any other requirements as to form.

2. Even though article 11 could be considered to relate to a matter of formation or validity,<sup>15</sup> the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract led to

\* The Working Group left this article in square brackets to indicate that it was a matter which it considered should be decided by the Commission. The USSR reserved its position in respect of this article.

<sup>13</sup> Articles 30, 45, 47, 48 and 49 provide for a declaration of avoidance of a contract under appropriate circumstances.

<sup>14</sup> Articles 16 (1), 29 (3), 46 (2), 47 (3) notice of suspension only, 50 (4), 63 (1), 63 (2).

<sup>15</sup> The terms of this article are to be found in almost identical words in article 3 of the Uniform Law on the Formation of Contracts for the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

the decision to include it in the present convention. Nevertheless, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract even though the contract itself would be enforceable between the parties.

*Article 12*

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

PRIOR UNIFORM LAW

Convention on the International Sale of Goods, The Hague, 1 July 1964, article VII.

ULIS, article 16.

*Commentary*

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

2. If the seller does not perform one of his obligations under the contract of sale or the convention, article 27 provides that "the buyer may require performance by the seller". Similarly, article 43 authorizes the seller to "require the buyer to pay the price, take delivery or perform any of his other obligations".

3. The question arises whether the injured party can obtain the aid of a court to enforce the obligation of the party in default to perform the contract. In some legal systems the courts are authorized to order specific performance of an obligation. In other legal systems courts are not authorized to order certain forms of specific performance and those States could not be expected to alter fundamental principles of their judicial procedure in order to bring this convention into force. Therefore, article 12 provides that a court is not bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this convention, e.g., domestic contracts of sale. Therefore, if a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, article 12 does not limit the application of articles 27 or 43. Article 12 limits their application only if a court could not under any circumstances order such a form of specific performance.

4. It should be noted that articles 27 and 43, where not limited by this article, have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party.

*Article 13*

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

## PRIOR UNIFORM LAW

ULIS, article 17.

Prescription Convention, article 7.

*Commentary*

National rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, article 13 emphasizes the importance, in the interpretation and application of the provisions of the convention, of having due regard for the international character of the convention and for the need to promote uniformity.

## CHAPTER III. OBLIGATIONS OF THE SELLER

*Article 14*

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

## PRIOR UNIFORM LAW

ULIS, article 18.

*Commentary*

Article 14 states the principal obligations of the seller and introduces chapter III of the convention. The principal obligations of the seller are to deliver the goods, to hand over any documents relating thereto and to transfer the property in the goods. The seller must carry out his obligations "as required by the contract and this Convention". Since article 5 of this convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and this convention, the seller must fulfil his obligations as required by the contract.

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

*Article 15*

If the seller is not required to deliver the goods at a particular place, delivery is made:

(a) If the contract of sale involves carriage of the goods, by handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding paragraph, the contract relates to

(i) Specific goods, or

(ii) Unidentified goods to be drawn from a specific stock or to be manufactured or produced,

and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, by placing the goods at the buyer's disposal at that place;

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

## PRIOR UNIFORM LAW

ULIS, articles 19, paragraph 2, and 23, paragraphs 1 and 2.

*Commentary*

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

2. Article 15 states how and where the seller's obligation to deliver is fulfilled. Article 17 states when the seller is obligated to deliver.

*"The goods" which must be delivered*

3. In order for the seller to deliver "the goods", in the case of specific goods, he must deliver the exact goods called for in the contract. In the case of unidentified goods, he must deliver goods which generally conform to the description of the type of goods called for by the contract. Therefore, if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes. However, the seller has delivered "the goods" if he does the appropriate act called for by subparagraphs (a) to (c) in respect of the specific goods described in the contract or, in the case of unidentified goods, of goods which conform to the generic description in the contract even though they are non-conforming or are not delivered at the time required or by the means of transportation specified. Therefore, the handing over to the carrier of No. 3 grade corn when No. 2 grade was called for or the handing over to the carrier of five tons when 10 tons were called for would constitute delivery of "the goods". Even though "the goods" had been "delivered", the buyer would be able to exercise any rights which he might have because of the seller's failure to "deliver the goods . . . as required by the contract and this Convention".<sup>16</sup> Among the buyer's rights would be the right to avoid the contract where the failure of the seller amounted to a fundamental breach.<sup>17</sup> Nevertheless, the seller would have "delivered the goods".

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

4. Where the contract of sale involves the carriage of goods, delivery of the goods is effected by handing them over to the first carrier for transmission to the buyer.

5. The contract of sale involves the carriage of goods if the seller is required or authorized to send the goods to the buyer. Both shipment contracts (e.g. CIF, FOB, FOR) and destination contracts (e.g. Ex Ship, Delivered at . . .) are contracts of sale which involve carriage of the goods. However, in order to make it clear that, *inter alia*, in a destination contract, delivery is not made by handing the goods over to the

<sup>16</sup> Article 14. Buyer's remedies for seller's breach are set forth in article 26.

<sup>17</sup> Article 30 (a). For the effect of a fundamental breach by seller on the passing of the risk of loss, see article 67.

first carrier, the opening clause of article 15 provides that the specific rules in article 15 (a) to (c) do not apply "if the seller is . . . required to deliver the goods at a particular place".

6. If the goods are to be transported by two or more carriers, delivery of the goods is made by handing them over "to the first carrier for transmission to the buyer". Therefore, if the goods are shipped from an inland point by rail or truck to a port where they are to be loaded aboard a ship, delivery is effected when the goods are handed over to the railroad or trucking firm.

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

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

8. If, at the time of the conclusion of the contract, the parties knew that the goods were at or were to be manufactured or produced at a particular place and the contract does not require or authorize the shipment of the goods, delivery of the goods is effected by placing the goods at the buyer's disposal at the place at which the goods were or were to be manufactured or produced.

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

10. If the goods are already in transit at the time of the conclusion of the contract, the contract of sale is not one which "involves" the carriage of goods under subparagraph (a) of this article but is one which involves goods which are at a particular place and which are therefore subject to this subparagraph. This is true whether the sale is of an entire shipment under a given bill of lading, in which case the goods are specified goods, or whether the sale is of only a part of the goods covered by a given bill of lading. Otherwise, if the contract of sale of goods already in transit were held to "involve the carriage of goods", thereby making it subject to article 15 (a), the seller would never "deliver the goods" because the goods would not be handed over to the carrier "for transmission to the buyer". However, by virtue of article 65 (2) the risk of loss would pass to the buyer at the time the goods were handed over to the first carrier, even though the handing over took place prior to the conclusion of the contract of sale.

11. Both parties must know of the location of the specific goods, of the location of the specific stock from

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

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

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

*In other cases, subparagraph (c)*

14. In other cases, not covered by subparagraphs (a) and (b), delivery is effected by placing the goods at the buyer's disposal where the seller carried on business at the time of the conclusion of the contract. If the seller had more than one place of business, the place at which delivery is to be made is governed by article 6 (a).

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

*Effect of reservation of title*

16. Delivery is effected under this article and risk of loss passes under article 65 or 66 even though the seller reserves title to the goods or otherwise reserves an interest in the goods if such reservation of title or other interest is for the purpose, *inter alia*, of securing the payment of the price.

#### Article 16

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

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

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

#### PRIOR UNIFORM LAW

ULIS, articles 19, paragraph 3, 54, paragraphs 1 and 2.

#### Commentary

1. Article 16 describes several additional obligations of the seller where the contract of sale involves the carriage of goods.

##### *Identification of the goods, paragraph (1)*

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

3. Failure to identify the goods would not affect either their "delivery" under article 15 (a) or the passage of the risk under article 65 (1)<sup>18</sup> so long as it can be shown that the goods were "handed over to the carrier for transmission to the buyer".<sup>19</sup> However, the fact that the goods have not been identified leaves the seller in a position to determine which buyer would suffer the loss where the loss has occurred to only a part of the goods. Moreover, if the goods are not identified, the buyer may not be able to procure the necessary insurance.<sup>20</sup>

4. In order to overcome these difficulties paragraph (1) requires the seller to send the buyer a notice of the consignment which specifies the goods if the goods are not otherwise identified to the contract. If the seller fails to do so, the buyer has available all the usual remedies including the right to require the other party to give notice of the consignment, the right to damages, and potentially the right to avoid the contract.<sup>21</sup>

<sup>18</sup> Article 66 (2) provides that "if the contract relates to the sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer [and therefore the risk does not pass] until they have been clearly identified to the contract". However, article 66 (2) applies only to contracts in which the contract of sale does not involve carriage of the goods.

<sup>19</sup> If the contract is for a portion of a shipment of goods in bulk, the goods have not been handed over to the carrier for transmission to the buyer and, therefore, the risk does not pass on shipment but only after arrival. See para. 5 of the commentary on article 65.

<sup>20</sup> Compare article 16 (3) and paragraphs 6 and 7 of this commentary.

<sup>21</sup> If the failure by the seller to fulfil his obligation to send notice of the consignment constitutes a fundamental breach of the contract, the buyer could avoid the contract, thereby effectively nullifying the passage of the risk. See articles 30 (1) (a) and 67.

#### *Contract of carriage, paragraph (2)*

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

#### *Insurance, paragraph (2)*

6. Either the seller or the buyer may be obligated under the contract of sale to procure insurance for loss of the goods during their carriage. This obligation will normally be determined by the trade term used in the contract of sale and is not governed by the passage of the risk of loss. For example, if the price is quoted CIF, the seller must procure the insurance even though the risk of loss passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.<sup>22</sup> If the price is quoted C & F or FOB, in the absence of other indications in the contract, it is the buyer's responsibility to procure any necessary insurance.<sup>23</sup>

7. Paragraph (2) provides that if the seller is not required by the contract to procure the insurance, he must provide the buyer with all available information necessary to enable him to effect such insurance. This is not a general obligation on the seller as he only has to provide such information if the buyer requests it of him. However, in some trades the seller may be required to give such information even without request on the buyer's part by virtue of a usage which becomes part of the contract pursuant to article 8 of the present convention.

#### *Article 17\**

The seller must deliver the goods:

- (a) If a date is fixed or determinable by agreement or usage, on that date; or
- (b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) In any other case, within a reasonable time after the conclusion of the contract.

#### PRIOR UNIFORM LAW

ULIS, articles 20, 21 and 22.

#### Commentary

1. Article 17 deals with the time at which the seller must fulfil his contractual obligation to deliver the goods.

2. Since the seller's obligation is to deliver at a certain time, he must hand over the goods to the car-

\* Czechoslovakia reserved its position in relation to the inclusion of "usage" in article 17 (a) and 17 (b).

<sup>22</sup> Article 65 (1).

<sup>23</sup> See, for example, Incoterms 1953.

rier, place the goods at the buyer's disposal at the appropriate place as required by article 15 or do such other act as may constitute delivery under the terms of the contract at or by the time specified. Article 17 does not require that the buyer have taken physical possession on the date on which delivery was due or even have been in a position to take physical possession if, for example, delivery was made by handing over the goods to a carrier.

*Delivery on fixed or determinable date, subparagraph (a)*

3. If the date for delivery is fixed or determinable by reference either to an agreement between the parties or to a usage which is applicable to their contract pursuant to article 8, the seller must deliver on that date.

*Delivery during a period, subparagraph (b)*

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

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

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

7. It should be noted that where the buyer is to choose the delivery date, the seller will need notice of that date in time to prepare the goods for shipment and to make any contracts of carriage he may be required to make under the contract of sale. If the buyer does not give such notice in adequate time, the seller would not be liable for his own non-performance to the extent he could prove that it was due to the buyer's fault and not his own.<sup>24</sup>

*Delivery in all other cases, subparagraph (c)*

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

<sup>24</sup> See article 50 (1).

### Article 18

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

PRIOR UNIFORM LAW

ULIS, article 50.

*Commentary*

1. Article 18 deals with the second obligation of the seller described in article 14, i.e., to hand over to the buyer any documents relating to the goods. The location of this article with the articles dealing with the delivery of the goods emphasizes the close relationship between the handing over of documents and the delivery of the goods.

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

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

4. Article 18 does not limit the right of the seller to withhold the documents until paid by the buyer when the contract calls for payment against documents.<sup>25</sup>

## SECTION II. CONFORMITY OF THE GOODS

### Article 19

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

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

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

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

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

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion

<sup>25</sup> Article 39.

of the contract the buyer knew or could not have been unaware of such non-conformity.

PRIOR UNIFORM LAW

ULIS, articles 33 and 36.

*Commentary*

1. Article 19 states the extent of the seller's obligation to deliver goods which conform to the contract.

2. This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under the present convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality.<sup>26</sup> It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods.<sup>27</sup>

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

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

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

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

poses for which these goods are intended so that he can refuse the order if necessary.

5. The seller is not obligated to deliver goods which are fit for some special purpose which is not a purpose "for which goods of the same description are ordinarily used" unless the buyer has "expressly or impliedly made known to the seller at the time of the time of the conclusion of the contract" such intended use.<sup>28</sup> This problem may arise if the buyer intends to use the goods for a purpose for which goods of this kind are sometimes, but not ordinarily used. In the absence of some indication from the buyer that such a particular purpose is intended, the seller would have no reason to attempt to supply goods appropriate for such purpose.

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

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

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

8. The seller is not liable for failing to deliver goods fit for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement". The circumstances may show, for example, that the buyer ordered the goods by brand name or by highly technical specifications. In such a situation it may be held that the buyer had not relied on the seller's skill and judgement in making the purchase.

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

*Sample or model, subparagraph (1) (c)*

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

*Packaging, subparagraph (1) (d)*

11. Subparagraph (1) (d) makes it one of the seller's obligations in respect of the conformity of the goods that they "are contained or packaged in the manner usual for such goods". This provision which sets forth

<sup>26</sup> The necessity that the seller hand over or place at the buyer's disposal goods which meet the contract description in order to have "delivered the goods" is discussed in paragraph 3 of the commentary on article 15.

<sup>27</sup> Article 26 (1).

<sup>28</sup> Subpara. 1 (b).

a minimum standard, is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging.

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

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

13. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate.<sup>29</sup>

*Article 20*

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

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

PRIOR UNIFORM LAW

ULIS, article 35.

*Commentary*

1. Article 20 deals with the time at which is to be judged the conformity of the goods to the requirements of the contract and the present convention.

*Basic rule, paragraph (1)*

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

3. Although the conformity of the goods is measured at the time the risk passes, the buyer may not

know of a non-conformity until much later. This may occur because the non-conformity becomes evident only after the goods have been used. It may also occur because the contract involves the carriage of goods. In such a case the risk passes when the goods are handed over to the first carrier for transmission to the buyer.<sup>30</sup> The buyer, however, will normally not be able to examine the goods until after they have been handed over to him by the carrier at the point of destination, some time after the risk has passed. In either case if the non-conformity existed at the time the risk passed, the seller is liable.

*Example 20A:* A contract called for the sale of "No. 1 quality corn, FOB seller's city". Seller shipped No. 1 corn, but during transit the corn was damaged by water and on arrival the quality was No. 3 rather than No. 1. Buyer has no claim against the Seller for non-conformity of the goods since the goods did conform to the contract when risk of loss passed to the Buyer.

*Example 20B:* If the corn in example 20A had been No. 3 quality when shipped, the Seller would have been liable even though the Buyer did not know of the non-conformity until the corn arrived at the Buyer's port or place of business.

*Damage subsequent to passage of risk, paragraph (2)*

4. Paragraph (2) provides that even after the passage of the risk the seller remains liable for any damage which occurs as a breach of one of his obligations. Although this is most evidently true when the damage occurs because of some positive act on the part of the seller, it is also true when the obligation which has been breached is an express guarantee given by the seller that the goods will retain some particular characteristics for a specified period after the risk of loss has passed. Since article 20 (1) states that conformity of the goods is to be judged at the time risk passes, it was considered necessary to state specifically that the seller was liable for any breach of an express guarantee of quality.

5. It should be noted that article 20 (2) states that the seller is liable "for any lack of conformity" which occurs after the risk has passed rather than "for the consequences of any lack of conformity", which appeared in ULIS article 35, paragraph 2. This makes it clear that the defect or flaw in the goods does not have to have existed at the time the risk passed if the lack of conformity in question is due to a breach of any of the obligations of the seller.

*Article 21*

If the seller has delivered goods before the date for delivery, up to that date he may, deliver any missing part or quantity of the goods or deliver other conforming goods or cure any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided in article 55.

<sup>29</sup> Article 26 (1).

<sup>30</sup> Article 65 (1).

