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**THE REMEDIES REGIME UNDER THE UNITED NATIONS CONVENTION ON
CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS**

A dissertation
presented to the Faculty of Law,
University of Ottawa
in partial fulfillment of the
thesis requirement for the Doctor of Laws degree

by

Hashem M. Jaber



Hashem Jaber, Ottawa, Canada, 1990



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ABSTRACT

On January 1, 1988, *The United Nations Convention on Contracts for the International Sale of Goods (The Convention)*,¹ which was adopted in 1980, became law in contracting States. *The Convention* is based on *The Uniform Law on the Formation of Contracts for the International Sale of Goods (ULIF)*,² and *The Uniform Law on International Sale of Goods (ULIS)*.³ As of May 30, 1989, nineteen countries had ratified *The Convention*. *The Convention* is the most important uniform law ever achieved in the field of sales law and is overwhelmingly supported by legal communities worldwide.

This study seeks to introduce the remedies regime provided in *The Convention*. It examines the ways in which each remedy works, and its true meaning as determined by its drafting history.

The study is divided into ten chapters including an introduction and conclusion in Chapters I and X respectively.

Following an introduction of the subject in Chapter I, Chapter II deals with the remedy of avoidance. It is divided into the following sections: avoidance in cases of fundamental breach, avoidance in cases of late performance, avoidance in particular situations (i.e. anticipatory breach, instalment contracts and delivery of the wrong

¹ *Final Act of the United Nations Convention on Contract for the International Sale of Goods*. UN Doc. A.CONF.97/18 (10 April, 1980); the text of the Act is printed in (1980), 19 *I. L. M.* pp. 671-699 (hereinafter cited as *The Convention*).

² *Convention Relating to a Uniform Law on the Formation of Contract for the International Sale of Goods*, The Uniform Law on the Formation of Contracts for the International Sale of Goods was annexed to the Convention. Printed in (1964), 13 *Am. J. Comp. L.* pp. 472-477; and (1964), 3 *I. L. M.* pp. 864-866 (hereinafter cited as *ULIF*).

³ *Convention Relating to a Uniform Law on the International Sale of Goods*, Opened for Signature in July 1, 1964, 834 *U.N.T.S.* 107. The Uniform Law on the International Sale of Goods was annexed to the Convention. Reprinted in (1964), 13 *Am. J. Comp. L.* pp. 453-472; and (1964), 3 *I. L. M.* pp. 855-863 (hereinafter cited as *ULIS*).

quantity), limitations on avoidance and, finally, the effects of avoidance.

Chapter III deals with the remedy of damages. This chapter is divided into three sections. The first deals with the availability of damages and covers the following issues: assessment of the aggrieved party's loss, the foreseeability test, and mitigation of damages. The second deals with the assessment of damages in particular situations. The third deals with the issue of interest.

Chapter IV deals with the remedy of specific performance. Two main questions are examined here. First, the availability of the remedy to buyers and sellers; second, limitations on compelling performance.

Chapter V deals with the requirements for, and effects of, the doctrine of exemption from liability.

Chapter VI deals with the remedy of suspension of performance. It examines the conditions that entitle a party to suspend his or her own performance and the effects of suspension.

Chapter VII deals with the remedy of price reduction. The first section of this chapter examines the conditions that entitle the buyer to reduce the price if the goods fail to conform to the contract. The second covers the operation and effects of the remedy.

Chapter VIII deals with the seller's right to cure. The first section considers the requirements of the remedy. The remedy's effects are dealt with in the second section.

Chapter IX deals the duties imposed on a party to preserve goods from loss or deterioration and the methods for discharging this duty.

In order to consider the ability of a given remedy to meet the needs of international sales participants, a comparison between the rules under the *ULIS* and the rules under *The Convention* is essential. It will help in discovering what improvements, if any, were achieved. Reference has also been made to a number of domestic laws,

particularly those of Egypt, England and France. This is instrumental in helping to understand *The Convention's* remedy provisions because (a) there have yet to be any decided cases under *The Convention*, (b) some of *The Convention's* remedies are still unfamiliar to many domestic legal systems, (c) the laws of England and France are adopted in one form or another in most countries of the world and (d) Egypt exercised and still continue to exercise a dominant role in the Arab World. Since this influence has not yet been examined by Western academics, the discussion of Egyptian law should demonstrate the importance of *The Convention* to the developing countries of the world.

The central part of this study shows how solutions may be attained in international sales transactions when *The Convention* is the governing law. Further, it concludes that courts in contracting states will apply *The Convention* and that business enterprises in these countries will base their international sales transactions on it. The author advances the thesis that courts, lawyers and commentators should interpret *The Convention* as an autonomous sales law in the light of its general principles and drafting history with the aim of developing a uniform international jurisprudence.

The study concludes that *The Convention* will be accepted by business communities in developing and developed, Western and Eastern European countries alike. As far as the remedies for non-performance or defective performance are concerned the study concludes that *The Convention's* remedial rules are a significant improvement over those of the *ULIS* and will prove, on the whole, to be superior to those of the domestic laws considered in this study. Moreover, these provisions are well-suited to international trade practice.

It is hoped that the discussion will contribute to the knowledge and understanding of *The Convention's* remedial rules. The study examines in detail the extent to which unification has been achieved by the adoption of *The Convention*. In so doing, it

traces the evolution of the rules under discussion and explains the terminology of its final draft.

PREFACE

This study asserts that a greater degree of uniformity in international sales law has been attained by the adoption of *The Convention*. It also argues that *The Convention* provides a satisfactory and uniform set of legal rules for the conduct of international sales transactions and successfully balances the interests of sellers and buyers. It may also serve as a useful guide, especially to developing countries, for the preparation or amendment of domestic sales laws. It may very well replace a party's own domestic law as the law of choice in international sales transactions.

It is customary to provide in the preface of a dissertation a statement of the author's opinion concerning his contribution to knowledge in his field. In my opinion, the value of any new rules of law, such as those in *The Convention*, lies in the clarity they bring to legal relations. The work of courts, lawyers and traders in contracting states would be made so much easier if *The Convention's* rules on remedies were thoroughly examined and compared with those of their domestic laws. The most that this thesis aims to achieve is to predict the reception that *The Convention's* remedy rules can expect in the courts of Egypt, England and France. The thesis, then, should be seen as a valuable addition to the treatment of remedies throughout Common and Civil law countries. Furthermore, this study equips traders and their lawyers to understand in depth, and not merely to be familiar with, *The Convention's* remedy rules. Various questions are expected to be asked by the international business community and their lawyers concerning these provisions. The structure of the study facilitates the task of interested individuals in their search for answers to these questions. Moreover, the thesis will assist in future research into the potential impact of *The Convention* on both the domestic laws and business communities of these countries. The ultimate aim is

not merely to contribute to the simplification of concepts, but also to prescribe, criticize and suggest.

The author's understanding of the Civil law system is based not only upon legal studies at Beirut Arab University and Cairo University, but upon work experience as well. His knowledge of the Common law system has been advanced through post-graduate studies at Tulane University and the University of Ottawa. In this study, English and French law are considered to represent the Common and Civil law systems respectively. Reference has also been made to Egyptian law. Limited reference has also been made, primarily in footnotes, to the Canadian *Draft Uniform Sale of Goods Act (DUSA)*, and the *American Uniform Commercial Code (UCC)*.

The Appendices of this study contain: (a) an empirical survey concerning the attitudes of international trade associations toward *The Convention*, (b) *The Convention*, (c) the *ULIS*, and (d) the *ULIF*. A list of specialized literature concerning the unification of the law of international sales and *The Convention* is also provided in the bibliography.

It will be observed that, from time to time, the number of a footnote appears on one page but the note itself appears on the following page. This problem is inherent in the wordprocessing software used, and cannot be solved.

THE REMEDIES REGIME UNDER THE UNITED NATIONS CONVENTION ON
CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	iv
ABSTRACT	vi
PREFACE	x
LIST OF ABBREVIATIONS	xxv
TABLE OF CASES	xxviii
LIST OF CONVENTIONS	xl
TABLE OF STATUTES	xli
REPORTS OF LAW REFORM AGENCIES	xlii
CHAPTER I: <i>INTRODUCTION</i>	1
CHAPTER II: <i>AVOIDANCE</i>	26
Section I: <i>Avoidance in cases of fundamental breach</i>	29
A. In general	29
B. Requirements for avoidance: domestic laws	34
C. Fundamental breach: <i>ULIS</i> and <i>The Convention</i>	43
D. A suggested definition of "fundamental breach"	53
Section II: <i>Avoidance in cases of late performance</i>	57
A. Avoidance in cases of late performance: domestic laws	57
B. Additional time notice: <i>ULIS</i> and <i>The Convention</i>	65
Section III: <i>Particular avoidance situations</i>	78
A. Anticipatory breach	78
B. Instalment contracts	90
C. Delivery of the wrong quantity or partial non-conformity	103
Section IV: <i>Limitations on the availability of avoidance</i>	114
Section V: <i>Effects of Avoidance</i>	124
A. Effects on the contract	125
B. Restitution	132
CHAPTER III: <i>DAMAGES</i>	150
Section I: <i>Availability of damages in general</i>	152
A. The aggrieved party's loss	159
B. The foreseeability test	166
C. Mitigation of damages	174

Section II: <i>Damages in particular situations</i>	182
A. Measurement of damages through substitute transaction	182
B. Measurement of damages through market price	196
Section III: <i>The right to recover interest</i>	209
CHAPTER IV: <i>SPECIFIC PERFORMANCE</i>	214
Section I: <i>In general</i>	216
Section II: <i>Availability of the remedy of specific performance</i>	223
Section III: <i>Limitations on the availability of specific performance</i>	234
CHAPTER V: <i>EXEMPTION FROM PERFORMANCE</i>	245
Section I: <i>Elements exonerating a party from liability</i>	250
Section II: <i>Effects of the doctrine of exemption</i>	266
CHAPTER VI: <i>SUSPENSION OF PERFORMANCE</i>	283
Section I: <i>Suspension of performance: nature and requirements+</i>	284
Section II: <i>The right of stoppage in transitu</i>	295
Section III: <i>Effects of suspension</i>	304
CHAPTER VII: <i>PRICE REDUCTION</i>	312
Section I: <i>Requirements</i>	317
Section II: <i>Operation and effects of price reduction</i>	324
CHAPTER VIII: <i>THE SELLER'S RIGHT TO CURE</i>	331
Section I: <i>Requirements</i>	333
Section II: <i>Effects of cure</i>	347
CHAPTER IX: <i>PRESERVATION OF THE GOODS</i>	351
Section I: <i>The duty to preserve the goods</i>	352
Section II: <i>The duty to preserve the goods: methods of fulfilment+</i>	357

CHAPTER X: <i>CONCLUSIONS OF THE STUDY</i>	362
APPENDIX 1: <i>The Attitude of International Trade Associations Toward The Convention: An Empirical Survey</i>	372
Section I: <i>Method of analysis</i>	374
Section II: <i>Findings of the survey</i>	378
APPENDIX 2: <i>UN Convention on Contracts for the International Sale of Goods, Vienna, 1980.</i>	396
APPENDIX 3: <i>Uniform Law on the International Sale of Goods, The Hague, 1964.</i>	427
APPENDIX 4: <i>Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1964.</i>	458
SELECTED BIBLIOGRAPHY	468

**THE REMEDIES REGIME UNDER THE UNITED NATIONS CONVENTION ON
CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS**

A DETAILED TABLE OF CONTENTS

ACKNOWLEDGEMENTS	iv
ABSTRACT	vi
PREFACE	x
LIST OF ABBREVIATIONS	xxv
TABLE OF CASES	xxviii
LIST OF CONVENTIONS	xl
TABLE OF STATUTES	xli
REPORTS OF LAW REFORM AGENCIES	xlii
CHAPTER I: <i>INTRODUCTION</i>	1
1. Scope and purpose of the study	2
2. Research method	5
3. Why is a unified sales law needed?	7
4. Trade practice and <i>The Convention</i>	11
5. A short history of <i>The Convention</i>	15
6. Availability of remedies under <i>The Convention</i>	20
7. Conclusions and remarks concerning method of analysis	24
CHAPTER II: <i>AVOIDANCE</i>	26
8. Introduction	27
9. The relationship between avoidance due to breach and avoidance for other reasons	28
Section I: <i>Avoidance in cases of fundamental breach</i>	29
A. In general	29
10. Introduction	29
11. Contractual avoidance provisions and fundamental breach	30
12. Comparison	32
13. Avoidance and judicial intervention: comparison	33
B. Requirements for avoidance: domestic laws	34
14. Egyptian law	34
15. French law	35
16. American law	36
17. English law	37
18. Innominate terms in English law	39
19. English law: a new approach to breach of contract	42

C. Fundamental breach: <i>ULIS</i> and <i>The Convention</i>	43
1. Fundamental breach: <i>ULIS</i>	43
20. The definition of "fundamental breach"	43
21. Criticisms of the <i>ULIS</i> definition of "fundamental breach"	44
2. The substantial detriment test under <i>The Convention</i>	45
22. What constitutes a substantial detriment?	45
23. Evaluation of the substantial detriment test under <i>The Convention</i>	46
3. The foreseeability test under <i>The Convention</i>	48
24. Foreseeable by whom?	48
25. Time of foreseeability	48
26. Time of foreseeability: practical considerations	51
27. Avoidance in cases of fundamental breach: conclusions	52
D. A suggested definition of "fundamental breach"	53
28. Formulation and description of the suggested definition	53
29. The degree of breach	54
30. Time of breach	54
31. The objective element of a reasonable person	55
32. Summary of avoidance in cases of fundamental breach	56
Section II: <i>Avoidance in cases of late performance</i>	57
A. Avoidance in cases of late performance: domestic laws	57
33. German law	57
34. French law	58
35. Egyptian law	59
36. English law: time of performance in general	59
37. English law: time of delivery	60
38. English law: time of payment or of taking delivery	62
39. Summary of avoidance in cases of late performance in domestic laws	63
40. Avoidance in cases of late performance: domestic laws in comparison with <i>The Convention</i>	64
B. Additional time notice: <i>ULIS</i> and <i>The Convention</i>	65
1. In general	65
41. The rule	65
42. Advantages of the additional time notice procedure	67
43. Is the giving of notice mandatory?	68
44. Content of the notice	69

2. Requirements of the additional time notice	70
45. Actual breach of contract	70
46. Period of reasonable length	71
47. Restrictions on the additional time notice procedure	72
48. Criticisms of <i>The Convention's</i> restrictions on the additional time notice procedure	73
49. Additional time notice: summary of requirements	74
3. Effects of the giving of an additional time notice	75
50. Suspension of performance	75
51. Notice by the party in breach of an intention not to perform	75
52. Procedures following expiry of the additional time period	76
53. Procedures following expiry of the additional time period: comparison	77
54. Additional time notice: conclusions	78
Section III: <i>Particular avoidance situations</i>	78
A. Anticipatory breach	78
55. Grounds for anticipatory breach	78
56. The breach must be fundamental	81
57. The time of the breach	83
58. The innocent party's options in cases of anticipatory breach	84
59. Notice of intention to avoid	85
60. Comparison	86
61. Assessment of damages in cases of anticipatory breach	87
62. Is there a duty to mitigate in cases of anticipatory breach?	89
B. Instalment contracts	90
63. Introduction	90
64. Definition of "instalment contract"	91
65. Egyptian law	92
66. French law	93
67. English law	94
68. One contract or several?	95
69. Avoidance of one instalment	97
70. Avoidance in respect of future instalments	98
71. Avoidance in respect of future instalments: comparison	99
72. Criticisms of <i>The Convention's</i> treatment of avoidance of future instalments	101
73. Additional time notice and instalment contracts	102
C. Delivery of the wrong quantity or partial non-conformity	103
74. Short delivery or partial non-conformity	103
75. Importance of Article 52 of <i>The Convention</i>	105
76. Avoidance of the entire contract	106
77. Short delivery of partial non-conformity: English law	108
78. American law	108
79. Egyptian and French law	109
80. Excess delivery: <i>The Convention</i>	110
81. Excess delivery: Egyptian law	110

82. Excess delivery: French law	111
83. Excess delivery: English law	112
84. A suggested rule for cases of excess delivery	112
Section IV: <i>Limitations on the availability of avoidance</i>	114
85. Nature of and reasons for limitations on the availability of avoidance	114
86. Notice of avoidance	115
87. Notice of avoidance: English law	117
88. Notice of avoidance: English law in comparison with <i>The Convention</i>	118
89. Form of notice: <i>The Convention</i>	119
90. Time of effectiveness of a notice of avoidance	120
91. Time constraints on the exercise of the buyer's right to avoid	121
92. Time constraints on the exercise of the seller's right to avoid	122
Section V: <i>Effects of Avoidance</i>	124
93. Introduction	124
A. Effects on the contract	125
94. General principles	125
95. Effects on the contract: English law	126
96. Partial survival of the contract	127
97. Partial survival of the contract: English law	129
98. Partial avoidance or avoidance of the entire contract?	131
B. Restitution	132
99. Nature and scope	132
100. Concurrent restitution	132
101. Restitution and damages	134
102. Restitution: domestic laws	135
103. Restitution of goods	137
104. Restitution of goods: practical difficulties	140
105. Restitution of goods: English law	141
106. Restitution of the price	142
107. Restitution of benefits derived from the goods or from the price	144
108. The remedy of avoidance: comparison of selected laws	146
109. The remedy of avoidance: conclusions	147

CHAPTER III: <i>DAMAGES</i>	150
110. Introduction	151
Section I: <i>Availability of damages in general</i>	152
111. General principles	152
112. Disclaimer clauses and damages	153
113. Damages in French law	156
114. English law: damages in cases of breach by the buyer	157
115. English law: damages in cases of breach by the seller	159
A. The aggrieved party's loss	159
116. The loss actually suffered	159
117. Loss of profit	162
118. The relevant time for assessing the amount of damages	164
B. The foreseeability test	166
119. <i>The Convention</i>	166
120. French law	168
121. English law	169
122. English law compared to <i>ULIS</i> and <i>The Convention</i>	171
123. Foreseeable by whom?	172
124. Time of foreseeability	173
C. Mitigation of damages	174
125. General principles	174
126. Mitigation of damages: domestic laws	175
127. The requirement that mitigation measures be reasonable	176
128. Is there a duty to mitigate in the event of anticipatory breach?	178
129. Effects of the doctrine of mitigation	181
Section II: <i>Damages in particular situations</i>	182
130. Introduction	182
A. Measurement of damages through substitute transaction	182
1. Requirements	182
131. Introduction	182
132. Substitute transaction: a condition precedent for a claim under Article 75 of <i>The Convention</i>	184
133. Making the substitute transaction in a reasonable manner	186
134. Making the substitute transaction within a reasonable time	187
135. Is the making of a substitute transaction mandatory or optional?	188
2. Effects of the making of a substitute transaction	189
136. Measurement of damages where there has been a substitute transaction	189

137. Failure to properly complete a substitute transaction	190
138. The relationship between the substitute transaction formula and the current price formula	191
139. Loss of profit under the substitute transaction formula	192
140. Can an innocent seller recover damages for the loss of a sale?	194
B. Measurement of damages through market price	196
141. The meaning of "current price"	196
142. Application of the current price formula	199
143. The time for determining the current price	201
144. The time for determining the current price: evaluation	203
145. The time for determining the current price: English law	204
146. The place for determining the current price	205
147. Criticism of the place for determining the current price adopted by <i>The Convention</i>	207
148. The place for determining the current price: English law	208
Section III: <i>The right to recover interest</i>	209
149. General principles	209
150. The rate of interest: <i>ULIS</i> and <i>The Convention</i>	210
151. The rate of interest: domestic laws	211
152. The remedy of damages: conclusions	212
CHAPTER IV: <i>SPECIFIC PERFORMANCE</i>	214
153. Introduction	215
Section I: <i>In general</i>	216
154. Importance of the remedy	216
155. Specific performance contrasted with other remedies	218
156. Specific performance in English law	219
157. Specific performance in French law	221
158. Specific performance in Egyptian law	222
Section II: <i>Availability of the remedy of specific performance</i>	223
159. The right to compel performance in general	223
160. Compelling payment of the price	225
161. Action for the price: English and American law	226
162. Can specific performance be granted in respect of preliminary steps?	227
163. Compelling delivery of substitute goods	229
164. Criticism of limitations on the right to compel delivery of substitute goods under <i>The Convention</i>	230
165. The buyer's right to compel the seller to make repairs	231
166. Compelling repairs: practical difficulties	232

Section III: <i>Limitations on the availability of specific performance+</i>	234
167. Generally	234
168. Availability subject to domestic laws	235
169. Availability under the law of the forum	238
170. The buyer's duty to attempt to obtain replacement goods under <i>ULIS</i>	239
171. The seller's duty to attempt to resell the goods under <i>ULIS</i>	241
172. The remedy of specific performance: conclusions	242
173. Specific performance in international sales: a suggested perspective	243
 CHAPTER V: <i>EXEMPTION FROM PERFORMANCE</i>	 245
174. Introduction	246
175. Terminology	247
 Section I: <i>Elements exonerating a party from liability</i>	 250
176. Non-performance "due to an impediment"	250
177. Unforeseeable event: <i>ULIS</i>	252
178. Unforeseeable event: <i>The Convention</i>	253
179. Unforeseeable event: English and French law	256
180. The impediment must be beyond a party's control	257
181. Avoiding or overcoming the impediment	259
182. Failure to perform as a result of the impediment	261
183. Applicability of the doctrine of exemption to cases of delivery of defective goods	262
184. Burden of proof	265
 Section II: <i>Effects of the doctrine of exemption</i>	 266
185. Non-performance by a third party	266
186. The distinction between an independent contractor and a supplier	268
187. Temporary impediment: <i>ULIS</i>	269
188. Temporary impediment: <i>The Convention</i>	270
189. The duty to give notice of the impediment and its effect on performance	271
190. The effect of exemption on liability in damages	273
191. The effect of exemption on avoidance	274
192. The effect of exemption on avoidance: domestic laws	275
193. The effect of exemption on other remedies	278
194. Does the doctrine of exemption apply to a failure to perform caused by the other party?	280
195. Exemption from performance: conclusions	281

CHAPTER VI: <i>SUSPENSION OF PERFORMANCE</i>	283
196. Introduction	284
Section I: <i>Suspension of performance: nature and requirements</i>	284
197. The nature of the remedy of suspension	284
198. Grounds for suspension in general	286
199. Grounds for suspension: <i>ULIS</i> and <i>The Convention</i> compared	289
200. Time of deterioration	290
201. Prospective non-performance of a substantial part of a party's obligations	291
202. Suspension of performance under the selected domestic laws	292
Section II: <i>The right of stoppage in transitu</i>	295
203. General principles	295
204. Grounds for stoppage <i>in transitu</i> : <i>The Convention</i>	297
205. The rights of third party's in the event of stoppage <i>in transitu</i>	298
206. Ground for stoppage <i>in transitu</i> : domestic laws	300
207. Stoppage <i>in transitu</i> : practical difficulties	302
Section III: <i>Effects of suspension</i>	304
208. The right of the suspending party to discontinue performance	304
209. Notice by the suspending party	305
210. Adequate assurance of performance	306
211. Failure to provide adequate assurance of performance	308
212. Suspension of performance: conclusions	310
CHAPTER VII: <i>PRICE REDUCTION</i>	312
213. Introduction	313
214. The nature of price reduction and its relation to other remedies	314
215. Price reduction in French law	316
Section I: <i>Requirements</i>	317
216. General principles	317
217. Declaration of intent to reduce the price	318
218. Delivery of non-conforming goods	319
219. Degree of breach	320
220. Seller's readiness to cure	321
221. Time of calculation of the reduction in price	321
222. Time of calculation of the reduction in price: evaluation	322
223. Place of calculation of the reduction in price	323

Section II: <i>Operation and effects of price reduction</i>	324
224. Operation of price reduction	324
225. Effects of price reduction	327
226. The remedy of price reduction: conclusions	328
CHAPTER VIII: <i>THE SELLER'S RIGHT TO CURE</i>	331
227. Introduction	332
Section I: <i>Requirements</i>	333
228. Cure before the date set for delivery	333
229. Cure after the date set for delivery	335
230. The seller's right to cure: English law	337
231. The seller's right to cure: Egyptian and French law	340
232. The seller's right to cure: American law	341
233. The seller's request that the buyer indicate whether the offer to cure will be accepted	342
234. The relationship between cure and contract avoidance	343
235. Must the seller notify the buyer of the intention to cure?	346
236. Limitations on the right to cure	346
Section II: <i>Effects of cure</i>	347
237. The effect of cure on damages	347
238. When does an offer to cure become effective?	348
239. Evaluation of Article 48(4) of <i>The Convention</i>	349
240. The effect of cure on price reduction	349
241. The seller's right to cure: conclusions	350
CHAPTER IX: <i>PRESERVATION OF THE GOODS</i>	351
242. Introduction	352
Section I: <i>The duty to preserve the goods</i>	352
243. The seller's duty to preserve the goods	352
244. The buyer's duty to preserve the goods	355
Section II: <i>The duty to preserve the goods: methods of fulfilment</i>	357
245. Depositing the goods with a third party	357
246. The right to sell the goods	358
247. Duty to sell the goods	359
248. Effects of sale	360

CHAPTER X: <i>CONCLUSIONS OF THE STUDY</i>	362
249. The strengths of <i>The Convention</i> as a whole and of its remedial provisions in particular	363
250. The weaknesses of <i>The Convention</i> as a whole and of its remedial provisions in particular	365
251. Future developments: short term	366
252. Future developments: long term	367
253. Summary of conclusions	371
APPENDIX 1: <i>The Attitude of International Trade Associations Toward The Convention: An Empirical Survey</i>	372
254. Introduction	373
Section I: <i>Method of analysis</i>	374
255. The questionnaire	374
256. Common features of the selected associations	375
257. Reasons for selecting the organizations surveyed	376
Section II: <i>Findings of the survey</i>	378
258. Awareness of <i>The Convention</i>	378
259. Express exclusion of <i>The Convention</i> from standard form contracts	379
260. Preferred dispute resolution mechanisms	383
261. Recommendations	385
262. Conclusions of the survey	387
APPENDIX 2: <i>UN Convention on Contracts for the International Sale of Goods, Vienna, 1980.</i>	396
APPENDIX 3: <i>Uniform Law on the International Sale of Goods, The Hague, 1964.</i>	427
APPENDIX 4: <i>Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1964.</i>	458
SELECTED BIBLIOGRAPHY	468

LIST OF ABBREVIATIONS

AC.	Ad-Hoc Committee
A.C.	Appeal Cases
All E.R.	All England Reports
App.Cas.	Appeal Cases
BGB	German Civil Code
C.A.	Court of Appeal
CMEA	Council for Mutual Economic Assistance
Com. 1	The First Committee which was established at the 1980 Sales Conference to deal with the substantive provisions (arts. 1-88).
Com. 2	The Second Committee established at the 1980 Sales Conference to deal with the Final Provisions (arts. 89-101) with a Protocol amending the Convention on Limitation Period in the International Sale of Goods.
Comecon	Council for Mutual Economic Assistance.
CONF.	Conference.
DUSA	Canadian Uniform Sale of Goods Act
F.Supp.	Federal Supplement (U.S.A.)
F. 2d.	Federal Reporter (Second Series) (U.S.A.)
G.A.O.R.	(UN) General Assembly Official Records
G.A.Res.	(UN) General Assembly Resolution
GATT	General Agreement on Tariffs and Trade
H.L.	House of Lord
ICC	International Chamber of Commerce
Incoterms	1980 International Chamber of Commerce, International Rules for the Interpretation of Trade Terms (I.C.C. Pub. No. 350, Paris, 1980)
KB	Law Reports, King's Bench Division (England)

Official Records	United Nations Conference on Contract for the International Sale of Goods, Vienna, 1980. Official Records (United Nations, New York, 1981) (A/CONF.97/19) (Sales No. E. 82. V. 5).
OLRC	Ontario Law Reform Commission
QB, QBD	Law Reports, Queens Bench Division (England)
RabelsZ	Rabels Zeitschrift Fur ausland und international Private (West Germany).
SGA	United Kingdom Sale of Goods Act
SR.	Summary Records of the First or the Second Committee meetings. The number that follows refer to the meeting number, e.g., A/CONF.97/C.1/ SR.1. SR.1 refers to the first meeting of Committee 1 and SR.2 to the second meeting and so on.
UCC	United States Uniform Commercial Code
UCP	Uniform Customs and Practice for Documentary Credit
U.K.	United Kingdom
ULC	Uniform Law Conference of Canada
ULIF	Uniform Law on the Formation on Contracts for the International Sale of Goods, The Hague, 1964.
ULIS	Uniform Law on International Sale of Goods, The Hague, 1964.
U.N.	United Nations
UNCITRAL	United Nations Committee on International Trade Law.
UNIDROIT	International Institute for the Unification of Private Law, (Rome).
U.N.T.S.	United Nations Treaty Series
W.G.	Working Group on International Sale of Goods established by UNCITRAL.
W.L.R.	Weekly Law Reports (England)
W.W.R.	Western Weekly Reports

Yearbook

UNCITRAL Yearbook published every year in English, French, Spanish and Russian. 1 UNCITRAL Yearbook refers to the first volume issued in (1968-1970) and the number of the volume and the year of publication are provided in all the following volumes.

TABLE OF CASES

References are to paragraph numbers

<i>A.B.D. (Metals & Waste) Ltd. v. Anglo-Chemical and Ore Co. Ltd.</i> (1955), 2 Lloyd's Rep. 456 (C.A.)	141
<i>Acetylene Co. of Great Britain v. Canada Carbide Co.</i> (1922), 6 Lloyd's L.R. 410	190
<i>Agricultores Federados Argentinos v. Ampro S.A. Commerciale, Industrielle et Financiere</i> , [1965] 2 Lloyd's Rep. 157	230
<i>Ajit v. Sammy</i> , [1967] 1 A.C. 255 (P.C.)	36, 46
<i>Allen v. Robles</i> , [1969] 1 W.L.R. 1193	53
<i>Almare Seconda, The., Blackgold Trading of Monrovia v. Almare Navigazione of Genoa</i> , [1981] 2 Lloyd's Rep. 443	115
<i>André & Cie S.A. v. J. H. Ventol Ltd.</i> , [1952] 2 Lloyd's L. Rep. 282	121
<i>Anglia Television Ltd. v. Reed</i> , [1972] 1 Q.B. 60 (C.A.)	116
<i>Anglo-African Shipping Co. of New York Inc. v. Mortner (J.) Ltd.</i> , [1962] 1 Lloyd's L. Rep. 610 (C.A.)	128
<i>Anglo-Russian Merchant Traders Ltd. and John Batt & Co. (London) Ltd., Re</i> , [1917] 2 K.B. 679 (C.A.)	200
<i>Armstrong v. Jackson</i> , [1917] 2 K.B. 822	105
<i>Arpad, The.</i> , [1934] P. 189 103 L.J.P. 129 (C.A.)	141
<i>Ashmore & Son v. C.S. Cox and Co.</i> , [1899] 1 Q.B. 436	230
<i>Avery v. Bowden</i> (1855), 5 E. & B. 714	58
<i>B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)</i> , [1979] 1 W.L.R. 783 affirmed 1 W.L.R. 232 (C.A.); [1983] 2 A.C. 352 (H.L.)	192
<i>Badische Co. Ltd., Re</i> , [1921] 2 Ch. 331	174, 186
<i>Baily v. De Crespigny</i> (1869), L.R. 4 Q.B. 180	174
<i>Balder London, The. Gatoil Anstalt v. Omennial</i> , [1980] 2 Lloyd's Rep. 489 .	53, 88
<i>Bank Line Ltd. v. Capel (Arthur) & Co. Ltd.</i> , [1919] A.C. 435 (H.L.)	174, 175, 180
<i>Barell, Ex P.</i> (1875), L.R. 10 Ch.App. 512	106

<i>Bauer v. Bank of Montreal</i> , [1980] 2 S.C.R 102	112
<i>Behn v. Burness</i> (1863), 122 E.R. 281 (Ex. Ch.)	17
<i>Behnke v. Bede Shipping Co. Ltd.</i> , [1927] 1 K.B. 649	156
<i>Behrend & Co. Ltd. v. Produce Brokers Ltd.</i> , [1920] All E.R. 125	77
<i>Berg (V.) & Son Ltd. v. Vanden-Avenne Izegem P.V.B.A.</i> , [1977] 1 Lloyd's Rep. 499 (C.A.)	89
<i>Bergerco U.S.A. v. Vegoil Ltd.</i> , [1984] 1 Lloyd's rep. 440	18
<i>Berndston v. Strang</i> (1868), L.R. 3 Ch.App. 588	207
<i>Besseler Waechter Glover & Co. v. South Derwent Coal Co.</i> , [1938] 1 Q.B. 408 (C.A.)	37
<i>Beswick v. Beswick</i> , [1968] A.C. 58 (H.L.)	154
<i>Bettini v. Gye</i> (1876), 1 Q.B.D. 183	17
<i>Bigelow-Sanford, Inc. v. Gunny Corp.</i> , 649 F.2d 1060 (5th Cir. 1981)	132
<i>Blackburn Bobbin Co. Ltd. v. Allen (T.W.) & Sons Ltd.</i> , [1918] 2 K.B. 467 (C.A.)	186
<i>Bloeman (F.J.) Pty. v. Council of the City of Gold Coast</i> , [1973] A.C. 115	97
<i>Borag, The Compania Financiera Soliada S.A. v. Hamoor Tanker Corp. Inc.</i> , [1981] 1 W.L.R. 274 (C.A.)	129
<i>Borrowman Phillips & Co. v. Free & Hollis</i> (1878), 4 Q.B.D. 500 (C.A.)	230
<i>Borthwick (Thomas) (Glasgow) Ltd. v. Faure Fairclough Ltd.</i> , [1968] 1 Lloyd's Rep. 16	175
<i>Boysen v. Antioch Sheet Metal Inc.</i> , 16 III App. 331 N.E.2d 69 (III App. Ct. 1974)	132
<i>Bradley v. Newsom (H.), Sons and Co.</i> , [1919] A.C. 16	55, 87, 106
<i>Bradley (F.C.) & Sons Ltd. v. Colonial and Continental Trading Ltd.</i> , [1964] 2 Lloyd's Rep. 52	106
<i>Brandt v. Lawrence</i> (1876), 1 Q.B.D 344 (C.A.)	64
<i>Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.</i> , [1978] 2 Lloyd's Rep. 109 (H.L.)	18, 19, 179
<i>Britain v. Rossiter</i> (1879), 11 Q.B.D. 123 (C.A.)	102

<i>British and Beningtons Ltd. v. North Western Cachar Tea Co. Ltd.</i> , [1923] A.C. 48 (H.L.)	198
<i>British Columbia, etc. Saw Mill Co. Ltd. v. Nettleship</i> (1868), L.R. 3 C.P. 499 ..	122
<i>British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.</i> , [1912] A.C. 673 (H.L.)	110, 126, 127, 129
<i>Budgett and Co. v. Binnington & Co.</i> , [1891] 1 Q.B. 35	174
<i>Bunge Corporation, New York v. Tradax Export S.A., Panama</i> , [1980] 1 Lloyd's Rep. 294 [1981] 2 All E.R. 513; [1981]; 1 W.L.R. 711 (C.A.)	18, 19, 37, 230
<i>Bung G.H. v. C.C.V. Landbouwbelang G.A.</i> , [1980] 1 Lloyd's Rep. 458	56
<i>Bunge S.A. v. Kruse</i> , [1979] 1 Lloyd's Rep. 279	11, 18
<i>Canso Chemicals Ltd. v. Canadian Westinghouse Co. Ltd.</i> (1974), 54 D.L.R. (3d) 517 (N.S.C.A.)	127
<i>Cantiere San Rocco S.A. v. Clyde Shipbuilding and Engineering Co. Ltd.</i> , [1924] A.C. 226	192
<i>Chandler v. Webster</i> , [1904] 1 K.B. 493 (C.A.)	192
<i>Charrington & Co. Ltd. v. Wooder</i> , [1914] A.C. 71 (H.L.)	141
<i>Charter v. Sullivan</i> , [1957] 2 Q.B. 117 (C.A.)	141, 143
<i>Cherry v. Thompson</i> (1872), L.R. 7 Q.B. 573	55
<i>Clarke v. Dickson</i> (1858), E. B. & E. 148	105
<i>Coddington v. Paleologo</i> (1867), L.R. 2 Ex. 193	37
<i>Collins v. Howard</i> , [1949] 2 All E.R. 324 (C.A.)	121
<i>Constantine (Joseph) Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.</i> , [1942] A.C. 154	174, 175, 180, 184
<i>Cricklewood Property Investment Trust Ltd. v. Leighton's Investment Trust Ltd.</i> , [1945] A.C. 221	179
<i>Cutter v. Powell</i> (1795), 6 T.R. 320 (K.B.)	102
<i>Danub Black Sea Railway v. Xenos</i> (1863), 13 C.B.N.S. 825	55
<i>Darbishire v. Warren</i> , [1963] 1 W.L.R. 1067 (C.A.)	125
<i>Davis Contractors Ltd. v. Fareham Urban District Council</i> , [1956] A.C. 696 (H.L.)	176, 179, 188

<i>Dawood (Ebrahim) Ltd. v. Heath (est. 1927) Ltd.</i> , [1961] 2 Lloyd's Rep. 512	74
<i>Dawsons Ltd. v. Bonnin</i> , [1922] 2 A.C. 413	11
<i>Denmark Productions Ltd. v. Boscobel Productions Ltd.</i> , [1969] 1 Q.B. 699 .	87, 174
<i>Denny, Mott and Dickson Ltd. v. Fraser (James B.) and Co. Ltd.</i> , [1944] A.C. 265 (H.L.)	175, 179, 188
<i>Dies v. British and International Mining and Finance Corp. Ltd.</i> , [1939] 1 K.B. 724	102, 106
<i>Diestal v. Stevenson</i> , [1906] 2 K.B. 345	142
<i>Dunkirk Colliery Co. v. Lever</i> (1878), 9 Ch.D. 20 (C.A.)	127, 141
<i>Dura-Wood Treating Co. v. Century Forest Industries, Inc.</i> 675 F.2d 745 33 U.C.C. Rep. Serv. (Callaghan) 1201 (5th Cir. 1982)	132
<i>Eastern Air Lines Inc. v. Gulf Oil Corp.</i> , 415 F.Supp. 429 (S.D.Fla. 1975)	184
<i>Elson v. Prices Tailors Ltd.</i> , [1963] 1 W.L.R. 287	106
<i>Emanuel (Lewis) & Son Ltd. v. Sammut</i> , [1959] 2 Lloyd's Rep. 629	197
<i>Emery Co. v. Wells</i> , [1906] A.C. 515	23
<i>Erie County Natural Gas and Fuel Co. Ltd. v. Carroll</i> , [1911] A.C. 105 (P.C.) ..	141
<i>Ertel Bieber & Co. v. Rio Tinto Co. Ltd.</i> , [1918] A.C. 260	179
<i>Esso Petroleum Co. Ltd. v. Mardon</i> , [1976] Q.B. 801 (C.A.)	129
<i>Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd.</i> , [1955] 1 Lloyd's Rep. 303	37, 40, 43
<i>Eugenia, The. Ocean Tramp Tankers Corporation v. V/O Sovfracht</i> , [1964] 2 Q.B. 226	178, 179, 184
<i>Federal Commerce and Navigation Co. Ltd. v. Molena Alpha Inc.</i> , [1979] A.C. 757 (H.L.)	18
<i>Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd.</i> , [1943] A.C. 32 (H.L.)	102, 175, 179, 190, 192
<i>Finkelkraut v. Monohan</i> , [1949] 2 All E.R. 234	50
<i>Finlay (James) and Co. Ltd. v. N.V. Kwik Hoo Tong Handel Maatschappij</i> , [1929] 1 K.B. 400 (C.A.)	127
<i>Flacke v. Gray</i> (1859), 4 Drew. 651	156

<i>Fletcher v. Tayleur</i> (1855), 17 C.B. 21	119
<i>Forslind v. Becheley Crundall</i> 1922 S.C. (H.L.) 173	55
<i>Freeth v. Burr</i> (1874), 43 L.J.C.P. 91	55, 71, 197
<i>Frost v. Knight</i> (1872), 41 L.J.Ex. 78 L.R. 7 Ex. 111	55, 62, 145
<i>Gallagher v. Shilcock</i> , [1949] 2 K.B. 765	106
<i>Garnac Grain Co. Inc. v. Faure (H.M.F.) and Fairclough Ltd.</i> , [1966] 1 Q.B. 650 (C.A.)	127, 128
<i>Gorse v. Durham County Council</i> , [1971] 1 W.L.R. 775	55
<i>Guiton v. Rochmond-upon-Thames</i> , [1981] Ch. 448	87
<i>Hadley v. Baxendale</i> (1854), 9 Ex. 341 (Exch.)	119, 122, 124
<i>Hadley v. Clarke</i> , (1799) 8 T.R. 259	190
<i>Hall (R. and H.) Ltd. and Pim (W.H.) (Junior) and Co.'s Arbitration, Re</i> (1928), 139 L.T. 50 (H.L.)	119, 121
<i>Hamzeh Malas & Sons v. British Imex Industries Ltd.</i> , [1958] 2 Q.B. 127 (C.A.)	212
<i>Hansa Nord, The. Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.</i> , [1976] Q.B. 44 (C.A.)	18, 19
<i>Hare v. Murphy Brothers Ltd.</i> , [1974] 3 All E.R. 940	190
<i>Harling v. Eddy</i> , [1951] 2 K.B. 739 (C.A.)	11, 17
<i>Harlow and Jones Ltd. v. Panex (International) Ltd.</i> , [1967] 2 Lloyd's Rep. 509	142
<i>Harrison v. Holland</i> , [1921] 3 K.B. 297	106
<i>Hartley v. Hymans</i> , [1920] 3 K.B. 475	37
<i>Hermosa, The. Chilean Nitrate Sales Corporation v. Marine Transportation Co. Ltd.</i> , [1982] 1 Lloyd's Rep. 570 (C.A.)	55
<i>Heron II, The. Koufos v. Czarnikow (C.) Ltd.</i> , [1969] 1 A.C. 350 (H.L.)	119, 121, 122, 124
<i>Heskell v. Continental Express Ltd.</i> , [1950] 1 All E.R. 1033	141
<i>Heyman v. Darwins Ltd.</i> , [1942] A.C. 356 (H.L.)	58, 60, 95, 96, 97
<i>Hinde v. Liddell</i> (1875), L.R. 10 Q.B. 265	142
<i>Hirji Mulji v. Cheong Yue Steamship Co. Ltd.</i> , [1926] A.C. 497 (P.C.)	175, 192

<i>Hochster v. De la Tour</i> (1853), 2 E. & B. 678 (Q.B.)	55, 62
<i>Honck v. Muller</i> (1881), 7 Q.B.D. 92 (C.A.)	64
<i>Hong Guan & Co. Ltd. v. Jumabhoy (R.) & Sons Ltd.</i> , [1960] A.C. 684 (P.C.) .	186
<i>HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.</i> , [1962] 2 Q.B. 26 (C.A.)	12, 17, 18, 19
<i>Horne v. Midland Railway Co.</i> (1873), L.R. 8 C.P. 131	122
<i>Household Machines Ltd. v. Cosmos Exporters Co. Ltd.</i> , [1947] 1 K.B. 217	139
<i>Howard v. Pickford Tool Co. Ltd.</i> , [1951] 1 K.B. 417 (C.A.)	60
<i>Howe v. Smith</i> (1884), 27 Ch. D. 89 (C.A.)	106
<i>Howell v. Coupland</i> (1876), 1 Q.B.D. 258 (C.A.)	186
<i>Howell v. Evans</i> (1926), 134 L.T. 570	64
<i>Hunt v. Silk</i> (1804), 5 East 449 (K.B.)	102
<i>Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.</i> , 719 F.2d Rep. 992 (9th Cir. 1983)	174
<i>Jackson v. Union Marine Insurance Co. Ltd.</i> , (1875) L.R. 10 C.P. 125	190
<i>Jacobs v. Crédit Lyonnais</i> (1884), 12 Q.B.D. 589	186
<i>Jamestown Farmers Elevator, Inc. v. General Mills, Inc.</i> , 552 F.2d 1285 (8th Cir. 1977)	132
<i>Jewelowski v. Propp</i> , [1944] 1 K.B. 510	127
<i>Johnson v. Agnew</i> , [1980] A.C. 367 (H.L.)	97
<i>Johnstone v. Milling</i> (1886), 16 Q.B.D. 460	55, 58, 87, 96, 97
<i>Jon-T Chemicals Inc. v. Freeport Chemical Co.</i> , 704 F.2d Rep. 1412 (5th Cir. 1983)	174
<i>K & M Joint Venture v. Smith Int'l Inc.</i> , 669 F.2d Rep. 1106 (6th Cir. 1982)	86
<i>King v. Parker</i> (1876), 34 L.T. 886	186
<i>Kingdom v. Cox</i> (1848), 136 E.R. 982	64
<i>Kish v. Taylor (Charles), Sons and Co.</i> , [1912] A.C. 604	87
<i>Krell v. Henry</i> , [1903] 2 K.B. 740	174, 175, 179

<i>Kwei Tek Chao v. British Traders & Shippers Ltd.</i> , [1954] 2 Q.B. 459	127, 142
<i>Laconia, The. Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia</i> , [1977] A.C. 850 (H.L.)	53, 88
<i>Lagunas Nitrate Co. v. Lagunas Syndicate</i> , [1899] 2 Ch. 392 (C.A.)	105
<i>Laskmijit v. Sherani</i> , [1974] A.C. 605	53
<i>Laws v. London Chronical (Indicator Newspapers) Ltd.</i> , [1959] 1 W.L.R. 698	55
<i>Lazenby Garages Ltd. v. Wright</i> , [1976] 1 W.L.R. 459 (C.A.)	140
<i>Leavey (J.) & Co. Ltd. v. Hirst (G.H.) & Co. Ltd.</i> , [1944] 1 K.B. 24 (C.A.)	139
<i>Lebeaupin v. Richard Crispin and Co.</i> , [1920] 2 K.B. 714	186
<i>Lep Air Services Ltd. v. Rolloswin Investments Ltd.</i> , [1973] A.C. 331	19
<i>Lesters Leather and Skin Co. Ltd. v. Home and Overseas Brokers Ltd.</i> , [1948] 64 T.L.R. 569 (C.A.)	141
<i>Lickbarrow v. Mason</i> (1794), 5 T.R. 683 (K.B.)	205
<i>Lindsay (A.E.) & Co. Ltd. v. Cook</i> , [1953] 1 Lloyd's R. 328	40
<i>Lloyd v. Stanbury</i> , [1971] 1 W.L.R. 535	116
<i>Lloyds & Scottish Finance Ltd. v. Modern Cars and Caravans (Kingston) Ltd.</i> , [1966] 1 Q.B. 764	129
<i>Longbottom & Co. Ltd. v. Bass, Walker & Co.</i> , [1922] W.N. 245 (C.A.)	230
<i>Lowther v. Lowther</i> (1806), 3 Ves. 95	156
<i>Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Co. Ltd.</i> , [1934] 1 K.B. 148 (C.A.)	67, 68, 76
<i>Marrison v. Bell</i> , [1939] 2 K.B. 187	190
<i>Martella v. Woods</i> , 715 F.2d 410 (8th Cir. 1983)	132
<i>Mayson v. Clouet</i> , [1924] A.C. 980 (P.C.)	106
<i>McDougall v. Aeromarine of Emsworth Ltd.</i> , [1958] 3 All E.R. 431	230
<i>McMillan v. Meuser Material & Equip Co.</i> , 541 S.W. 2d. 911 (1976)	133
<i>Mehmet Dogan Bey v. G.G. Abdeni & Co. Ltd.</i> , [1951] 2 K.B. 405	121
<i>Melachrino v. Nickoll and Knight</i> , [1920] 1 K.B. 693	61, 128, 145

<i>Mersey Steel and Iron Co. v. Naylor, Benzon & Co.</i> (1884), 9 App.Cas. 434 (H.L.)	55, 67, 71, 198
<i>Metropolitan Water Board v. Dick, Kerr & Co. Ltd.</i> , [1918] A.C. 119	179
<i>Michael v. Hart & Co.</i> , [1902] 1 K.B. 482	96, 97
<i>Mihalis Angelos, The. Marendelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H.</i> , [1971] 1 Q.B. 164	19, 55, 56
<i>Millar (Andrew) & Co. Ltd. v. Taylor & Co. Ltd.</i> , [1916] 1 K.B. 402	179
<i>Millar's Machinery Co. Ltd. v. Way (David) & Son</i> (1935), 40 Com.Cass. 204 ...	115
<i>Millet v. Van Heek and Co.</i> , [1921] 2 K.B. 369	145
<i>Monkland v. Barclay (Jack) Ltd.</i> , [1951] 2 K.B. 252	186
<i>Moore & Co. Ltd. and Landauer & Co., Re</i> , [1921] All E.R. 466 (C.A.)	11, 77
<i>Moschi v. Lep Air Services Ltd.</i> , [1973] A.C. 331 (H.L.)	11, 95, 96
<i>Mott Equity Elevator v. Svihovec</i> 236 N.W. 2d 900 (N.D. 1975)	16
<i>Mount v. Oldham Corporation</i> , [1973] 1 All E.R. 26	190
<i>National Carriers Ltd. v. Panalpina (Northern) Ltd.</i> , [1981] A.C. 675	179
<i>North v. Great Northern Ry.</i> (1860), 2 Giff. 64	156
<i>Nutbrown v. Thornton</i> (1804), 10 Ves. 159	156
<i>Odenfeld, The. Gator Shipping Corp. v. Trans-Asiatic Oil S.A. and Occidental Shipping Establishment</i> , [1978] 2 Lloyd's Rep. 357	128
<i>Ogle v. Earl Vane</i> (1868), L.R. 3 Q.B. 272 (Exch. Ch.)	37
<i>Pacific Phosphate Co. Ltd. v. Empire Transport Co. Ltd.</i> (1920), 36 T.L.R. 750	179
<i>Parsons (H.) (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.</i> , [1978] Q.B. 791 (C.A.)	119, 121, 124
<i>Patrick and Co. v. Russo-British Grain Export Co. Ltd.</i> , [1927] 2 K.B. 535	139
<i>Pavia & Co. S.P.A. v. Thurmann-Nielson</i> , [1952] 1 All E.R. 492 (C.A.)	37
<i>Payzu Ltd. v. Saunders</i> , [1919] 2 K.B. 581 (C.A.)	127, 230
<i>Photo Production Ltd. v. Securicor Transport Ltd.</i> , [1980] A.C. 827 (H.L.)	12, 17, 19, 95, 96

<i>Pilkington v. Wood</i> , [1953] Ch. 770	127, 151
<i>Plevins v. Downing</i> (1876), 1 C.P.D. 220	37
<i>Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty.</i> , [1981] 1 W.L.R. 138	96
<i>Poussard v. Spiers & Pond</i> (1876), 1 Q.B.D. 410	190
<i>Prenn v. Simmonds</i> , [1971] 1 W.L.R. 1381	11
<i>Pusey v. Pusey</i> (1684), 1 Vern. 273	156
<i>Quadrangle Development and Construction Co. Ltd. v. Jenner</i> , [1974] 1 All E.R. 729	50
<i>Rawlings v. General Trading Co. Ltd.</i> , [1921] 1 K.B. 635	156
<i>Reardon-Smith Line Ltd. v. Yngvar Hansen-Tangen</i> , [1976] 1 W.L.R. 989 (H.L.)	19
<i>Regent O.H.G. Aisenstadt und Barig v. Francesco of Jermyn Street</i> , [1981] 3 All E.R. 327	18
<i>Reuter, Hufeland & Co. v. Sala & Co.</i> (1879), 4 C.P.D. 239 (C.A.)	68, 71
<i>Riches v. Westminster Bank Ltd.</i> , [1943] 2 All E.R. 725	151
<i>Rickards (Charles) Ltd. v. Oppenheim</i> , [1950] 1 K.B. 616 (C.A.)	36, 37
<i>Robinson v. Harman</i> (1848), 1 Exch. 850 (Exch.)	110
<i>Rockwell Int'l Systems Inc. v. Citibank N.A.</i> , 719 F.2d Rep. 583 (2d Cir. 1983) .	174
<i>Roehm v. Horst</i> (1900), 44 L. Ed. 953	62
<i>Roper v. Johnson</i> (1873), L.R. 8 C.P. 167	145
<i>Rosenthal (J.) & Sons Ltd. v. Esmail</i> , [1965] 1 W.L.R. 1117 (H.L.)	68
<i>Roth and Co. v. Tayson, Townsend, and Co.</i> (1895), 73 L.T. 628	128
<i>Rowland v. Divall</i> , [1923] 2 K.B. 500 (C.A.)	107
<i>Saint Line Ltd. v. Richardsons Westgarth & Co. Ltd.</i> , [1940] 2 K.B. 99	119
<i>Scaptrade, The. Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana (The Scaptrade)</i> , [1981] 2 Lloyd's Rep. 425 affirmed [1983] 1 All E.R. 301 (H.L.)	53, 88
<i>Schulze v. G.E. Ry.</i> (1887), 19 Q.B.D. 30	139

<i>Schuler (L.) A.G. v. Wickham Machine Tool Sales Ltd.</i> , [1973] 2 W.L.R. 683 (H.L.)	12, 17
<i>Shaffer (James) Ltd. v. Findlay Durham & Brodie</i> , [1953] 1 W.L.R. 106	71
<i>Shipton, Anderson & Co. v. Weil Bros. and Co.</i> , [1912] 1 K.B. 574	83
<i>Short v. Stone</i> (1864), 8 Q.B. 358	55
<i>Smith (E.E. & Brian) (1928) Ltd. v. Wheatsheaf Mills Ltd.</i> , [1939] 2 K.B. 302 ..	230
<i>Smyth (Ross T.) & Co. Ltd. v. Bailey (T.D.), Son & Co.</i> , [1940] 3 All E.R. 60 (H.L.)	56, 68
<i>Société Co-operative Suisse des Céréales et Matières Fouragères v. La Plata Cereal Co. S.A.</i> (1947), 80 Lloyd's L.R. 530	186
<i>Societe General de Paris v. Milders</i> (1883), 49 L.T. 55	60
<i>Solholt, The. Sortiros Shipping Inc. & Aecomartime S.A. v. Sameiet Solholt</i> , [1981] 2 Lloyd's Rep. 574; [1983] 1 Lloyd's Rep. 605 (C.A.)	125
<i>Solle v. Butcher</i> , [1950] 1 K.B. 671 (C.A.)	105
<i>Somerset v. Cookson</i> (1735), 3 P.Wms. 390	156
<i>Somes v. British Empire Shipping Co.</i> (1860), 8 H.L.Cas. 338	243
<i>Spettabile Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co. Ltd.</i> (1919), 121 L.T. 628	71
<i>Stach (Ian) Ltd. v. Baker Bosley Ltd.</i> , [1958] 2 Q.B. 130	37
<i>Standard Alliance Inc. v. Black Clawson Co.</i> , 587 F.2d Rep. 813 (6th Cir. 1978) .	86
<i>Stickney v. Keeble</i> , [1915] A.C. 386 (H.L.)	36, 46
<i>Stockloser v. Johnson</i> , [1954] 1 Q.B. 476 (C.A.)	102, 106
<i>Stone and Saville's Contracts, Re</i> [1963] 1 W.L.R. 163	43
<i>Storey v. Fulham Steel Works Co.</i> (1907), 24 T.L.R. 89	190
<i>Sudan Import and Export Co. (Khartoum) Ltd. v. Société Générale de Compensation</i> , [1958] 1 Lloyd's Rep. 310 (C.A.)	128
<i>Sudbrooke Trading Estate Ltd. v. Eggleton</i> , [1983] A.C. 444 (H.L.)	154
<i>Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale</i> , [1967] 1 A.C. 361 (H.L.)	17

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<i>Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Co. Ltd.</i> , [1916] 2 A.C. 397 (H.L.)	190
<i>Tatem (W.J.) Ltd. v. Gamboa</i> , [1939] 1 K.B. 132	174, 178, 184
<i>Taylor v. Caldwell</i> (1863), 122 E.R. 309	175
<i>Thiis v. Byers</i> (1876), 1 Q.B.D. 244	174
<i>Thompson (W.L.) Ltd. v. Robinson (Gunmakers) Ltd.</i> , [1955] Ch. 177 (C.A.)	140, 141, 142
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<i>Transatlantic Financing Corp. v. U.S.A.</i> , 363 F.2d 312 (D.C. Cir. 1966)	175
<i>Tsakiroglou & Co. Ltd. v. Noble Thorl, G.m.b.H.</i> , [1962] A.C. 93 (H.L.)	174
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<i>United Scientific Holdings Ltd. v. Burnley Borough Council</i> , [1978] A.C. 904 (H.L.)	37
<i>Universal Cargo Carriers Corporation v. Citati</i> , [1957] 2 Q.B. 401	55, 56, 176
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<i>Walton Harvey Ltd. v. Walker & Homfrays Ltd.</i> , [1931] 1 Ch. 274	179
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<i>Wertheim v. Chicoutimi pulp Co.</i> , [1911] A.C. 301 (P.C.)	110
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<i>Williams v. Reynolds</i> (1865), 6 B. & S. 495	114

<i>Willis (George) & Sons Ltd. v. Cunningham (R.S.), Son & Co. Ltd.</i> , [1924] 2 K.B. 220	186
<i>Worth v. Tyler</i> , [1974] Ch. 30	121
<i>Ziebrath v. Kalnze</i> , 238 N.W. (2d) 261 (N.D. 1976)	16

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Chapter I

INTRODUCTION

[1] *Scope and purpose of the study*

This study seeks to introduce the remedies⁴ available to parties in international sale of goods under *The Convention* and to compare these remedies with Egyptian, English and French law in order to reveal some of the effects *The Convention* may have on traders involved in international sales. The problems that usually result from a breach of contract⁵ are complex and may lead to quite different outcomes under the various legal systems. In many situations, breach of contract causes much uncertainty and confusion within domestic jurisdictions and considerable complications when a foreign party is involved or a foreign law must be applied.

⁴ The term "remedy" as used in this study indicates any step that an innocent party may take to protect his or her interests against the party committing a breach. This study assumes that there is a valid contract between the contracting parties and that *The Convention* is the governing law. It further assumes that one of the parties, either the seller or the buyer, has committed a breach of the contract by not performing one or more obligations under it and has consequently given the other party the right to resort to one or more of the remedies under *The Convention*, *ULIS*, Egyptian, English and French law.

⁵ Since the expression "breach of contract" is widely used in this study and remedies become available only when there has been a breach, either actual or anticipatory, its meaning as used in all of the laws considered in this study requires some terminological clarification. In English law, a breach of contract arises from a wide variety of situations. As one author points out, "a breach of contract is committed when a party without lawful excuse fails or refuses to perform, performs defectively or incapacitates himself from performing the contract." Treitel, *The Law of Contract*, 4th ed. (London: Stevens, 1983), at 626 (hereinafter cited as *Contract*).

In French and Egyptian law, the expression *inexécution du contrat* is used as an equivalent of breach of contract. *Inexécution du contrat* covers cases of both defective performance, e.g. a sale of defective goods and non-performance, e.g. late delivery by a seller. It may be said that the use of both "breach of contract" and *inexécution du contrat* cover a wide variety of situations in which aggrieved parties suffer very different types of loss. For example, the buyer may suffer a total loss of his or her bargain if the seller fails to deliver the goods; or that buyer may suffer a partial loss of the bargain if the seller fails to deliver on time or delivers defective goods. *ULIS* and *The Convention* use the expression "breach of contract" to cover the failure of one of the parties to perform one or more obligations. In this study, both "breach of contract" and "non-performance" are used to refer to cases where a contracting party has not duly performed a contractual obligation.

Assuming that a binding sales contract, domestic or international, has been entered into, a breach by either party involves various important problems. Any successful ascertainment of the consequences of such a breach requires answers to the following questions. Is a party entitled to *avoid* the contract? Is a party required, in cases where the other party is delaying performance, to *give an additional time notice* for the other party to perform before avoiding the contract? Is a party entitled to *damages*? If so, how should they be *calculated*? Is a party entitled to *interest* in addition to damages? If so, what *rate* should be applied? Is a party entitled to *compel the performance* of the other side? Is a party entitled to *suspend* further performance of the contract? Assuming that there is an impediment to performance beyond the control of one of the parties, is that party then *discharged* from his or her obligation to further perform the contract? Assuming that the seller fails to perform satisfactorily, is the buyer entitled to *reduce the price* in proportion to the loss in value caused by the lack of conformity? Is the seller, in such a case, entitled to *cure* the defective performance?

The Convention has been explored in numerous articles, and several symposia.⁶ Much more will be published now that *The Convention* has entered into force. However, little if any research has been conducted on *The Convention's* core provisions, i.e. those dealing with remedies. This is a demanding and largely unexplored topic that requires further research. Consequently, *The Convention's* remedial rules will probably be the focus of much of the discussion surrounding its application.

When the author began his research, he immediately encountered the following questions: What improvements, if any, over the *ULIS* have been achieved in *The Convention*? In other words, will *The Convention*, unlike the *ULIS*, be a useful and acceptable instrument for unification of international sales law? If so, will *The Convention*, which is the culmination of over fifty years of planning and discussion aimed at codifying international sales law, successfully displace domestic laws when the contracting

⁶ See the selected bibliography annexed to this study.

parties' places of business are located in different countries? What, moreover, will be the implications both for domestic contract law and for international sales law? As the research progressed, it soon became clear that (a) international traders and their lawyers will have the benefit of a truly unified international sales law and (b) *The Convention* achieves a fair balancing of the interests of buyers and sellers.

The next step was to compare *The Convention's* remedy rules to those of the most representative legal systems. Two Civil law jurisdictions, namely Egypt and France, and one Common law jurisdiction, England, were chosen. Comparison, it is submitted, is the best way to establish a concrete understanding of and to provide an efficient introduction to unfamiliar rules, such as those in *The Convention*.

The objectives of this thesis are as follows: first, to show that, despite certain shortcomings, *The Convention* should serve as a useful initial step in the unification of international trade law if proper attention is given to its general principles and drafting history;⁷ second, to show that *The Convention's* remedial provisions serve the needs of international trade participants better than existing law and that international traders can be expected, now and in the foreseeable future, to rely on *The Convention's* coherent system of remedies; third, to argue that *The Convention's* remedial provisions, unique as they are, correspond more fully to international trade practice than do the selected domestic laws considered in this study; fourth, and finally, to advocate the interpretation of *The Convention* according to its own terms so as to contribute to the development of a uniform international jurisprudence around *The Convention*.

⁷ The legislative history of *The Convention* consists of a compilation of documents considered at the diplomatic conference held in Vienna in 1980. This includes the final draft of *The Convention*, comments by the Secretary-General, governments and international organizations, the texts of amendments submitted at the conference, and summary records of plenary and committee meetings. Although there is no official commentary to the final text, previous drafts contain very helpful comments. It is advisable also to examine differences between the final version and the previous drafts published in the UNCITRAL Yearbook. See also note 1205.

The Convention's remedial provisions, which reflect a compromise between Civil and Common law systems, are simple, clear, easy for the international traders and their lawyers to understand, and free from complicated legal theory. Moreover, *The Convention* contains a unique system of remedies that, as this study will reveal, is similar in some respects and different in many others from the remedies regimes of the domestic laws under consideration.

It is too early to tell whether international trade lawyers will urge their clients to exclude the application of *The Convention* and to insist on a governing law clause limited to their domestic laws. It may take some time for *The Convention* as a whole to be accepted by international trade practitioners, but with the passage of time they will probably become significantly more familiar with *The Convention*.

If widespread acceptance of *The Convention* as a whole is not immediately forthcoming, this should not be the result of objections to its remedial provisions, which, for the most part, are well-adapted to the international commercial environment in which they will operate. Those involved with transactions within the scope of *The Convention* will soon come to rely on its coherent system of remedies.

[2] *Research method*

The differences in legal analysis and in the concepts and words used to express legal ideas often make it difficult for a researcher from one legal system to understand a legal text from another legal system. His or her grasp of a foreign law may be more one of vague familiarity than extensive knowledge. This is particularly true when a new international convention is to be analyzed and its provisions compared to those of various domestic jurisdictions.

Research for the present study required particular attention to be given to the approach of *ULIS* to the questions under discussion with the purpose of discovering

any improvements achieved by *The Convention*. It will be seen throughout this study that *The Convention* has benefited from the mistakes of *ULIS* and is therefore markedly superior to it.

There are two good reasons for comparing the rules of *The Convention* with a typical Civil (the French) and Common (the English) law system. First and foremost, although many domestic legal systems influenced the drafting of both *ULIS* and *The Convention*, either directly or indirectly, the influence of Common and Civil law countries was pervasive. As will be seen, *The Convention's* remedial rules contain concepts that are more familiar to one legal system than to others and represent a compromise between Civil and Common law concepts. Second, a large number of countries have adopted either French or English law as a model. Thus, one or the other is dominant, in one form or another, virtually everywhere in the world.

Egyptian law, though part of the Civil law family, has its own peculiarities. The *Egyptian Civil Code* of 1949 is the oldest civil code in the Arab World.⁸ The civil codes of most Arab countries were influenced by the Egyptian Code.⁹ Egypt holds the predominant position, legislatively and jurisprudentially, in the reformation of civil and commercial law in the Arab World. Since this influence has not yet been adequately treated by Western scholars,¹⁰ one aim of this study is to contribute to a better under-

⁸ Law n. 31 of the Code appearing in the *Journal Du Commerce Et De la Marine* (Perrot, Fanner & Sims Marshal trans. 1952). For more details, see Zweigert and Kotz, *An Introduction to Comparative Law* (Oxford: Clarendon Press, 1987), Vol. I, at 113 ff (T. Weir trans.); Badr, "The New Egyptian Civil Code and the Unification of the Laws of the Arab Countries" (1956), 30 *Tulane L. Rev.* 299; Kourides, "The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts" (1970), 9 *Colum. L. Trans. L.* 384.

⁹ For instance, the *Syrian Civil Code*, 1949, the *Iraqi Civil Code*, 1953, the *Libyan Civil Code*, 1954, the *Civil Code of Qatar*, 1971, the *Civil Code of Somalia*, 1973, the *Civil Code of North Yemen*, 1976, the *Civil Code of Kuwait*, 1980, the *Civil Code of Algeria*, 1980, the *Jordanian Civil Code*, 1982.