## PRIOR UNIFORM LAW

## ULIS, article 37.

*Commentary*

1. Article 21 deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but the goods delivered do not conform with the contract.<sup>31</sup> It would be possible to say that the decision whether the goods conform to the requirements of the contract shall be made once and for all at the time delivery has been made. However, article 21 provides that the seller may remedy the non-conformity by delivering any missing part or quantity of the goods, by delivering replacement goods which are in conformity with the contract, or by curing any non-conformity in the goods.<sup>32</sup>

2. The seller has the right to cure the non-conformity of the goods under article 21 only until the "date for delivery". After the date for delivery his right to cure is based on article 29. In those international sales which involve carriage of the goods, delivery is effected by handing over the goods to the first carrier.<sup>33</sup> Therefore, in those contracts the date until which the seller may cure any non-conformity of the quantity or quality of the goods under article 21 is the date by which he was required by the contract to hand over the goods to the carrier.

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

*Example 21A:* The contract required the Seller to deliver 100 machine tools by 1 June. He shipped 75 by an appropriate carrier on 1 May which arrived on 15 June. He also shipped an additional 25 machine tools on 30 May which arrived on 15 July. Seller cured the non-conformity by handing over the remaining 25 machine tools to the carrier before the contract date for delivery, 1 June.

*Example 21B:* If the contract in example 21A did not authorize Seller to deliver by two separate shipments, the Seller could cure the original non-conformity as to quantity only if receiving the missing 25 machine tools in a later second shipment did not cause Buyer "unreasonable inconvenience or unreasonable expense".<sup>34</sup>

*Example 21C:* On arrival of the machine tools described in example 21A at the Buyer's place of business on 15 June and 15 July, the tools were found to be defective. It was too late for Seller to cure under article 21 because the date for delivery (1 June) had passed. However, the Seller may have a right to cure under article 29.

<sup>31</sup> The buyer is not required to take delivery of the goods prior to the delivery date: article 33 (1).

<sup>32</sup> In order for the seller to be made aware of any non-conformity so that he can effectively exercise his right to cure, the buyer is required by article 22 to examine the goods within as short a period as is reasonable in the circumstances and by article 23 to give the seller notice of the non-conformity.

<sup>33</sup> Article 15 (a).

<sup>34</sup> For a discussion of the result if the sale was a CIF or other documentary sale see paras. 4 and 5 of the commentary on article 29.

*Example 21D:* The machine tools described in example 21A were handed over to the Buyer by the carrier prior to 1 June, the contractual delivery date. When examined by the Buyer the tools were found to be defective. Although the Seller had the ability to repair the tools prior to the delivery date, he would have had to do the work at the Buyer's place of business. If the Seller's efforts to cure under such circumstances would cause "unreasonable inconvenience or unreasonable expense" to Buyer, the Seller had no right to cure.

*Article 22*

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

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

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

## PRIOR UNIFORM LAW

## ULIS, article 38.

*Commentary*

1. Article 22 describes the point of time when the buyer is obligated to examine the goods. This article is prefatory to article 23, which provides that if the buyer fails to notify the seller of lack of conformity of the goods within a reasonable time after he has discovered it or ought to have discovered it, he loses the right to rely on the lack of conformity. The time when the buyer is obligated to examine the goods under article 22 constitutes the time when the buyer "ought to have discovered" the lack of conformity under article 23, unless the non-conformity is one which could not have been discovered by such examination.

2. The examination which this article requires the buyer to make is one which is reasonable in the circumstances. The buyer is normally not required to make an examination which would reveal every possible defect. That which is reasonable in the circumstances will be determined by the individual contract and by usage in the trade and will depend on such factors as the type of goods and the nature of the parties. Because of the international nature of the transaction, the determination of the type and scope of examination required should be made in the light of international usages.

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

4. Paragraph (2) provides that if the contract of sale involves the carriage of goods "examination may be deferred until after the goods have arrived at the place of destination". This rule is necessary because, even though delivery is effected and risk of loss passes when the goods are handed over to the first carrier for

transmission to the buyer,<sup>85</sup> the buyer is normally not in a physical position to examine the goods until they arrive at the destination.

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

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

#### Article 23\*

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

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

#### PRIOR UNIFORM LAW

ULIS, article 39.

Prescription Convention, articles 8 and 10, paragraph 2.

#### Commentary

1. Article 23 states the consequences of the buyer's failure to give notice of non-conformity of the goods to the seller within a reasonable time.

#### Obligation to give notice, paragraph (1)

2. Under paragraph (1) the buyer loses his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a specified time. If notice is not given within that time, the buyer cannot claim damages under article 26 (1), require the seller to cure the lack of conformity under arti-

cle 27, avoid the contract under article 30 or declare a reduction of the price under article 31.<sup>86</sup>

3. The buyer must send the notice to the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If the lack of conformity could have been revealed by the examination of the goods under article 22 the buyer ought to have discovered the lack of conformity at the time he examined them or ought to have examined them. If the lack of conformity could not have been revealed by the examination, the buyer must give notice within a reasonable time after he discovered the non-conformity in fact or ought to have discovered it in the light of the ensuing events.

*Example 23A:* The non-conformity in the goods was not such that the Buyer ought to have discovered it in the examination required by article 22. However, the non-conformity was such that it ought to have been discovered once the Buyer began to use the goods. In this case the Buyer must give notice of the non-conformity within a reasonable time after he "ought to have discovered" it by use.

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

#### Termination of the right to give notice, paragraph (2)

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

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

<sup>85</sup> Articles 15 (a) and 65 (1).

\* The Federal Republic of Germany, Hungary and the Union of Soviet Socialist Republics reserved their positions in respect to paragraph (1) of article 23.

<sup>86</sup> For a discussion of failure to give notice in relation to the passing of risk, see paragraph 3 of the commentary on article 67 and example 67B.

7. The overriding principle of the autonomy of the will of the parties recognized by article 5 would allow the parties to derogate from the general obligation to give the notice required by paragraph (2). However, in the absence of a special provision, it would not be clear whether the obligation to give notice within two years was affected by an express guarantee that the goods would retain specified qualities or characteristics for a specified period.<sup>37</sup> Accordingly paragraph (2) provides that this obligation to give notice within two years will not apply if "such time-limit is inconsistent with a contractual period of guarantee". Whether it is, or is not, inconsistent is a matter of interpretation of the guarantee.

*Example 23B:* The contract for the sale of machine tools provides that the machine tools will produce a minimum of 100 units per day for at least three years. Because of the three-year guarantee, this clause is inconsistent with the two-year time-limit in paragraph (1). It would be a matter of interpretation of the guarantee clause whether the notice of failure to produce 100 units per day had to be given within three years or whether Buyer had an additional period after the three years to notify Seller that within the three-year period there was a breach of the guarantee.

*Example 23C:* The contract provides that the machine tools will produce a minimum of 100 units per day for one year. It would be unlikely that this contract calling for a specified performance for one year would be interpreted to affect the two-year time-limit in article 23 (2) within which notice must be given.

*Example 23D:* The contract provides that notice of a failure to produce at least 100 units per day must be given within 90 days of the date of delivery. Such an express clause would be inconsistent with the two-year time-limit in paragraph (2).

#### *Risk in transmission*

8. Article 10 (3) states that if any notice required by article 23 is "sent by appropriate means within the required time, the fact that the notice fails to arrive within [the required] time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice". Therefore, the risk of the loss, delay or inaccurate transmission of the notice required by article 23 falls on the seller.

#### *Article 24*

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### PRIOR UNIFORM LAW

ULIS, article 40.

#### *Commentary*

Article 24 relaxes the notice requirements of articles 22 and 23 where the lack of conformity relates to facts which the seller knew or of which he could not have been unaware and which he did not disclose. The

<sup>37</sup> Article 20 (2) provides that the seller is liable for any lack of conformity of the goods which occurs after the delivery date if that lack of conformity is in breach of an express guarantee.

seller has no reasonable basis for requiring the buyer to notify him of these facts.

#### *Article 25\**

The seller must deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

#### PRIOR UNIFORM LAW

ULIS, article 52, paragraph (1).

#### *Commentary*

##### *Claims of third persons*

1. Article 25 states the obligation of the seller to deliver goods which are free from the right or claim of any third person. Naturally, the seller does not have such an obligation if the buyer agreed to take the goods subject to such right or claim.

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

3. This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of the goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous.<sup>38</sup> If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim<sup>39</sup> or the buyer can exercise his rights as set out in article 26.

\*Norway expressed its reservation to this article and proposed the following text to paragraph (2) to article 25:

"(2) Where the goods are subject to a right or claim of a third person based on industrial or intellectual property, the seller is responsible to the buyer only to the extent that such right or claim arises, or is recognized, under the law of the State where the seller has his place of business at the time of the conclusion of the contract."

<sup>38</sup> Cf. article 47 on the right of a party to suspend his performance when he has reasonable grounds to believe that the other party will not perform a substantial part of his obligations.

<sup>39</sup> Although the seller may ultimately free the goods from the third person's claim by successful litigation, this could seldom be accomplished within a reasonable time from the buyer's point of view. When it cannot, the seller must either replace the goods, induce the third person to release the claim as to the goods or provide the buyer with the indemnity adequate to secure him against any potential loss arising out of the claim.

4. Third-party rights and claims to which article 25 is addressed include only rights and claims which relate to property in the goods themselves by way of ownership, security interests in the goods, or the like. Article 25 does not refer to claims by the public authorities that the goods violate health or safety regulations and may not, therefore, be used or distributed.<sup>40</sup> Moreover, article 7 (2) provides that this convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims which relate to industrial or intellectual property or the like.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### Article 26

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

(a) Exercise the rights provided in article 27 to 33;

(b) Claim damages as provided in article 55 to 59.

(2) The buyer is not deprived of any right he may have to claim damages even though he resorts to other remedies.

(3) If the buyer resorts to a remedy for breach of contract, the seller is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.

#### PRIOR UNIFORM LAW

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

#### Commentary

1. Article 26 serves both as an index to the remedies available to the buyer if the seller fails to perform any of his obligations under the contract and this convention and as the source for the buyer's right to claim damages.

2. Article 26 (1) (a) provides that in case of the seller's breach, the buyer may "exercise the rights provided in articles 27 to 33". The substantive conditions under which those rights may be exercised are set forth in the articles cited.

3. In addition, article 26 (1) (b) provides that the buyer may "claim damages as provided in articles 55 to 59" "if the seller fails to perform any of his obligations under the contract of sale and this Convention". In order to claim damages it is not necessary to prove a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfil his obligations. Articles 55 to 59, to which article 26 (1) (b) refers, do not provide the substantive conditions as to whether the claim for damages can be exercised but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the seller. First, all the seller's obligations are brought together in one

<sup>40</sup> If the goods delivered are subject to such restrictions, there may be a breach of the seller's obligations under article 19 (1) (a) or (b).

place without the confusions generated by the complexities of repetitive remedial provisions. This makes it easier to understand what the seller must do, that which is of prime interest to merchants. Second, problems of classification are reduced with a single set of remedies. Third, the need for complex cross referencing is lessened.

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

6. Paragraph (3) states that the national provisions of law which provide for applications to courts or arbitral tribunals for periods of grace are not to be applied. Such a provision seems desirable in international commerce.

#### Article 27

(1) The buyer may require performance by the seller unless he has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

#### PRIOR UNIFORM LAW

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

#### Commentary

1. Article 27 describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed.

#### General rule, paragraph (1)

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

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

4. In addition to the right to require performance of the contract, article 26 (2) ensures that the buyer can recover any damages he may have suffered as a result of the delay in the seller's performance.

5. It may at times be difficult to know whether the buyer has made demand that the seller perform under this article or whether the buyer has voluntarily modified the contract by accepting late performance. The application of paragraphs (4) and 5 can be illustrated as follows:

*Example 27A:* When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller "Your

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

6. In order for the buyer to exercise the right to require performance of the contract, he must not have resorted to a remedy which is inconsistent with that right, e.g. by declaring the contract avoided under article 30 or by declaring a reduction of the price under article 31.

7. The style in which article 27 in particular and section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the requested relief.<sup>41</sup> However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 27 (1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

8. Although the buyer has a right to the assistance of a court or arbitral tribunal to enforce the seller's obligation to perform the contract, article 12 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this convention, it is not required to enter such a judgement in a case arising under this convention, even though the buyer had a right to require the seller's performance under article 27. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 27 are met.

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

#### *Substitute goods, paragraph (2)*

10. If the goods which have been delivered do not conform to the contract, the buyer may want the seller

<sup>41</sup> United Kingdom: Sale of Goods Act 1893, sect. 52 (in part). "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

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

to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice under article 23 or within a reasonable time thereafter".

11. If the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller. Therefore, article 52 (1) provides that, subject to three exceptions set forth in article 52 (2), "the buyer loses his right to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

#### *Buyer's right to cure*

12. In place of requesting the seller to perform pursuant to this article, the buyer may find it more advantageous to cure the defective performance himself or to have it cured by a third party. Article 59, which requires the party who relies on a breach of contract to mitigate the losses, authorizes such measures to the extent that they are reasonable in the circumstances.

#### *Article 28*

The buyer may request performance within an additional period of time of reasonable length. In such a case, the buyer cannot during such period resort to any remedy for breach of contract, unless the seller has declared that he will not comply with the request.

#### *PRIOR UNIFORM LAW*

ULIS, article 44, paragraph 2.

#### *Commentary*

1. Article 28 states the right of the buyer to request the seller to perform the contract within an additional period of time of reasonable length and specifies one of the consequences of such a request.

2. Article 28 is a companion of article 27 which states the right of the buyer to require performance of the contract by the seller and which anticipates the aid of a court or arbitration tribunal in enforcing that right. If the seller delays performing the contract, the judicial procedure for enforcement may require more time than the buyer can afford to wait. It may consequently be to the buyer's advantage to avoid the contract and make a substitute purchase from a different supplier. However, at that point of time it may not be certain that the seller's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 30 (1) (a).

3. In order to remedy this difficulty, article 28 authorizes the buyer to "request performance [by the seller] within an additional period of time of reasonable length". If the seller does not deliver the goods within that additional period of time or declares that he will not comply with the request, the buyer may avoid the contract under article 30 (1) (b).

4. However, in order to protect the seller who may be preparing to perform the contract as requested by the

buyer, perhaps at considerable expense, during the additional period of time of reasonable length the buyer cannot resort to any remedy for breach of contract, unless the seller has declared that he will not comply with the request. Once the additional period of time has expired without performance by the seller, the buyer may not only avoid the contract under article 30 (1) (b) but may resort to any other remedy he may have.

5. If the seller's failure to perform related to part only of the goods, see article 32 and the commentary thereon.

#### Article 29

(1) The seller may cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply within a reasonable time, the seller may perform within the time indicated in his request or, if no time is indicated, within a reasonable time. The buyer cannot, during either period of time, resort to any remedy which is inconsistent with performance by the seller.

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

#### PRIOR UNIFORM LAW

ULIS, articles 43 and 44, paragraph 1.

#### Commentary

1. Article 29 regulates the right of the seller to cure any failure to perform his obligations under the contract and this convention after the date for delivery. It is a companion article to article 21 which regulates the right of the seller to cure any failure to perform his obligations prior to the date for delivery and to articles 27 and 28 which regulate the buyer's right to require performance. The date for delivery is established in accordance with article 17.

#### General rule, paragraph (1)

2. Paragraph (1) permits the seller to cure any failure to perform his obligations after the date for delivery subject to three conditions: (1) the seller must be able to perform without such delay as will amount to a fundamental breach of contract, (2) the seller must be able to perform without causing the buyer unreasonable inconvenience or unreasonable expense, and (3) seller must perform prior to the time the buyer has declared the contract avoided or has declared the price to be reduced.<sup>42</sup>

<sup>42</sup> If the seller has completed curing the defect, it is too late for the buyer to declare the contract avoided or declare the reduction of the price. If the seller commenced curing the defect and so notified the buyer, such a notice would constitute the notice described in para. (3) of this article. See para. 7 *infra*. Therefore, for a reasonable time after receipt

3. It should be noted that the seller may cure under this article even though the failure to perform amounted to a fundamental breach, so long as that failure was not a delay in performance. For example, even though the delivery of machinery which did not operate might constitute a fundamental breach of contract, the seller could cure the defect by repairing or replacing the machinery. Naturally, the buyer would still have his right to claim damages for any loss caused him by the original breach or by the seller's actions in curing the non-conformity.

4. The seller's right to cure under article 29 (1) is a strong right in that it goes against the terms of the contract. For instance, if the seller has not delivered by the contract delivery date of 1 June but delivers on 15 June, he has cured his failure to deliver but he has not and cannot cure his failure to deliver by 1 June. Nevertheless, article 29 (1) authorizes him to cure in this manner if he can do so before the delay amounts to a fundamental breach.