¹⁰ Edge, "Comparative Commercial Law of Egypt and the Arabian Gulf" (1985), 34 *Clev. State L. Rev.* 129, at 144.

standing of the approach of Egyptian law to the issues under discussion.

Reference is made from time to time, mainly in the notes, to the *American Uniform Commercial Code (UCC)* and the *Canadian Uniform Sale of Goods Act*¹¹ adopted by the Uniform Law Conference of Canada.¹²

This study predicts the reception that *The Convention's* remedial rules can expect in the courts of Egypt, England and France, using their domestic laws as comparative frames of reference. The theory behind and practice under these national statutes ought to provide valuable information as to the probable interpretations of *The Convention's* remedial provisions in Egyptian, English and French courts. Comparisons are essential until *The Convention* becomes familiar to those who must interpret and apply its provisions. Courts in contracting states, international trade lawyers and international trade participants will have to approach *The Convention* from the perspective of the law with which they are already acquainted. Comparisons, therefore, can provide an efficient introduction to unfamiliar provisions.

[3] *Why is a unified sales law needed?*

International trade has increased significantly in recent decades. This expansion has made it necessary for those active in international trade to develop a common understanding of their legal rights and duties. The international business community has developed usages and trade terms to solve the many potential problems that can arise

¹¹ The Uniform Sale of Goods Act has its origin in the report on sale of goods issued by the Ontario Law Reform Commission (OLRC) in 1979. The OLRC (*Report on Sales*, at 30) urged consultation with the Uniform Law Conference (ULC) to see whether agreement could be reached on the formulation of a uniform sale of goods act. The ULC appointed a special committee to review the OLRC report. This committee reported favourably in 1981 and submitted a draft Uniform Sale of Goods Act for the conference's approval. In the following year, the conference formally adopted the Uniform Sale of Goods Act. ULC, *Proceedings*, 1981 at 34 and Appendix S at 185; *Proceedings*, 1982 at 36 and Appendix HH at 531.

¹² The ULC, which is a recommending body, was established in 1918 to promote the uniformity of law among the Canadian provinces. The federal and provincial governments appoint the members of the conference.

in an international sales transaction. However, eliminating all these problems is difficult. Disputes inevitably arise and have to be resolved through lawsuits or arbitration. In addition, international sales transactions, which at one time dealt mainly with sales of food, raw materials, clothing and furniture, now include highly complex exchanges involving such matters as manufacturing rights, marketing rights and the right to use sophisticated forms of technology. Although not all these matters are governed by *The Convention*, these transactions have given rise to problems that scarcely existed a short time ago. The need for a unified sales law to eliminate some of these problems, from the point of view of international trade participants, international trade lawyers, and governments will be discussed below.

Before this is done, it should be emphasized that countries all over the world regulate the legal relations of parties to sales contracts in different ways. These differences create many difficulties. This is particularly true regarding the relation between the Common law countries and the legal systems of the Civil law tradition. There are even differences within each of these legal systems. For example, although they share a common legal legacy, there are differences in detail, and sometimes in principle, between Article 2 of the *UCC* and the English *Sale of Goods Act (SGA)*. The same is true of German and French law. Of course, there are, in addition, considerable differences between these laws and the laws of the socialist countries.

International trade participants are not always aware of differences in national rules governing the law of sales. They may simply assume that the remedies available under the various laws are substantially similar. This can often result in disaster for a party who has agreed to the application of a foreign law. Contracts for the sale of goods involve many technical questions of law, such as the circumstances that trigger the passage of title and risk of loss. These may have a considerable material impact on the nature of the remedies available to an aggrieved party. Technical issues must be resolved by technical rules of law. Clearly, these differ from country to country.

Taking full account of the effect that a foreign law may have upon a contract for the international sale of goods frequently involves extensive negotiations before the contract is concluded. There may be no established trade terms that the parties are willing to adopt. It is not surprising, therefore, that there have been several efforts made to unify the law of international sales and to adopt a common approach to the liabilities and risks of the parties.

Given a choice, almost every party to an international sales contract would insert into the contract a clause to the effect that his or her own domestic legal rules are to govern all future disputes.¹³ This is a logical choice, since that party is familiar with his or her own domestic rules. This choice is often made even when a foreign law with a real and substantial connection to the transaction might serve his or her interests better. It is submitted that this attitude will change and that the parties will come to prefer *The Convention* to their own law, particularly if *The Convention* is ratified by one or both of their countries. Depending on his or her bargaining position,¹⁴ a party may not always be able to dictate the terms of the contract and, indeed, neither party may wish to delay business for extended negotiation on this sensitive point. The unification of the rules regulating international sale of goods contracts plays an important role in providing the parties with a set of rules that puts them in equal bargaining positions.¹⁵

Suppose, however, that the contract contains no express choice of law clause because the parties cannot agree on which law to apply or because the issue was not addressed at all. In this case, conflict of laws rules must be invoked in the event of a dispute. The application of the conflict of laws rules raises difficulties for the parties

¹³ Feltham, "Export Contracts" in Ziegel and Graham (eds.), *New Dimensions in International Trade Law, A Canadian Perspective* (Toronto: Butterworths, 1980), 3, at 13 (hereinafter cited as *New Dimensions*).

¹⁴ Graham, "Performance and Bid Bonds, Choice of Law, Arbitration" in *New Dimensions, id.*, 104, at 108.

¹⁵ Reinhart, "Development of a Law for the International Sale of Goods" (1983-84), 14 *Cumberland L. Rev.* 89, at 91.

because these rules vary from one domestic legal system to another. A unified law allows the parties to escape the uncertainties of choice of law rules and the ensuing application of rules of law unfamiliar to at least one of them. Furthermore, conflict of laws rules may fail to answer many of the questions that arise in international commercial practice.¹⁶ The confusion created by this situation cries out for resolution by a body of uniform rules for international sales such as are contained in *The Convention*.

International trade lawyers play a crucial role in the negotiation and drafting of international sales contracts. They must know the national sales law that would best serve the interests of their clients. Furthermore, they must be able to analyze the problems posed by conflict of laws rules and be familiar with international and local trade usages. The international trade lawyer is anxious to have his or her client's contract safely anchored in one domestic law through a carefully drafted clause as to choice of law and forum. If possible, that lawyer is likely to choose the law of the client's domicile, or a trustworthy "neutral" law.¹⁷

A carefully prepared uniform law for international sales is undoubtedly capable of reducing the commercial lawyer's complex burden. Their clients trade with many countries, each with its own rules and traditions. An adequate understanding of even a few of these can only be gained at the cost of considerable time and effort.

Moreover, countries from different legal and economic backgrounds can benefit from the unification of the law governing international sale of goods contracts.¹⁸ Gov-

¹⁶ Goldstajn, "Usages of Trade and Other Autonomous Rules of International Trade According to the UNCITRAL Sales Convention" in Sarcevic and Volkan (ed.), *International Sales of Goods, Dubrovnik Lectures* (New York, London, Rome: Oceana Publications, 1986), 55, at 66 (hereinafter cited as *Dubrovnik Lectures*).

¹⁷ Horn, "Uniformity and Diversity in the Law of International Commercial Contracts" in Horn and Schmitthoff (eds.), *Transnational Law of International Commercial Transactions* (Boston: Kluwer, 1982), 3, at 9 (hereinafter cited as *Transnational Law*).

¹⁸ Tschikvadse and Rubanov, "Some Aspects of the Unification of the Law of Sales" in Honnold (ed.), *Unification of the Law Governing International Sales of Goods* (Paris: Dalloz, 1966), 333, at 333. But see Cremades and Plehn "The New Lex

ernments intervene in transactions in many ways. For example, they provide information services to international traders; they promulgate regulations concerning export licenses, exchange controls and customs duties; they establish specialized departments or corporations (such as the Canadian Export Development Corporation) to facilitate and develop export trade by providing insurance, guarantees, loans, and other financial facilities.¹⁹ Diverse regulations relating to restrictive trade practices and competition have also been enacted in most countries. The more unification is advanced at the global level, the more the promotion of those countries' interests is achieved.

[4] *Trade practice and The Convention*

In order to assess *The Convention's* potential impact on international trade practice, it is vital to have some understanding of the existing practice. The first impression of a neutral observer is that *ULIS*, *ULIF* and *The Convention* are relatively unknown, certainly in trade circles. In fact, they are often applicable to international contracts of sale without the parties being aware of this fact. To illustrate, suppose that a Canadian company contracts to sell computer equipment to a French company. The Canadian company may not realize that neither French nor Canadian law governs the contract but that it is governed by *The Convention*, even though Canada has not ratified it. This is so since *The Convention* applies to international transactions whenever the rules of private international law would lead to the application of the law of a contracting state.²⁰ Given that France has ratified *The Convention*, there is a substantial likelihood that a French court would apply *The Convention* if it found that French law was

Mercatoria and Harmonization of the Laws of International Commercial Transactions" (1984), 2 *Boston U. Int'l. L. J.* 317, at 320 (where it is noted that some countries will not necessarily benefit from the further unification of international sales law).

¹⁹ Preamble to the *Canadian Export Development Act*, R.S.C. 1970, C.E.18, as am.

²⁰ *The Convention*, art. 1(1)(b).

the proper law governing the contract. It is often the case that traders and their lawyers find out which law is applicable to the contract only after the commencement of litigation.

Another observation is that international traders usually try to regulate all relevant matters in the contract and leave as little scope as possible for the operation of domestic laws. The widespread use of international commercial arbitration, as well as standard form contracts, reflects the wish of contracting parties to avoid surprises. The parties may prefer to stick to the familiar rules of their association and to settle their disputes by arbitration,²¹ rather than rely upon untried rules such as those of *The Convention*. This is particularly true when there is no common forum to create judicial precedents under *The Convention*. International trade lawyers will then be forced to rely upon a growing body of international case law and scholarly writing.

This observation is further illustrated by the fact that the international business community has developed detailed form contracts for the purpose of resolving questions that the law may have left unsettled. As a result of the freedom of contract principle and the desire of international traders to avoid the application of domestic laws, parties may resort to the use of comprehensive self-regulatory contracts.²² Several international associations have developed standard form contracts, each with its own rules and regulations,²³ to regulate international trade in many commodities and capital goods.²⁴ Standard form contracts have also been drafted by international organiza-

21 In fact, this is one of the findings of the empirical survey conducted in this study concerning the attitudes of international trade associations towards *The Convention*. See [260].

22 See Cremades and Plehn, *supra*, note 18, at 328.

23 Hoyle, *The Law of International Trade* (London: Blackwell Press Ltd., 1981), at 25.

24 Examples of these associations are: the London Corn Trade; the Timber Trade Federation of the United Kingdom; the Incorporated Oil Seed Association (London); the Jute Association; the London Rubber Trade Association and the Cocoa Association of London Ltd. See Schmitthoff, *Export Trade*, 7th ed. (London: Ste-

tions like the United Nations Economic Commission for Europe (ECE).²⁵ Others are issued by organizations like the Grain and Feed Trade Association (GAFTA).²⁶ The customs and practices of particular trades and commercial sectors have played a key role in the drafting of these documents.

Standard form contracts often expressly provide for the settlement of disputes by arbitration²⁷ and frequently appoint the institution that drafted the standard form contract to administer such disputes. Standard form contracts are widely used in international sales of grain, silk, coffee, oil, and sugar. Therefore, in the case of commodities, a great deal of uniformity already exists.²⁸

Here, the function of *The Convention* is, at least for the moment, somewhat more modest than has been assumed by most writers. Most international contracts of sale, especially in respect of commodities, are governed (a) by trade terms developed by professional trade organizations, such as those developed by the International Chamber of Commerce (Incoterms); (b) by trade usage or; (c) by a standardized set of conditions, such as the standard form contracts of international trade associations. There

vens, 1980), at 51 ff. For more details about the attitudes of these and other associations towards *The Convention*, see appendix 1.

²⁵ In preparing a series of general conditions, the ECE was assisted by a working group of representatives of sellers and buyers engaged in trading the commodity to which the general conditions were to apply. See David, "The International Unification of Private Law" (1972), 2 *Int'l. Encyclopedia of Comp. L.* (Tubingen: Mohr, 1971), Chapter 5, at 59. The ECE General Conditions of Sale and Standard Forms of Contract are optional and take effect only when the parties refer to them in the contract. See Benjamin, "The ECE General Conditions of Sale and Standard Forms of Contract" [1961] *J. Bus. L.* 113, at 121; Cornil, "The ECE General Conditions of Sale" (1969), 3 *J. W. T. L.* 390, at 395; Farnsworth, "Formation of International Sales Contracts: Three Attempts at Unification" (1962), 110 *U. Pa. L. R.* 305, at 309. They have no application without the consent of the parties. They precisely define the rights and obligations of sellers and buyers by achieving a fair and just balancing of their interests.

²⁶ See Schmitthoff, *Export Trade*, *supra*, note 24, at 51 ff.

²⁷ See Hoyle, *supra*, note 23, at 25.

²⁸ Eorsi, "Regional and Universal Unification of the Law of International Trade" [1967] *J. Bus. L.* 145, at 147.

are two differences between (a) and (c). First, while Incoterms are definitions of trade terms designed to facilitate the interpretation of international sales contracts generally, standard form contracts are drafted by international trade associations to be used by sellers and buyers trading only in a certain commodity. Second, even if an international sales contract incorporates one of the trade terms, the parties still have to agree on the method of settling disputes and on the law to be applied. The contracts of sellers and buyers who are members of an international trade association that has developed a standard form contract with an arbitration clause will most likely also contain a clause stating the jurisdiction competent to hear disputes arising out of the contract.

International traders, by nature, do not hesitate to make use of the principle of freedom of contract by doing business in risky environments. It is common for parties not to reach, or even to wish to reach, agreement as to the law applicable to their contract. They focus primarily on the many deals that go forward without any problems.

In essence, what is being suggested is that one must not exaggerate the value of *The Convention*; its contribution must be assessed in a realistic manner. Furthermore, the potential for divergent national interpretations must be recognized. However, it is submitted that opposition to a unified sales law is ill-advised. *The Convention* holds great promise for the emergence of a new international legal framework for international trade. In this regard, it is important to consider the alternatives: conflict of laws rules that are unclear and that vary from country to country; and domestic sales laws expressed in doctrines and languages foreign to lawyers of other legal systems.

At the present time, *The Convention* seems to meet with the approval of states representing different regions of the world and different legal and political systems. This is a clear indication that it will be more successful than *ULIS*.

[5] *A short history of The Convention*

To appreciate *The Convention's* remedial provisions, it is vital that the reader be aware of *The Convention's* drafting history, which is both extensive and interesting. However, we shall not deal with the background of *The Convention* in great detail. A brief account of the major events leading to the adoption of *The Convention* will be given instead.

The need for a unified international sales law was felt prior to 1930 when the International Institute for the Unification of Private Law (UNIDROIT)²⁹ established a committee of European legal scholars to draft such a law.³⁰ In 1935 the Secretary of the League of Nations sent the Committee's preliminary draft and a report to all states³¹ irrespective of their membership in the League of Nations. Based on the comments, a second draft was promulgated in 1939.³² However, the Second World War interrupted unification efforts and revision of the 1939 draft was not considered until 1951.³³ Even as the rubble of war was being cleared, the scholars returned to their

²⁹ For an introduction to UNIDROIT, see Matteucci, "UNIDROIT, The First Fifty Years" in *New Directions in International Trade Law* (Oceana Publications, 1977) Vol. 1, at xvii ff; Schmitthoff, *Commercial Law in Changing Economic Climate*, 2nd ed. (London: Sweet & Maxwell, 1981), at 26. UNIDROIT was established in 1926 by a multilateral treaty under the aegis of the League of Nations. It was established to study methods for harmonizing private law between states, to prepare a uniform law, and to encourage the adoption by states of this uniform private law. Its seat is in Rome.

³⁰ The history of *ULIS* is traced in Honnold, "A Uniform Law for International Sales" (1958-59), 107 *U. Pa. L. Rev.* 299; Nadelmann, "The United States Joins The Hague Conference on Private International Law: A History with Comments" (1965), 30 *L. and Contemp. Prob.* 291. See also Nadelman, "The United States and Plans for a Uniform (World) Law on International Sales of Goods" (1964), 112 *U. Pa. L. R.* 697.

³¹ Richards "Contracts for the International Sale of Goods: Applicability of the United Nations Convention" (1983), 69 *Iowa L. R.* 209, at 213.

³² Sutton, "The Hague Conventions of 1964 and the Unification of the Law of International Sale of Goods" (1971), 7 *U. Queensland L. J.* 145, at 145.

³³ *Ibid.*

task and in 1951 an international conference of 21 nations encouraged further development of the project.³⁴ A new draft was produced that took into account the suggesting problems of governments concerning the 1956 draft. The 1962 draft was published in 1963 with an accompanying report by Tunc.³⁵

A diplomatic conference was held at The Hague in April 1964 to finalize the 1963 drafts. Twenty-eight states attended.³⁶ After three weeks of deliberations two conventions were brought into existence: *ULIS* and *ULIF*. In 1972, both Conventions entered into force, following ratification by five States.³⁷

ULIS and *ULIF* proved unacceptable to many States and had rather limited success.³⁸ Lack of global participation in the drafting process was the main reason for their non-acceptance. Moreover, the Conventions were too dogmatic and complex, and predominantly of the European Civil law tradition.³⁹

³⁴ Rabel, "The Hague Conference on the Unification of Sales Law" (1952), 1 *Am. J. Comp. L.* 58, at 58.

³⁵ Professor André Tunc of the Faculty of Law and Economics at the University of Paris wrote a brief commentary on *ULIS* and *ULIF*. It is reprinted in the *Report of The Hague Conference of 1964, Records and Documents* vol. 1, at 355 (hereinafter cited as *Tunc's Commentary*).

³⁶ Of the twenty-eight countries attending the conference, there were twenty-two European or other developed Western Countries, three Socialist countries, and three developing countries. See Eorsi, "A propos for the 1980 Vienna Convention on Contracts for the International Sale of Goods" (1983), 31 *Am. J. Comp. L.* 333, at 335.

³⁷ *ULIS* has been ratified or acceded to by Belgium, the Federal Republic of Germany, Gambia, Israel, Italy, the Netherlands, San Marino and the United Kingdom. *ULIF* has been ratified or acceded to by the same states, with the exception of Israel. See Honnold, "The Draft Convention on Contracts for the International Sale of Goods: An Overview" (1979), 27 *Am. J. Comp. L.* 223, at 224.

³⁸ See Honnold, *id.*, at 225.

³⁹ Conetti, "Uniform Substantive and Conflicts Rules on the International Sale of Goods and their Interaction" in *Dubrovnik Lectures*, *supra*, note 16, 385, at 385; also Sono, "The Vienna Sales Convention: History and Perspective" in *Dubrovnik Lectures*, *id.*, 1, at 3.

A new initiative was undertaken by the creation of the United Nations Commission on International Trade Law (UNCITRAL).⁴⁰ At its first session, UNCITRAL faced the question of whether it would be possible to obtain widespread adoption of *ULIS* and *ULIF*. UNCITRAL requested the Secretary-General to transmit to governments the text of the two 1964 Conventions and Tunc's commentary. It asked the governments whether they intended to adhere to these Conventions and the reasons for their positions.⁴¹

UNCITRAL requested that the Working Group⁴² prepare a text that would facilitate "acceptance by countries of different legal, social and economic systems."⁴³ The Working Group considered each provision of *ULIS* and solicited comments from governments.⁴⁴ It then formulated a proposed text and commentary⁴⁵ and submitted

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- ⁴⁰ UNCITRAL was established by the resolution of the General Assembly 2205 (XXI) of December 17, 1966. The resolution was published in (1968-70), 1 *UNCITRAL Yearbook* 70. The reasons behind the establishment of UNCITRAL have been explained by Schmitthoff "The Unification of the Law of International Trade" [1968] *J. Bus. L.* 105, at 113 ff, who points out that the existing organizations engaged in the unification of international trade law had a limited aim and restricted membership. UNCITRAL was initially composed of twenty-nine member states. (See (1968-70), 1 *UNCITRAL Yearbook* at 65 f). It was then enlarged to thirty-six. See *U.N. G.A.Res.* 3108 (XXVIII), December, 1973, U.N. Doc. A/9617, at 2. Members are elected from various geographical regions and principal economic and legal systems of the world. Canada's participation is limited to observer status. UNCITRAL's main function, according to the resolution under which it was established, is the harmonization and unification of the law of international trade. See *U.N. G.A.Res.* 2205/ XXI where these functions, among others, are set out.
- ⁴¹ Honnold, *Uniform Law for the International Sales Under the 1980 United Nations Convention* (Boston: Kluwer, 1982), at 53 (hereinafter cited as *Uniform Law*).
- ⁴² The Working Group on the International Sale of Goods was established by UNCITRAL at its second session in March 1969, "Report of UNCITRAL" 2nd sess., (1968-70), 1 *UNCITRAL Yearbook* at 99-100, para. 38 (hereinafter cited as *the W.G.*).
- ⁴³ "Report of UNCITRAL" 2nd sess., (1968-70), 1 *UNCITRAL Yearbook* at 99-100.
- ⁴⁴ Vishny, *Guide to International Commercial Law* (Colorado Springs, Colorado: McGraw-Hill Book Company, 1984), at 2-7.
- ⁴⁵ "Draft Convention on the International Sale of Goods" (1976), 7 *UNCITRAL Yearbook* 89 (hereinafter cited as *The 1976 Draft Convention*) and "Commentary on

these to the entire membership for approval.⁴⁶ The 1976 Draft Convention was approved by UNCITRAL in June 1977. In September 1977 the Working Group completed its draft based on *ULIF*. In 1978 UNCITRAL integrated both drafts into a single convention⁴⁷ which was referred by the United Nations General Assembly to a diplomatic conference in Vienna. That conference took place from March 10 to April 11, 1980. After five weeks of deliberations, the diplomatic conference approved *The Convention*, with minor modifications. Sixty-two states attended the conference.⁴⁸

The Convention came into force on January 1, 1988, one year after the tenth ratification or accession was received on December 11, 1986.⁴⁹ After January 1, 1988, for

the 1976 Draft Convention", *id.*, 96, reprinted in (1977), 16 *I.L.M.* 1456.

⁴⁶ Lasting, "The Change in the American Attitude to the International Unification of Sales Law Movement and UNCITRAL" (1980), 18 *Am. J. Bus. L.* 269, at 276.

⁴⁷ "The text of the 1978 Draft Convention on Contracts for the International Sale of Goods" (1978), 9 *UNCITRAL Yearbook* 14 (hereinafter cited as *the 1978 Draft Convention*).

⁴⁸ Out of the sixty-two States attending the conference, there were twenty-two European and other developed Western States, eleven Socialist, eleven South American, seven African and eleven Asian Countries. Several international organizations also participated in the conference, including the Bank for International Settlements, Central Office for International Railway Transport, Council for Europe, European Economic Community, Hague Conference on Private International Law, UNIDROIT, International Chamber of Commerce (ICC) and the World Bank.

⁴⁹ See *The Convention*, art. 99(1). On December 11, 1986, China, Italy, and the United States deposited instruments of ratification, bringing the number of ratifications to eleven. The first eight nations to ratify or accede were Argentina, Egypt, France, Hungary, Lesotho, Syria, Yugoslavia and Zambia. As of February 14, 1990, Australia, Austria, Byelorussian Soviet Socialist Republic, Chile, Denmark, Federal Republic of Germany, Finland, German Democratic Republic, Mexico, Norway, Sweden and Ukrainian Soviet Socialist Republic had added their assent, bringing to twenty three the number of nations having filed instruments of ratification or accession. Telephone interview with Ms. Anne Reicheo, United Nations Treaty Office (February 14, 1990). To determine whether a country has ratified or acceded to *The Convention*, contact the U.N. Treaty Office, telephone (212) 963-3918. In his report on the status of Conventions that were the outcome of UNCITRAL's work, the Secretary-General mentioned that several states had indicated that adherence to *The Convention* was under active consideration within their Governments and that the prospects were good. "Report of UNCITRAL" 17th sess., 39 U.N. Doc. A/139/17 (July 1984); also Sono, *supra*, note 39, at 8.

states that ratify, accept or accede to it, *The Convention* becomes binding on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification.⁵⁰

Canada sent a delegation to the diplomatic conference. To date, however, Canada has not acceded to *The Convention*. *The Convention* enables a federal government, like Canada, to declare, at ratification or accession, that for the time being *The Convention* shall only apply to some of its territorial units.⁵¹ New Brunswick, Newfoundland, Nova Scotia, Manitoba, Ontario and Prince Edward Island and the Northwest Territories have adopted implementing legislations. Quebec has expressed support for *The Convention* and intends to introduce implementing legislation in the near future.⁵² The Uniform Law Conference of Canada (ULC) has drafted a Uniform International Sale of Goods Act for adoption by the provinces.⁵³ The federal government does not have a policy expressly stating that a minimum number of provinces must consent before Canada will accede to *The Convention*. It is unlikely the federal government will wait until the consent of all the provinces is obtained before it ratifies *The Convention*.⁵⁴

⁵⁰ *The Convention*, art. 99(2).

⁵¹ See *id.*, art. 93.

⁵² Telephone interview with Chantal Bernier, Department of Justice, Canada, June 8, 1989. According to Ms. Bernier, the Canadian federal government is expected to accede to *The Convention* within a year.

⁵³ Uniform Law Conference of Canada, *Proceedings*, 67th Annual Meeting, Aug. 1985, at 73, 172, and Appendix G.

⁵⁴ In October 1987, a conference was organized by the Faculty of Law, University of Ottawa (the text of the conference was published by Wilson & Lafleur Itée, Montreal, 1989) (hereinafter cited as *Ottawa Conference*) to examine the usefulness of *The Convention's* ratification by Canada. The learned speakers reached the conclusion that the ratification of Canada will not cause insurmountable harmonization problems, and it will not tie the hands of those Canadian exporters and importers who prefer their contracts to be governed by another law. There was general agreement at the conference that international trade is of the utmost importance to Canada's economic well-being. Further, it was noted that *The Convention* is an attempt to facilitate trade by simplifying the law and that Canada

[6] *Availability of remedies under The Convention*

In this paragraph a general overview of the system of remedies in *The Convention* will be introduced for the following three reasons. First, since each of the following chapters deals with a specific remedy, it is advisable to first take a brief look at the structure of *The Convention's* remedy provisions in order to facilitate the understanding of later chapters. Second, *The Convention's* remedy provisions, as will be seen below, differ structurally from those of *ULIS*. Finally, since some remedies are available to only one of the parties, it is important to give an overview of the system of remedies as a whole. The availability of remedies will therefore be discussed in order to highlight its most important aspects.

Under *The Convention*, several remedies are available to buyers⁵⁵ and sellers.⁵⁶ Under *ULIS*, the rules as to buyers'⁵⁷ and sellers'⁵⁸ remedies were scattered throughout several provisions and were treated with the corresponding duties of seller and buyer. *The Convention*, in contrast, introduced at an early stage of drafting a single uni-

should give serious consideration to *The Convention*.

⁵⁵ *The Convention*, arts. 45-52.

⁵⁶ See *id.*, arts. 61-65.

⁵⁷ Arts. 26-29 of *ULIS* dealt with remedies for default in respect of the date of delivery, and arts. 30-32 contained remedies for default in respect of the place of delivery. Remedies for lack of conformity were provided for in arts. 41-49; remedies for failure to hand over documents were contained in art 51; remedies for transfer of property were provided for in arts. 52-53; and remedies for failure to perform other obligations of the seller were contained in art. 55.

⁵⁸ *ULIS* provided three sets of remedial provisions that are available to a seller when a buyer fails to perform one or more of his or her obligations. Articles 61-64 deal with remedies for non-payment, arts. 66-68 with remedies for failure to take delivery, and art. 70 with remedies for failure to perform any other obligation.

⁵⁹ "Report of the W.G." 4th sess., (1973), 4 *UNCITRAL Yearbook* 61, at 67, paras. 79 ff.

fied set of remedies for the buyer⁵⁹ and another for the seller.⁶⁰ This avoids the complexity that accompanied *ULIS* and simplifies the remedial provisions, making them more comprehensible. It should be mentioned, however, that under both *ULIS* and *The Convention* there are various remedial provisions that apply to both sellers and buyers.⁶¹

When there is a breach of contract by the seller, the buyer has a wide variety of remedies available under *The Convention*. Some (the specific performance remedy, the remedy of fixing an additional period of time for performance, the avoidance remedy and the price reduction remedy) enable him or her to adapt the contract to the misperformance. The buyer's selection of one remedy, such as avoidance or specific performance, does not preclude recourse to other remedies as well (e.g. damages). Although some of the remedies, such as the remedy of price reduction, may be inconsistent with a claim for damages, the buyer is always able to claim damages when he or she bears extra expenses or if further loss has occurred.

A seller is entitled to compel performance, to fix an additional time for performance, or to avoid the contract altogether. The value of these remedies depends on whether or not the seller has received the price and relinquished possession of the goods. If he or she has, then as a practical matter there will be less need for remedies. However, the seller will normally be bound to relinquish possession of the goods before receiving the price. In such a situation, the seller's remedies could be of great help.

⁶⁰ "Report of the W.G" 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, at 33 ff, paras. 39 ff.

⁶¹ *The Convention*, arts. 71-88; *ULIS*, arts. 71-95.

⁶² Ziegel, "The Remedial Provisions in the Vienna Sale Convention: Some Common Law Perspectives," (hereinafter cited as *The Remedial*) in Gaston and Smit (eds.) *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (New York: Mathew-Bender, 1984), 9-1, at 9-29 (hereinafter

Some remedies are available to the seller but not to the buyer, and *vice versa*.⁶² For instance, *The Convention* gives the seller the right to cure any defective performance but does not give the buyer the same right. Remedies available under *The Convention* to the buyer but not the seller are (a) reduction of the price, (b) partial exercise of the remedies available to the buyer under *The Convention* in cases of non-conformity of part of the goods and (c) acceptance or refusal of an early delivery or excess quantity.

It should also be mentioned that both *ULIS* and *The Convention* excuse a party in breach from liability if the non-performance results from an impediment beyond his or her control.⁶³ In these circumstances, the innocent party will not be entitled to damages or interest but may avoid the contract or even compel performance.⁶⁴

Under *The Convention*, a court is not permitted to grant a period of grace for performance once a seller⁶⁵ or buyer⁶⁶ has resorted to any remedy for breach of contract. Since it would expose the parties to the broad discretionary power of a judge, who would usually be of the same nationality as one of the parties, the procedure of applying to a court for a period of grace is particularly inappropriate in the context of international commerce.⁶⁷

cited as *International Sales*).

⁶³ See *infra*, ch. V.

⁶⁴ See [185] - [194].

⁶⁵ *The Convention*, art. 61(3).

⁶⁶ See *id.*, art. 45(3).

⁶⁷ See "Commentary prepared by the U.N. Secretariat on the 1978 Draft Convention on Contract for the International Sale of Goods" U.N. Doc. A/CONF.97/5, (14 March 1979), (hereinafter cited as *The 1978 Draft Commentary*), comment to art. 43, para. 5; reprinted in *Official Records of the United Nations Conference on International Sale of Goods*, UN. Doc. A/CONF.97/19, at 14 (hereinafter cited as *Official Records*), at 39.

Under *ULIS* and *The Convention*, the aggrieved party is entitled to damages whenever the other party fails to perform any obligation. This is so whether the party in breach is at fault or not, unless the failure to perform is caused by an impediment beyond his or her control. In Civil law systems, a seller who delivers defective goods is liable, in the absence of fault, for redhibition⁶⁸ and price reduction, but is liable for what a Common law lawyer would call damages for breach of contract only on proof of fault.⁶⁹ In Common law countries fault is not, in principle, a necessary element of contractual liability. Nor is the degree of fault normally an element in measuring the extent of liability. Once a breach is established it makes no difference, as a general rule under the Common law, whether it was committed deliberately, negligently or innocently, or whether the party in default acted in good or bad faith. *ULIS* and *The Convention* appear to follow the Common law approach, founding an action for damages on any breach of contract.

When the parties accept *The Convention* as the governing law the remedies described therein are to be employed unless they are excluded in whole or in part by the parties.⁷⁰ *The Convention* applies only when the remedies are not specified in the

⁶⁸ For example, the remedy of redhibition is defined in art. 2520 of the *Louisiana Civil Code* as follows:

Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

The action in redhibition is also contained in the *Quebec Civil Code*, art. 1522 and the *French Civil Code*, art. 1641. For a thorough discussion of the subject, see Morrow, "The Warranty of Quality: A Comparative Survey" (1940), 14 *Tulane L. Rev.* 327. See also, Connell-Thouez, "Redhibition as a Twentieth Century Remedy: A Discussion of Louisiana Solutions to General Motors Ltd v. Kravitz" (1979-80), 25 *McGill L. Rev.* 386.

⁶⁹ Treitel, "Remedies for Breach of Contract" (1976) 7 *International Encyclopedia of Comparative Law*, Chapter 16 (The Hague: Mouton; Tubingen: Mohr), at 56, para. 78 (hereinafter cited as *Remedies*).

⁷⁰ Enderlein, "Rights and Obligations of the Seller Under the UN Convention on

contract or when the remedies specified are not valid.⁷¹ Because the validity of the contract is left to be determined by the applicable domestic law, the remedies that the parties have agreed upon may be declared invalid. In such cases, the validity of the whole contract depends on its severability. If the contract is severable, the invalidity is limited to the offending clauses. If any of the invalid clauses regulate the parties' remedies, then the remedies under *The Convention* are to be used to fill the gap.

[7] *Conclusions and remarks concerning method of analysis*

In the preceding analysis, five questions have been discussed. First, what are the scope and purposes of this study? Second, what is the research method that has been followed? Third, why is *The Convention* needed? Fourth, to what extent is *The Convention* expected to affect international trade practice? And finally, what remedies are available in *The Convention* to sellers and buyers?

Before proceeding with a critical analysis of the remedies available to an aggrieved party, it is necessary to make four important points.

First, the methodology used varies from one remedy to another. Most chapters begin with a discussion of *The Convention*, followed by an overview of the selected domestic laws or *vice versa*. However, in cases where the rule in *The Convention* is recognized in one domestic law but not in others, that domestic law will be analyzed in greater detail. But in most chapters, all the selected domestic laws have been presented if they all recognize the principle in question.

Second, while some issues analyzed are followed by a system-by-system analysis, others are presented in an integrated comparative exposition. It was felt that there was no reason to burden the reader with more descriptive parts than necessary, partic-

Contracts for the International Sale of Goods" in *Dubrovnik Lectures, supra*, note 16, 133, at 188.

⁷¹ See Honnold, *Uniform Law, supra*, note 41, at 47-48.

ularly if the issue in question has not been recognized in all domestic laws.

Third, as Egyptian and French law belong to the Civil law family, several principles are common to both. Whenever this is the case, a discussion of French law is considered sufficient to cover both laws. Express discussion of Egyptian law is omitted in such cases so as to avoid repetition.

Finally, in order to solve the problems that arise when a contract governed by *The Convention* is breached, it is vital that parties and their lawyers know which remedies a given breach gives rise to. The categorization in *The Convention* of breaches into fundamental and non-fundamental breaches dictates the remedies open to the aggrieved party. Fundamental breaches entitle the aggrieved party to avoid the contract and claim damages. Non-fundamental breaches entitle that party to claim damages and to opt for the set of remedies that contemplates the completion of the basic exchange. The following chapter deals extensively with the aggrieved party's right to avoid the contract. Subsequent chapters cover remedies other than avoidance.

Chapter II
AVOIDANCE

[8] *Introduction*

The remedy of contract avoidance⁷² means, in general, the right of the innocent party, by notice to the party in breach, to put an end to his or her obligations under the contract if certain requirements are met. Avoidance does not imply the termination of all rights and duties under the contract. On the contrary, the party who avoids the contract will retain the right to recover damages for any loss resulting from the breach.

The remedy of contract avoidance is important in international sales transactions. It can, however, cause grave problems for the participants. The time and space separating sellers and buyers often make it difficult or wasteful for sellers to dispose of goods rejected at the port of destination. One cannot expect to find adequate storage facilities in all countries.⁷³ The parties' interests may be dramatically affected as a result of the avoidance of the contract, especially where the goods are manufactured according to the buyer's specifications. The main practical justification for the remedy of avoidance is to shift the burden of disposing of defective goods to the party in breach.

Avoidance is one of several remedies that, according to *ULIS* and *The Convention*, is available to both sellers and buyers whenever the breach amounts to a fundamental breach. It is also available if the defaulting party fails to perform within the additional period of time fixed by the innocent party. Avoidance terminates the obligation to exchange goods for the price and triggers the avoiding party's right to damages either through the substitute transaction or market price formula.⁷⁴

⁷² A variety of words have been used in different legal systems to describe the situation where a breach entitles the innocent party to put an end to the contract: rescission, repudiation, cancellation, resolution, and avoidance. In this study, the term "avoidance," as used by *ULIS* and *The Convention*, will be used.

⁷³ Michida, "Cancellation of Contract" (1979), 27 *Am. J. Comp. L.* 279, at 281.

⁷⁴ For further discussion of the consequences of avoidance, see [94] - [107].

Questions relating to the avoidance remedy under *The Convention* will be examined under five sections: avoidance in the cases of fundamental breach, avoidance in cases of additional time notice, particular avoidance situations, limitations on avoidance, and the effects of avoidance. However, before considering these questions, the relationship between the remedy of avoidance and other concepts will be considered.

[9] *The relationship between avoidance due to breach and avoidance for other reasons*

Avoidance due to breach is different from avoidance due to hidden defects in goods, a remedy available in some domestic laws such as Egyptian, French and German law. Hidden defects are those existing at the time of the sale that, *prima facie*, the buyer could not discover and that render the goods unfit for the use originally intended. Even if the seller did not know of these defects, the buyer is entitled to avoid the contract provided he or she acts within a reasonable time.

Avoidance due to breach also differs from avoidance due to frustration (which is known in English law) or *force majeure* (which is known in Egyptian and French law). The essential difference between the remedy of avoidance and frustration/*force majeure* is the *cause* of the event that discharges the innocent party from the obligation to perform. In cases of avoidance, the event is one for which the defaulting party has undertaken liability. In cases of frustration/*force majeure*, the event is one for which the defaulting party has not undertaken liability. Furthermore, unlike occurrences justifying avoidance, the events causing frustration/*force majeure* must be unforeseeable.

The effect of the three concepts is the same: putting an end to the parties' contractual relationship and placing them in the same position as before the contract was concluded.⁷⁵

⁷⁵ Art. 81(1) of *The Convention* states that avoidance releases both parties from their contractual obligations. See [94] - [98].

Section I

Avoidance in cases of fundamental breach

A. In general

[10] *Introduction*

All domestic legal systems provide rules that give the parties a right to avoid the contract where there has been a breach of one or more of the parties' obligations under the contract. The remedy of avoidance, like other remedies, comes into play after such a breach occurs. Although it is important to all domestic legal systems to encourage the fulfillment of parties' obligations, it is a generally recognized principle that substantial (i.e. serious) breaches give the aggrieved party the right to avoid the contract. However, different legal systems provide different definitions of what circumstances constitute serious or fundamental breach.

Both *ULIS* and *The Convention* permit the innocent party to avoid the contract if the defaulting party's breach amounts to a fundamental breach. Under *ULIS* and *The Convention* the definition of fundamental breach affects the remedies regime as a whole⁷⁶ and is the key to the innocent party's right to avoid the contract.⁷⁷

⁷⁶ See Enderlein, *supra*, note 70, at 187.

⁷⁷ Under both *ULIS* and *The Convention*, the innocent party may combine the avoidance remedy with a claim for damages. Nothing in either law requires avoidance. Even if a fundamental breach has occurred, the innocent party can choose not to avoid but to opt instead for the set of remedies that contemplates completion of the basic exchange. The *French Civil Code* permits this cumulation of a claim for avoidance and a claim for damages. Art. 1184 of the Code provides that the innocent party has the right either to demand performance of the contract or "d'en demander la résolution avec dommages et intérêts."

[11] *Contractual avoidance provisions and fundamental breach*

A contract may stipulate a right to avoid in the event of a specified breach. The contract may not actually use the term "fundamental breach." Often it will simply give the innocent party the right to avoid or terminate performance in the event of the other party's failure to perform specified obligations.

The application of both *ULIS* and *The Convention* may be excluded by agreement of the parties, who may then set their own rules.⁷⁸ For example, the parties may decide to have *The Convention* govern their contract generally but elect a different rule for such limited purposes as delivery, warranties, or breach of contract. It is submitted that courts applying *The Convention* should *prima facie* honour any provision that expressly labels a breach "fundamental" or that expressly states that it would justify avoidance by the aggrieved party. Such a provision should only be disregarded if it is found to be vague. The question of whether the parties' agreement as a whole, or the individual provision, is valid is to be decided by the proper law of the contract and not by *The Convention*.⁷⁹

Under English law, a contract may expressly provide that one party shall be entitled to avoid in the event of some specified failure of the other party to perform. For example, the contract may state that the buyer is entitled to refuse to accept the goods if the seller fails to adopt a method of packing that forms part of their description.⁸⁰ Alternatively, it may give the seller the right to avoid if the buyer fails to comply with a contractual requirement to arrange a bank guarantee or confirmed credit.⁸¹ The pur-

⁷⁸ *The Convention*, art. 6; *ULIS*, art. 3.

⁷⁹ By virtue of art. 4(a) of *The Convention*. See also art. 8 of *ULIS*.

⁸⁰ *Re Moore & Co. Ltd. and Landauer & Co.* [1921] All E.R. 466, at 469 (C.A.).

⁸¹ *Benjamin's Sale of Goods*, 3d ed. by Guest (London: Sweet & Maxwell, 1987), para. 1774 (hereinafter cited as *Benjamin*); see also Treitel, *An Outline of the Law of Contract*, 2nd ed. (London: Butterworths, 1978), at 293 (hereinafter cited as *An Outline*). In one case it was held that the term will generally be regarded as

pose of such clauses is to prevent disputes from arising as to whether a given failure to perform is sufficiently serious to justify avoidance. English courts will generally abide by the wishes of the parties as they appear from statements made by them. Although they may not have regard to the prior negotiations of the parties as a basis for the construction of the contract,⁸² the court will examine the circumstances surrounding the contract and the commercial background against which the parties were contracting.⁸³

Under Egyptian and French law, the aggrieved party may avoid the contract, subject to the requirement that avoidance must be pronounced by the court, if it provides that he or she may do so, even in the case of a breach that would be considered slight in normal circumstances.⁸⁴ Once the contract is concluded it binds the contracting parties, provided that they have fixed its essential elements. The advantage of including clauses to avoid the contract in specified circumstances is to avoid the uncertainty inherent in judicial rescission. One cannot reliably predict whether a judge will treat a particular breach as sufficiently serious to justify avoidance or will instead grant the defaulting party a period of grace.

a condition whenever this is expressly provided in the contract. See, e.g. *Dawsons Ltd. v. Bonnin*, [1922] 2 A.C. 413; similarly, where the contract expressly states that rescission will be available on breach of the term. *Harling v. Eddy*, [1951] 2 K.B. 739 (C.A.).

⁸² *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381; *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, at 354.

⁸³ See, e.g. *Bunge S.A. v. Kruse*, [1971] 1 Lloyd's Rep. 492, at 497.

⁸⁴ See Houin, "Sale of Goods in French Law" (1964) 9 Supp. *Int'l & Comp. L. Q.* 16, at 19; see also Planiol et Ripert, *Traité Pratique de Droit Civil Français* 2^{ème} éd., t. 10, (Vente) par Hamel, Paris, L.G.D.J., t. 10, para. 165. As to Egyptian law, see the *Egyptian Civil Code*, art. 158; also Faraj, *Sales Contracts* (Cairo, 1985) (in Arabic), at 570.

[12] *Contractual avoidance provisions: comparison*

The position of Egyptian and French law differs dramatically from that of English law, in the following ways.

First, the right to avoid the contract in English law depends upon the nature of the term breached.⁸⁵ A distinction is made between "conditions," the breach of which allows for termination (and damages) and "warranties," the breach of which does not allow for termination but only for a claim for damages.⁸⁶ It should be noted that if the contract defines a particular term as a "condition" or a "warranty,"⁸⁷ this helps to determine in advance whether or not its breach will justify avoidance.⁸⁸ Such advance classification is desirable because it is difficult for the innocent party to predict whether the court will construe a term as a "condition," or a "warranty." Egyptian and French law do not make a similar distinction. Both are concerned with the effect and the nature of the breach rather than with the nature of the term.

⁸⁵ The position of English law as to avoidance will be discussed in [17] - [19].

⁸⁶ SGA, 1979, s. 61. This section defines a warranty as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated." The term "condition" was not expressly defined by the Act. However, s. 11(3) defines it, inferentially, as a term "the breach of which may give rise to a right to treat the contract as repudiated." S. 11(3) states that "whether a stipulation in a contract of sale is a condition ... or a warranty ... depends in each case on the construction of the contract."

⁸⁷ It is to be noted that the distinction is not exhaustive. See [18].

⁸⁸ But the mere use by the parties of the word "condition" will not necessarily have this effect since the ascertainment of express terms is primarily a question of fact to be decided on the basis of the commercial importance of the term. See Manwaring, "Reforming Domestic Sales Law: Lessons to be Learned From the International Convention on the Sale of Goods", in *Ottawa Conference, supra*, note 54, 139, at 158. As to case law, see *Schuler (L.) A.G. v. Wickman Machine Sales Ltd.*, [1973] 2 W.L.R. 683 (H.L.).

Second, Egyptian and French law require contractual terms to be expressed (*en terms formels et express*) in order to avoid any vagueness regarding the parties' intention.⁸⁹ This is not the case in English law, where a contract may contain both express and implied terms.⁹⁰

Finally, under French and Egyptian law, it is a condition precedent to avoidance, as well as to other remedies, that the avoiding party put the other party into default (*mise en demeure*),⁹¹ even where avoidance is based on a contractual power. The innocent party must give this notice unless a stipulation, expressed or implied, provides relief from the duty to do so.⁹² English law contains no similar rule.

[13] *Avoidance and judicial intervention: comparison*

Under both Egyptian and French law, in civil and commercial cases, avoidance can only be pronounced by order of the court.⁹³ This differs from *The Convention*, where avoidance can be effected by a declaration made by the innocent party. Under English law, the innocent party is allowed to avoid the contract. However, the court may

⁸⁹ See Planiol et Ripert, *supra*, note 84, para. 165.

⁹⁰ See, for example, *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26, at 63 (C.A.); *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827, at 849 (H.L.).

⁹¹ See [34] and [35].

⁹² Nicholas *French Law of Contract* (London: Butterworths, 1982), at 232 ff; see also *Amos and Walton's Introduction to French Law*, by Lawson, Anton and Brown (Oxford: University Press, 1967), at 187 (hereinafter cited as *Amos and Walton*); Ryan, *An Introduction to the Civil Law* (Sydney: Halstead Press, 1962), at 81.

⁹³ The *French Civil Code*, art. 1184; see also *Louisiana Civil Code*, art. 2046. It is worth noting here that the Québec Committee on the Law of Obligations proposed a rejection of the French rule requiring court action for the resolution of contractual disputes. See *Québec Report on Obligations*, at 337 and 339. See also art. 1491 of the *Draft Bill of An Act to add the reformed law of obligations to the Civil Code of Québec* (Québec Official Publisher, 1988) (hereinafter cited as *Québec Draft Bill*), which states that "a contract may be dissolved or terminated without judicial proceedings ..."

inquire into the issue of whether the breach justified avoidance.⁹⁴ Under *The Convention* and English law, it seems that the court has no discretion in the matter if the requirements of avoidance are satisfied. By way of contrast, French and Egyptian courts are empowered to award avoidance or to grant a period of grace for performance. This also differs from *The Convention*, where no grace period can be granted by courts in contracting states.⁹⁵ Egyptian and French courts may also award partial avoidance instead of avoidance of the whole contract, even if the aggrieved party's right to avoid is based on a contractual clause. Courts in such a case will look at the terms of the contract to see if the provision breached is really fundamental.⁹⁶

B. Requirements for avoidance: domestic laws

[14] Requirements for avoidance: Egyptian law

Article 157 of the *Egyptian Civil Code* states that in bilateral contracts the aggrieved party must put the defaulting party into default. Only then is he or she entitled to require performance or apply to the court for avoidance, which may be combined with a claim for damages.

Under this provision, several conditions must be met before the contract can be avoided. First, the contract must impose contractual obligations upon both parties. Second, one of the parties must have failed to perform a contractual obligation and have been put in default. In this case, non-performance cannot be the result of an event beyond the defaulting party's control. Finally, the aggrieved party must have performed his or her obligations or be ready to perform them in the event that the

⁹⁴ It will, however, be useful to obtain a judgment to give an effect to the consequence of avoidance with regard to restitution. See Treitel, *Remedies, supra*, note 69, para. 152.

⁹⁵ See [6].

⁹⁶ See *Amos and Walton, supra*, note 92, at 188; see also Ryan, *supra*, note 92, at 81.

defaulting party performs. These conditions make avoidance a very restricted remedy in Egyptian law.

Avoidance of contract in Egyptian law is subject to the discretion of, and is pronounced solely by, the court.⁹⁷ Parties' agreements that specified breaches justifying avoidance do not dispense with the requirement of putting the aggrieved party in default, unless this requirement is expressly waived in the contract.⁹⁸

[15] *Requirements for avoidance: French law*

In French law, the aggrieved party, in the case of the other party's failure to perform, can either insist upon performance (when that is possible) or ask for avoidance.

In French law, as in Egyptian law, avoidance requires a court judgment. In determining whether to grant avoidance, the court will consider various factors, such as the degree of the defendant's fault and the seriousness of the defect in performance.⁹⁹ In order for the court to grant avoidance, it must be satisfied that a good reason exists for doing so.¹⁰⁰ Unlike the traditional English approach, that determines the legal effect of a breach at the time of the conclusion of the contract according to the commercial importance of the contractual provision breached, in French law, the nature of the breach and the obligation determine the consequences of non-performance.¹⁰¹

According to Article 1184 of the *French Civil Code*, the innocent party is entitled to avoid the contract in cases of non-performance. However, paragraph 3 of the same Article provides a period of grace within which the non-performing party must perform

⁹⁷ The *Egyptian Civil Code*, arts. 158 and 1117.

⁹⁸ Murkus, *Obligations* (Cairo, 1961), at 312-313 (in Arabic).

⁹⁹ See Treitel, *Remedies*, *supra*, note 69, at 113, para. 147.

¹⁰⁰ Drobnič, "General Principles of European Contract Law" in *Dubrovnik Lectures*, *supra*, note 16, 305, at 327.

¹⁰¹ The *French Civil Code*, arts. 1143 and 1144. The same is true as to Egyptian law. See [14].

the contract. Upon the expiration of this period the court may issue an order avoiding the contract. The requirement of a judgment of avoidance under French law inevitably creates delays and uncertainty. This is because it is difficult to know in advance whether the court will grant avoidance, refuse it, or grant the defaulting party extra time to perform.¹⁰²

Nevertheless, the requirement of judicial avoidance is subject to two exceptions. First, under Article 1657 of the *French Civil Code*, if the contract specifically provides for a date by which the buyer must take delivery, the seller may, upon the passage of that date, treat the contract as avoided by operation of law, without any court's judgment. Second, avoidance may occur without judicial intervention if the parties have specified in their contract the circumstances under which a party is entitled to avoid the contract.

[16] *Requirements for avoidance: American law*

The *UCC* empowers the buyer to reject the goods if they or the tender of delivery fail to conform to the contract.¹⁰³ If the buyer has accepted the goods (even without an opportunity to ascertain the defect), that buyer may refuse to keep them only if a "non-conformity substantially impairs the value of the goods."¹⁰⁴ If he or she elects to avoid the contract after receiving defective goods, that buyer must notify the seller.

As far as the seller's right to avoid is concerned, if payment is due on or before delivery and the buyer fails to make the payment when due, the seller is entitled, among other remedies, to resell the goods or avoid the contract.¹⁰⁵ Failure by the buyer to accept delivery of the goods within a reasonable time entitles the seller to

¹⁰² See Treitel, *Remedies*, *supra*, note 69, para. 148.

¹⁰³ The *UCC*, s. 2-601.

¹⁰⁴ See *id.*, s. 2-608.

¹⁰⁵ See *id.*, s. 2-703.

avoid under section 2-703 of the *UCC*.¹⁰⁶

The Convention's approach to avoidance in cases of fundamental breach differs from, and is superior to, that of the *UCC*. First, *The Convention's* definition of "fundamental breach," as will be seen in paragraphs [22-26], is more objective. Second, the *UCC* leaves it unclear (in cases of non-payment) whether a material breach is always required for avoidance and, if it is, whether materiality is to be governed by an objective or subjective standard. Some courts have read a materiality requirement into the *UCC*, section 2-703, but these decisions do not clarify whether an objective or subjective standard applies under the Code.¹⁰⁷

[17] *Requirements for avoidance: English law*

In English law, a contract may be avoided at the option of the innocent party "where, having regard to the contract as a whole, the obligation that has been broken is of vital as distinct from trivial importance."¹⁰⁸ Here the applicable doctrine is often called the doctrine of fundamental breach.¹⁰⁹ In *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*,¹¹⁰ the doctrine was defined to mean "the type of breach which entitles the innocent party to treat it as repudiatory and to

¹⁰⁶ See, e.g. *Mott Equity Elevator v. Svihovec*, 236 N.W. 2d 900 (N.D. 1975); *Ziebarth v. Kalnze*, 238 N.W. 2d 261 (N.D. 1976).

¹⁰⁷ One commentator argues that the definition of fundamental breach under *The Convention* may require the innocent party's loss to be more than material. See Ziegel, *The Remedial*, *supra*, note 62, at 9.03.

¹⁰⁸ *Cheshire and Fifoot's Law of Contracts*, 10th ed. by Furmston (London: Butterworths, 1981), at 531 (hereinafter cited as *Cheshire*).

¹⁰⁹ The terminology of "fundamental breach" and "breach of fundamental term" was originally adopted to deal with problems created by wide exclusionary clauses. The doctrine of fundamental breach has recently been addressed in connection with wide exemption clauses in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] 1 All E.R. 556 (H.L.).

¹¹⁰ [1967] 1 A.C. 361 (H.L.).

rescind the contract."¹¹¹

Traditionally, breaches of contract have been separated into two categories:¹¹² (1) "conditions," the breach of which entitles the innocent party to treat the contract as at an end and to release him or her from performance of any further obligations and (2) "warranties," the breach of which entitles the innocent party to recover damages only. The right to avoid the contract depends on the nature of the obligation that the defaulting party has failed to perform.¹¹³

The different consequences, under English law, of breaching conditions and warranties, show that not all rights and obligations are of the same commercial importance.¹¹⁴ It is open to the parties to expressly classify a term as a "condition."¹¹⁵ Obviously, if all the terms of the contract are classified in advance into two categories, the innocent party will be spared the heavy burden of examining the "seriousness of the

¹¹¹ See *id.*, at 397, per Lord Reid.

¹¹² For a brief but interesting account of the historical developments of this distinction, see *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Lloyd's L. Rep. 478, at 493 (C.A.), per Diplock L.J. See also the test under the English case *Bettini v. Gye* (1876), 1 Q.B.D. 183, at 188.

¹¹³ See, however, the *UCC*, s. 2-608(1), which provides that "the buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if..." But prior to acceptance, the "substantially impairs its value" test is not required and the buyer may reject the goods for any non-conformity. If the goods or tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole. *OLRC Report on Sales*, at 147, proposed that all express or implied terms relating to goods be classified as warranties with a "unitary conception of substantial breach" being introduced to ascertain when a party was entitled to treat him- or herself as discharged from the contract or to avoid the contract.

¹¹⁴ *OLRC, Report on Sales*, at 145 ff and 333-334 recommended the abolition of the classification of contractual terms and suggested that, instead, a distinction be drawn between material and non-material breaches.

¹¹⁵ The *SGA* is helpful in classifying contractual terms, by dividing implied terms in a contract for sale of goods into conditions and warranties. For instance, under s. 12 of the Act, it is an implied condition that the seller has the right to sell the goods, but only an implied warranty that the goods are free from charges or encumbrances in favour of third parties. (*SGA*, 1979, s. 12; see also ss. 13 and 14).

breach or its consequences."¹¹⁶ In some cases where the parties specify the effect of a breach, it becomes clear whether a condition or warranty was intended.¹¹⁷ This advance knowledge and certainty provide the principal justification for maintaining the distinction.¹¹⁸ If the contract gives no indication, the court must decide the legal result of the breach on the basis of the commercial importance of the term and the consequences of the breach.¹¹⁹ However, even if the parties use the word "condition" to designate a term, the court may still hold otherwise on the basis of the commercial importance of the term and the consequences of its breach. The question must be decided by construing the contract as a whole.¹²⁰

[18] *Innominate terms in English law*

Although the distinction between conditions and warranties was originally based on the severity of the breach, it was eventually blurred by numerous technicalities. This has been the subject of much criticism,¹²¹ because it is not always possible to determine precisely whether a term is a condition or a warranty. Indeed, the situation remained unsettled until the judgment of *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*¹²² This decision marks the beginning of the modern law of breach of contract. A firm grasp of what may be called the "*Hongkong Fir* principles" is therefore

¹¹⁶ *Anson's Law of Contract*, 24th ed. by Guest (Oxford: Clarendon Press, 1975), at 522 (hereinafter cited as *Anson*).

¹¹⁷ *Harling v. Eddy*, [1951] 2 K.B. 739 (C.A.).

¹¹⁸ See *Anson, supra*, note 116, at 522.

¹¹⁹ *Behn v. Burness* (1863), 3 B. & S. 751.

¹²⁰ *Schuler (L.) A.G. v. Wickham Machine Tool Sales Ltd.* [1973] 2 W.L.R. 683 (H.L.). See also note 88.

¹²¹ Treitel, *An Outline, supra*, note 81, at 292; see also *Anson, supra*, note 116, at 521; OLRC, *Report on Sales*, at 145 ff.

¹²² [1962] 2 Lloyd's L. R. 478 (C.A.).

crucial to an understanding of the present law.

Four principles can be drawn from this case.

1. A party who intends to rescind must exercise the utmost care, otherwise he or she runs the risk of being liable for wrongfully avoiding the contract.

2. There are many complex contractual undertakings that cannot be categorized as conditions or warranties in the sense in which those terms are used in the *Sale of Goods Act*.¹²³

3. Damages may not be a sufficient remedy even for the breach of a warranty.

4. A term can only be a condition if "every breach of it would ... deprive the aggrieved party of substantially the whole benefit which it was intended that he or she would obtain from the contract."¹²⁴

It can certainly be said that the classification of contractual terms into conditions and warranties is not a true dichotomy, and that there are contractual terms recognized by English law that are neither conditions nor warranties. These are often called "intermediate" or "innominate" terms. This new classification has been used in several cases since the *Hongkong Fir* case.¹²⁵

¹²³ See *id.*, at 494, per Diplock L.J.

¹²⁴ But this view was later rejected in *Bunge Corporation, New York v. Tradax Export S.A., Panama*, [1981] 1 W.L.R. 711 (C.A.), where it was held that "many cases... where terms the breach of which do not deprive the innocent party of substantially the whole benefit which he or she was intended to receive from the contract were nonetheless held to be conditions any breach of which entitled the innocent party to rescind."

¹²⁵ See, for example, *Bergerco U.S.A. v. Vegoil m.b.H. Ltd.*, [1984] 1 Lloyd's Rep. 440; *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.*, [1978] 2 Lloyd's Rep. 109, at 113 (H.L.); *Bunge S.A. v. Kruse*, [1979] 1 Lloyd's Rep. 279, at 290-291; *Bunge Corporation case, id.*, at 725 (where Lord Roskill referred to a "third class of term"); *Federal Commerce and Navigation Co. Ltd. v. Molena Alpha Inc.*, [1979] A.C. 757, at 783 (H.L.); *Regent O.H.G. Aisenstadt und Barig v. Francesco of Jermyn Street*, [1981] 3 All E.R. 327, at 334.

An "innominate" term is one whose breach will in some circumstances have the effect of a breach of condition and in others that of a breach of warranty.¹²⁶ This indicates that if the term breached is classified as a condition or as a warranty, its legal consequences can be easily enunciated. But if the term falls within the third category, innominate terms, an assessment must be made of the nature of the breach in order to determine its legal effect. Therefore, it may be assumed that a fundamental breach (a) includes any breach of an innominate obligation that goes to the root of the contract but (b) excludes any trifling breach of condition.

Although the creation of a category of innominate terms reduces the technical nature of the otherwise overly rigid and complex system of classifying contractual terms into conditions or warranties, it also creates uncertainty for the innocent party, who must decide whether to continue performance or avoid the contract. First, a decision by the innocent party that the breach of an innominate term justified avoidance could result in responsibility in damages if a court disagreed. This is not the case under the dual classification system, where parties can specify their rights and remedies at the time of contracting. However, in practice parties seldom address these issues during contract negotiations. Second, and even more important, the "innominate term" usage leads to the conclusion that the court is always faced with three construction questions when considering a breach. These were stated in *Bunge Corporation, New York v. Tradax Export S.A., Panama*,¹²⁷ where it was asked whether the breach in question was "as a matter of interpretation ... a condition ... or an innominate term, or a warranty." The adoption of this approach would make the law extremely complicated. If a court decided that a term was not a condition then, following this approach, it would

¹²⁶ Schmitthoff, "The Statutory Basis of the Law on Sale of Goods in the United Kingdom", in Guyon (ed.) *Les Ventes Internationales de Marchandise*, (Paris: Economica, 1981), 290, at 291; as to case law, see *The Hansa Nord* [1976] 1 Q.B. 44 (C.A.).

¹²⁷ [1980] 1 Lloyd's Rep. 294, at 309.

always be required to ask whether the breach was a warranty or, alternatively, an innominate term. This would mean that if, for example, the definition of a "warranty" in s. 61(1) of the *Sale of Goods Act, 1979* is of general application, it would always be open to a defaulting party to prove that the term should be construed as a "warranty." This could result in delays and uncertainty and could affect the innocent party's final entitlement to avoidance and, sometimes, liability in damages.

[19] *English law: a new approach to breach of contract*

It can now be said that the issue of whether a breach is a substantial (fundamental) breach depends on the construction of the contract. It does not depend on the application of a presumption that breaches are substantial. As was stated in one case,¹²⁸ the law now proceeds on "more rational lines" than previously "in attending to the nature and seriousness of the breach rather than in accepting rigid categories" of contractual terms. According to this approach, if the result of a breach is sufficiently serious, it can have the same effect as a breach of condition, i.e. justifying avoidance. If, on the other hand, the consequences are less serious, the breach will only have the same effect as a breach of warranty, i.e. avoidance will not be available.¹²⁹

Unless pre-determined by statute, the classification of contractual terms is to be decided by the court in the light of all surrounding circumstances and based upon the presumed intention of the parties. It has been held that "in the absence of any clear agreement or prior decision that this was to be a condition, the court should lean in

¹²⁸ *Readon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, at 998; see also *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.); *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.*, [1968] 1 W.L.R. 74, at 80, 82 (C.A.); *The Mihalis Angelos*, [1971] 1 Q.B. 164; *The Hansa Nord*, [1975] 3 W.L.R. 447, at 455, 464, 476 (C.A.).

¹²⁹ *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.*, [1978] 2 Lloyd's Rep. 109, at 113; *The Hansa Nord* case, *id.*; *Hongkong* case, *id.*; *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] 2 W.L.R. 283, at 294 (H.L.); *Lep Air Services Ltd. v. Rolloswin Investments Ltd.*, [1973] A.C. 331, at 349; *Reardon-Smith* case, *ibid.*

favour of construing this provision as to impurities as an innominate term, only a serious and substantial breach of which entitled rejection."¹³⁰

As will be seen in paragraphs [22-27], the new approach to breach of contract in English law differs from the one adopted by *The Convention* in two significant respects: *The Convention* concentrates on detriment rather than expectations under the contract, and it gives no weight to any special circumstances of the case.

C. Fundamental breach: *ULIS* and *The Convention*

1. Fundamental breach: *ULIS*

[20] *The definition of "fundamental breach"*

The *ULIS* defines "fundamental breach" to be any breach beyond which the innocent party loses all economic benefits of the contract.¹³¹ It is also a requirement of fundamental breach that the party in breach know that performance of the obligation breached is of real importance to the innocent party. The breach is to be regarded as fundamental if the following requirements have been satisfied. First, the breach should be such that a reasonable person in the same situation as the innocent party at the time the contract was concluded would not have entered into the contract had he or she expected the breach to occur. The breach must make the contract useless to the innocent party and destroy the benefits he or she expected under it.

¹³⁰ *Tradax Internacional S.A. v. Goldschmidt S.A.*, [1977] 2 Lloyd's Rep. 604, at 612; see also *Bunge Corporation, New York v. Tradax Export S.A., Panama*, [1981] 1 W.L.R. 711 (C.A.), where it was held that the courts should not be too ready to interpret terms as conditions, but that in suitable cases they should not be reluctant, if the intention of the parties as shown by the contract so indicates, to hold that a term is a condition, even though it is possible to envisage breaches of it that would not be serious.

¹³¹ *ULIS*, art. 10.

Second, under *ULIS*, it is required that the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the position of the innocent party would not have entered into the contract had he or she expected the breach to occur. This requirement, of course, imposes a heavy burden on the party in breach.¹³²

This test is an objective one, as can be seen from Article 13, which provides that what a party knew or ought to have known refers to what should have been known to a reasonable person in the same situation.¹³³ The definition requires no actual knowledge by the defaulting party, merely the knowledge of a reasonable person possessing average intelligence and a special knowledge of his or her trade.

[21] *Criticisms of the ULIS definition of "fundamental breach"*

The *ULIS* definition of "fundamental breach" is highly complex and pays scant attention to the actual practice of international merchants.¹³⁴ It connects the concept of fundamental breach with the attitude and knowledge, actual or constructive, of a reasonable person at the time of the conclusion of the contract and ignores the circumstances of the market at the time of the breach.

Moreover, *ULIS* forces courts in contracting states to determine whether the innocent party foresaw the breach and whether the party in breach should have known what attitude a reasonable person would have taken. Different findings by national courts could frustrate the objectives of the uniform law. This is especially likely since different cultural and economic values will probably be attributed to the reasonable

¹³² Ziontz, "A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?" (1980), 94 *N.W. J. Int'l. L. and Bus.* 129, at 154; see also Michida, *supra*, note 73, at 283-284.

¹³³ *ULIS*, art. 13.

¹³⁴ Graveson and Cohn, *The Uniform Laws on International Sales Act, 1967, A Commentary* (London: Butterworths, 1968), at 55 ff.

person, leading to different judgments on the same facts.

The standard of diligence required of a contracting party depends not on that party's actual knowledge and diligence, but on the knowledge available to a person in his or her situation and trade. It is submitted that this rule possesses little merit and is perhaps the least successful of all attempts to achieve a reasonable compromise between the positions of the various legal systems.¹³⁵ As Honnold has observed,¹³⁶ one must possess an active imagination in order to distill all of the reciprocating states of mind contained in this definition into a workable judicial standard.

2. *The substantial detriment test under The Convention*

[22] *What constitutes a substantial detriment?*

Under *The Convention*, the definition of "fundamental breach" focuses on whether the breach substantially deprives the innocent party of what he or she is entitled to expect under the contract.¹³⁷ The test is composed of the following elements. There must be substantial detriment suffered by the innocent party and such detriment must be based upon his or her expectations under the contract.¹³⁸ If the innocent party has suffered no detriment (or, presumably, if such detriment is caused by factors other than the

¹³⁵ See Graveson and Cohn, *id.*, at 55.

¹³⁶ Honnold, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964" (1965), 30 *L. & Contem. Prob.* 326, at 344.

¹³⁷ *The Convention*, art. 25. For the legislative background of the definition, see the following documents: "Report of the W.G." 2nd sess., (1971), 2 *UNCITRAL Yearbook* at 50, paras. 83 ff and at 57 and 59, paras. 39 ff; annex III, paras. 62 ff; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* at 49, paras. 43 ff; "Report of the W.G." 7th sess., (1976), 6 *UNCITRAL Yearbook* at 87, annex 1, art. 9; "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* at 11, annex 1, paras. 88 ff, at 16, art. 8, 139, para. 12; "Report of UNCITRAL" 11th sess., (1978), 8 *UNCITRAL Yearbook* at 11, para. 28; *Official Records, supra*, note 67, at 98-99, 295 ff, 329-330, 157 and 206, paras. 12 ff.

¹³⁸ As one commentator points out, a breach may be fundamental when serious consequences become evident subsequent to the making of the contract. See Honnold, *Uniform Law, supra*, note 41, at 213.

breach) then the test is not satisfied. What constitutes substantial detriment is for the court to decide. In so doing, the court may compare the situation before it with a properly completed transaction in a similar trade. This comparison may be helpful in deciding the legal consequences of the breach.¹³⁹

[23] *Evaluation of the substantial detriment test under The Convention*

In sum, then, the substantial detriment formula under *The Convention*, which is the most important factor in Article 25, takes into account any detriment suffered, or likely to be suffered, by the aggrieved party as a result of the defaulting party's breach, as long as it is substantial enough to deprive the innocent party of his or her expectations under the contract. This formula is impractical.

For example, suppose that the market price has risen after the conclusion of the contract. If the buyer fails to pay on time, the seller cannot resort to avoidance on the ground of fundamental breach even if it is clear that the buyer will never make payment. Neither can the seller rely on the doctrine of anticipatory breach, which is based, *inter alia*, on the fundamentality of the breach.¹⁴⁰ This is because the seller has not, it is submitted, sustained a substantial detriment because of the buyer's failure to pay on time.

The seller's position becomes difficult if he or she is not entitled to require the buyer to make payment, since a court applying its own law would not allow such a claim.¹⁴¹ The court is permitted to do so under Article 28 of *The Convention* that if, under *The Convention*, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter judgment for specific performance

¹³⁹ Sutton, "The International Sale of Goods-Part I" (1976), 4 *Australian B. L. R.* 269, at 286 (hereinafter cited as *Part I*).

¹⁴⁰ See [55] - [62].

¹⁴¹ See [167] - [169].

unless it would do so under its own law in respect of similar contracts of sale not governed by *The Convention*.¹⁴² In this case, the seller can neither avoid the contract nor compel performance.

It is submitted that *The Convention* ought to have focused on expectations under the contract rather than on detriment suffered. This approach would have been in line with that of English law, under which a decision as to whether a breach is substantial (i.e. fundamental) is a question of law depending on the construction of the contract.¹⁴³ Moreover, in order to decide whether or not a breach has actually occurred, English courts must identify what the defaulting party has agreed to supply to the innocent party.

However, the innocent party's problem can be easily solved under *The Convention*. As far as the remedy of avoidance is concerned, the innocent party can give the defaulting party an additional time of reasonable length and, if the defaulting party does not perform the overdue obligation within such additional period or declares that he or she will not do so within such period, the innocent party may declare the contract avoided.¹⁴⁴ In this case, avoidance would be justified *regardless of the degree of breach*.

142 *The Convention*, art. 28.

143 *Emery Co. v. Wells*, [1906] A.C. 515.

144 *The Convention*, arts. 47(1) and 63(1).

3. *The foreseeability test under The Convention*

[24] *Foreseeable by whom?*

Under *The Convention*, the concept of fundamental breach is based on foreseeable substantial detriment suffered by the innocent party. The foreseeability test is satisfied if the defaulting party has foreseen the result of the breach or if a reasonable person in the same circumstances would have foreseen such a result.¹⁴⁵ A defaulting party is liable whenever a detriment is foreseeable because he or she could have avoided such detriment by not committing the breach. If, for example, the seller delivers the goods ten days after the date specified in the contract, this delay may cause a serious detriment to the buyer amounting to a fundamental breach. But if the seller's delay does not cause such a detriment, an issue that will depend on the nature of the goods, the buyer may well be confined to other non-avoidance remedies, including damages.

Although questions of proof are generally outside the scope of *The Convention*, the burden of proving the absence of foreseeability is imposed upon the party in breach.¹⁴⁶ That party is under a duty to show that he or she did not foresee and could not have foreseen such a result in order for responsibility for a fundamental breach to be denied.

[25] *Time of foreseeability*

The question of the relevant time for assessing foreseeability is expressly settled in *ULIS*. It is the time at which the contract was concluded.¹⁴⁷

¹⁴⁵ See *id.*, art. 25; *ULIS*, art. 10.

¹⁴⁶ See, however, "Report of the W.G." 6th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 1, art. 9 and its criticism by UNCITRAL, "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* at 11, annex 1, para. 89.

¹⁴⁷ *ULIS*, art. 10.

Under *The Convention*, however, the phrase "unless the party in breach did not foresee and a reasonable person in the same circumstances would not have foreseen such a result" provides no guidance as to whether the time of foreseeability is the time of contracting or the time of the breach. Although the drafting history demonstrates that the omission was intentional, that is, designed to empower courts to decide the issue on a case-by-case basis,¹⁴⁸ commentators hold conflicting views on the matter. Honnold, for example, has concluded that foreseeability be determined at the time of a breach.¹⁴⁹ Schlechtriem, however, argues that foreseeability should always be measured from the time of contract formation.¹⁵⁰ Ziegel suggests that Article 74 of *The Convention* limits damages to losses foreseeable at the time of contracting because consequences foreseeable only at the time of breach are too remote to justify avoidance.¹⁵¹

Ziegel's argument is unconvincing. Despite the legislative history indicating that courts should have discretion to determine the relevant time, the foreseeability requirements in Articles 25 and 74 of *The Convention* serve different purposes. While the former is designed to limit avoidance to appropriate circumstances, the latter is intended to limit the innocent party's recovery to losses actually foreseen by the defaulting party. Neither is an innocent party required to continue performance where the other party

¹⁴⁸ See Ziegel, *The Remedial*, *supra*, note 62, at 9-19.

¹⁴⁹ See Honnold, *Uniform Law*, *supra*, note 41, at 213; see also Feltham, "The United Nations Convention on Contracts for the International Sales of Goods" [1981] *J. Bus. L.* 346, at 353; Barbic, "Uniform Law on the International Sale of Goods, (1964) and United Nations Convention on Contracts for the International Sale of Goods (1980)," in Voskuil and Wade (eds.), *Hague-Zagreb Essays 4 on the Law of International Trade* (The Hague, Asser Institute: Martinus Nijhoff Publishers, 1981), 3, at 19-20 (hereinafter cited as *Hague-Zagreb Essays*).

¹⁵⁰ Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (Vienna, 1986), at 46 ff; also Velden, "The Law of International Sales: The Hague Conventions of 1964 and the UNCITRAL Uniform Sales Code 1980: Some Main Items Compared" in *Hague-Zagreb Essays*, *id.*, 46, at 64.

¹⁵¹ See Ziegel, *The Remedial*, *supra*, note 62, at 9-20.

should have foreseen, at the time of breach, that the breach would cause substantial detriment to the innocent party.

Since *The Convention's* drafting history suggests that the time of foreseeability is to be decided by courts in contracting states on a case-by-case basis, it is possible for a court to conclude in a particular case that the time of foreseeability should be considered to be the time of the breach and not the time the contract was concluded.¹⁵² If this view is correct, *The Convention* is in general accord with the *UCC*. Under both laws, damages are limited to losses foreseeable at the time of contracting.¹⁵³ Although the *UCC* permits the buyer to revoke an acceptance of non-conforming goods if the non-conformity "substantially impairs their value to him,"¹⁵⁴ it does not specify when foreseeability should be measured. However, the notion that the substantial impairment must be foreseeable at the time of contracting was rejected,¹⁵⁵ even though the *UCC* holds a defaulting party liable in damages only for losses foreseeable at that time.

It is submitted that the foreseeability requirement under Article 25 of *The Convention* should be interpreted by courts in contracting states in such a way as to take into account all the surrounding circumstances from the time of contract formation until the time of a breach. This construction is consistent with the drafting history, which indicates that the time for measuring foreseeability was intentionally left ambiguous.

¹⁵² See [30], where this study's suggested definition of fundamental breach adopted the time of breach as the relevant time for assessing foreseeability.

¹⁵³ The *UCC*, s. 2-715(2)(a). However, the language of this provision of the *UCC* is cast in objective terms, referring to a seller who "at the time of contracting has reason to know ..." Article 74, on the other hand, provides an objective and subjective foreseeability test: "Damages may not exceed the loss which the party in breach foresaw or ought to have foreseen ..."

¹⁵⁴ See *id.*, s. 2-608(1).

¹⁵⁵ See *id.*, s. 2-608, comment 2.

[26] *Time of foreseeability: practical considerations*

The failure of *The Convention* to settle the issue of the time of foreseeability may not in practice influence the application of its rules. The foreseeability test under *The Convention* favours the defaulting party by giving that party the opportunity to prove that he or she did not foresee, and that a reasonable person in the same circumstances would not have foreseen, that the breach would result in substantial detriment to the innocent party. The innocent party cannot be confident that avoidance of the contract is justified because he or she can never be sure that the party in breach will be unable to prove the absence of foreseeability. The innocent party would be able to make a more confident decision had *The Convention* adopted the substantial detriment test alone. Substantial detriment to the innocent party resulting from the breach should by itself entitle that party to avoid the contract whether or not the foreseeability test is met.¹⁵⁶ A breach is a breach whether foreseen or not, unless its occurrence was beyond the control of the breaching party.

In any case, whenever a dispute arises concerning the time of foreseeability, it must be resolved by a tribunal.¹⁵⁷ Thus, if one of the parties makes known to the other party that he or she has a special requirement concerning the transaction, and the other party fails to meet this requirement in his performance, this may be considered a fundamental breach. This would be the case whether the breach occurred at the time of the conclusion of the contract or after such conclusion. Although the innocent party's detriment should be measured according to what he or she is entitled to expect under the contract, nothing in the text prevents a tribunal from concluding that the defaulting party foresaw or could have foreseen the substantial detriment resulting from his breach after the contract was concluded.

¹⁵⁶ See Sutton, *Part 1, supra*, note 139, at 288.

¹⁵⁷ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 23, para. 5.

[27] *Avoidance in cases of fundamental breach: conclusions*

The Convention's definition of "fundamental breach" is certainly a great improvement over the definition contained in *ULIS*.¹⁵⁸ Findings of substantial detriment to the innocent party and actual foresight of the defaulting party will depend on the circumstances of each case and on how these tests are interpreted by the domestic courts of contracting states.

Nevertheless, *The Convention's* definition of "fundamental breach" does not provide an entirely satisfactory approach to advancing the existing law. Because of the importance of this definition, considerably more time and analysis are needed to achieve a universal consensus on what it should be.

The Convention's doctrine of fundamental breach is in accord with the new trend in English law, since it looks at the gravity of the breach. It does not, however, incorporate the traditional English distinction between breaches of "conditions" and breaches of "warranties." The fundamental breach doctrine is a concept foreign to both French and Egyptian law. Neither the *French Civil Code* nor the *Egyptian Civil Code* requires a fundamental breach in order for a contract to be avoided.

Although the basic rule is the same in English, Egyptian, and French law, it is expected that years of professional legal training and practice will influence each nation's interpretation of the definition. The major factors the courts in these jurisdictions may consider in determining whether a breach is fundamental are (a) the length of any delay in performance; (b) whether the defaulting party repeatedly failed to

¹⁵⁸ See Sutton, *Part 1, supra*, note 139, at 287. Despite this fact, this study will suggest a new definition in the following section. As *The Convention* is not likely to be amended at this point, it was suggested by one of my jury members that I refer to this suggested definition as an "interpretation." It is submitted that referring to the suggested definition as an "interpretation" would be misleading. This is particularly so since I advocated that the rules of *The Convention* be interpreted in light of their drafting history and *The Convention's* international character. The suggested definition is not such an interpretation, but an effort to provide a workable definition of fundamental breach.

respond to the innocent party's demands to perform; (c) whether the defaulting party was given reasonable time to perform; and (d) whether the breach is so serious as to go to the root of the contract. It is essential for the party in breach to establish the reasonableness of any delay. Often, this depends upon circumstances peculiar to the case. At any rate, courts in contracting states should interpret the definition of fundamental breach having regard to *The Convention's* international character and the need to promote uniformity in its application.

D. A suggested definition of "fundamental breach"

[28] *Formulation and description of the suggested definition*

The preceding discussion was concerned with the formula contained in Article 25 of *The Convention* and the uncertainty expected to result from its application. The formula concentrated on substantial and foreseeable detriment resulting from the breach. Two main shortcomings were discerned in *The Convention's* formula. First, it was suggested that it would have been preferable had *The Convention* focused on expectations under the contract rather than on detriment suffered. Second, the time of foreseeability, as has been seen, is unclear under the definition. For these reasons, the following definition of "fundamental breach" is suggested:

A breach of contract is fundamental if a reasonable buyer in the same or substantially similar circumstances as the innocent buyer, or a reasonable seller in the same or substantially similar circumstances as the innocent seller, as the case may be, would not have entered into the contract had he or she known at the time of the breach of the nature and extent of the consequences of the breach.

This definition, which includes objective conditions, is in line with the general principles of both *ULIS* and *The Convention*. The degree of breach should be considered with no element of subjectivity. This definition also recognizes the necessity of estimating the degree of breach either (a) at the time of non-conforming performance or

(b) after the expiry of the performance period, but not at the time the contract was concluded. Furthermore, the definition specifies that such estimation should be objectively determined, i.e. by reference to a reasonable person. This person would not be the buyer or seller in question but a reasonable buyer or a reasonable seller. These conditions will now be considered below.

[29] *The degree of breach*

Under the suggested definition, whether there has been a fundamental breach of contract depends on the identification of what obligations the parties have, by their contract, undertaken. For example, under a contract for the sale of goods, the seller may fail to deliver the goods or fail to ensure that they are of a certain quality or fit for a particular purpose. Alternatively, the seller may discharge his or her contractual obligations in the agreed order, but deliver the goods in deficient quantity or after the agreed time. In each of these cases, the seller is in breach. Whether a breach is fundamental should depend upon the importance of the obligation breached to the innocent party. This would avoid the problems created by the "subjective judgment of the parties" formula adopted in *ULIS*.

[30] *Time of breach*

The most relevant time for considering the degree of the breach, according to the suggested definition, is the time at which the breach occurred. An approach that calls for an assessment of the breach at the time the contract was concluded is unacceptable because it is much more practical to determine this question at the time of the breach. The breach occurs after the conclusion of the contract and, as has often been pointed out, parties at the time of contracting contemplate a contract's performance, not its breach. Moreover, it is often hard for any reasonable person to know at that time,

either by actual or presumed knowledge, that the other party will fail to perform one or more obligations.

To illustrate, suppose that a contract called for delivery of goods of a particular size, but that a reasonable seller would not regard this requirement as fundamental at the time of contract formation. If, after the contract is entered into, the seller learns that there is no market for goods of a different size, he or she will know that the breach of the size provision will cause the buyer serious detriment. In this case, the buyer had a contractual expectation, at the time of contracting, that the goods would be of a certain quality, and a failure to meet this expectation would have serious consequences. In this setting, it seems unjust to deprive the buyer of the right to avoid the contract just because the seller's breach was not fundamental.

It is submitted that the time of breach is the most relevant time for determining whether or not a breach is fundamental. Moreover, it would remove the uncertainty as to the state of mind of the parties at the time of the conclusion of the contract. Also, it would ease the court's task of finding a just and satisfactory solution to the question of foreseeability of fundamental breach in international sales.

This approach differs from both *ULIS*,¹⁵⁹ which expressly adopted the time of the contract's conclusion as the time of foreseeability, and *The Convention*, which makes no reference to the time of foreseeability.¹⁶⁰

[31] *The objective element of a reasonable person*

The reasonable person of the suggested definition differs from the reasonable person of Article 10 of *ULIS*. The latter is a reasonable person in the same situation as the innocent party who would not have entered into the contract had he or she foreseen the breach and its effects. In the suggested definition, on the other hand, a reasonable

¹⁵⁹ See [25].

¹⁶⁰ See [25] and [26].

person is either a reasonable seller or a reasonable buyer. When the breach is of such a degree that a reasonable buyer in the same situation as the actual buyer would not accept the goods with the breach or a reasonable seller in the same situation as the actual seller who would not agree to perform the contract with this degree of breach, then the breach is fundamental. In practice, a reasonable seller or buyer would not enter into a contract knowing at that time that the agreed exchange would not be received. This is because each of them would prefer to deal with a reliable party of good reputation so as to remove any expectation of future breach.

[32] *Summary of avoidance in cases of fundamental breach*

The rules of law related to avoidance in cases of fundamental breach may be summarized in three brief statements:

1. *The Convention's* definition of "fundamental breach" is based on three factors: (a) the breach must result in a detriment to the innocent party; (b) this detriment must substantially deprive the innocent party of what he is entitled to expect under the contract; and (c) this detriment must have been foreseeable.

2. The doctrine of fundamental breach, according to the new trend in English law, means a breach that deprives the innocent party of substantially the whole benefit of the contract. Under Egyptian and French law, the courts take into account the degree of breach before granting a decree of avoidance.

3. Although the definition of "fundamental breach" in *The Convention* is a great improvement over that found in *ULIS*, a new definition has been suggested. This suggested definition is based on three considerations: (a) the breach must be serious; (b) the degree of breach should be determined at the time of the breach; (c) a reasonable buyer or seller (as the case may be) in the position of the innocent party would not have entered into the contract if forewarned about the breach.

Section II

Avoidance in cases of late performance

A. Avoidance in cases of late performance: domestic laws

[33] *Avoidance in cases of late performance: German Law*

Under German law, when one of the parties fails to perform, the other party is entitled neither to refuse to accept performance if tendered late nor to terminate the contract.¹⁶¹ The innocent party may, however, give the non-performing party notice requiring performance within a stated period. This is known in German law as *Nachfrist*.¹⁶² If performance is not rendered within that period, the innocent party is entitled to demand compensation or to terminate the contract.¹⁶³

Termination is effected by the innocent party delivering to the defaulting party, upon the expiry of the additional time specified in the *Nachfrist* notice, a declaration that the contract is at an end.¹⁶⁴ Court action is not needed to effect the termination.

The doctrine of additional time notice in *ULIS* and *The Convention* is taken from German law. In each case it is the innocent party, and not the court, who is authorized to give the notice. German law does not require any action by the buyer when the seller breaches the obligation as to the date of delivery. The passing of the delivery date without delivery constitutes the seller's breach. However, this in itself does not entitle the innocent buyer to avoid the contract unless he or she gives the defaulting seller notice requiring delivery within a stated period.

¹⁶¹ Zweigert, "Aspects of the German Law of Sales" (1964), 9 *supp. Int'l & Comp. L. Q.* 1, at 10.

¹⁶² Throughout this study "*Nachfrist*" and "additional time notice" are used to mean the innocent party's right to give additional time notice requiring the defaulting party to perform.

¹⁶³ The *German (F.R.G.) Civil Code*, art. 326.

¹⁶⁴ See *id.*, art. 349.

[34] *Avoidance in cases of late performance: French law*

Article 1147 of the *French Civil Code* states that non-performance or delay in performance *prima facie* gives rise to a cause of action compensable in damages and rebuttable only by proof of a supervening event (*cause étrangère*). As a rule, the time fixed for performance is not as strictly observed in French law as in English law. When this time has arrived and performance has not taken place, the innocent party is expected to send to the other party a written notice called *mise en demeure* requiring performance. So long as performance is not demanded, the innocent is considered to waive any delay. He or she may not resort to any remedy on account of the breaching party's delay in performance until a *mise en demeure* is served, thereby putting the breaching party in default.¹⁶⁵ The breaching party's failure to perform starts from the moment of giving *mise en demeure* even if the contract provides for performance by a fixed date,¹⁶⁶ unless the parties waive the notice requirement in the contract. The *mise en demeure*, in which the innocent party agrees to accept late performance by the defaulting party, specifies an additional period of time within which the defaulting party may perform.

Since the power to resolve contractual disputes is judicial, the power to grant an additional period is also given to the court. In exceptional cases the innocent party may grant the additional period himself. In such cases, however, his authority is subject to the right of the courts to examine the reasonableness of the period granted. In considering a claim for avoidance, the French court has the power to set a period within which the defaulting party must render performance (*délai de grâce*).¹⁶⁷ If performance has still not been made after the expiry of the additional period, the court has the

¹⁶⁵ See Amos and Walton, *supra*, note 92, at 183-184; see also art. 1139 of the *French Civil Code*.

¹⁶⁶ See Nicholas, *supra*, note 92, at 232 ff.

¹⁶⁷ The *French Civil Code*, art. 1184, para. 3.

discretion to either terminate the contract or grant a further period of time for performance.

Although the *délai de grâce* may be treated as a kind of *Nachfrist*, *délai de grâce* and *Nachfrist* differ in a number of respects.¹⁶⁸ The decree of *délai de grâce* can only be granted by a judge while the *Nachfrist* notice can be given by the innocent party. Also, and most importantly, the granting of the *délai* decree is discretionary while the giving of a *Nachfrist* notice (under German law and, in certain circumstances, under *ULIS* and *The Convention*) is mandatory.

[35] *Avoidance in cases of late performance: Egyptian law*

As in French law, the innocent party must put the defaulting party in default.¹⁶⁹ This is a prerequisite for avoiding the contract or claiming damages by the innocent party. If the innocent party chooses to sue for damages, these are to be assessed from the time the breaching party is put in default, and not from the time of breach.

Article 157(2) of the *Egyptian Civil Code* provides for the granting of an extension for performance if the circumstances warrant it. Only the court may grant such extensions, however. The innocent party may not do so.

[36] *English law: time of performance in general*

The English general law of contract considers the time fixed for performance as an essential element of the contract.¹⁷⁰ Its breach gives the innocent party a claim for

¹⁶⁸ See Treitel, *Remedies*, *supra*, note 69, at 118.

¹⁶⁹ The *Egyptian Civil Code*, arts. 219 and 220.

¹⁷⁰ There are no rules in the *UCC* similar to the *Nachfrist* notice. However, s. 2-309(2), which governs the termination of contracts of indefinite duration, deserves special attention. The termination of a contract of indefinite duration is effected only by a reasonable notice. The notice can be issued by any party irrespective of the other party's fault and without fixing an additional period of time. Comments 3 and 5 to s. 2-309 of the Code recommend the use of notices granting an additional period of time in order to add certainty to the relationship

damages and, if the term broken is of the essence of the contract, the right to avoid as well. For example, when a seller fails to deliver on time or delivers defective goods, his or her responsibility for such a breach survives any subsequent attempt to make a second (conforming) tender.¹⁷¹ However, where time for performance is not of the essence of the contract, the innocent party is entitled to fix a period within which the other party must perform. If the court finds this period reasonable, the innocent party can avoid the contract and, in suitable cases, claim damages.¹⁷²

Under English law, some stipulations as to time of performance are treated as being of the essence of the contract. "Whether any stipulation as to time (other than as to time of payment) is of the essence of the contract or not depends on the terms of the contract."¹⁷³ Failure to honour these terms gives rise to a right to avoid. Other stipulations are regarded as less important and may not give rise to a right to avoid. However, in cases where it is not clear that the failure of one of the parties to provide timely performance amounts to a fundamental breach, the innocent party is able to make time of the essence by allowing performance by the end of a fixed period.

[37] *English law: time of delivery*

English courts consider time to be *prima facie* of the essence with respect to delivery. Failure to deliver on time is therefore *prima facie* a breach of condition.¹⁷⁴ As a general rule, the seller's failure to deliver on time justifies the buyer's refusal to take delivery when the time for delivery is expressly stipulated in the contract.¹⁷⁵ Exceptional-

between the parties.

¹⁷¹ Atiyah, *The Sale of Goods*, 7th ed. (London: Pitman, 1985), at 82.

¹⁷² *Stickney v. Keeble*, [1915] A.C. 386 (H.L.); *Rickards (Charles) Ltd. v. Oppenheim*, [1950] 1 K.B. 616 (C.A.); *Ajit v. Sammy*, [1967] 1 A.C. 255 (P.C.).

¹⁷³ SGA, 1979, s. 10(2).

¹⁷⁴ *Hartley v. Hymans*, [1920] 3 K.B. 475, at 484.

ly, however, a stipulation as to time of delivery might be construed as an innominate term¹⁷⁶ the breach of which entitles the buyer to treat him- or herself as discharged only if the breach was sufficiently serious to frustrate the commercial purpose of the contract.¹⁷⁷

Where the buyer, either expressly or implicitly, voluntarily accedes to a request by the seller that the delivery of the goods be postponed, waiver of the delivery time specified in the contract is valid and binding on the buyer.¹⁷⁸ Likewise, the buyer may be held to have waived that right if, by words or conduct, he or she has led the seller to believe that delivery will be accepted at a time later than that fixed in the contract. For example, in *Charles Rickards Ltd. v. Oppenheim*,¹⁷⁹ the defendant ordered a Rolls Royce chassis from the plaintiffs to be ready on 20 March 1948 at the latest. It was not ready on that date and the defendant pressed for delivery. On 29 June 1948, the defendant informed the plaintiffs in writing that he would not accept delivery after 25 July 1948. The chassis was not ready until 18 October 1948 and the defendant refused to accept delivery on that date. The Court of Appeal held that the defendant was entitled to reject the chassis, as he had given the plaintiffs reasonable notice that delivery must be made by a certain date. In this case, the buyer agreed to a specific date in the contract then implicitly waived the condition for the delivery date. If a buyer, after the delivery date, agrees to accept late delivery of the goods and the seller

¹⁷⁵ *Plevins v. Downing* (1876), 1 C.P.D. 220, at 226; *Coddington v. Paleologo* (1867), L.R. 2 Ex. 193, at 196-197.

¹⁷⁶ See [18].

¹⁷⁷ *United Scientific Holdings Ltd. v. Burnley Borough Council*, [1978] A.C. 904 (H.L.). But see *Bunge Corporation, New York v. Tradax Export S.A., Panama*, [1981] 1 W.L.R. 711 (C.A.).

¹⁷⁸ *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272 (Exch. Ch.); *Hartley v. Hymans*, [1920] 3 K.B. 475; *Besseler, Waechter, Glover & Co. Ltd. v. South Derwent Coal Co. Ltd.*, [1938] 1 Q.B. 408 (C.A.); *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616 (C.A.).

¹⁷⁹ [1950] 1 K.B. 616 (C.A.).

does not act on it, then there is probably a *variation* of the original contract or the formation of a new contract in its place.¹⁸⁰ This is because performance on a different date from that envisaged in the contract cannot be considered performance of the original contract.

[38] *English law: time of payment or of taking delivery*

The English *Sale of Goods Act* provides that, unless a different intention appears, the time of payment is not deemed to be of the essence of the contract.¹⁸¹ Where the seller expressly or implicitly accedes to a request that the time of payment or of taking delivery be postponed, he or she may be held to have waived the right to insist that payment be made or delivery be taken (as the case may be) at the time specified in the contract. The seller may make time of the essence by giving an additional time notice requiring the buyer to take delivery of the goods or to pay the price.¹⁸² If the rule followed under the general law of contract (as discussed at the beginning of paragraph [36]) is to be applied, the seller will be entitled to avoid the contract after the additional time has expired without performance by the buyer.

Where a right to avoid arises as a result of the buyer's breach of a documentary credit clause, a different rule is followed. It is common practice, particularly in international trade, to have a documentary credit clause. These clauses oblige the buyer to open a documentary credit in favour of the seller.¹⁸³ Often, the period of shipment is the only time specified in the contract; the time by which the documentary credit must be furnished is often not specified.¹⁸⁴ When this is the case, it is necessary to deter-

¹⁸⁰ This legal principle was expressed in *Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd.*, [1955] 1 Lloyd's Rep. 303. See in particular p. 312.

¹⁸¹ *SGA*, 1893, s. 10(1).

¹⁸² See Benjamin, *supra*, note 81, paras. 662 and 701.

¹⁸³ See *id.*, para. 2153.

mine when the buyer was supposed to open the documentary credit in order to ascertain whether there was a breach entitling the seller to avoid the contract.

The issue was raised in *Pavia & Co. S.P.A. v. Thurmann-Nielson*,¹⁸⁵ where it was held that, in the absence of an express stipulation in the contract, the credit should have been opened not when the seller was ready to ship the goods, but at the beginning of the shipment period. Hence, although no general rule clearly sets out the time in which the buyer must comply with specifications concerning the method of payment, it seems that compliance with the method of payment (i.e. the issuance of a letter of credit or the establishment of a bank guarantee) is required at the latest by the first date of shipment. In some cases, however, this would have to be accomplished within a reasonable length of time before the first date of shipment.

[39] *Summary of avoidance in cases of late performance in domestic laws*

The principles of law related to avoidance in cases of late performance in the domestic laws under discussion may be summarized in three statements.

1. The basic rule of *The Convention* that the innocent party is entitled to grant the defaulting party an additional period of time in which to perform his or her obligations and to avoid the contract if that period expires without compliance is taken from German law.

2. In English law, s. 10(2) of the *Sale of Goods Act, 1979*, states that whether or not time is of the essence depends on the terms of the contract. In all cases, the construction of the contract determines whether or not a breach is substantial and, therefore, a condition. If a definite time stipulation is being construed then its definiteness will be a factor indicating that the breach is substantial. If not, the aggrieved party

184 See *id.*, para. 2195.

185 [1952] 1 All E.R. 492 (C.A.); see also *Ian Stach Ltd. v. Baker Bosley Ltd.*, [1958] 2 Q.B. 130.

may make time of the essence by giving an additional time notice of reasonable length. If it expires without compliance then avoidance would be legally justified.

3. As to French and Egyptian law, although the innocent party must put the defaulting party into default when this is required, the court is empowered to give the aggrieved party a *délai de grace*.

[40] *Avoidance in cases of late performance: domestic laws in comparison with The Convention*

Under all the laws considered in this study, two fundamental factors are relevant to the innocent party's right to avoid by means of the fixing of an additional time notice: first, whether the defaulting party repeatedly fails to perform following the innocent party's demands; second, whether the defaulting party is given a reasonable time to perform. Thus, in these cases, whether the innocent party is entitled to avoid cannot be determined without considering the circumstances existing at the time an allegedly reasonable time was given to the defaulting party.

In English law, where the buyer fails to comply with a requirement of the contract to establish a letter of credit by a certain date, that date is of the essence of the contract and the seller can treat him- or herself as discharged from further performance.¹⁸⁶ Any breach involving the opening of a letter of credit or the establishment of a bank guarantee is deemed so important that it gives the seller the right to avoid the contract. Under *The Convention*, any such breach is fundamental.¹⁸⁷ In this regard, English law differs from *The Convention*. *The Convention* does not provide the seller with an automatic right to avoid in these circumstances. Instead, it obliges the buyer

¹⁸⁶ *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.*, [1952] 1 All E.R. 970, at 976 (C.A.); see also *A.E. Lindsay & Co. Ltd. v. Cook*, [1953] 1 Lloyd's R. 328; *Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd.*, [1955] 1 Lloyd's R. 303.

¹⁸⁷ *The Convention*, art. 25.

to complete the steps required to make the funds available.¹⁸⁸ *The Convention* does not consider any non-performance in respect of providing a letter of credit or bank guarantee to constitute non-payment on the part of the buyer.

The attitude of English law also differs from that of French and Egyptian law. Under the latter two laws, the innocent party's silence and non-insistence on strict performance of the contract by the breaching party, even after the expiry of the date of performance, is considered acceptance of a grant of additional time for performance. The innocent party remains in this position until he or she puts the breaching party in default (*mise en demeure*). From this date, the positions of both parties are clarified. The innocent party is free to pursue available remedies for non-performance and the risks of continued non-performance are conclusively shifted to the breaching party. The principal effect of *mise en demeure* is the fixing of the date(s) from which damages and interest will accrue.¹⁸⁹ Granting an additional period of time under English law, on the other hand, is possible only where time for performance was not originally of the essence of the contract. English law differs in this respect from both *ULIS* and *The Convention*, where the innocent party is entitled to give an additional time notice immediately after the other party's breach.

B. Additional time notice: *ULIS* and *The Convention*

1. In general

[41] *The rule*

In both *ULIS* and *The Convention* the additional time notice is linked with the remedy

¹⁸⁸ See *id.*, art. 54.

¹⁸⁹ The *French Civil Code*, art. 1146.

¹⁹⁰ *The Convention*, art. 47; under *ULIS*, the rule was employed in arts. 27(2)

of avoidance. Both buyer¹⁹⁰ and seller¹⁹¹ have the right to fix an additional period of time for performance by the other party. If the breaching party fails to perform a basic contractual obligation (for sellers, delivery of the goods; for buyers, taking delivery or paying the price) within the period fixed in a notice, or if the breaching party declares that he or she will not perform within that period, the innocent party can avoid the contract. This right is given only to the innocent party, either seller or buyer; courts in contracting states do not have the authority to give the defaulting party extra time. The reason for this may be that only the innocent party is able to assess his or her situation and the consequences of providing such a notice.

Unlike under German law, under *The Convention* the innocent party is not obliged to give the defaulting party notice fixing an additional period of time to perform.¹⁹² Although he or she may be unable to avoid the contract because the breach is not fundamental, the innocent party may choose among other non-avoidance remedies, including damages. In other words, the notice under *ULIS* and *The Convention* is not a condition precedent to obtaining the other remedies, as is the case with a *Nachfrist* notice

(date), 31(2) (place) and 44 (2). For the drafting history of the text see the following documents: "Report of the W.G." 3d sess., (1972), 3 *UNCITRAL Yearbook* 77, at 92; "Report of the W.G." 4th sess., (1973), 4 *UNCITRAL Yearbook* 61, at 77, art. 43; "Revised Text of the Convention on the International Sale of Goods" (1975), 6 *UNCITRAL Yearbook* 63, at 66; *The 1976 Draft Convention*, *supra*, note 45, at 92; art. 28; "Draft Convention on the International Sale of Goods" (1977), 8 *UNCITRAL Yearbook* 15, at 17, art. 29; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11, at 14, para. 27. At the Conference, art. 43 of the 1978 Draft Convention was not changed but renumbered as art. 47 in *The Convention*.

¹⁹¹ *The Convention*, art. 63(1); *ULIS*, arts. 62(b), 66(2). For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, annex 1, art. 72; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, annex 1, art. 44; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, annex 1 (art. 44); *The 1976 Draft Convention*, *supra*, note 45, at 93; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, para. 373; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11, para. 28; *The 1978 Draft Convention*, *supra*, note 47, art. 59; at the Conference, no amendments were submitted, see *Official Records*, *supra*, note 67, at 124 (art. 59), 212 para. 47.

¹⁹² See Enderlein, *supra*, note 70, at 192.

under German law. If an innocent party, however, wants to avoid a contract under *ULIS* or *The Convention* when the breach is not fundamental, the only path to avoidance is through the additional time notice procedure.

The additional time notice adopted in *ULIS* and *The Convention* differs from *Nachfrist* in German law,¹⁹³ *mise en demeure* in French and Egyptian law¹⁹⁴ and the notice making time of the essence in English law.¹⁹⁵ The extent of these differences will be explored in the following discussion.

[42] *Advantages of the additional time notice procedure*

The giving of an additional time notice benefits both parties. First and foremost, it reduces the uncertainty surrounding sales transactions. Suppose that the defaulting party is a seller who fails to deliver. In this case, the remedy provides that seller with additional time within which to cure the breach. The buyer, on the other hand, is bound to accept the tender, otherwise he or she would become the party in default. To the buyer, who may, in the mistaken belief that the breach is fundamental, declare the contract avoided, the principle is of particular importance. This is due to the fact that the court may well reach a different conclusion when estimating the degree of breach. In this case, the innocent party would become the party in default since the unjustified declaration of avoidance is itself a breach of contract.

The innocent party's avoidance after the expiry of the additional time without performance would be justified *irrespective of the degree of breach*. It is also easier for the court to ascertain the lawfulness of the avoidance if it is based on the additional time notice rather than on an alleged fundamental breach. As mentioned, determining whether or not the breach is fundamental is a very difficult task.

¹⁹³ See [33].

¹⁹⁴ See [34] and [35].

¹⁹⁵ See [36], in particular the cases cited in note 172.

[43] *Is the giving of notice mandatory?*

Under both *ULIS* and *The Convention*, the innocent party is not bound to grant the defaulting party extra time before resorting to other available remedies. If the breach is fundamental, these will include requiring performance, claiming damages and avoiding the contract. If it is not fundamental, however, the giving of an additional period of time is the only route to avoidance. In this sense, the notice would appear to be mandatory.

In German law, no remedy is available to the innocent party unless before a *Nachfrist* has been given to the defaulting party. Hence, the notice is mandatory and the innocent party is released from the duty to give it only when the defaulting party has expressly declared an intention not to perform.

Under the laws of France and Egypt the innocent party must put the breaching party in default by serving a notice called a *mise en demeure*. The service of a *mise en demeure* is not required if the right to receive it is waived in the contract.¹⁹⁶ Where the innocent party begins an action, *mise en demeure* is not necessary since the beginning of the action constitutes a *mise en demeure*. A *Mise en demeure* is also not necessary if the breaching party has expressly refused to perform.

English law entitles the innocent party to give the other party extra time for performance when time is not originally of essence to the contract. If this extra period expires without compliance, the innocent party may avoid the contract. The granting of extra time is required only when the innocent party seeks avoidance; it is not necessary when the remedy sought is specific performance or damages. While this approach is similar to that of *ULIS* and *The Convention*, it differs from that of Egyptian, French, and German law. Furthermore, in English law, the giving of a notice making time of the essence is not required if it is clear from the circumstances that the other

¹⁹⁶ See Nicholas, *supra*, note 92, at 232.

party will never be able to comply.¹⁹⁷ This differs from *ULIS* and *The Convention*, under which it is unclear whether the innocent party is freed from the obligation to give an additional time notice in such cases.

[44] *Content of the notice*

Under *ULIS* and *The Convention* no special content requirements need be met in order for the additional time notice to be effective. In particular, the notice need not state that a failure to perform within the additional period will result in avoidance. This conclusion may be inferred from the fact that even after the additional period expires the innocent party is not obliged to avoid the contract. Recourse may be had, however, to any non-avoidance remedy. However, the notice should, at a minimum, announce the innocent party's readiness to accept performance within a reasonable time and the intention to avoid the contract if the defaulting party fails to perform by the end of that period.¹⁹⁸ Parties should fix the date for performance in a clear and definite manner.¹⁹⁹

English law requires no particular statement to be contained in the notice making time of the essence. Neither are there magic words that must appear in an Egyptian or French *mise en demeure*. In each case, requiring the defaulting party to perform within a reasonable time is sufficient; one need not even mention the consequences that may follow non-compliance. This differs from German law, which requires the innocent party to state that he or she will refuse performance after the additional period has expired. Failure to do so deprives the innocent party of the right to avoid the contract or sue for specific performance at the end of the additional period, leaving a

¹⁹⁷ *Re-stone and Saville's Contracts*, [1963] 1 W.L.R. 163, at 171; see also *Etablissements Chainbaux S.A.R.L. v. Harbormaster Ltd.*, [1955] 1 Lloyd's Rep. 303, at 312.

¹⁹⁸ See Honnold, *Uniform Law*, *supra*, note 41, at 306.

¹⁹⁹ See Enderlein, *supra*, note 70, at 193.

claim for damages as the only available remedy.²⁰⁰

2. Requirements of the additional time notice

[45] Actual breach of contract

Under both *ULIS* and *The Convention* one party may give the other an additional time notice *only* if the latter is already in breach. After a breach the innocent party is entitled to give the notice without waiting indefinitely for performance. The additional time notice assumes that the contractual performance date has passed.

The degree of breach has no effect on the innocent party's right to rely on the additional time notice. Whether the breach is fundamental is irrelevant if, subject to certain requirements, a valid notice is given to the defaulting party. It seems that the drafters of *The Convention* failed to make a distinction based on the *fundamentality of the delayed performance*. However, despite the drafters' failure to provide clear guidance, Articles 49(1)(b) and 64(1)(b) should be construed as permitting avoidance only when there has been a failure to perform a substantial portion of the specified obligation within the time fixed in an additional time notice. Moreover, it is submitted that it is to the innocent party's advantage to use the additional time notice procedure as a legal basis for avoidance even if the breach is fundamental. This is because *The Convention's* ambiguous definition of "fundamental breach" makes it difficult to determine whether a particular breach is fundamental.²⁰¹

Again, there are practical advantages to giving an additional time notice.²⁰² Even with the possibility of avoiding the contract when the breach is fundamental, the burden of proof, at least in part, rests with the innocent party. As has already been

²⁰⁰ See Treitel, *Remedies, supra*, note 69, at 115, para. 49.

²⁰¹ See [22] - [27].

²⁰² See [42].

noted,²⁰³ in deciding whether or not the breach is fundamental, the court must weigh diverse competing interests. Except in clear-cut cases, the result is difficult to predict. To illustrate, suppose that a seller has declared the contract avoided immediately after the buyer has refused to take delivery. In this case, a court may conclude that an additional period for delivery should have been set prior to the seller's avoidance and that, in its absence, the buyer's refusal did not amount to a fundamental breach. The seller might well be held liable to the buyer for any damages suffered as a result of the seller's consequent non-delivery.

In short, giving an additional time notice rather than relying solely on the fundamentality of the breach (a) gives an innocent party greater assurance that he or she will be entitled to avoid the contract; and (b) eases the court's task of determining whether avoidance is justified.

[46] *Period of reasonable length*

The Convention, as well as *ULIS*, expressly provides that the additional time must be of a reasonable length.²⁰⁴ English law contains a similar rule.²⁰⁵ What constitutes a reasonable time depends on the circumstances of each case.²⁰⁶ It is clear, however, that it is one that does not cause the breaching party unreasonable inconvenience. The period may be "fixed" either by specifying a date, or a period of time.²⁰⁷

²⁰³ See [22] and [23].

²⁰⁴ *The Convention*, arts. 46 and 63; *ULIS*, arts. 27(2), 31(2), 44(2) and 62.

²⁰⁵ See [36].

²⁰⁶ *Stickney v. Keeble*, [1915] A.C. 386 (H.L.); *Ajit v. Sammy*, [1967] 1 A.C. 255 (P.C.).

²⁰⁷ It has been suggested that the buyer cannot rely on the notice for avoiding the contract if the period is not "fixed." See "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* annex 1, para. 236.

What happens if the defaulting party disputes the reasonableness of the additional period? Who decides whether the period is reasonable? Neither *ULIS* nor *The Convention* answers this question. It is submitted that this should be decided by courts in contracting states rather than by the innocent party.

[47] *Restrictions on the additional time notice procedure*

Under Article 49(1)(b) of *The Convention*, the buyer has a right, "in case of non-delivery," to fix an additional period of time for the seller to deliver.²⁰⁸ On the other hand, the additional time procedure under Article 47(1) entitles the buyer to fix an additional period of time of reasonable length for performance by the seller of *any* of his obligations.²⁰⁹ Although it may be understood that the additional time notice procedure applies to all of the seller's obligations, the buyer's right of avoidance, as a rule, is limited to cases of non-delivery.²¹⁰ Preventing the buyer from converting a minor lack of conformity into a fundamental breach by using the additional time notice procedure and then avoiding the contract if the seller does not perform within the additional

²⁰⁸ *The Convention*, art. 49(1)(b). Art. 44(2) of *ULIS* corresponds to this provision. For the drafting history of the rule see the following documents: "Report of the W.G." 3d sess., (1972), 3 *UNCITRAL Yearbook* 77, annex 1, at 81-82, para. 26, art. 43(3); "Report of the Secretary-General" (1973), 4 *UNCITRAL Yearbook* 36, at 53, paras. 128 ff, and "Report of the W.G." 4th sess., (1973), 4 *UNCITRAL Yearbook* 61, at 69-70, paras. 98 ff; "Revised text of the Convention on the International Sale of Goods" (1975), 6 *UNCITRAL Yearbook* 63, at 66, art. 29; *The 1976 Draft Convention*, *supra*, note 45, at 42, art. 30(1)(b); "Draft Convention on the International Sale of Goods" (1977), 8 *UNCITRAL Yearbook* 15, at 18, art. 31; *Official Record*, *supra*, note 67, at 116, paras. 1 ff, at 354, paras. 62 ff, at 357, paras. 15 ff.

²⁰⁹ *The Convention*, art. 47(1).

²¹⁰ See *id.*, art. 49(1)(b). See, however, the Netherlands (A/CONF.97/C.1/L. 165) and Canadian (A/CONF.97/C.1/ L. 150) proposals at the Conference (where an extension of the *Nachfrist* principle was proposed to situations where the seller delivers non-conforming goods). For a thorough discussion of these proposals, see *Official Records*, *supra*, note 67, at 354 ff, paras. 62 ff, at 116-117, paras. 1 ff. See also a similar proposal "Report of the Secretary General: Analysis of Comments by Governments and International Organizations on the Draft Convention of the International Sale of Goods" (1977), 8 *UNCITRAL Yearbook* 142, at 155.

period was the main reason for this restriction.²¹¹

As with the buyer, the seller's right to give an additional time notice under *The Convention* is restricted to cases where the buyer fails to pay the price or take delivery of the goods. Thus, the operation of the principle is limited to cases of non-delivery, non-payment, or failure to accept delivery.

[48] *Criticisms of The Convention's restrictions
on the additional time notice procedure*

Under *The Convention*, an additional time notice can lead to avoidance only in cases of non-delivery. This is an unsatisfactory state of affairs. Limiting avoidance to non-delivery situations may be justified on the ground that it protects the seller from unjustified avoidance by the buyer. However, the door is still open for uncertainty and confusion. It is clear from the wording of Article 47(1) that the buyer's additional time notice applies to the performance of *all* obligations of the seller. Article 49(1)(b), on the other hand, applies only to cases dealing with the seller's non-delivery. *The Convention* may be understood to mean that in order for the buyer to declare the contract avoided, a distinction should be drawn between the two situations. In the case of failure by the seller to deliver, the buyer is entitled to grant an additional period of time for performance and, if it expires without compliance, to avoid the contract. However, when non-conforming goods are delivered, *The Convention* does not permit the buyer to avoid unless the seller's breach is fundamental. If it is not, the buyer may not be able to avoid the contract even though the seller was given an additional period of time. It could be advisable for the buyer, in this case, to resort to other available remedies. It should always be remembered that even if the seller delivers late, or delivers non-conforming goods, he or she will still be liable in damages.

²¹¹ "Report of the W.G." 4th sess., (1973), 4 *UNCITRAL Yearbook* 61, at 69, paras. 101 ff.

The reasons given for restricting the remedy to cases where the seller fails to deliver all of the goods are unsound. Why should the buyer be able to transform a minor defect into something that justifies avoidance? It is submitted that it is preferable to force the buyer to accept non-conforming goods, making the necessary modifications or alterations, and sue in damages. The remedy, therefore, should apply to cases of late delivery as well as to cases of delivery of non-conforming goods. The buyer's interests would be adversely affected by delivery of defective goods as well as by late delivery. Because the seller has failed to perform a contractual obligation, he or she ought to expect the buyer, who presumably has performed satisfactorily, to avoid the contract.

[49] *Additional time notice: summary of requirements*

The requirements for the operation of the additional time notice remedy under *The Convention* may be summarized in the following five statements:

1. The innocent party, seller or buyer, is entitled to fix an additional period of time of reasonable length for the performance by the other party.²¹²

2. In cases of non-delivery, if the seller fails to deliver within this additional period of time, or declares that delivery will not be made within that period, the buyer is entitled to avoid the contract.²¹³

3. The seller is entitled to avoid if, within such an additional period of time, the buyer fails to pay the price or take delivery of the goods, or declares that he or she will not do so within such period.²¹⁴

4. If these requirements are met, the degree of breach is irrelevant. Moreover, it is to the aggrieved party's advantage to give an additional time notice even if the breach is fundamental.

²¹² *The Convention*, arts. 47(1) and 63(1).

²¹³ See *id.*, 49(1)(b).

²¹⁴ See *id.*, art. 64(1)(b).

5. The adoption of the additional time rule in *The Convention* provides the innocent party with a new and effective alternative in non-fundamental breach cases. It also provides the defaulting party with an additional period of time in which to perform.

3. *Effects of the giving of an additional time notice*

[50] *Suspension of Performance*

The innocent party cannot resort to any remedy other than damages during the additional period.²¹⁵ Whether or not the defaulting party performs during the time fixed, that party is responsible for damages the late performance.²¹⁶ Thus, the innocent party must accept the defaulting party's performance if duly tendered. After the expiry of the time, the innocent party may resort to any other available remedy. Similarly, in English law, once a notice is given it binds both parties. If either party fails to perform by the end of that period, the other can avoid.²¹⁷

[51] *Notice by the breaching party of an intention not to perform*

The innocent party becomes entitled to avoid and to exercise other remedies upon receipt of notice from the defaulting party that the latter will not perform before the expiration of the additional period. Such a notice must clearly express a refusal to perform. Merely suggesting amendment of the contract does not amount to the expression of an intention *not* to perform. Neither *ULIS* nor English law contains a similar rule.

²¹⁵ See *id.*, arts. 47(2) and 63(2).

²¹⁶ See Honnold, *Uniform Law*, *supra*, note 41, at 308.

²¹⁷ *Finkelkraut v. Monohan*, [1949] 2 All E.R. 234; *Quadrangle Development and construction Co. Ltd. v. Jenner*, [1974] 1 All E.R. 729.

A notice of refusal to perform is of no legal effect unless the innocent party receives it. This is an exception to the general rule that any communication between the parties is effective upon its dispatch to the addressee if given by appropriate means in the circumstances.²¹⁸ It places the risk of loss or delay in transit on the innocent party. If the notice is lost before reaching its destination, the innocent party cannot avoid the contract since the defaulting party may withdraw the notice any time prior to its receipt.²¹⁹

[52] *Procedures following expiry of the additional time period*

The Convention gives an innocent party the right to avoid the contract upon the expiry of the period specified in an additional time notice or upon the receipt of notice that the defaulting party does not intend to perform. How soon after it arises must this right to avoid be exercised? Can the innocent party keep the right of avoidance pending indefinitely?

Three possibilities are likely after such notice becomes effective. The defaulting party may perform his or her obligations within the additional period or send notice to the innocent party that performance will not be forthcoming. The defaulting party may also choose to do nothing. Under *The Convention*, it is not clear when the innocent party must act after the expiry of the additional time. But the time for avoidance runs after the expiry of any additional time or after the defaulting party has declared that he or she will not perform the overdue obligation.²²⁰

One could argue that once the right to avoid has arisen, the innocent party must exercise it within a reasonable period of time. The reasonableness of the time depends on the circumstances of each case. The innocent party's behavior in these circumstan-

²¹⁸ *The Convention*, art. 27.

²¹⁹ For more details, see [90] - [92].

²²⁰ *The Convention*, art. 49(2)(b)(ii).

ces is to be judged by courts in contracting states. This conclusion is supported by the widespread understanding among international trade participants of the importance of time in their business.

[53] *Procedures following expiry of the additional time period: comparison*

Under *The Convention*, silence following expiry of the additional time period should not be construed as an affirmation of the contract so as to deprive the innocent party of the right to avoid. This right continues to exist until delivery (or payment) is made. However, the innocent party must exercise the right to avoid without unreasonable delay, particularly when it is based on an additional time notice. This differs from *ULIS* and English law. The silence of the innocent party may be construed as an affirmation of the contract under the English general law of contract. This is so since rescission in English law is not automatic but is dependent upon the election of the innocent party.²²¹ Although failure to exercise the right to rescind does not amount to a clear indication that this right will not be exercised,²²² unreasonable delay in exercising the right may give rise to the inference that the contract has been affirmed. This is so particularly where, as a matter of business, it is reasonable to expect the innocent party to act promptly.²²³

ULIS provides that the innocent party must promptly inform the defaulting party of whether the right to avoid will be exercised, otherwise the right is lost.²²⁴ Although the term "promptly" was deleted from *The Convention*, it may be suggested that the

²²¹ *Laskmijit v. Sherani*, [1974] A.C. 605.

²²² *Tyrer & Co. v. Hessler & Co.* (1902), 7 Com.Cas. 166; *Allen v. Robles*, [1969] 1 W.L.R. 1193.

²²³ *The Scaptrade*, [1981] 2 Lloyd's Rep. 425, at 430 aff'd [1983] 1 All E.R. 301 (H.L.); *The Laconia*, [1977] A.C. 350, at 872 (H.L.); *The Balder London*, [1980] 2 Lloyd's Rep. 489, at 491-493.

²²⁴ *ULIS*, arts. 26(2)(3), (when the innocent party is a buyer) and 62(2) (when the innocent party is a seller).

innocent party's right of avoidance revives once the defaulting party has been served with another additional time notice and it too has lapsed without compliance.

[54] *Additional time notice: conclusions*

The additional time notice as adopted by *ULIS* and *The Convention* is a very practical device that reflects the need to reduce the availability of the right to avoid the contract. The rule has been met with general acceptance by Common law lawyers.²²⁵ It has also been well-received by delegates from various regions of the world, and makes a useful contribution to a problem that has proven troublesome under the domestic law of many countries.²²⁶ It is therefore sound to recommend the adoption of the additional time notice procedure in those domestic laws that do not yet recognize it.

Section III

Particular avoidance situations

A. Anticipatory breach

[55] *Grounds for anticipatory breach*

A breach of contract usually occurs when a party fails to fulfil an obligation in accordance with the terms of the contract when it becomes due. There is, however, another form of breach known as anticipatory breach. This occurs when one of the parties refuses to carry out one or more obligations prior to the date fixed for performance. The doctrine of anticipatory breach, as formulated in *ULIS* and *The Convention*, authorizes a party to avoid the contract if it becomes clear that the other party is about to commit

²²⁵ Farnsworth, "Problems of the Unification of Sales from the Standpoint of the Common Law Countries" (1980), 7 *Digest of Comm. Laws* 3, at 16.

²²⁶ Honnold, "The Unified Law for International Sale and the UCC: A Comparison" (1984), 18 *Int'l. Law.* 21, at 28.

a fundamental breach.²²⁷

The doctrine of anticipatory breach has its origin in the Common law²²⁸ and has no counterpart in Civil law.²²⁹ In contrast to English law, French and Egyptian law generally do not recognize a doctrine of anticipatory breach.²³⁰ Under both laws, whatever a party may do or say, no liability for damages in respect of a breach arises until there has been an actual default on one or more duties under the contract. The other party must wait until the time for performance has passed before exercising any available legal rights for breach of contract. It can therefore be said that anticipatory breach is a doctrine peculiar to Common law. Nevertheless, as will be seen below, there is a substantial difference between English law and both *ULIS* and *The Convention* in this matter.

In English law, the doctrine of anticipatory breach had its genesis in the case of *Hochster v. De la Tour*,²³¹ where it was held that if, prior to the date fixed for performance, one party announced an intention not to perform, the other could treat this

²²⁷ *The Convention*, art. 72(1); *ULIS*, art. 76. For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, paras. 128 ff; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, annex 1, art. 49; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, paras. 35, 428 ff of annex 1; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11.

²²⁸ The rule is stated in s. 2-610(6) of the *UCC* and in ss. 8.8 and 8.9 of *OLRC, Report on Sales*; on the subject, see Nienaber, "The Effect of Anticipatory Repudiation: Principle and Policy", [1962] *Cam. L. J.* 213; Gulotta, "Anticipatory Breach – A Comparative Analysis" (1976), 50 *Tulane L. Rev.* 927. As to case law, see the leading case of *Hochster v. De la Tour* (1853), 2 E. & B. 678 (Q.B.); *Gorse v. Durham County Council*, [1971] 1 *W.L.R.* 775. For criticism of the terminology used in English law see *Bradley v. H. Newsom, Sons and Co.*, [1919] *A.C.* 16, 53 (where the term anticipatory breach was criticized by Lord Wrenbury as being unfortunate and misleading because it implies an antithesis between anticipatory and actual breaches).

²²⁹ See Treitel, *Remedies*, *supra*, note 69, para. 177; see also Houin, *supra*, note 84, at 27.

²³⁰ Neither the *Egyptian Civil Code* nor the *French Civil Code* contains a provision regarding anticipatory breach.

²³¹ (1853), 2 E. & B. 678 (Q.B.); see also Benjamin, *supra*, note 81, para. 1207.

as a repudiation of the contract and sue immediately for damages. Subsequently, under the rule in *Frost v. Knight*²³² it was held that the intention not to perform may be inferred from conduct. For example, if one who has contracted to sell a specific object to another at a future time sells the same object to a third person, this sale constitutes an anticipatory breach. The test used to determine the meaning of conduct is the following: has the party acted in such a way as to lead a reasonable person to the conclusion that he or she does not intend to fulfil one or more obligations under the contract?²³³ In other words, "the real matter for consideration is whether the acts or conduct of the party in default do or do not amount to an intention to abandon and altogether to refuse performance of the contract."²³⁴ Whether conduct has this effect "is to be considered as at the time when it is treated as terminating the contract, in the light of the then existing circumstances."²³⁵ This rule is still of general application.²³⁶

The following discussion will show that the scope of operation of anticipatory breach in both *ULIS* and *The Convention* is unjustifiably wide. The concept of adequate assurance, as formulated in *The Convention* (but not *ULIS*) would reduce the scope for avoidance based on anticipatory breach. Under both *ULIS* and *The Convention*, the breach remains anticipatory but not actual, at least where it is based on

²³² (1872), 41 L.J. Ex. 78. In *Hochster* case, *id.* a time was fixed for performance and before it arrived the defendant declared that he would not perform his obligation, but in *Frost v. Knight* (1872), 41 L.J. Ex. 78 performance was contingent upon an event that might not happen within the lifetime of the parties. The defendant promised to marry the plaintiff upon his father's death, but during his father's lifetime he renounced the contract.

²³³ *The Hermosa*, [1982] 1 Lloyd's Rep. 570, at 572 (C.A.); *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401, at 436. See also *Forslind v. Becheley Crundall*, 1922 S.C. (H.L.) 173; *Laws v. London Chronicle (Indicator Newspapers) Ltd.*, [1959] 1 W.L.R. 698.

²³⁴ *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at 213. See also *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App.Cas. 434, at 438-439 (H.L.).

²³⁵ *The Hermosa*, [1982] 1 Lloyd's Rep. 570 (C.A.).

²³⁶ See *Cheshire, supra*, note 108, at 484.

grounds other than words or conduct, until the time for performance arrives.

In English law, however, anticipatory breach is not considered a breach of contract (assuming that the repudiation has not been withdrawn) until the time for performance arrives.²³⁷ Alternatively, the repudiation becomes a breach when it is "accepted" as such. According to this approach, the defaulting party's cause of action is not complete until either the time for performance arrives, or the repudiation is "accepted." Thus, although there were, at one time, statements in the cases that anticipatory breach was itself an actual breach²³⁸ and that the defaulting party had broken an existing obligation to be willing and able to perform,²³⁹ it eventually became the law that the right of the innocent party to "treat"²⁴⁰ the anticipatory breach as a breach indicated that anticipatory breach was not an actual breach until it was "acted on"²⁴¹ or "accepted."

[56] *The breach must be fundamental*

The test under the doctrine of anticipatory breach is much stricter than in the case of suspension of performance. Articles 71 and 72 of *The Convention* distinguish between a threat to commit a fundamental breach²⁴² and a threat to fail to perform a substantial part of the contractual obligations. The latter triggers only a right to suspend performance while the former entitles the innocent party to avoid the contract, suggesting

²³⁷ *The Mihalis Angelos*, [1971] 1 Q.B. 164.

²³⁸ See, e.g. *Short v. Stone* (1864), 8 Q.B. 358, at 370; *Frost v. knight* (1872), L.R. 7 Ex. 111, at 113 and 118.

²³⁹ *Bradley v. H. Newsom, Sons and Co.*, [1919] A.C. 16, at 53; *The Mihalis Angelos*, [1971] 1 Q.B. 164; see also Goode, *Commercial Law* (Harmondsworth, Middlesex: Penguin Books, 1982) at 127; *Anson, supra*, note 116, at 512.

²⁴⁰ *Danub and Black Sea Railway v. Xenos* (1863), 13 C.B.N.S. 825, at 827; *Cherry v. Thompson* (1872), L.P. 7 Q.B. 573, at 574.

²⁴¹ *Johnstone v. Milling* (1886), 16 Q.B.D. 460, at 470.

²⁴² What constitutes a fundamental breach has already been explained in [20] - [26].

that a breach may be substantial without being fundamental.²⁴³

Whether it is clear that there will be a future fundamental breach depends on the facts of each case. The future fundamental breach may be made clear either by words or actions constituting a repudiation of the contract or by an objective fact, such as the destruction of the seller's plant by fire that will render impossible future performance.²⁴⁴

In English law too, the breach must be such that its prospective effects satisfy the requirement of substantial failure to perform or that it comes within an exception to that requirement.²⁴⁵ As stated in *Ross T. Smyth & Co. Ltd. v. T.D. Bailey Son & Co.*,²⁴⁶ "repudiation of a contract is a serious matter, not to be lightly found or inferred."²⁴⁷ If the effects of the breach are not of this degree, avoidance will not be justified.²⁴⁸ There is an exception to this rule. The doctrine of anticipatory breach does not apply where the right to avoid arises under an express contractual provision.²⁴⁹ In other words, the breach of what is termed a "condition," which entitles the innocent party to avoid, is the main exception to this rule. Consequently, if the parties have agreed that the designated breach constitutes (or is to be considered) a breach of condition, the doctrine of anticipatory breach applies to such a breach. This means that the requirement that the anticipatory breach be serious (i.e. fundamental) in order

²⁴³ It was pointed out at the Conference that the difference between the "fundamental breach" language in Article 72 and the "substantial part" language in Article 71 is that Article 71 is more flexible. See *Official Records, supra*, note 67, at 420.

²⁴⁴ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 63, para. 2.

²⁴⁵ See Treitel, *Contract, supra*, note 5, at 644.

²⁴⁶ [1940] 3 All E.R. 60, at 71.

²⁴⁷ These words have been quoted many times. A recent example is *Bunge G.m.b.H. v. C.C.V. Landbouwbetang G.A.*, [1980] 1 Lloyd's Rep. 458, at 461.

²⁴⁸ *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401, at 449-450.

²⁴⁹ *The Mihalis Angelos*, [1971] 1 Q.B. 164.

to justify avoidance is not applicable in this case.

By contrast, it should always be remembered that even if the parties opt out of *The Convention* or vary any of its provisions,²⁵⁰ this does not necessarily mean that their agreement is valid. This is because *The Convention* is not concerned with the validity of a contract.²⁵¹ Only if the parties' agreement is valid under the proper law of the contract can the doctrine of anticipatory breach be regulated in the parties' agreement.

[57] *The time of the breach*

After the contract has been made, one of the parties may find grounds for concern that the other party will fail to perform part of the bargain. In order for a breach to be anticipatory, the time at which it becomes clear that one of the parties will commit a fundamental breach must be before the date at which performance is due. This would be the case, for example, if it became clear before delivery was due that the goods would not be delivered on time. This is the position of *ULIS*, *The Convention* and English law.²⁵²

It might happen, however, that such a ground clearly existed at the time the contract was entered into. This would be the case, for example, if at the time of contracting the buyer was bankrupt or insolvent and it was clear that he or she would commit a fundamental breach when the time for payment arrived. If, however, the certainty of breach becomes clear only after the contract is made, avoidance on the ground of anticipatory breach may be justified only as long as this continues to be the case.

²⁵⁰ *The Convention*, art. 6.

²⁵¹ See *id.*, art. 4.

²⁵² See Anson, *supra*, note 116, at 510; also *Chitty on Contracts*, 25th ed. by Guest (London: Sweet and Maxwell, 1983), para. 1604; Schmitthoff, *The Sale of Goods*, 2d ed. (London: Stevens, 1966), at 182-183; Treitel, *An Outline*, *supra*, note 81, at 305.

Admittedly, it may be difficult to justify avoidance in this case, but it is reasonable to assume that the innocent party is permitted to demand an assurance and sue for breach if no such assurance is forthcoming.

[58] *The innocent party's options in cases of anticipatory breach*

Under *ULIS* and *The Convention*, if it becomes clear that the defaulting party will commit a fundamental breach, the innocent party may either (a) accept the breach and avoid the contract; or, (b) keep the contract alive by continuing to press for performance.²⁵³

In English law, anticipatory breach entitles the innocent party to immediately treat him- or herself as discharged from any further obligations under the contract and to sue for damages. Alternatively, that party may wait until the time for performance and then sue. In any event, it is submitted that action must be taken within a reasonable time under the circumstances so as to minimize any damage suffered as a result of the breach. Otherwise, a failure to avoid may, in certain circumstances, be construed as an affirmation of the contract. Likewise, such a failure gives the defaulting party an opportunity to notify the innocent party that the contract will be honoured after all. This retraction restores the enforceability of the contract. *ULIS* and *The Convention*, by contrast, contain no similar rule.²⁵⁴ *The Convention* differs, however, from English law and *ULIS* in that the repudiating party's request for an adequate assurance is, in certain circumstances, a condition precedent to the remedy of avoidance.²⁵⁵

²⁵³ *The Convention*, art. 72(1); *ULIS*, art. 76.