5. It should be noted that article 29 (1) in conjunction with the rule that a buyer can normally avoid the contract only if there has been a fundamental breach<sup>43</sup> leads to an important change in the rules regarding CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the terms of the contract, buyers have often been able to refuse the documents if there has been some discrepancy, even if that discrepancy was of little practical significance. However, if, for example, a documentary sale called for the presentation of a single bill of lading and the seller presented the buyer with two bills of lading which indicated that the total quantity required by the contract had been shipped, the buyer would not be able to avoid the contract (and, therefore, could not effectively refuse to pay against the documents, unless the presentation of the two bills of lading by the seller "results in substantial detriment to the [buyer] and the [seller] foresaw or had reason to foresee such a result".<sup>44</sup>

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

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

7. Paragraph (2) provides that if the seller sends the buyer such a notice, the buyer must reply within a reasonable time. If the buyer does not reply, the seller may perform and the buyer may not avoid the contract or reduce the price during the period of time the seller indicated in the notice would be necessary to cure the defect or, if no time was stated, during a reasonable

of the notice the buyer could not declare the contract avoided or reduce the price. However, in the absence of a notice to him, the buyer can terminate the seller's right to cure by declaring the contract avoided or the price reduced even though the seller has commenced curing the defect.

<sup>43</sup> Article 30 (1) (a). Article 30 (1) (b) authorizes the buyer to avoid the contract only if there has been a failure of delivery and the seller has been requested to make delivery under article 28. As to when delivery takes place, see article 15 and the commentary thereon.

<sup>44</sup> Article 9.

time. Even if the seller's notice said only that he would perform the contract within a specific period of time or within a reasonable period of time, paragraph (3) provides that the buyer must either declare the contract avoided, declare the price reduced or protest the cure proposed or else he will be bound by the terms of the seller's notice unless he can show that for some reason the seller's notice should not be treated as including a request to the buyer to respond.

#### Article 30

(1) The buyer may declare the contract avoided:

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

(b) If the seller has been requested to make delivery under article 28 and has not delivered the goods within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request.

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

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

(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach or, if the buyer has requested the seller to perform under article 28, after the expiration of the additional period of time or after the seller has declared that he will not comply with the request.

#### PRIOR UNIFORM LAW

ULIS, articles 26, 43, 44, paragraph 2.

#### Commentary

1. Article 30 describes the buyer's right to declare the contract avoided. The seller's right to declare the contract avoided is described in article 45.

#### Declaration of avoidance

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

3. Article 10 (2) provides that "a declaration of avoidance is effective only if notice is given to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 10 (3).

#### Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the buyer may declare the contract avoided is where the failure by the seller to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 9.

#### Seller's delay in curing, subparagraph (1) (b)

5. Subparagraph (1) (b) further authorizes the buyer to declare the contract avoided in one restricted case. If the seller has not delivered the goods and the buyer requests him to do so under article 28, the buyer can avoid the contract if the seller "has not delivered the goods within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request".<sup>45</sup>

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

6. Paragraph (2) provides the time-limits within which the buyer must declare the contract avoided in cases when the seller has made delivery or else lose the right to do so. The buyer does not lose his right to declare the contract avoided under this paragraph until all the goods have been delivered.

7. If the fundamental breach on which the buyer relies to declare the contract avoided is the late delivery of the goods, then once the seller has made delivery, subparagraph (2) (a) provides that the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time after he becomes aware that delivery has been made.

8. If the seller has made delivery but there is a fundamental breach of the contract in respect of some obligation other than late delivery, such as the conformity of the goods to the contract, then article 30 (2) (b) provides that the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time after he knew or ought to have known of the breach.<sup>46</sup>

9. Article 30 (2) (b) may also take away the right of the buyer to declare the contract avoided in cases where he has requested the seller to deliver the goods under article 28. If the seller delivers the goods but not within the additional period specified in the request pursuant to article 28, the buyer loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of that additional period.

10. Since the buyer does not lose his right to declare the contract avoided under article (30) (2) until all the goods have been delivered, under this provision all the instalments in an instalment contract must be delivered before the buyer loses the right to declare the contract avoided. However, under article 48 (1) the buyer's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the seller which justifies the declaration of avoidance.

11. In addition to article 30 (2), several other articles provide for the loss or suspension of the right to declare the contract avoided.

12. Article 52 (1) provides that "the buyer loses his right to declare the contract avoided... where it

<sup>45</sup> However, see article 32 (2) and the commentary thereon.

<sup>46</sup> See article 22.

is impossible for him to return the goods substantially in the condition in which he received them" unless the impossibility is excused for one of the three reasons listed in article 52 (2).

13. Article 23 provides that a buyer loses his right to rely on a lack of conformity of the goods, including the right to avoid the contract, if he does not give the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it and at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

14. If the buyer has requested the seller to perform his obligations pursuant to article 28, the buyer may not resort to the remedies for breach, including a declaration of avoidance under article 30 until the expiration of the period fixed by the buyer unless within that period the seller has declared that he will not comply with the request.

15. Similarly, if it is the seller who wishes to cure any defect after the delivery date, the buyer's right to avoid the contract may be suspended for the period of time indicated by the seller as necessary to effect the cure.<sup>47</sup>

#### *Right to avoid prior to the date of delivery*

16. For the buyer's right to avoid the contract prior to the contract date of delivery, see articles 47 (3), 48, 49 and the commentaries thereon.

#### *Effects of avoidance*

17. The effects of avoidance are described in articles 51 to 54. The most significant consequence of avoidance for the buyer is that he is no longer obligated to take delivery and pay for the goods. However, avoidance of the contract does not terminate either the seller's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>48</sup> Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

#### *Article 31*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of the non-conformity.

#### PRIOR UNIFORM LAW

ULIS, article 46.

#### *Commentary*

1. Article 31 states the conditions under which the buyer can declare the price to be reduced where the goods do not conform with the contract.

<sup>47</sup> See para. (7) to the commentary on article 29.

<sup>48</sup> Art. 51 (1).

2. The remedy of reduction of the price must not be confused with the remedy of damages. Although the two remedies lead to the same result in some situations, they are two distinct remedies to be used at the buyer's choice.

3. The remedy of reduction of the price is in effect a partial avoidance of the contract. The price may be reduced for any non-conformity of the goods, whether the non-conformity be of quantity or quality. Moreover, the price can be reduced by the buyer even though he has already paid the price. Article 31 does not depend on the buyer's ability to withhold future sums due.

4. The fact that the remedy of reduction of the price is in effect a partial avoidance of the contract leads to two important consequences. First, even if the seller is excused from paying damages for his failure to perform the contract by virtue of article 50, the buyer may still reduce the price if the goods do not conform with the contract. Second, similar to that which prevails in respect of avoidance, the amount of monetary relief which is granted the buyer is measured in terms of the contract price which need not be paid (or which can be recovered from the seller if already paid), and not in terms of monetary loss which has been caused to the buyer.

5. This basis for calculation is obvious if the seller's non-performance consists of the delivery of less than the agreed upon quantity. These aspects of the rule can be illustrated by the following examples:

*Example 31A:* Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$200 a ton for a total of \$2,000. Seller delivered only 2 tons. Since such an extensive short delivery constituted a fundamental breach, Buyer avoided the contract, took none of the corn and was not obligated to pay the purchase price.

*Example 31B:* Under the same contract as in example 31A, Seller delivered 9 tons. Buyer accepted the 9 tons and reduced the price by 10 per cent, paying \$1,800.

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

*Example 31C:* Under the same contract as in example 31A, Seller delivered 10 tons of No. 3 corn instead of 10 tons of No. 1 corn as required. At the time of contracting the market price for No. 3 corn was \$150 a ton. If the delivery of No. 3 corn in place of No. 1 corn constituted a fundamental breach of the contract, Buyer could avoid the contract and not pay the contract price. If the delivery of No. 3 corn did not constitute a fundamental breach or if Buyer did not choose to avoid the contract, Buyer could declare the reduction of the price from \$2,000 to \$1,500.

7. Although the principle is simple to apply in a case where, as in example 31C, the non-conformity as to quality is such that the goods delivered have a definite market price which is different from that for the goods which should have been delivered under the contract, it is more difficult to apply to other types of non-conformity as to quality. For instance:

*Example 31D:* Seller contracted to furnish decorative wall panels of a certain design for use by Buyer in an

office building being constructed by Buyer. The wall panels delivered by Seller were of a less attractive design than those ordered. Buyer has the right to "declare the price . . . reduced in the same proportion as the value of the goods at the time of conclusion of the contract diminished because of the non-conformity".

8. In example 31D there may be no easy means of determining the extent to which the value of the goods was diminished because of the non-conformity, but that does not affect the principle. It should be noted that it is the buyer who makes the determination of the amount by which the price is reduced. However, if the seller disputes the calculation, the matter can finally be settled only by a court or an arbitration tribunal.

9. It should also be noted that the calculation is based on the extent to which the value of the goods "at the time of the conclusion of the contract" has been diminished. The calculation of the reduction of the price does not take into consideration events which occurred after this time as does the calculation of damages under articles 55 to 60. In the case envisaged in example 31D this would normally cause no difficulties because the extent of lost value would probably have been the same at the time of the conclusion of the contract and at the time of the non-conforming delivery. However, if there has been a price change in the goods between the time of the conclusion of the contract and the time of the non-conforming delivery, different results are achieved if the buyer declares the price reduced under this article rather than if the buyer claims damages. These differences are illustrated by the following examples:

*Example 31E:* The facts are the same as in example 31C. Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$200 a ton for a total of \$2,000. Seller delivered 10 tons of No. 3 corn. At the time of contracting the market price for No. 3 corn was \$150 a ton. Therefore, if Buyer declared a reduction of the price, the price would be \$1,500. Buyer would in effect have received monetary relief of \$500.

However, if the market price had fallen in half by the time of delivery of the non-conforming goods so that No. 1 corn sold for \$100 a ton and No. 3 corn sold for \$75 a ton, Buyer's damages under article 55 would have been only \$25 a ton or \$250. In this case it would be more advantageous to Buyer to reduce the price under article 31 than to claim damages under article 55.

*Example 31F:* If the reverse were to happen so that at the time of delivery of the non-conforming goods the market price of No. 1 corn had doubled to \$400 a ton and that of No. 3 corn to \$300 a ton, Buyer's damages under article 55 would be \$100 a ton or \$1,000. In this case it would be more advantageous to Buyer to claim damages under article 55 than to reduce the price under article 31. However, article 26 (2) makes it clear that the Buyer could reduce the price under article 31 and recover the additional loss by means of a claim for damages.

10. It should be noted that the results in examples 31E and 31F are caused by the fact that the remedy of reducing the price acts as a partial avoidance of the contract. The same result occurs in even greater degree

if the buyer totally avoids the contract as is illustrated in the following example:

*Example 31G:* In example 31E it was shown that if the market price for No. 1 corn had dropped in half from \$200 a ton to \$100 a ton and the price of No. 3 corn had dropped from \$150 a ton to \$75 a ton, Buyer could retain the No. 3 corn and either receive \$250 in damages or reduce the price by \$500. If the delivery of No. 3 corn in place of No. 1 corn amounted to a fundamental breach of contract and Buyer avoided the contract pursuant to article 31 (a), he could purchase in replacement 10 tons of No. 1 corn for \$1,000, i.e., for an amount \$1,000 less than the contract price, or purchase No. 3 corn for \$750, i.e., for \$1,250 less than the contract price.

11. Except for example 31D, all of the examples above have assumed a fungible commodity for which substitute goods were freely available thereby making it feasible for the buyer to avoid the contract, providing a ready market price as a means of measuring damages, and precluding any additional damages by way of lost profits or otherwise. If there is not such a ready market for the goods, the problems of evaluation are more difficult and the possibility of additional damages is greater. These factors do not change the means by which article 31 works but they may change the relative advantage to the buyer of one remedy rather than another.

12. Article 26 (2) makes it clear that the buyer can claim damages in addition to declaring the reduction of the price in those cases where, as in example 31F, reducing the price does not give as much monetary relief as would an action for damages.

#### Article 32

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 27 to 31 apply in respect of the part which is missing or which does not conform.

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

#### PRIOR UNIFORM LAW

ULIS, article 45.

#### Commentary

1. Article 32 states the buyer's remedies when the seller fails to perform only a part of his obligations.

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

2. Paragraph (1) provides that if the seller has failed to perform only a part of his obligations under the contract by delivering only a part of the goods or by delivering some goods which do not conform to the contract, the provisions of articles 27 to 31 apply in respect of the quantity which is missing or which does not conform to the contract. In effect, this paragraph provides that the buyer can avoid a part of the contract under article 30 if the non-conformity amounts to a fundamental breach as to the part of the goods in question or if, after buyer's request pursuant to ar-

article 28 that seller perform the contract by delivering the missing quantity or substitute goods, the seller has not delivered the goods within the additional period of time fixed by the buyer. This rule was necessary because in some legal systems a party cannot avoid only a part of the contract. In those legal systems the conditions for determining whether the contract can be avoided at all must be determined by reference to the entire contract. However, under article 32 (1) it is clear that under this convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part.

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

3. Paragraph (2) provides that the buyer may avoid the entire contract "only if the failure to make delivery completely and in conformity with the contract amounts to a fundamental breach of the [entire] contract". Although this provision reiterates the rule which would otherwise be applied under article 30 (1) (a), it is useful that it be made clear.

4. The use of the word "only" in article 32 (2) also has the effect of negating the implication which might have been thought to flow from article 30 (1) (b) that the entire contract could be avoided on the grounds that the seller failed to deliver a part of the goods within the additional period of time fixed by the buyer in accordance with article 28 even though such failure to deliver did not in itself amount to a fundamental breach of the entire contract.

#### *Article 33*

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

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

#### PRIOR UNIFORM LAW

ULIS, articles 29 and 47.

#### *Commentary*

1. Article 33 deals with two situations where the buyer may refuse to take delivery of goods which have been placed at his disposal.

#### *Early delivery, paragraph (1)*

2. Article 33 (1) deals with the situation where the goods have been delivered to the buyer before the delivery date fixed. If the buyer were forced to accept these goods, it might cause him inconvenience and expense in storing them longer than anticipated. Furthermore, if the contract links the day payment is due to the day delivery is made, early delivery will force early payment with consequent interest expense. Therefore, the buyer is given the choice of taking delivery of the goods or refusing to take delivery of them when the seller delivers them prior to the delivery date.

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

4. However, where the buyer does refuse to take delivery of the goods under article 33 (1), according to article 61 (2) he will still be bound to take possession of them on behalf of the seller if the following four conditions are met: (1) the goods have been placed at his disposal at their place of destination, (2) he can take possession without payment of the price, e.g., the contract of sale does not require payment in order for the buyer to take possession of the documents covering the goods, (3) taking possession would not cause the buyer unreasonable inconvenience or unreasonable expense, and (4) neither the seller nor a person authorized to take possession of the goods on his behalf is present at the destination of the goods.

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

6. If the buyer does take early delivery of the goods, he may claim from the seller for any damages he may have suffered unless, under the circumstances, the acceptance of early delivery amounts to a modification of the contract.<sup>49</sup>

#### *Excess quantity, paragraph (2)*

7. Article 32 (2) deals with the situation where an excess quantity of goods has been delivered to the buyer.

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

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

#### CHAPTER IV. OBLIGATIONS OF THE BUYER

#### *Article 34*

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

#### PRIOR UNIFORM LAW

ULIS, article 56.

#### *Commentary*

Article 34 states the principal obligations of the buyer and introduces chapter IV of the convention. The principal obligations of the buyer are to pay the price for

<sup>49</sup> Article 33 (1) does not refer to the buyer's right to seek damages. However, the buyer's right to damages is a general right under article 26 (1) (b).

the goods and to take delivery of them. The buyer must carry out his obligations "as required by the contract and this Convention". Since article 5 of the convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the convention the buyer must fulfil his obligations as required by the contract.

## SECTION I. PAYMENT OF THE PRICE

*Article 35*

The buyer must take the necessary steps to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee.

## PRIOR UNIFORM LAW

ULIS, article 69.

*Commentary*

1. Article 35 sets forth the obligation of the buyer to take the steps which are necessary to enable the price to be paid or to procure the issuance of documents which will assure payment.

2. Even if the buyer is to make direct payment to the seller, it may be necessary for him to take several preliminary steps to effect such payment. For example, he may need to procure the necessary foreign currency or obtain official authorization to remit the currency abroad. Article 35 provides that in such cases the buyer must take the necessary steps.

3. Similarly, if the contract provides that payment is to be made or guaranteed by an intermediary such as a bank, article 35 requires the buyer to "take the necessary steps" to procure the documents assuring payment, such as a letter of credit or a banker's guarantee.

4. The buyer's obligation under article 35 is limited to "tak[ing] steps". He does not undertake to pay the price or to procure the issuance of documents assuring payment if, for example, the Government refuses to make available the necessary foreign exchange. Of course, the buyer is obligated to take all the appropriate measures to persuade the Government to make the funds available and cannot rely on a refusal by the Government unless those measures have been taken.