²⁵⁴ See, however, [71], where in cases of instalment contracts, the innocent party must avoid the contract with respect to future instalments within a reasonable time.

²⁵⁵ See [210] and [211].

If the innocent party wishes to treat him- or herself as discharged from the contract, the party in default must be notified of this decision.²⁵⁶ Once this notice is given, it cannot be withdrawn. Such a notice extinguishes the defaulting party's power to retract the repudiation. If, however, the innocent party elects to await performance and maintain the contract, his or her own obligations must continue to be performed. Electing this course of action is not without risk²⁵⁷ since supervening events could frustrate the contract, thereby depriving the innocent party of some or all rights under it.²⁵⁸

[59] *Notice of intention to avoid*

Under *The Convention*, a party who intends to avoid the contract must, "if time allows," give reasonable notice to the other party in order to permit the latter to give adequate assurance of performance.²⁵⁹ This notice is essential to both parties in mitigating their damages pending the resolution of their dispute.

The expression "if time allows" may be subject to different interpretations by courts in contracting states.²⁶⁰ The facts of each case are the determining factors. New modes of communication make it difficult for a party intending to avoid the contract to justify any failure to give notice immediately. Such a party should act according to a commercially accepted standard and in good faith.

²⁵⁶ *Heyman v. Darwins Ltd.*, [1942] A.C. 356, at 361 (H.L.).

²⁵⁷ *Johntson v. Milling* (1866), 16 Q.B.D. 460, at 470.

²⁵⁸ *Avery v. Bowden* (1855), 5 E. & B. 714; (1856) 6 E. & B. 953 (where the outbreak of war, subsequent to an alleged repudiation but prior to any "acceptance" by the innocent party, was held to frustrate performance of a charterparty). Once the frustrating event occurred it was too late for the innocent party to "accept" the repudiation.

²⁵⁹ *The Convention*, art. 72(2).

²⁶⁰ At the Conference, a suggestion to delete the phrase "if time allows" was rejected. See *Official Records, supra*, note 67, at 432, paras. 1 ff and at 131, para. 10.

The purpose of the reasonable notice is to permit the defaulting party to provide adequate assurance of performance. The concept of adequate assurance has no equivalent in either English law²⁶¹ or *ULIS*.²⁶² Since future fundamental breach is required for applying the doctrine of anticipatory breach, a failure to provide adequate assurance has no effect on the innocent party's right to avoid.²⁶³

The requirement that the innocent party demand an adequate assurance is dispensed with if the other party has expressly declared an intention not to perform.²⁶⁴ A defaulting seller will most likely not be able to deliver the goods if, for example, a plant has been destroyed by fire, there is a total embargo on exports, or there is an outbreak of hostilities that makes shipment impossible. In such cases, the buyer would be entitled to avoid the contract immediately without first notifying the seller.

[60] *Notice of intention to avoid: comparison*

Once again, *The Convention* requires the innocent party, "if time allows," to give reasonable notice of an intention to avoid the contract, in order to permit the party in breach to provide adequate assurance of performance.²⁶⁵ Although the *UCC* employs the notion of adequate assurance in section 2-610, it creates no notice requirement in cases of anticipatory breach. *ULIS* contains no notice requirement either.²⁶⁶

²⁶¹ Beale, *Remedies for Breach of Contract* (London: Sweet & Maxwell, 1980), at 77 ff.

²⁶² See [210].

²⁶³ The discussion in [210] and [211] is applicable here.

²⁶⁴ *The Convention*, art. 72(3). Similarly, the *UCC* does not require use of the adequate assurance procedure where there has been a clear repudiation, i.e. an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance. See the *UCC*, s. 2-610, comment 1.

²⁶⁵ *The Convention*, art. 72(2).

²⁶⁶ The adoption of paras. 2 and 3 of art. 72 was a result of the Egyptian proposal at the Conference and the establishment of an *ad hoc* Working Group to consid-

In English law, anticipatory breach must be accepted before it becomes a breach of contract. The innocent party can accept the anticipatory breach either by bringing an action for damages, or by giving notice to the other party or some other act as buying the goods elsewhere.²⁶⁷ It follows that any statement as to the acceptance of the breach by the innocent party must be supported by some action.²⁶⁸ Unless and until the innocent party makes known to the party in default his or her decision to accept the repudiation, the contract remains in full effect.

One authoritative *dictum* described an unaccepted repudiation as a "thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind."²⁶⁹ This statement has been taken to mean that a repudiation has no legal effect unless accepted. It has been quoted with approval in a number of English cases.²⁷⁰ This differs from *The Convention*, where a notice is required only "if time allows."

[61] *Assessment of damages in cases of anticipatory breach*

The problem that arises from the doctrine of anticipatory breach is whether damages are to be assessed at the time of repudiation or at the time specified in the contract for performance. This issue is important, especially if the refusal to perform and the court proceedings occur long before the date fixed for performance. However, the issue remains unsettled under Common law jurisdictions.²⁷¹ *ULIS* and *The Convention* pro-

er arts. 62 and 63 (now arts. 71 and 72). See note 974.

²⁶⁷ See Chitty on Contracts, *supra*, note 252, para. 1604; Treitel, *An Outline*, *supra*, note 81, at 305; and in *Contract*, *supra*, note 5, at 642.

²⁶⁸ *Societe General de Paris v. Milders* (1883), 49 L.T. 55, at 58.

²⁶⁹ *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417, at 421 (C.A.).

²⁷⁰ See, e.g. *Heyman v. Darwins Ltd.*, [1942] A.C. 356, at 361 (H.L.), per Viscount Simon L.C.; *White and Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413, at 444 (H.L.), per Lord Hodson.

²⁷¹ For more details about the conflicting approaches of Common law jurisdictions, see OLRG, *Report on Sales*, at 532 ff.

vide no separate rule dealing with the assessment of damages in anticipatory repudiation cases. Thus, the exact date of assessment of damages, as provided by the general rules of damages,²⁷² is the date on which the contract is avoided. The amount of damages will therefore be equal to the difference between the price fixed by the contract and the current price at the date of avoidance.

In English law, in cases of anticipatory breach, damages are to be assessed as at the time when the contract ought to have been performed, not the time of repudiation.²⁷³ In *Melachrino v. Nickoll and Knight*,²⁷⁴ for example, it was held that damages should be assessed as far as possible with reference to the market price at the time of delivery, by taking into account all the probabilities. The American position is different from English law, where damages are assessed in cases of anticipatory breach, as in those of actual breach, "at the time when the buyer learned of the breach."²⁷⁵ However, section 2-723 of the *UCC* provides that if an action for anticipatory breach comes to trial before the time for performance, damages should be assessed according to the price of such goods prevailing at the time when the innocent party learned of the repudiation. If, on the other hand, no such price exists at the time of repudiation, damages should be measured in accordance with the price prevailing within any reasonable time before or after the time fixed by section 2-723. Under American law, therefore, the breach is anticipatory, but not actual, for all purposes including the assessment of damages.

²⁷² See [143] and [144].

²⁷³ *Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory*, [1978] 1 All E.R. 515 (P.C.).

²⁷⁴ [1926] 1 K.B. 693.

²⁷⁵ The *UCC*, s. 2-713.

It is submitted that courts in contracting states should assess damages only after the arrival of the time for performance, even though the aggrieved party is entitled to bring an action immediately. This view is backed by two reasons. First, having regard to the normal delays of litigation, it must be rare indeed for the assessment of damages to precede the arrival of the time for performance. Second, this view would make the assessment of damages easier since the court would never be placed in the situation of having to assess damages before the arrival of the time for performance.

[62] *Is there a duty to mitigate in cases of anticipatory breach?*

Although it is not stated in either *ULIS* or *The Convention*, the innocent party, after deciding to avoid, may be required by courts in contracting states to take all reasonable measures to minimize any needless expenditure or wastage of resources that might otherwise occur during the frequently long delays (a) between the decision to avoid and the defaulting party's response;²⁷⁶ or, (b) between an anticipatory breach and its acceptance. Postponement of the time for performance means that the parties must prepare for performance, and it is senseless for one party to prepare for a performance that will never take place. It would be equally justifiable for courts in contracting states to either force the aggrieved party to wait until the time for performance arrives, or allow avoidance as long as timely measures to mitigate losses are taken in the meantime.

Furthermore, as the main purpose of giving a reasonable notice is to permit the breaching party to give adequate assurance of performance, he or she is entitled to expect that such assurance will be accepted.

²⁷⁶ For express statements, see *Hochster v. De la Tour* (1853), 2 E. & B. 678, at 690 (Q.B.); *Frost v. Knight* (1872), L.R. 7 Ex. 111, at 114-115; *Roehm v. Horst* (1900), 44 L. Ed. 953, at 961.

In English law, there would appear to be no duty to mitigate in cases of anticipatory breach unless the innocent party accepts the repudiation and treats the contract as discharged.²⁷⁷ The seller might resell the goods to another buyer or the buyer might repurchase if this would be reasonable in the circumstances. Their failure to take such measures will affect the amount of damages for which the breaching party will be held liable.

B. *Instalment contracts*

[63] *Introduction*

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. It is possible, however, for parties to agree on delivery by instalments.

For example, assume that a seller promises to sell to a buyer 6000 tons of rice to be delivered in three instalments of 2000 tons each. If the seller then delivers one defective instalment amounting to a fundamental breach in respect of that instalment, can the buyer avoid the contract not only for that instalment but for the future instalments as well? If, on the other hand, the buyer is late in paying for one instalment, does the seller have the right to bring the whole contract to an end? The breach in these cases is both actual and anticipatory. Thus, while avoidance in the case of a violation of one or more instalments is based on an actual breach, it is anticipatory in respect of future instalments. These and related questions will be the subject of the following discussion.

²⁷⁷ *White and Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413 (H.L.Sc.); for more details see [128].

[64] *Definition of "instalment contract"*

The contract calls for delivery by instalments if it requires or authorizes the delivery of goods in "separate lots."²⁷⁸ The expression "separate lots" is also found in various domestic laws.²⁷⁹

The Convention provides no definition of the term "lot." The absence of a definition, however, is not expected to create difficulties for contracting parties. Its meaning may be inferred from (a) the nature of an agreement²⁸⁰ that calls for delivery by instalments; (b) the duty to pay a calculable part of the price for each instalment; and, (c) the circumstances of the case. Otherwise, the buyer is not obliged to accept delivery by instalment²⁸¹ unless otherwise agreed; nor is the seller bound to make such a delivery.²⁸²

There are many contracts that call for delivery and/or payment in instalments, yet are not considered instalment contracts. For example, the subject matter of a sale may be a set of individual components that amount to an integrated whole, such as a machine to be delivered in parts. Yet the contract may call for the price to be paid in a lump sum or in some other manner not fixed by reference to the individual instal-

²⁷⁸ See *The 1978 Draft Commentary, supra*, note 67, Comment to art. 64, para. 1. Article 73 of *The Convention* deals with the avoidance of instalment contracts by both parties; see also art. 75 of *ULIS*, which was subject to substantial changes. For a legislative history, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, paras. 116 ff; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, annex 1, art. 48; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, paras. 421 ff; "Report of UNCITRAL" 11th sess., (1978), 8 *UNCITRAL Yearbook* 11, para., 28 (art. 64); *Official Records, supra*, note 67, at 221, para. 31.

²⁷⁹ The *UCC*, s. 2-612(1); see also s. 8.10 of *DUSA*, which is substantially the same as the *UCC* provision.

²⁸⁰ *Brandt v. Lawrence* (1876), 1 Q.B.D. 344, at 347 (C.A.); *Howell v. Evans* (1926), 134 L.T. 570.

²⁸¹ *SGA*, s. 31(1). See also *Honck v. Muller* (1881), 7 Q.B.D. 92, at 98-99 (C.A.).

²⁸² *Kingdom v. Cox* (1848), 136 E.R. 982; 5 C.B. 522.

ments of components. The fact that the seller's delivery obligations are distributed over the number of instalments in question does not make such a contract an instalment contract since no one delivery corresponds to any one part of the price. In such cases, the seller may only avoid the contract in the event of an actual breach, e.g. when the buyer fails to make payment.²⁸³

As to the buyer, if one of the deliveries is not of acceptable quality, he or she will be entitled to damages or to any other non-avoidance remedy but will not be entitled to avoid the contract unless (a) the seller's breach constitutes a fundamental breach with respect to a single instalment; and/or, (b) the breach, when taken together with the seller's performance, leads to the inference that a fundamental breach will occur with respect to future instalments.

[65] *Instalment contracts: Egyptian law*

Under Egyptian law, unless otherwise agreed, the breaching party is not entitled to compel the innocent party to accept partial performance.²⁸⁴ The severability of an obligation must be agreed upon by the parties.²⁸⁵ In the absence of a stipulation to the contrary, the seller must deliver all the goods at the same time. The buyer is not obliged to accept delivery by instalments.

Where one or more instalments is breached, the innocent party is entitled, as a general rule, either to claim damages or to avoid the contract. A sales contract is to be considered a single contract despite dividing delivery or payment into instalments. It may be suggested that the *Egyptian Civil Code* be amended to adopt a similar rule to

²⁸³ *ULIS*, art. 75(2); *The Convention*, art. 73(3). See also Benjamin, *supra*, note 81, para. 640; OLCRC, *Report on Sales*, at 544; *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 64, paras. 4 and 7-8; see further Graveson and Cohn, *supra*, note 134, note 97.

²⁸⁴ *The Egyptian Civil Code*, art. 242.

²⁸⁵ See Murkus, *supra*, note 98, at 899-900.

that of English law where a distinction is made between severable and non-severable obligations.²⁸⁶ This is because such a rule is compatible with the general principles of the *Egyptian Civil Code* and is more consistent with international trade usage than the existing law.

[66] *Instalment contracts: French law*

Under the French general law of contract, obligations to be performed in succession over a period of time are called *contrat successif*.²⁸⁷ Although as a rule the avoidance remedy operates only retrospectively, in *contrat successif* it operates prospectively.

There is a trend in French courts to treat each delivery as a separate contract. Courts are permitted to decide whether there has been partial performance in the light of the circumstances of each case. The reason for this trend is to save the contract. It should be remembered that, in French law, avoidance must be sought before the court. This means that the court is empowered to grant avoidance in respect of future instalments. In all instances, the degree of the breach and the surrounding circumstances will be taken into consideration by the court.

It seems, however, that the notion of instalment contracts in *ULIS* and *The Convention* is more familiar to English than to Egyptian or French law. This statement is supported by the following two observations. First, unlike section 31(2) of the English *Sale of Goods Act, 1979*, neither the *French Civil Code* nor the *Egyptian Civil Code* contains a provision similar to Article 75 of *ULIS* or Article 73 of *The Convention*. Second, under *ULIS* and *The Convention*, avoidance of instalment contracts is based either upon anticipatory breach or upon fundamental breach, both of which are Common and not Civil law concepts.

²⁸⁶ SGA, 1979, s. 31.

²⁸⁷ See generally Planiol et Ripert, *supra*, note 84, vol. 6, para. 45.

[67] *Instalment contracts: English law*

In English law, buyers are not bound to accept partial delivery unless this is agreed upon in the contract or otherwise. The most common example of an agreement that the buyer must accept partial performance is the instalment contract.²⁸⁸ The notion of instalment contracts is recognized in section 31(2) of the *Sale of Goods Act, 1979*.²⁸⁹ The language of the sub-section is based on the language used in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.*²⁹⁰ In that case, it was established that there is no rule of law that the buyer's breach of his obligation to make payment for a single delivery, whether by repudiation or failure to perform, constitutes a substantial (i.e. serious) breach of the contract as a whole. This was confirmed by section 31(2) of the *Sale of Goods Act, 1893*, the terms of which are repeated in section 31(2) of the *Sale of Goods Act, 1979*.

Turning to section 31(2), the basic question appears to be whether or not the breach gives rise to an inference that the defaulting party will not be ready, willing and able to perform his or her obligations when the time for performance arrives. In the absence of an express term in the contract or a commercial practice recognized by law, this question can only be answered having regard to the terms of the contract and the

²⁸⁸ See generally, Atiyah, *supra*, note 171, at 94 ff; Benjamin, *supra*, note 81, paras. 622 ff; Goode, *supra*, note 239, at 224 ff; Schmitthoff, *Sale, supra*, note 252, at 130 ff; OLRC, *Report on Sales*, at 541 ff.

²⁸⁹ S. 31(2) states:

"Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

²⁹⁰ (1884), 9 App.Cas. 434 (H.L.); see also *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd.*, [1934] 1 K.B. 148, at 154 and 155 (C.A.).

circumstances of the case.²⁹¹ The factors to be considered are: (a) how significant a proportion the individual instalment is of the whole contract; and, (b) the likelihood that the breach will be repeated.²⁹² This depends on whether the obligation is severable or non-severable,²⁹³ i.e. whether the breach goes to the root of the contract, so as to constitute a repudiation of the whole contract, or is merely a severable breach giving rise to a claim for compensation only.²⁹⁴

[68] *One contract or several?*

The concept of an instalment contract is normally associated with a single contract only, even though the delivery of the goods or the payment of the price may be by stated instalments. However, this is not always the case. The distinction between severable and non-severable contracts is a question of fact to be decided by courts having regard to the contract itself and the surrounding circumstances.

Delivery of goods in instalments is a common practice in international sales. Often, terms like "each delivery is to be treated as a separate contract" and "each shipment is deemed to be a separate contract" are used. In such cases, one party's duty to perform in respect of one delivery does not depend on performance by the other party in respect of another.

²⁹¹ *SGA*, 1979, s. 31(2).

²⁹² *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Co. Ltd.*, [1934] 1 K.B. 148, at 157 (C.A.).

²⁹³ See Treitel, *Contract*, *supra*, note 5, at 590, who emphasizes that what is severable is not the contract but a particular obligation. See also Goode, *supra*, note 239, at 227, note 42.

²⁹⁴ See *Anson*, *supra*, note 116, at 520; Schmitthoff, *Sale*, *supra*, note 252, at 130 ff; Adams, *Cases and Materials on Sale of Goods* (London: Croom Helm, 1982) at 114.

In English law, unless the contract calls for delivery by instalments, such terms will not convert a single contract into several contracts;²⁹⁵ it is still one contract even though particular instalments may be treated separately for the purpose of performance.²⁹⁶ Inserting such terms into a contract gives the seller the option of either delivering in one consignment, in which case there is one indivisible contract, or making several deliveries, in which case there are several separate contracts.²⁹⁷ If the seller ships the goods in one vessel but under several bills of lading, it is necessary to examine whether the parties intended to treat the contract as one contract or several.²⁹⁸

It is unclear in either *ULIS* or *The Convention* whether inserting such a term into the contract turns it into several contracts. A strict construction of Article 75 of *ULIS* and Article 73 of *The Convention* may not give the seller, when one of these terms is used, the right to avoid the whole contract when the buyer fails to perform in respect of one or more instalments. This is because both provisions refer to "a contract" for delivery by instalments. The proper construction of this, presumably, is that the contract is to be treated as a single contract even when such a term is used unless, of course, the parties intend that there should be several contracts.

²⁹⁵ *Ross T. Smyth & Co. Ltd. v. T.D. Bailey, Son & Co.*, [1940] 3 All E.R. 60 (H.L.); *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Co. Ltd.*, [1934] 1 K.B. 148 (C.A.).

²⁹⁶ See Goode, *supra*, note 239, at 277; Schmitthoff, *Sale, supra* note 252, at 130-131; and in *Export Trade, supra*, note 24, at 99; see also *Ross T. Smyth case, id.*, at 73. A similar approach is followed by both the *UCC*, s. 2-612(1) and *DUSA*, s. 8.10(1).

²⁹⁷ The seller, however, is bound by the election. See *Reuter, Hufeland & Co. v. Sala & Co.* (1879), 4 C.P.D. 239 (C.A.).

²⁹⁸ *J. Rosenthal & Sons Ltd. v. Esmail*, [1965] 1 W.L.R. 1117 (H.L.) (where it was held that when there is a c.i.f. contract and several bills of lading relating to several parts of the goods are used, the contract is severable).

[69] *Avoidance of one instalment*

Suppose that in the case of a contract for delivery of goods by instalments, the seller delivers one defective instalment or the buyer is late in paying for one instalment. In both cases, the aggrieved party is entitled, under *The Convention*, to avoid with respect to that instalment.²⁹⁹ However, such a breach must be fundamental.³⁰⁰ Sometimes, it is difficult to separate one instalment from another, as in the case of a large machine to be delivered in segments for assembly by the buyer.

Article 73(1) of *The Convention*, which entitles the innocent party to avoid in respect of one instalment only, has no counterpart in either *ULIS* or the English *Sale of Goods Act*.³⁰¹ Under *ULIS*, an innocent party may, however, avoid in respect of future instalments if the defaulting party's breach gives that party "good reason to fear failure of performance in respect of future instalments."³⁰² These words suggest that if this test is met, the innocent party may avoid in respect of future instalments but not in respect of the breached instalment(s).

Turning to English law, the *Sale of Goods Act* contains no provision similar to Article 73(1) of *The Convention*. Section 31(2) of the Act does provide that there is a repudiation when the terms of the contract and the circumstances of the case show there to be a repudiation.³⁰³ This provides no clear guidance as to the aggrieved par-

²⁹⁹ *The Convention*, art. 73(1); *The 1978 Draft Commentary, supra*, note 67, comment to art. 64, para. 3. See also s. 8.10(2) of *DUSA* (whereby the seller's rights and remedies in the event of a breach by the buyer in respect of any instalment are the same as if that instalment was a separate contract).

³⁰⁰ The definition of fundamental breach has already been discussed in [20] - [26].

³⁰¹ But see s. 2-612(2) of the *UCC* which entitles a buyer to reject a non-conforming delivery under an instalment contract "if the non-conformity substantially impairs the value of that instalment ..." But see note 310.

³⁰² *ULIS*, art. 75.

³⁰³ It should be pointed out, however, that s. 31(2) of *SGA*, 1979, provides that a severable breach gives "rise to a claim for compensation but not to a right to treat the whole contract as repudiated"; see also *OLRC, Report on Sales*, at

ty's rights with regard to a particular breach of one or more instalments. The issue should be governed by the rule governing avoidance of instalment contracts generally, as discussed in paragraph [67].

The buyer's right to avoid in cases of short delivery or partial non-conformity, under Article 51(1) of *The Convention*,³⁰⁴ may operate in a manner similar to the right of partial avoidance in respect of one or more instalments and may achieve the same results. Unlike Article 51(1), which is available only to the buyer, Article 73(1) is available to both seller and buyer.³⁰⁵ Avoidance in both cases, however, depends on the fundamentality of the breach. So, if the breach of a single instalment constitutes a fundamental breach, it will entitle the aggrieved party, whether buyer or seller, to avoid the contract with respect to that instalment but not to avoid the whole contract. Instead of avoiding the contract, the innocent party may accept the non-conforming instalment as it is or may require the defaulting party to deliver a new instalment instead. If the innocent party elects to avoid, the party in breach must be notified of this election.

[70] *Avoidance in respect of future instalments*

If one party's performance is defective in respect of the first instalment, is the other party entitled to avoid the contract with respect to subsequent instalments? Suppose the buyer unlawfully rejects the first instalment, or fails to pay for it. Suppose further that this constitutes a fundamental breach in respect of that instalment. Does this

551-552; Benjamin, *supra*, note 81, para. 642.

304 See [74].

305 As a result of a proposal based on the fact that there is no provision enabling the seller to avoid a part of the contract which is equivalent to art. 32 (now art. 51), which permits the buyer to do so, a new paragraph was added. "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, at 55, paras. 421 ff. The new paragraph became para. (1) of art. 73 which gives the seller and buyer a right to avoid the contract with respect to any instalment.

rejection or failure discharge the seller from the duty to deliver the remaining instalments?

Under both *ULIS* and *The Convention*, if some of the instalments are in conformity with the contract and others are not, the buyer has the right to declare the contract avoided not only in respect of the non-conforming instalments but also in respect of all instalments if the instalments are interdependent.³⁰⁶

The seriousness of the breach is not the most significant factor in such cases. The most important factor is the interdependency of the goods. In order for goods to be interdependent they must form part of an integrated whole.³⁰⁷

[71] *Avoidance in respect of future instalments: comparison*

Under *The Convention*, when one party fails to perform with respect to one instalment, it is possible for the other party to declare the contract avoided not only in respect of that instalment but in respect of future instalments as well.³⁰⁸ *The Convention's* approach is in line with that of *ULIS* and the English *Sale of Goods Act*, although these laws use different tests;³⁰⁹ its approach differs, however, from that of the *UCC*.³¹⁰ These tests will be considered below.

³⁰⁶ *The Convention*, art. 73(3); *ULIS*, art. 75(2).

³⁰⁷ See *The 1978 Draft commentary, supra*, note 67, comment to art. 64, para. 8.

³⁰⁸ *The Convention*, art. 73(2).

³⁰⁹ According to s. 31(2) of the *SGA*, the same principle applies whether the defaulting party is the buyer or the seller.

³¹⁰ The *UCC*, s. 2-612(3) provides that "whenever non-conformity or default with respect to one or more instalments substantially impairs the value of the whole contract there is a breach of the whole." The purpose of this section is to vary the perfect tender rule (the *UCC*, s. 2-601) by imposing a materiality standard for breaches of entire instalment contracts. This differs from *The Convention's* approach where the fundamental breach standard applies to *all* contracts.

Under *The Convention*, the test is whether or not the breach in respect of the first instalment gives "the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments."³¹¹ Under *ULIS*, if any breach in respect of one instalment gives the innocent party "good reason to fear failure in respect of future instalments," he or she may declare the contract avoided in respect of all future instalments.³¹²

Under *The Convention*, if the innocent party wishes to avoid the contract in respect of future instalments, this must be done "within a reasonable time." In contrast, the term "promptly" is used in *ULIS*.³¹³ However, it might be said that both laws leave the question to be decided according to the circumstances of each case. An innocent party who unduly delays in exercising the right of avoidance may, under both *ULIS* and *The Convention*, lose that right unless new grounds arise. The time runs from the time of the breaching party's failure to perform.³¹⁴ In cases where the failure to perform could not have been detected immediately, it is suggested that the time be measured from the moment the innocent party discovered (or ought to have discovered) the breach.

As far as English law is concerned, the innocent party is not entitled to avoid in respect of future instalments unless the breach constitutes a repudiation of the whole contract.³¹⁵ For example, the buyer's default in paying for one instalment³¹⁶ does not

³¹¹ See Honnold, *Uniform Law, supra*, note 41, at 406.

³¹² *ULIS*, art. 75(1).

³¹³ For the meaning of this term under *ULIS*, see art. 11, which provides that avoidance must be declared "within as short a period as possible, in the circumstances, from the moment" the avoidance could reasonably be declared.

³¹⁴ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 64, para. 5.

³¹⁵ *SGA*, 1979, s. 31(2); see also OLRC, *Report on Sales*, at 547 ff.

³¹⁶ *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App.Cas. 434 (H.L.).

entitle the seller to withhold delivery of future instalments except where the defect is so grave or persistent as to constitute a repudiation of the contract as a whole. Furthermore, even if the defaulting party intends to perform the contract, if the intention is to perform it in a manner substantially different from that envisaged in the contract, this will still be construed as a repudiation of the contract. This is a question of fact to be determined according to the circumstances of each case.³¹⁷ The question is whether the acts and conduct of the defaulting party evince an intention to no longer be bound by the contract.³¹⁸

[72] *Criticisms of The Convention's treatment of avoidance of future instalments*

The Convention's test for avoidance of future instalments is too subjective. It requires the breach to give the *aggrieved party* "good grounds to conclude that a fundamental breach will occur with respect to future instalments."³¹⁹ If, for instance, the aggrieved party has concluded that there will be a fundamental breach, the test will be satisfied even if any other person in the same position would have concluded otherwise.

One might wonder why the test was not criticized on the same grounds that were raised with regard to the rules on suspension (Article 71) and avoidance before the date set for performance (Article 72),³²⁰ namely, that it restricts avoidance to cases where there is an objective certainty that one of the parties will not perform. The reason, suggests Honnold,³²¹ may be "that in the setting of the test, a breach of contract

³¹⁷ *SGA*, 1979, s. 31(2). The same rule applies when the buyer's improper rejection of an instalment constitutes a repudiation of the whole contract. See *Reuter, Hufeland & Co. v. Sala & Co.* (1879), 4 C.P.D. 239, at 247 (C.A.).

³¹⁸ *James Shaffer Ltd. v. Findlay Durham & Brodie*, [1953] 1 W.L.R. 106; *Spettabile Consorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co. Ltd.* (1919), 121 L.T. 628, at 634; *Freeth v. Burr* (1874), L.R. 9 C.P. 208.

³¹⁹ *The Convention*, art. 73(2).

³²⁰ See [201].

has already occurred." This has not happened in cases covered by the doctrines of anticipatory breach and suspension of performance.

This argument is unconvincing. It is true that the test is applied to obligations under the contract that have already occurred. The issue is whether a past or current breach demonstrates that a fundamental breach will occur with respect to future instalments. *The Convention's* drafting history suggests that just because there has been a breach in respect of one or more past instalments, it does not necessarily follow that there will be a fundamental breach in respect of future instalments.³²²

The test has failed to objectively define the conditions for avoidance of future instalments. It permits the innocent party to avoid the contract with respect to future instalments even if the defaulting party offers to provide adequate assurance of performance. It remains unclear why this should be the case. Finally, the test is open to abuse when there is no interdependency between past non-conforming instalments and future instalments.

[73] *Additional time notice and instalment contracts*

When there has been a non-fundamental breach in respect of one instalment and there is no good reason to believe that a fundamental breach will occur in respect of future instalments, can the additional time notice procedure be used to avoid an instalment contract in respect of (a) the breached instalment, and (b) future instalments?

In general, the operation of the additional time notice starts when a seller fails to deliver the goods³²³ or when a buyer fails to pay the price or take delivery.³²⁴ If the additional period expires without performance, the innocent party may utilize the addi-

³²¹ See Honnold, *Uniform Law, supra*, note 41, at 406.

³²² See *The 1978 Draft commentary, supra*, note 67, comment to art. 64, para. 5.

³²³ *The Convention*, art. 47.

³²⁴ See *id.*, art. 63.

tional time notice procedure as a basis for avoidance.³²⁵ How does the additional time notice procedure operate in the case of late performance under a single instalment of an instalment contract? It seems that avoidance of the breached instalment or of future instalments requires the existence of a fundamental breach or the probability of its occurrence in the future. Although it is not clear, one could argue that, in cases of late performance under one instalment, the innocent party should be able to use the additional time notice procedure to establish grounds for avoiding with respect to that instalment. There is no good reason why the innocent party should not be able to do so since this right is given under *ULIS* and *The Convention* in respect of non-instalment contracts.³²⁶ The additional time notice given in respect to late performance under one instalment should also lead to avoidance in respect of future instalments if the contract is construed as a single contract rather than as a series of contracts.

C. *Delivery of the wrong quantity or partial non-conformity*

[74] *Short delivery or partial non-conformity*

If the seller makes delivery that includes some non-conforming goods or less than the required quantity of goods, the buyer can treat the missing or non-conforming goods, for remedy purposes, as the subject of a severable contract³²⁷ and may either (a) require the seller to deliver substitute goods or (b) avoid part of the contract, if the non-conformity amounts to a fundamental breach or if the additional period fixed

³²⁵ See *id.*, arts. 49(1)(b) and 64(1)(b).

³²⁶ See [41] - [49].

³²⁷ *The Convention*, art. 51.

expires without performance by the seller.³²⁸ Alternatively, the buyer may accept the defective goods and reduce the price,³²⁹ or claim damages.³³⁰ In cases of minor breaches, however, the buyer must accept delivery. This rule, which applies to both instalment and single-delivery contracts, is in accordance with the trend adopted by most domestic laws.³³¹

It might be argued that the buyer's acceptance of partial non-performance implies the conclusion of a new contract embodying the same terms as the old one except for a modification to accommodate the partial non-performance, and that the buyer is therefore under an obligation to pay the whole price unless it is based on number or weight (in which case payment need only be made for the goods actually delivered).

This argument may be criticized on the ground that it assumes a new legal relationship that supersedes the existing one. But the undermining of an existing contractual relationship because of the breach and the imposition of a new relationship can hardly be a source of the parties' rights and obligations. If one of the parties breaks an obligation imposed by the contract, a right of action is conferred upon the party injured by the breach.

It should be noted that the delivery of non-conforming goods mixed with conforming goods constitutes partial non-performance by the seller.³³² For example, the parties may agree upon the sale of goods of a specified quality in specified sizes. If the

³²⁸ See *id.*, art. 49(1)(a)(b).

³²⁹ See *id.*, art. 50.

³³⁰ See *id.*, art. 74.

³³¹ For example, the *UCC* permits a buyer to reject or revoke acceptance as to "commercial units" of goods and to obtain market-price or cover damages for a missing portion of a delivery. See the *UCC*, ss. 2-601(c), 2-608(1) and 2-711(1).

³³² The same rule is stated in *SGA*, 1979, s. 30(4), where the buyer is entitled either to accept those goods that are in accordance with the contract and reject the rest, or reject the whole; see also *Ebrahim Dawood Ltd. v. Heath (est. 1927) Ltd.*, [1961] 2 *Lloyd's Rep.* 512.

seller delivers the agreed quality of goods but in different sizes, including the sizes agreed upon, *The Convention's* remedies regarding partial performance, as discussed above, are applicable.

[75] *Importance of Article 51 of The Convention*

The Convention's treatment of partial non-conformity or short delivery, as described above, differs from its treatment of a complete failure of the seller to deliver. Complete failure to deliver gives the buyer a right to avoid the contract. But when the seller has failed to perform only part of his or her obligations, by delivering goods that do not conform to the contract or by delivering only part of the goods, the rule grants the buyer optional remedies. It is in the availability of these less radical remedies, which do not terminate the contract, that the strength of *The Convention's* rules on partial non-conformity and short delivery lies.

Avoidance of the whole contract is permitted when the seller's defective performance constitutes a fundamental breach or when the additional time notice has expired.³³³ Immaterial non-conformities in a portion of a delivery will not entitle the buyer to reject or withhold payment for the non-conforming portion. The buyer can, however, exercise other remedies, e.g. requiring the seller to repair or claiming damages with respect to the defective goods. The higher the ratio of non-conformity to satisfactory performance, the more likely a court will regard the failure as fundamental. *The Convention* gives a buyer the choice of avoiding part of the contract if the requirements as to avoidance of this part are satisfied.

³³³ *The Convention*, art. 49(1)(a)(b), where these rules are clearly stated. Article 51(1) merely makes this rule applicable to a non-conforming or missing portion of a delivery.

[76] *Avoidance of the entire contract*

Under *The Convention* the buyer may avoid the entire contract only if the seller's failure to make delivery of one instalment, either in its entirety or in conformity with the contract, amounts to a fundamental breach of the entire contract.³³⁴

The Convention's approach is the same as English law in one respect but different in another. The difference results from the fact that English law distinguishes between entire and divisible contracts, while *The Convention* does not. If the contract is entire, English law provides that the buyer has the right to reject the whole consignment and to avoid the contract regardless of the degree of the seller's breach, as long as the non-conformity is significant, for *de minimis non curat lex* (the law does not concern itself with trifles). Under *The Convention* the buyer is entitled to avoid the contract in such a case only if the seller's breach is fundamental, regardless of whether the contract is entire or severable. The similarity occurs when the contract is divisible. In that case, both English law and *The Convention* provide that short delivery of one instalment does not justify the buyer's refusal to accept future deliveries, or even the instalment in question.³³⁵

It may be asked whether the buyer can fix an additional time period and request the seller to deliver the missing part within that period³³⁶ and, if so, whether the seller's failure to perform within that period empowers the buyer to avoid the entire contract. It seems that a buyer who has taken delivery of less than the required amount of goods cannot use the additional time notice procedure to avoid the entire contract, for the following two reasons. First, the buyer is entitled, under Article 47 of *The Convention*, to grant the seller an additional time notice to perform his obligations and, if it

³³⁴ See *id.*, art. 51(2).

³³⁵ *SGA*, 1979, s. 31(2); see also *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Co. Ltd.*, [1934] All E.R. 15, at 17 (C.A.).

³³⁶ *The Convention*, art. 47(1).

expires without compliance, to avoid the contract. However, Article 49(1)(b), as seen in paragraph [47], restricts the buyer's right of avoidance based on an additional time notice to cases of complete non-delivery.³³⁷ Second, the buyer's right to avoid the entire contract in cases of non-conformity of part of the goods is limited to cases where the seller's breach amounts to a fundamental breach. This may lead to confusion and uncertainty.

Suppose the seller delivers only 100 of the 1000 bags of sugar required under the contract but indicates that the balance will be delivered in the future. In this setting, the buyer may avoid the contract on the basis of the additional time notice only if the seller's delay in completing delivery amounts to a fundamental breach. The buyer is forced to wait until the seller's breach is sufficient to constitute fundamental breach. Nor can recourse be had to the doctrine of anticipatory breach. It too requires the breach to be fundamental.

One of the main advantages of using the additional time notice, as seen in paragraph [42], is to eliminate uncertainty. It seems, however, that the buyer's problem can be solved by resorting to the additional time notice under Article 49(1)(b). This justifies avoidance of the entire contract if the seller fails to deliver a material part of the goods within the time fixed by the notice. This is what the drafters had in mind when they limited the buyer's right to avoid the entire contract to situations where the seller has committed a fundamental breach. Indeed, an additional time notice should also be available as a route to avoidance of the entire contract in the event of a partially non-conforming or insufficient delivery. Article 51(2), however, precludes this.

³³⁷ For criticisms of this approach, see [48].

[77] *Short delivery or partial non-conformity: English law*

Section 30(1) of the English *Sale of Goods Act* states that "where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate."³³⁸ Section 11(4) of the same Act provides that the buyer's right to accept the conforming goods and reject the rest depends on whether the contract is "severable." This differs from *ULIS* and *The Convention* where no distinction is made between a divisible (i.e. severable) and indivisible (i.e. entire or non-severable) obligation. In English law, where the seller delivers too little or too much, the buyer is entitled to refuse to accept delivery.³³⁹ However, under English law and under other laws considered in this study, if the discrepancy is minimal or the contract provides for a margin, the buyer is obliged to accept. This is in conformity with international trade practice.

[78] *Short delivery or partial non-conformity: American law*

Section 2-601(c) of the *UCC* provides that in the event of a defective delivery the buyer may "accept any commercial unit and reject the rest."³⁴⁰ A "commercial unit" is defined as a unit the division of which would materially impair its character or value on the market or in use.³⁴¹ In theory, this is different from the right to avoid with

³³⁸ *SGA*, 1979, s. 30(1). See also Atiyah, *supra*, note 171, at 215; Schmitthoff, *Sale, supra*, note 252, at 126. As to case law, see *Re Moore & Co. Ltd. and Landauer & Co.*, [1921] 2 K.B. 519 (C.A.).

³³⁹ In one case, a seller agreed to sell tinned fruit in cases of thirty tins each. The seller delivered the right quantity of tins but some were packed in cases of twenty-four tins. It was held that, for this reason, the buyer was entitled to reject the whole consignment. See *Re Moore* case *id.*; also *Behrend & Co. Ltd. v. Produce Brokers Ltd.*, [1920] All E.R. 125.

³⁴⁰ The *UCC*, s. 2-601(c).

³⁴¹ See *id.*, s. 2-105(b).

respect to the defective part, although in practice there will be little difference.³⁴² Thus, the buyer is not permitted to reject part of a commercial unit when that part is defective but can reject the entire unit.

[79] *Short delivery or partial non-conformity: Egyptian and French law*

Article 433 of the *Egyptian Civil Code* states that when the quantity of the goods is clearly stated in the contract, the seller is responsible for any loss resulting from partial non-performance. The buyer may not avoid the contract if the partial non-performance is such that, even knowing of it in advance, he or she would still have entered into the contract. The degree of the breach depends on the buyer's knowledge and acceptance of it. Under Egyptian law, price reduction and avoidance are remedies available for any partial non-performance in respect of quantity.³⁴³

Egyptian law thus differs from *ULIS* and *The Convention* in that the latter determine the degree of partial non-performance without considering the knowledge of any of the parties or their acceptance of the breach. The only acceptance recognized by these laws is that which follows the performance of the contract.

Under French law, if the seller's partial failure to perform affects an essential element of the contract without which the buyer would not have contracted, the buyer may either reduce the price or avoid the contract.³⁴⁴ French courts will likely refuse to grant avoidance if the breach is not important. In such cases, the buyer will be forced to accept the goods and claim damages.

³⁴² See Treitel, *Remedies*, *supra*, note 69, at 137, para. 175.

³⁴³ Sanhoury, *Al-Wasit (the Middle Way)*, Sales, (Cairo, 1960), at 572. This multi-volume work on each and every aspect of the *Egyptian Civil Code* is the most comprehensive of all legal texts in the Arab world.

³⁴⁴ See *Amos and Walton*, *supra*, note 92, at 188; see also Houin, *supra*, note 84, at 26.

[80] *Excess delivery: The Convention*

Under *The Convention*, where a seller delivers a quantity of goods greater than that called for by the contract, the buyer may accept the entire quantity tendered or refuse to take delivery of the excess quantity.³⁴⁵ If the buyer takes delivery of all or part of the excess quantity, it must be paid for at the contract rate.

This rule is derived from the general rule that states that parties are only under a duty to do what they contracted to do. The buyer has contracted to buy a specific quantity of goods and there is no reason why he or she should have to take delivery of a quantity larger than the one contracted for.

Sometimes it is not feasible for the buyer to reject only the excess amount. This is the case where the seller tenders a single bill of lading covering a total shipment in exchange for payment for the entire shipment. In this case, the buyer may be able to avoid the entire contract if the delivery of such a quantity constitutes a fundamental breach. Avoidance of the entire contract in such cases may be difficult to justify. Consequently, it is advisable for the buyer to resort to another remedy, such as damages. In any event, where the delivery of the excess quantity does not constitute fundamental breach, damages may be claimed for any loss suffered as a result.

[81] *Excess delivery: Egyptian law*

In cases of excess delivery, Egyptian law draws a distinction between contracts that require payment of the full price in a single amount and those that call for payment in instalments. If the contract states that the price is to be paid in a single amount and if the goods are divisible, the buyer is permitted to accept or reject the excess quantity. If the excess quantity is accepted it must be paid for. In the case of non-divisible contracts, on the other hand, the buyer must both accept and pay for the whole of the

³⁴⁵ *The Convention*, art. 52(2); *ULIS*, art. 47.

goods, including the excess portion. The only exception to this rule is when the excess quantity is so great that the buyer is entitled to avoid the whole consignment.³⁴⁶

It is worthy of note that some Egyptian writers argue that a distinction should be made only between severable and non-severable contracts.³⁴⁷ If the contract is severable, they contend, the buyer is allowed to either pay for the excess quantity or accept the goods contracted for and reject the rest. Where the contract is not severable, the buyer must accept and pay for the excess quantity unless the breach justifies avoidance of the entire contract.

In practice *The Convention*, *ULIS* and Egyptian law all treat cases of excess delivery in the same way: the buyer is given the option of rejecting or accepting the excess quantity. However, these similar results are based on different principles. Egyptian law essentially follows French law in focusing on the method of payment and on the type of goods involved. *The Convention* and *ULIS*, on the other hand, entitle the buyer, within certain limits, to take or refuse delivery in all cases of excess delivery without regard to these factors.

[82] *Excess delivery: French law*

The delivery of a quantity of goods greater than that provided for in the contract is dealt with in Articles 1616 to 1623 of the *French Civil Code*. Like Egyptian law, French law distinguishes between those contracts in which the price is to be paid in a single payment and those in which it is to be paid in instalments. Where the price is paid in a single payment the buyer must either accept the excess quantity or avoid the contract. French courts will rarely grant avoidance if the excess quantity is not significant. The buyer must accept it and pay for it.

³⁴⁶ The *Egyptian Civil Code*, art. 433(2).

³⁴⁷ Sharkawi, *Sales Contracts* (Cairo, 1975) at 162 (in Arabic).

[83] *Excess delivery: English law*

In English law, where the seller delivers a quantity of goods larger than the one contracted to sell, the buyer has the option of either accepting the goods contracted for and rejecting the rest, or rejecting the goods as a whole.³⁴⁸ This rule does not apply where the discrepancy is trivial.³⁴⁹

Unlike Egyptian and French law, English law does not distinguish between payment of the price in a single payment and payment in instalments. English law differs from *ULIS* and *The Convention* in one respect, namely, the ability of the buyer to reject the whole consignment and avoid the contract unless the non-conformity is minor. Under the two uniform laws, the buyer can avoid the entire contract only if the seller's breach amounts to a fundamental breach of the whole contract.

However, it seems that other aspects of the rule, as adopted in *ULIS* and *The Convention*, are in accord with a recent trend in English law linking the right of avoidance to the gravity of the breach.³⁵⁰

[84] *A suggested rule for cases of excess delivery*

It is submitted that it is desirable to always treat excess delivery, however trivial, as a breach of contract. Buyers in international sales always consider their financial position and the extent of their need for goods when specifying description, price *and* quantity. This is the case whether the buyer plans to use the goods him- or herself or to resell them. Buyers can hardly be expected to assume that sellers will deliver a quantity of goods larger than that contracted for. This would cause the buyer incon-

³⁴⁸ SGA, 1979, ss. 30(2) and (3).

³⁴⁹ See e.g., *Shipton, Anderson & Co. v. Weil Bros. and Co.*, [1912] 1 K.B. 574, where the quantity delivered exceeded the 4,950 tons of wheat the contract called for by 55 lbs. This excess was considered trivial.

³⁵⁰ See [18] and [19].

venience and extra expense associated with preserving the goods. In fact, in sales contracts, international or domestic, the quantity of the goods is so important that it is often specified in the contract. What constitutes a negligible excess or deficiency in quantity is frequently specified in the contract.

It is difficult to justify the seller's delivery of a quantity of goods larger than the one contracted for. The buyer should be given the option of either accepting the goods contracted for and rejecting the rest or avoiding the whole contract. Under *ULIS* and *The Convention*, a buyer who decides to reject the excess quantity must take reasonable steps to preserve the goods³⁵¹ but is entitled to recover any expense this entails.

The delivery of a quantity of goods larger than the one contracted for could have any one of several causes. It could be the result of an honest error on the part of the seller. Alternatively, it could be intentional. In any case, if the seller is in breach, the buyer should have two options: to reject the excess quantity or to avoid the whole contract. A seller who delivers a quantity of goods larger than the one contracted for should be forced to take back the excess quantity since this constitutes a violation of the agreement. A refusal to do so should be taken as proof of bad faith, entitling the buyer to avoid the contract and claim damages.

This solution would discourage the frequent practice of sellers intentionally delivering larger quantities than they contracted to sell whenever the price of the goods has fallen. It would also discourage the practice of delivering smaller quantities when the price of the goods has risen. Because the goods were in the hands of the seller before actual delivery, he or she should have separated the excess quantity before delivery and should bear the cost of any failure to do so. So, too, is it difficult to argue that the goods were delivered by mistake since they were under the seller's control. The chance of mistake is limited since the standard that governs the actions of international trade participants is that of the reasonable person. This standard gives the seller no excuse

³⁵¹ See [244].

not to take all reasonable measures to ensure that delivery is properly made.

As for the buyer, his duty to pay relates to the quantity of the goods delivered. Money is always severable, so the price should always correspond to the quantity of goods delivered. Though goods are of different nature, the same principle should apply to them as well since the basis of the seller's duty to deliver is not the corresponding price but the contract itself. The duty of the buyer to pay is based on the contract but it always corresponds to the quantity of goods actually delivered.

Thus, it would have been preferable if *The Convention* had given the buyer the right to keep any excess quantity delivered for nothing, unless the seller reclaims and removes it within a short period.

Section IV

Limitations on the availability of avoidance

[85] *Nature of and reasons for limitations on the availability of avoidance*

The remedy of avoidance has a great effect on the parties' interests. Each party tries to protect his or her own interests not only in the event that the other party avoids, but also throughout the negotiation and performance of the contract. Avoidance by one of the parties puts the interests of the parties in conflict. Resort to the remedy of avoidance demonstrates the seriousness of the breach. It also causes many problems for both parties. Hence, resort to the remedy of avoidance should be restricted.³⁵²

A number of methods may be employed to limit the availability of the avoidance remedy, especially in cases where a satisfactory balancing of the parties' interests can be achieved. These include: (a) requiring the innocent party to give the party in breach a formal notice clearly indicating an intention to avoid; (b) making avoidance

³⁵² Von Mehren and Gordley, *The Civil Law System* (Boston and Toronto: Brown and Company, 1977), at 1118.

available only in cases of certain serious breaches; and, (c) requiring the intervention of the court, as is done in some domestic legal systems.

Various limitations on the right to avoid have been adopted by both *ULIS* and *The Convention*. These will now be considered.

[86] *Notice of avoidance*

The giving of a notice of avoidance by the innocent party is a prerequisite to avoiding the contract under *ULIS* and *The Convention*. *The Convention's* approach differs from the concept of *mise en demeure* and from the French and Egyptian law requirement that the innocent party go to court for permission to avoid.³⁵³

Where the seller has delivered the goods, effective rejection or revocation is a prerequisite to the buyer's claim for damages under both *The Convention* and the *UCC*. Also, under both laws, a buyer who is avoiding the contract after delivery must give notice.³⁵⁴ Under the *UCC*, however, a buyer that has not received delivery and an unpaid seller need not give notice in order to avoid the contract.³⁵⁵ Under *The Convention*, by contrast, a declaration of avoidance by the innocent party is effective only if made by notice to the other party.

Where the innocent party is the buyer, he or she must inspect the goods and notify the seller of any non-conformity within a reasonable time after discovery of the defect.³⁵⁶ The courts of contracting states will most likely arrive at different conclu-

³⁵³ See [13], [15], [34] and [35].

³⁵⁴ The *UCC*, ss. 2-602(1) and 2-608(2); *The Convention*, art. 26.

³⁵⁵ Exceptions to this are where a buyer accepts non-conforming delivery in an instalment contract or a seller accepts a late payment. In these cases, the innocent party must give reasonable notice in order to terminate the executory portion of the contract. The *UCC*, ss. 2-612(3) and 2-612, comment 7.

³⁵⁶ *The Convention*, arts. 39(1), 43(1) and 49(2)(b)(i). A similar rule is adopted in the *UCC*, s. 2-602(1) (a buyer must reject goods "within a reasonable time after their delivery or tender"), with due allowance for a reasonable opportunity to inspect the goods. *Id.*, s. 2-606(1)(b).

sions as to what constitutes a reasonable time. This will create uncertainty. In all cases, however, what is reasonable will depend on the circumstances of the case. In any event, the buyer loses the right to rely on a lack of conformity of the goods within a period of two years at the latest.³⁵⁷ The purpose of this requirement is to give the seller sufficient time to decide which course of action to take.³⁵⁸ Such reasonable notice enables the seller to "review his records, contact witnesses, test the products involved, and investigate the claim as well as proceed through negotiation toward a settlement."³⁵⁹

Under *ULIS* and *The Convention*, the notice has no effect unless it is given to the defaulting party or to an authorized agent of that party. This approach is similar to avoidance in German law that does not require a court judgment.

The ability to avoid the contract without the court's involvement is one of the main features of *ULIS* and *The Convention*. It is the approach preferred by international trade participants. The provisions on notice are among the most practical rules of *The Convention*. It is to be expected that courts in contracting states will apply these provisions in a very strict manner. The innocent party must therefore be careful to adhere to these rules as closely as possible.

³⁵⁷ *The Convention*, art. 39(2). It should be mentioned that the two year period governs all claims for non-conforming goods and not merely the right to avoid the contract. See Ziegel, *The Remedial*, *supra*, note 62, at 9-27.

³⁵⁸ In a recent case, for example, the United States Sixth Circuit Court denied the buyer any remedy because of his failure to give the seller adequate notice. *K & M Joint Venture v. Smith Int'l Inc.*, 669 F.2d Rep. 1106, at 1113 (6th Cir. 1982); *Standard Alliance Inc. v. Black Clawson Co.*, 587 F.2d Rep. 813 (6th Cir. 1978). For a criticism of this decision, see Milberger, "Section 2-607(3)(a): Effective Notification of Breach Under the Uniform Commercial Code" (1982-83), 44 *U. Pittsburgh L. Rev.* 733.

³⁵⁹ Chavis, "Notice of Breach and the Uniform Commercial Code" (1973), 25 *U. Fla. L. Rev.* 520, at 524.

[87] *Notice of avoidance: English law*

The approach of English law to the necessity of notice is different from that followed in *The Convention*. In English law, the following principles are well-established.

First, a buyer who wishes to reject non-conforming goods must communicate to the seller his or her refusal to accept them.³⁶⁰ But unlike *The Convention* that requires the buyer to avoid within a reasonable time or at the latest within two years, there is no fixed time limit for such notice. All that is required is that notice be given within a reasonable time. However, even if the time for rejection of the goods has expired, the buyer retains the right to sue for damages for the reduced value of the goods.

Second, where the goods are not perishable, an unpaid seller must give the buyer notice of an intention to resell the goods.³⁶¹

Third, in English law, giving a notice of avoidance has been characterized as an offer to put an end to the contract and an acceptance of the defaulting party's breach.³⁶² A breach can be accepted by bringing an action for damages³⁶³ or by giving notice of the acceptance of the breach to the defaulting party and acting accordingly.³⁶⁴ The acceptance of the breach must be complete and unequivocal.³⁶⁵

Fourth, unlike *The Convention*, under which notice is always required before avoidance, the innocent party need not make a statement expressly accepting the breach. Such an intention may, however, be inferred from conduct.³⁶⁶ It has been

³⁶⁰ SGA, 1979, s. 36.

³⁶¹ See *id.*, s. 48(3); as to case law, see *R.V. Ward Ltd. v. Bignall*, [1967] 2 All E.R. 449; 1 Q.B. 534 (C.A.).

³⁶² *Denmark Productions Ltd. v. Boscobel Productions Ltd.*, [1969] 1 Q.B. 699, at 731-732; *Bradley v. H. Newsom, Sons and Co.*, [1919] A.C. 16, at 51-52.

³⁶³ See Treitel *An Outline*, *supra*, note 81, at 305.

³⁶⁴ Treitel, *ibid.*; and *Contract*, *supra*, note 5, at 642.

³⁶⁵ *Johnstone v. Milling* (1886), 16 Q.B.D. 460.

held that it is a question of fact in each case whether the option to avoid has been exercised.³⁶⁷

Finally, it seems that notice of the exercise of the option to avoid is not necessary where the innocent party makes a substitute contract to satisfy the mitigation requirement.³⁶⁸

[88] *Notice of avoidance: English law in comparison with The Convention*

As discussed above, *The Convention* differs from English law in that it requires formal notice of avoidance in all cases. Another difference is that *The Convention* does not recognize an implicit acceptance of the breach. However, the third principle listed in paragraph [87] may operate in a way similar to *The Convention* in that the innocent party may avoid the contract by giving notice of avoidance if certain requirements are met; and an innocent party who is entitled to avoid may instead elect one or more of *The Convention's* non-avoidance remedies.

English law is similar to *The Convention* in that the silence of the innocent party does not lead automatically to avoidance. It differs from *The Convention*, however, in that it permits any unreasonable delay on the part of the innocent party in exercising the right to avoid to be construed as an affirmation of the contract.³⁶⁹ Under *The Convention* silence can never be interpreted as an affirmation of the contract. The innocent party is always entitled to avoid the contract as long as the price has not been paid or the goods have not been delivered.

³⁶⁶ See Treitel, *An Outline*, *supra*, note 81, at 15; and *Contract*, *supra*, note 5, at 609-610; *Chitty on Contracts*, *supra*, note 252, para. 55.

³⁶⁷ *Kish v. Charles Taylor, Sons and Co.*, [1912] A.C. 604, at 617; see also Treitel, *Contract*, *supra*, note 5, at 638.

³⁶⁸ *Guiton v. Richmond-upon-Thames*, [1981] Ch. 448, at 468.

³⁶⁹ *The Scaptrade*, [1981] 2 Lloyd's Rep. 425, at 430; affirmed [1983] 1 All E.R. 301 (H.L.); *The Laconia*, [1977] A.C. 850, at 872 (H.L.); *The Balder London*, [1980] 2 Lloyd's Rep. 489, at 491-493.

Moreover, English law gives effect to any conduct of the aggrieved party that reasonably leads the breaching party to believe that the aggrieved party intends to continue to perform the contract. *The Convention* does not. Furthermore, in English law the effect of the buyer's "acceptance" of the goods is to bar rejection (termination). This can be seen in the operation of sections 11(4) and 35 of the *Sale of Goods Act, 1979*.³⁷⁰ In *The Convention*, where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless that right is exercised within certain time-limits.³⁷¹

[89] *Form of notice: The Convention*

The Convention provides no form for the notice of avoidance.³⁷² Nor does it require the innocent party to give reasons for avoidance. Neither does it specify the means by which the notice is to be given. However, if the notice is made in an unusual manner, the innocent party runs the risk of loss or delay during transmission of the communication.

Therefore, even though the innocent party is under an obligation not to prejudice the interests of the defaulting party, he or she is not required to identify the deficiencies in performance.³⁷³ It is advisable, however, that where the innocent party is the buyer, the contracting date, the shipment number, the name of the vessel and its arrival date, the nature of the breach and the intention to avoid all be expressly set out in

³⁷⁰ While s. 11(4) of the Act states that if the buyer has accepted the goods, the breach of a condition can be treated as a warranty, s. 35 of the Act covers cases where the buyer is deemed to have accepted the goods. These cases are mentioned in note 521.

³⁷¹ *The Convention*, art. 49.

³⁷² In fact, this rule is not confined to the notice of avoidance; it applies to all notices provided for in *The Convention*. See Honnold, *Uniform law, supra*, note 41, at 147.

³⁷³ *Berg (V.) & Son Ltd. v. Vanden-Avenne Izegem P.V.B.A.*, [1977] 1 Lloyd's Rep. 499 (C.A.).

the notice of avoidance. In addition, if the goods do not conform to the contract, the buyer would be wise to specify precisely the defect objected to. A mere general notice of non-conformity may not preserve the right to avoid.

[90] *Time of effectiveness of a notice of avoidance*

Since a valid notice terminates the contract, determining the time at which such notice is effective is very important. Any discussion of whether a notice of avoidance becomes effective on dispatch or on receipt requires an explanation of *The Convention's* approach to the question of the communication of acceptance generally.

Under *The Convention*, the offeree's acceptance becomes effective only when it is received by the offeror (the receipt rule).³⁷⁴ This differs from the rule in Article 27 for communications generally, which provides that a delay or error in the transmission of the communication, or a complete failure of the communication to arrive, does not deprive a party of the right to rely on the communication if the communication was sent by reasonable means (the dispatch rule).³⁷⁵

The introductory phrase "unless otherwise expressly provided in this part of *The Convention*" in Article 27 may be interpreted to mean that the dispatch rule applies only in Part III of *The Convention* (Articles 25-88), and then only where there is no express provision to the contrary.³⁷⁶ One can therefore argue, on the basis of Article 27, that a notice of avoidance takes effect at the time of its dispatch by means appropriate in the circumstances. If other means are used, the failure of the notice to actually reach the defaulting party will deprive it of any legal effect.

³⁷⁴ *The Convention*, art. 15.

³⁷⁵ See *id.*, art. 27.

³⁷⁶ The following Articles are exceptions to the dispatch rule: 47(2), 48(4), 63(2), 65(1), 65(2) and 79(4).

[91] *Time constraints on the exercise of the buyer's right to avoid*

ULIS contains several provisions imposing time constraints concerning avoidance by the buyer.³⁷⁷ Most of these use the term "promptly." Some use the term "reasonable time." Although *ULIS* does not define "reasonable time," "promptly" is defined as within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed.³⁷⁸

The Convention draws a distinction between avoidance in the event of late delivery and avoidance in the event of other breaches. In the former case, the buyer loses the right to declare the contract avoided unless he or she does so within a reasonable time after becoming aware that delivery has been made.³⁷⁹ In the case of an instalment contract, the buyer does not lose the right to avoid until all goods have been delivered.³⁸⁰

In respect of other breaches, such as delivery of non-conforming goods, a buyer loses the right to avoid if it is not exercised within a reasonable time after that buyer knows or ought to have known of the breach. In situations requiring an additional time notice, the period runs from the expiration of the additional time or from the seller's declaration that compliance will not be forthcoming.³⁸¹ When a seller has made a delivery that amounts to a misperformance, or has made a late delivery, that seller may ask the buyer whether such performance will be accepted.³⁸² In this case the period runs from the expiration of the additional time or from the buyer's refusal to

³⁷⁷ *ULIS*, arts. 26, 30, 32, 43 and 44. The same is true with regard to the seller. See *id.*, arts. 62(2), 66(2) and 70(1)(a).

³⁷⁸ See *id.*, art. 11.

³⁷⁹ *The Convention*, art. 49(2)(a).

³⁸⁰ See *id.*, art. 49(2).

³⁸¹ See *id.*, art. 49(2)(b)(ii).

³⁸² See *id.*, art. 48(2).

accept.³⁸³

In the case of a delivery of non-conforming goods the buyer is obliged to examine the goods delivered. The buyer must then give notice to the seller of any lack of conformity within a reasonable time and, in any event, within two years of receiving the goods.³⁸⁴ The time runs from when he or she ought to have discovered the non-conformity.³⁸⁵

This differs from English and Egyptian law. In these countries the buyer must notify the seller of the rejection of the goods within a reasonable time. No specific time limit is fixed.³⁸⁶ However, the right to reject is barred if after the lapse of a reasonable time the buyer retains the goods without informing the seller of their rejection.³⁸⁷ As to French law, the claim for redhibition based on latent defect must, as noted by Treitel,³⁸⁸ be brought within *un bref délai* after the time for delivery.

[92] *Time constraints on the exercise of the seller's right to avoid*

An innocent seller loses the right to avoid if the buyer pays the total price, as long as such payment is made at the date specified in the contract.³⁸⁹ In cases of late performance, e.g. delay in taking delivery, the right to avoid must be exercised within a reasonable time after the seller becomes aware that performance has been tend-

³⁸³ See *id.*, art. 49(2)(b)(iii).

³⁸⁴ See *id.*, art. 39.

³⁸⁵ See *id.*, art. 38.

³⁸⁶ The *UCC*, s. 602(1) (rejection of goods must take place within a reasonable time).

³⁸⁷ *SGA*, 1979, s. 35(1); the *Egyptian Civil Code*, art. 449(2).

³⁸⁸ See Treitel, *Remedies*, *supra*, note 69, para. 187.

³⁸⁹ *The Convention*, art. 64(2)(b).

³⁹⁰ If the seller has employed the additional time notice procedure, however, the reasonable time for avoidance begins to run after the date for performance set in

ered.³⁹⁰ Thus, if a buyer pays the price after the due date, but before the seller declares the contract avoided, he or she will be protected from avoidance despite the late performance.³⁹¹

In English law, the seller is considered to be unpaid until the whole price has been paid or tendered.³⁹² Where a valid tender of the price is made by the buyer, the seller is no longer considered to be unpaid and can no longer exercise any rights against the goods.³⁹³

The Convention's approach to late payment can be criticized on the ground that it unduly favours buyers. By paying the price, and informing the seller of this fact, a buyer can deprive the seller of the option of avoiding the contract.³⁹⁴ However, this approach is unlikely to work to the detriment of sellers for the following three reasons. First, the seller is entitled to avoid the contract at any time prior to payment of the *whole* price. Second, the seller's actual knowledge of such payment is also necessary. Third, the rule also applies to the late performance of certain obligations of *buyers* as well, e.g. a duty to establish a letter of credit or a banker's guarantee (other than the duty to pay the price or take delivery).

If the buyer accepts the goods without paying for them, the seller is entitled to resort to any remedy, including avoidance. However, if the buyer subsequently pays the price, the seller may no longer need to avoid the contract. Moreover, the seller must exercise the right to avoid within a reasonable time after he or she knows or

the notice (or after the buyer has declared that he or she will not perform within the additional time). *The Convention*, art. 64(2)(b)(ii).

³⁹¹ See Ziontz, *supra*, note 132, at 156.

³⁹² SGA, 1979, s. 38(1) (definition of the unpaid seller). For the meaning of a valid tender of the price, see *Cheshire, supra*, note 108, at 501.

³⁹³ See Benjamin, *supra*, note 81, para. 1122.

³⁹⁴ Hellner, "The UN Convention on International Sales of Goods -- an Outsider's View" in *Jus Inter Nations: Festschrift für Stefan A. Riesenfeld* (Barkely-Kolner Rechtsstudien, 1983), 71, at 93.

ought to have known of the breach.³⁹⁵ Furthermore, if the seller grants the buyer an additional period of time for performance the contract must be avoided within a reasonable time after the expiration of this period or after a declaration by the buyer of an intention not to perform.³⁹⁶ Otherwise, the right is lost.

The reasonableness of a given delay in declaring avoidance is necessarily determined by a variety of factors, such as whether the goods are perishable or are subject to fluctuations of price.³⁹⁷ But it should be noted that any unjustified declaration of avoidance is itself a breach of contract.

Section V

Effects of avoidance

[93] *Introduction*

Under all the laws considered in this study, the primary effect of avoidance is to release both parties from their obligations under the contract. The seller need not deliver the goods and the buyer need not take delivery or pay the price.

Because avoidance has such a considerable effect on the rights and obligations of the parties, its exercise is limited to cases of fundamental breach. Where the breach is fundamental, the aggrieved party is not bound to avoid the contract but has the right to do so. Certain consequences are likely to flow from the exercise of the right to avoid. These will be examined under two headings: effects on the contract and restitution.

³⁹⁵ *The Convention*, art. 64(2)(b)(i).

³⁹⁶ *Ibid.*

³⁹⁷ See Honnold, *Uniform Law*, *supra*, note 41, at 305.