*Article 36\**

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

## PRIOR UNIFORM LAW

ULIS, article 57.

*Commentary*

1. Article 36 provides a means for the determination of the price when a contract has been concluded

\* The Union of Soviet Socialist Republics expressed a reservation in respect of this article.

which does not state a price or expressly or impliedly make provision for its determination.

2. It may happen that the parties do not state the price in their agreement. The buyer may order from a catalogue expecting to pay the seller's current price. Or, if the goods are to be delivered at some time in the future and prices are unstable, the parties may anticipate that the buyer will pay the price current at the time of delivery. There is little difficulty if the agreement between the parties refers to a means of determining the price, such as by reference to the seller's price list, to market quotations, or to the like. This article provides the rule for the determination of the price if the parties have neither stated the price nor expressly or impliedly provided for the means for its determination.

*Formation and validity of the contract*

3. Even though article 36 provides a means for the determination of the price, the absence of an explicit or implicit price term in the contract may indicate that the parties had not completed the process of negotiation. The court or arbitration tribunal must determine in each case whether the absence of a price or of an express or implied means of determining the price indicates that the parties had not yet reached agreement on the existence of a contract.

4. Neither article 36 nor any other provision of this convention governs the question whether a contract is valid if the price is neither determined nor determinable from the terms of the contract itself. This is a matter left to the applicable national law.

5. Article 36 can be applied to determine the price only if the applicable national law recognizes the existence and validity of the contract.<sup>50</sup>

*Determination of the price*

6. In accordance with article 8, the parties are bound by any practices which they have established between themselves. Therefore, if there have been prior dealings between the parties which have established a practice in regard to the price, that practice would be determinative.

7. In the absence of such a practice between the parties, the price is that "generally charged by the seller at the time of the conclusion of the contract". Since a seller may charge several different prices to different purchasers or for sales of different quantities or under different conditions, the relevant price would be that charged under comparable circumstances.

8. If there is no price generally charged by the seller for the sale of goods of the type in question, "the buyer must pay the price generally prevailing at the [time of the conclusion of the contract] for such goods sold under comparable circumstances".

9. Article 36 applies only if there is a price either "generally charged by the seller" or "generally prevailing . . . for such goods". If no such price exists, this article offers no formula for creating a "reasonable price".

<sup>50</sup> Article 7 specifies that this convention is not concerned with the formation of the contract or with its validity.

*Time of calculation of price*

10. The price to be determined by the application of article 36 is that charged at the time of the conclusion of the contract. It is the price which would presumably have been agreed upon by the parties at that time of contracting if they had agreed upon a price at that time.

11. However, this does not preclude a court or arbitration tribunal from applying the formula of article 36 to the prices current at the time of delivery if the court or arbitration tribunal were to find that it was the intention of the parties that the buyer was to pay the price current at that time.

*Article 37*

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

## PRIOR UNIFORM LAW

ULIS, article 58.

*Commentary*

1. Article 37 provides that "if the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight".

2. This is a rule of interpretation of the contract which does not raise any questions. If the parties have not expressly or impliedly stipulated otherwise, the buyer does not pay for the weight of the packing materials.

*Article 38*

(1) The buyer must pay the price to the seller at the seller's place of business. However, if payment is to be made against the handing over of the goods or of documents, the price must be paid at the place where the handing over takes place.

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

## PRIOR UNIFORM LAW

ULIS, article 59.

*Commentary*

1. Article 38 provides a rule for the place at which payment of the price is to be made. Because of the importance of the question, the contract will usually contain specific provisions on the mode and place of payment. If such provisions exist, they govern the relationship between the parties.<sup>51</sup> If the contract does not contain such provision, article 38 provides the rules to be applied.

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

<sup>51</sup> Article 5.

3. This convention does not govern the extent to which exchange control regulations or other rules of economic public order may modify the obligations of the buyer to pay the seller at a particular time or place or by a particular means. The buyer's obligations to take the steps which are necessary to enable the price to be paid are set forth in article 35. The extent to which the buyer who has fulfilled his obligations under article 35 may be relieved of liability for damages for his failure to pay as agreed because of exchange control regulations or the like is governed by article 50.<sup>52</sup>

*Place of payment, paragraph (1)*

4. Article 38 (1) provides that if the payment is to be made against the handing over of the goods or of documents, the payment must be made at the place where the handing over takes place. This rule will be applied most often in the case of a contract stipulation for payment against documents.<sup>53</sup> The documents may be handed over directly to the buyer, but they are often handed over to a bank which represents the buyer in the transaction. The "handing over" may take place in either the buyer's or the seller's country or even in a third country.

*Example 38A:* The contract of sale between the Seller in State X and the Buyer in State Y called for payment against documents. The documents were to be handed over to the Buyer's bank in State Z for the account of Buyer. Under article 38 (1) the Buyer must pay the price at the Buyer's bank in State Z.

5. If the contract does not call for payment against the handing over of the goods or documents and no other provisions for the place of payment are stipulated in the contract, the buyer must pay the price at the seller's place of business. It should be noted that, according to article 6 (a), if the seller has more than one place of business, the place of business at which payment must be made "is that which has the closest relationship to the contract and its performance".

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

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

*Article 39\**

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

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

\* Brazil and Japan reserved their position in respect to article 39 (2).

<sup>52</sup> For the extent to which the seller may be relieved of the duty to deliver the goods if the buyer does not pay as agreed, see articles 39 (1), 45 and 47.

<sup>53</sup> The documents referred to in article 38 (1) are those which the seller is required to hand over by virtue of article 18.

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

PRIOR UNIFORM LAW

ULIS, articles 71 and 72.

*Commentary*

1. Article 39 governs the time for the buyer's payment in relation to performance by the seller.

*General rule, paragraph (1)*

2. Article 39 (1) recognizes that, in the absence of an agreement, the seller is not required to extend credit to the buyer. Therefore, the general rule stated in paragraph (1) is that the buyer is required to pay the price at the time the seller makes the goods available to the buyer, by placing either the goods or a document controlling their disposition at the buyer's disposal. If the buyer does not pay at that time, the seller may refuse to hand over the goods or document.

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

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

*Payment and examination of the goods, paragraph (3)*

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

5. Where the contract of sale involves carriage of the goods and the seller wishes to exercise his right under article 39 (2) to ship the goods on terms whereby neither the goods nor the documents will be handed over to the buyer prior to payment, the seller must preserve the buyer's right to examine the goods. Since the buyer normally examines the goods at the place of destination,<sup>54</sup> the seller may be required to make special arrangements with the carrier to allow the buyer access to the goods at the destination prior to the time the goods or documents are handed over in order to allow for the buyer's examination.

6. The buyer loses the right to examine the goods prior to payment where "the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity". This convention does not set forth which procedures for delivery or payment are inconsistent with the buyer's right to examine the goods prior to payment. However, the most common example is the agreement that payment of the price is due against the handing over of the documents controlling the disposition of the goods whether or not the goods have

arrived. The quotation of the price on CIF terms contains such an agreement.<sup>55</sup>

7. It should be noted that since the buyer loses the right to examine the goods prior to payment of the price only if the procedures for payment or delivery "agreed upon by the parties" are inconsistent with such right, he does not lose his right to examine the goods prior to payment where the contract provides that he must pay the price against the handing over of the documents after the arrival of the goods. Since payment is to take place after the arrival of the goods, the procedure for payment and delivery are consistent with the right of examination prior to payment. Similarly, the buyer does not lose his right to examine the goods prior to payment where the seller exercises his right under article 39 (2) to dispatch the goods on terms whereby the documents controlling the disposition of the goods will be handed over to the buyer only upon the payment of the price.

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

*Example 39A:* The contract of sale quoted the price on CIF terms. Therefore, it was anticipated that payment would be made in the following manner. Seller would draw a bill of exchange on Buyer for the amount of the purchase price. Seller would forward the bill of exchange accompanied by the bill of lading (along with other documents enumerated in the contract) to a collecting bank in the Buyer's city. The contract provided that the bill of lading (and other documents) would be handed over to Buyer by the bank only upon the payment of the bill of exchange. Since this agreed-upon procedure for payment requires payment to be made at the time the bill of exchange is presented, often at a time the goods are still in transit, the means of payment is inconsistent with the Buyer's right to examine the goods prior to payment. Therefore, Buyer did not have such a right in this case.

*Example 39B:* The contract of sale was not on CIF terms and made no other provision for the time or place of payment. Therefore, pursuant to the authority in article 39 (2) Seller took the same actions as in example 39A. Seller drew a bill of exchange on Buyer for the purchase price and forwarded it accompanied by the bill of lading through his bank to a collecting bank in the Buyer's city. Seller gave the collecting bank instructions that it should not hand over the bill of lading to Buyer until Buyer had paid the bill of exchange.

In this example the means of payment, though authorized by articles 39 (2), was not "agreed upon by the parties". Therefore, Buyer does not lose his right to examine the goods prior to paying the price, i.e., prior to paying the bill of exchange. It is the Seller's obligation to assure the Buyer of the possibility of examination prior to payment.

*Example 39C:* The contract of sale provided for payment of the price on presentation of the documents at the point of arrival of the goods but only after the ar-

<sup>55</sup> Incoterms 1953, CIF, provides that the buyer must "accept the documents when tendered by the seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract".

<sup>54</sup> Article 22 (2).

rival of the goods. In this case the procedures for delivery and payment expressly stipulated by the parties are not inconsistent with the right of the Buyer to examine the goods prior to payment even though the price was to be paid against the presentation of the documents.

#### Article 40

The buyer must pay the price on the date fixed or determinable by the contract or this Convention without the need for any formalities.

#### PRIOR UNIFORM LAW

ULIS, article 60.

#### Commentary

Article 40 provides that the buyer is required to pay the price on the date fixed or determinable by the contract or this convention without the need for any formalities. This rule is intended to deny the applicability of the rule in some national legal systems which states that in order for the payment to become due, the seller must make a formal demand for it from the buyer. A date for payment established by usage or by article 39 (1)<sup>56</sup> has the same result as a date for payment established by agreement of the parties.

### SECTION II. TAKING DELIVERY

#### Article 41

The buyer's obligation to take delivery consists:

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

(b) In taking over the goods.

#### PRIOR UNIFORM LAW

ULIS, article 65.

#### Commentary

1. Article 41 describes the second obligation of the buyer set out in article 34, i.e., to take delivery of the goods.

2. The buyer's obligation to take delivery consists of two elements. The first element is that he must do "all the acts which could reasonably be expected of him in order to enable the seller to make delivery". For example, if under the contract of sale the buyer is to arrange for the carriage of the goods, he must make the necessary contracts of carriage so as to permit the seller to "[hand] the goods over to the first carrier for transmission to the buyer".<sup>57</sup>

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

4. The second element of the buyer's obligation to take delivery consists of his "taking over the goods". This aspect of the obligation to take delivery is of importance where the contract calls for the seller to make delivery by placing the goods at the buyer's disposal

<sup>56</sup> Article 8.

<sup>57</sup> Article 15 (a). Cf. article 16 (2).

at a particular place or at the seller's place of business.<sup>58</sup> In such case the buyer must physically remove the goods from that place.<sup>59</sup>

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

#### Article 42

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

- (a) Exercise the rights provided in articles 43 to 46;
- (b) Claim damages as provided in articles 55 to 59.

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

(3) If the seller resorts to a remedy for breach of contract, the buyer is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.

#### PRIOR UNIFORM LAW

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

#### Commentary

1. Article 42 serves both as an index to the remedies available to the seller if the buyer fails to perform any of his obligations under the contract and this convention and as the source of the seller's right to claim damages. Article 42 is comparable to article 26 on the remedies available to the buyer.

2. Article 42 (1) (a) provides that in case of the buyer's breach, the seller may "exercise the rights provided in articles 43 to 46". Although the provisions on the remedies available to the seller in articles 43 to 46 are drafted in terms comparable to those available to the buyer in articles 27 to 33, they are less complicated. This is so because the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. Therefore, the seller has no remedies comparable to the following which are available to the buyer: reduction of the price because of non-conformity of the goods (article 31), right to partially exercise his remedies in the case of partial delivery of the goods (article 32), right to refuse to take delivery in case of delivery before the date fixed or of an excess quantity of goods (article 33).

3. Article 42 (1) (b) provides that the seller may "claim damages as provided in articles 55 to 59" "if the buyer fails to perform any of his obligations under the contract of sale and this Convention". In order to claim damages it is not necessary to prove a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the buyer to fulfil his obligations. Articles 55 to 59, to which article 42 (1) (b) refers, do not provide the substantive conditions for the exercise of a claim for damages but

<sup>58</sup> Article 15 (b) and (c).

<sup>59</sup> Cf. the buyer's obligation under article 61 (2) to take possession on behalf of the seller of goods which have been dispatched to and have been put at the disposal of the buyer at the place of destination and of which the buyer has exercised his right to reject.

the rules for the calculation of the amount of damages. In particular, article 58 gives a minimum measure of damages where the breach of contract consists of delay in the payment of the price.

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

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

6. Paragraph (3) states that the national provisions of law which provide for applications to courts or arbitral tribunals for periods of grace are not to be applied. Such a provision seems desirable in international commerce.

#### Article 43\*

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

#### PRIOR UNIFORM LAW

ULIS, articles 61, 62 paragraph 1, 70 paragraph 2.

#### Commentary

1. Article 43 describes the seller's right to require the buyer to perform his obligations under the contract and this convention.

#### *Failure to pay the price, paragraph (1)*

2. This article recognizes that the seller's primary concern is that the buyer pay the price at the time it is due. If the buyer does not do so, this article authorizes the seller to require the buyer to pay the price.

3. The seller can act to recover the purchase price under article 43 where the buyer has refused to pay it, although it is unlikely that the seller will sue for the price unless either the buyer has taken delivery of the goods or the goods have been damaged or destroyed after the risk of loss has passed to the buyer.<sup>60</sup> So long as the seller either has not yet delivered the goods<sup>61</sup> or, having delivered the goods by handing them over to the first carrier,<sup>62</sup> the seller has dispatched them to the buyer on terms whereby neither the goods nor the documents controlling their disposition would be handed over to the buyer unless payment was made,<sup>63</sup> the seller would normally refuse delivery, keep the goods and sue for

damages<sup>64</sup> or resell the goods and sue for the difference between the contract price and that obtained by the resale.<sup>65</sup>

#### *Failure to perform other obligations*

4. Article 43 goes on to authorize the seller to require the buyer "to take delivery or to perform any of his other obligations".<sup>66</sup>

5. In some cases the seller may be authorized or required to substitute his own performance for that which the buyer has failed to do. Article 46 provides that in a sale by specification, if the buyer fails to make the specifications required on the date requested or within a reasonable time after receipt of a request from the seller, the seller may make the specifications himself. Similarly, if the buyer is required by the contract to name a vessel on which the goods are to be shipped and fails to do so by the appropriate time, article 59, which requires the party who relies on a breach of contract to mitigate the losses, may authorize the seller to name the vessel so as to minimize the buyer's losses.

6. The style in which article 43 in particular and section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view held in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the required relief.<sup>67</sup> However, the two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 43 provides that the "seller may require the buyer to pay the price, take delivery or perform any of his other obligations", it anticipates that, if the buyer does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

7. Although the seller has a right to the assistance of a court or arbitral tribunal to enforce the buyer's obligations to pay the price, take delivery and perform any of his other obligations, article 12 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this convention, it is not required to enter such a judgement in a case arising under this convention even though the seller had a right to require the buyer's performance under article 43. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 43 are met.

8. The seller can require performance under this article and also sue for his damages. In particular, where the buyer's non-performance of one of his obligations consists in the delay in the payment of the price, the seller's damages would equal at least the interest calculated in accordance with article 56.

<sup>64</sup> Articles 42 (1) (b), 55 and 57.

<sup>65</sup> Article 56.

<sup>66</sup> The obligation to "take delivery" is specifically mentioned because it is the second of the two obligations of the buyer set forth in article 34. The definition of taking delivery is found in article 41.

<sup>67</sup> See foot-note 1 to paragraph 7 of the commentary on article 27 for examples of this legislative drafting style.

\* The United States reserved its position in respect to this article.

<sup>60</sup> Article 64.

<sup>61</sup> The means by which the seller delivers the goods are set forth in article 15.

<sup>62</sup> Article 15 (a).

<sup>63</sup> Article 39 (2).

*Inconsistent acts by the seller*

9. Article 43 also provides that in order for the seller to exercise the right to require performance of the contract he must not have acted inconsistently with that right e.g. by avoiding the contract under article 45.

*Article 44*

The seller may request performance within an additional period of time of reasonable length. In such a case, the seller cannot during such period resort to any remedy for breach of contract, unless the buyer has declared that he will not comply with the request.

## PRIOR UNIFORM LAW

ULIS, article 66, paragraph 2.