A. *Effects on the contract*

[94] *General principles*

The Convention provides that avoidance discharges both parties from their contractual obligations, subject to any damages that may be due.³⁹⁸ This discharge operates from the date of the declaration of avoidance by the aggrieved party. Partial avoidance releases both parties from their obligations in that part of the contract avoided. Other obligations continue to bind the parties and may give rise to a claim in restitution.³⁹⁹ The same approach is followed in *ULIS*.⁴⁰⁰

Any performance carried out before a declaration of avoidance remains unaffected. For example, a buyer who lawfully avoids an instalment contract need not accept or pay for future instalments but must pay for any past deliveries that have not themselves been lawfully rejected.

The principle laid down in *ULIS* and *The Convention* is closer to French and Egyptian law than to English law, as will be seen in the following paragraph. The general rule under French and Egyptian law is that avoidance affects the whole contract. Both parties are released from all obligations under the contract whether or not those obligations are due. In the case of *contrats successifs*, avoidance operates prospectively rather than retrospectively and has no impact on those obligations that have already matured.

³⁹⁸ *The Convention*, art. 81(1). For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, paras. 138 ff; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, para. 108; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, annex 1, art. 51; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, para. 462; "Report of UNCITRAL" 11th sess., (1978), 8 *UNCITRAL Yearbook* 11, para. 28, art. 66; *Official Records, supra*, note 67, at 136, 387-388, 144, 146, and at 227, para. 32.

³⁹⁹ See [96] - [107].

⁴⁰⁰ *ULIS*, art. 78.

[95] *Effects on the contract: English law*

In English law, a breach of contract, no matter how serious, does not, in and of itself, terminate the performance of the contract.⁴⁰¹ The option to avoid (discharge) performance rests with the innocent party. In certain circumstances, a breach of contract entitles the innocent party not merely to suspend performance of a particular correlative obligation but to treat the contract as avoided. If the innocent party elects to avoid, the breaching party must be notified of this decision. Unlike Egyptian and French law, *ULIS* and *The Convention*, avoidance in English law terminates all those obligations of the parties that have not yet come due. The liability of the parties as to past obligations remains. The effect of avoidance is to deprive both parties of their right to demand performance.⁴⁰² The question of whether avoidance affects an existing obligation depends on whether that obligation appears in the part of the contract that has been justifiably avoided.⁴⁰³ If it does, avoidance terminates that obligation. In this respect, English law is in agreement with *ULIS*, *The Convention*, Egyptian and French law.

However, termination or avoidance in English law is not the same as rescission *ab initio*. While avoidance does not affect those existing rights and obligations that are due at the time of avoidance, rescission *ab initio* is retrospective. That is, it cancels the contract from the beginning, so that it is deemed never to have existed. Further, the right to rescind derives not from a breach of the contract but from some external

⁴⁰¹ *Heyman v. Darwins Ltd.*, [1942] A.C. 356, at 361 (H.L.).

⁴⁰² It may, however, be the intention of the parties that certain primary obligations, for example, an arbitration or jurisdiction clause, should continue notwithstanding that their other primary obligations have come to an end. *Heymans case, id;* *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, at 350 (H.L.).

⁴⁰³ For instance, in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] 1 All E.R. 556; A.C. 827 (H.L.), it was reaffirmed that termination of a contract because of breach by the other party, even if the breach is fundamental, does not nullify a contractual provision limiting the liability of the breaching party consequent of breach.

act or event (e.g. fraud, misrepresentation, duress, undue influence) that preceded the contract itself.

Also, it should be noted that the assertion frequently made in English case law that a contract that has been avoided is "at an end," means that *performance* of the contract is at an end (i.e. terminated). The contract itself survives to support a claim for damages. In this respect termination is distinguishable from rescission, following which the contract does not survive.

[96] *Partial survival of the contract*

Avoidance of the contract is subject to the obligation to pay damages. Although both parties are freed from their primary contractual obligations, the defaulting party becomes subject to a secondary obligation to pay damages to compensate the innocent party for any losses sustained as a result of the breaching party's non-performance.⁴⁰⁴ Thus, if the seller commits a fundamental breach and the buyer avoids the contract, the seller is relieved of the duty to deliver and to transfer ownership of the goods. The buyer is relieved of the duty to take delivery and to pay the price. However, the seller remains responsible in damages for the breach. This principle was adopted in both *ULIS*⁴⁰⁵ and *The Convention* and is well-established in English,⁴⁰⁶ French⁴⁰⁷ and Egyptian Law.⁴⁰⁸

404 *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, at 350 (H.L.); *Photo Production case, id.*, at 848-851; *Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty.*, [1981] 1 W.L.R. 138, at 145.

405 *ULIS*, art. 78.

406 See, e.g. *Michael v. Hart & Co.*, [1902] 1 K.B. 482, at 490; *Johnstone v. Milling* (1886), 16 Q.B.D. 460; see also Beale, *supra*, note 261, at 104; Benjamin, *supra*, note 81, para. 1210.

407 See Nicholas, *supra*, note 92, at 236 ff.

408 *The Egyptian Civil Code*, art. 157.

Furthermore, under *The Convention*, provisions relating to the settlement of disputes, such as those governing arbitration, choice of law, and choice of forum, would not be affected by avoidance and could subsequently be enforced.⁴⁰⁹ The same is true in English law.⁴¹⁰ In addition, under *The Convention* any contractual provision that governs the rights and obligations of the parties in the event of avoidance, such as a clause providing for reciprocal notice or restitution, remains in force after avoidance. Provisions excluding consequential damages, providing for liquidated damages or specifying a limited or exclusive remedy also survive avoidance.

If one of these clauses is invalid under the applicable domestic law, *The Convention's* drafting history suggests that it is not terminated by avoidance.⁴¹¹ Neither, however, can it be validated by *The Convention*.

Not all of the parties' obligations are affected by avoidance. Some continuing obligations are set forth in other provisions of *The Convention*. A buyer who has received the goods and intends to reject them is required to take reasonable steps to preserve the goods even after avoidance.⁴¹² In addition, avoidance does not preclude a party from claiming restitution of whatever he or she has supplied or paid under the contract.⁴¹³ It is precisely after one of the parties has avoided the contract that these obligations have their greatest importance.⁴¹⁴

409 The second sentence in art. 81 of *The Convention* concerning the settlement of disputes was not contained in art. 78(1) of *ULIS*.

410 *Port Jackson Stevedoring Pty. Ltd. v. Salmond and Spraggon (Australia) Pty. Ltd.*, [1981] 1 W.L.R. 138, at 145. See also *Heyman v. Darwins Ltd.*, [1942] A.C. 356 (H.L.); *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, at 351 (H.L.) (arbitration clauses stating without qualification that any contractual dispute shall be referred to arbitration will continue to apply).

411 See *The 1978 Draft commentary*, *supra*, note 67, comment to art. 66, para. 5.

412 *The Convention*, art. 86(1). For further discussion, see [244].

413 See *id.*, art. 81(2). For further discussion, see [99] - [107].

414 See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 66, para. 6; also Honnold, *Uniform Law*, *supra*, note 41, at 448.

The Convention contains nothing equivalent to the approaches of either English law or the *UCC* invalidating penalty clauses.⁴¹⁵ Nor does it contain anything that limits the enforceability of unconscionable attempts to exclude or limit consequential damages.⁴¹⁶ The distinction made in English law between penalty clauses and liquidated damages is unknown in France and Egypt, where both are designated under the name *clause pénale* and are valid. The *French Civil Code* was even amended in 1985 to allow judges to increase or decrease the amount of the penalty.⁴¹⁷ Since the question of validity is outside the scope of *The Convention*, the validity of such clauses is subject to the applicable domestic law. Because penalty clauses are valid and enforceable in most Civil law jurisdictions but may not be enforceable in Common law courts, it may be advisable for Common law practitioners to structure and not merely label the clause as a liquidated damage clause by ensuring that the damages agreed upon would not overcompensate the aggrieved party.

[97] *Partial survival of the contract: English law*

In English law, termination or discharge of the parties' contractual obligations operates prospectively but not retrospectively.⁴¹⁸ The general rule is that an election to avoid the contract discharges the duty to specifically perform any obligation that had not been fully performed at the time of the innocent party's election to avoid. This rule applies to both the obligations of the innocent party and to those of the breaching party. However, because avoidance does not divest rights, both parties to the contract

⁴¹⁵ S. 2-718(1) of the *UCC* strikes down liquidated damage clauses if they operate as penalties.

⁴¹⁶ See *id.*, s. 2-719(3), which invalidates contractual terms that unconscionably limit or exclude consequential damages.

⁴¹⁷ The *French Civil Code*, art. 1152.

⁴¹⁸ *Heyman v. Darwins Ltd.*, [1942] A.C. 356, at 399 (H.L.); *Johnson v. Agnew*, [1980] A.C. 367, at 392-393 (H.L.). See also *Cheshire*, *supra*, note 108, at 491; *Ryan*, *supra*, note 92, at 82.

can enforce those obligations in respect of which the right to receive performance had already accrued at the time of avoidance. It is, of course, important to know how to identify such accrued rights. A distinction was drawn in *Heyman v. Darwins*⁴¹⁹ between procedural primary obligations and substantive primary obligations. Substantive primary obligations may be defined as those obligations that create and regulate the rights and duties of the parties and that may give rise to a cause of action, as distinguished from procedural primary obligations, which prescribe the practice and procedures by which the substantive obligations are determined or made effective. Only procedural primary obligations, it was held, could be enforced after an election to avoid. Unfortunately, the decision offered little guidance as to the precise nature of the distinction.⁴²⁰

Although the distinction between substantive and procedural obligations was considered relevant in *F.J. Bloeman Pty. v. Council of the City of Gold Coast*,⁴²¹ there appears to be little point in trying to analyse the effect of an election to avoid in terms of such a distinction. The essential element is that the parties intended the promise to be enforced after avoidance, as would be the case, for example, when the contract calls for arbitration to decide whether avoidance is justified. This right to arbitration would not be dependent on further performance of the contract. A mutual submission provision is a clear example of a promise the performance of which is independent of the obligation to perform other terms of the contract.

419 See *id.*

420 Lord Wright *id.*, at 377 distinguished between "substantial" and "ancillary" obligations, and at 387 between those obligations "essential" to the contract and those merely "collateral" to it. See also the distinction made at 373-374 between provisions that "set out obligations which the parties undertake towards each other," and those that embody the agreement of the parties.

421 [1973] A.C. 115 (the promise to pay interest was considered to be a substantive obligation).

Where there has been an anticipatory breach, the innocent party's acceptance of the breach releases him from all obligations to perform.⁴²² The acceptance of the breach must, however, be complete. If the anticipatory breach is accepted, the contract is avoided in its entirety. The innocent party may not avoid one part of the contract and treat other parts as still in existence for other purposes.⁴²³

[98] *partial avoidance or avoidance of the entire contract?*

In some situations, the aggrieved party has the option of resorting either to total or partial avoidance. This depends on the individual case and on the distinction between entire and severable obligations. By way of illustration, if the contract is by instalments and either the seller fails to deliver or the buyer fails to pay for the first instalment, then the aggrieved party may, at his or her option, (assuming that the requirements for avoidance are met in respect of both that instalment and future instalments) avoid the contract in whole or in part.

The principle that gives an aggrieved party the option to resort to either partial or total performance, as adopted in both *ULIS* and *The Convention*, differs from the general rule prevailing in French law.⁴²⁴ The doctrine of total avoidance is recognized in French law, and it operates prospectively as well as retrospectively.⁴²⁵ The effect of avoidance is to nullify the contract, subject to the retention of provisions such as *clauses pénales*. But in contracts for successive or continuous performance avoidance operates only prospectively, since accomplished facts (*faits accomplis*) cannot be

⁴²² *Michael v. Hart & Co.*, [1902] 1 K.B. 482.

⁴²³ *Johnstone v. Milling* (1886), 16 Q.B.D. 460.

⁴²⁴ The same is true in Egyptian law. See the *Egyptian Civil Code*, art. 160; see also Faraj, *supra*, note 84, at 578.

⁴²⁵ See *Amos and Walton's*, *supra*, note 92, at 188; Nicholas, *supra*, note 92, at 230; Ryan, *supra*, note 92, at 81.

⁴²⁶ See Nicholas, *ibid.*

reversed.⁴²⁶ It must be remembered that the French court has wide discretionary power to decide whether to grant partial or total avoidance and indeed whether to grant avoidance at all.

B. Restitution

[99] *Nature and scope*

The principle of restitution, as adopted in *ULIS* and *The Convention*, entitles a party who has performed the contract either wholly or in part to recover whatever he or she has supplied or paid under the contract.⁴²⁷ For example, it gives a buyer who has paid in advance the right to reimbursement of monies paid under the contract, while imposing an obligation to return whatever goods the seller has supplied. It should be noted that the claim for restitution applies only to those parts of the contract that have been avoided.

In most cases, the restitution principle operates in respect of the price and the goods. The language used in both *ULIS* and *The Convention* appears wide enough to include anything provided under the contract, including designs, blueprints, operating manuals, or other documents. Restitution also covers any raw materials supplied by the buyer for use in the manufacture of the goods.⁴²⁸

⁴²⁷ *The Convention*, art. 81(2).

⁴²⁸ But see *id.*, art. 3(1), which provides that 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. See also *ULIS*, art. 6.

[100] *Concurrent restitution*

If both parties are bound to make restitution, they must do so concurrently. Although neither *The Convention* nor *ULIS* makes this clear, it may be assumed that reciprocal restitution is to be made at the same time. English law contains no similar rule. The rule, in *The Convention* and in *ULIS*, that both parties are to make restitution concurrently fails to deal with many of the issues surrounding its application.

Suppose, for example, that a buyer, after discovering a non-conformity in the goods justifying avoidance, and after paying the price, avoids the contract. Such a buyer is given the right to restitution of the price and incurs an obligation to return the goods to the seller. If the seller fails to make restitution the buyer is entitled to withhold the goods but must continue to preserve them. How long does this duty to preserve the goods continue to exist? Does it exist until a court orders the seller to make restitution? *The Convention* authorizes the buyer to sell the goods if the seller delays unreasonably in making restitution of the price.⁴²⁹ This relieves the buyer of further preservation expenses. As will be seen in paragraph [248], the buyer's right to deduct reasonable preservation expenses from the proceeds of sale depends on the applicable domestic law, which may or may not permit an avoiding buyer to set off the price paid to the seller against the proceeds of resale. This might frustrate any attempt by the buyer to deduct the cost of preserving the goods and of reselling them. This is because *The Convention* specifies that mutual restitution must occur concurrently, and no clear right to set off is given to the buyer. The issue is to be decided according to the applicable domestic law. Thus, the buyer's problems will not be solved if the applicable domestic law fails to address the issue of set off.

⁴²⁹ See *The Convention*, art. 88(1); see also [246] and [247].

[101] *Restitution and damages*

A claim for restitution must be distinguished from a claim for damages. The function of the former is to put the parties into the position they would have been in had the contract never been made. The function of the latter is to put the innocent party, as nearly as possible, into the position he or she would have been in had the contract been performed. A claim for damages, moreover, is subject to the foreseeability requirement⁴³⁰ and the duty to mitigate.⁴³¹ Restitution is subject to neither.

A complicated and related issue concerns the case where the innocent party's restitutionary claim exceeds the sum that would have been awarded by way of damages. It is obviously in the innocent party's interest to make a restitutionary claim where he or she has entered into an unprofitable contract. Under *The Convention*, no restriction is imposed upon the innocent party's election to sue for damages or to sue in restitution. However, it seems unjust to allow the innocent party to proceed by way of restitution (where the sums recoverable are more substantial than in the case of an award of damages) when that party has made an unprofitable contract. In such a case, restitution would place the innocent party in a better position than if the contract had been performed.

The approach of *The Convention* to this issue differs from that of English law, where, whatever the nature and extent of the benefits exchanged, the measure of recovery does not depend on the contract price (though it has been suggested that the contract price—or the rateable proportion of it—should be regarded as the maximum amount recoverable).⁴³²

430 See [119] - [124].

431 See [125] - [129].

432 In cases where the innocent party has avoided a contract after rendering services or supplying goods to the other party, it has been suggested that a claim for damages should be the only remedy available. See Goff and Jones *The Law of Restitution*, 3rd ed. (London: Sweet & Maxwell, 1986), at 380. The same view pre-

[102] *Restitution: domestic laws*

The principle of restitution as adopted by *ULIS* and *The Convention* is more familiar to Egyptian and French law than to English law. It reflects the prospective aspect of avoidance since it is concerned not with compensation for loss of a bargain but with the surrender of benefits that it would be unjust for a party to retain. In both Egyptian⁴³³ and French law,⁴³⁴ avoidance, in general, operates retrospectively with respect both to the contracting parties and to others. Both contracting parties are required to make restitution of what has been received under the contract. In cases where restitution is not possible, French and Egyptian courts will assess the value of such services or consumption (if goods have been consumed) in terms of money and damages.

In English law, restitution is meant not to compensate the innocent party for losses resulting from the breach but to deprive the breaching party of an undeserved profit.⁴³⁵ When discussing a claim for restitution, it is necessary to keep in mind the differences between rescission and termination, already referred to in paragraph [95]. The following points should also be borne in mind. First, the ultimate aim of rescission is to restore both parties, as far as possible, to the situation they were in before they entered into the contract. The only way to achieve this is for each party to return to the other all property received under the contract. Second, the parties must indemnify each other for those costs incurred as a direct consequence of the contract and in

vails in the U.S. See Perillo, "Restitution in the Second Restatement of Contract" (1981), 81 *Col. L. R.* 37.

433 The *Egyptian Civil Code*, art. 160; see also Murkus, *supra*, note 98, at 311.

434 The *French Civil Code*, art. 160; see also Planiol et Ripert, *supra*, note 84, para. 1661; Amos and Walton, *supra*, note 92, at 170.

435 See Treitel, *Contract*, note 5, at 693.

accordance with the obligations arising from the contract. Finally, restitution may be made at the time of rescission. If it is impossible for a thing to be returned, rescission cannot be awarded in respect of it.

In cases of termination, the innocent party is entitled to restitution. This was decided in *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd.*⁴³⁶ In that case, the seller agreed to supply machinery, but before the machinery could be delivered the performance of the contract was terminated by the occurrence of a frustrating event. The buyer sued to recover a sum paid in part payment before the occurrence of the event. It was held that the buyer was entitled to recover the payment, even though the frustrating event did not terminate the contract. Although it is arguable that this decision is only applicable to cases of frustration, in principle there is no reason why this should be the case.⁴³⁷ The principles of the *Fibrosa* case are not restricted to cases of frustration and the remedy of restitution is available when the performance of the contract is terminated.⁴³⁸

In any case, restitutionary rights of the parties where the contract has been avoided are not as extensive in English law as in *ULIS, The Convention*, Egyptian and French law. In English law, several limitations are imposed upon restitutionary rights.

First, if benefit takes the form of a payment of money, the innocent party can claim it back only if nothing has been received in exchange, that is, only if there has been a total or substantial failure of consideration.⁴³⁹ Although the Law Commission is currently seeking to reform the rule, a party in breach cannot recover money already

⁴³⁶ [1943] A.C. 32.

⁴³⁷ See *id.*, at 67 (where Lord Wright clearly indicated that restitution is available after termination).

⁴³⁸ See also Goff and Jones, *supra*, note 432, at 372.

⁴³⁹ *Hunt v. Silk* (1804), 5 East 449 (K.B.); see also OLRC, *Report on Sales*, at 504 ff; s. 54 of the *SGA*, 1979, which expressly preserves the buyer's right to recover money paid on a total failure of consideration.

paid to the innocent party unless it was truly paid on condition that the contract would not be breached later by either side.⁴⁴⁰

Second, except in a claim for the recovery of monies paid,⁴⁴¹ the party in breach can recover nothing unless that party's obligations have been substantially completed or the other party is deemed to have accepted the deficient performance.⁴⁴² This means that the innocent party has to be in a position to rescind by not being in breach, and by being ready, willing and able to perform any future obligations.⁴⁴³

Finally, only if an unpaid seller has retained title to the goods, or if there is an agreement otherwise providing for the retention of the goods, can there be recovery of the goods delivered.⁴⁴⁴ Otherwise, the seller is limited to damages.

[103] *Restitution of goods*

Under *ULIS* and *The Convention*, the seller can recover any goods delivered in addition to any benefits derived from the goods or parts thereof. If the seller has delivered goods, an avoiding buyer must preserve⁴⁴⁵ and return the goods, although that seller may retain them until he or she is reimbursed for reasonable expenses of preserva-

⁴⁴⁰ Law Commission Report No. 121, *Pecuniary Restitution on Breach of Contract* (1983).

⁴⁴¹ *Dies v. British and International Mining and Finance Corp. Ltd.*, [1939] 1 K.B. 724, aff'd in *Stockloser v. Johnson*, [1954] 1 Q.B. 476 (C.A.).

⁴⁴² *Cutter v. Powell* (1795), 6 T.R. 320 (K.B.); *Britain v. Rossiter* (1879), 11 Q.B.D. 123 (C.A.); see also *Cheshire*, *supra*, note 108, at 529-530.

⁴⁴³ *Hunt v. Silk* (1804), 5 East 449 (K.B.).

⁴⁴⁴ See Honnold, *Uniform Law*, *supra*, note 41, at 448-449; Benjamin, *supra*, note 81, para. 1217; cf., the *UCC*, s. 2-702.

⁴⁴⁵ See [244].

⁴⁴⁶ However, in certain circumstances, the buyer does have a right or even a duty to sell goods in his or her possession. *The Convention*, art. 88(3); see also [246] and [247].

tion.⁴⁴⁶ This is in line with Egyptian⁴⁴⁷ and French law.⁴⁴⁸ English law, by contrast, limits the ability of the seller to recover goods to cases involving "wrongful conduct of the buyer in obtaining the goods" or in which the seller retains a security interest in the goods.⁴⁴⁹

Unlike *The Convention*, the *UCC* gives the seller extremely limited rights to recover the goods after they have been accepted by the breaching buyer. In a credit sale, for example, a seller can claim goods that have been accepted only if (a) the buyer received them while insolvent and the seller made demand within ten days of receipt or, (b) the buyer misrepresented solvency in writing within three months before delivery.⁴⁵⁰ Thus, the seller's right under *The Convention* to avoid the contract and claim restitution of accepted goods differs significantly from the right under both English law and the *UCC*.

Under *ULIS* and *The Convention*, subject to certain broad exceptions,⁴⁵¹ if the buyer cannot return the goods "substantially in the condition in which he received them," he or she is not entitled to avoid the contract or to require performance.⁴⁵²

⁴⁴⁷ The *Egyptian Civil Code*, art. 160; see also Faraj, *supra*, note 84, at 578.

⁴⁴⁸ See Nicholas, *supra*, note 92, at 77 and 240; Plaiol et Ripert, *supra*, note 84, para. 166; Vaise, "Right and Remedies available to an Unpaid Seller under French Law" (1976) 4 *Int'l. Bus. Law.* 379, at 380.

⁴⁴⁹ See Honnold, *Uniform Law*, *supra*, note 41, at 448-449; also Benjamin, *supra*, note 81, paras. 1214 ff.

⁴⁵⁰ The *UCC*, s. 2-702(2). Beyond credit sales, the only other situation in which a seller can reclaim accepted goods is where payment fails in a cash sale. *Id.*, ss. 2-511(3) and 2-507(2).

⁴⁵¹ The buyer does not lose the right to avoid the contract or to require substitute goods even if the goods cannot be returned: (a) if the destruction or deterioration of the goods is not due to his or her act or omission; (b) if the goods have perished or deteriorated in whole or in part during their examination; or, (c) if the goods have been sold, consumed or transformed by the buyer before discovering of their non-conformity. *The Convention*, art. 82(2).

⁴⁵² *The Convention*, art. 82(1). This art. is similar to art. 79 of *ULIS*. For a legislative history of the text, see the documents cited in note 398 *mutatis mutandis*.

This rule is in accordance with most legal systems.⁴⁵³ It is in line with French law, where avoidance is unavailable if the inability to restore is the aggrieved party's "fault."⁴⁵⁴ Under Egyptian law, it is generally accepted that a buyer who cannot restore the goods in the same condition as they were received loses the right to avoid but can still claim damages.⁴⁵⁵

It is submitted that courts in contracting states will face a difficult task in determining whether or not the condition of the goods has changed. *The Convention* requires the goods to be in "substantially" the same condition as they were received by the buyer. There is, however, no indication as to what the term "substantially" means. In fact, it is difficult to define the term precisely because whether goods have been substantially changed is always a question of fact. In any event, *The Convention's* drafting history suggests that the goods are not substantially changed if the change is so significant 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."⁴⁵⁶

The buyer's power to avoid after the goods have been delivered is in accord with Egyptian, English and French law. However, *The Convention* goes further than English law. Unlike under *The Convention*, in English law, by using, converting, or reselling the goods, the buyer is deemed to have accepted them, and cannot then avoid the contract.⁴⁵⁷ In short, *The Convention's* approach to the ability of the buyer to avoid after the goods have been delivered may have undesirable results.

453 The *UCC*, s. 2-608, for example, limits the buyer's ability to revoke an acceptance if the goods have undergone "any substantial changes" not caused by their own defects; also Treitel, *Remedies*, *supra*, note 69, para. 181.

454 The *French Civil Code*, art. 1647, para. 2.

455 See Faraj, *supra*, note 84, at 488-489; see also Sanhoury, *supra*, note 343, at 749.

456 See the *1978 Draft Commentary*, *supra*, note 67, comment to art. 67, para. 3.

457 The position of English law on this issue will be discussed in [105].

Suppose, for example, that the buyer has accepted the goods without discovering a latent defect that justifies avoidance. In this case, it is arguable that the buyer's ability to avoid the contract, even though there is nothing to return, constitutes an injustice to the seller because the latter may not be able to redispense of defective goods. Nonetheless, the seller is adequately protected by the requirement that the buyer must account for all benefits derived from the goods.⁴⁵⁸

Also, a buyer who has lost the right to declare the contract avoided or to request that the seller deliver substitute goods is entitled to claim damages, reduce the price, and require any defects to be cured.⁴⁵⁹ In English law, even after the buyer loses the right to rescind the contract for breach of the seller's obligations, the court can award damages in lieu of rescission. In French law in cases where it is impossible to restore the goods to their status before the contract, the court may order payment of such damages or any other expenses as will satisfy the equities of the particular case.⁴⁶⁰ The same rule is adopted in Egyptian law.⁴⁶¹

[104] *Restitution of goods: practical difficulties*

In practice, any one of several obstacles may hinder the seller's efforts to recover the goods. For example, the goods may have already perished or been consumed. In such cases, it is impossible for them to be returned. In other cases, only limited restoration will be possible, such as where there has been some deterioration or alteration in the goods. These obstacles are common to domestic and international sales.

458 See [107].

459 *The Convention*, art. 83; *ULIS*, art. 80; for a legislative history of the text, see the documents cited in note 398 *mutatis mutandis*.

460 See Ryan, *supra*, note 92, at 81.

461 See Faraj, *supra*, note 84, at 495 ff; also Sanhoury, *supra*, note 343, at 747.

There are, however, other obstacles peculiar to international transactions. The claim of restitution may be thwarted by bankruptcy or other insolvency laws that do not recognize such a claim against the property or do not give the claimant a priority in the distribution of the bankrupt's estate.⁴⁶² Because *The Convention* governs only the rights of the parties to the sales agreement, creditors of the buyer who have priority over the goods under the applicable domestic law may defeat the seller's restitution rights under *The Convention*. Nonetheless, when restitution is impossible for any reason, reasonable remuneration, which may be assessed by reference to the value of the goods at the time of avoidance, would be the likely substitute.

[105] *Restitution of goods: English law*

In English law, in cases where the benefits conferred take the form of goods supplied, under no circumstances can the defaulting party recover unless, exceptionally, a new contract can be construed on the facts.

The position of English law is more easily stated where the contract is rescinded *ab initio*. If the contract is rescinded *ab initio*, all benefits already transferred pursuant to the contract may be recovered. Moreover, equity has stepped in to ensure that justice is done, by ordering a party to account for any profits made through the use of the goods and by setting aside the terms of the contract.⁴⁶³

Also, a buyer who avoids a contract for misrepresentation cannot rescind it when the goods have been radically changed in extent or character.⁴⁶⁴ This is so, for exam-

⁴⁶² See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 66, para. 10.

⁴⁶³ *Solle v. Butcher*, [1950] 1 K.B. 671 (C.A.). Cf. Diplock LJ in *R.V. Ward Ltd. v. Bignall*, [1967] 1 Q.B. 534, at 550 (C.A.): "It is, of course, well established that where a contract for the sale of goods is rescinded after the property in the goods has passed to the buyer, the rescission divests the buyer of his property in the goods."

⁴⁶⁴ See *Cheshire*, *supra*, note 108, at 258-259; see also OLRC, *Report on Sales*, at 474.

ple, when the subject matter of the contract comprises goods that have been consumed or altered by the buyer.⁴⁶⁵ This rule, however, should not be strictly construed, and the mere fact that the subject matter of the contract has deteriorated due to an extraneous cause, as where goods are damaged by a third party, does not bar the right to rescind.⁴⁶⁶

Because the last point is concerned with rescission, it is uncertain to what extent this process will be required in cases where restitution is claimed after termination. However, it is unlikely that the restitution will be allowed where restoration of the goods is not possible. To this extent it is doubtful whether there is any substantive difference between termination and rescission where the right to restitution is in issue. If this argument is correct, English law is in line with *ULIS*, *The Convention*, Egyptian and French law on this matter.

[106] *Restitution of the price*

The principle of restitution as adopted by *ULIS* and *The Convention* entitles the buyer to recover the price paid⁴⁶⁷ in addition to interest from the date of payment.⁴⁶⁸ Again, these principles are in accord with Egyptian⁴⁶⁹ and French law.⁴⁷⁰

⁴⁶⁵ *Clarke v. Dickson* (1858), E.B. & E. 148, at 155; see also *Crompton* at 154 "You cannot both eat your cake and return your cake."

⁴⁶⁶ *Armstrong v. Jackson*, [1917] 2 K.B. 822, at 829; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392 (C.A.).

⁴⁶⁷ *The Convention*, art. 81(2); *ULIS*, art. 78(2).

⁴⁶⁸ *The Convention*, art. 84(1); *ULIS*, art. 81(1); see also [107].

⁴⁶⁹ *The Egyptian Civil Code*, arts. 160 and 443; also Sanhoury, *supra*, note 343, at 792.

⁴⁷⁰ See Nicholas, *supra*, note 92, at 77 and 240; also Ryan, *supra*, note 92, at 81.

English law differs regarding the buyer's ability to recover monies paid. A distinction is made between a deposit and a part payment. In the latter case, if a buyer pays in advance and the seller fails to deliver, the buyer can claim damages or the return of the money. In this situation, the buyer receives no consideration for the payment. Likewise, if there is a part payment that is not intended to be a deposit, the innocent party may have a claim in restitution despite the fact that the non-performance of the contract was his or her own fault.⁴⁷¹

Different principles apply if a sum is paid as a deposit, i.e. as security for performance by the payor. In this case, the sum will be forfeited to the other party if the depositor fails to perform his or her side of the bargain.⁴⁷² Whether or not the contract contains a retention clause is irrelevant.⁴⁷³ Even where there is a retention clause, equity may interfere by granting relief from forfeiture of the monies paid.⁴⁷⁴ However, the circumstances in which the court will apply this rule are still unclear⁴⁷⁵ and English courts seem likely to apply it when the contract calls for instalment payments, as is usually the case with sales of land.⁴⁷⁶

Two further points should be mentioned. First, when a sum is paid under the contract and the contract is not completed, the question of whether it is a deposit, part payment, or both, depends on the construction of the particular term of the contract or

⁴⁷¹ *Gallagher v. Shilcock*, [1949] 2 K.B. 765, at 768; *Howe v. Smith* (1884), 27 Ch.D. 89, at 104 (C.A.); *Mayson v. Clouet*, [1924] A.C. 980 (P.C.).

⁴⁷² *Howe case*, *id.*, at 97-98; see also *Elson v. Prices Tailors Ltd.*, [1963] 1 W.L.R. 287.

⁴⁷³ *Howe case*, *id.*; *Ex P. Barell* (1875), L.R. 10 Ch.App. 512; *Harrison v. Holland*, [1921] 3 K.B. 297; see also Benjamin, *supra*, note 81, paras. 1231 ff; OLRC, *Report on Sales*, at 425; Treitel, *An Outline*, *supra*, note 81, at 355.

⁴⁷⁴ *Stockloser v. Johnson*. [1954] 1 Q.B. 476 (C.A.).

⁴⁷⁵ See *Cheshire*, *supra*, note 108, at 535; OLRC, *Report on Sales*, at 425.

⁴⁷⁶ See Benjamin, *supra*, note 81, para. 1232; see also Treitel, *Contract*, *supra*, note 5, at 757, who argues that the rule should be applied by the court where the forfeiture provision is penal in nature.

the custom of the trade.⁴⁷⁷ Second, where the seller resells the goods and on resale receives more than the original price, the buyer may be entitled to recover even a deposit in the strict legal sense.⁴⁷⁸

[107] *Restitution of benefits derived from the goods or from the price*

When the contract has been avoided, buyers and sellers are required to make restitution not only of goods supplied and monies paid but also, under Article 84 of *The Convention*, of any other benefits received.⁴⁷⁹ For example, a seller who has been paid in advance and then fails to deliver is bound to restore both the price and interest. The rate of interest is discussed elsewhere in this study.⁴⁸⁰

Although it is not determined in *The Convention*, it seems that the rate of interest is to be based on the current rate at the seller's place of business. This is so because restitution of the price concerns itself with the benefit derived by the seller from the monies paid in advance rather than with the loss suffered by the buyer. This principle is known to Egyptian,⁴⁸¹ French and English law. The basis for this rule would appear to be that the innocent buyer has been deprived of the use of a definite sum of money on account of the seller's failure to deliver the goods.

⁴⁷⁷ See *Cheshire*, *supra*, note 108, at 535. As to case law, see *Dies v. British and International Mining and Finance Corp. Ltd.*, [1939] 1 K.B. 724; *F.C. Bradley & Sons Ltd. v. Colonial and Continental Trading Ltd.*, [1964] 2 Lloyd's Rep. 52, at 63.

⁴⁷⁸ *Gallagher v. Shilcock*, [1949] 2 K.B. 765; see also Benjamin, *supra*, note 81, para. 1231; OLRC, *Report on Sales*, at 425.

⁴⁷⁹ *The Convention*, art. 84. For a legislative history of the text, see the documents cited in note 398 *mutatis mutandis*.

⁴⁸⁰ See [150].

⁴⁸¹ The *Egyptian Civil Code*, arts. 160, 458(2) and 443(1).

⁴⁸² *ULIS*, art. 81(2).

⁴⁸³ *The Convention*, art. 84(2).

As for the seller, under both *ULIS*⁴⁸² and *The Convention*⁴⁸³ the buyer must account to the seller for all benefits derived from the goods, or part thereof, whether that buyer is able to make restitution or not. If a buyer has received no benefits, the seller is entitled to nothing. This is not the case under English law, where there is no rule making a rescinding buyer accountable for all benefits.⁴⁸⁴ This is so since a buyer who has made substantial use of goods may not reject them.⁴⁸⁵ However, where the buyer complains of defective title, use or, arguably, even consumption of the goods will not preclude rejection of the goods and recovery of all monies paid for them.⁴⁸⁶

Is a party required to account to the other for all benefits derived from the goods or the price without being able to set off corresponding expenses?⁴⁸⁷ Since there is no definition of the word "benefit" in either *ULIS* or *The Convention*, one could argue that a party should be accountable only for those profits that remain after deducting any reasonable expenses incurred in connection with the goods.⁴⁸⁸ Assessing the value of benefits derived from the goods is difficult even under domestic laws. Courts will have to settle this issue by referring to other rules of *The Convention* (such as the rules concerning damages)⁴⁸⁹ or to the applicable domestic law.

484 However, a similar rule is followed under the doctrine of revocation followed in the *UCC*, s. 2-608; see also *OLRC, Report on Sales*, at 505-506.

485 See *SGA*, 1979, s. 11(4); see also Beale, *supra*, note 261, at 205; Schmitthoff, *Sale, supra*, note 252, at 142 ff; Treitel, *An Outline, supra*, note 81, at 299.

486 *Rowland v. Divall*, [1923] 2 K.B. 500 (C.A.); see also Atiyah, *supra*, note 171, at 390; *Report on Sales*, at 504 ff.

487 See Sutton, "The Draft Convention on International Sales-Part III" (1977), 5 *Australian Bus. L. Rev.* 92, at 93 (hereinafter cited as *Part 3*); Vilus, "Provisions Common to the Obligations of the seller and the Buyer" in *Dubrovnik Lectures, supra*, note 16, 239, at 259.

488 Graveson and Cohn *supra*, note 134, at 100 have reached the same conclusion when discussing art. 81 of *ULIS*.

489 See ch. III.

[108] *The remedy of avoidance: comparison of selected laws*

It can safely be said that *The Convention's* avoidance provisions are superior to those of any other law considered in this study. This view is supported by the following three points:

First, in English law, the adoption of a third category of contractual term, the innominate term, causes uncertainty for the innocent party.⁴⁹⁰ This is because it is difficult to predict whether the court will construe a term as a "condition," "warranty" or "innominate term." This uncertainty can be easily eliminated under *The Convention*, where the innocent party can require performance within a reasonable time and then avoid if the breaching party does not perform.⁴⁹¹

Second, in Egyptian and French law, an innocent party is not entitled to avoid the contract, but must have recourse to legal proceedings. The innocent party is therefore faced with uncertainty as to whether a court will grant avoidance. Instead of granting avoidance, the court may set the breaching party a supplementary time for the performance of his or her duties. *The Convention* reduces this uncertainty by allowing the innocent party to use the additional time notice procedure as a legal basis for avoidance, and by expressly denying courts in contracting states the right to grant an additional time notice.

Third, the definition of fundamental breach in *ULIS* has been criticized on the grounds that it depends not upon objective factors, but upon the subjective judgment of the parties.⁴⁹² *The Convention*, in contrast, permits avoidance if there has been a breach that substantially deprived the innocent party of what he or she is entitled to

⁴⁹⁰ Manwaring, *supra*, note 88, at 159.

⁴⁹¹ *The Convention*, arts. 47 and 62.

⁴⁹² (1972), 3 *UNCITRAL Yearbook* at 41; also (1968-70), 1 *UNCITRAL Yearbook* at 159, para. 86.

expect under the contract.⁴⁹³ This formula includes an objective element by considering the detriment suffered by the innocent party, which must be based on his or her expectations under the contract.

[109] *The remedy of avoidance: conclusions*

From the preceding analysis of the remedy of avoidance, it may be concluded that, despite certain criticisms, *The Convention's* avoidance provisions, on the whole, resolve the problems of contract avoidance in international sales by providing the parties with effective measures to avoid any uncertainty caused by breach of contract. However, because courts in contracting states are more familiar with their own systems of law, *The Convention's* avoidance provisions may receive divergent treatments from various domestic courts. It is in the interest of the contracting parties and their lawyers, *The Convention's* drafters, and courts in contracting states, to minimize, to the greatest extent possible, the inherent difficulties in interpreting international treaties. A desire for achieving uniformity of interpretation should guide parties in fashioning their claims for avoidance. It should also guide courts in contracting states in handing down their decisions.

It is one of the contributions of this study to encourage courts to refer to *The Convention's* drafting history rather than to rely on their own domestic laws. Thus, courts in contracting states should interpret *The Convention's* avoidance rules consistently with *The Convention's* purpose of promoting a uniform international sales law and in conformity with the general principles on which it is based.⁴⁹⁴ For this purpose, the following may be suggested as a list of factors that domestic courts should consider when deciding whether avoidance is justified. Before doing so, it should be pointed out that this list is not intended to be exhaustive and merely provides examples of those

⁴⁹³ *The Convention*, art. 25.

⁴⁹⁴ *Id.*, art. 7.

factors that courts in contracting states ought to consider in deciding whether a given breach entitles the innocent party to avoid the contract.

First, detriment suffered, or likely to be suffered, by the innocent party as a result of the breach should be the most important factor. An aggrieved party who fails to prove substantial detriment should not be able to avoid the contract. The detriment should assume greater or lesser importance depending upon whether the breaching party knew what the effects of the breach would be.

Second, other factors that should be of fundamental importance are (a) the existence and extent of any physical damage to the goods and its effects on the uses to which they can be put, (b) the purpose of the contract and, (c) the actual knowledge of the breaching party. For example, if a seller delivers a machine to a buyer without one of its necessary components and the contract envisaged immediate use by the buyer (or the seller otherwise had knowledge that the buyer wanted the machine for immediate use), then even a relatively short delay for repairs could make the machine useless for the buyer's purpose.

Third, courts should consider the cost of making the performance received (or tendered) conform with the contract. If this cost is unreasonably high, avoidance should probably be justified. If the expenditure of a small sum will make performance conform, then no avoidance should be justified and the innocent party should be limited to non-avoidance remedies.

Fourth, it is relevant to consider whether an offer has been made (or opportunity given) at a later date to the breaching party to perform the obligation broken. The additional time notice is one of the main features of *The Convention's* avoidance provisions. Under *The Convention's* additional time notice procedure, the aggrieved party must give the breaching party an opportunity to perform any unfulfilled obligation if the breach is not fundamental and no provision of the contract justifies avoidance.

Fifth, courts ought to take account, when considering whether avoidance is justified, of the likelihood that the breach will recur. Sometimes, a repeated breach will justify avoidance in and of itself.

Sixth, the reason why a party has failed to perform should generally be of little relevance once it is established that there has been a breach. The central concern of courts should be to establish whether the breach has caused the aggrieved party substantial and foreseeable detriment.

Finally, courts should consider whether, in particular cases, it is fair and just to avoid the contract or, alternatively, to force the innocent party to rely on less radical remedies that keep the contract alive. Avoidance should not be granted if it would be fair to hold the innocent party to the further performance of the contract. By considering this factor a court would be respecting one of the main principles underlying *The Convention*, namely that the contracting parties enter a contract fully intending to meet their obligations under it and that "successful contracting requires co-operation rather than competition."⁴⁹⁵

⁴⁹⁵ See Manwaring, *supra*, note 88, at 143.

Chapter III

DAMAGES

[110] *Introduction*

"No aspect of a system of contract law is more revealing of its underlying assumptions than the law that prescribes the relief available for breach."⁴⁹⁶ A claim for damages differs from specific performance or avoidance in that it is available to the innocent party either alternatively to one of the other remedies or jointly with it.

Damages can be claimed where there has been a breach of contract, either actual or anticipatory, after the conclusion of the contract. The fundamentality of the breach is irrelevant and in this regard, it differs from avoidance. A claim for damages will be sustained whenever the aggrieved party has suffered a loss resulting from the other party's breach. The object of an award of damages in English, French and Egyptian law, and under *ULIS* and *The Convention*, is to put the aggrieved party, in so far as money can do it, in the same position as if the contract had been performed.⁴⁹⁷ It is therefore possible to say that damages constitute monetary compensation in respect of loss suffered as a result of the breach.⁴⁹⁸ Generally, all laws considered in this study provide similar criteria for what constitutes a loss and for the manner in which a loss is measured. This and other matters will be considered below.

⁴⁹⁶ Farnsworth, "Damages and Specific Relief" (1979), 27 *Am. J. Comp. L.* 247, at 247.

⁴⁹⁷ See Benjamin, *supra*, note 81, para. 1296; see also Treitel, *Contact*, *supra*, note 5, at 701; also "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 2, comment to art. 55, para. 2; *The 1978 Draft Commentary*, *supra*, note 67, art. 70, para. 3; as to case law, see *Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory*, [1979] A.C. 91, at 104; [1978] 1 All E.R. 515 (P.C.); *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673, at 689 (H.L.); *Robinson v. Harman* (1848), 1 Exch. 850, at 855 (Exch.); *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at 307 (P.C.); *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, at 539 (C.A.).

⁴⁹⁸ See the introductory phrase of arts. 74 of *The Convention* and 82 of *ULIS*.

The present chapter will address questions relating to damages under three sections: availability of damages in general, damages in particular cases, and the issue of interest entitlement.

Section I

Availability of damages in general

[111] *General principles*

A breach of contract provides the innocent party with a right to claim damages as well as to resort to any other remedy available to that party. Courts assess damages in order to compensate the aggrieved party for losses resulting from the breach. Once it has been established that the innocent party has sustained a recoverable loss, the value of the loss must be assessed. The amount of damages should not exceed the value of those losses of the aggrieved party that are foreseeable.⁴⁹⁹ But it is important to note that, under *ULIS* and *The Convention*, if the contract is avoided, the extent and foreseeability of the actual loss are irrelevant to the extent that damages are based on the substitute transaction or current price formula.⁵⁰⁰ To illustrate, satisfying the requirement of the current price formula would entitle the aggrieved party to recover as damages the difference between the contract and current price even if no loss has actually been sustained, and irrespective of whether the loss, if any, has met the test of foreseeability. Both *ULIS* and *The Convention* are in agreement on this principle.

ULIS distinguishes between damages in cases in which the contract has been avoided and in those in which it has not. Article 82 contains the rule for assessment of damages in cases where the contract has not been avoided, while Article 84 deals with

⁴⁹⁹ The loss suffered, as well as the foreseeability test, will be discussed in [116] - [124].

⁵⁰⁰ See [131] - [148].

cases where the contract has been avoided. *The Convention*, on the other hand, provides a general principle for the assessment of damages in Article 74, and in Articles 75 and 76 provides alternative means of measuring damages in cases of repurchase or resale of goods when the contract has been avoided. Article 77 governs the duty of the innocent party to mitigate damages and the consequences of a failure to do so.

Despite this divergence between *ULIS* and *The Convention*, the two laws achieve the same result, but in different ways. The extent of the loss suffered by the aggrieved party and the foreseeability of the breach are material factors in an assessment of any claim for damages. A claim for damages is available whether or not the breach results in avoidance and whether the breach is actual or anticipatory.⁵⁰¹ Furthermore, the innocent party has a right to claim damages for any future loss, including a possible claim for interest.

[112] *Disclaimer clauses and damages*

Under *The Convention*, it is not clear whether courts in contracting states will give effect to an express disclaimer clause limiting damages.⁵⁰² It is possible for one of the parties to include one or more disclaimer clauses in the contract in order to be freed in the event he or she fails to perform a specified duty, from paying damages otherwise payable. Article 4 of *The Convention* states that *The Convention* "is not concerned with ... the validity of a contract or of any of its provisions."⁵⁰³ In the face of this provision, can a court enforce a domestic rule invalidating disclaimer clauses? Put another way, is a domestic rule that denies the effectiveness of disclaimer clauses a

⁵⁰¹ Except where the other party is unable to perform due to an event beyond his or her control under art. 74 of *ULIS* and art. 79 of *The Convention*.

⁵⁰² Disclaimer clauses are also called privative clauses, exclusionary clauses, exemption clauses, waiver clauses and exculpatory clauses. For a definition of such clauses, see the decision of the Supreme Court of Canada in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at 108.

⁵⁰³ *The Convention*, art. 4(a).

rule of validity?

In dealing with this issue, one point must be remembered: the parties can agree on all aspects of the seller's obligations as to conformity, and any such agreement will override the provisions of *The Convention*.⁵⁰⁴ In the absence of an express definition of the term "validity," it has been argued that domestic law provisions on disclaimer of warranties are "in fact requirements for validity within the meaning of *The Convention*."⁵⁰⁵ If this is true, the validity of disclaimer clauses, in international sales contracts governed by *The Convention*, is subject to domestic rules.

This argument is unconvincing. It would permit each domestic legal system to define the term "validity" as broadly as it deemed appropriate. By merely characterizing an aspect of contract law as a rule of validity, each jurisdiction could subject international sales contracts governed by *The Convention* to numerous rules of substantive domestic commercial law. This would clearly undermine *The Convention's* goal of uniformity.⁵⁰⁶ Although *The Convention* has left the rule on validity to be determined by domestic law, this power is "not to be read so broadly as to import domestic rules that would supplant other provisions of *The Convention*."⁵⁰⁷

⁵⁰⁴ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 33, para. 4.

⁵⁰⁵ Logobardi, "Disclaimers of Implied Warranties: The 1980 United Nations Convention On Contracts for the International Sales of Goods" (1985), 53 *Fordham L. R.* 863, at 870.

⁵⁰⁶ Legal systems differ widely in their concept of validity and in their use of the word "validity." In French law, for example, some issues relating to non-conformity of goods are treated as issues of validity. See Nicholas, "Force Majeure and Frustration" (1979), 27 *Am. J. Comp. L.* 231, at 231-232; cf. Honnold, *Uniform Law, supra*, note 41, at 258-259 (arguing that the warranty provisions of the *UCC* should not be treated as rules of validity merely because they deny legal effect to, or render "invalid," some contract provisions). But see Ziegel, *The Remedial, supra*, note 62, at 9-38 (observing that courts might interpret Article 4 to include domestic rules on disclaimer of warranties).

⁵⁰⁷ See Honnold, *Uniform Law, supra*, note 41, at 259.

Defining validity by reference to domestic law too easily dismisses the possibility of a Convention-based definition. The term "validity" is used in *The Convention* itself, so it ought to have some kind of meaning intrinsic to *The Convention*. Moreover, Article 7(1) of *The Convention* mandates such a definition: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

Thus, courts in contracting states, in determining the validity of a disclaimer clause, should settle the issue on the basis of the general principles of *The Convention*. Applying these general principles, the term "validity" in Article 4 can be defined consistently with the principles of interpretation, uniformity, and good faith.⁵⁰⁸ The result will depend on the manner in which the courts understand these principles and on the extent to which they are disposed to minimize resort to domestic laws.⁵⁰⁹

⁵⁰⁸ Art. 7(2) of *The Convention* permits limited reference to domestic law only if the general principles underlying *The Convention* do not provide a solution.

⁵⁰⁹ A West German court was faced with the issue of the validity of a disclaimer clause and arrived at what it is submitted was the proper conclusion. A contract for the sale of material for use in the manufacture of trousers had been made between an Italian seller and a German buyer. The contract included a disclaimer clause stating that all remedies were excluded after processing of the delivered goods. Defects were discovered after the trousers were finished and the seller asserted his disclaimer clause. This defense was rejected by the German court on the ground that the disclaimer clause violated basic principles of *ULIS*. See Schlechtriem, "The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods" in *International Sales, supra*, note 62, 6-1, at 6-6. Courts in contracting states should arguably take the same position in relying on the general principles of *The Convention* when considering any type of contractual clause not expressly addressed by *The Convention*. It is worth mentioning that West Germany has ratified and applied *ULIS*. Schlechtriem has observed that he has learned from personal experience that the application of *ULIS* in West Germany has reduced the uncertainties of conflict of laws rules and that its substantive provisions are better suited to international sales than those of German law. See Schlechtriem, "From the Hague to Vienna, Progress in Unification of the Law of International Sales Contracts" in *Transnational Law, supra*, note 17, 125, at 126.

[113] *Damages in French law*

Damages are the usual remedy for a breach of contract in French law. However, the remedy is restricted to damages imputable to the breaching party. Moreover, in cases where a *mise en demeure* must be given, a claim for damages cannot be made until such a notice has been given.⁵¹⁰ In contrast to English law, French law does not permit an award of damages to be made until a loss has actually been suffered.⁵¹¹ The innocent party may recover damages both for losses suffered and potential profits foregone.⁵¹² When the obligation breached is an obligation to pay a sum of money, the innocent party will receive, for the entire duration of the delay in payment, a sum of money corresponding to the legal rate of interest.⁵¹³ The innocent party may also be entitled to claim damages in addition to interest if the breach has caused prejudice independent of the delay or the defaulting party has acted in bad faith.⁵¹⁴

Noteworthy here is that this rule is not applicable where the contract has been avoided. In this case, the aggrieved party has the option of either forcing the other to perform or declaring the contract avoided with damages.⁵¹⁵ In this case, the court may in its discretion base its award on the difference between the contract price and

⁵¹⁰ The notion of *mise en demeure* is discussed in [34]. The Egyptian law approach to the remedy of damages is exactly the same as French law. Thus, the following discussion covers both laws.

⁵¹¹ See also note 530.

⁵¹² The *French Civil Code*, art. 1149.

⁵¹³ See *id.*, art. 1153.

⁵¹⁴ It should be pointed out, however, that art. 1652 of the *French Civil Code* entitles the seller to claim damages in three situations: first, if the contract so provides; second, if the thing sold and delivered produces income or other revenue; third, if the buyer has been notified to pay. These rules do not apply where the defaulting party is guilty of bad faith. See Treitel, *Remedies*, *supra*, note 69, at 89, para. 115. Where the loss is entirely attributable to an act of bad faith, the innocent party may obtain damages plus interest.

⁵¹⁵ The *French Civil Code*, art. 1148.

the proceeds of resale.⁵¹⁶

[114] *English law: damages in cases of breach by the buyer*

In English law, the buyer's non-acceptance of the goods entitles the seller to recover any loss resulting directly or indirectly therefrom.⁵¹⁷ This could include the cost of bringing the goods back from the original buyer's premises or of storing, insuring and reselling them.⁵¹⁸ Here, the measure of damages is the difference between the contract price and the market price at the time the goods ought to have been accepted or, if no date was fixed for acceptance, at the date that the buyer rejected them.⁵¹⁹

It is important to note that taking delivery must be distinguished from accepting the goods.⁵²⁰ While non-acceptance denotes rejection of the goods, failure to take delivery may signify an intention to reject or nothing more than that the buyer is not yet ready to receive the goods. The buyer is not deemed to have accepted goods delivered until he or she has had an opportunity to inspect them. In the absence of agreement to the contrary, the seller must allow the buyer a reasonable opportunity to examine the goods when they are delivered. What is a reasonable opportunity depends upon the circumstances of the case. If, however, goods are sold under special trade terms (such as c.i.f.) that render examination impractical at the time of delivery, examination is postponed until such time as the goods have arrived at a destination point where examination is possible. In all cases, the buyer will be deemed to have accepted the goods when, after a reasonable lapse of time following an opportunity to inspect, he or she

⁵¹⁶ See Treitel, *Remedies*, *supra*, note 69, para. 69.

⁵¹⁷ See generally Atiyah, *supra*, note 171, at 356; Benjamin, *supra*, note 81, para. 1316; Schmitthoff, *Sale*, *supra*, note 252, at 173-174.

⁵¹⁸ This is by virtue of s. 54 of the *SGA*, 1979.

⁵¹⁹ See *id.*, s. 50(3).

⁵²⁰ See Benjamin, *supra*, note 81, para. 672; Goode, *supra*, note 239, at 348; see also *SGA*, 1979, s. 27.

retains the goods without indicating to the seller an intention to reject them.⁵²¹

It is clear, then, that the seller's right to damages is broader under *The Convention* than under English law. Article 74 of *The Convention* permits the seller to sue for damages, direct or consequential, as well as for the price.⁵²² In contrast, there is a rule in English law to the effect that loss caused by a failure to pay money will not be compensated; only the unpaid sum and (at the court's discretion) interest are recoverable.⁵²³ The purpose and scope of the rule are both unclear as a result of *dicta* in *Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.*,⁵²⁴ where it was suggested that the rule may not be rigidly followed in the future. However, in a recent case,⁵²⁵ it was held that the rule only applied to limit general damages for non-payment of money. Therefore, a seller who can prove the existence of a particular loss that was not within the contemplation of the parties (or foreseeable by them), can recover special damages in respect of that loss even though the aggrieved party's only breach consisted of failing to pay money when it was due.

⁵²¹ SGA, 1979, s. 35. A buyer is treated as having accepted the goods when he or she either informs the seller of the intention to keep them, treats the goods in a manner inconsistent with continued ownership by the seller, or retains the goods for a reasonable time without intimating to the seller that he or she has rejected them.

⁵²² *The Convention*, art. 61(2).

⁵²³ *Williams v. Reynolds* (1865), 6 B. & S. 495, at 505; *Law Reform (Miscellaneous Provisions) Act*, 1934, s. 3.

⁵²⁴ [1952] 2 Q.B. 297, at 306 (C.A.); see also Benjamin, *supra*, note 81, para. 1295.

⁵²⁵ *Wadsworth v. Lydall*, [1981] 1 W.L.R. 598 (C.A.).

[115] *English law: damages in cases of breach by the seller*

If the seller fails to deliver the goods contracted for, the buyer may claim damages for any loss suffered as a result of the delay.⁵²⁶ It is assumed that if the seller fails to deliver the goods, the buyer will obtain identical goods elsewhere. Therefore, damages will be awarded in the amount of the difference between the contract price and the market price at the time delivery was supposed to have been made.

The buyer may also maintain an action for damages, if the seller has delivered goods that the buyer is entitled to reject.⁵²⁷ A buyer who elects to accept non-conforming goods is entitled to maintain an action for breach of warranty under section 53 of the *Sale of Goods Act*. The measure of damages is *prima facie* the difference between the value of the goods in their delivered state and the value they would have possessed had they conformed to the contract. Except where the buyer is required to pay for the goods before taking delivery, the loss resulting from the breach of warranty will, in practice, be set off against the purchase price.

A. *The aggrieved party's loss*

[116] *The loss actually suffered*

A party who does not receive the promised performance because of a breach by the other party is entitled to compensation for any loss resulting from the breach that was both foreseeable and unavoidable through mitigation. The purpose of damage awards in sale of goods contracts (and, indeed, in all contracts) is to protect the interests of the aggrieved party. In a sale of goods action, the court awards the innocent party the

⁵²⁶ SGA, 1979, s. 51(1).

⁵²⁷ *Millar's Machinery Co. Ltd. v. David Way & Son* (1935), 40 Com.Cass. 204; *The Almara Secunda*, [1981] 2 Lloyd's Rep. 443.

profit that would have been earned had the transaction been completed.⁵²⁸ For example, if the seller contracts to sell goods and fails to deliver them, with the result that the buyer is forced to pay a higher price for substitute goods, the loss recoverable is ordinarily the difference between that higher price and the contract price.

Under *The Convention*, damages for non-performance will be a sum equal to the loss, including loss of profit, suffered by the aggrieved party.⁵²⁹ It follows from the compensatory nature of damages that the aggrieved party is only entitled to such a sum as will indemnify that party for losses actually suffered. Where the innocent party has not, in fact, suffered any loss attributable to the breach, an action for damages is groundless.⁵³⁰

Under both *ULIS* and *The Convention*, losses may include expenses incurred by the aggrieved party after the breach. The buyer is entitled to recover all expenses incurred in making the new sales contract. Where a seller delivers non-conforming goods and the buyer cannot avoid the contract because the defects do not meet the fundamental breach standard, the buyer can (assuming he or she is not entitled to require conforming performance) claim damages for any loss resulting from the defects.⁵³¹

528 Pitch, *Damages for Breach of Contract* (Toronto: Carswell, 1985), at 2.

529 *The Convention*, art. 74; *ULIS*, art. 82.

530 An exception for this is where Common law courts award nominal damages even though the aggrieved party has suffered no loss. See Beale, *supra*, note 261, at 152; Treitel, *Remedies, supra*, note 69, at 26, paras. 46 ff. However, an award of nominal damages is more akin to a declaration of right than to monetary compensation. See Treitel, *ibid.* See also Drobniq, *supra*, note 100, at 324. French law, in contrast, requires the aggrieved party to prove that he or she has suffered damages but damages are presumed when there has been delay in paying a sum. See *Amos and Walton, supra*, note 92, at 184.

531 The buyer, in this case, is also entitled to resort to the price reduction remedy. See ch. VII.

532 S. 2-714(2) of the *UCC* entitles a buyer who has accepted the goods to recover damages for breach of warranty. Under both the *UCC* and *The Convention*, damages are assessed as the difference between the value of the goods delivered

The same approach is followed in the *UCC*⁵³² and in English law.⁵³³

Any worsening of a party's economic or financial position should also be considered when determining the loss suffered by that party. The wording of Article 74 of *The Convention* suggests that a claim for damages applies to all types of loss. In determining the amount of loss, due consideration should be given to the position of the aggrieved party and to the circumstances of the case.⁵³⁴

Like *ULIS* and *The Convention*, the *French Civil Code* contains no provision determining what kind of loss, other than actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), the innocent party is entitled to recover.⁵³⁵ In French law, the damages due to the innocent party consist of two elements: the loss suffered and the profit that would have been made had the contract been performed.⁵³⁶ But damages, as will be seen in paragraph [120], are subject to the test of foreseeability except in the case of *dol* (art. 1150) and, in all cases, recovery is limited by the requirement that the loss should be the immediate and direct consequence of the non-performance.⁵³⁷ This is so even if the non-performance is due to fraud or wilful misrepresentation on the part of the breaching party.

Under the English general law of contract, pecuniary loss takes two main forms. First, there is what is called normal pecuniary loss, that is, loss that any aggrieved party would be likely to suffer because of the breach. Essentially, this means loss of bar-

and the value of the goods had they been as warranted.

⁵³³ See [115].

⁵³⁴ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 70, para. 4.

⁵³⁵ See the *French Civil Code*, art. 1149, which provides that "Damages due to a creditor [innocent party] are, in general, for the loss which he incurred and for the gain of which he was deprived, apart from the exceptions and modifications hereinafter set forth."

⁵³⁶ *Ibid.* The same rule is found in Egyptian law. The *Egyptian Civil Code*, art. 433(5).

⁵³⁷ The *French Civil Code*, art. 1151.

gain, represented by the difference between the value of the performance as contracted for and its value as actually tendered. A party who makes a bargain obviously has some expectations under the contract. In the event of a breach, a party is entitled to compensation for any loss suffered when these expectations are not realized. For example, in cases of non-delivery of goods, the buyer's damages are ordinarily taken to be the excess of the market value at the due delivery date over the contract price.⁵³⁸

Second, additional losses for which damages may be recovered are the indirect or "consequential" losses caused by the breach, provided that these were foreseeable and could not have been avoided through mitigation.⁵³⁹ Foreseeability (or contemplation) aside, consequential damages may include loss of profits in respect of goods that have been damaged. They may also include expenses incurred prior to, and in anticipation of, the making of a contract, provided that these were reasonably in the contemplation of the parties (or foreseeable by them) and would be wasted if the contract was breached.⁵⁴⁰

[117] *Loss of profit*

Under *The Convention*, the aggrieved party can recover damages not only for loss of bargain but also for profits lost as a result of the breach. English,⁵⁴¹ French⁵⁴² and

⁵³⁸ *SGA*, 1979, s. 51(3).

⁵³⁹ See generally Treitel *Remedies*, *supra*, note 69, at 28, para. 50; and in *Contract*, *supra*, note 5, at 706-707. But see [114] (regarding the seller's ability to sue for consequential damages suffered as a result of the buyer's failure to pay the price).

⁵⁴⁰ *Anglia Television Ltd. v. Reed*, [1972] 1 Q.B. 60 (C.A.) (reliance loss in the form of expenses wasted by a buyer while waiting for delivery of the goods that the seller fails to provide). See also *Lloyd v. Stanbury*, [1971] 1 W.L.R. 535.

⁵⁴¹ See [114] and [115].

⁵⁴² The *French Civil Code*, art. 1149; see also Nicholas, *supra*, note 92, at 220 ff; also [113].

Egyptian law⁵⁴³ each contain a similar rule. *ULIS* and *The Convention* provide no clear guidance as to which losses are recoverable. A specific reference has been made, however, to loss of profit because "in some legal systems the concept of loss standing alone does not include loss of profit."⁵⁴⁴ In the absence of a definition, it is submitted that profit means the net profit that the aggrieved party would have earned had the contract been performed. In practice, loss of profit may occur in various situations. For example, a seller is deemed to have lost a profit if a buyer repudiates a sales contract, unjustifiably rejects the goods, or revokes acceptance of them.

A simple example illustrates when a party is deemed to have lost a profit. Suppose that a seller contracts to sell goods to a buyer for \$10,000 and that the buyer intends to resell these goods to a third party for \$13,000. If the seller fails to deliver the goods on the fixed date, the amount of the buyer's damages depends on the market value of the goods at the time of the breach. If this is \$10,000 or less, it is to the buyer's advantage to simply buy the goods elsewhere and to claim damages for any expenses incurred in consequence of the seller's breach. However, the buyer cannot recover for loss of profits if the contract with the third party is saved. Otherwise, he or she would be placed in a better financial position than if the original seller had performed the contract. This would be inconsistent with the principles on which damages are based. If, on the other hand, the market value of the goods has increased or if it is not possible to save the contract with the third party, the buyer may recover any substantial damages including damages for loss of profit, which would be \$3,000. In any event, the award of damages should not exceed the buyer's actual loss.

⁵⁴³ The *Egyptian Civil Code*, art. 443(5); see also Faraj, *supra*, note 84, at 371-372.

⁵⁴⁴ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 70, para. 3; see also Vilus, *supra*, note 487, at 247.

The innocent party has the burden of proving all aspects of entitlement to damages.⁵⁴⁵ In calculating the loss of profit, an innocent party must demonstrate both the fact and the amount of the loss. Courts in contracting states are likely to dismiss claims for loss of profit if they are speculative. However, unless the uncertainty is of a very high degree, an innocent party's claim for loss of profit is likely to succeed.⁵⁴⁶ Under all of the laws considered in this study, courts have a large degree of discretion in determining whether an innocent party has suffered a loss of profit and, if so, in what amount.

[118] *The relevant time for assessing the amount of damages*

The exact amount of damages will depend on the point in time by reference to which the assessment of damages is made. Should the loss be assessed as at the time of breach, the time of avoidance, or the time of judgment? The choice is especially important in a fluctuating market. *The Convention* provides no answer to this question. The time and place of assessing damages may differ between (a) cases in which there has been a resale by the seller or a substitute purchase by the buyer (Article 75); and, (b) cases in which there has been no substitute transaction and damages are to be calculated by reference to the current price (Article 76).

As to cases covered by Article 74, it is vital to distinguish clearly between cases where there has been an actual breach, and cases where there has been an anticipatory breach. In the former, it can be assumed that damages are to be assessed by reference to the market price or other costs at the time of avoidance where the contract comes to an end as a result of the breach.⁵⁴⁷ Where there has been an anticipatory breach, the

⁵⁴⁵ Anderson, "Plunging the Depths of the Seller's Resale Remedy under the Uniform Commercial Code" (1985), 50 *J. of Air L. and Comm.* 411, at 438.

⁵⁴⁶ See Treitel, *Remedies*, *supra*, note 69, at 83, para. 107.