*Commentary*

1. Article 44 states the right of the seller to request the buyer to perform the contract within an additional period of time of reasonable length and specifies one of the consequences of such a request.

2. Article 44 is a companion to article 43 which states the right of the seller to require performance of the contract by the buyer and which anticipates the aid of a court or arbitration tribunal in enforcing that right. If the buyer delays performing the contract, the use of judicial procedures for enforcement may not seem feasible or may require more time than the seller can afford to wait. This may be particularly the case if the buyer's failure to perform consists of delay in procuring the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee, or of securing the permission to import the goods or pay for them in restricted foreign exchange. It may be to the seller's advantage to avoid the contract and make a substitute sale to a different purchaser. However, at that time it may not be certain that the buyer's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 45 (1) (a).

3. In order to remedy this difficulty, article 44 authorizes the seller to "request performance [by the buyer] within an additional period of time of reasonable length". If the buyer does not pay the price or take delivery of the goods, as the case may be, within that additional period of time or declares that he will not comply with the request, the seller may avoid the contract under article 45 (1) (b).

4. However, in order to protect the buyer who may be preparing to perform the contract as requested by the seller, perhaps at considerable expense, during the additional period of time the seller cannot resort to any remedy for breach of contract, unless the buyer has declared that he will not comply with the request. Once the additional period of time has expired without performance by the buyer, the seller may not only avoid the contract under article 45 (1) (b) but may resort to any other remedy he may have.

*Article 45\**

(1) The seller may declare the contract avoided:

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

\* Brazil expressed a reservation in respect of article 45 (2).

(b) If the buyer has been requested under article 44 to pay the price or to take delivery of the goods and has not paid the price or taken delivery within the additional period of time fixed by the seller in accordance with that article or has declared that he will not comply with the request.

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

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

(b) In respect of any breach other than late performance, within a reasonable time after the seller knew or ought to have known of such breach or, if the seller has requested the buyer to perform under article 44 within a reasonable time after the expiration of the additional period of time or after the buyer has declared that he will not comply with the request.

## PRIOR UNIFORM LAW

ULIS, articles 61, paragraph 2, 62, 66, 70.

*Commentary*

1. Article 45 describes the seller's right to declare the contract avoided. The buyer's right to declare the contract avoided is described in article 30.

*Declaration of avoidance*

2. The contract is avoided as a result of the buyer's breach only if "the seller . . . declare[s] the contract avoided". This narrows the rule from that found in articles 61 and 62 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the seller. Automatic or *ipso facto* avoidance was deleted from the remedial system in this convention because it led to great uncertainty whether the contract was still in force or whether it was *ipso facto* avoided. Under article 45 of this convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 10 (2) provides that "a declaration of avoidance is effective only if notice is given to the other party". The consequences, which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 10 (3).

*Fundamental breach, subparagraph (1) (a)*

4. The typical situation in which the seller may declare the contract avoided is where the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 9.

*Buyer's delay in curing, subparagraph (1) (b)*

5. Subparagraph (1) (b) allows the seller to avoid the contract when the buyer fails to pay the price or take delivery of the goods within the additional period of time fixed by the seller in accordance with article 44 regardless of whether that failure to perform constituted a fundamental breach of the contract.

*Suspension of right to avoid*

6. If the seller has requested the buyer to perform his obligations pursuant to article 44, the seller may not resort to the remedies for breach of contract, including a declaration of avoidance of the contract under article 45, until the expiration of the period fixed by the seller unless the buyer has declared that he will not comply with the request to perform.

*Loss of right to avoid, paragraph (2)*

7. Paragraph (2) provides the time-limits within which the seller must declare the contract avoided or else lose the right to do so. The seller does not lose his right to declare the contract avoided so long as the total price has not been paid.

8. If the fundamental breach on which the seller relies to declare the contract avoided is the late performance of an obligation, once the price has been paid paragraph (2) (a) provides that the seller loses his right to declare the contract avoided when he becomes aware that the performance has been rendered. Because the seller will most often intend to declare the contract avoided because of the buyer's failure to pay the price, paragraph (2) (a) will normally take effect at the time the seller becomes aware that the price has been paid.

9. On the other hand if the seller intends to avoid the contract for any fundamental breach which does not involve late performance by the buyer, paragraph (2) (b) provides that the seller loses that right if the price has been paid and the seller does not declare the contract avoided within a reasonable time after he knew or ought to have known of the breach.

10. Similarly, if the seller intends to declare the contract avoided on the grounds that he requested performance under article 44 and the buyer did not perform within the additional period of time specified in the request, the seller loses the right to declare the contract avoided if the price has been paid and the seller has not declared the contract avoided within a reasonable time after the expiration of the additional time or within a reasonable time after the buyer has declared that he will not comply with the request.

11. Since the seller does not lose his right to declare the contract avoided under article 45 (2) until the total price is paid, under this provision all the instalments in an instalment contract must be paid before the seller loses the right to declare the contract avoided. However, under article 48 (1) the seller's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the buyer which justifies the declaration of avoidance.

*Right to avoid prior to the date for performance*

12. For the seller's right to avoid prior to the contract date of performance, see articles 47 (3), 48 and 49 and the commentaries thereon.

*Effects of avoidance*

13. The effects of avoidance by the seller are described in articles 51 and 54. The most significant consequence of avoidance for the seller is that he is no longer required to deliver the goods and he may claim their return if they have already been delivered.

14. Avoidance of the contract does not terminate either the buyer's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>68</sup> Such a provision is important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, which usually means arbitration clauses, terminate with the rest of the contract.

*Article 46*

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

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

## PRIOR UNIFORM LAW

ULIS, article 67.

*Commentary*

1. Article 46 describes the seller's rights where the buyer fails to specify some aspect or quality of the goods ordered by the date on which he was obligated to do so.

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

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

*Seller's remedies, paragraph (1)*

4. Article 46 rejects any suggestion that the contract is not complete until the buyer has notified the seller of the specification or that the buyer's notification

<sup>68</sup> Article 51 (1).

of the specification is a condition to seller's right to deliver the goods and demand payment of the price.

5. Article 46 (1) authorizes the seller, at his choice, to provide the specification himself or to exercise any other rights he may have under the contract and this convention for the buyer's breach. Of course, the buyer's failure to make the specification would constitute a breach of the contract only if the buyer was obligated to do so, not if he was merely authorized to do so.

6. If the buyer's failure to make the specification constituted a breach of contract, the seller could pursue his remedies for that breach in place of or in addition to making the specification himself under article 46. Therefore, the seller could (1) sue for damages under article 42 (1) (b), (2) if the buyer's failure to make the required specification amounted to a fundamental breach of contract, avoid the contract under article 45 (1) (a) and sue for any damages,<sup>69</sup> or (3) request the buyer to perform his obligation pursuant to article 44. If, pursuant to article 44 the seller requests the buyer to perform within an additional period of time of reasonable length by making the specification and the buyer does not do so within this additional time the seller could avoid the contract under article 45 (1) (b) and sue for any damages even if the buyer's failure to make the specification did not constitute a fundamental breach of contract.

7. If the seller chooses to exercise his right to make the specification himself pursuant to article 46 (1), he may do so immediately upon the passage of the date expressly or impliedly agreed upon in the contract as the date by which the buyer would make the specification. Alternatively, the seller may request the specification from the buyer, in which case the seller must await a reasonable time after the buyer has received the request from the seller before he can make the specification himself.<sup>70</sup>

*Notice to the buyer, paragraph (2)*

8. The seller must inform the buyer of the details of the specification which the seller has made pursuant to paragraph (1). He must fix a reasonable period of time during which the buyer may submit a different specification. "If the buyer fails to do so, the specification made by the seller is binding."

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

SECTION I. ANTICIPATORY BREACH

*Article 47\**

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness of the other party or his conduct is preparing to perform or in actually performing the contract gives grounds to con-

clude that the other party will not perform a substantial part of his obligations.

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

(3) A party suspending performance whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance. If the other party fails to provide such assurance within a reasonable time after he has received the notice, the party who suspended performance may avoid the contract.

PRIOR UNIFORM LAW

ULIS, article 73.

*Commentary*

1. Article 47 describes the extent to which a party may suspend the performance of his obligations because of the existence of reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

*Right to suspend performance, paragraph (1)*

2. Paragraph (1) provides that a party may suspend the performance of his obligations if it is reasonable to do so because after the conclusion of the contract a serious deterioration of the other party's ability or willingness to perform "gives grounds to conclude that the other party will not perform a substantial part of his obligations". The deterioration in ability or willingness must have taken place after the conclusion of the contract. If at the time of the conclusion of the contract a party's ability or willingness to perform was already in doubt, the other party may not later rely on that doubt as a basis for suspending the performance of his own obligations under the contract. This is true even though the other party learned of the circumstances which lead to the doubts only after the conclusion of the contract.<sup>71</sup>

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

4. The circumstances which justify suspension may relate to general conditions so long as those general conditions affect the other party's ability to perform. For

\* Brazil reserved its position in respect of article 47 (2) and Mexico reserved its position in respect of article 47 (3).  
<sup>69</sup> Article 51 (1) preserves the right to sue for damages even though the contract has been avoided.

<sup>70</sup> It should be noted that the request for specification here is pursuant to article 46 (1) and not pursuant to article 44 as discussed in para. 6 *supra*.

<sup>71</sup> There may be a remedy under the applicable national law of contracts for a party who entered into a contract not knowing relevant facts as to the other party's ability to perform.

example, the outbreak of war or the imposition of an export embargo may give reasonable grounds to conclude that the party from that country will not be able to perform his obligations.

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

6. These rules are illustrated by the following examples:

*Example 47A:* Buyer fell behind in his payments to Seller in respect of other contracts. Even though the late payments were in respect of other contracts, such late payments might indicate a serious deterioration in Buyer's creditworthiness authorizing Seller to suspend performance.

*Example 47B:* Buyer contracted for precision parts which he intended to use immediately upon delivery. He discovered that, although there had been no deterioration in Seller's ability to manufacture and deliver parts of the quality required, defective deliveries were being made to other buyers with similar needs. These facts alone do not authorize Buyer to suspend his performance. However, if the cause of Seller's defective deliveries to other buyers was the result of using a raw material from a particular source, Seller's conduct in preparing to use the raw material from the same source would give Buyer reasonable grounds to conclude that Seller would deliver defective goods to him also.

7. It should be noted that in certain circumstances the form of the contract may preclude a party from requiring adequate assurances of performance even though the party has reasonable grounds to conclude that the other party will not perform. For example, if payment is to be made by means of a letter of credit, the issuer of the credit is required to pay a draft drawn on it if accompanied by the proper documents even though the buyer has reasonable grounds to believe that the goods are seriously defective. Similarly, it would appear that where the buyer has assumed the risk of payment before inspection of the goods, as in a contract of sale on CIF or similar cash against documents terms, that risk is not to be evaded by a demand for assurance.

8. If the criteria discussed in paragraphs 2 to 4 above are met, the party "may suspend the performance of his obligation". A party who is authorized to suspend performance is freed both from the obligation to render performance to the other party and from the obligation to prepare to perform.<sup>72</sup> He is not obligated to incur additional expenses for which it is reasonable to assume he will never be compensated.

9. If an obligation is suspended for a period of time and then reinstated pursuant to article 47 (3), the date required for performance will be extended for

<sup>72</sup> The conditions under which the party who is authorized to suspend the performance of his obligations may avoid the contract are discussed in paras. 13 and 14 *infra*.

the period of the suspension. This principle is illustrated by the following examples:

*Example 47C:* Under the contract of sale, Seller was required to deliver the goods on 1 July. Because of reasonable doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods. Seller must now deliver the goods by 15 July.

*Stoppage in transit, paragraph (2)*

10. Paragraph (2) continues the policy of paragraph (1) in favour of a seller who has already shipped the goods. If the deterioration of the buyer's creditworthiness gives the seller reasonable grounds to conclude that the buyer will not pay for the goods, the seller has the right as against the buyer to order the carrier not to hand over the goods to the buyer even though the buyer holds a document which entitles him to obtain them, e.g., an ocean bill of lading, and even if the goods were originally sold on terms granting the buyer credit after receipt of the goods.

11. The seller loses his right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith.

12. Since this convention governs the rights in the goods only between the buyer and the seller,<sup>73</sup> the question whether the carrier must or is permitted to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question.<sup>74</sup>

*Notice, adequate assurances of performance, and avoidance, paragraph (3)*

13. Paragraph (3) provides that the party suspending performance pursuant to paragraph (1) or stopping the goods in transit pursuant to paragraph (2) must immediately notify the other party of that fact. The other party can reinstate the first party's obligation to continue performance by giving the first party adequate assurance that he will perform. For such an assurance to be "adequate", it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performance. If such assurances are not forthcoming within a reasonable period of time after receipt of the notice, the first party may avoid the contract.

*Example 47D:* The contract of sale provided that Buyer would pay for the goods 30 days after their arrival at Buyer's place of business. After the conclusion of the contract Seller received information which gave him reasonable grounds to doubt Buyer's creditworthiness. After he suspended performance and so notified Buyer, Buyer offered either (1) a new payment term so that he would pay against documents, or (2) a letter of credit issued by a reputable bank, or (3) a guarantee by a reputable bank or other such party that

<sup>73</sup> Article 47 (2) expressly states that it relates only to the rights in goods as between the buyer and the seller. This reflects the general principles expressed in article 7.

<sup>74</sup> The rules governing the carrier's obligation to follow the consignor's orders to withhold delivery from the consignee differ between modes of transportation and between various international conventions and national laws.

it would pay if Buyer did not, or (4) a security interest in sufficient goods owned by Buyer to assure Seller of reimbursement. Since any one of these four alternatives would probably give Seller adequate assurances of being paid,<sup>75</sup> Seller would be required to continue performance.

*Example 47E:* The contract of sale called for the delivery of precision parts for Buyer to use in assembling a high technology machine. Seller's failure to deliver goods of the requisite quality on the delivery date would cause great financial loss to Buyer. Although Buyer could have the parts manufactured by other firms, it would take a minimum of six months from the time a contract was signed for any other firm to be able to deliver substitute parts. The contract provided that Buyer was to make periodic advance payments of the purchase price during the period of time Seller was manufacturing the goods.

When Buyer received information giving him reasonable grounds to conclude that Seller would not be able to deliver on time, Buyer notified Seller that he was suspending any performance due the Seller. Seller gave Buyer written assurances that he would deliver goods of the contract quality on time and offered a bank guarantee for financial reimbursement of all payments made under the contract if he failed to meet his obligations.

In this case Seller has not given adequate assurance of performance. Seller's statements that he would perform, unless accompanied by sufficient explanations of the information which caused Buyer to conclude that Seller would not deliver on time, were only a reiteration of his contractual obligation. The offer of a bank guarantee of reimbursement of payments under the contract was not an adequate assurance to a Buyer who needs the goods at the contract date in order to meet his own needs. Therefore, having failed to receive adequate assurances from Seller, Buyer can avoid the contract and purchase the goods elsewhere.

14. Article 51 (1) preserves the right of a party who avoids the contract pursuant to article 47 (3) to claim any damages which may occur from the breach of contract. For example, if the buyer in example 47E purchased substitute goods elsewhere at a higher price, he can recover the difference between his repurchase price and the contract price.<sup>76</sup> If the assurances furnished by the seller were in fact not adequate, these damages can be recovered even though it turns out that at the time performance was due under the original contract the seller could have performed.

#### Article 48

(1) If, in the case of a contract for delivery of goods by instalments, the failure of one party to perform any of his obligations in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

<sup>75</sup> The offer of a security interest would be an adequate assurance only if the national law in question allowed such interests and provided a procedure on default which was adequate to assure the creditor prompt reimbursement of his claim.

<sup>76</sup> Article 56 (1).

(2) A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of deliveries already made if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract.

PRIOR UNIFORM LAW

ULIS, article 75.

#### Commentary

1. Article 48 describes the right to avoid the contract in respect of past or future deliveries where the contract calls for the delivery of goods by instalments.

2. The contract calls for the delivery by instalments if it requires or authorizes the delivery of goods in separate lots.

#### *Failure to perform in respect of one instalment, paragraph (1)*

3. Paragraph (1) considers the situation where the failure of one party to perform any of his obligations under the contract in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments. In such a case he may declare the contract avoided for the future, provided only that he declares the avoidance of the future performance within a reasonable time of the failure to perform. It should be noted that article 48 (1) permits the avoidance of the contract in respect of future performance of an instalment contract without the necessity of awaiting the possibility that the party in breach will be able to provide adequate assurances of future performance, as is required by article 47 (1) in respect of most other contracts.<sup>77</sup>

4. It should be noted that the test of the right to avoid under article 48 (1) is whether a failure to perform in respect of an instalment gives the other party good reason to fear that there will be a fundamental breach in respect of future instalments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear.