⁵⁴⁷ See Sutton, *Part 3*, *supra*, note 487, at 102.

time for the assessment of damages depends on the course of action taken by the innocent party. If that party accepts the breach and avoids the contract, assuming he or she is entitled to do so, the relevant time for assessment is the date of avoidance. If the repudiation is ignored, the damages will be assessed as from the date on which the defaulting party should have performed.

Under English law, the general rule is that damages are assessed by reference to the time of breach. This is clearly stated in sections 50(3) (with regard to the buyer's breach) and 51(3) (with respect to the seller's breach) of the English *Sale of Goods Act*. This rule is based on two assumptions: first, the innocent party knew of the breach as soon as it was committed and, second, knowing of the breach, he or she was in a position to take the necessary steps to mitigate any loss likely to flow from it.⁵⁴⁸

In the United States, the measure of damages in cases of non-delivery or repudiation is the difference between the contract price and the market price at the time the buyer learned of the breach.⁵⁴⁹ This rule is similar to the one applied in English law. A seller's damages in cases of a breach by the buyer are based on the difference between the market price at the time and place for tender and the unpaid contract price.⁵⁵⁰

⁵⁴⁸ See Treitel, *Contract*, *supra*, note 5, at 709.

⁵⁴⁹ The *UCC*, s. 2-713.

⁵⁵⁰ See *id.*, s. 2-708.

B. *The foreseeability test*

[119] *Foreseeability: The Convention*

One of the limitations on damages recoverable is foreseeability. The rationale of this principle is that the consequences of a breach may be far-reaching, and a line must be drawn beyond which damages are not recoverable. Under *The Convention*, "damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract."⁵⁵¹

How can it be determined whether the loss was one that the party in breach foresaw or ought to have foreseen at the time the contract was made? Do we employ the objective test of a reasonable person under the same circumstances?

In understanding the foreseeability test, one important fact should be kept in mind: it is essential to determine whether the party in breach foresaw (subjective) or ought to have foreseen (objective), at the time of contracting, the damages that would occur.⁵⁵² Thus, under *ULIS* and *The Convention*, the test of foreseeability may be satisfied even if the breaching party has not actually foreseen the result of the breach. This is similar to the position of English law, where foreseeability is of two kinds: one actual (knew) and the other presumed or imputed (ought to have known).⁵⁵³ For example, assume that the seller knew or ought to have known, at the time of the conclusion of the contract, that the buyer intended to resell the goods to a third party for a profit. In such an event, if the seller fails to deliver the goods, the buyer may recover the loss of profit on any sub-sale.⁵⁵⁴ Further, it is sufficient for the defaulting party to have foreseen

⁵⁵¹ *The Convention*, art. 74. In substance, the approach of *ULIS* is the same but its wording is different.

⁵⁵² See Vilus, *supra*, note 487, at 247.

⁵⁵³ See, for example, *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, at 539 (C.A.); see also Benjamin, *supra*, note 81, para. 1308; Schmitthoff, *Sale*, *supra*, note 252, at 175.

the nature of the aggrieved party's loss; it is not necessary to have predicted its extent.⁵⁵⁵

In considering whether the party in breach foresaw or ought to have foreseen the loss suffered by the aggrieved party, the following factors should be looked to by courts in contracting states: (a) the particularity of the trade; (b) the parties involved; (c) the breaching party's knowledge and experience (not only about his or her own business but about that of the aggrieved party); (d) the future use of the goods; and, (e) their particular nature.⁵⁵⁶

In order to be foreseeable, Article 74 of *The Convention* requires a loss to be "a possible consequence of the breach of contract." This means that in order to prove damages, the innocent party must establish that the breach has caused a non-trivial loss and that this loss was a possible consequence of the breach.

The term "possible" is broad enough to include most of the circumstances that might cause loss.⁵⁵⁷ This could result in a large number of claims for damages, there-

⁵⁵⁴ It should be mentioned, however, that the breaching party's actual or imputed knowledge may be satisfied from the circumstances surrounding the particular contract, as for example, when the buyer is known to be a dealer in the goods in question, from which it may be inferred that the seller contemplated the probability that the goods were to be sold. *Re R. and H. Hall Ltd. and W.H. Pim (Junior) and Co.'s Arbitration* (1928), 139 L.T. 50, All E.R. 763 (H.L.); *The Heron II*, [1969] 1 A.C. 350, at 403 and 416 (H.L.); see also *Victoria Laundry case id.*, at 536; *Fletcher v. Tayleur* (1855), 17 C.B. 21; *Saint Line Ltd. v. Richardsons Westgarth & Co. Ltd.*, [1940] 2 K.B. 99.

⁵⁵⁵ *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.*, [1978] Q.B. 791, at 804 and 813 (C.A.).

⁵⁵⁶ For example, goods to be resold for a profit differ from those to be used as spare parts for a machine. In the latter situation, the seller's failure to deliver might cause the buyer's factories to close. In this case, the seller is responsible for damages unless he or she did not know and could not have foreseen at the time of contracting that a "defect in the goods or a delay in delivery might cause the shutdown of the buyer's factory". Honnold *Uniform Law, supra*, note 41, at 410.

⁵⁵⁷ Farnsworth has reported that "although the use of possible consequence may seem at first to cast a wider net than the Restatement's 'probable result', the preceding clause ('in the light of the facts...') cuts this back at least to the scope of the Code language." Farnsworth, *supra*, note 496, at 253.

by increasing the parties' exposure to liability. Unlike in *The Convention*, the test of "possible" damages was expressly rejected in at least one English case.⁵⁵⁸ Presumably, therefore, "the literal words of Article 74 will have to be read down somewhat in order to prevent the breaching party from being saddled with excessive damage claims."⁵⁵⁹

[120] *Foreseeability: French law*

The principle of excluding recovery for unreasonable losses is a well-established rule in many legal systems.⁵⁶⁰ It is adopted in Article 1150 of the *French Civil Code*. That Article provides that "when the non-performance of the obligation is not due to the *dol* of the debtor [breaching party], he is liable only for such damages as were foreseen or as could have been foreseen at the time of the contract."⁵⁶¹

Under Article 1150, the test of foreseeability is subject to an exception; that is, even if it was not foreseeable at the time the contract was made, a loss will be taken into consideration if non-performance is due to a *dol* on the part of the defaulting party. *Dol* in this context need not imply fraud, but merely a willful breach of contract or a breach due to gross negligence. The defaulting party who is guilty of *dol* is liable in damages for all losses directly arising from the breach, whether foreseeable or not.

558 *The Heron II*, [1969] 1 A.C. 350. In the leading case of *Hadley v. Baxendale* (1854), 9 Ex. 341 (Exch.), reference was also made to the "probable result." But in some English case law, the word "loss" and "a possible consequence" have been used. See, for example, *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.*, [1978] Q.B. 791, at 804 (C.A.).

559 See Ziegel, *The Remedial*, *supra*, note 62, at 9-38.

560 See *Tunc's Commentary*, *supra*, note 35, at 92.

561 See also Nicholas *supra*, note 92, at 223; *Amos and Walton*, *supra*, note 92, at 185.

562 Art. 89 of *ULIS* provides that "in case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present

Unlike with *ULIS*,⁵⁶² no similar rule is provided in either English law⁵⁶³ or *The Convention*.⁵⁶⁴

[121] *Foreseeability: English law*

In English law, the general rule concerning foreseeability of damages was established in the leading case of *Hadley v. Baxendale*.⁵⁶⁵ According to this rule, two types of damages are recognized: general and special.⁵⁶⁶ General damages are assessed by the court for losses arising naturally from the breach, i.e. according to the ordinary course of events following the breach. Special damages, recognized in what is often called the second rule in the *Hadley* case, cover losses that do not arise naturally from the breach. These are only recoverable if the breaching party had actual knowledge of special circumstances, outside the ordinary course of events that resulted in additional loss.

Setting aside the question of fraud or *dol*, the principle of foreseeability has its origin in both English and French law. The basic test of foreseeability, as laid down in *Hadley v. Baxendale*,⁵⁶⁷ is whether the loss was within the reasonable contemplation of the parties. In that case, express reference was made to Articles 1149, 1150 and

law."

⁵⁶³ See Treitel, *Remedies*, *supra*, note 69, para. 81.

⁵⁶⁴ It was suggested by Norway that *The Convention* should contain provisions regulating the effect of fraud on damages. However, this suggestion was not acted upon. "Comments by Governments and International Organizations on the Draft Convention on International Sale of Goods" (1977), 8 *UNCITRAL Yearbook* at 109, add. 1, paras. 52-53.

⁵⁶⁵ (1854), 9 Ex. 341, at 354-355 (Exch.); see also *Worth v. Tyler*, [1974] Ch. 30, at 61; *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, at 539 (C.A.).

⁵⁶⁶ See Schmitthoff, *Sale*, *supra*, note 252, at 175-176.

⁵⁶⁷ (1854), 9 Ex. 341 (Exch.); see also Drobnič, *supra*, note 100, at 325.

1151 of the *French Civil Code*.⁵⁶⁸ Furthermore, a distinction was drawn between losses that may fairly and reasonably be considered to have arisen naturally and those additional losses that may fairly and reasonably be considered to have been in the contemplation of both parties at the time they made the contract. With regard to the latter, the application of the rule will depend upon the existence of any special circumstances, and whether these were made known to the party in default at the time the contract was made.⁵⁶⁹

Although reference was not made in *Hadley v. Baxendale*⁵⁷⁰ to "foreseeability," but rather to damages that were "in the contemplation of the parties," the rules of foreseeability were subsequently declared in a number of English cases and reformulated in modern language.⁵⁷¹ It was suggested in a recent case that the correct standard of foreseeability is not whether the loss was reasonably foreseeable by the parties but whether it should have been within their reasonable contemplation at the time of the contract, having regard to their actual knowledge at that time.⁵⁷² In that case, it was suggested that "foreseeable" and "within the contemplation" are different concepts and that the former, being more inclusive, should be restricted to torts cases. The test of foreseeability in English law, then, has become somewhat uncertain.⁵⁷³

Whichever test is used, it appears that (a) whether or not a particular loss is foreseeable is to be decided by the court on the basis of the actual and presumed knowledge of the parties;⁵⁷⁴ and, (b) the two tests are likely to lead to similar results in

⁵⁶⁸ See *id.*, at 181.

⁵⁶⁹ *The Heron II*, [1969] 1 A.C. 350, at 384-385.

⁵⁷⁰ (1854), 9 Ex. 341 (Exch.).

⁵⁷¹ For example, see *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, at 539 (C.A.).

⁵⁷² *The Heron II*, [1969] 1 A.C. 350 (H.L.).

⁵⁷³ See Treitel, *Remedies*, *supra*, note 69, at 60, para. 83.

practice. In *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.*,⁵⁷⁵ it was observed that it is difficult to draw a distinction between what a person "contemplates" and what he or she "foresees." Accordingly, as a matter of practice, no benefit may result from distinguishing between foreseeing the possibility of an event happening and contemplating the possibility of that event happening.

[122] *Foreseeability: English law compared to ULIS and The Convention*

The approach of English law, as discussed above, differs from that of *ULIS* and *The Convention* in three basic respects. First, under English law, general damages are recoverable, at least in theory, whether or not they are foreseeable. In *ULIS* and *The Convention*, by contrast, general damages are always subject to the foreseeability test. Second, as to special damages, the breaching party's actual knowledge of the circumstances leading to the loss is essential in English law,⁵⁷⁶ whereas this knowledge may be imputed in both *ULIS* and *The Convention*. And finally, in *The Heron II*,⁵⁷⁷ the test of "possible" damages adopted in *The Convention* was expressly rejected.

⁵⁷⁴ See Schmitthoff, *Sale, supra*, note 252, at 176; see also *Collins v. Howard*, [1949] 2 All E.R. 324 (C.A.).

⁵⁷⁵ [1978] Q.B. 791, at 802 (C.A.); in this case, it was suggested by Scarman L.J. at 807 that the difference between the two tests may be merely semantic, at least where the case is one in which the defendant is liable in both tort and contract; see also *André & Cie S.A. v. J. H. Ventol Ltd.*, [1952] 2 Lloyd's L. Rep. 282, 293; *Mehmet Dogan Bey v. G.G. Abdeni & Co. Ltd.*, [1951] 2 K.B. 405, at 411.

⁵⁷⁶ But there is some authority for the view that the mere communication to a party of the existence of special circumstances is not enough: there must be something to show that the contract was made on the terms that the defendant was to be liable for that loss. See *British Columbia, etc. Saw Mill Co. Ltd. v. Nettleship* (1868), L.R. 3 C.P. 499, at 509; *Horne v. Midland Railway Co.* (1873), L.R. 8 C.P. 131, at 141; see also *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, at 538 (C.A.). This view cannot be supported since it is quite unnecessary that the special circumstances be a term of the contract. See *The Heron II*, [1969] 1 A.C. 350, at 422 (H.L.). It is essential that such circumstances be disclosed in such a manner that both parties, or at least the defaulting party, contemplated the exceptional loss as a probable result of the breach.

⁵⁷⁷ See *ibid.*

Despite the above differences, it is fair to say that the assessment of damages in both the English *Sale of Goods Act*,⁵⁷⁸ and *ULIS* corresponds to the rules declared in *Hadley v. Baxendale*.⁵⁷⁹ This is also the case with *The Convention*, subject to two qualifications. The first, which has already been discussed,⁵⁸⁰ relates to the seller's claim in respect of consequential damages suffered as a result of the buyer's failure to pay the price. The second is that the scope of the foreseeability test is broader under *The Convention* than in English law. However, although the test of possible damages was expressly rejected in at least one English case, this difference is unlikely to have any practical effect. This is because the question of foreseeability has, in many cases, been regarded as a question of fact. Practitioners are advised to draft their international sales contracts to exclude or limit the seller's liability for consequential damages, whether foreseeable or not.

[123] *The foreseeability test: foreseeable by whom?*

The Convention refers to foreseeability by a reasonable person in the position of the breaching party.⁵⁸¹ This would suggest that if a reasonable person with knowledge of the special circumstances at the time the contract was concluded would have foreseen the loss, the party in breach would be liable in damages for that loss.⁵⁸² The breaching party is not obliged to foresee any extra loss that might result from special circumstances of which he or she does not and cannot be expected to know. Furthermore, if

⁵⁷⁸ See Benjamin, *supra*, note 81, para. 1306; Schmitthoff, *Sale, supra*, note 252, at 174.

⁵⁷⁹ (1854), 9 Ex. 341 (Exch.).

⁵⁸⁰ See [114] (with respect to a claim by the seller of consequential damages).

⁵⁸¹ For a criticism of this text, see "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* at 11, annex 1, para. 575. It has been noted, however, that the text produces an objective criterion for assessing damages. *Official Records, supra*, note 67, at 394, para. 21.

⁵⁸² See Sutton, *Part 3, supra*, note 487, at 102.

the loss results from some intervening act of the aggrieved party or a third party that the breaching party could not reasonably have foreseen as a consequence of the breach, the foreseeability test will not have been satisfied.

Under English law, the test of foreseeability requires the consequences of the breach to have been foreseeable by both parties⁵⁸³ or, in any case, by the party who later commits the breach.⁵⁸⁴ Reference is also made in French law to foreseeability by the defaulting party or a reasonable person in the same position as that party,⁵⁸⁵ although Article 1150 of the *French Civil Code* is by no means clear on this point.

[124] *Time of foreseeability*

The time by which the party in breach must have foreseen the loss is very important in applying the foreseeability test. It is stated expressly in *The Convention*, as well as in *ULIS*, that a loss must have been foreseeable at the time of the conclusion of the contract.⁵⁸⁶ Thus, later notice of an unusual risk will have no effect even if given before the actual breach. This is in line with English law.⁵⁸⁷

Under French law, foreseeability at the time of contracting is expressly made the criterion.⁵⁸⁸ But in cases of fraud, it is no defense that a particular loss was unfore-

⁵⁸³ See Treitel, *Remedies, supra*, note 69, at 64, para. 88.

⁵⁸⁴ *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, at 539 (C.A.).

⁵⁸⁵ See Treitel, *Remedies, supra*, note 69, at 64, para. 88.

⁵⁸⁶ *ULIS*, art. 86; *The Convention*, art. 74.

⁵⁸⁷ *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528 (C.A.); also *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co. Ltd.*, [1978] Q.B. 791 (C.A.); *Hadley v. Baxendale* (1854), 9 Ex. 341, 354 (Exch.); *The Heron II*, [1969] 1 A.C. 350 (H.L.). See also Treitel, *An Outline, supra*, note 81, at 342 and *Remedies, supra*, note 69, at 64, para. 89; also Beale, *supra*, note 261, at 185, who criticizes this rule.

⁵⁸⁸ The *French Civil Code*, art. 1150.

seeable.⁵⁸⁹

C. Mitigation of Damages

[125] General principles

The Convention imposes upon the innocent party a duty to mitigate any loss, including loss of profit, resulting from the breach.⁵⁹⁰ This includes a duty to refrain from taking any steps that might increase the loss.⁵⁹¹ Failure to take such steps will result in damages being reduced by the amount by which the loss would have been mitigated, provided the breaching party is able to prove that an opportunity to mitigate existed but was not taken.⁵⁹²

The duty to mitigate has both a negative and a positive aspect. Not only must the innocent party take reasonable steps to reduce the loss, that party must also refrain from taking unreasonable steps to increase the loss. For example, the buyer whose seller fails to make delivery must go into the market at the relevant time to buy substitute goods. The duty arises on breach in the sense that this marks the time from which the innocent party must act reasonably to reduce his or her loss. It may, however, be reasonable to defer mitigation until there has been a proper opportunity to discover the

⁵⁸⁹ See [120]; see also Nicholas, *supra*, note 92, at 223 ff; *Amos and Walton*, *supra*, note 92, at 185.

⁵⁹⁰ *The Convention*, art. 77. For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, paras. 189 ff, and annex 1, art. 88; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, annex 1, art. 59; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, para. 28, art. 73; *Official Records*, *supra*, note 67, at 133, 396 ff, 163, art. 70 and at 221, para. 36.

⁵⁹¹ See Pitch, *supra*, note 528, at 123.

⁵⁹² *Darbishire v. Warren*, [1963] 1 W.L.R. 1067, at 1075 (C.A.); see also Beale, *supra*, note 261, at 187; Schmitthoff, *Sale*, *supra*, note 252, at 186; Treitel, *Remedies*, *supra*, note 69, para. 100.

best way of accomplishing it.

The principle of mitigation imposes upon the innocent party a duty to mitigate his or her loss even though that party is under no actual obligation to do so. Because the doctrine of mitigation does not impose any legal liability upon the innocent party,⁵⁹³ and because the defaulting party is not entitled to force the other side to mitigate, the term "duty," in this context, has been described as loose and inaccurate.⁵⁹⁴

[126] *Mitigation of damages: domestic laws*

The principle that damages should be mitigated is widely recognized.⁵⁹⁵ It is well established in Common law jurisdictions⁵⁹⁶ and has been adopted in *ULIS* and *The Convention*. The principle of mitigation is stated in section 22(1) of the English *Sale of Goods Act*, which states that a loss is to be considered a natural consequence of the breach unless the innocent party could have mitigated by taking reasonable steps.

Although in French law the duty to mitigate is not clearly recognized,⁵⁹⁷ any saving of expense would be relevant in determining the loss suffered under Article 1149 of the *French Civil Code*.⁵⁹⁸ Furthermore, there must be a causal link between the aggrieved party's loss and the other party's fault. This means that any part of the loss that

⁵⁹³ *The Solholt*, [1981] 2 Lloyd's Rep. 574, at 580; [1983] 1 Lloyd's Rep. 605 (C.A.).

⁵⁹⁴ See Lord Pearson in *Darbishire v. Warren*, [1963] 1 W.L.R. 1067 (C.A.); see also Goode, *supra*, note 259, at 124; Treitel *Contract*, *supra*, note 5, at 736.

⁵⁹⁵ See Drobnig, *supra*, note 100, at 326.

⁵⁹⁶ See Treitel, *An Outline*, *supra*, note 81, at 345. The principle of mitigation was established in the House of Lords decision of *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673 (H.L.). See also *White and Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413 (H.L.Sc.) (illustrating a limitation on the mitigation principle).

⁵⁹⁷ See Von Mehren and Gordley, *supra*, note 352, at 1115.

⁵⁹⁸ See Treitel, *Remedies*, *supra*, note 69, at 87, para. 104.

is the fault of the aggrieved party will be deducted from the amount of damages otherwise recoverable. It is worth mentioning here that French courts have great discretion in assessing damages.

The principle of mitigation is also known in Egyptian law. The last sentence of Article 221 of the *Egyptian Civil Code* states that damages include the aggrieved party's loss, including loss of profit, provided that damages are a natural consequence of the non-performance or late performance. Damages are considered to be a natural consequence only when the aggrieved party cannot avoid them by taking reasonable measures. Thus, Egyptian law adopts the "natural consequence" criterion in the awarding of damages; it requires a causal link between the aggrieved party's loss and the other party's breach.⁵⁹⁹

In short, the principle, as adopted in both *ULIS* and *The Convention*, is derived from English law, implicitly adopted in Egyptian law, and recognized in some of its aspects in French law.

[127] *The requirement that mitigation measures be reasonable*

The principle of mitigation requires the innocent party to act reasonably. The duty to mitigate does not extend beyond one's own loss. The question of what steps are reasonable is generally one of fact. Courts in contracting states might employ the standard of a reasonable person involved in the trade concerned.⁶⁰⁰ In determining the reasonableness of the measures to be taken, English cases, from which the principle is derived, give some guidance as to whether or not reasonable measures have been taken.

⁵⁹⁹ Murkus, *Civil liability in Arab Civil Codes* (Cairo, 1971), at 476 ff (in Arabic).

⁶⁰⁰ Canadian courts have adopted a number of guidelines that require the aggrieved party to refrain from doing such acts by way of mitigation. See for example the Nova Scotia Court of Appeal in *Canso Chemicals Ltd. v. Canadian Westinghouse Co. Ltd.* (1974), 54 D.L.R. (3d) 517 (N.S.C.A.).

The duty to mitigate might require the aggrieved party to make a substitute transaction.⁶⁰¹ It is not necessary to take any step that a reasonable person would not ordinarily take in the course of business,⁶⁰² or to embark upon complicated litigation⁶⁰³ in order to mitigate the loss. Nor is it necessary to spend money to engage in a risky venture in order to minimize the damage,⁶⁰⁴ nor to buy piecemeal in small quantities,⁶⁰⁵ nor to sue a sub-purchaser if the action, though likely to succeed in law, would ruin one's commercial reputation.⁶⁰⁶

It is clear that the mitigation principle can present the innocent party with a difficult decision. It may force a decision as to whether to enter into a substitute transaction before the effect of external considerations is known, such as whether the market will change or whether the defaulting party will perform at all. For this reason, presumably, the burden of proving that the innocent party has failed to mitigate should rest upon the defaulting party since that is the party who may claim a reduction in the damages. This rule is followed in English law.⁶⁰⁷ The innocent party can avoid the contract if the breach is fundamental, or, alternatively, can seek specific performance or any other available remedy.

⁶⁰¹ *Kwei Tek Chao v. British Traders & Shippers Ltd.*, [1954] 2 Q.B. 459, at 489.

⁶⁰² *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673, at 689 (H.L.); see also *Dunkirk Colliery Co. v. Lever* (1878), 9 Ch.D. 20, at 25 (C.A.).

⁶⁰³ *Pilkington v. Wood*, [1953] Ch. 770.

⁶⁰⁴ *Jewelowski v. Propp*, [1944] 1 K.B. 510.

⁶⁰⁵ *Garnac Grain Co. Inc. v. H.M.F. Faure & Fairclough Ltd.*, [1965] 2 Lloyd's Rep. 229, at 245 (H.L.).

⁶⁰⁶ *James Finlay and Co. Ltd. v. N.V. Kwik Hoo Tong Handel Maatschappij*, [1929] 1 K.B. 400 (C.A.).

⁶⁰⁷ *Payzu Ltd. v. Saunders*, [1919] 2 K.B. 581 (C.A.); *Garnac Grain Co. Inc. v. H.M.F. Faure & Fairclough*, [1968] A.C. 1130 (H.L.).

[128] *Is there a duty to mitigate in the event of anticipatory breach?*

Where there is an anticipatory breach, the innocent party is not obliged to accept it but may instead keep the contract alive by continuing to press for performance. If the repudiation is accepted and the contract is treated as immediately discharged, a duty to mitigate arises, e.g. buying in a rising market⁶⁰⁸ or selling in a falling one.⁶⁰⁹ The innocent party's continued performance after the breaching party has repudiated creates a duty to mitigate that exists until the time for performance is due.⁶¹⁰ Conversely, if the anticipatory repudiation is not accepted, the innocent party is under no obligation to mitigate unless the breach actually occurs.⁶¹¹ It is submitted that a party claiming damages under an international sales contract should do everything possible to mitigate his or her loss until the dispute is resolved.

The issue of whether the aggrieved party is obliged, in certain circumstances, to accept the other party's anticipatory breach has not been answered definitively in *The Convention*. If there is no obligation to accept the repudiation, an aggrieved party who seeks damages is not entitled to require performance. The converse is also true; that is, if there is no obligation to accept the repudiation, the innocent party is entitled to continue performance of his or her part of the contract and to incur further costs. Subsequently, resort may also be had to any remedy for breach, including specific performance. The issue is controversial, and domestic legal systems have reached differ-

⁶⁰⁸ *Melachrino v. Nickoll and Knight*, [1920] 1 K.B. 693, at 697; *Garnac Grain case* *ibid.*

⁶⁰⁹ *Roth and Co. v. Tayson, Townsend and Co.* (1895), 73 L.T. 268; *Sudan Import and Export Co. (Khartoum) Ltd. v. Société Générale de Compensation*, [1958] 1 Lloyd's Rep. 310, at 316 (C.A.)

⁶¹⁰ See Benjamin, *supra*, note 81, paras. 1373 (on the buyer's non-acceptance of the seller's repudiation) and 1338 (on the seller's non-acceptance of the buyer's repudiation).

⁶¹¹ See Benjamin, *ibid.*

ent conclusions on it.⁶¹²

The general rule that the innocent party is entitled to continue performance if possible and, at least in some circumstances, to recover avoidable expenditures incurred after learning of the repudiation, was upheld in a few English decisions.⁶¹³ However, it seems that the aggrieved party's right to ignore a repudiation and to carry on with performance is controversial in English law; and, as suggested,⁶¹⁴ it can be said that the application of the rule to the sale of goods is doubtful. In contrast, the *UCC* states the circumstances⁶¹⁵ in which, "in the exercise of reasonable commercial judgment" and "for the purpose of avoiding loss," the seller may, *inter alia*, complete the manufacture of the goods or proceed in any other reasonable manner.⁶¹⁶

As to *The Convention*, some commentators have argued that the mitigation principle imposes an additional limitation on the right to require performance.⁶¹⁷ This is

⁶¹² For a discussion of the contrary approaches of American and Anglo-Canadian laws to the issue, see OLRC, *Report on Sales*, at 537 ff. The report criticized the language of s. 2-610(a) of the *UCC*. The section states that when one party repudiates, "the aggrieved party may for a commercially reasonable time await performance by the repudiating party." The report at 538 recommended a new provision imposing an obligation to mitigate. The principle was adopted in s. 9.6(2) of *DUSA*.

⁶¹³ For example, *White and Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413 (H.L.Sc.); *Anglo-African Shipping Co. of New York Inc. v. Mortner (J.) Ltd.* [1962] 1 Lloyd's L. Rep. 610 (C.A.); *The Odenfeld*, [1978] 2 Lloyd's Rep. 357.

⁶¹⁴ See Benjamin, *supra*, note 81, para. 1315; Treitel, *Contract*, *supra*, note 5, at 760 ff.

⁶¹⁵ It should be mentioned that this rule applies to any breach under the *UCC*, s. 2-703, and not just an anticipatory breach.

⁶¹⁶ See the *UCC*, s. 2-704(2); a similar rule is adopted in *DUSA*, s. 9.6(2). Cf. Ulen, "The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies" (1984), 83 *Mich. L. Rev.* 341, at 349 (noting that the duty to mitigate does not apply in an action for specific performance under United States law and concluding that a rule favoring specific performance nevertheless would not inefficiently induce promises to increase their loss).

⁶¹⁷ See Honnold, *Uniform Law*, *supra*, note 41, at 302 and 418 ff. Honnold argues at 419 that such a duty to mitigate would prevent injustice and waste in a case where, for example, shortly after placing an order the buyer notifies the seller that he or she will not be able to use the goods, but the seller nevertheless contin-

doubtful, however, for the following two reasons.⁶¹⁸ First, Article 77 specifies the consequences for failure to mitigate one's loss: "The breaching party may claim a reduction in damages." This suggests that the mitigation principle applies only when the aggrieved party claims damages, not when he or she seeks specific performance. Moreover, the clear intention of the drafters was that Article 77 should not limit the right to performance in Articles 46 and 62. The 1978 Draft Commentary expressly states that Article 77 does not affect the seller's claim for payment of the price.⁶¹⁹ At the Conference, there was a proposal to amend Article 77 to provide that a failure to mitigate would allow the breaching party not only to have any damage claim reduced but also to claim "a corresponding modification or adjustment of any other remedy."⁶²⁰ This proposal was rejected on the ground that it would limit the aggrieved party's right to performance.⁶²¹ Accordingly, an aggrieved party under *The Convention* is not bound to accept the other party's repudiation.⁶²²

ues production of the goods and eventually sues the buyer for the price.

⁶¹⁸ See generally, Farnsworth, *supra*, note 496, at 249 (concluding that Article 77 does not apply to an action for specific performance); Ziegel, *The Remedial, supra*, note 62, at 9-41 ff (noting significant "hurdles" to application of Article 77 in an action for specific relief).

⁶¹⁹ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 73, para. 3.

⁶²⁰ *Official Records, supra*, note 67, at 396. The issue was discussed by the Working Group at an early stage of drafting. See "Report of the W.G." (1974), 5 *UNCITRAL Yearbook* at 32.

⁶²¹ See *Official Records, id.*, at 393.

⁶²² See *id.*, at 397, paras. 64-65 (Ziegel of Canada).

[129] *Effects of the doctrine of mitigation*

If the aggrieved party fails to mitigate, the party in breach may claim a reduction of damages in the amount by which the loss should have been mitigated.⁶²³ Conversely, if the steps taken to mitigate are reasonable, the innocent party is entitled to recover any expenses incurred in taking such steps; otherwise, damages will be assessed on the assumption that the loss is no greater than it would have been had that party taken reasonable measures in mitigation. For example, where, in a rising market, the seller fails to deliver and the buyer fails to buy substitute goods, the buyer cannot recover damages for any further loss that occurs because the market continues to rise. In assessing the amount of damages, the benefits received by the aggrieved party have to be taken into consideration. Courts in contracting states have to decide what reasonable measures the aggrieved party could have taken in order to mitigate damages. In English law, too, if the aggrieved party fails to take reasonable steps to minimize losses, there can be no recovery in respect of any extra loss that results from that failure.⁶²⁴

One other important point needs to be made. The aggrieved party may recover any reasonable expenses incurred during an attempt to mitigate damages. Such expenses are recoverable under English law even if they prove to be greater than the loss thereby avoided.⁶²⁵ *ULIS* and *The Convention* contain no provision to that effect.

⁶²³ *The Convention*, art. 77.

⁶²⁴ *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673, at 689 (H.L.).

⁶²⁵ *Lloyds & Scottish Finance Ltd. v. Modern Cars and Caravans (Kingston) Ltd.*, [1966] 1 Q.B. 764, at 782; *Esso Petroleum Co. Ltd. v. Mardon*, [1976] Q.B. 801 (C.A.). It should be pointed out that if the plaintiff acts unreasonably in attempting to mitigate there can be no recovery in respect of any extra loss suffered as a result. See *The Borag*, [1981] 1 W.L.R. 274 (C.A.).

Section II

Damages in particular situations

[130] *Introduction*

Under *ULIS* and *The Convention*, an aggrieved party who has a right to avoid the contract has the option of choosing either avoidance or a remedy other than avoidance. For instance, a buyer who has suffered a fundamental breach may either (a) avoid and recover damages based on either the market price or substitute transaction formula; or, (b) go forward with the transaction.

The Convention, after providing a general rule for assessing damages, distinguishes between (a) those cases in which the seller has resold the goods or the buyer has bought replacement goods (as the case may be); and, (b) those cases in which the aggrieved party has entered into no such substitute transaction. Although *ULIS* does not contain a general rule for measuring damages, it makes the same distinction in cases of avoidance. These two situations are the subject of the following discussion.

A. Measurement of damages through substitute transaction

1. *Requirements*

[131] *Introduction*

If a buyer unjustifiably rejects contract goods, fails to pay the price, or is otherwise in breach prior to final acceptance of the goods, Article 75 of *The Convention* allows the seller to resell the goods.⁶²⁶ Likewise, if the seller fails to make delivery or if the buy-

⁶²⁶ Art. 75 is similar to art. 85 of *ULIS*. For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, paras. 177 ff, and annex 1 (art. 85); "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, annex 1, art. 58; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, annex 1, art. 56; "Report of

er rightfully rejects, the buyer is entitled to purchase goods in substitution for those wrongfully withheld or improperly tendered. In both cases, an avoiding party is permitted to recover damages in the amount of the difference between the contract price and the price in a reasonable substitute transaction. The aggrieved party can claim further damages under Article 74. But one point should be kept in mind: the purpose of the rule is compensation, no more and no less, and the aggrieved party will not be allowed to use the rule to better his or her position by, for example, purchasing goods superior to those promised in the breached contract.

The English *Sale of Goods Act* has no provision equivalent to those provided in *ULIS* and *The Convention* regarding the measurement of damages where there has been a substitute transaction. Although the resale or cover provisions in *ULIS* and *The Convention* have no counterpart in the *French Civil Code*, damages, in cases of avoidance, are assessed by measuring the difference between the contract price and the price that could be obtained on resale to a third party. Provisions comparable to Article 75 of *The Convention* are found in the *UCC* sections 2-706 (seller's resale damages) and 2-712 (buyer's cover damages), both of which also allow recovery of consequential and/or incidental damages.⁶²⁷

The following discussion reveals significant differences between the *UCC* and *The Convention*. Article 75 of *The Convention* imposes no requirement that the aggrieved seller notify the buyer of an intention to resell. In contrast, notice of intention to resell is almost always a prerequisite to resale under the *UCC*.⁶²⁸ However, Article 75 is in

UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, paras. 480 ff; "Report on UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11, para. 28, art. 71; *Official Records, supra*, note 67, at 132 (art. 71), 394, paras. 24 ff, 163, art. 71 and 221, para. 37.

⁶²⁷ OLRC, *Report on Sales*, at 408 ff and 498-499, recommended a similar provision and adopted one in section 9.10 for the seller's right to resell and for the buyer's procurement of substitute goods in s. 9.16(1)(2).

⁶²⁸ The *UCC*, s. 206(3) (notice of private sale) and s. 2-706(4)(b) (notice of public resale except where the goods "are perishable or threaten to decline in value

agreement with section 2-712 of the *UCC*, where there is no requirement that the aggrieved buyer notify the seller of an intention to cover.

[132] *Substitute transaction: a condition precedent for a claim under Article 75*

There must be an actual resale by the seller or repurchase by the buyer, as the case may be, for Article 75 to be applicable. The rule, it is submitted, is applicable only if the buyer has not finally accepted the goods.⁶²⁹ Upon breach by the buyer, the seller is entitled to go into the market and resell the goods and recover the difference between the contract price and the resale price. Similarly, after a seller's breach, the rule allows the buyer to go immediately into the market and make a purchase in substitution for the goods involved in the breached contract. For example, if the buyer fails to pay the contract price of \$15,000 and the seller resells the goods for \$12,000, the seller's recovery in damages would be \$3,000. If the seller has incurred any additional expenses, such as the cost of advertising the goods for resale, such expenses may be recovered, as long as they were reasonably incurred. These expenses are referred to in some domestic laws as "incidental damages."⁶³⁰ It must be noted, however, that if an aggrieved party has made a substitute transaction under Article 75 he or she may not proceed on the basis of the current price formula under Article 76.

Like its counterpart in *The Convention*, the cover remedy in the *UCC* is available only where the buyer has actually made a substitute purchase. American case law provides some guidance as to whether or not the buyer has done so. It has been held that

speedily."

⁶²⁹ Thus, in an American case involving the sale of a furnace, the court rejected the buyer's claim to cover damages because he notified the seller only that there were problems with the furnace but did not revoke his acceptance of it in accordance with the normal procedure under s. 2-608 of the *UCC*. See *Boysen v. Antioch Sheet Metal Inc.*, 16 Ill App. 331 N.E.2d 69; 14 U.C.C. Rep. Serv. (Callaghan) 120 (Ill App. Ct. 1974).

⁶³⁰ For example, the *UCC*, s. 2-206 as qualified by s. 2-710.

the cover remedy is not mandatory where there is no evidence of a substitute purchase.⁶³¹ Nor is the remedy permitted to be used to buy better quality goods than the ones contracted for.⁶³² However, it has been held that cover may take a variety of forms, including manufacture of the substitute goods by the buyer.⁶³³ Under the *UCC*,⁶³⁴ whether or not a buyer has actually covered is a question of fact. This is arguably the case under *The Convention* as well.

For the seller's resale remedy, an actual resale of the goods is necessary. If literally construed, Article 75 of *The Convention* applies only to the sale of goods that have been identified with the contract at the time of the buyer's breach. Otherwise, Article 76 would be applicable. Thus, if the seller has made several sales of the same type of goods, the remedy is not applicable unless that seller resells the goods after first identifying them with the breached contract at the time of the buyer's breach. Section 706(2) of the *UCC* applies to goods identified with the contract after the breach.⁶³⁵ As with the seller, where the buyer continues to purchase similar or identical goods from various sources for use either as components in a manufacturing process or for resale, the buyer must identify a particular purchase as being "in substitution." In this case, it may be difficult for the seller to refute the buyer's contention that a particular purchase was "in substitution." However, if the buyer is an end user of goods, such as a consumer purchasing an automobile or a merchant purchasing a machine, it is usually easy to

⁶³¹ *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285; 21 U.C.C. Serv. Rep. (Callaghan) 783 (8th Cir. 1977).

⁶³² *Martella v. Woods*, 715 F.2d 410; 36 U.C.C. Serv. Rep. (Callaghan) 1200 (8th Cir. 1983).

⁶³³ *Dura-Wood Treating Co. v. Century Forset Industries Inc.*, 675 F.2d 745; 33 U.C.C. Serv. Rep. (Callaghan) 1201 (5th Cir. 1982).

⁶³⁴ *Bigelow-Sanford, Inc. v. Gunny Corp.*, 649 F.2d 1060; 31 U.C.C. Serv. Rep. (Callaghan) 968 (5th Cir. 1981).

⁶³⁵ The *UCC*, s. 706(2) (general rules on conducting the resale); the same approach is followed in *DUSA*, s. 9.10(4).

identify a true substitute purchase.

[133] *Making the substitute transaction in a reasonable manner*

In order for a repurchase or resale to meet the requirements of Article 75, the party claiming damages must act in a reasonable manner. *The Convention* provides no guidance as to how this requirement may be met. The 1978 Draft Commentary, however, states that in order for a substitute transaction to be made in a reasonable manner, it must be made in a way likely to produce a resale at the highest possible price or a cover purchase at the lowest possible price.⁶³⁶ It is expected that the expression "in a reasonable manner" will cause uncertainty. However, it may be described as the manner in which a prudent businessperson would act in similar circumstances.⁶³⁷

By stipulating only that the substitute transaction should be conducted in "a reasonable manner," Article 75 allows the courts in contracting states considerable latitude. Sections 2-706 (seller's resale damages) and 2-712 (buyer's cover damages) of the *UCC* are also couched in terms of good faith⁶³⁸ and reasonableness.⁶³⁹ This shows that, here too, courts in contracting states are to be the ultimate arbiters of the reasonableness of substitute transactions, having regard to the facts of each case.

⁶³⁶ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 71, para. 4; see also Vilus, *supra*, note 487, at 248.

⁶³⁷ See Sutton, *Part 3*, *supra*, note 487, at 103.

⁶³⁸ Article 75 of *The Convention* does not specifically require that the substitute purchase or sale be made in good faith. Contrast this with the *UCC*, ss. 2-706(1) and 2-712(1). The difference is probably not significant, given the general rule in Article 7(1) that *The Convention* be interpreted in a manner that promotes "the observance of good faith in international trade."

⁶³⁹ It was held in one American case that the provision "requires that every aspect of the resale including the method, manner, time, place, and terms must be commercially reasonable." *McMillan v. Meuser Material & Equip. Co.*, 260 Ark. 422, 424; 541 S.W. 2d. 911, 913; 20 U.C.C. Rep. Serv. (Callaghan) 110, 112 (1976).

[134] *Making the substitute transaction within a reasonable time*

The time within which buyers and sellers are allowed to avoid the contract has been discussed already.⁶⁴⁰ Under *The Convention*, when the right to a substitute purchase or resale arises, it should be exercised within a reasonable time after avoidance. *The Convention* offers no guidance as to what constitutes a "reasonable time"; presumably, this depends upon the facts of each case.⁶⁴¹ It is submitted that the reasonable time for effecting the substitute transaction begins to run from the date of the defaulting party's breach. In general, the innocent party is allowed a reasonable period of time following the breach to assess his or her situation and determine the best course of action.

Unreasonable delay by the innocent party puts the other party in an uncertain position, especially when the market conditions for the goods are unstable.⁶⁴² For this reason, it seems likely that an aggrieved buyer will be allowed a broader latitude for delay in a stable or declining market than in a rapidly rising one. Likewise, an aggrieved seller will be allowed more time to resell goods whose price is stable or rising. This is especially true when the innocent party is regularly engaged in buying or reselling goods of the same kind and there is no clear link between a post-breach purchase or sale by the innocent party and the contract that has been breached.⁶⁴³

⁶⁴⁰ See [91] and [92] respectively.

⁶⁴¹ See comment 5 to s. 2-706 (What is a reasonable time depends upon the nature of the goods, the conditions of the market and other circumstances of the case; its length cannot be measured by any legal yardstick). See also comment 2 to section 2-712 (the buyer must cover without unreasonable delay). This is the same as *DUSA*, ss. 9.10(1) (seller's right to resell) and 9.16(1) (buyer's procurement of substitute goods).

⁶⁴² See Vilus, *supra*, note 487, at 249-250.

⁶⁴³ See Ziegler, *The Remedial*, *supra*, note 62, at 9-40.

[135] *Is the making of a substitute transaction mandatory or optional?*

Under *The Convention*, neither an aggrieved buyer nor an aggrieved seller is obliged to make a substitute transaction and a failure to do so is not a bar to other remedies. However, an aggrieved party who has not made a substitute transaction may always base an action for general damages on the market price formula of Article 76.⁶⁴⁴ The only sanction likely to result from failing to comply with the requirements just discussed is to being barred from relying on the substitute transaction for assessing damages.⁶⁴⁵ In fact, an aggrieved party is always free to choose between the various remedies available under *The Convention*. But it should be remembered that the resale or repurchase formula under Article 75 of *The Convention* provides a more exact measure of compensation than is normally available through the market price formula under Article 76. Moreover, Article 75 relieves an avoiding party of the difficulties often inherent in proving market price at a particular time and place. To proceed successfully under Article 75, an aggrieved party need only introduce evidence of the price under the breached contract, the resale or repurchase price, and his or her compliance with the Article's requirements.

The approach of *ULIS* is the same as that of *The Convention* except in the two situations described in Articles 25 and 61 of *ULIS*. (These are discussed in greater detail in paragraphs [170] and [171]). In these two situations, the seller is bound to resell and the buyer is bound to cover. If such a substitute transaction takes place the contract is *ipso facto* avoided. These provisions have no counterpart in *The Conven-*

tion and one may conclude, without ignoring these provisions, that resale or cover is a right, but not an obligation, of an aggrieved party.

2. Effects of the making of a substitute transaction

[136] Measurement of damages where there has been a substitute transaction

Once a party has made a substitute transaction in conformity with the requirements of Article 75, he or she is entitled to recover damages equal to the difference between the contract price and the price in the substitute transaction. In addition, that party is entitled to recover any further damages recoverable under Article 74. The calculation of damages under Article 75 can be expressed by the following formula:

$$\begin{aligned} \text{total damages} &= \text{price in the substitute transaction} - \text{contract price} \\ &+ \text{any further expenditures} \end{aligned}$$

In practice, the application of the formula will be easy. Courts in contracting states should take two steps: first, they should determine the difference between the substitute transaction price and the contract price; and second, the damage award should be increased by any further damages recoverable under Article 74.

To illustrate, assume that the price of the goods in the breached contract was \$3,000 and that the buyer would have resold them for \$3,800. Ignoring transaction costs, the buyer would have realized a profit of \$800. If the buyer goes into the market and reasonably makes a substitute purchase for \$3,300 and honours the resale contract, that buyer will be able to recover general damages of \$300. If no substitute transaction had been made because the substitute goods were not reasonably available, Article 74 would have allowed recovery of \$800 as damages. However, if a substitute purchase was reasonably available to the buyer and he or she refused to cover, recovery would

be denied under Article 75. It would be restricted to the market formula under Article 76.

The formula discussed above does not provide for any adjustment if expenses are saved as a result of the breach. This differs from the *UCC*, sections 2-706(1) and 2-712(2), where the aggrieved party is entitled to recover the difference between the cost of cover or resale and the contract price *less expenses, if any, saved in consequence of the breach*. The purpose of this adjustment is to avoid giving a windfall to the aggrieved party. A similar result could be reached under *The Convention*, however, by construing the phrase "price in the substitute transaction" in Article 75 to include such an adjustment. Equitable considerations demand this construction, otherwise *The Convention's* formula would place the aggrieved party in a better position than he or she would have been in had the contract been performed.

Suppose, for example, that the buyer contracts to purchase goods for \$1000 plus shipping expenses of \$300. After the seller's breach, the buyer repurchases for \$1,500. As the goods in the first contract were not delivered, the \$300 deduction should be made because the buyer is no longer obligated to pay that amount, the expense being excused and thus saved in consequences of the seller's breach. Furthermore, transportation and other similar expenses associated with the substitute transaction would constitute losses suffered as a result of the breach and would thus be recoverable under Article 74.

[137] *Failure to properly complete a substitute transaction*

What is the consequence if the resale or recovery is not made in a reasonable manner or within a reasonable time after the contract is avoided? *The Convention's* drafting history suggests that damages, in such cases, would be calculated as though no substitute transaction had taken place.⁶⁴⁶ Damages would be measured according to the

⁶⁴⁶ See *The 1978 Draft commentary, supra*, note 67, comment to art. 71, para. 6.

current price formula or, if applicable, the general rule on damages. However, to avoid overcompensating the innocent party, such a substitute transaction should be deemed to establish an upper limit on the amount of damages recoverable under Article 76, even though the text of *The Convention* does not mandate this result.⁶⁴⁷

In all these cases, courts in contracting states should remember one important fact. Nothing precludes the aggrieved party from claiming damages under Article 74 when the requirements of that provision are satisfied. There is no reason to suppose that an innocent party who makes an unsuccessful attempt to comply with the substitute transaction requirements completely loses the right to recover damages.⁶⁴⁸

[138] *The relationship between the substitute transaction
formula and the current price formula*

An aggrieved party who has properly made a substitute transaction may base an action for damages on the formula set out in Article 75. But is a general damages claim limited to Article 75 or may the aggrieved party elect instead to base it on the market price formula under Article 76, if that would produce a greater recovery? The latter would prove tempting whenever the seller resold for more than the current price or the buyer repurchased for less than the current price.

However, Article 76 clearly states that recovery based on the current price is only available if the aggrieved party "has not made a purchase or resale under Article 75."⁶⁴⁹ The reason for this is obvious. The principal objective of damages is to put the aggrieved party in the same position as if the other party had fully performed. Accordingly, if the requirements of the substitute transaction test are met, that test is

⁶⁴⁷ *Ibid.*

⁶⁴⁸ See Honnold, *Uniform Law*, *supra*, note 41, at 416.

⁶⁴⁹ *The Convention*, art. 76; also "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* at 11, annex 1, para. 472.

to be employed unless this would be inconsistent with the principal objective of damages. Courts appear to have no discretion in the matter.

The substitute transaction formula in *ULIS* and *The Convention* is superior to that of the *UCC* in that the latter leaves unresolved the issue of whether a buyer or a seller is bound by an election to cover or resell.⁶⁵⁰ There is, however, strong evidence that an aggrieved buyer or seller who resells or covers would not be permitted to claim market price damages more generous than those produced by the substitute transaction formula. Article 76(1) of *The Convention* resolves this issue by providing that an aggrieved party may claim market price damages only if no substitute purchase or sale has been made under Article 75.

The more difficult question is how to calculate damages in situations where an aggrieved buyer purchases inferior goods as a substitute when similar goods were available, or where the proceeds of the resale are less than the current price. In such cases, it is submitted that the buyer has failed to act in a reasonable manner and would be hard pressed to argue that the substitute transaction was a true substitute for the bargain struck in the contract. If this is correct, the difference between the contract price and current price may be claimed, but damages based on the substitute transaction formula may not.

⁶⁵⁰ See Ziegel, *The Remedial*, *supra*, note 62, at 9-40; see also OLRC, *Report on Sales*, at 408 ff, 498 ff and 523. The Commission reported that the issue is not settled in s. 2-706 of the *UCC* and that the commentators are divided. The report recommended a general provision to the effect that where a seller has exercised the right of resale, that seller should be bound by the results of the resale in claiming damages. The report recommended a departure from the market rule and the adoption of a more concrete rule based on the *UCC*, s. 2-706 and s. 712 respectively. This was implemented by ss. 9.16 of *DUSA*, which confers on the buyer the right to purchase; see also s. 9.10 of the same Act.

[139] *Loss of profit under the substitute transaction formula*

Neither *ULIS* nor *The Convention* defines the term "profit" nor provides any indication as to when the aggrieved party is deemed to have lost or gained a profit. Again, it may be assumed that "profit" means the net profits that the seller or buyer would have gained had the contract been performed. In practice, one of the parties may suffer additional losses, including loss of profit, in a variety of situations. For example, where a seller has wrongfully failed to deliver goods that the buyer has subsold at a profit, the resale price may be taken into consideration in assessing the buyer's damages for loss of profit. It must be pointed out that the aggrieved party cannot combine a claim for the difference between the contract price and resale price with a claim for the whole net profit. If both tests are satisfied, that party has the right to resort to one of them but not both.

Can the innocent party keep any financial gain resulting from the substitute transaction? It is not clear whether Article 75 allows an aggrieved party to retain any profit made on the substitute transaction.⁶⁵¹ However, it is reasonable to suggest that if the resale price exceeds the price of the breached contract or if the repurchase price is less than that price (as the case may be) the aggrieved party may not retain that profit and is accountable to the other party for it. To allow recovery of the additional damages, while retaining the profit, would place that party in a better position than he or she would have been in had the contract been performed.

In English law, a breaching seller is only liable for loss of resale profits if he or she knew or ought to have known⁶⁵² that the goods were required for resale.⁶⁵³ Even

⁶⁵¹ In contrast, see the *UCC*, s. 2-706(6), and *DUSA*, s. 9.10(7) ("the seller is not accountable to the buyer for any profit made on any resale").

⁶⁵² *Schulze v. G.E. Ry.* (1887), 19 Q.B.D. 30.

⁶⁵³ *Patrick and Co. v. Russo-British Grain Export Co. Ltd.*, [1927] 2 K.B. 535; *Household Machines Ltd. v. Cosmos Exporters Co. Ltd.*, [1947] 1 K.B. 217; *J. Leavey & Co. Ltd. v. G.H. Hirst & Co. Ltd.*, [1944] 1 K.B. 24 (C.A.).

then no liability arisen in respect of the buyer's loss of an extraordinary profit unless the seller was notified of the possibility of such a profit.⁶⁵⁴

[140] *Can an innocent seller recover damages for the loss of a sale?*

Whenever the buyer has wrongfully refused to accept and pay for the goods, Article 75 of *The Convention* allows the aggrieved seller to resell them in a reasonable manner and within a reasonable time, and to recover the difference between the contract price and the resale price. But if the seller could have made both the sale under the breached contract and the sale under the resale contract, the resale formula will under-compensate him or her by the amount of profit that would have been made on the resale contract. In this situation, the question arises whether the seller is entitled to recover damages for loss of profits on the second sale.

A simple example demonstrates the difference between a substitute transaction and an additional sale, and the inability of the substitute transaction formula to adequately compensate an innocent seller in damage claims arising from the latter. Assume that a seller has contracted to sell goods for \$5,000 whose total cost is \$4,500. Assume, too, that the seller has resold the goods, after the buyer's repudiation, for \$5,000. In this situation, the seller is not entitled to any damages under the resale formula since a profit will already have been made in making the second sale. Nevertheless, the seller may argue that an additional sale has been lost and there would have been a gain of \$1,000 (instead of \$500) if the buyer had performed the original contract. If the second sale is an additional one and not truly a substitute one, then an additional claim should be available for these lost profits.⁶⁵⁵

⁶⁵⁴ See [116] and [117].

⁶⁵⁵ See generally, Atiyah, *supra*, note 171, at 381; Beale, *supra*, note 261, at 199; Benjamin, *supra*, note 81, paras. 1320 and 1335.

The issue receives different treatment in various legal systems.⁶⁵⁶ The *UCC* deals with it directly in section 708(2), which permits an aggrieved seller to recover lost profits where the market price damage formula "is inadequate to put the seller in as good a position as performance would have done." Unfortunately, the issue is not addressed in either *ULIS* or *The Convention*, despite the inability of either Article 75 or Article 76 to put the seller, in the above example, in as good a position as if the contract had been performed. At least one commentator has argued that since the general rule on assessing damages states only a broad principle, it will be up to the court to answer this question.⁶⁵⁷

This argument is unconvincing. Although *The Convention* does not directly address the issue, both Articles 75 and 76 permit an avoiding party to claim further damages under Article 74. Article 74, in turn, permits an aggrieved party to recover the loss, including loss of profit, suffered as a consequence of the breach. This provision will permit an aggrieved seller to recover damages for the profits associated with the lost sale. Courts in contracting states should treat the tests of substitute transaction and current price as merely particularized applications of the general principle stated in Article 74 of *The Convention* and Article 82 of *ULIS* and should therefore answer any unresolved questions in the light of these dominant provisions.⁶⁵⁸

In any case, the seller's entitlement will depend on the state of the market on the relevant date. In particular, it will depend on whether he or she has more customers than it is possible to supply or more goods than customers. If the buyer can show that supply exceeded demand on that date, it is unlikely that the seller's claim will suc-

⁶⁵⁶ See Hellner, *supra*, note 394, at 100.

⁶⁵⁷ See Hellner, *ibid.* But see Honnold, *Uniform Law, supra*, note 41, at 416; Ziegel *The Remedial, supra*, note 62, at 9-41.

⁶⁵⁸ See Ziegel, *ibid.*

⁶⁵⁹ *W.L. Thompson Ltd. v. Robinson (Gunmakers) Ltd.*, [1955] Ch. 177 (C.A.); *Charter v. Sullivan*, [1957] 2 O.B. 117 (C.A.); *Re Vic Mill Ltd.*, [1913] 1 Ch.

ceed.⁶⁵⁹ If, however, the seller can establish that demand exceeded supply on the relevant date, it is assumed that a profit could have been made from every buyer that could be found.⁶⁶⁰ Whether or not a second sale could have been made is a matter for the seller to prove.⁶⁶¹ An excess of demand over supply does not of itself establish the loss of an extra sale or that the seller would have made the same profit as on the sale to the defaulting party. Thus, consideration must be given by courts in contracting states to the possibility that the second sale would have been less profitable than the first.

B. Measurement of damages through market price

[141] *The meaning of "current price"*

Article 12 of *ULIS* provides that the expression "current price" means a price based upon an official market quotation. This definition has been criticized as imprecise.⁶⁶² Accordingly, a reference to an official market quotation was deleted at an early stage in the drafting of *The Convention*.⁶⁶³ Article 76 of *The Convention*, therefore, does not require the existence of an official or unofficial quotation. The Commentary con-

465 (C.A.).

⁶⁶⁰ See Benjamin, *Supra*, note 81, para. 1320.

⁶⁶¹ *Lazenby Garages Ltd. v. Wright*, [1976] 1 W.L.R. 459 (C.A.). In this case, it was held that a second-hand B.M.W. car was a "unique" object, and as the car was resold for more than the original price to a second customer, the original customer (who had refused to take it) was not liable for loss of profit. No such loss had been suffered in respect of the car in question, and the possibility that the dealer might have sold a different car to the second customer was dismissed as too remote.

⁶⁶² "Report of the Secretary-General" (1974), 4 *UNCITRAL Yearbook* at 31, para. 98; see also "Note by the Secretary-General" (1971), 2 *UNCITRAL Yearbook* at 37, paras. 75 ff.

⁶⁶³ "Report of the W.G." 2nd sess., (1971), 2 *UNCITRAL Yearbook* at 50, para. 97.

firms that no quotation need exist.⁶⁶⁴ However, it also notes that where there is no quotation either at the place where delivery was to have been made, or at another place which serves as a reasonable substitute, there may not be a "current price." If no current price exists, damages are to be calculated under Article 74.

The word "market" has no precise meaning in English law.⁶⁶⁵ The English *Sale of Goods Act* provides for a special method of calculating damages for non-delivery or non-acceptance when there is an available market for the goods.⁶⁶⁶ In these circumstances, the sum awarded should be the difference between the contract price and the current market price. An aggrieved party who has suffered no loss or has even sold or bought the goods at a profit is entitled to nominal damages only.⁶⁶⁷ The application of these rules depends upon there being an available market.⁶⁶⁸

The terms "available market" and "fair market" have been examined in a number of English cases. In an early case, it was held that there was a "fair market," since the sellers could have found a purchaser, either by themselves or through some agent, at the relevant place.⁶⁶⁹ This test was acceptable back when the marketplace was the center of so much commerce, but is less so in modern times. In another case, it was held that an "available market" means not only a market at a particular place, but also

⁶⁶⁴ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 72, paras. 6 and 7.

⁶⁶⁵ *Charrington & Co. Ltd. v. Wooder*, [1914] A.C. 71, at 82 (H.L.).

⁶⁶⁶ SGA, 1979, ss. 50(3) (seller's damages) and 51(3) (buyer's damages). The *French Civil Code* lacks special provisions similar to sections 50(3) and 51(3) of the English SGA concerning the assessment of damages when there is an available market. But it may be doubted whether this is of any consequence in light of the conclusions given in the French cases.

⁶⁶⁷ *Erie County Natural Gas and Fuel Co. Ltd. v. Carroll*, [1911] A.C. 105, at 117 (P.C.).

⁶⁶⁸ See generally Atiyah, *supra*, note 171, at 375 ff; Benjamin, *supra*, note 81, para. 1319; Schmitthoff, *Sale, supra*, note 252, at 180; see also OLRC, *Report on Sales*, at 409-410 and 521 ff.

⁶⁶⁹ *Dunkirk colliery Co. v. Lever* (1878), 9 Ch.D. 20, at 24-25 (C.A.).

at a "particular level [volume] of trade." Retail prices differ considerably from wholesale prices, and even the latter vary from one end of the marketing chain to the other.⁶⁷⁰ It has also been suggested that there was an available market if the goods in question could be freely sold.⁶⁷¹

Modern English case law has held that an available market exists "where it is possible for a person to go into the market and buy what he wants and sell what he wants."⁶⁷² The market must also be "available" in the sense that the seller is not bound to go globe-trotting in order to find a buyer.⁶⁷³ It must be available to the buyer in the sense of being within reasonable geographical access to his or her place of business.⁶⁷⁴

As far as English law is concerned, three points should be observed. First, English courts treat the availability of a market as a question of fact.⁶⁷⁵ English courts do not universally treat the issue as a question of degree.⁶⁷⁶ Second, the "market price" test is a *prima facie* test and is best seen as an illustration of the rule that the aggrieved party should mitigate his or her loss by going into the market to effect a substi-

⁶⁷⁰ *Heskell v. Continental Express Ltd.*, [1950] 1 All E.R. 1033, at 1050.

⁶⁷¹ *W.L. Thompson Ltd. v. Robinson (Gunmakers) Ltd.*, [1955] Ch. 177, at 187 (C.A.). This test for the definition of market price was considered unsatisfactory in *Charter v. Sullivan*, [1957] 2 Q.B. 117, at 128 (C.A.), where it was held that there could not be an available market for goods unless the price was fixed with reference to supply and demand. According to this view, there could not be an available market where the goods could only be sold at a price fixed in advance by the manufacturer.

⁶⁷² *The Arpad*, [1934] P. 189, at 191 (C.A.); *W.L. Thompson case ibid.*; *A.B.D. (Metals & Waste) Ltd. v. Anglo-Chemical and Ore Ltd.*, [1955] 2 Lloyd's Rep. 456, at 465 (C.A.).

⁶⁷³ *Lesters Leather and Skin Co. Ltd. v. Home and Overseas Brokers Ltd.*, [1948] 64 T.L.R. 569 (C.A.).

⁶⁷⁴ See Benjamin, *supra*, note 81, para. 1324.

⁶⁷⁵ See Schmitthoff, *Sale, supra*, note 252, at 180.

⁶⁷⁶ See Atiyah, *supra*, note 171, at 374.

tute transaction.⁶⁷⁷ English courts take a common-sense view of the question of when it is reasonable for an aggrieved party to dispose of goods in an "available market."⁶⁷⁸ Finally, the only effect of the absence of an available market is the displacement of the *prima facie* rule embodied in sections 50(3) and 51(3) of the *Sale of Goods Act*. The aggrieved party will still be expected to take reasonable measures to mitigate his or her loss.

[142] *Application of the current price formula*

Article 76(1) of *The Convention* permits a party that has entered into a substitute transaction to claim damages measured by the difference between the contract price and the current market price.⁶⁷⁹ In addition, it authorizes recovery of any further damages if the loss (including loss of profit) exceeds the amount recoverable under Article 74. The comparable provisions in the *UCC* are sections 2-708(1) (seller's market price damages) and 2-713 (buyer's market price damages). In the English *Sale of Goods Act* the comparable sections are 50(3) (seller's damages) and 51(3) (buyer's damages). A similar approach to *The Convention* may be inferred from Article 1144 of the *French Civil Code*, which provides that in cases of non-performance, the innocent party may have an obligation fulfilled at the expense of the breaching party. It will be seen below that the manner of measuring market price damages under *The*

⁶⁷⁷ See Atiyah, *id.*, at 375 ff; Benjamin, *supra*, note 81, para. 1322; Schmitthoff, *Sale, supra*, note 252, at 179. But see Goode, *supra*, note 239, at 344 ff and 326-327.

⁶⁷⁸ See Atiyah, *ibid.*

⁶⁷⁹ *The Convention*, art. 76. For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29; at 29 ff; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* at 49, para. 116, annex 1, art. 57; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, art. 57, "Report on UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, para. 484; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11, para. 28, art. 72; *Official Records, supra*, note 67, at 132, 394 ff, paras. 26 ff, 415, paras. 85 ff, 163, art. 72 and 222 ff, paras. 38 ff.

Convention differs in some respects from the methods followed in English and American law.

The application of the current price rule assumes that there is an available market that the aggrieved party has not used to make a substitute transaction. Where there is no current price, loss will be assessed according to Article 74 of *The Convention*, Article 82 of *ULIS* or sections 50(2) and 51(2) of the English *Sale of Goods Act*, as the case may be.⁶⁸⁰ It must be remembered, however, that the test of foreseeability, it is submitted, is not applicable to the current price rule. Also, the current price test is excluded if the requirements for the substitute transaction formula are satisfied.

In English law, if there is an available market, damages are *prima facie* assessed by reference to it, so that the aggrieved party will be entitled to the amount (if any) by which the contract price exceeds the market price.⁶⁸¹ Furthermore, the aggrieved party is entitled to be compensated for any expenses reasonably incurred as a result of the breach. This would apply, for example, to the cost of adapting the goods to make them suitable for resale, where these steps are considered reasonable.⁶⁸²

But the market price rule will not be applied where it would operate unfairly, even when there is an available market.⁶⁸³ It may, for instance, be that sales take place of the commodity in question, but only rarely or in a small quantities.⁶⁸⁴ Alternatively, there may be evidence that similar (though not identical) goods are readily available or disposable.⁶⁸⁵ Further, the test cannot be invoked when the contract provides for

⁶⁸⁰ See Benjamin, *supra*, note 81, para. 1333.

⁶⁸¹ *SGA*, 1979, ss. 50(3) (seller's damages) and 51(3) (buyer's damages); see also *Harlow and Jones Ltd. v. Panex (International) Ltd.*, [1967] 2 Lloyd's Rep. 509.

⁶⁸² By virtue of s. 54 of the *SGA*, 1979. See also *Re Vic Mill Ltd.*, [1913] 1 Ch. 465 (C.A.).

⁶⁸³ *W.L. Thompson Ltd. v. Robinson (Gunmakers) Ltd.*, [1955] Ch. 177, at 188 (C.A.); *Charter v. Sullivan*, [1957] 2 Q.B. 117, at 128.

⁶⁸⁴ *Kwei Tek Chao v. British Traders & shippers Ltd.*, [1954] 2 Q.B., 459, at 498.

liquidated damages.⁶⁸⁶ In brief, the test is not applicable whenever its application would not probably compensate the aggrieved party for loss of profit.⁶⁸⁷

[143] *The time for determining the current price*

Under *ULIS*, the current price of the goods is to be assessed by reference to the market price on the date on which the contract is avoided, whether by a declaration of the aggrieved party or by operation of law (*ipso facto*).⁶⁸⁸ Assuming he or she has a right to avoid the contract, the aggrieved party may elect not to do so immediately. If that party waits and the market price falls, this will increase the amount of damages at the other party's expense.⁶⁸⁹ But when the market price is equal to the contract price, the aggrieved party may, instead of avoiding the contract, require performance by the other party.

The Convention contains two tests to determine the correct price to be applied. If the goods have not been taken over by the buyer, the current price at the time of avoidance is to be applied. If the goods have been taken over by the buyer, the current price at the time of such taking over is to be applied.⁶⁹⁰

⁶⁸⁵ *Hinde v. Liddell* (1875), L.R. 10 Q.B. 265.

⁶⁸⁶ *Diestal v. Stevenson*, [1906] 2 K.B. 345.

⁶⁸⁷ See Benjamin, *supra*, note 81, para. 1320.

⁶⁸⁸ *ULIS*, art. 84(1).