#### *Avoidance of past deliveries, paragraph (2)*

5. In some contracts it will be the case that none of the deliveries can be used for the purpose contemplated by the parties to the contract unless all of the deliveries can be so used. This would be true, for example, of the sale of a large machine which is delivered in segments to be assembled at the buyer's place. Therefore, paragraph (2) provides that a buyer who avoids the contract in respect of future deliveries, may also avoid in respect of deliveries already made "if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract". The declaration of avoidance of past deliveries must take place at the same time as the declaration of avoidance of future deliveries.

<sup>77</sup> For another situation in which a party can avoid the contract as to future performance without awaiting the possibility of the provision of adequate assurances of performance, see article 49.

*Avoidance in instalment contracts under other provisions*

6. There are several fact situations in respect of instalment contracts in which the right to avoid is governed by other provisions of this convention.

7. If the failure by one party in respect of an instalment was so serious that it alone would constitute a fundamental breach of the entire contract, whether or not such failure gave good reason to fear any breach as to future instalments, the other party could avoid the entire contract under article 30 (1) (a) or 45 (1) (a), as the case may be.

8. Similarly, under articles 30 (1) (a) and 32 the buyer could avoid the contract as to a single instalment if the performance of the seller in respect of that instalment was such as to constitute a fundamental breach as to that instalment even though the breach was neither such as to constitute a fundamental breach of the entire contract nor one which gave good reason to fear a fundamental breach in respect of any future instalment.

*Example 48A:* The contract called for the delivery of 1,000 tons of No. 1 grade corn in 10 separate instalments. When the fifth instalment was delivered, it was unfit for human consumption. Even if in the context of the entire contract one such delivery would not constitute a fundamental breach of the entire contract and even if this one defective delivery gave no reason to anticipate any future defective deliveries, the buyer could avoid the contract in respect of the fifth instalment under articles 30 (1) (a) and 32.

*Article 49*

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

## PRIOR UNIFORM LAW

## ULIS, article 76.

*Commentary*

1. Article 49 provides for the special case where prior to the date for performance it is clear that one of the parties will commit a fundamental breach. In such a case the other party may declare the contract avoided immediately.

2. The future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance.<sup>78</sup>

3. Article 49 should be contrasted with article 47. Under article 47, where the existence of certain enumerated conditions "gives grounds to conclude that [one] party will not perform a substantial part of his obligations", the other party may suspend the performance of his own obligations if it is reasonable to do so. He must notify the first party of the suspension and

<sup>78</sup> Even though the imposition of an embargo or monetary controls which renders future performance impossible justifies the other party's avoidance of the contract under article 49, the non-performing party may be excused from damages by virtue of article 50.

wait for a reasonable period of time for the possibility that adequate assurances of performance will be provided. He may avoid the contract if such assurances are not provided within that period.

4. The difference between the two articles rests on the fact that under article 47 the party who acts to protect himself against the other party's future breach need have only "grounds to conclude" that the other party will breach. Under those circumstances it is necessary that the other party be given the opportunity to give adequate assurances that he will not breach the contract. However, if it is clear that the other party will commit a fundamental breach of the contract in the future, there is no reason to require the procedure envisaged by article 47.

5. A party who intends to declare the contract avoided pursuant to article 49 should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation was not "clear" and, since there was no authorization to avoid the contract, the declaration of avoidance would itself be void. Therefore, the party who attempted to avoid would be in breach of the contract for his own failure to perform. If there is any doubt whether a fundamental breach of contract will occur, the party who intends to declare the contract avoided should, if it is possible, proceed under article 47.<sup>79</sup>

6. Where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 59 may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance.<sup>80</sup>

## SECTION II. EXEMPTIONS

*Article 50\**

(1) If a party has not performed one of his obligations, he is not liable in damages for such non-performance if he proves that it was due to an impediment which has occurred without fault on his part. For this purpose there is deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take into account or to avoid or to overcome the impediment.

(2) If the non-performance of the seller is due to non-performance by a subcontractor, the seller is exempt from liability only if he is exempt under the provisions of paragraph (1) of this article and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment existed.

(4) The non-performing party must notify the other party of the impediment and its effect on his ability to perform. If he fails to do so within a reason-

\* The United States and the United Kingdom of Great Britain and Northern Ireland expressed reservations in respect of article 50 (3).

<sup>79</sup> Article 47 can be used only if the criteria discussed in paras. 2 to 5 of the commentary on that article are met.

<sup>80</sup> See para. 4 of the commentary on article 59 and examples 59A and 59B.

able time after he knew or ought to have known of the impediment, he is liable for the damage resulting from this failure.

#### PRIOR UNIFORM LAW

ULIS, article 74.

#### Commentary

1. Article 50 governs the liability in damages of a party who has not performed one of his obligations where such non-performance was due to an impediment which has occurred without fault on his part.

#### General rule, paragraph (1)

2. Paragraph (1) specifies that a party is not liable in damages for not performing one of his obligations "if he proves that [the non-performance] was due to an impediment which occurred without fault on his part". The second sentence goes on to state that "unless the non-performing party proves that he could not reasonably have been expected to take the impediment into account or to avoid or to overcome the impediment", there is deemed to be fault on his part.

3. The impediment to performance must have occurred after the conclusion of the contract in order for the non-performing party to be exonerated by articles 50 (1). However, if at the time of the conclusion of the contract there was an existing impediment to performance, the national law applicable to the formation or the validity of the contract may provide either that no contract was concluded or that it was invalid by reason of the mistake or fraud of the parties.<sup>81</sup>

4. Paragraph (1) combines the requirement that there was an objective impediment to the performance of the obligation and that there was no fault on the part of the non-performing party. Fault will be deemed to exist unless the non-performing party proves: first, that he could not reasonably have been expected to take the impediment into account; second, that he could not avoid the impediment; and third, that he could not overcome the impediment. If he fails to prove any one of the three, fault will be deemed to exist and he will not be exonerated from damages for the non-performance.

5. The most difficult to evaluate of the three points which the non-performing party must prove is that he could not reasonably have been expected to take the impediment into account at the time he undertook the obligation in the contract. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future. Frequently, the parties to the contract have envisaged the possibility of the impediment which did occur. Sometimes they have explicitly stated whether the occurrence of the impending event would exonerate the non-performing party from the consequences of the non-performance. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even

though certain impediments might arise. In either of these two classes of cases, article 5 of the present convention assures the enforceability of such explicit or implicit contractual stipulations.

6. However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of undertaking the obligation. In the final analysis this determination can only be made by a court or arbitration tribunal on a case-by-case basis.

7. Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of contracting, he must also prove that he could neither have avoided the impediment nor overcome it. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was rendered impossible.

8. Article 50 (1) only exonerates the non-performing party from liability for damages. All of the other remedies are available to the other party, i.e. demand for performance, reduction of the price or avoidance of the contract. However, if the party who is required to overcome an impediment does so by furnishing a commercially reasonable substitute, the other party could not avoid the contract and thereby reject the substitute performance on the grounds that there was a fundamental breach of contract.

*Example 50A:* The contract called for the delivery of specific goods. Prior to the time when the risk of loss would have passed pursuant to article 65 or 66 the goods were destroyed by a fire for which Seller was not responsible. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.

*Example 50B:* The contract called for the delivery of 500 machine tools Ex Ship Liverpool. At the time the tools were being loaded on the ship the crate in which they were packaged was dropped and the tools were destroyed. In such a case the Seller would not only have to bear the loss of the 500 tools but he would also be obligated to ship to the Buyer an additional 500 tools. The difference between this example and example 50A is that in example 50A the Seller cannot provide that which was contracted for whereas under example 50B the Seller can overcome the effect of the destruction of the tools by shipping replacement goods.

*Example 50C:* If the machine tools shipped in replacement of those destroyed in example 50B could not arrive in time, the Seller would be exempted from damages for late delivery.

*Example 50D:* The contract called for the goods to be packed in plastic containers. At the time the packing should have been accomplished, plastic containers were not available for reasons which Seller could not have

<sup>81</sup> See articles 5 to 10 of the Draft of a Law for the Unification of Certain Rules Relating to Validity of Contracts of International Sale of Goods, prepared by the International Institute for the Unification of Private Law (UNIDROIT).

avoided. However, if other commercially reasonable packing materials were available, Seller must overcome the impediment by using those materials rather than refuse to deliver the goods. If the Seller used commercially reasonable substitute packing materials, he would not be liable for damages and the Buyer could not avoid the contract but the Buyer could reduce the price under article 31 if the value of the goods had been diminished because of the non-conforming packing materials.

*Example 50E:* The contract called for shipment on a particular vessel. Due to no fault of Buyer or Seller, the schedule for the vessel was revised and it did not call at the port indicated within the shipment period. In this circumstance the party responsible for arranging the carriage of the goods must attempt to overcome the impediment by providing an alternative vessel.

*Non-performance by subcontractor, paragraph (2)*

9. It often happens that the non-performance of the seller is due to the non-performance of one of his subcontractors. Paragraph (2) provides that where this is the case, "the seller is exempt from liability only if he is exempt [himself] under the provisions of paragraph (1) of this article and if the subcontractor would be so exempt if the provisions of that paragraph were applied to him".

*Temporary impediment, paragraph (3)*

10. Paragraph (3) provides that an impediment which prevents a party from performing for only a temporary period of time exempts the non-performing party from liability for damages only for the period during which the impediment existed. Therefore, the date at which the exemption from damages terminates is the contract date for performance or the date on which the impediment was removed, whichever is later in time.

*Example 50F:* The goods were to be delivered on 1 February. On 1 January an impediment arose which precluded the Seller from delivering the goods. The impediment was removed on 1 March. The Seller delivered on 15 March.

The Seller is exempted from any damages which may have occurred because of the delay in delivery up to 1 March, the date on which the impediment was removed. However, since the impediment was removed after the contract date for delivery, the Seller is liable for any damages which occurred as a result of the delay in delivery between 1 March and 15 March.

11. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence<sup>82</sup> and the removal of the impediment reinstates the obligations of both parties under the contract.

*Example 50G:* Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1) until the plant was rebuilt. Seller's plant was rebuilt in

<sup>82</sup> See para. 2 of the commentary on article 30 and para. 2 of the commentary on article 45.

two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and Buyer was obligated to take delivery and to pay the contract price.<sup>83</sup>

*Duty to notify, paragraph (4)*

12. The non-performing party who is exempted from damages by reason of the existence of an impediment to the performance of his obligation must notify the other party of the impediment and its effect on his ability to perform. Failure to give the notice within a reasonable time after the non-performing party knows or ought to have known of the impediment gives rise to damages resulting from the failure to give notice. It should be noted that the damages for which the non-performing party is liable are only those arising out of the failure to give notice and not those arising out of the non-performance.

13. The duty to notify extends not only to the situation in which a party cannot perform at all because of the unforeseen impediment, but also to the situation in which he intends to perform by furnishing a commercially reasonable substitute. Therefore, the seller in example 50D and the party responsible for arranging the carriage of the goods in example 50E must notify the other party of the intended substitute performance. If he does not do so, he will be liable for any damages resulting from the failure to give notice.

SECTION III. EFFECTS OF AVOIDANCE

*Article 51*

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect provisions for the settlement of disputes.

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

PRIOR UNIFORM LAW

ULIS, article 78.

*Commentary*

1. Article 51 sets forth the consequences which follow from a declaration of avoidance. Articles 52 to 54 give detailed rules for implementing certain aspects of article 51.

*Effect of avoidance, paragraph (1)*

2. The primary effect on the avoidance of the contract by one party is that both parties are released from their obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

3. Partial avoidance of the contract under article 32 or 48 releases both parties from their obligations as

<sup>83</sup> Seller would have no right to insist that Buyer take the goods if the delay constituted a fundamental breach of contract even if Buyer had not declared the avoidance of the contract (article 29 (1)).

to the part of the contract which has been avoided and gives rise to restitution under paragraph (2) as to that part.

4. In some legal systems avoidance of the contract eliminates all rights and obligations which arose out of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration, choice of law, choice of forum, and clauses excluding liability or specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

5. Paragraph (1) provides a mechanism to avoid this result by specifying that the avoidance of the contract is "subject to any damages which may be due" and that it "does not affect provisions for the settlement of disputes". It should be noted that article 51 (1) would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law. Article 51 (1) only states that such a provision is not terminated by the avoidance of the contract.

6. The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the avoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this convention. For example, article 61 (1) provides that "if the goods have been received by the buyer, and if he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them" and article 51 (2) permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself<sup>84</sup> or may arise out of the necessities of justice.

#### *Restitution, paragraph (2)*

7. It will often be the case that at the time the contract is avoided, one or both of the parties will have performed all or part of his obligations. Sometimes the parties can agree on a formula for adjusting the price to the deliveries already made. However, it may also occur that one or both parties desires the return of that which he has already supplied or paid under the contract.

8. Paragraph (2) authorizes either party to the contract who has performed in whole or in part to claim the return of whatever he has supplied or paid under the contract. Subject to article 52 (2), the party who makes demand for restitution must also make restitution of that which he has received from the other party. "If both parties are required to make restitution, they must do so concurrently", unless the parties agree otherwise.

9. Paragraph (2) differs from the rule in some countries that only the party who is authorized to avoid the contract can make demand for restitution. Instead, it incorporates the idea that, as regards restitution, the avoidance of the contract undermines the basis on which either party can retain that which he has received from the other party.

<sup>84</sup> Article 5.

10. It should be noted that the right of either party to require restitution as recognized by article 51 may be thwarted by other rules which fall outside the scope of the international sale of goods. If either party is in bankruptcy or other insolvency procedures, it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets. Exchange control laws or other restrictions on the transfer of goods or funds may prevent the transfer of the goods or money to the demanding party in a foreign country. These and other similar legal rules may reduce the value of the claim of restitution. However, they do not affect the validity of the rights between the parties.

11. The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 59 of the party who relies on the breach of the contract to "adopt such measures as are reasonable in the circumstances to mitigate the loss" may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market if such resale would adequately protect the seller at a lower net cost.<sup>85</sup>

#### *Article 52*

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act of the buyer; or

(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or

(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

#### PRIOR UNIFORM LAW

ULIS, article 79.

#### *Commentary*

*Loss of right by buyer to avoid or require substitute goods, paragraph (1)*

1. Article 52 states that "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

<sup>85</sup> Cf. article 63 on the authority of one party who holds goods for the account of the other party to sell the goods for the account of the other party.

2. The rule in paragraph (1) recognizes that the natural consequences of the avoidance of the contract or the delivery of substitute goods is the restitution of that which has already been delivered under the contract. Therefore, if the buyer cannot return the goods, or cannot return them substantially in the condition in which he received them, he loses his right to declare the contract avoided under article 30 or to require the delivery of substitute goods under article 27 (1).

3. It is not necessary that the goods be in the identical condition in which they were received; they need be only in "substantially" the same condition. Although the term "substantially" is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract.<sup>86</sup>

*Exceptions, paragraph (2)*

4. Paragraph (2) states three exceptions to the above rule. The buyer should be able to avoid the contract or require substitute goods even though he cannot make restitution of the goods substantially in the condition in which he received them (1) if the impossibility of doing so is not due to his own act, (2) if the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 22 or 23, if part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

5. A fourth exception to the rule stated in article 52 (1) is to be found in article 67 which states that if the seller has committed a fundamental breach of contract, the passage of the risk of loss under article 65 or 66 does not impair the remedies available to the buyer on account of such breach.<sup>87</sup>

*Article 53*

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 52 retains all other remedies.

PRIOR UNIFORM LAW

ULIS, article 80.

*Commentary*

Article 53 makes it clear that the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods because he cannot return the goods substantially in the condition in which he received them does not deprive the buyer of the right to claim damages under article 26 (1) (b), to require that any defects be cured under article 27, or to declare the reduction of the price under article 31.

<sup>86</sup> The buyer can declare the avoidance of the contract under article 30 or require the delivery of substitute goods under article 27 (2) only if the seller is in fundamental breach of the contract.

<sup>87</sup> See para. 2 of the commentary on article 67.

*Article 54*

(1) If the seller is required to refund the price, he must also pay interest thereon, at the rate fixed in accordance with article 58, as from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them;

(a) If he must make restitution of the goods or part of them; or

(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided, or required the seller to deliver substitute goods.

PRIOR UNIFORM LAW

ULIS, article 81.

*Commentary*

1. Article 54 reflects the principle that a party who is required to refund the price or return the goods because the contract has been avoided or because of a request for the delivery of substitute goods must account for any benefit which he has received by virtue of having had possession of the money or goods. Where the obligation arises because of the avoidance of the contract, it is irrelevant which party's failure gave rise to the avoidance of the contract or who demanded restitution.<sup>88</sup>

2. Where the seller is under an obligation to refund the price, he must pay interest from the date of payment to the date of refund at the interest rate fixed by article 58. The obligation to pay interest is automatic because it is assumed that the seller has benefited from being in possession of the purchase price during this period.