⁶⁸⁹ This test was criticized on the ground that it permits the aggrieved party to speculate at the other's expense. "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* at 29, paras. 170-171; "Report of the W.G." 6th sess. (1975), 6 *UNCITRAL Yearbook* at 49, para. 116.

⁶⁹⁰ *The Convention*, art. 76(1); this test was adopted at the Conference; *Official Records, supra*, note 67, at 132, 222, 415, paras. 85 ff, and 222, paras. 38 ff. A similar suggestion was made prior to the Conference. See "Report of UNCITRAL" 11th sess., (1977), 7 *UNCITRAL Yearbook* at 11, para. 485.

The Convention provides no guidance as to the meaning of the expression "taking over the goods." Nevertheless, it appears to imply something akin to "acceptance" under section 27 of the English *Sale of Goods Act* and section 2-606 of the *UCC*. The approach of English law will be considered below. As to the *UCC*, the seller's market price damages are normally measured at the time of tender.⁶⁹¹ The buyer's damages, in the case of non-delivery or repudiation by the seller, are usually measured with reference to the time the buyer "learned" of the seller's breach.⁶⁹² However, if there has been an anticipatory repudiation and the action comes to trial before the date on which the contract ought to have been performed, the court measures damages under the *UCC* as at the time the aggrieved party learned of the repudiation.⁶⁹³ In such an event, damages would be measured differently under the *UCC* than under *The Convention*. Suppose, for example, that the seller agreed to deliver goods at a price of \$5,000 on September 1, at which time the market price was \$4,500. If the buyer wrongfully rejects the goods, the seller's damages under section 2-718(1) will be \$500. Under Article 76(1) of *The Convention*, however, the seller's damages would be determined at the time of avoidance. If avoidance occurred on September 20, when the market price had risen to \$4,800, the seller's damages would be \$200.

It should be remembered that the seller's obligation to deliver differs from the buyer's obligation to take delivery. The seller may fulfil the duty to deliver by handing over the goods to a carrier for transportation to the buyer.⁶⁹⁴ In this case, the buyer does not take delivery until he or she removes the goods from the possession of the carrier. In such an event, both take place at different times. Sometimes, however, the making of delivery and the taking of delivery of the goods occur at the same time, such

⁶⁹¹ The *UCC*, s. 2-708(1).

⁶⁹² See *id.*, s. 2-713.

⁶⁹³ *Ibid.*

⁶⁹⁴ *The Convention*, art. 31.

as when the seller delivers the goods directly to the buyer.

The application of the current price rule requires the party claiming damages to act without unreasonable delay after the goods have been taken over by the buyer or after the contract has been avoided. If the aggrieved party delays in avoiding the contract, he or she can neither reap an increase in damages if the market price rises nor suffer a reduction in damages if the market price falls. Since reasonableness is presumably a question of fact, courts in contracting states, it is suggested, could prevent speculation by considering (in the light of the circumstances) whether the aggrieved party's decision was taken too late. In so doing, several factors ought to be considered. The nature of the goods is a very important factor since the party who is bound to preserve the goods, as will be seen in paragraph [247], must take reasonable measures to resell them if they are subject to rapid deterioration or if their preservation would involve unreasonable expense.⁶⁹⁵ It can be argued that what is a "reasonable time" is a question of fact, and depends on the facts of each case and on the market value of the goods.

[144] *The time for determining the current price: evaluation*

In general, the time specified in *The Convention* as the relevant time for determining the current price is satisfactory. Rigid though it is, it reduces the difficulties of establishing a causal connection between the breach and the loss by ignoring events that occur after the goods have been taken over by the buyer or the contract has been avoided, and by looking only at the market price at that date. It has the advantages of simplicity and greater certainty since it avoids the formidable problems associated with the internal calculation of profits. In addition, the rule avoids difficult issues that have arisen in some domestic laws. Under the *UCC*, for example, the time for determining the market price in the case of anticipatory breach is not clear. This is so since the

⁶⁹⁵ *The Convention*, art. 88(2).

buyer's market price damages are calculated from the time the buyer learned of the repudiation, provided that the breach of contract action goes to trial before the date for the seller's performance.⁶⁹⁶ But if the action is not heard before the seller's performance is due, damages are measured under section 2-713(1), according to which the measure of damages for non-delivery or repudiation by the seller is the difference between the contract price and the market price at the time the buyer *learned* of the breach (i.e. the date of the seller's repudiation). It seems that section 2-713(1) of the *UCC* is ambiguous as to the time at which damages should be assessed in the case of anticipatory breach. Article 76 of *The Convention* avoids this ambiguity by specifying that, in all anticipatory repudiation situations, the buyer's market price damages are measured at the time the contract is avoided.

[145] *The time for determining the current price: English law*

In English law, damages are assessed by reference to the time of the breach.⁶⁹⁷ Where a buyer wrongfully fails to accept delivery or pay the price, or a seller fails to deliver, damages are *prima facie* based on the market price at the time the goods ought to have been accepted or delivered or, if no time was fixed for acceptance (or delivery), at the time of the refusal to accept (or deliver). Once again, the buyer's duty to accept the goods⁶⁹⁸ differs from the right to take delivery of them. The buyer is not deemed to have accepted goods until there has been a reasonable opportunity to examine them for the purpose of ascertaining whether they conform to the contract.⁶⁹⁹

⁶⁹⁶ The *UCC*, s. 2-723(1).

⁶⁹⁷ *SGA*, 1979, s. 50(3), with regard to the buyer's breach and 51(3) in respect to the seller's breach.

⁶⁹⁸ See *id.*, s. 27.

⁶⁹⁹ See *id.*, s. 34.

If the contract calls for the seller to deliver the goods directly to the buyer, this date is the date for assessing damages.⁷⁰⁰ If the contract fixes a period of time during which delivery or acceptance of the goods is to occur, the last day of that period is the relevant time for ascertaining the market price.⁷⁰¹

In English law, in cases of an anticipatory breach of the duty to accept goods where no time has been fixed for delivery, it is unclear whether the time of the refusal is the proper time to ascertain the market price, or whether the general rule in cases of anticipatory breach applies.⁷⁰² In such an event, it seems that damages, as a general rule, will be assessed by reference to the time the contract ought to have been performed, not the time of repudiation.⁷⁰³ Similarly, when the seller fails to deliver the goods, an aggrieved buyer may bring an action at once and damages will be assessed with reference to the market price of the goods at the time they ought to have been delivered.⁷⁰⁴ If the case comes to trial before the contractual date for performance, the court must arrive at that price as best it can.⁷⁰⁵ Damages will necessarily be speculative as they will be based on estimates as to future movements of the market.⁷⁰⁶

⁷⁰⁰ See Atiyah, *supra*, note 171, at 416; Goode, *supra*, note 239, at 340 ff and 360-361.

⁷⁰¹ See Benjamin, *supra*, note 81, para. 1327.

⁷⁰² See Benjamin, *id.*, para. 1328; Treitel, *Remedies, supra*, note 69, at 47, para. 71.

⁷⁰³ See Schmitthoff, *Sale, supra*, note 252, at 183; Treitel, *ibid*; see also *Millet v. Van Heek and Co.*, [1921] 2 K.B. 369, at 376; *Tai Hing Cotton Mill Ltd. v. Kamsing Knitting Factory*, [1979] A.C. 91; [1978] 1 All E.R. 515 (P.C.).

⁷⁰⁴ *Frost v. Knight* (1872), L.R. 7 Ex. 111, at 113.

⁷⁰⁵ *Melachrino v. Nickoll and Knight*, [1920] 1 K.B. 693. But see s. 2-723(1) of the UCC which provides that damages based on the market price formula shall be determined by reference to the market price when the aggrieved party learned of the repudiation. See also [143].

⁷⁰⁶ See, for example, *Roper v. Johnson* (1873), L.R. 8 C.P. 167.

[146] *The place for determining the current price*

Under *ULIS*, the place for calculating damages under the current price formula is the place where the contract was concluded.⁷⁰⁷ This test was criticized on the ground that it is difficult to determine when a contract has been concluded.⁷⁰⁸ *The Convention* provides a completely different approach. It requires the current price to be calculated by reference to the place where delivery should have been made.⁷⁰⁹ If the contract stipulates the place of delivery, either expressly or implicitly, only that place may be considered the relevant place. If there is no agreement to this effect, determining the place where delivery should have been made requires that consideration be given to Article 31 of *The Convention*.⁷¹⁰

Under the *UCC*, the place at which the market price is calculated depends on whether it is the buyer or the seller who is claiming damages. In the case of a claim by the seller, section 2-708(2) measures damages at the place where tender has been or is to be made. When it is the buyer who is claiming damages, however, section 2-713(2) measures the market price at the place of tender (of the goods) or, in cases of rejection after arrival or revocation of acceptance, at the place of arrival. *The Convention* and the *UCC* often point to the same place for measuring market price damages (the place where delivery should have been made in *The Convention* and the place of tender in the *UCC*). But market price damages may be measured at different places if the aggrieved buyer rejects the goods after arrival or revokes an earlier acceptance. Under section 2-713(2) of the *UCC*, market price damages are determined at the place

⁷⁰⁷ *ULIS*, art. 84(2).

⁷⁰⁸ "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* at 49.

⁷⁰⁹ *The Convention*, art. 76(2).

⁷¹⁰ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 72, para. 5; see also "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 49, annex 2, comment to art. 57, para. 5.

of tender. Under *The Convention*, if the buyer rejects the goods and avoids the contract, market price damages are to be measured by reference to the prevailing price at the place where delivery of the goods should have been made.

If there is no current price at the place of delivery (*The Convention*) or at the place where the contract was concluded (*ULIS*), the price to be considered is the price at such other place as serves as a reasonable substitute. Here, moreover, one is to make "due allowance for differences in the cost of transporting the goods."⁷¹¹ But this test is likely to cause great difficulty and uncertainty. How can one conclude that there is no current price at the place of delivery? How can one determine which places would serve as reasonable substitutes? How should the expression "making due allowance" be interpreted? Admittedly, there are no definitive answers to these questions. They must be treated as questions of fact to be determined according to the circumstances of each case.

[147] *Criticism of the place for determining the
current price adopted by The Convention*

The Convention's approach to the place for calculating the current price seems to favour the seller where he or she is the party in breach.⁷¹² Great distances often separate the parties to international sales contracts. Current prices can differ significantly from one country to another. Suppose, for example, that goods are purchased by a Toronto buyer from a Parisian merchant. Under *The Convention*, Paris will be the place where delivery of the goods is to be made. If the seller fails to deliver, or if the buyer rightfully rejects the goods after arrival and inspection, Paris would also be the market from which the current price is to be taken. In such situations, it is difficult to expect the buyer to successfully prove damages based on the market price in Paris. In

⁷¹¹ *The Convention*, art. 76(2); the *UCC*, s. 2-723(2) contains an equivalent rule.

⁷¹² See also Sutton, *Part 3, supra*, note 487, at 104.

practice, this difficulty may be avoided by buying replacement goods at a higher price in a market closer to home and claiming damages accordingly rather than relying on current prices at the place of delivery.

Practical problems may arise when, for example, the contract specifies that delivery is to be made in more than one place. Courts in this case are expected to reach different conclusions in determining the current price, since several factors may play a role. Some might concentrate on the place where the largest quantity of goods is delivered; others might give all places equal consideration. The rule, moreover, is far too rigid if the place of receipt of the goods and the place of delivery are different, as is often the case. In these cases, courts in contracting states would be wise not to apply Article 76, but to let the matter be governed instead by Article 74.⁷¹³

These problems cannot arise under *ULIS* since it only refers to one place: the place where the contract was concluded. Since the market price formula is available only when there has been no repurchase or resale, the aggrieved party can avoid the consequences of the rule's uncertainty by making a substitute transaction. This will make damages calculable under Article 75 rather than Article 76.

[148] *The place for determining the current price: English law*

The English *Sale of Goods Act* provides no guidance as to the relevant place for determining the current price and the case law is inconclusive on the point.⁷¹⁴ Different tests have been adopted to determine the existence of an "available market."⁷¹⁵ Thus, there appears to be uncertainty about the meaning of the term "available market" in English law; and that the relevant place for determining damages based on current price is not yet settled in English law. It is important to point out, however, that where

⁷¹³ See [116] - [124].

⁷¹⁴ See OLRC, *Report on Sales*, at 524.

⁷¹⁵ See [141].

there is more than one market, the aggrieved party is not allowed to have damages calculated by reference to the market whose price is most favourable to that party. Thus, an aggrieved buyer may not select the market with the higher price. It seems that the relevant market in this case is that which the seller ought reasonably to have expected the buyer to prefer. Accordingly, the question in each case, it has been suggested, is one of reasonableness in light of the time, expense and trouble actually involved.⁷¹⁶

Section III

The right to recover interest

[149] *General principles*

Under *The Convention*, the aggrieved party is entitled to interest on the unpaid price and on any other sum that is in arrears.⁷¹⁷ This rule applies whenever one party owes money to the other. This differs from all the previous drafts, which entitled only the seller to recover interest, and then only when there was a delay in paying the price.⁷¹⁸ Although Article 84(1) refers to restitutionary interest payable by the seller to the buyer, Article 78 establishes a more general rule by referring to the breaching party and to any sum that is in arrears. This gives the rule a broader applicability than it had in previous drafts.

⁷¹⁶ See Benjamin, *supra*, note 81, para. 1324. OLRC, *Report on Sales*, at 525, has recommended the adoption of a rule that a reasonable place is any place where the goods could have been obtained in a commercially reasonable manner.

⁷¹⁷ *The Convention*, art. 78. For a legislative history of the rule, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, annex 1 (art. 83); "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, annex 1 (art. 58); "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, paras. 392 ff; *Official Records, supra*, note 67, at 415 ff, paras. 1 ff, 163 and 223 ff.

⁷¹⁸ *ULIS*, art. 83 and *The 1976 Draft Convention, supra*, note 45, art. 58.

The place at which the interest should be calculated is of great importance since the rate of interest differs from one place to another. Much may turn on this question, particularly where the buyer and seller are far apart or trade in different markets. If the rate of interest in the seller's country is lower than it is in the buyer's, the buyer may be encouraged to delay payment in order to benefit from this favourable rate. At the same time, the seller may be limited to the lower interest rate in his or her country rather than the higher rate in the buyer's. Indeed, in some countries the charging of interest may be prohibited altogether.

[150] *The rate of interest: ULIS and The Convention*

Under *ULIS*, the rate of interest is equal to the official discount rate in the country where the seller has his or her place of business or, if the seller has no place of business, his or her habitual residency, plus one per cent.⁷¹⁹ *The Convention* is less clear about where the interest should be calculated. Article 78 does not stipulate the rate of interest or how it is to be determined. Then what interest rate is to be applied?

One commentator has suggested that this question should be governed by the domestic law applicable to the contract.⁷²⁰ However, this interpretation is questionable. The view that the interest rate should be determined by domestic law was roundly criticized at the Conference.⁷²¹ Accordingly, the issue will have to be decided by courts in contracting states. They should determine the applicable rate of interest, absent agreement to the contrary. Courts in contracting states have the discretion to decide whether the aggrieved party is entitled to interest and, if so, what rate will pro-

⁷¹⁹ Art. 58 of the 1976 Draft Convention and art. 83 of *ULIS* contained the rule that the interest due is to be calculated in the country where the seller has his or her place of business.

⁷²⁰ See Feltham, *supra*, note 149, at 359. But see Honnold, *Uniform Law, supra*, note 41, at 423.

⁷²¹ See the statement made by the representative of Sweden, *Official Records, supra*, note 67, at 415, SR. 34, para. 1.

vide fair compensation.⁷²² This is so even if the law applicable to the contract forbids interest and without prejudice to any claim for damages. Furthermore, it is submitted that courts in contracting states are not limited to the rates of interest in the countries of the buyer and seller. This will prevent the difficulties that could result from conflicts between domestic laws on the issue of interest. In deciding the issue, courts in contracting states should remember one important point: the aggrieved party is not required to prove the fact of lost interest in order to be entitled to interest since it is presumed that interest is always foregone when the breaching party fails to pay on time.

[151] *The rate of interest: domestic laws*

In English law, the court has unfettered discretion to fix the rate of interest and to decide whether interest should be paid for the whole or any part of the period between the date when the cause of action arose and the date of judgment.⁷²³ The defaulting party is not required to include the statement of claim a request for interest or for the exercise of the court's discretion.⁷²⁴ But where the contract entitles the seller to claim interest on the price, the court has no discretion in the matter;⁷²⁵ it must allow the interest claim. It has been suggested that the court may also allow interest on the price of goods sold where the course of dealings between the parties, or the custom or usage of the particular trade, gives such a right.⁷²⁶

⁷²² The approaches to interest in Anglo-American, French and German law and in other systems are discussed by Treitel, *Remedies, supra*, note 69, at 88-89, para. 114 ff.

⁷²³ *Law Reform (Miscellaneous Provisions) Act, 1943, s. 3.*

⁷²⁴ *Riches v. Westminster Bank Ltd.*, [1943] 2 All E.R. 725; *Pilkington v. Wood*, [1953] Ch. 770, at 781.

⁷²⁵ See Benjamin, *supra*, note 81, para. 1277.

⁷²⁶ See Benjamin, *id.*, paras. 1267 and 1277, note 54; see also Schmitthoff, *Sale, supra*, note 252, at 195.

There are remarkable differences between English and French law concerning the payment of interest. French law lays down the general rule that in obligations limited to the payment of a certain sum, the damages resulting from delay in payment are never to exceed the legal rate of interest.⁷²⁷ In the absence of agreement to the contrary, the rate of interest is four per cent. in civil matters and five per cent. in commercial ones. French courts, unlike English courts, have no discretion in the matter. Legislation formerly fixed the maximum rate of interest which the parties could not exceed by agreement.⁷²⁸ Even now, however, the parties must avoid contravening the legislation relating to usury.

In Egyptian law, the seller is not entitled to claim interest on an amount due until the buyer has been put in default.⁷²⁹ Interest is to be calculated as from either the date fixed by the contract for payment or the date the default notice is served. In the absence of agreement to the contrary, Egyptian law allows interest to be awarded at the rate of seven per cent. Although the parties may agree to exceed this rate, the rate is applied where the contract fixes a lower rate.⁷³⁰

[152] *The remedy of damages: conclusions*

The preceding discussion demonstrates that the underlying principles involved in the awarding of damages are similar under all the laws considered in this study. According to these laws, the object of damages is to put the innocent party into as good a financial position as he or she would have been had the contract been fully performed. In addition, damages must be foreseeable. Moreover, there must be a causal relation-

⁷²⁷ The *French Civil Code*, art. 1153; see also art. 1652, which lists three cases in which the buyer is bound to pay damages. These situations are listed in note 514.

⁷²⁸ But see Treitel, *Remedies*, *supra*, note 69, at 89, para. 115.

⁷²⁹ The *Egyptian Civil Code*, art. 458(1).

⁷³⁰ See Sanhoury, *supra*, note 343, at 521.

ship between the breach and the loss incurred. In these respects, *The Convention* is the same as the laws considered in this study.

The preceding analysis demonstrates that the seller's resale damages and the buyer's cover damages, besides being innovative, are the most important method of calculating damages under *The Convention*. However, the ability to repurchase or resell in international sales contracts should be carefully evaluated. While fungible goods may be readily covered or resold in a domestic market, this may not be true in international trade.⁷³¹ Even though alternative suppliers exist, it may be difficult for a buyer in one country to locate a new seller in another with whom to negotiate a substitute contract. Similarly, a seller of goods with an international market will often have difficulty locating a new buyer.

⁷³¹ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 42, para. 2.

Chapter IV
SPECIFIC PERFORMANCE

[153] *Introduction*

Different legal systems approach the remedy of specific performance⁷³² in different ways.⁷³³ The scope of the remedy was "one of the stubborn issues encountered in the preparation of the uniform rules."⁷³⁴ Most Civil law and socialist legal systems conclude that each party to a contract, subject to various exceptions, is entitled to performance from the other side. For largely historical reasons, most Common law jurisdictions have concluded that the aggrieved party is not normally entitled to compel actual performance by the breaching party, but only to recover the monetary equivalent of performance.

In *The Convention*, the sections dealing with the remedies available to the buyer (Article 46) and to the seller (Article 62) start with a rule providing for a remedy of specific performance. Article 46 (1) provides that "the buyer may require performance by the seller of his obligations."⁷³⁵ Likewise, Article 62 provides that "the seller may require the buyer to pay the price, take delivery or perform his other obligations."⁷³⁶ Despite the broad language of these provisions, which is similar to that used in most Civil law and socialist systems, an aggrieved party's right to demand actual performance of the other side's obligations under *The Convention* is subject to certain limitations. The most important restriction is found in Article 28, which provides that even

⁷³² The expression "specific performance" has been described in English law to mean, in general, an order that commands the defendant to perform a particular contractual obligation. The expression *exécution en nature* is used in French law to refer to the plaintiff receiving performance in kind. While the English language version of Article 28 of *The Convention* refers to "specific performance," the French version refers to "*l'exécution en nature*." In both languages, the words used may overlap with technical terms used in domestic laws. In this study, the expression "specific performance" is used.

⁷³³ See Treitel, *Remedies*, *supra*, note 69, at 6 ff.

⁷³⁴ See Honnold, *Uniform Law*, *supra*, note 41, at 221.

⁷³⁵ *The Convention*, art. 46(1).

⁷³⁶ See *id.*, art. 62.

if one party is entitled to performance, "a court is not bound to enter a judgment for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by *The Convention*."⁷³⁷

This limitation is expected to prove troublesome for parties and their lawyers, and for courts. The issues raised by the uneasy compromise reached concerning the right to require performance will be dealt with in three sections. The first deals with the remedy of specific performance in general; the second covers the availability of the remedy; the third examines the various limitations on the availability of specific performance under *The Convention*.

Section I: In general

[154] *Importance of the remedy*

A simple illustration demonstrates the importance of the remedy of specific performance. Suppose that a seller contracts to sell manufactured goods but repudiates before delivery. Under all the laws considered in this study, if reasonable substitute goods are available from another manufacturer, an aggrieved buyer will probably purchase them, regardless of any right to compel performance. Sometimes, however, the purchase of substitute goods may not be a satisfactory solution. Substitute goods may be difficult to locate, and their price may be substantially higher than the contract price.

The Convention gives an aggrieved party the right to choose between specific performance and damages. This adds additional importance to the remedy of specific performance because, in many cases, damages would not fully compensate the aggrieved party for a loss,⁷³⁸ either because they would be inadequate, unforeseeable or

⁷³⁷ See *id.*, art. 28.

⁷³⁸ For example, an award of nominal or negligible damages may be a "wholly inadequate and unjust remedy for the breach." See *Sudbrooke Trading Estate Ltd.*

difficult to calculate due to their speculative nature (i.e. loss of profits). In addition, resort to the substitute transaction formula under Article 75 may require an aggrieved party to incur the costs of finding an alternative trading partner and negotiating a new deal. Because of the foreseeability requirement under Article 74, a buyer may be unable to recover all costs. This is because some of these costs often involve the expenditure of time and effort, for which it is difficult to establish an accurate monetary value. The same is true of the seller's resale formula under Article 75.

Furthermore, though an international sales transaction mainly affects the contracting parties in question, the national economies of their countries are also affected. Goods may be badly needed by consumers in the importing country; imported raw materials may be required to insure that factories remain in business; and the country's labour market may also be affected by the failure of contract performance.

In any of the above cases, an aggrieved party will usually force the other party to perform. This enables a buyer, for example, to obtain the goods contracted for and not just monetary compensation.⁷³⁹ It also prevents that party from bearing all losses caused by the breach. An aggrieved party is permitted, under *The Convention*, to determine whether damages will provide full compensation for any loss. If they will not, he or she is entitled to require performance.

v. *Eggleton*, [1983] A.C. 444, at 478 (H.L.); *Beswick v. Beswick*, [1968] A.C. 58 (H.L.). See also Berryman, "The Specific Performance Damages Continuum: A Historical Perspective" (1984-85), 17 *Ottawa L. Rev.* 295, at 320.

⁷³⁹ Treitel, "Specific Performance in the Sale of Goods" [1966] *J. Bus. L.* 211, at 211.

[155] *Specific performance contrasted with other remedies*

Articles 46 and 62 expressly provide that the right to compel performance cannot be enforced if the aggrieved party has resorted to a remedy inconsistent with performance.⁷⁴⁰ For example, a buyer loses the right to compel performance when he or she declares the contract avoided under Article 49. That buyer may seek damages only.⁷⁴¹ Likewise, a seller loses the right to payment under Article 62 when he or she declares the contract avoided under Article 64. The reason for this rule is obvious: avoidance puts an end to the contract thereby releasing both parties from their contractual obligations.⁷⁴² This general rule adopted in both *ULIS* and *The Convention* is in line with Egyptian and French law.⁷⁴³ A similar approach is also followed under the English general law of contract.⁷⁴⁴

As for the remedy of price reduction, it is inconsistent with specific performance since it can be exercised immediately without the buyer obtaining performance. The aggrieved party, however, is not deprived of the right to claim damages by exercising the right to require specific performance because there is no contradiction between specific performance and damages.

Articles 45(2) and 61(2) make it clear that the remedial approach of *The Convention* does not call for an election of remedies. The aggrieved party may claim damages resulting from the other party's breach even if he or she takes steps to compel performance by the breaching party or avoids the contract because of a fundamental breach by the breaching party.

⁷⁴⁰ *The Convention*, arts. 46 and 62.

⁷⁴¹ See Ziegel, *The Remedial*, *supra*, note 62, at 9-9.

⁷⁴² These rules are discussed in detail in [93] - [98].

⁷⁴³ The *French Civil Code*, art. 1124; the *Egyptian Civil Code*, art. 203.

⁷⁴⁴ See Treitel, *Contract*, *supra*, note 5, at 641. (A seller, for example, cannot avoid the contract and then demand payment).

[156] *Specific performance in English law*

In English law, specific performance implies an order by the court compelling the defaulting party to perform the contract. It did not have its origin in the Common law but is an equitable remedy. An order for specific performance was supplementary to the Common law remedy of damages, as it was (and still is) granted only when other forms of relief were inadequate in the circumstances.⁷⁴⁵ Strictly speaking, the remedy is available only (a) if damages are inadequate; and, (b) if the court sees fit, in its sole and unfettered discretion, to grant it.

Specific performance may be granted when damages are inadequate. It appears that damages are adequate if a buyer who has not received the goods ordered, or who has received goods that are seriously defective, can purchase equivalent goods elsewhere. But the situation is different if the contract is for the sale of rare or unique items,⁷⁴⁶ or if the items are not obtainable elsewhere, as in the case of contracts to supply machinery or other industrial plant,⁷⁴⁷ or if the items possess a special historical value, or where a chattel is of peculiar importance to the buyer.

In addition to being able to grant specific performance when damages would be inadequate, English courts have discretion to order performance of a contract for the sale of goods for any other reason.⁷⁴⁸ This discretionary power is stated in section 52

⁷⁴⁵ Szakats, "The Sale of Goods Act 1893 and the Uniform Law on the International Sale of Goods: Some Points of Contrast and Contract" [1968] *J. Bus. L.* 235, at 239; Treitel, *An Outline, supra*, note 81, at 359.

⁷⁴⁶ Heirlooms and great works of art are regarded as "unique." For this purpose, see *Pusey v. Pusey* (1684), 1 Vern. 273; *Somerset v. Cookson* (1735), 3 P.Wms. 390; *Lowther v. Lowther* (1806), 3 Ves. 95; *Flacke v. Gray* (1859), 4 Drew. 651, 658.

⁷⁴⁷ *Nutbrown v. Thornton* (1804), 10 Ves. 159; *North v. Great Northern Ry.* (1860), 2 Giff. 64; *Behnke v. Bede Shipping Co. Ltd.*, [1927] 1 K.B. 649.

⁷⁴⁸ SGA, 1979, s. 52. For example, in *Rawlings v. General Trading Co. Ltd.*, [1921] 1 K.B. 635, specific performance was granted without argument as to the remedy.

of *Sale of Goods Act*, 1979, which provides for the remedy of specific performance only if the goods are "specific" or "ascertained."⁷⁴⁹ Even when goods are specific or ascertained, section 52 gives the court no discretion to order specific performance unless the innocent party requests it. While the term "ascertained goods" is not defined by the Act, "specific goods" are defined in section 61 as "goods identified and agreed on at the time a contract of sale is made..." The words "specific" and "ascertained" have always caused confusion in cases to which section 52 is applied. However, it seems that "specific goods," within the meaning of the section, are goods that have a special quality or a special value to the innocent party at the time the contract is made. The term "ascertained goods" appears to refer to goods that, at the time of contracting, comprise an indistinguishable portion of a specified bulk of goods that is to be apportioned in accordance with the parties' agreement after the contract of sale is made.

At present, the attitude of English courts is that specific performance is a remedy to be granted in exceptional cases only. This may be the case where damages do not serve the sole purpose of the remedy of damages, which is to put the innocent party into the same position as if the contract had been performed, to the extent that money can do so. For example, a buyer may not be able to obtain a precise substitute for the

⁷⁴⁹ OLRC, *Report on Sales*, at 443-444, considered that the rule provided in s. 52 of the 1893 English *SGA* (which was not modified in the 1979 Act) and s. 50 of the *Ontario Sale of Goods Act* (concerning the buyer's right to specific performance) was defective. The report recommended the elimination of the restrictions as to specific or ascertained goods and that no restrictions be imposed on the court's discretion, whether by reference to unique goods or otherwise. See also the *UCC*, s. 2-716(1), which prescribes generally that specific performance may be decreed "where the goods are unique or in other proper circumstances," and a claim for specific performance is normally granted if the sale is for specific goods which are very rare or extremely valuable or of special sentimental value to the purchaser. Thus, unlike the English law approach, which allows specific performance only where goods are specific or ascertained, s. 2-716 allows specific performance in the case of generic goods. However, in sales of generic goods, a claim for damages is normally adequate since the purchaser can usually buy elsewhere fairly readily. Moreover, s. 2-716(2) of the *UCC* entitles both sellers and buyers to require performance. Furthermore, under s. 2-716(3) of the *UCC*, specific performance may be ordered in those cases in which the buyer is unable to buy substitute goods within a reasonable time.

goods contracted for and may even incur an unforeseeable consequential loss as well.

[157] *Specific performance in French law*

Specific performance is available under French law. In practice, however, damages and avoidance are the remedies more often chosen.

French law distinguishes between contracts "to do" (*de faire*) and "not to do" (*de ne pas faire*), on the one hand, and contracts "to give" (*de donner*), on the other. Damages are ordinarily ordered for breaches of the former; specific performance is reserved for breaches of the latter.⁷⁵⁰ It is beyond the scope of this study to discuss in detail the difference between these two types of contracts, but suffice it to say that sales contracts are contracts "to give."⁷⁵¹ In this context "give" means to transfer ownership. Strictly speaking, there can never be a breach of an obligation to pass ownership since this is transferred by the agreement setting up the obligations; but there may be a breach of subsidiary obligations, such as the duty to deliver the goods or put the buyer into possession of them.

Where the goods are moveable and ascertained, the innocent party may be put into possession of them by the judicial process of seizure. Where the goods are of a generic character and unascertained, the buyer has the right to buy replacement goods at the seller's expense.⁷⁵² This may be regarded as an indirect form of specific per-

⁷⁵⁰ See Treitel, *Remedies, supra*, note 69, at 13; See also Nicholas, *supra*, note 92, at 210.

⁷⁵¹ Art. 1610 of the *French Civil Code* provides that instead of seeking avoidance of the contract in the event of non-delivery, the buyer may demand that the seller put the buyer in possession of the goods. Art. 1142 states that non-performance of an obligation to do or not to do something gives rise to liability in damages.

⁷⁵² The *French Civil Code*, art. 1144. In Québec, it is not clear whether the remedy of specific performance or damages is the primary remedy; art. 1065 of the *Québec Civil Code* sets out both the general right to damages and the right to specific performance in cases where specific performance is available. From the wording of the Article, it appears that the scope of specific performance is limited to exceptional cases, i.e. where the goods are unique or rare. To avoid this confusion, the English language version of the proposed new *Québec Civil Code* uses

formance, differing from damages in that the innocent party can achieve the greater part of what was bargained for.

[158] *Specific performance in Egyptian law*

In principle, pursuant to Article 199(1) of the *Egyptian Civil Code*, the right to require performance is the primary remedy for breach of contract. If the seller does not perform, the buyer is entitled to compel performance. The right to specific performance in Egyptian law is, however, subject to certain requirements. First, according to Article 203 of the Code, a party may be required to perform only if performance is possible. Specific performance will be denied, for instance, if the goods have been destroyed by fire. Second, an innocent party or a defaulting party can apply to the courts to obtain an order for performance. If the order is granted, the other party must comply with it; he or she cannot offer to pay damages instead. If neither party has applied for such an order, an action for damages will then be justified. Third, it is generally held that specific performance will not be granted if performance would cause unreasonable inconvenience to the defaulting party. Fourth, when the innocent party requires performance, the defaulting party must be given notice to that effect. The innocent party may claim damages resulting from the delay in performance. And, finally, in contracts involving goods that are neither specific nor ascertained, ownership cannot be transferred until they are ascertained.⁷⁵³ If the defaulting party refuses to cooperate with the innocent party to make the goods ascertained, the court may permit the innocent party or an expert to do so. In any event, the innocent party is always entitled to damages.

the expression "execution in kind" when it refers to *exécution en nature*. See the *Draft Civil Code and Commentaries*, Québec, Éditeur Officiel du Québec, 1978, Articles 267 to 287 of Book V. See also Articles 1647 and 1655 of the *Québec Draft Bill*, *supra*, note 93.

⁷⁵³ The *Egyptian Civil Code*, art. 205.

From the foregoing, it is clear that Egyptian law, like French law, considers specific performance a remedy to be applied whenever possible. Enforcing performance, subject to certain limitations, is the norm; other remedies are the exception.

Section II

Availability of the remedy of specific performance

[159] *The right to compel performance in general*

Under *The Convention*, the starting point, in cases of breach of contract by the seller⁷⁵⁴ or the buyer,⁷⁵⁵ is the remedy of specific performance. The main difference in the treatment of specific performance among the domestic laws considered in this study is that in French and Egyptian law it is considered the normal remedy for breach of contract, one that originates directly from the contract, while in English law it is an equitable remedy available, in principle, in exceptional cases only.

⁷⁵⁴ *The Convention*, art. 46. *ULIS*, in several articles, gives the buyer a right to require the seller to perform; see arts. 24(1)(a) and 27(1) (date of delivery); arts. 30(1) and 31(2) (place for delivery); art. 41(1)(a) (non-conformity of goods); art. 42 (remedying defects: delivery of goods or missing parts); art. 55(2) (other obligations). For the drafting history of the text, see the following documents: "Report of the W.G." 3rd sess., (1972), 3 *UNCITRAL Yearbook* 77, at 85; "Report of the W.G." 4th sess.", (1973), 4 *UNCITRAL Yearbook* 61, at 68-69, paras. 87 ff; *The 1976 Draft Convention*, *supra*, note 45, at 90 ff; *The 1978 Draft Convention*, *supra*, note 47, art. 27.

⁷⁵⁵ *The Convention*, art. 62. Also arts. 61, 62(1) and 70(2) of *ULIS*. For a legislative background of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* at 29, annex 4, paras. 22 ff; *id.*, paras. 36 ff and annex 1, art. 71; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* at 87, annex 1, art. 43; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 1, art. 43; "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* at 11, annex 1, paras. 366 ff; "Report of UNCITRAL" 11th sess., (1978), 8 *UNCITRAL Yearbook* at 11, para. 28 (art. 58); *Official Records*, *supra*, note 67, at 11, 124, 161 (art. 58) and 212, paras. 45-46.

The general rule contained in Article 46(1) of *The Convention* gives the buyer the right to require the seller to perform any obligation that the latter has failed to perform. This includes the seller's duty to deliver the goods or any missing parts thereof, to hand over documents and to cure defects.

Likewise, *The Convention* entitles the seller to require the buyer to pay the contract price, take delivery, or perform any other obligation. The buyer's obligation to take delivery consists of all the acts that are reasonably required to enable the seller to make delivery, as well as taking over the goods.⁷⁵⁶ The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods.⁷⁵⁷ If, for example, the contract provides that the buyer should name the vessel on which the goods are to be shipped, he or she is obliged to do so within the period specified. But if the buyer fails to nominate the vessel, can the seller compel its nomination? From a practical point of view, requiring performance of such an obligation may not be the best solution for the seller since a court action will be needed in order to have performance enforced.

As to compelling payment of the price, it can be assumed that a seller cannot do so until the time for payment has elapsed. Whether the buyer has failed to take preliminary steps in respect of payment is immaterial. This can be illustrated by the following example. Suppose that a contract provides for payment by confirmed letter of credit at any time during September and October, and that on the 10th of September the buyer opens an unconfirmed letter of credit. The seller is not bound to accept such a letter of credit. However, since the buyer is allowed to cure any defect in payment as long as there is still time to do so, the seller cannot compel payment until the end of October. The seller's right to compel the buyer to pay the price under *ULIS* and *The Convention* should be understood in this light.

⁷⁵⁶ *The Convention*, art. 60.

⁷⁵⁷ See *id.*, art. 30.

[160] *Compelling payment of the price*

It is not clear whether an action for the price under Article 62 is to be considered an action for specific performance. The practical importance of this issue is that, in *ULIS* and *The Convention*, if an action for the price is to be considered an action for specific performance, then a court in a contracting state is not bound to grant specific performance unless it can do so under its own law.⁷⁵⁸

It seems reasonable to suggest that the term "specific performance" under *The Convention* refers to any order requiring the performance of contractual obligations of the seller or buyer.⁷⁵⁹ This interpretation is supported both by the structure of *The Convention* and by its drafting history.

First, *The Convention* places Article 28 in Part I, entitled "General Provisions." If the rule applied only to performance by the seller, it would have been placed in Chapter II, entitled "Obligations of the Seller," under section III, which deals with the remedies of the buyer.⁷⁶⁰ Accordingly, *The Convention* should be interpreted as giving the seller the right to require the buyer to pay the price when the buyer has failed to do so. If the buyer fails to perform any obligation, the court will order such performance and enforce that order by whatever means are available to it.⁷⁶¹ The seller's ability to successfully sue for the price depends on the location of the court or arbitral tribunal and on whether a judgment for specific performance is possible under its law.

⁷⁵⁸ See *id.*, art. 28.

⁷⁵⁹ See also Honnold, *Uniform Law, supra*, note 41, at 357 (concluding that the seller's right to require the buyer to pay the price is subject to domestic law); also Ziegel, *The Remedial, supra*, note 62, at 9-31; but see Farnsworth, *supra*, note 496, at 249-250 (arguing that an action for the price is not specific performance and is not subject to the "forum's own law" under Article 28); see also Treitel, *Remedies, supra*, note 69, at 7, para. 8 (noting that in Common law countries, actions for an agreed sum are not referred to as suits for specific performance).

⁷⁶⁰ See Honnold, *Uniform Law, supra*, note 41, at 358, note 6.

⁷⁶¹ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 58, para. 5.

Second, The 1978 Draft Commentary to Article 28 mentions both Articles 46, regarding the buyer's right to performance, and 62, regarding the seller's right to payment of the price.⁷⁶² Furthermore, the Commentary to Article 62 specifically notes that the seller's right to payment is subject to Article 28.⁷⁶³

[161] *Action for the price: English and American law*

The availability of an action for the price differs under English and American law.⁷⁶⁴ Under section 49 of the English *Sale of Goods Act*, the seller is expressly entitled to an action for the price in two situations. The first is where property in the goods has passed to the buyer and the latter wrongfully fails to pay for the goods according to the terms of the contract.⁷⁶⁵ The second is where, under the contract, the price is payable on a particular day irrespective of delivery. Here, an action for the price may be maintained regardless of whether property in the goods has passed.

As an example of the second situation, suppose that goods are to be delivered on December 1 but are to be paid for a month earlier, on November 1. In this case, if the buyer fails to pay on November 1, the seller can bring a legal action for the price.⁷⁶⁶

Clearly, the principal application of section 49 of the English *Sale of Goods Act* is where the contract provides for payment to be made after delivery and the payment is not forthcoming. However, the provision also applies, as is clear from the example, where the price is payable before delivery and the buyer fails to pay. In this instance, rather than resell the goods and bring an action for damages to recover the shortfall, the seller is entitled to sue for the price.

⁷⁶² See *id.*, comment to art. 26.

⁷⁶³ See *id.*, comment to art. 58.

⁷⁶⁴ See Ziegel, *The Remedial*, *supra*, note 62, at 9-30.

⁷⁶⁵ *SGA*, 1979, s. 49.

⁷⁶⁶ See *id.*, s. 49(2).

Under section 2-709 of the *UCC*, the seller is only entitled to recover the price in cases where (a) the goods have been accepted; (b) conforming goods have been lost or damaged within a commercially reasonable time after the risk of loss has passed to the buyer; or, (c) the seller is unable to resell identified goods at a reasonable price and the circumstances indicate that further efforts to do so would be fruitless. In all other cases, the seller is only entitled to a claim for damages.

It seems from the foregoing that there are two principal differences between the English rule and the *UCC* provision. First, under the *UCC*, the seller's remedy of first recourse is the right to resell the goods. An action for the price is only available if resale is either impossible (because the buyer has accepted the goods or they have been destroyed after the risk of loss has passed to the buyer) or is impractical. Moreover, contrary to the English rule, neither the passage of title nor the stipulation of a specific day for payment are material in determining the seller's right to bring an action for the price.

From the preceding analysis, two important points emerge. First, English law appears to be more amenable than American law regarding the seller's entitlement to an action for the price. Second, both American and English law differ from *The Convention* where an aggrieved party is entitled to exact actual performance from the other side unless the matter is litigated in a forum in which the domestic law does not permit such relief.

[162] *Can specific performance be granted in respect of preliminary steps?*

Under *The Convention*, the buyer must take any steps necessary to enable the payment of the price.⁷⁶⁷ Under *ULIS*, such steps may involve accepting a bill of exchange, opening a documentary credit or giving a banker's guarantee.⁷⁶⁸ But would failure on

⁷⁶⁷ *The Convention*, art. 54.

⁷⁶⁸ *ULIS*, art. 69.

the part of the buyer to take these preliminary steps empower the seller to require performance? In other words, if the buyer fails to provide a letter of credit or a banker's guarantee, is it possible for the seller to compel that buyer to do so? The drafting history of Article 62 of *The Convention* strongly suggests that it is. Article 62 contains other obligations, in addition to the duty to pay the price and to take delivery. Article 61, which serves as an index of the seller's remedies, makes it clear that it applies to all the buyer's obligations, including the obligation to do all acts necessary to enable the seller to make delivery.⁷⁶⁹ Moreover, The 1978 Draft Commentary states that taking the steps and complying with the formalities required to enable payment is considered a current obligation, the breach of which gives rise to remedies under *The Convention*.⁷⁷⁰

The breach of an express contractual term requiring either the buyer or the seller to take preliminary steps should be regarded as a breach of contract.⁷⁷¹ This argument indicates, in turn, that providing the necessary co-operation is, as suggested by Honnold,⁷⁷² an example of the fulfillment of one of the general principles on which *The Convention* is based: that the parties should act with diligence and in good faith. Accordingly, if a party has promised to do something, and does not take the necessary preliminary steps, he or she has clearly acted in bad faith.⁷⁷³ Such a failure enables the other party to resort to any remedy available under *The Convention*, including spe-

⁷⁶⁹ *The Convention*, art. 60(1).

⁷⁷⁰ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 50, para. 5; see also *Official Records*, *supra*, note 67, at 45.

⁷⁷¹ See Honnold, *Uniform Law*, *supra*, note 41, at 336. Also Hellner, "The Vienna Convention and Standard Form Contracts" in *Dubrovnik Lectures*, *supra*, note 16, 325, at 325.

⁷⁷² See Honnold, *id.*, at 352, note 5. See also *The Convention*, arts. 19(2), 21(2), 32, 48(2), 58(3), 60(a), 56, 71, 73(2), 79(4) and 85-88.

⁷⁷³ Tallon, "The Buyer's Obligations Under The Convention on Contracts for the International Sale of Goods" in *International Sales*, *supra*, note 62, 7-1, at 7-8.

cific performance.⁷⁷⁴

[163] *Compelling delivery of substitute goods*

The delivery of substitute goods and the disposal of non-conforming goods is generally very costly to the parties in international sales. *The Convention* therefore limits the buyer's ability to require delivery of substitute goods to cases where the non-conformity constitutes a fundamental breach of contract,⁷⁷⁵ i.e. where the defect substantially deprives the buyer of what he or she is entitled to expect from the contract.⁷⁷⁶ Unlike *The Convention*, *ULIS* makes no reference to fundamental breach.

Limiting the buyer's right to demand delivery of substitute goods to cases where the non-conformity constitutes a fundamental breach is unfortunate; the right to require the seller to repair is subject to no such restriction.⁷⁷⁷ The reason for such a restriction, it has been suggested,⁷⁷⁸ is that the cost of sending another shipment of goods and of disposing of the non-conforming goods might be greater than the loss to the buyer of having received non-conforming goods. The breach, then, must be fundamental.⁷⁷⁹

⁷⁷⁴ See also [159].

⁷⁷⁵ What constitutes a fundamental breach of contract has been discussed in [22] - [25].

⁷⁷⁶ *The Convention*, art. 25.

⁷⁷⁷ See [165].

⁷⁷⁸ See Sutton, "The Draft Convention on International Sales-Part II" (1977), 5 *Australian Bus. L. Rev.* 28, at 56 (hereinafter cited as *part 2*).

⁷⁷⁹ See, however, the proposal made by West Germany as a compromise between *ULIS* (which made no reference to fundamental breach) and *the 1978 Draft Convention* (which required delivery of substitute goods only if the lack of conformity constituted a fundamental breach) to the effect that the buyer may require delivery of substitute goods whenever this is reasonable in the circumstances. This proposal was rejected on the grounds that it would have imposed unreasonable expenses on the seller and would have combined the remedies of substitution and repair. See *Official Records, supra*, note 67, at 337, paras. 47-48, SR. 19, paras. 47 ff.

[164] *Criticism of limitations on the right to compel*

delivery of substitute goods under The Convention

Article 46(2) of *The Convention*, which restricts the application of specific performance to cases where lack of conformity constitutes a fundamental breach, is unsatisfactory. The approach of *ULIS* is preferable because it focuses on the nature of the goods and not the seriousness of the breach (the test used in *The Convention* to determine whether the remedy of specific performance is available to the buyer).⁷⁸⁰ Under both uniform laws, however, the buyer is required to take reasonable steps to preserve the goods regardless of the degree of the breach.⁷⁸¹ Also, the buyer is under a duty to mitigate his or her damages when relying upon a breach of contract by the seller.⁷⁸²

It is submitted that the seller should not be compelled to perform if this would involve unreasonable expense or if it would be pointless to do so. This is the position taken by *ULIS*, which provides that the buyer's right to require the delivery of substitute goods or to have the seller repair the goods depends on the character of the goods and not on the degree of the breach.⁷⁸³ The buyer should therefore be able to require either repair or an offer of substitute goods irrespective of whether there has been a fundamental breach.⁷⁸⁴

⁷⁸⁰ See also Enderlein *supra*, note 70, at 191.

⁷⁸¹ *The Convention*, art. 86.

⁷⁸² See *id.*, art. 77.

⁷⁸³ *ULIS*, art. 42.

⁷⁸⁴ See also Bonell, "La nouvelle Convention des Nations Unies sur les contrats de vente international de marchandises" (1981), 7 *Droit et Pratique du commerce international* 7, at 21 (abbreviated English translation accompanies French text).

[165] *The buyer's right to compel the seller to make repairs*

Under both *ULIS* and *The Convention*, the buyer is entitled to require the seller to carry out repairs. This right is available even if the seller's breach is not fundamental. It is very important for the buyer of machinery and equipment to be able to require repairs by the seller because of the buyer's inability, in many cases, to make such repairs. The necessary skills are likely to be lacking in the case of buyers from developing countries. For this reason, sellers of machinery and equipment usually provide assistance with the maintenance of their products.

The remedy of repair is less important in the case of commodities and raw materials. In this case, it may be more beneficial to a buyer in possession of non-conforming goods to demand the delivery of substitute goods under Article 46(2) of *The Convention*.

Article 46(3) gives a buyer a right to require the seller to repair the defects only if this is not unreasonable under the circumstances. Whether it is reasonable depends "on the technical difficulties or the amount of expense required."⁷⁸⁵ Presumably, it would be unreasonable to compel the seller to repair if the cost of repair exceeded the diminution in value to the buyer caused by the defect. In practice, if the defect is not substantial and it would be unreasonable to compel the seller to take back the goods to repair them, the buyer may decide to have the repairs done in his or her country at the seller's expense. In such a case, the buyer retains the right under Article 50 to reduce the price to reflect any diminution in value.

If Article 28 (which permits a court to refuse specific performance if it would do so under its own law) applies to an order requiring the seller to repair defective goods, the right to repair under Article 46(3) will be severely limited because it is unknown in many legal systems.⁷⁸⁶ For example, repair is not normally available to an aggrieved

⁷⁸⁵ See Enderlein, *supra*, note 70, at 192.

buyer under the *UCC* unless volunteered by the seller, as in the case of an attempt to cure under section 2-508.⁷⁸⁷

This question is not directly addressed by *The Convention*. The language of both Articles 28 and 46 suggests that an order to repair is subject to Article 28. One may conclude, however, that courts still have the discretion to vary the effect of the applicable domestic law by interpreting Articles 28 and 46 in the light of *The Convention's* international character and the need to promote uniformity in its application.⁷⁸⁸ Courts in contracting states, therefore, should exercise their discretion to treat international sales contracts governed by *The Convention* differently from contracts governed by their domestic laws. Accordingly, they should be willing to compel performance of the former either by ordering a seller to deliver substitute goods or by requiring that seller to repair defective goods.

[166] *Compelling repairs: practical difficulties*

The application of Article 46(3) of *The Convention*, entitling the buyer to require the seller to repair defective goods, is expected to cause practical difficulties. These merit careful consideration. For example, it is not clear whether the remedy is restricted to contracts involving "specific" goods or whether it also applies to those involving unascertained goods. In addition, it is not clear whether the remedy is available only where the seller is the manufacturer of the goods. *ULIS* recognizes a right to demand repairs only with respect to goods produced or manufactured by the seller.⁷⁸⁹ It seems that

⁷⁸⁶ See *Official Records, supra*, note 67, at 335-336 (where several representatives expressed this opinion).

⁷⁸⁷ An order requiring the seller to repair non-conforming goods may be available under the *UCC* where the circumstances justify specific performance under s. 2-716(1). Unlike under Article 46(3) of *The Convention*, however, an order requiring repair is limited to situations falling within the *UCC*, s. 2-716(1), that is, "where the goods are unique or in proper circumstances." See also note 749.

⁷⁸⁸ *The Convention*, art. 7.

the seller is presumed under *The Convention* to be the manufacturer or the producer of the goods, but it is not clear what happens if not. Considering the purposes of Article 46(3) of *The Convention*, one may conclude that the goods referred to are "specific or ascertained," since it is presumed that the buyer generally requires the seller to repair following the discovery of non-conformity. Further, it seems that the rule includes traders as well as manufacturers and producers, as long as they have the ability to do the repairs.

Although the right to compel repairs will likely be denied if its exercise would be unreasonable or impossible, *The Convention* should have given the buyer the opportunity to repair minor defects at the seller's expense, particularly when the seller's facilities for repairs are in a distant country. In practice, however, the buyer may not resort to the remedy of repair unless the goods are of a special nature and only the seller is capable of doing the repairs, as in the case, for example, of airplanes and factories.

To avoid future difficulties, it should have been clearly stated that a seller may be compelled to do repairs only where he or she is the manufacturer or producer of the goods. According to this suggestion, if the buyer were to buy from a dealer, rather than from a manufacturer or producer, he or she would only have the right to require delivery of substitute goods. In any event, whether or not the seller is a manufacturer or producer, it would have been more in accordance with international trade practice had the buyer been given the right to do minor repairs or obtain replacement goods.⁷⁹⁰ This is because the completion of repairs usually takes a significant amount of time, thus depriving the buyer of the benefit of the goods. This, however, should be subject to one condition: such repair or replacement should be done without causing the seller unreasonable expense. Replacement is unlikely to be reasonable if (a) the price of the

⁷⁸⁹ *ULIS*, art. 42.

⁷⁹⁰ In fact, this right was stated in art. 42(1)(a) of the 1978 Draft Convention; see also the Canadian proposal at the Conference. *Official Records, supra*, note 67, at 336, paras. 23 and 40.

goods has risen significantly; or, (b) the goods cannot be easily located so that the buyer must go to the extra expense of procuring them from a distant place. If replacement is difficult, or otherwise not in accordance with international trade practice, or if the necessary repairs are major, the buyer should have the right to require the seller to deliver substitute goods.

Section III

Limitations on the availability of specific performance

[167] *Generally*

There are a number of circumstances in which specific performance will not be the most appropriate remedy. Its availability should therefore be restricted.

In general, the remedy imposes unduly onerous obligations on a defaulting party who is not willing to perform in circumstances where the aggrieved party would be adequately compensated. Compelling such a party to perform might unfairly restrict freedom of choice, especially when the subject matter of the contract is generic goods that may be obtained from other merchants. It is reasonable, therefore, to say that specific performance may impose a strain on the law enforcement machinery that must be balanced against the benefits derived by the aggrieved party from such an enforced performance.⁷⁹¹ Practically speaking, enforcement of specific performance may involve incurring extra storage expenses by at least one party. Furthermore, it is possible for the parties to encounter unpredictable situations. Since this remedy requires court action, which may take a considerable period of time, a seller may find the buyer bankrupt by the time an order for specific performance is obtained. This situation would make his or her position worse. In most cases, a seller can be expected to

⁷⁹¹ See Treitel, *Remedies*, *supra*, note 69, at 8, para. 10.

reduce the amount at risk by promptly reselling the goods. When any loss results, the seller may, of course, recover it in the form of damages.⁷⁹²

To summarize, both *ULIS* and *The Convention* contain the general rule that the aggrieved party may elect to compel specific performance. *The Convention*, but not *ULIS*, imposes a restriction on the buyer's right to obtain specific performance, namely, that the non-conformity must constitute a fundamental breach. However, *The Convention* and *ULIS* both impose restrictions on the reasonableness of requiring repairs. Article 28 and other restrictions on obtaining specific performance will be considered below.

[168] *Availability of specific performance subject to domestic laws*

Article 28 of *The Convention* provides that "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts for sale not governed by this Convention."⁷⁹³ The primary purpose of Article 28 is to provide Common law courts with complete freedom to refuse to order specific performance (an order they rarely make).⁷⁹⁴ This means that a judge in

⁷⁹² See Honnold, *Uniform Law, supra*, note 41, at 359.

⁷⁹³ The corresponding Article in *ULIS* is art. 16, which allows a court to decline either to order a vendor to deliver the goods or to enforce a judgment ordering that vendor to do so, if that is what the court would do if it were applying the *lex fori* to a wholly domestic contract. Art. VII (1) of the treaty contains a similar rule. Both provisions limit the availability of the remedy of specific performance. For the legislative history of art. 28, see the following documents: "Report of the W.G." 2nd sess., (1971), 2 *UNCITRAL Yearbook* 50, paras. 124-125; "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* at 29, annex 1, art. 16; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49 ff, paras. 52-53, and annex 1, art. 12; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 1, art. 12; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* at 11, annex 1, paras. 135-136; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* at 11, para. 28 (art. 26); *Official Record, supra*, note 67, at 7, 100, 304-305, paras. 41 ff, 157 and 206, para. 21.

⁷⁹⁴ See Szakats, *supra*, note 745, at 239. See also *Official Records, id.*, at 304-305, SR. 13, 11 and 41 ff.

a Common law country may dismiss an aggrieved party's claim for specific performance even though the claim would most likely be granted if a Civil law judge were to decide the same case.

The drafting history of Article 28 reveals that one influential argument made in favour of its adoption is that the specific performance remedy is economically inefficient and ought, therefore, to be discouraged whenever possible.⁷⁹⁵ Indeed, economic analysts have actively questioned the economic efficiency of specific performance. It is submitted, however, that the more convincing view, discussed below, suggests that specific performance may be more efficient than damages. Damages do not, at least in certain cases, fully compensate an aggrieved party for all financial loss, inconvenience, and delay caused by a breach of contract. Parties should therefore be permitted to choose between specific performance and damages.

Dawson has severely criticized the various doctrines that the Common law has developed in order to limit claims for specific performance. He has also found it particularly disadvantageous that an Anglo-American judge should enjoy so great a discretion in enforcement proceedings.⁷⁹⁶ Schwartz has also criticized the Common law approach and advocated the general availability of specific performance at the option of the aggrieved party.⁷⁹⁷ Ulen has concluded that specific performance should be the routine contract remedy if the goal of contract law is to promote the economically efficient exchange of mutually beneficial promises.⁷⁹⁸

⁷⁹⁵ Farnsworth, *supra*, note 496, at 250-251 (arguing in favour of broadening Article 28).

⁷⁹⁶ Dawson, "Specific Performance in France and Germany" (1959), 25 *Mich. L. Rev.* 495, at 533.

⁷⁹⁷ Schwartz, "The Case for Specific Performance" (1979), 89 *Yale L. J.* 271. Yorio criticizes Schwartz's position. See Yorio, "In Defense of Money Damages for Breach of Contract" (1982), 82 *Colum. L. Rev.* 1365.

⁷⁹⁸ Ulen, "The Efficiency of Specific performance: Toward a Unified Theory of Contract Remedies" (1984), 83 *Mich. L. Rev.* 341, at 402.

Other scholars have argued in favour of the Common law approach. Kronman, for example, has supported the traditional distinction in Common law between unique and non-unique goods. He argues that, if left to their own negotiation, most parties would prefer specific performance only where the goods are unique.⁷⁹⁹ Bishop has analyzed Schwartz's argument and concluded that the Common law rules on the choice of specific performance or on damages are fundamentally sound from the viewpoint of economic theory.⁸⁰⁰

Other writers have made a distinction between contracts "to give" and contracts "to do." Shavel has suggested that there is an economic case to be made for the French rule of specific performance in the case of contracts "to give" and damages in the case of contracts "to do."⁸⁰¹ He supports his contention by arguing that in production contracts, specific performance appears to be the least desirable remedy from the point of view of risk-sharing because it makes the seller absorb (or negotiate his or her release from) the potentially great risks associated with variation of the production cost. But in regard to contracts for transfer of possession (i.e. contracts "to give"), specific performance appears to be more desirable. This is because there is no variation in the seller's position. That is, that seller gets the payment and delivers to the buyer the goods in his or her possession. But if the buyer is protected by damages, "the later offers of purchase at a higher price might encourage the seller to breach the contract, pay damages and then sell to a higher bidder."⁸⁰²

799 Kronman, "Specific Performance" (1978), 45 *U. Chi. L. Rev.* 351, at 365 ff.

800 Bishop, "The Choice of Remedy for Breach of Contract" (1985), XIV *J. Leg. Stud.* 229, at 317.

801 Shavel, "The Design of Contracts and Remedies for Breach" (1984), 99 *Q. J. Econ.* 121, at 146.

802 *Ibid.*

This review of the debate over the economic efficiency of the remedy of specific performance suggests that the aggrieved party should be allowed to choose between specific performance and damages. This indicates, in turn, that *The Convention's* general remedial provisions giving the aggrieved party the choice of whether to enforce the right to performance or to seek damages instead is fundamentally sound. Moreover, this approach accords with the notions of fairness and justice shared by all the laws considered in this study. Consequently, courts in contracting states should order specific performance more readily in disputes governed by *The Convention*, unless this is unreasonable in the circumstances.

[169] *The law of the forum*

Under Article 28 of *The Convention*, a court is not bound to enter a judgment of specific performance unless it would do so under "its own law." This Article was clearly intended to refer to the "*lex fori*." However, it is not clear whether a court should also look to the forum's choice of law rules in considering whether to grant specific performance. Accordingly, the court's "own law" might be interpreted to refer to the substantive law of the forum or to the rules applicable under the domestic conflict of laws rules.⁸⁰³ This can be illustrated as follows. Assume that an English court has jurisdiction to decide a dispute and that a request for specific performance is not allowed under English law. Assume further that French law is the law applicable to the contract. The court's decision with respect to specific performance will differ depending upon whether the law of the forum (English law) or the proper law of the contract (French law) provides the rules on specific performance.

Any solution the English court might adopt could be expected to cause difficulties in practice, particularly if one assumes, as in the previous example, that English law is the applicable law (either because it is the law of the forum or the proper law of the

⁸⁰³ See Honnold, *Uniform law*, *supra*, note 41, at 224.

contract). This is because an English court is not bound to enter a judgment for specific performance under its domestic law. One wonders, then, what remedies are still available to the buyer. Since under *The Convention*, unlike in the example, avoidance can only be effected by means of a declaration of avoidance by the innocent party, damages and price reduction may be the only remedies available if no such declaration is given.⁸⁰⁴ The reason for this problem is the lack of clarity as to whether the granting of specific performance is governed by the proper law of the contract as determined by conflict of laws rules, or by the substantive law of the forum.

The policies underlying the compromise of Article 28 suggest that "law" in the phrase "under its own law" refers to the forum's domestic substantive law, without any reference to its conflict of laws rules. This argument is supported by the drafting history of Article 28, in which the debates over the provision focused on preserving domestic law as the final arbiter of whether specific performance would be granted.⁸⁰⁵ Accordingly, courts in those legal systems that consider specific performance to be an exceptional remedy are not required to apply their conflict of laws rules that might lead to the application of a law that is inconsistent with the forum's own substantive law.

[170] *The buyer's duty to attempt to obtain replacement goods under ULIS*

ULIS imposes another limitation on the remedy of specific performance. It provides that the buyer shall not be entitled to require performance if it is in conformity with usage that this right be denied and if, in addition, it is reasonably possible to purchase goods to replace those specified in the contract.⁸⁰⁶ This rule is based on considera-

⁸⁰⁴ This example assumes that the aggrieved party is the buyer. The seller in this example has recourse to the remedy of damages only.

⁸⁰⁵ See, for example, *The 1978 Draft Commentary, supra*, note 67, comment to art. 26, para. 3; *Official Records, supra*, note 67, at 304-305.

⁸⁰⁶ *ULIS*, art. 25.

tions, similar to those that have shaped the rule in Common law jurisdictions, that lead to a refusal of specific performance if damages are an adequate remedy.⁸⁰⁷ Accordingly, the buyer under *ULIS* is under a duty, in cases of non-delivery, to obtain substitute goods elsewhere. This, as a matter of practice and efficiency encourages continuity in the buyer's business while allowing recourse to any other remedy against the defaulting seller.

The buyer's ability to require the seller to perform depends on the possibility of finding replacement goods of the same quality and quantity as the goods contracted for. Replacement should take place once there is a clear sign that the seller will not deliver the goods. However, if the delivery is merely late, and the delay is not significant, the buyer will not be justified in replacing the goods.

Once the goods have been replaced, the buyer can no longer compel the seller to deliver. Nor can the seller force the buyer to accept delivery. This probably means that an action for damages will follow in which the loss will be measured as from the time of replacement. It is clear, however, that the buyer need not replace the goods unless replacement (a) would be in conformity with usage; and, (b) is reasonably possible.

Although *The Convention* contains no similar rule, it may be argued⁸⁰⁸ that the same result will obtain under both *The Convention's* trade usage rule (Article 9) and mitigation of damages rule (Article 77).⁸⁰⁹ Accordingly, if the seller wants to resist the buyer's claim for specific performance, the existence of such a trade usage must be

⁸⁰⁷ See Treitel, *Remedies, supra*, note 69, at 23.

⁸⁰⁸ See also Herber, "The Rules of the Convention Relating to the Buyer's Remedies in Cases of Breach of Contract" (1980), 7 *Digest of Comm. Laws* 104, at 116.

⁸⁰⁹ But see Farnsworth, *supra*, note 494, at 250-251 (concluding that neither the seller nor the buyer is free to reallocate his or her resources even if the other party has a ready market on which it can recover or resell, as the case may be, and even if that party is fully compensated for any resulting loss).

established.⁸¹⁰

[171] *The seller's duty to attempt to resell under ULIS*

The seller is not allowed to compel the buyer to accept and pay for the goods if resale is both reasonably possible and in conformity with usage.⁸¹¹ In such cases, the seller must endeavour to resell the goods in order to be entitled to require performance from the buyer. If the price of the goods has fallen, the seller may claim damages for the difference in price.

The tests of "usage" and "reasonably possible to sell" will be applied in practice only in those circumstances in which the seller remains in possession of the goods; otherwise, usages are fairly uncommon. It should be pointed out that the question of when it is reasonable for the seller to resell is a question of fact.

Unless otherwise stated in the contract, Egyptian law contains a similar rule whereby a seller is entitled to avoid the contract if, and only if, the buyer fails to pay the price on time or to accept delivery. The date for payment, however, must be clearly stated.⁸¹² *ULIS* and Egyptian law differ from French law⁸¹³ in one respect. They give the seller the option of avoiding without serving a *mise en demeure* where the buyer fails to pay the price on the due date.⁸¹⁴

⁸¹⁰ See, however, Ziegel, *The Remedial, supra*, note 62, at 9-12 (noting that it is difficult to conceive of a usage that would lead to such anomalies).

⁸¹¹ *ULIS*, art. 61(2).

⁸¹² The *Egyptian Civil Code*, art. 461.

⁸¹³ See the *French Civil Code*, art. 1657, which states that where, in a contract for the sale of commodities or other moveables, a date is specified by which the buyer must take delivery, the seller may, after that date, treat the contract as terminated by operation of law. This provision does not extend, as it does in Egyptian law, to failure of the buyer to pay the price. See Treitel, *Remedies, supra*, note 69, at 114, para. 148.

⁸¹⁴ Murkus, *Sales Contract*, (Cairo, 1968) (in Arabic), at 476-477, para. 259; see also Faraj, *supra*, note 84, at 572 ff, para. 292; Sanhoury, *supra*, note 343, at 836 ff, para. 416.