3. Where the buyer must return the goods, it is less obvious that he has benefited from having had possession of the goods. Therefore, paragraph (2) specifies that the buyer is liable to the seller for all benefits which he has derived from the goods only if (1) he is under an obligation to return them or (2) it is impossible for him to make restitution of the goods or part of them but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

SECTION IV. DAMAGES

*Article 55*

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

<sup>88</sup> See article 51 (2) and para. 9 of the commentary thereon.

## PRIOR UNIFORM LAW

## ULIS, article 82.

*Commentary*

1. Article 55 introduces the section containing the rules on damages in case of a claim under article 26 (1) (b) or article 42 (1) (b) by setting forth the basic rule for the calculation of those damages. Articles 56 and 57 provide alternative means of calculating the damages in certain situations at the discretion of the injured party while articles 58 and 59 provide supplementary provisions in respect of damages.

*Basic damages*

2. Article 55 provides that the injured party may recover as damages "a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach". This makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed. The specific reference to the loss of profit is necessary because in some legal systems the concept of "loss" standing alone does not include loss of profit.

3. Since article 55 is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damage ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in article 55 describing the appropriate method of determining "the loss . . . suffered . . . as a consequence of the breach". The court or arbitration tribunal must calculate that loss in the manner which is best suited to the circumstances. The following paragraphs discuss two common situations which might arise under article 55 and suggest means of calculating "the loss . . . suffered . . . as a consequence of the breach".

4. Where the breach consists of a refusal of the buyer to take delivery and pay for the goods, article 55 would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had made in the performance of the contract.<sup>89</sup> The profit lost because of the buyer's breach includes any contribution to overhead which would have resulted from the performance of the contract.

*Example 55A:* The contract provided for the sale of 100 machine tools for \$50,000 FOB. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of \$45,000 of which \$40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and \$5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated the contract, Seller did not expend the \$40,000 in costs which would have been incurred by reason of the existence of this contract. However, the \$5,000 of overhead which were allocated to this contract were for expenses of the business which were

<sup>89</sup> At his discretion in this situation the seller might choose to proceed under article 56 or 57.

not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of the Buyer's breach the Seller has lost the allocation of \$5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is \$10,000.

	\$
Contract price . . . . .	50,000
Expenses of performance which could be saved . . . . .	40,000
Loss arising out of breach . . . . .	<u>10,000</u>

*Example 55B:* If, prior to Buyer's repudiation of the contract in example 55A, Seller had already incurred \$15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal \$25,000.

*Example 55C:* If the product of the part performance in example 55B could be sold as salvage to a third party for \$5,000, Seller's loss would be reduced to \$20,000.

5. Where the seller delivers and the buyer retains defective goods,<sup>90</sup> the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the value of any production lost during the period the tools could not be used.

6. If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract as measured at the place the seller delivered the goods on the date the buyer declared the contract avoided.<sup>91</sup> Since this formula is intended to restore him to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages. To the amount as calculated above there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach.<sup>92</sup>

*Example 55D:* The contract provided for the sale of 100 tons of grain for a total price of \$50,000 FOB. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to the Buyer of drying the grain was \$1,500. If the grain had been as contracted its value at the place the Seller delivered the goods as determined on the day the Buyer declared the contract

<sup>90</sup> If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract and measure his damages under article 56 or 57.

<sup>91</sup> Article 55 gives no indication of the time and place at which "the loss" to the injured party should be measured. Presumably it should be at the same time and place specified in article 57. See paras. 2 to 7 of the commentary on article 57.

<sup>92</sup> These additional elements of the buyer's damages will often be limited by the requirement of foreseeability discussed in para. 7 *infra*.

avoided would have been \$55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only \$51,000.

	\$
Contract price .....	<u>50,000</u>
Value the grain would have had if as contracted .....	55,000
Value of grain as delivered .....	<u>51,000</u>
	4,000
Extra expenses of drying the grain	1,500
	<u>5,500</u>

#### Foreseeability

7. The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can be recovered by the party not in breach "cannot exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract". Should a party at the time of conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

8. In some legal systems the limitation of damages to those "which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract" is not applicable if the non-performance of the contract was due to the fraud of the non-performing party. However, no such rule exists in this convention.

#### Article 56\*

(1) If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 57, recover the difference between the contract price and the price in the substitute transaction.

(2) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied.

#### PRIOR UNIFORM LAW

ULIS, article 85.

#### Commentary

1. Article 56 sets forth a means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.

#### Basic formula, paragraph (1)

2. In such a case the injured party may, at his discretion, "recover the difference between the contract price and the price in the substitute transaction", i.e. the price paid for the goods bought in replacement or that obtained in the resale.

\* Austria expressed a reservation in respect of this article.

3. If the contract has been avoided, the formula contained in this article will most often be the one used to calculate the damages owed the injured party since, in most commercial situations, a substitute transaction will have taken place. If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs (such as increased transportation) less any expenses saved as a consequence of the breach.

4. Even if there has been a substitute transaction, the injured party may require that the damages be calculated under article 55 or 57.

5. Article 56 provides that the injured party can rely on the price paid for the goods bought in replacement or that obtained by the resale only if the resale or cover purchase were made "in a reasonable manner and within a reasonable time after avoidance". If the resale or cover purchase were not made in such time and manner, the injured party must rely on article 55 or 57 for the calculation of the damages.

#### Additional damages, paragraph (2)

6. Paragraph (2) recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the formula in paragraph (1). In such a case the additional losses may be recovered under article 56 (2) if those additional losses were foreseeable at the time of the conclusion of the contract, as is required by article 55.

#### Article 57\*

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 56, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

(2) In calculating the amount of damages under paragraph (1) of this article, the current price to be taken into account is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

(3) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied.

#### PRIOR UNIFORM LAW

ULIS, article 84.

#### Commentary

1. Article 57 sets forth an alternative means of measuring damages where the contract has been avoided.

#### Basic formula, paragraphs (1) and (2)

2. Where the contract has been avoided, both parties are released from any future performance of their obligations<sup>93</sup> and restitution of that which has already

\* Austria and Ghana expressed reservations in respect of this article.

<sup>93</sup> Article 51 (1).

been delivered may be required.<sup>94</sup> Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price as is provided under article 56.

3. Article 57 permits the use of such a formula even though no resale or repurchase took place in fact or where it is impossible to determine which was the resale or repurchase contract in replacement of the contract which was breached.<sup>95</sup> However, the use of article 57 is not restricted to these situations but may be applied at the option of the injured party any time the contract has been avoided and there is a current price for the goods.

4. The price to be used in the calculation of damages under article 57 is the current price on the date on which the contract was avoided prevailing at the place where delivery of the goods should have been made.

5. The place where delivery should have been made is determined by the application of article 15. In particular, where the contract of sale involves carriage of the goods, delivery is made at the place the goods are handed over to the first carrier for transmission to the buyer whereas in destination contracts delivery is made at the named destination.

6. The "current price" is that for goods of the contract description in the contract amount. Although the concept of a "current price" does not require the existence of official or unofficial market quotations, the lack of such quotations raises the question whether there is a "current price" for the goods.

7. "If there is no such current price" at the place where delivery of the goods should have been made, "the price" [to be used is that] "at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods".

*Additional damages, paragraph (3)*

8. Paragraph (3) recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the formulas in paragraphs (1) and (2). In such a case the additional losses may be recovered under article 57 (3) if those additional losses were foreseeable at the time of the conclusion of the contract, as is required by article 55.

*Example 57A:* The contract price was \$50,000 CIF. The Seller avoided the contract because of the Buyer's fundamental breach. The current price on the date on which the contract was avoided for goods of the con-

<sup>94</sup> Article 51 (2). If the contract calls for delivery by instalments, article 48 (2) allows avoidance of the contract and a demand for restitution in respect of deliveries already made only "if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract".

<sup>95</sup> If the seller has a finite supply of the goods in question or the buyer has a finite need for such goods, it may be clear that the seller has resold or that the buyer has made a cover purchase, as the case may be. However, if the injured party is constantly in the market for goods of the type in question, it may be difficult or impossible to determine which of the many contracts of purchase or sale was the one in replacement of the contract which was breached. In such a case the use of article 56 may be impossible and article 57 may be particularly useful.

tract description at the place where the goods were to be handed over to the first carrier was \$45,000. The Seller's damages under article 57 were \$5,000.

*Example 57B:* The contract price was \$50,000 CIF. The Buyer avoided the contract because of the Seller's non-delivery of the goods. The current price on the date on which the contract was avoided for goods of the contract description at the place the goods were to be handed over to the first carrier was \$53,000. Buyer's extra expenses caused by the Seller's breach were \$2,500. The Buyer's damages under article 57 were \$5,500.

*Article 58\**

If the breach of contract consists of delay in the payment of the price, the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business, plus 1 per cent, but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business.

PRIOR UNIFORM LAW

ULIS, article 83.

OTHER UNCITRAL DRAFT CONVENTIONS

Draft uniform law on International Bills of Exchange and International Promissory Notes, articles 67 (A/CN.9/99, paras. 36 to 40).

*Commentary*

1. Article 58 states a rule for the calculation of the minimum amount of damages which may be recovered by the seller where the breach of contract consists of the buyer's delay in the payment of the price.<sup>96</sup> In such a case the seller is entitled to recover the higher of (1) the official discount rate in the country where the seller has his place of business plus 1 per cent or (2) the rate applied to unsecured short-term commercial credits in that country.

2. This rule of damages is an exception to the rule expressed in article 55 that the injured party recovers "a sum equal to the loss" in that the seller need not prove that the delay in payment caused him any loss. For the purpose of assessing damages, it is assumed that a party who is not paid at the time the debt is due loses a sum equivalent to the interest he would have had to pay if he had borrowed an amount equal to that which is in arrears. For that reason the interest due is measured in relation to the rate current in the country where the seller has his place of business. Where the seller has places of business in more than one State, article 6 (a) provides that the relevant place of business is the one which has the closest relationship to the contract and its performance.

3. The fact that the buyer will have to pay the official discount rate plus 1 per cent or the rate applied to unsecured short-term credit whichever is higher, assures that the buyer will have little or no incentive to delay payment in order to take advantage of an interest rate which is less than the rate at which he would have

\* Austria and Ghana expressed reservations in respect of this article.

<sup>96</sup> The same rule applies where the seller is under an obligation to refund the price pursuant to article 54 (1).

had to borrow. The existence of the two alternatives also assures that a formula for the calculation of interest will be available in those countries in which there is no official discount rate.

4. The interest rate formula set forth in article 58 is available to the seller "in any event". This makes it clear that pursuant to article 55 the seller can claim any other loss over and above the loss of interest if he can prove the loss was caused him by the delay in paying the price.

#### Article 59

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

#### PRIOR UNIFORM LAW

ULIS, article 88.

#### Commentary

1. Article 59 requires a party who relies on a breach of contract to adopt such measures as may be reasonable in the circumstances to mitigate the loss, including the loss of profit, resulting from the breach.

2. Article 59 is one of several articles which states a duty owed by the injured party to the party in breach.<sup>97</sup> In this case the duty owed is the obligation of the injured party to take actions to mitigate the harm he will suffer from the breach so as to mitigate the damages he will claim under article 26 (1) (b) or 42 (1) (b). "If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

3. It will be noted that article 59 applies only to the injured party's obligation to mitigate his own loss. It does not require him to choose the remedy which would be the least expensive to the party in breach or the formula for the calculation of damages under article 55, 56 or 57, which would result in the lowest amount of damages.<sup>98</sup> If two or more remedies or damage formulas are applicable to a breach of the contract, the injured party may choose the one most beneficial to himself. It should be noted, however, that the injured party can require the delivery of substitute goods or, in most cases, declare the avoidance of the contract with the consequential choice of damage formulas only if there has been a fundamental breach of the contract.<sup>99</sup>

4. The duty to mitigate applies to an anticipatory breach of contract under article 49 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach of the contract, the other party

<sup>97</sup> Under articles 60 to 63 the party in possession of goods has a duty under certain circumstances to preserve these goods and to sell them for the benefit of the party who has breached the contract, even though the risk of loss is on the party in breach.

<sup>98</sup> See para. 9 of the commentary on article 27.

<sup>99</sup> Articles 27 (2), 30 (1), 32, 45 (1), 47 (3), 48 and 49 provide for the delivery of substitute goods or the avoidance of the contract. A party who has avoided the contract can calculate his damage under article 55, 56 or 57 at his option.

cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise. The use of the procedure set forth in article 47, if applicable, would be a reasonable measure even though it may delay the avoidance of the contract and the cover purchase, resale of the goods or otherwise, beyond the date on which such actions would otherwise have been required.

*Example 59A:* The contract provided that Seller was to deliver 100 machine tools by 1 December at a total price of \$50,000. On 1 July he wrote Buyer and said that because of the rise in prices which would certainly continue for the rest of the year, he would not deliver the tools unless Buyer agreed to pay \$60,000. Buyer replied that he would insist that Seller deliver the tools at the contract price of \$50,000. On 1 July and for a reasonable time thereafter, the price at which Buyer could have contracted with a different seller for delivery on 1 December was \$56,000. On 1 December Buyer made a cover purchase for \$61,000 for delivery on 1 March. Because of the delay in receiving the tools, Buyer suffered additional losses of \$3,000.

In this example buyer is limited to recovering \$6,000 in damages, the extent of the losses he would have suffered if he had made the cover purchase on 1 July or a reasonable time thereafter, rather than \$14,000, the total amount of losses which he suffered by waiting 1 December to make the cover purchase.

*Example 59B:* Promptly after receiving Seller's letter of 1 July, in example 59A, pursuant to article 47 Buyer made demand on Seller for adequate assurances that he would perform the contract as specified on 1 December. Seller failed to furnish the assurances within the reasonable period of time specified by Buyer. Buyer promptly made a cover purchase at the currently prevailing price of \$57,000. In this case Buyer can recover \$7,000 in damages rather than \$6,000 as in example 59A.

#### SECTION V. PRESERVATION OF THE GOODS

#### Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

#### PRIOR UNIFORM LAW

ULIS, article 91.

#### Commentary

If the buyer is in delay in taking delivery of the goods and the seller is in physical possession of the goods or is in a position to control the disposition of the goods which are in the possession of a third person, it is appropriate that the seller be required to take reasonable steps to preserve the goods for the benefit of the buyer. It is also appropriate that the seller "may retain" [the goods] "until he has been reimbursed his reasonable expenses by the buyer", as is provided in article 60.

*Example 60A:* The contract provided that Buyer was to take delivery of the goods<sup>100</sup> at the Seller's warehouse during the month of October. Seller made delivery on 1 October by placing the goods at Buyer's disposal.<sup>101</sup> On 1 November, the day when Buyer was in breach of his obligation to take delivery and the day on which the risk of loss passed to the Buyer,<sup>102</sup> Seller shifted the goods to a portion of the warehouse which was less appropriate for the storage of such goods. On 15 November Buyer took delivery of the goods at which time the goods were damaged because of the inadequacies of the portion of the warehouse to which they had been shifted. In spite of the fact that the risk of loss had passed to Buyer on 1 November, Seller is liable for the damage to the goods which occurred between 1 November and 15 November by reason of the breach of his obligation to preserve them.

*Example 60B:* The contract called for delivery on CIF terms. Buyer wrongfully dishonoured the bill of exchange when it was presented to him. As a result, the bill of lading and other documents relating to the goods were not handed over to Buyer. Article 60 provides that in this case Seller, who is in a position to control the disposition of the goods through his possession of the bill of lading, is obligated to preserve the goods when they are discharged at the port of destination.<sup>103</sup>

#### Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been put at his disposal at the place of destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

PRIOR UNIFORM LAW

ULIS, article 92.

#### Commentary

1. Article 61 sets forth the buyer's obligation to preserve goods which he intends to reject.

2. Paragraph (1) provides that if the goods have been received by the buyer and he intends to reject them, he must take reasonable steps to preserve them. The buyer may retain those goods until he has been reimbursed his reasonable expenses by the seller.

3. Paragraph (2) provides for the same result where goods which have been dispatched to the buyer have been put at his disposal at their place of destination and he exercises his right to reject them.<sup>104</sup> How-

<sup>100</sup> The buyer's obligation to take delivery is set forth in article 41.

<sup>101</sup> See article 15 (b) and 15 (c).

<sup>102</sup> Article 66 (2).

<sup>103</sup> Compare example 61C.

<sup>104</sup> Para. (2) states that the buyer "must take possession of [the goods] on behalf of the seller". Once possession is taken, the obligation to preserve the goods arises out of para. (1).

ever, since the goods are not in the buyer's physical possession at the time he exercises his right to reject them, it is not as clear that he should be required to take possession of them on behalf of the seller. Therefore, paragraph (2) specifies that he need take possession only if "he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense" and only if the seller or a person authorized to take charge of the goods for him is not present at the place of destination.

4. Paragraph (2) is applicable only if goods which have been dispatched to the buyer "have been put at his disposal at the place of destination". Therefore, the buyer is obligated to take possession of the goods only if the goods have physically arrived at the place of destination prior to his rejection of them. He is not obligated to take possession of the goods under paragraph (2) if before the arrival of the goods he rejects the shipping documents because they indicate that the goods do not conform to the contract.

*Example 61A:* After the goods were received by the Buyer he rejected them because of their failure to conform to the contract. The Buyer is required by article 61 (1) to preserve the goods for the Seller.

*Example 61B:* The goods were shipped to the Buyer by railroad. Prior to taking possession, Buyer found on examination of the goods that there was a fundamental breach of the contract in respect of their quality. Even though Buyer has the right to avoid the contract under article 30 (1) (a) by virtue of article 61 (2) he is obligated to take possession of the goods and to preserve them, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense and provided that the Seller or a person authorized to take possession on his behalf is not present at the place of destination.

*Example 61C:* The contract provided for delivery on CIF terms. When the bill of exchange was presented to the Buyer, he dishonoured it because the accompanying documents were not in conformity with the contract of sale. In this example Buyer is not obligated to take possession of the goods for two reasons. If the goods have not arrived and been put at his disposal at the place of destination at the time the Buyer dishonours the bill of exchange, the provisions of article 61 (2) do not apply at all. Even if article 61 (2) were to apply, because the Buyer could take possession of the goods only by paying the bill of exchange, he would not be required by article 61 (2) to take possession and preserve the goods.<sup>105</sup>

#### Article 62

The party who is under an obligation to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

PRIOR UNIFORM LAW

ULIS, article 93.

#### Commentary

Article 62 permits a party who is under an obligation to take steps to preserve the goods to discharge his

<sup>105</sup> Compare example 60B.

obligation by depositing them in the warehouse of a third person. The warehouse must be appropriate for the storage of goods of the type in question and the expense of storage must not be unreasonable.

#### Article 63

(1) If there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation and notice of his intention to sell has been given, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 must make reasonable efforts to sell them. To the extent possible he must give notice of his intention to sell.

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

#### PRIOR UNIFORM LAW

ULIS, articles 94 and 95.

#### Commentary

1. Article 63 sets forth the right to sell the goods by the party who is under an obligation to preserve them.

#### Right to sell, paragraph (1)

2. Under paragraph (1) the right to sell the goods arises where there has been an unreasonable delay by the other party in taking possession of them or in taking them back or in paying the cost of preservation.

3. The sale may be by "any appropriate means" after "notice of his intention to sell" has been given. The convention does not specify what are appropriate means because conditions vary in different countries. To determine whether the means used are appropriate, reference should be made to the means required for sales under similar circumstances under the law of the country where the sale takes place.

4. The law of the State where the sale under this article takes place including the rules of private international law, will determine whether the sale passes a good title to the purchaser if the party selling the goods has not complied with the requirements of this article.<sup>106</sup>

#### Goods subject to loss, paragraph (2)

5. Under paragraph (2) the party who is under an obligation to preserve the goods must make reasonable efforts to sell them if (1) the goods are subject to loss or rapid deterioration or (2) their preservation would involve unreasonable expense.

6. The most obvious example of goods which must be sold, if possible, because they are subject to loss or rapid deterioration is fresh fruits and vegetables. However, the concept of "loss" is not limited to a physical deterioration or loss of the goods but includes

situations in which the goods threaten to decline rapidly in value because of changes in the market.

7. Paragraph (2) only requires that reasonable efforts be made to sell the goods. This is so because goods which are subject to loss or rapid deterioration may be difficult or impossible to sell. Similarly, the obligation to give notice of the intent to sell exists only to the extent to which such notice is possible. If the goods are rapidly deteriorating, there may not be sufficient time to give notice prior to sale.

8. If the party obligated to sell the goods under this article does not do so, he is liable for any loss or deterioration arising out of his failure to act.

#### Right to reimbursement, paragraph (3)

9. The party selling the goods may reimburse himself from the proceeds of the sale for all reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance. If the party selling the goods has other claims arising out of the contract or its breach, under the applicable national law he may have the right to defer the transmission of the balance until the settlement of those claims.

#### CHAPTER VI. PASSING OF RISK

#### Article 64

If the risk has passed to the buyer, he must pay the price notwithstanding loss or damage to the goods, unless the loss or damage is due to an act of the seller.

#### PRIOR UNIFORM LAW

ULIS, article 96.

#### Commentary

1. Article 64 introduces the provisions in the convention that regulate the passing of the risk of loss.

2. The question whether the buyer or the seller must bear the risk of loss is one of the most important problems to be solved by the law of sales. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement with its attendant strain on current assets, and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the allocation of the risk has an even sharper impact.

3. Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C & F may specify the moment when the risk of loss passes from the seller to the buyer.<sup>107</sup> Where the contract sets forth rules for the determination of the risk of loss by the use of trade

<sup>107</sup> E.g., Incoterms 1953, FOB, A4 and B2; CIF, A6 and B3; C & F, A4 and B2 provide that the seller bears the risk until the goods pass the ship's rail from which time the risk is borne by the buyer.

The use of such terms in a contract without specific reference to Incoterms or to some other similar definition and without a specific provision in the contract as to the moment when risk passes may nevertheless be sufficient to indicate that moment if the court or arbitral tribunal finds the existence of a usage. See para. 6 of the commentary on article 8.

<sup>106</sup> Article 7.

terms or otherwise, those rules will prevail over the rules set forth in the present convention.<sup>108</sup>

4. Article 64 states the main consequence of the passing of the risk. Once the risk has passed to the buyer, the buyer is obligated to pay for the goods notwithstanding subsequent loss or deterioration of the goods. This is the converse of the rule stated in article 20 that "the seller is liable... for any lack of conformity which exists at the time when the risk passes to the buyer".

5. The buyer's obligation to pay the price where the risk has passed notwithstanding the loss or deterioration of the goods is subject to the qualification that the loss or deterioration not be due "to an act of the seller". The loss or deterioration is due to an act of the seller if it was due to a defect which existed at the time the risk passed even though that defect was hidden.

6. Similarly, the buyer may be exonerated from paying the price if the loss or deterioration was in violation of an express guarantee given by the seller.

#### Article 65

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

(2) If at the time of the conclusion of the contract the goods are already in transit, the risk passes as from the time the goods were handed over to the first carrier. However, the risk of loss of goods sold in transit does not pass to the buyer if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods had been lost or damaged, unless the seller has disclosed such fact to the buyer.

#### PRIOR UNIFORM LAW

ULIS, articles 19 paragraph 2, 97 paragraph 7, 99 and 100.

#### Commentary

1. Article 65 governs the passage of the risk of loss where the contract of sale involves the carriage of the goods or where the goods are in transit at the time of the sale.<sup>109</sup>

#### *Where the contract involves carriage of the goods, paragraph (1)*

2. If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk of loss passes when the goods are handed over to the first carrier. The contract of sale involves carriage of the goods if the seller is required or authorized to ship the goods. The goods are handed over to the carrier at the time physical possession is given to the carrier, whether or not they are then on board the vessel which will transport them to the buyer.

3. However, since in a contract Ex Ship the seller's obligation is to hand over the goods to the buyer at a particular destination, i.e. at the port of destination named in the contract, the risk of loss in such a con-

<sup>108</sup> Article 5.

<sup>109</sup> Article 67 affects the application of article 65 if there has been a fundamental breach of contract.

tract passes not under article 65 (1) but under article 66 (1).

4. If the goods are to be transported by two or more carriers, "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer". Therefore, if the goods are shipped from an inland point by rail or truck to a port where they are loaded aboard a ship, the risk of loss passes when the goods are handed over to the railroad or trucking firm.

5. It is important to note that the goods must be handed over to the first carrier "for transmission to the buyer". In some cases goods may be handed over for the purpose of fulfilling a sales contract and still not be handed over for transmission to the buyer. For example, if a seller shipped 10,000 tons of wheat in bulk to fulfill his obligations to deliver 5,000 tons to each of two separate buyers, the goods would not have been handed over "for transmission to the buyer". Therefore, article 65 (1) would not apply and the risk would pass to the buyer under article 66 (1) "when the goods were placed at his disposal and taken over by him", i.e. after the arrival of the goods at the place of destination. This would change the rule in some legal systems that the risk would pass to the two buyers jointly at the time of shipment and that they would share *pro rata* in any loss suffered.

#### *Goods in transit, paragraph (2)*

6. If the goods were in transit at the time the contract of sale was concluded, the risk of loss is deemed to have passed retroactively at the time the goods were handed over to the first carrier, as in paragraph (1). This rule that the risk of loss passes prior to the making of the contract arises out of purely practical concerns. It would normally be difficult or even impossible to determine at what precise moment in time damage known to have occurred during the carriage of the goods in fact occurred. It is simpler if the risk of loss is deemed to have passed at a time when the condition of the goods was known. In addition, it will usually be more convenient for the buyer, who is in physical possession of the goods at the time the loss or damage is discovered, to make claim against the carrier and the insurance company.

7. This rule of retroactive passage of the risk of loss does not apply "if, at the time of the conclusion of the contract, the seller knew or ought to have known that the goods had been lost or damaged unless the seller has disclosed such fact to the buyer".

#### Article 66

(1) In cases not covered by article 65 the risk passes to the buyer as from the time when the goods were placed at his disposal and taken over by him.

(2) If the goods have been placed at the disposal of the buyer but they have not been taken over by him or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract. If the contract relates to the sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

## PRIOR UNIFORM LAW

ULIS, articles 97 and 98.

*Commentary*

*Risk of loss in cases not governed by article 65, paragraph (1)*

1. Article 66 (1) governs the risk of loss in all cases in which article 65 does not apply.<sup>110</sup> In such case "the risk passes to the buyer as from the time when the goods were placed at his disposal and taken over by him".

2. In order for the risk to pass under article 66 (1), the buyer must take over the goods. The goods are taken over when the buyer either takes physical possession or, if the goods are in the hands of a third person, when the appropriate act has occurred after which the third person is liable to the buyer for the goods. Such act includes the handing over of a negotiable document of title (e.g., negotiable warehouse receipt) or the acknowledgement by the third person that he holds the goods for the benefit of the buyer.

*Where the buyer has wrongfully not taken over the goods, paragraph (2)*

3. Since article 66 (1) shifts the risk of loss to the buyer only when the buyer has taken over the goods, article 66 (2) is necessary to provide for the situation in which the goods are placed at the buyer's disposal but he wrongfully fails to take them over. Article 66 (2) provides that in such a case "the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract".

4. Article 66 (2) goes on to specify that the risk of loss of goods not identified to the contract at the time of the conclusion of the contract does not pass until the goods have been clearly identified to the contract and the buyer has been informed of such identification. This provision is intended to assure that the seller cannot identify goods to the contract which were damaged after the risk of loss would have passed under article 66 (1). It should be noted that article 66 (2) does not apply to contracts which involve carriage of the goods. For the rule in respect of such contracts, see article 16 (1) and the commentary thereon.

*Example 66A:* The Buyer was to take delivery of 100 cartons of transistors at the Seller's warehouse during the month of July. On 1 July the Seller marked 100 cartons with the Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July the Buyer took delivery of the 100 cartons. Therefore, the risk of loss passed to the Buyer on 20 July at the moment that the goods were taken over by him.

*Example 66B:* In the contract described in example 66A the Buyer did not take delivery of the 100 cartons until 10 August. The risk of loss passed to him at the close of business on 31 July, the last moment he could have taken over the goods without committing a breach of contract.

*Example 66C:* Although the Seller in the contract described in example 66A should have had the 100

cartons ready for the Buyer to take delivery at any time during the month of July, no cartons were marked with the Buyer's name or otherwise identified to the contract until 15 September. The Buyer took delivery on 20 September, which was within a reasonable time after he was notified of the availability of the goods. The risk of loss passed to the Buyer on 20 September, the time when the Buyer took delivery of the goods. This result occurs, rather than the result given in example 66B, because the Buyer was not in breach of the contract for not taking delivery before 20 September.

*Article 67*

If the seller has committed a fundamental breach of contract, the provisions of articles 65 and 66 do not impair the remedies available to the buyer on account of such breach.

## PRIOR UNIFORM LAW

ULIS, article 97, paragraph 2.

*Commentary*

1. Article 67 provides that the passage of the risk of loss under article 65 or 66 does not impair any remedies which the buyer may have which arise out of a fundamental breach of contract by the seller.

2. The primary significance of article 67 is that the buyer may be able to insist on the delivery of substitute goods under article 27 or 28 or to declare the contract avoided under article 30 (1) (a) or (b) even though the goods have been lost or damaged after the passage of the risk of loss under article 65 or 66. In this respect article 67 constitutes an exception to article 52 (1) as well as to articles 65 and 66 in that, subject to three exceptions enumerated in article 52 (2), "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

3. Article 67 must be read in connexion with articles 23 and 30 (2) because in some examples the buyer will lose his right to declare the contract avoided or to require the seller to deliver substitute goods because he did not act within the time-limits required by those articles.

*Example 67A:* The contract was the same as in example 66A. The Buyer was to take delivery of 100 cartons of transistors at the Seller's warehouse during the month of July. On 1 July the Seller marked 100 cartons with the Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July the Buyer took delivery of the 100 cartons at which time he paid the price. Therefore, under article 66 (1) the risk of loss passed to the Buyer on 20 July.

On 21 July, before the Buyer could give the examination required under article 22, 50 of the cartons were destroyed in a fire. When the Buyer examined the contents of the remaining 50 cartons, the transistors were found not to conform to the contract to such a degree that the lack of conformity constituted a fundamental breach of the contract.

In spite of the Buyer's inability to return all 100 cartons because of the fire which had occurred after the

<sup>110</sup> Article 67 affects the application of article 66 if there has been a fundamental breach of contract.

passage of the risk of loss, the Buyer could avoid the contract and recover the price he had paid.

*Example 67B:* The facts are the same as in example 67A except that the Buyer did not examine the remaining 50 cartons of transistors for six months after he received them. In such a case he could probably not avoid the contract because it would probably be held under article 23 (1) that he had not given notice of the lack of conformity "within a reasonable time after he . . . ought to have discovered it" and under article 30 (2) (b) that he had not declared the contract avoided "within a reasonable time . . . after he . . . ought to have known of such breach".

*Example 67C:* In partial fulfilment of his obligations under the contract in example 67A, on 1 July the Seller identified to the contract 50 cartons of transistors rather than the 100 cartons called for in the contract.

On 5 August, before the Buyer took delivery of the goods, the 50 cartons were destroyed in a fire in the Seller's warehouse. Even though the risk of loss in respect of the 50 cartons had passed to the Buyer at the close of business on 31 July,<sup>111</sup> if identifying to the contract only 50 cartons instead of 100 cartons constituted a fundamental breach of contract, the Buyer could still declare the contract avoided by reason of article 67. However, he must do so "within a reasonable period of time . . . after he knew or ought to have known" of the shortage or he will lose the right to declare the contract avoided by virtue of article 30 (2) (b).

*Example 67D:* Although the Seller in the contract described in example 67A should have had the 100 cartons ready for the Buyer to take delivery at any time during the month of July, no cartons were marked

with the Buyer's name or otherwise identified to the contract until 15 September. The Buyer took delivery on 20 September. As was stated in example 66C, the risk of loss passed to the Buyer on 20 September, the time when the Buyer took delivery of the goods.

On 23 September the goods were damaged through no fault of the Buyer. If the Seller's delay in putting the goods at the Buyer's disposal amounted to a fundamental breach, article 67 provides that the damage to the goods after the passage of the risk of loss would not prohibit the Buyer from declaring the contract avoided. However, under article 30 (2) (a), it is likely that it would be held that once the Buyer had taken delivery of the goods by picking them up at the Seller's warehouse, he had lost the right to declare the contract avoided for not having "done so within a reasonable time . . . after he [became] aware that delivery has been made".

*Example 67E:* The contract was similar to that in example 67A except that the Seller was to ship the goods on FOB terms during the month of July. The goods were shipped late on 15 September. Under article 65 (1) the risk of loss passed on 15 September.

On 17 September the goods were damaged while in transit. On 19 September both the fact that the goods had been shipped on 15 September and that they were damaged on 17 September were communicated to the Buyer. Under these facts, if the late delivery constituted a fundamental breach, the Buyer could avoid the contract if he did so "within a reasonable time . . . after he has become aware that delivery has been made",<sup>112</sup> a time which would undoubtedly be very short under the circumstances.

<sup>111</sup> See example 66B.

<sup>112</sup> Article 30 (2) (a).