There is no similar requirement in *The Convention*. This would eventually put the seller in a difficult situation. Although entitled to resell the contract goods to a third party, the seller is still obliged to resort to alternative remedies. If the breach is fundamental, avoidance is available; if not, an additional period of time can be fixed for the buyer to perform. One could argue that in spite of the deletion of Article 61 of *ULIS*, a buyer is still able to rely on trade usage under Article 9 of *The Convention*.⁸¹⁵ This means that, in order to resist the seller's claim for performance, the buyer must show that it was reasonably possible for the seller to resell the goods to a third party.⁸¹⁶

[172] *The remedy of specific performance: conclusions*

The preceding analysis demonstrates that the efforts of *The Convention's* drafters to achieve a compromise between the approaches of various legal systems has been somewhat unsuccessful. The text remains unclear and the aggrieved party's right to the remedy of specific performance still depends primarily on the applicable domestic law, including that which governs *locus standi*.⁸¹⁷ It is hardly surprising, then, that the "whole area of the remedy of specific performance has been deliberately left vague in order to meet the conflicting philosophies of differing legal systems."⁸¹⁸

The Convention's approach of combining Civil and Common law theories creates a law that does not establish a unified rule for the remedy of specific performance and that causes uncertainty for the parties. The reason for this is the conflicting approaches of the Common and Civil law systems to the enforcement of contractual obligations.

815 "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* at 29, para. 45. As a matter of fact, usages always prevail over the law in accordance with art. 9 of *ULIS*.

816 But see the United States proposal at the Conference to amend art. 73 of the 1978 Draft Convention, *Official Records, supra*, note 67, at 369-370, paras. 55 ff.

817 See Drobnič, *supra*, note 100, at 321.

818 See Sutton, *Part 2, supra*, note 778, at 56.

This illustrates the difficulties surrounding the drafting of unified rules at the international level, where it is difficult for states to abandon their traditional positions.

[173] *Specific performance in international sales: a suggested perspective*

One should be careful not to overestimate the effectiveness of the remedy of specific performance as currently practiced by the international business community. Rather than compelling the defaulting party to perform, it may be to the benefit of the aggrieved party to resort to other remedies. Continued communication between the parties is very important once a breach has been discovered. Usually it is more efficient for an aggrieved buyer to promptly purchase substitute goods or for an aggrieved seller to resell rejected goods. In this way, productive activity can continue while an aggrieved party pursues a claim for damages.⁸¹⁹

Upon closer scrutiny, the differences between various domestic laws, particularly Common and Civil law legal systems, concerning the remedy of specific performance are not that significant.⁸²⁰ In fact, the greater availability of specific performance in Common law jurisdictions in recent years has led a number of writers to express doubts that English law in its present state is less liberal than French law concerning the remedy of specific performance.⁸²¹ Accordingly, the achievement of a rule on specific performance that would be acceptable to Civil and Common law legal systems is a real possibility. The following principles might be of practical importance in formulating such a rule. Since the buyer has to subject a claim for specific performance to litiga-

⁸¹⁹ See Honnold, *Uniform Law*, *supra*, note 41, at 228.

⁸²⁰ See Zweigart, *supra*, note 161, at 5.

⁸²¹ Farnsworth points out that "the current trend is clearly in favour of the extension of specific relief." See Farnsworth, "Legal Remedies for Breach of Contract" (1970), 70 *Colum. L. Rev.* 1145, at 1156. See also Lawson, *Remedies in English Law* (London: Penguin Books, 1972), at 205 ff and 243 ff, especially at 245 (concluding that specific performance is probably granted more liberally now in England than it is in France).

tion, it is often better to procure goods elsewhere and to pursue a claim for damages against the seller.⁸²² During the litigation period, the aggrieved party has to take care of the goods. This could cost time and money. What is important to the buyer is to supply his or her needs as soon as possible from another source. In so doing, claiming damages, which can always be done, may be more practical than seeking specific performance since it would permit business operations to continue without interruption. Alternatively, if other sources of supply are limited, or if the buyer needs goods with specific qualities, the remedy of specific performance is more appropriate. In any case, it would be unwise to require specific performance when this performance would involve the breaching party an unreasonable effort or expense.

This suggestion, however, does not mean that the buyer's right to claim specific performance should be limited to cases where the goods are rare, extremely valuable, of special sentimental value (the *UCC*, s. 2-716(1)), or unique (the traditional Common law distinction being between unique and non-unique goods). The remedy should be permitted to stand on its own as a separate remedy available to a party. As a result, a party to an international sales contract will not, in most cases, insist on requiring the other side to perform. As explained in paragraph [154], resort to the remedy will be limited to certain situations. In other situations, an award of damages will provide adequate compensation.⁸²³

⁸²² See Reinhart, *supra*, note 15, at 99.

⁸²³ Here, an important point should be mentioned: the real difference, according to this suggestion, is not between English and French law but between the laws of market-economy countries and those of socialist countries. Simply put, contracts are made in the latter countries for the fulfillment of an economic plan. This is completely different from the former, where most contracts are made for profit. It has been noted, however, that the completion of sales contracts is more important to the achievement of economic planning goals when the transaction is purely domestic than when it is international. See Drobing, *supra*, note 100, at 322.

Chapter V

EXEMPTION FROM PERFORMANCE

[174] *Introduction*

After a contract is made, a party bound under that contract may encounter impediments that make performance impossible. When this is the case, that party is not liable for any damages that may result from a failure to perform. Examples of such impediments are varied: war, strikes, governmental restrictions (e.g. embargo, exchange control), storm, fire, requisition, and the closing of an international waterway (e.g. Suez Canal).

Although it is difficult for the parties to foresee all future economic and political changes, they usually insert one or more clauses into their contract defining their mutual rights and duties if certain events beyond their control occur.⁸²⁴ Examples are easy to find: *force majeure* clauses, hardship clauses, escalation clauses and price variation terms all typify the ways in which contracting parties can seek to control the consequences of unforeseen impediments. This, of course, introduces greater certainty, particularly when the scope of such clauses is defined in detail. Courts in most countries recognize the validity of such clauses.⁸²⁵

By introducing a *force majeure* or similar clause into their contract, parties can expressly provide that the risk of a supervening event is to be borne by only one of them⁸²⁶ or apportioned between them. Such a clause may give one or both parties the right to avoid the contract upon the occurrence of the specified event.⁸²⁷ Alternative-

⁸²⁴ For an example of a typical *force majeure* clause, see *Rockwell Int'l Systems Inc. v. Citibank N.A.*, 719 F.2d Rep. 583, at 585 (2d Cir. 1983).

⁸²⁵ The validity of *force majeure* clauses has been upheld in several American cases. See, for example, *Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d Rep. 992; 37 U.C.C. Rep. 779, at 783-89 (9th Cir. 1983); *Jon-T Chemicals Inc. v. Freeport Chemical Co.*, 704 F. 2d Rep. 1412 (5th Cir. 1983).

⁸²⁶ *Budgett and Co. v. Binnington & Co.*, [1891] 1 Q.B. 35, at 41; *Thiis v. Byers* (1876), 1 Q.B.D. 244.

⁸²⁷ *Bank Line Ltd. v. Arthur Capel & Co.*, [1919] A.C. 435 (H.L.).

ly, it may provide for the contract's automatic termination.⁸²⁸ The doctrine of exemption becomes significantly less important when the parties have regulated the consequences of a catastrophe in advance.⁸²⁹ However, it has been held that even if the parties actually foresaw the event at the time of contracting, this need not prevent the application of the doctrine of frustration.⁸³⁰

The present chapter is divided into two sections. The first deals with the requirements for exemption from liability. The second deals with the effects of applying the doctrine of exemption. Before proceeding with either, however, a terminological clarification must be made.

[175] Terminology

In French law, the occurrence of a supervening event that excuses one of the parties from performance is referred to as *force majeure*.⁸³¹ It is also a facet of the English law doctrine of frustration.⁸³² In general, frustration refers to situations where the

828 See, e.g., *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.*, [1962] A.C. 93 (H.L.).

829 *Krell v. Henry*, [1903] 2 K.B. 740, at 752. ("The test of frustration seems to be whether the event which causes the impossibility was or might have been anticipated or guarded against.") Similar statements are found in the following cases: *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.*, [1942] A.C. 154, at 163; *Baily v. De Crespigny* (1869), L.R. 4 Q.B. 180, at 185; *Re Badische Co. Ltd.*, [1921] 2 Ch. 331, at 379; *Denmark Productions Ltd. v. Boscobel Productions Ltd.*, [1969] 1 Q.B. 699, at 725.

830 *W.J. Tatem Ltd. v. Gamboa*, [1939] 1 K.B. 132, at 137-139. But see Treitel, *An Outline*, *supra*, note 81, at 317.

831 See the *French Civil Code*, art. 1148, which refers to "*force majeure*" or "*cas fortuit*."

832 "Frustration" can be a confusing term. In the past, it has been limited to describing situations in which the object or purpose of the contract is subverted. The more modern and, it is submitted, better view is to regard it as an omnibus concept applicable to all cases of supervening impracticability (impossibility being a misnomer under English law), supervening illegality, and frustration of purpose. See Treitel, *Contract*, *supra*, note 5, ch. 20.

contract comes to an end automatically,⁸³³ where its further fulfillment is brought to an end by some irresistible and extraneous cause for which neither party is responsible,⁸³⁴ or where further fulfillment is only possible in a way that is very different from that originally contemplated. To be sure, it is impossible to list all the circumstances to which the doctrine of frustration may apply. However, it is worthy of note that the doctrine has been applied in the following types of cases: supervening illegality;⁸³⁵ supervening impossibility through government interference;⁸³⁶ destruction of specific premises at which the contract was to have been performed;⁸³⁷ and non-occurrence of a certain event.⁸³⁸ It has also been noted that the word "frustration" is used in a narrow sense in the U.S. to distinguish between the doctrine of frustration and the doctrine of impossibility of performance.⁸³⁹ In England, however, the word "frustration"

833 *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*, [1926] A. C. 497, at 505 (P.C.); *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.*, [1942] A.C. 154, at 163.

834 *Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd.*, [1944] 1 All. E.R. 678, at 683 (H.L.).

835 For example, see *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd.*, [1943] A.C. 32 (H.L.) (the outbreak of war meant that performance would have involved trading with the enemy).

836 *Bank Line Ltd. v. Arthur Capel & Co. Ltd.*, [1919] A.C. 435 (H.L.) (Government requisition of ship let on a time charter).

837 *Taylor v. Caldwell* (1863), 122 E.R. 309 (Q.B.).

838 The case of *Krell v. Henry*, [1903] 2 K.B. 740 is a good illustration of this. In that case, the doctrine was extended to instances where literal performance is not "impractical," but where some event has frustrated the purpose of the contract. One of the parties was excused from paying for the use of a balcony that he had hired, at an enhanced price, to watch a coronation procession when the procession was cancelled due to the illness of the king. It has been said that despite criticisms, the case was innovative, since it introduced the idea of frustration of purpose. See Fridman, *The Law of Contract in Canada* (Toronto: Carswell, 1986), at 583.

839 See Farnsworth, *supra*, note 822, at 5. The doctrine of impossibility under U.S. law refers to situations in which the performance of the contract has become literally impossible, either by destruction of the subject matter, the death of a necessary person, or the nonexistence of the specifically contemplated means of performance. The doctrine of frustration applies to situations where performance is

is used to encompass both doctrines.⁸⁴⁰

In French law, the main object of *force majeure* is to exempt the affected party from his or her obligations whenever an unforeseen, supervening event renders the performance of one or more of them impossible.⁸⁴¹ The concept includes physical impossibility (act of God) and legal impossibility (act by foreign or domestic government).

Neither Article 74(1) of *ULIS* nor Article 79(1) of *The Convention* refers either to the Civil law term "*force majeure*" or to the Common law term "frustration;" instead, the word "exemption" is used in both laws.

The main features of these doctrines will be discussed in greater detail below. Suffice it to say here that what the doctrines have in common is that they are linked to disturbances during the period of the performance of the contract for which neither of the parties is legally responsible (in contrast with a breach of contract such as defective quality and lack of performance). However, whereas frustration completely discharges the parties from future obligations for all time, *force majeure* allows the contract to operate again once the impediment disappears.

possible, but would not achieve the original intentions of either the promisor or the promisee. See also Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British law" (1980), 13 *Vand. J. Trans. L.* 107; at 114; OLRC, *Report on Sales*, at 374, accepted the test of commercial impracticability, and subject to certain changes, recommended the adoption of a similar provision.

⁸⁴⁰ The English doctrine of frustration is substantially similar to the United States doctrine of impossibility. See *Transatlantic Financing Corp. v. U.S.A.*, 363 F.2d 312 (D.C. Cir. 1966).

⁸⁴¹ But see *Borthwick (Thomas) (Glasgow) Ltd. v. Faure Fairclough Ltd.*, [1968] 1 Lloyd's Rep. 16, at 28, where it was held that the concept of *force majeure* has no precise and comprehensive meaning.

Section I

Elements exonerating a party from liability

[176] *Non-performance "due to an impediment"*

The drafting history of Article 74 of *ULIS* reveals that the choice between the word "obstacles" and the word "circumstances" caused considerable controversy at the 1964 Conference.⁸⁴² After much discussion, the drafters adopted the word "circumstances" rather than the word "obstacles," which had been used in Article 75 of the 1956 draft. This reflects the intention of the drafters to adopt a more flexible approach in order to cover all circumstances beyond the control of the parties at the time of contracting.

But the approach of *ULIS* was criticized⁸⁴³ on the ground that it covers too wide a range of circumstances.⁸⁴⁴ Its definition may extend not only to situations where performance has become impossible (as is the case in both English and French law)⁸⁴⁵ but also to situations where performance has merely become onerous (as is not the case in either English⁸⁴⁶ or French law).⁸⁴⁷

⁸⁴² Nicholas, "Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods" in *International Sales*, note 62, 5-1, at 5-11 (hereinafter cited as *Impracticability*).

⁸⁴³ But Berman argues that art. 74 of *ULIS* contains an excellent general definition of excuse for non-performance. See Berman, "The Uniform Law on International Sale of Goods: A Constructive Critique" (1965), 30 *L. & Contem. Prob.* 354, at 357.

⁸⁴⁴ "Report of the W.G" 5th sess., (1974), 5 *UNCITRAL Yearbook* at 29, annex 3, para. 2.

⁸⁴⁵ See [175].

⁸⁴⁶ See, e.g., *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.); see also *Cheshire*, *supra*, note 108, at 513.

⁸⁴⁷ See *Amos and Walton*, *supra*, note 92, at 86-87; von Mehren and Gordley, *supra*, note 352, at 1049.

For Article 79 of *The Convention* to apply, non-performance must be "due to an impediment" beyond his or her control.⁸⁴⁸ An example of an impediment that no laws relevant to this study expect the seller to avoid or overcome is the accidental destruction of specific goods.

In the absence of a definition, the term "impediment," within the meaning of *The Convention*, may be interpreted to include not only (a) cases where performance is physically impossible due to the destruction of specific goods but also, (b) cases where performance, though still possible, has become too expensive and burdensome. This interpretation is supported by the fact that the term "impossibility" was intentionally excluded at an early stage of *The Convention's* drafting.⁸⁴⁹ However, *The Convention* requires the non-performing party to establish that he or she could not reasonably have been expected to foresee the impediment at the time of contracting, avoid it or overcome it. This, it is submitted, connotes impossibility of performance. If this is correct, *The Convention* is similar to French but not to English law. Under French law, an event must render impossible performance by one of the parties in order to constitute *force majeure*.⁸⁵⁰

In English law, the doctrine of impossibility is in many ways like the doctrine of frustration. However, there is one significant difference between the two. A contract is frustrated not only in cases of impossibility, but also in circumstances where per-

⁸⁴⁸ *The Convention*, art. 79(1). For a legislative history of the text, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, at 39, paras. 107 ff; "Texts of Comments" *id.*, 65, at 66 ff, reproduced in (1975), 6 *UNCITRAL Yearbook* 84; "Report of the W.G." 6th sess., *id.*, 49, at 60-61, paras. 102 ff; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11, para. 28; *Official Records, supra*, note 67, at 133 ff, 378 ff, paras. 1 ff, 408 ff, 146 (art. 65) and at 227, paras. 26 ff.

⁸⁴⁹ "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* at 49, annex 2, para. 4. The reason for such an exclusion is that the test of impossibility would lead to ambiguity since it had different meanings in different legal systems.

⁸⁵⁰ See Benjamin, *supra*, note 81, para. 651; see also *Amos and Walton, supra*, note 92, at 165 and 168-169; Von Mehren and Goldley, *supra*, note 352, at 1049-1050.

formance would involve something radically different from what was undertaken in the contract.⁸⁵¹

The contract may permit one of the parties to choose any one of several modes of performance. For example, the buyer may have the option of either paying in cash at a specified place or paying by letter of credit. A contract is not impeded if one or more of the permissible methods becomes impossible so long as at least one other remains available.⁸⁵² Thus if, in the above example, payment in the specified place becomes impossible, the buyer is still obliged to pay by letter of credit.

The impediment may be natural, as in the case of an act of God or loss of the contractual object without the non-performing party's fault. Alternatively, it may be due to human intervention, as in the case of a governmental exchange control or a law prohibiting dealings with either the seller or the buyer.

[177] *Unforeseeable Event: ULIS*

The application of Article 74 of *ULIS* requires a party pleading exemption to prove that he or she was not bound to take the event into account. *ULIS* does not define what is meant by an unforeseeable event. However, preference is given to the subjective standard of the parties' intention, at the time of the conclusion of the contract, to exclude certain circumstances in accordance with the general principles of the law.⁸⁵³ Generally, in international sales contracts, many provisions, mainly in the form of *force majeure*, are used to provide for foreseeable events. For example, when negotiating their contract, parties may be able to foresee the possibility of an insurrection or

⁸⁵¹ See Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696, at 729 (H.L.); *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401. See also *Cheshire*, *supra*, note 108, at 517; Treitel, *Contract*, *supra*, note 5, at 662-663.

⁸⁵² See Schmitthoff, *Export Trade*, *supra*, note 24, at 118; Treitel, *Contract*, *supra*, note 5, at 661.

⁸⁵³ See Graveson and Cohn, *supra*, note 134, at 95.

war in one of their countries. In such a case, if the seller declares that the occurrence of such an event will not affect the delivery of the goods, then the foreseen event would not be a sufficient ground for exemption. Consequently, it would be difficult for the seller to plead exemption if such an event occurs.⁸⁵⁴

In the absence of a shared intention of the parties, either expressed or implied, appeal is made to the objective standard of the intention of a reasonable person in similar circumstances. This, it is submitted, is a question of fact to be determined in the light of the circumstances that existed at the time the contract was entered into. Clearly, this objective test will create difficulties in practice since a reasonable seller and a reasonable buyer might have intended different things.⁸⁵⁵

[178] *Unforeseeable event: The Convention*

Article 79 of *The Convention* deviates from the *ULIS* formulation. It provides that a non-performing party must show that he or she could not reasonably be expected to have taken the impediment into account at the time of contracting. This means that the impediment must have been unforeseeable and that the non-performing party must not have contemplated the impediment at the time of contracting. It is submitted, therefore, that international business participants should be informed of any political, commercial or economic developments that might conceivably interfere with contractual performance.⁸⁵⁶ However, it remains unclear what the position would be, under *The Convention's* test, if a party at the time of contracting had foreseen the possibility of the impediment occurring but had done nothing about it. Such foresight might not prevent the doctrine of frustration from applying at Common law.⁸⁵⁷ It is also submit-

⁸⁵⁴ *Ibid.*

⁸⁵⁵ "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* at 29, annex 3.1 (the representative of U.K.), para. 2.C.

⁸⁵⁶ See Cremades and Plehn, *supra*, note 18, at 342.

ted that Article 79 is not applicable to such an event, on the ground that the impediment should have been taken into account, avoided or overcome. In any event, it depends upon whether the silence of the parties is tantamount to an implied allocation of risk.

The test of reasonable expectation is vague and subject to differing interpretations. Moreover, the application of the test is difficult since most impediments are likely to be foreseeable to some degree.⁸⁵⁸ It is suggested, therefore, that the reasonable expectation test should be regarded not as the crucial factor in exemption cases, but as just one of several elements to be taken into account. To attach too much importance to the test would be a mistake; many foreseeable or contemplated contingencies are unavoidable even when caution is taken. This interpretation is supported by the drafting history of Article 79, which shows that the determination of foreseeability is to be made by courts on a case-by-case basis. Accordingly, courts in contracting states should make an initial determination of impossibility of performance before ascertaining the reasonable expectation of the non-performing party.⁸⁵⁹ Thus, if a reasonable person would have entered into the contract under similar circumstances and had expected the occurrence of the event, the doctrine of exemption would not apply.

The allocation of risk is really the central task of the courts when an impediment prevents performance, and foreseeability (or reasonable contemplation) is among the significant elements to be considered in this regard. Essentially, an international sale of goods contract is only meaningful insofar as it provides for mutual economic benefit. More precisely, although each party expects to profit from any favourable changes in the circumstances, he or she also accepts the risk that the change may be unfavoura-

⁸⁵⁷ *The Eugenia*, [1964] 2 Q.B. 226; *W.J. Tatem Ltd. v. Gamboa*, [1939] 1 K.B. 132.

⁸⁵⁸ See Sutton, *Part 3, supra*, note 487, at 114.

⁸⁵⁹ See Cremades and Plehn, *supra*, note 18, at 338.

ble.⁸⁶⁰ The determination of whether the non-occurrence of a particular event was or was not a basic assumption of the parties involves a judgment as to which party assumed the risk of such an event occurring. For example, in contracting for the manufacture and delivery of goods at the price fixed in the contract, the seller assumes the risk of increased costs within the normal range. Nevertheless, that seller may be exempted from liability if such an increase is so significant as to be outside the normal range, as might result from a natural disaster or general crisis. In such an event, a court might determine that the seller did not assume that risk. Again, to make such a determination, a court will look at all the circumstances, including the terms of the contract.

Other factors to be considered by courts in contracting states are (a) the nature of the transaction; (b) the period in which the contract is to be performed; and, (c) the effectiveness of the market in spreading the risk. For example, a defaulting seller who is a dealer has an opportunity to adjust the price to cover certain risks. A producer of the goods may not have this option.

In short, determining the reasonable expectation of an impediment is only one method of resolving the underlying problem of the equitable allocation of risk. Accordingly, Article 79 of *The Convention* binds the parties not just to what they themselves undertook, but also to what international custom stipulates and to what *The Convention's* international character prescribes.

The approach of *The Convention*, which focuses on the reasonable expectation of the non-performing party, is different from that of *ULIS*. Both *ULIS* and *The Convention*, however, are in agreement that the foreseeability of the event must be considered at the time the contract was made.

⁸⁶⁰ See *id.*, at 340.

[179] *Unforeseeable event: English and French law*

In French law, the doctrine of *force majeure*, expressed in Articles 1147 and 1148 of the *French Civil Code*, requires the intervening event to be unforeseeable at the time of contracting.⁸⁶¹

English courts have often stressed the unexpected nature of the supervening event.⁸⁶² It seems that English law distinguishes between two situations. The first situation occurs when the intervening event was foreseeable only by the party alleging frustration. A party cannot rely, as a ground of frustration, on an event that was, or should have been, foreseen by that party but not by the other party.⁸⁶³ This is similar to both *ULIS* and *The Convention*.

The second situation occurs when the event was foreseen or foreseeable by both parties. Generally, if a contract provides for discharge on the occurrence of a specific supervening event, then the doctrine of frustration does not apply, even though the parties did not expect or consider it probable that the event would occur.⁸⁶⁴ This view is based on the assumption that if the parties knowingly undertook the risk that the event might occur, this risk must have been reflected in the contract price. If the "contractual frustration clause"⁸⁶⁵ comes into operation, the contract is discharged under one of its express terms rather than under the doctrine of frustration. But this rule does not apply to certain cases of frustration. Here, the doctrine of frustration continues to be

⁸⁶¹ See Nicholas, *supra*, note 92, at 197; see also *Amos and Walton, supra*, note 92, at 186; Von Mehren and Gordley, *supra*, note 352, at 1049; Ryan, *supra*, note 92, at 56 ff; Houin, *supra*, note 84, at 27.

⁸⁶² See, e.g., *Krell v. Henry*, [1903] 2 K.B. 740, at 752.

⁸⁶³ *Walton Harvey Ltd. v. Walker & Homfrays Ltd.*, [1931] 1 Ch. 274.

⁸⁶⁴ *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.); see also Schmitthoff, *Export Trade, supra*, note 24, at 115.

⁸⁶⁵ As it was called in *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.*, [1978] 2 Lloyd's Rep. 109, at 112 (H.L.).

applied even if the event was foreseen by the parties, where the supervening event rendered the performance of the contract illegal.⁸⁶⁶ This could happen for a variety of reasons, namely: that it involves trading with an enemy;⁸⁶⁷ that a subsequent change in the law renders further performance illegal or impossible;⁸⁶⁸ or that the effect of the event is more fundamental and serious than the parties had envisaged in their contract.⁸⁶⁹ If, on the other hand, there is no agreement dealing with the frustrating event, then it is a matter of construction whether the occurrence of the event affects the contract.⁸⁷⁰

[180] *The impediment must be beyond a party's control*

Article 79 of *The Convention* excuses a party from liability for damages where that party proves that a failure to perform was due to an impediment beyond his or her control.⁸⁷¹ As in English and French law, only where the non-performing party is without fault will a failure to perform be excusable pursuant to Article 79. Where the impediment was not beyond a party's control, or where it could reasonably have been avoid-

⁸⁶⁶ See Schmitthoff, *Export Trade*, *supra*, note 24, at 124. This is similar to Egyptian law. The *Egyptian Civil Code*, art. 217(3); see also Murkus, *supra*, note 814, at 669-670.

⁸⁶⁷ *Ertel Bieber & Co. v. Rio Tinto Co. Ltd.*, [1918] A.C. 260; *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd.*, [1943] A.C. 32 (H.L.).

⁸⁶⁸ *Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd.*, [1944] A.C. 265 (where the import of timber became illegal); *Metropolitan Water Board v. Dick, Kerr & Co. Ltd.*, [1918] A.C. 119. But the latter rule is subject to exceptions where the statutory prohibition is likely to be temporary, (*Andrew Millar & Co. Ltd. v. Taylor & Co. Ltd.*, [1916] 1 K.B. 402; *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675) or affects the contract only to a minor degree. (*Cricklewood Property Investment Trust Ltd. v. Leighton's Investment Trust Ltd.*, [1945] A.C. 221).

⁸⁶⁹ See, e.g., *Pacific Phosphate Co. Ltd. v. Empire Transport Co. Ltd.* (1920), 36 T.L.R. 750.

⁸⁷⁰ See, e.g., *The Eugenia*, [1964] 2 Q.B. 226.

⁸⁷¹ *The Convention*, art. 79(1).

ed, the non-performance may be characterized as negligent or perhaps even intentional, depending upon the circumstances.

Whether the defense of exemption may be raised by a party already in default at the time the impediment occurred was discussed at an early stage of *The Convention's* drafting. One of the drafts required the non-performing party to prove that the impediment occurred without his or her fault.⁸⁷² Subsequently, it was proposed that any reference to "fault" be deleted, on the ground that it would be possible to define the exemption rule objectively without reference to fault.⁸⁷³ This deletion resulted in the absence of any reference to "fault" in all succeeding drafts.⁸⁷⁴ In any event, it appears that the requirement that the impediment was beyond the control of the non-performing party (i.e. that non-performance was not his or her fault) would achieve the objective of the fault requirement.⁸⁷⁵

A similar requirement is contained in French law in respect of *force majeure*, where the non-performing party must prove that the non-performance resulted from a "foreign cause" (*cause étrangère*) that cannot be imputed to that party.⁸⁷⁶ It should be pointed out that French law distinguishes between performance and the payment of damages in substitution for performance. Thus, if the non-performing party fails to show that the non-performance is attributable to a "foreign cause," he or she may be ordered to pay damages.

⁸⁷² "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 63, at 68, art. 50(1).

⁸⁷³ See (1977), 8 *UNCITRAL Yearbook* at 56, paras. 438-439.

⁸⁷⁴ See *The 1978 Draft Convention*, *supra*, note 47, art. 65(1); also *The Convention*, art. 79.

⁸⁷⁵ The same is true in Egyptian law. See the *Egyptian Civil Code*, art. 217(2), which talks about the non-performing party's fault or fraud in causing the *force majeure*.

⁸⁷⁶ The *French Civil Code*, art. 1147; see also *Amos and Walton*, *supra*, note 92, at 186; *Ryan*, *supra*, note 92, at 56; *Von Mehren and Gordley*, *supra*, note 352, at 1048.

Similarly, it is assumed under the English doctrine of frustration that the supervening event occurred through no fault of either party. Otherwise, the defaulting party may not be heard to plead frustration. In particular, as Lord Sumner stated, "reliance cannot be placed on a self-induced frustration."⁸⁷⁷ The burden of proving that the frustrating event was caused by the act or default of a party lies on the innocent party.⁸⁷⁸ Alternatively, in French law, the burden rests with the defaulting party to prove that the non-performance was the result of a foreign cause (including the default of the other party).

[181] *Avoiding or overcoming the impediment*

In order to be exempted, the non-performing party is required to prove that the unforeseeable event was irresistible by reasonable measures, i.e. that he or she could not reasonably be expected to have avoided or overcome it. An example of an irresistible event, recognized as such in all the laws considered in this study, is the destruction of specific goods through events beyond the control of the seller. The requirement in *ULIS* is formulated in the same way as the foreseeability test. Under *ULIS*, the non-performance must be due to circumstances that, according to their intention at the time of the contract, the parties were not bound to take into account, avoid or overcome.⁸⁷⁹ The language of *The Convention* differs where the non-performing party could reasonably have been expected to avoid or overcome either the impediment itself or its consequences.

⁸⁷⁷ *Bank Line Ltd. v. Arthur Capel & Co.*, [1919] A.C. 435, at 452 (H.L.).

⁸⁷⁸ *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.*, [1949] A.C. 154, at 179.

⁸⁷⁹ *ULIS*, art. 74(1).

As for French law, under the doctrine of *force majeure*, if the event merely makes performance of the contract more difficult or more expensive, the obligations nevertheless remain due. This requirement clearly distinguishes the doctrine of *force majeure* from the doctrine of *imprévision* (lack of foresight), or the theory of unexpected circumstances. Under French law, a line is drawn between impossibility of performance (*force majeure*) and fundamental and far-reaching changes in economic conditions that destabilize the contract. The latter is called the doctrine of *imprévision*. This doctrine of "unforeseen events" or "lack of foresight" operates under French law under special circumstances; it lies, however, beyond the scope of this study. Nevertheless, it is noteworthy that for contracts not involving a public entity, that is, for contracts not governed by administrative tribunals, the civil courts, headed by the *Cour de Cassation*, have always rejected the application of the doctrine of *imprévision*, and remained faithful to a strict application of the notion of impossibility.⁸⁸⁰

Here, there are two differences between *ULIS* and *The Convention*. First, *The Convention* requires that the non-performing party could not reasonably be expected to have avoided or overcome the impediment or, subsequently, its consequences. *ULIS* refers only to the inability of avoiding or overcoming the intervening event. To illustrate the difference between the two, suppose that the contract calls for delivery by a specific vessel and that this vessel is prevented by governmental regulation from leaving port. Although the seller cannot avoid the event, he or she can overcome it by delivering the goods on another vessel.

The other difference between the two laws is that *ULIS*, unlike *The Convention*, refers to the time of concluding the contract as the relevant time for determining whether the event is irresistible. In practice, the difference is very important since the non-performing party may not be expected to overcome the intervening event at the

⁸⁸⁰ It is interesting to note that lower level French courts have the power to decide whether the unforeseen event has rendered performance impossible. The question is regarded as one of fact.

time of making the contract but at a later time, specifically at or after the time at which the event has occurred. Suppose, for example, that at the time of concluding the contract, the seller has only one factory capable of producing the goods. In the meantime, after concluding the contract, that seller has opened another factory in another country. In an unexpected move, the government where the first factory is located places an embargo on the exportation of the goods sold. Suppose that the seller was not bound to overcome such an event at the time of contracting. In such a case, the seller's plea for exemption might be successful under *ULIS* even if he or she made no attempt to overcome the impediment or its effects. Under *The Convention*, such a plea could not succeed. The relevant test, then, should be whether the non-performing party could have avoided the occurrence of the event and if not, whether the event or its consequences could have been overcome. The approach of *The Convention* is therefore preferable to that of *ULIS*.

[182] *Failure to perform as a result of the impediment*

Article 79(1) of *The Convention* provides that in the event of an unforeseeable impediment that could not reasonably be expected to have been avoided or overcome, "a party is not liable for a failure to perform any of his obligations ...". This language suggests that the exemption rule applies to all of the seller's and buyer's obligations. In the case of the seller, this would include the duty to "deliver goods which are of the quantity, quality and description required by the contract."⁸⁸¹ Similarly, the failure to perform may relate to any of the buyer's duties including time, place, and method of payment.

ULIS also uses the words "has not performed one of his obligations." The language of both laws assumes that the intervening event has occurred before the time fixed for performance of that obligation. Therefore, the doctrine of exemption does

⁸⁸¹ *The Convention*, art. 79(1).

not, as a rule, apply under *ULIS* and *The Convention* where the non-performance is anticipatory. However, it is submitted that the non-performing party will be exempted from liability if the anticipatory breach is due to events other than a mere intention not to perform.⁸⁸² Thus, where the requirements of the doctrine of exemption are met, the non-performing party will be exempted from liability (a) in all cases of actual breach; and, (b) in some cases of anticipatory breach.

The approach of both *ULIS* and *The Convention* is in accord with that of French law. Both speak of the non-performance of an obligation rather than of the impossibility of performance (or frustration) of the contract as a whole.⁸⁸³ The defaulting party may be exempted from liability for damages flowing from a failure to perform obligations whose non-performance resulted from *force majeure*. However, that party will still be liable for any failure to perform other obligations.⁸⁸⁴ This differs from English law, where the doctrine of frustration does not apply unless the object of the contract is wholly defeated.⁸⁸⁵

[183] *Applicability of the doctrine of exemption to cases of delivery of defective goods*

The extent to which a seller can escape liability for delivery of defective goods pursuant to Article 79 may present considerable problems of interpretation for courts in contracting states and for parties and their lawyers. Under *ULIS*, it is clearly possible for the seller to be exempted from liability for delivering defective goods through no fault of his or her own. *The Convention*, in contrast, provides no definite answer to the issue of whether or not the exemption rule applies to the delivery of defective

882 See [55] - [62].

883 *The French Civil Code*, art. 1147 (foreign cause).

884 See [191] and [193].

885 Nicholas, *supra*, note 506, at 234-235; see also Treitel, *An Outline*, *supra*, note 81, at 315; Goode, *supra*, note 239, at 137.

goods. Under *The Convention*, it would be very difficult for the seller to prove that the defect was not caused by his or her negligence, which it would be necessary to do in order to be exempted from liability.

Article 79 would seem to have at least a theoretical applicability to the seller's delivery of defective goods.⁸⁸⁶ The legislative history and theory underlying Article 79 support this view. As previously indicated, there was considerable controversy at the 1964 Conference over the choice between the words "obstacles" and "circumstances." When the Working Group discussed the doctrine, the central objection was that, under *ULIS*, "a party could be too readily excused from performing his obligations."⁸⁸⁷ The importance of having an objective ground for exemption from liability was noted by several representatives.⁸⁸⁸ This resulted in the replacement of the word "circumstances" by the word "impediment" in *The Convention*, narrowing accordingly the scope of the doctrine.

Moreover, Article 79 applies to a failure to perform any obligation. The seller's obligation to deliver conforming goods pursuant to Article 35 includes, *inter alia*, the duty "to 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."⁸⁸⁹ Furthermore, Article 45 of *The Convention*, which sums up the remedies available to the buyer, refers to any non-performance by the seller. More precisely, one basis of liability applies to both specific and generic sales irrespective of whether

⁸⁸⁶ See Nicholas, *Impracticability*, *supra*, note 842, at 5-19 (concluding that the doctrine of exemption is unlikely to prevent the application of Article 79 to defective goods). But see Honnold *Uniform Law*, *supra*, note 41, at 432 (arguing that the replacement of the word "circumstances" with the word "impediment" implies that an exemption is not available in cases of defective goods).

⁸⁸⁷ "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, at 39, paras. 107 ff.

⁸⁸⁸ *Ibid.*

⁸⁸⁹ *The Convention*, art. 35.

the breach involves delay, non-delivery, or delivery of defective goods. Accordingly, any exemption from liability for defective delivery must satisfy the requirements just discussed; that is, the seller would reasonably be expected to take most impediments into account at the time of contracting, including the manufacture of defective goods subsequently delivered under the contract. It is the seller's duty, therefore, to prove the elements required by the doctrine if an exemption is to be obtained. The word "impediment," then, at least in theory, could extend to events occurring before the conclusion of the contract and not known to either of the parties, including the delivery of defective goods.

The theoretical applicability of the doctrine of exemption under Article 79 to defective goods is a significant departure from English and American law, according to which a seller is apparently never excused from liability for defective goods. If the goods are defective, the seller is in breach and the buyer is entitled to damages, assuming that all other requirements for damages are satisfied. The *UCC*, for example, speaks of breach of express or implied warranty. Under section 2-314, the issue is whether the goods are merchantable, i.e. could pass without objection in the trade, are of average quality, and fit for ordinary purposes.

As for Civil law systems, it has been observed that "it will not be easy to find circumstances ... which the seller was not bound to take into account."⁸⁹⁰ But it can still be said that, under Article 79, a seller will be exempted from liability for delivering goods that are defective as the result of an unforeseen export restriction that prohibits the goods from being packed in the manner stipulated in the contract. Similarly, as in section 2-615 of the *UCC*, defects due to extremely bad weather may be deemed unforeseeable, depending on the circumstances of the case.

⁸⁹⁰ See Nicholas, *supra*, note 506, at 238.

[184] *Burden of proof*

Where the parties disagree as to whether an exemption is justified under *The Convention*, who bears the burden of proof? Article 79 of *The Convention* exempts the non-performing party upon proof that the excuse fulfils the conditions it sets out. More precisely, *The Convention* requires the non-performing party to prove three facts in order to be exempted from liability. First, there must be proof of the existence of an impediment beyond his or her control that caused the non-performance. Second, it must be shown that he or she could not reasonably have been expected to take the impediment into account at the time of the contract. Finally, it must be demonstrated that the party could not have avoided or overcome the impediment.

The general principles upon which *ULIS* and *The Convention* are based⁸⁹¹ permit the non-performing party to prove the three elements needed to justify exemption by any and all modes of proof. In some cases, this can be done by presenting certain documents, such as a certificate from the chamber of commerce or other concerned institution confirming the existence and nature of the impediment.

French law⁸⁹² is in line with *ULIS* and *The Convention* in that it expressly provides that the defaulting party is liable unless proof is given that the non-performance is due to an external cause (*cause étrangère*) that cannot be imputed to that party.⁸⁹³ Similarly, the general rule in American law is that the non-performing defendant has the burden of establishing the nature, extent, and causality of the alleged impossibility.⁸⁹⁴

⁸⁹¹ By virtue of art. 17 of *ULIS* and art. 7 of *The Convention*.

⁸⁹² See also the *Egyptian Civil Code*, art. 217.

⁸⁹³ The *French Civil Code*, art. 1147; see also *Amos and Walton, supra*, note 92, at 186; Houin, *supra*, note 84, at 27; Nicholas *supra*, note 92, at 194 ff.

⁸⁹⁴ See, for example, *Eastern Air Lines Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429 (S.D. Fla. 1975).

The approach of English law is somewhat different. There, the following rules are well established: a contract is not frustrated if the event making its performance impossible or illegal was due to the voluntary conduct of one of the parties;⁸⁹⁵ once the non-performing party shows that a supervening event rendered performance impossible, the burden of proof as to whether that event was due to his or her negligence shifts to the plaintiff.⁸⁹⁶ In short, the onus of proving the occurrence and impact of the event lies upon the party who seeks to invoke the application of the doctrine,⁸⁹⁷ while the onus of proving that the frustration was self-induced rests upon the other party.

Section II

Effects of the doctrine of exemption

[185] *Non-performance by a third party*

The Convention contains a rule that exonerates the non-performing party from liability if his or her failure to perform is due to the non-performance of a third party, provided that this third party would be exempt under the doctrine.⁸⁹⁸ No similar provision appears in *ULIS*.

⁸⁹⁵ *W.J. Tatem Ltd. v. Gamboa*, [1939] 1 K.B. 132, at 138; *The Eugenia*, [1964] 2 Q. B. 226, at 239.

⁸⁹⁶ *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.*, [1942] A.C. 154, at 179; Ryan, *supra*, note 92, at 57; but see *Treitel Contract*, *supra*, note 5, at 684, who argues that the decision is controversial.

⁸⁹⁷ See *Joseph Constantine* case, *ibid.*

⁸⁹⁸ *The Convention*, art. 79(2). Originally, it was intended that the provision would apply only to a seller who might sub-contract any of his or her obligations. "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 1, art. 50(2). But the word "seller" was replaced by the word "party" by UNCITRAL without explanation. "Report of UNCITRAL" 10th sess., (1977), 7 *UNCITRAL Yearbook* at 11, para. 35, art. 51(2).

The principle addresses situations where one of the parties (usually the seller) has contracted with a third party to perform some or all of his or her obligations under the contract (usually the production of all or part of the contracted goods) and this third party has failed to perform such obligations due to an impediment.⁸⁹⁹

The non-performing party's ability to be exempted from liability depends on whether or not the impediment resulted from the third party's mismanagement or negligence; that is, the third party must not have defaulted in the performance of his or her own obligations to the non-performing party. Accordingly, it is not enough for the non-performing party to argue that the third party's fault is beyond his or her control and that that party should not be held accountable for it. The non-performing party is liable in damages even if the third party's performance is beyond his or her control. In fact, in all the laws considered in this study, the final liability for damages will rest on the third party when the impediment was self-induced or could have been avoided or overcome. In order to be exempted, the non-performing party must not only show that the third party's failure to perform was beyond the control of the non-performing party but also that he or she could not be expected to take this impediment into account or to overcome it. It is clear from these requirements that the scope for the exemption of the non-performing party is narrow, since the rule treats as his or her failure any failure of the third party.⁹⁰⁰

⁸⁹⁹ Such a situation would exist, for example, if a Canadian computer manufacturer had contracted to sell computer equipment to China, and had contracted to buy a crucial component from an American firm that was the sole supplier of that component but was prevented from exporting the goods because the United States government placed an embargo on the export of computer equipment whose ultimate destination is China in response to the repression of recent pro-democracy demonstrations in Beijing.

⁹⁰⁰ See Honnold, *Uniform Law*, *supra*, note 41, at 440.

[186] *The distinction between an independent contractor and a supplier*

The distinction between an independent contractor and a general supplier was extensively discussed during the drafting of the doctrine of *The Convention's* exemption provision. The drafting history suggests that the third party in Article 79(2) does not include general suppliers of the goods or of raw materials to the seller.⁹⁰¹ The issue is important and courts in contracting states will soon face the issue of whether an agreement for contracted goods is limited to a particular source of supply, factory, or the like. This is precisely the case where a seller has contracted to buy raw materials or a component part for the production of the contracted goods from a supplier who subsequently fails to perform. In terms of Article 79, the issue is whether the seller is expected to overcome the failure of a usual and intended source of supply or whether the contract should be read as contemplating supply from that one source only. Non-performance due to the failure of suppliers should be judged in the light of the considerations just discussed.

One last point is worthy of note. The party that manufactures and sells the goods would be seriously affected by this rule in as much as it would increase his or her liability in the event of breach by the subcontractor.⁹⁰² If, however, the seller could not obtain the supplies elsewhere within a reasonable time and if, moreover, the supplier has a good business reputation, these circumstances might enable the seller to be exempted from liability.

⁹⁰¹ At the Conference, proposals were made to extend the application of the doctrine to failures by a supplier or other third party. See *Official Records, supra*, note 67, at 134 (by Denmark and Finland). These proposals were later withdrawn. See *id.*, SR. 27, paras. 23-24. It appears that the reason for the opposition to these amendments was that the exemption rule is already narrow.

⁹⁰² See Ziontz, *supra*, note 132, at 157.

⁹⁰³ It has been held by an English court that the seller must be treated, for purposes of exemption from liability for damages, as occupying the position of the subcon-

To some extent, the foregoing principle is similar to that followed in English law,⁹⁰³ according to which a contract is not frustrated merely because goods of the description contracted for are no longer available from the source the seller intended to obtain them.⁹⁰⁴ However, if the parties intended the goods to come from a particular source only, then the doctrine of frustration would apply and neither party would be liable.⁹⁰⁵ Whether this is the case depends on the intention of the parties.

[187] *Temporary impediment: ULIS*

According to Article 74(2) of *ULIS*, whenever the circumstances constitute only a temporary impediment to performance, the party in default is permanently relieved of his or her obligation only if, by reason of the delay, the performance would be so radically changed as to amount to the performance of an obligation significantly different from that intended by the contract.⁹⁰⁶ This suggests that if the impediment is temporary, the contract may be restored after the impediment disappears. This is similar to the doctrine of frustration in English law, under which in all cases the impediment must be permanent in order to discharge both parties from their contractual duty.⁹⁰⁷

tractor. Thus, the former cannot rely on any defense that the later would be unable to rely upon. See *Lebeaupin v. Richard Crispin and Co.*, [1920] 2 K.B. 714, at 718.

904 *King v. Parker* (1876), 34 L.T. 886; *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589; *Blackburn Bobbin Co. Ltd. v. T.W. Allen & Sons Ltd.*, [1918] 2 K.B. 467 (C.A.); *Lebeaupin case, id.*; *George Willis & Sons Ltd. v. R.S. Cunningham, Son & Co. Ltd.*, [1924] 2 K.B. 220; *Monkland v. Jack Barclay Ltd.*, [1951] 2 K.B. 255, at 258; *Hong Guan & Co. Ltd. v. R. Jumabhoy & Sons Ltd.*, [1960] A.C. 684 (P.C.).

905 *Re Badische Co. Ltd.*, [1921] 2 Ch. 331; *Société Co-operative Suisse des Céréales et Matières Fouragères v. La Plata Cereal Co. S.A.* (1947), 80 Lloyd's L.R. 530. See also *Howell v. Coupland* (1876), 1 Q.B.D. 258 (C.A.).

906 *ULIS*, art. 74(2).

907 It seems that American law, however, has neither conceptual nor practical problems with partial impossibility; the non-performing party remains bound to perform that portion of his promised performance that remains possible.

ULIS refers to relief from the obligation affected by the intervening event, meaning automatic relief by operation of law. This result is to be imposed upon the non-performing party even if he or she does not wish it.

[188] *Temporary impediment: The Convention*

Article 79(3) of *The Convention* provides that the exemption doctrine has effect for the period during which the impediment exists.⁹⁰⁸ This means that after the impediment is removed, the duty to perform arises once more, presumably immediately after the impediment is gone. This would be the case, for example, where a seller is prevented from delivering the goods because a factory has been destroyed by fire. If the seller were to rebuild the factory, say after a year, and the buyer had not avoided the contract during that period, the buyer could insist that the seller perform as soon as the factory was rebuilt.

If one of the parties faces a temporary impediment, the other party, under Article 79(3), can either avoid the contract (if the breach is fundamental) or accept the fact that the contract will revive after the removal of the impediment and insist on performance at that time. Accordingly, the non-performing party will be exempted from liability for damages as long as the impediment exists. It is possible, however, as we shall see in paragraph [193], that once the impediment is removed he or she may be forced to pay damages or fulfil the contractual obligations. An aggrieved seller, for example, would then have to deliver the goods in order to fulfil the contract, regardless of the change in the price, or pay damages based on the new price, immediately after the impediment is removed.⁹⁰⁹ But that seller will not be liable for damages for failure to

⁹⁰⁸ *The Convention*, art. 79(3); also *The 1976 Draft Convention*, *supra*, note 45, art. 50(3), and *The 1978 Draft Convention*, *supra*, note 47, art. 65(3).

⁹⁰⁹ This approach differs substantially from the Common law doctrine of frustration, where extraneous events, whether temporary or permanent, are held to excuse performance of the contract only if the courts believe that holding the parties to further performance would, in the light of the changed circumstances, alter the

perform while the impediment exists.

Hence, under *The Convention*, if the circumstances that existed after the removal of the impediment were such that performance would be radically different from that envisioned by the contract, the exemption would continue in force. This means that under *The Convention* (a) a contract is never automatically avoided by operation of law; and, (b) if the impediment precludes full performance (say, delivery of the whole goods) but not partial performance (say, delivery of a portion of the goods), the party in breach must carry out that part of the contract unaffected by the impediment at the time specified in the contract, and the remainder as soon as the impediment is removed. In such a case, avoidance by either the seller or the buyer must be based on fundamental breach or on the additional time notice formula.⁹¹⁰

Article 79(3) of *The Convention*, then, is significantly different from English law. It does not provide that the contract may be avoided when the impediment renders performance radically different from that undertaken in the contract.

[189] *The duty to give notice of the impediment and its effect on performance*

Under *The Convention*, the non-performing party must notify "the other party of the impediment and its effect on his ability to perform."⁹¹¹ Unlike *The Convention*, *ULIS* imposes no duty to give notice of an impediment. The doctrine of frustration, in English law, does not require such notice either. Neither does the doctrine of *force majeure* in French law.⁹¹² It seems, however, that *The Convention's* notice requirement

fundamental nature of the contract. *Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd.*, [1944] A.C. 265, at 272 (H.L.). For an elaboration of the theory of frustration see *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696; 2 All E.R. 145 (H.L.).

⁹¹⁰ See [22] - [26] and [41] - [48].

⁹¹¹ *The Convention*, art. 79(4).

⁹¹² Unless, of course, the *force majeure* clause in the contract provides for such notification.

is in conformity with trade practice and has been adopted in other laws.⁹¹³

The importance of notification to the contracting parties is obvious: the unforeseen impediment affects not only the performance of the contract but the expectations of both parties. The duty to notify generally, which is based on the necessity for communication between international sales participants, has been noted already throughout this study.⁹¹⁴ The point here is that the failure of the non-performing party to notify gives rise to liability for damages only in respect of losses attributable to the failure to notify, and not in respect of losses resulting from the non-performance itself.

The notice should be received by the other party within a reasonable time after the non-performing party knew or ought to have known of the impediment. Otherwise, the latter will be liable for damages resulting from non-receipt.⁹¹⁵ This requirement provides for the "receipt theory" rule of communication rather than the "dispatch theory" rule adopted in Article 27.⁹¹⁶ Consequently, the non-performing party is responsible for any delay or error in transmission.⁹¹⁷

913 See, e.g., *The CMEA General Conditions*, art. 69; *DUSA*, ss. 8.11(2)(3) and the *UCC*, s. 2-615(c) (non-performing seller).

914 See, for instance, [85] and [86].

915 *The Convention*, art. 79(4).

916 For further discussion of this point, see [90], [92], [238] and [239].

917 There was an attempt at the Conference to bring the "notification" rule under art. 79(4) into conformity with the general rule stated in art. 27. See the text of the Norwegian and Finnish proposals as stated in *Official Records*, *supra*, note 67, at 135 and the discussion of the proposals at 382-383, SR. 28, paras. 4 ff. The purpose of these proposals was to ensure that the non-performing party would not be liable for damages resulting from delay or error in transmission. These proposals were rejected on the ground that a failure of the non-performing party to give notice may be considered as an impediment beyond his or her control, which would release that party from any obligation to perform or to notify.

[190] *The effect of exemption on liability in damages*

If a court finds that a party's excuse for non-performance qualifies for an Article 79 exemption, no liability in damages can result from a failure to perform. This is also the approach of both *ULIS* and French law, where the non-performance is due to *force majeure*.⁹¹⁸ This is so irrespective of whether the contract has been avoided or remains alive and regardless of whether the intervening event is permanent or temporary.⁹¹⁹

In English law, when the contract is frustrated there is no liability for damages.⁹²⁰ Generally, in English law, a temporary impediment is not sufficient unless it interferes so radically with performance that the contract's whole complexion is significantly altered.⁹²¹ For example, in one case⁹²² shipment of goods was delayed for three years by wartime requisitioning of all available shipping space. When performance again became physically possible, it was held that the seller was no longer bound to deliver, as market conditions had radically changed. It has been held, too, that under the general law of contract temporary impediments suspend but do not dissolve the contract and that the non-performing party is liable in damages even while the impediment exists.⁹²³ In contrast, in personal services contracts whose performance is impeded by temporary illness or other incapacity,⁹²⁴ (a) the non-performing party is

918 The *French Civil Code*, art. 1147; see also Nicholas, *supra*, note 506, at 234.

919 The same approach is adopted in *DUSA*, s. 8.11.

920 *Fibrosa Spolka Akcyjna v. Fairbairn Lawson, Combe, Barbour Ltd.*, [1943] A.C. 32, at 70 (H.L.)

921 See, e.g., *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Co. Ltd.*, [1916] 2 A.C. 397 (H.L.).

922 *Acetylene Co. of Great Britain v. Canada Carbide Co.* (1922), 6 Lloyd's L. R. 410.

923 *Hadley v. Clarke*, (1799) 8 T.R. 259; see also *Jackson v. Union Marine Insurance Co. Ltd.*, (1875) L.R. 10 C.P. 125, at 135.

not liable in damages while the impediment exists and the contract will not be discharged in most cases;⁹²⁵ and, (b) if the illness or incapacity goes to the root of the contract, the contract will be discharged.⁹²⁶ In short, the position of English law on temporary impediment or partial impossibility is complex and depends on the type of contract involved.⁹²⁷

[191] *The effect of exemption on avoidance*

Unlike in English and French law, under *The Convention*, the existence of an impediment does not automatically terminate the contract. The performing party is entitled to determine, in the light of the supervening event, what remedies other than damages he or she wishes to pursue.⁹²⁸

If the non-performance due to the impediment constitutes a fundamental breach, or if the additional time notice procedure has been resorted to, the party expecting performance may avoid the contract. Hellner argues that such rules may be suitable for the sale of commodities but are not suitable for contracts for the sale of machinery.⁹²⁹ If this is the case, such a party will not receive any damages. However, that party must satisfy the grounds for avoidance.⁹³⁰ If the requirements of avoidance are satisfied, the consequences of avoidance following non-performance caused by an impediment are to be decided by the provisions regulating the effects of avoidance in

924 *Storey v. Fulham Steel Works Co.* (1907), 24 T.L.R. 89; *Mount v. Oldham Corporation*, [1973] 1 All E.R. 26; *Hare v. Murphy Brothers Ltd.*, [1974] 3 All E.R. 940.

925 *Marrison v. Bell*, [1939] 2 K.B. 187.

926 *Poussard v. Spiers & Pond* (1876), 1 Q.B.D. 410.

927 See *Cheshire, supra*, note 108, at 525.

928 *The Convention*, art. 79(5).

929 See Hellner *supra*, note 771, at 354.

930 See [20] - [27].

Articles 81-84.⁹³¹

This approach is unfair to both parties. Articles 81-84 should not determine the consequences of avoidance resulting from an impediment. A contracting party is, in most cases, expected to fulfill his or her obligations. The situation, however, is completely different when performance becomes impossible owing to an impediment, which is presumably independent of the will of such a party. For example, if a seller is unable to deliver, owing to circumstances within Article 79, the seller would not be liable for damages. The buyer, then, could avoid the contract and claim restitution from the seller for all property supplied or paid under the contract.⁹³² Obviously, this would be unfair to the seller because he or she would be obliged to refund the price despite having (a) incurred expenses in preparing to perform; and, (b) having exercised all care and diligence owed under the contract.

[192] *The effect of exemption on avoidance: domestic laws*

The effect of contract avoidance due to an exemption on the rights and obligations of the parties varies considerably between English and French law. In English law, the primary legal effect of frustration is to bring the contract automatically to an end as soon as a frustrating event occurs.⁹³³ No steps to avoid the contract need be taken by either party. The parties are released from any obligation that has not yet come due at the time of the frustrating event.⁹³⁴ In short, the frustrating event has no retroactive

⁹³¹ See [93] - [107]. But see the report made by the United Kingdom representative, which contained a proposal that the consequences of avoidance be dealt with by special provisions. (1975), 6 *UNCITRAL Yearbook* at 86, paras. 13 ff. This proposal was not accepted by the W.G. "Report of the W.G." 6th sess., *id.*, 49, at 61, para. 107.

⁹³² *The Convention*, art. 81.

⁹³³ *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*, [1926] A.C. 497, at 505 (P.C.); *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783, at 809; affirmed 1 W.L.R. 232 (C.A.); [1983] 2 A.C. 352 (H.L.); see also Treitel, *An Outline*, *supra*, note 81, at 313 and in *Contract*, *supra*, note 5, at 684.

effect. Thus, as regards sales law, payment and delivery are constructive and concurrent conditions (i.e. the buyer need not pay the price and the seller need not deliver).

The rule that frustration has no effect on rights and liabilities that accrue before the frustrating event could, to some extent, operate unfairly, particularly where a party has incurred expenses before the frustrating event. Such a party could end up bearing a loss in respect of this expense (due to the termination of a reciprocal duty that had not yet come due) through no fault of his or her own. This rule, as adopted in some English cases,⁹³⁵ attracted considerable criticism⁹³⁶ and was overruled in *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Barbour Ltd.*⁹³⁷ In this case it was held that a party to a contract that was frustrated could recover any costs he had paid in advance if there was total failure of consideration. For this purpose, a mere promise was not regarded as consideration, only its actual performance.

But this solution is still not satisfactory. The beneficiary of the obligation may have incurred expenses in financing the initial stages of the contract prior to the frustrating event. Moreover, the problem of partial performance is left unresolved. To deal with this and other defects, *The Law Reform (Frustrated Contract) Act* of 1943 was passed. It applied the following principles to the issue under discussion: First, all sums actually paid before frustration are recoverable; second, any money due to be paid but not actually paid before frustration ceases to be payable; and finally, any expenses reasonably incurred in the performance of the contract prior to frustration may be retained out of money already received or recovered.⁹³⁸

⁹³⁴ See Ryan, *supra*, note 92, at 60.

⁹³⁵ *Chandler v. Webster*, [1904] 1 K.B. 493 (C.A.) (not a sale of goods case).

⁹³⁶ *Cantiere San Rocco S.A. v. Clyde Shipbuilding and Engineering Co. Ltd.*, [1924] A.C. 226, at 257.

⁹³⁷ [1943] A.C. 32 (H.L.).

⁹³⁸ For a detailed consideration of these provisions, see *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*, [1979] 1 W.L.R. 783.

It is important to note that the provisions of the Act may be excluded by the contract. Furthermore, a court may give effect to the Act only to the extent that this is consistent with any provision in the contract concerning frustrating events. In addition, the Act excludes its own application, *inter alia*, to contracts for the sale of specific goods.⁹³⁹

The approach of French law is considerably different although it may, on occasion, lead to similar results. *Force majeure* in French law is far narrower than frustration in English law since it discharges individual obligations rather than the whole contract. In English law, the doctrine of frustration involves an "all-or-nothing" approach. Thus, *force majeure* may extinguish only some contractual obligations. Suppose, for example, that delivery became impossible for the seller. Under the doctrine of *force majeure*, the buyer would be released from the duty to pay the price. This is so because the extinction of the one obligation necessarily entails the extinction of the other.⁹⁴⁰ The contract in this case is avoided by operation of law.⁹⁴¹

Force majeure in French law may or may not bring the contract to an end, depending on the nature of the obligation that has not been performed. It discharges the parties from their reciprocal obligations and entitles them to recover any down payment or other benefits exchanged before the time of *force majeure*, so as to place them in the same position as if the contract had never been entered into. In such a case, the test is whether the contract would have been entered into if the intervening event had been

⁹³⁹ For exceptions, see *The Law Reform (Frustrated Contracts) Act 1943*, s. 2(5).

⁹⁴⁰ See Nicholas, *supra*, note 92, at 199.

⁹⁴¹ This is subject to an exception where, in contracts of sale, the risk passes with the property by delivering the goods sold. If the goods perish before delivery, the buyer remains under a duty to pay the price even if the obligation to deliver disappears, unless he or she proves fault on the part of the seller or the person in whose hands the goods perished (art. 1302 of the *French Civil Code*). But this is not the case when the seller has expressly or impliedly assumed the risk, or has failed to deliver at the agreed time and has been warned by a written notice (*mise en demeure*) (art. 1302).

contemplated at the time the contract was concluded. Indeed, in French law, *force majeure* is referred to and explained under the theory of cause, which must be the basis of every obligation in order for it to be binding. That cause is the motive, purpose, or end to which parties bind themselves. If that cause fails, so does the obligation.

The approach of English and French law to the effects of the doctrine of exemption on avoidance differs from that of *The Convention* in two respects. First, *The Convention* gives no indication of whether an impediment automatically terminates the contract. However, it appears that under *The Convention*, non-performance due to an impediment does not automatically bring the contract to an end. It is the exercise of the innocent party's right, rather than operation of law, that brings the contract to an end. Second, the doctrine of exemption under *The Convention* entitles both parties to exercise any right other than the right to claim damages, including avoidance. In French law, the availability of other remedies, including avoidance, depends on the nature of the obligation, while in English law other remedies are not needed by the non-performing party since termination is clearly automatic as soon as the frustrating event occurs.

[193] *The effect of exemption on other remedies*

ULIS provides that the exemption doctrine does not affect the right of the parties to avoid the contract or to reduce the price, unless the circumstances are the clear result of the acts of the other party or a person for whom the other party is responsible.⁹⁴² The aggrieved party, under this rule, has the right to reduce the price or to avoid the contract. In contrast, Article 79(5) of *The Convention* states that "nothing in this Article prevents either party from exercising any right other than to claim damages under

⁹⁴² *ULIS*, art. 74(3).

*The Convention.*⁹⁴³

This language suggests that the remedies of specific performance, avoidance and price reduction are available to the party expecting performance. This is so despite efforts to exclude the availability of a remedy requiring performance from the operation of the provision.⁹⁴⁴ The rigidity of this rule can lead to unfair results.⁹⁴⁵ This is because the compelling of performance can be difficult not only when performance is physically impossible but when it is impracticable.⁹⁴⁶ In this case, a party can be compelled to perform even though he or she is not liable for damages. Since some domestic courts may enforce penalty clauses together with an order for performance, *The Convention* is essentially saying that one can be exempt from paying damages for one's non-performance yet be required to pay an even larger sum by way of penalty for the same non-performance.⁹⁴⁷

It is submitted that the possibility of compelling the non-performing party to perform will not cause many difficulties in practice. The party's obligations continue despite an inability to perform because of the impediment. If the impediment is temporary and disappears and/or there is a clear indication that performance is possible, the question of compelling the non-performing party to perform becomes relevant. This becomes clear in cases of partial performance where the performance of other

943 *The Convention*, art. 79(5).

944 See, for example, the proposals made at the Conference to the effect that the non-performing party cannot be compelled to perform by the other party. See the Norwegian and the Federal Republic of Germany proposals in *Official Records*, *supra*, note 67, at 134-135. The discussion of these proposals is provided at 383 ff, paras. 7 ff.

945 Feltham, *supra*, note 149, at 359 (describing the possibility of requiring the non-performing party to perform in spite of the impediment as a "strange result." But see Herber, *supra*, note 808, at 128 (arguing that claims for performance are excluded, as in *ULIS*).

946 See Nicholas, *Impracticability*, *supra*, note 842, at 5-19.

947 *Ibid.*

obligations remains possible. Conversely, neither the court nor the other party is likely to endeavour to compel the non-performing party to perform if a contractual obligation has become impossible. It is apparent, therefore, that the doctrine of exemption, which generally operates on the basis of non-performance due to an impediment, will likely not be invoked immediately upon the occurrence of an impediment.

The issue does not raise any difficulties in either English or French law. Where an impediment has made performance impossible, a judgment for specific performance is precluded since the contract (or, in French law, one or more of the contractual obligations) no longer exists. If, on the other hand, non-performance is partial or temporary, a French court may avoid the contract and order restitution or reduce or vary the innocent party's obligation, in order to take account of the reduced performance of the defaulting party. The situation is somewhat different in English law, where the contract is only frustrated if the intervening event has so radically interfered with performance that the contract's purpose has been significantly altered.

[194] *Does the doctrine of exemption apply to a failure to perform caused by the other party?*

Article 80 of *The Convention* provides that "a party cannot rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission." *ULIS* contains a similar rule,⁹⁴⁸ as do both French⁹⁴⁹ and Egyptian law.⁹⁵⁰ Likewise, the doctrine of frustration, in English law, applies where the alleged frustrating event is the result of a party's own voluntary act or negligence. But a party should not be permitted to take advantage of his or her own failure, such as a failure to give effective shipping instructions or to supply accurate measurements for the con-

948 *ULIS*, art. 74(3).

949 See *Amos and Walton, supra*, note 92, at 186; *Nicholas, supra*, note 92, at 199; *Ryan, supra*, note 92, at 56.

950 *The Egyptian Civil Code*, art. 217(3).

struction of a machine, if this could impede performance by the other party.

It appears that the main remedy to which the principle applies is damages.⁹⁵¹ For example, suppose that the seller's failure to deliver in time is due to the buyer's failure to nominate the vessel. In such a case, the buyer could not claim damages in respect of that part of the loss attributable to his or her own failure. Presumably, responsibility in such cases would be apportioned between the parties by the court or arbitral tribunal.

[195] *Exemption from performance: conclusions*

The preceding discussion shows that different solutions are possible for the problems that arise when unexpected impediments threaten the performance of contractual obligation. It shows, moreover, that *The Convention's* rule embodies a certain degree of compromise between the Common law doctrine of impossibility or impracticability of performance and the Civil law doctrine of *force majeure*.⁹⁵²

It can be concluded, too, that *The Convention's* exemption rule does not ignore differences between opposing legal systems so much as it achieves a uniform standard apt to solve the problem of exemption from liability in international sales. The application of this standard, moreover, need not cause difficulties. The ultimate determination of whether an exemption will be granted will be made by courts in contracting states who, it is submitted, should read *The Convention* in the context "not only of the particular contract itself but also of the practices of international trade."⁹⁵³ Further-

⁹⁵¹ However, it has been suggested that the provision enunciates a general principle and applies throughout *The Convention*. See Honnold, *Uniform Law, supra*, note 41, at 444, note 5.

⁹⁵² See Feltham, *supra*, note 149, at 359; Nicholas, *Impracticability, supra*, note 842, at 5-16; Farnsworth, *supra*, note 822, at 20 and Note, "Unification and Certainty: the United Nations Convention on Contract for the International Sale of Goods" (1984), 97 *Harv. L. Rev.* 1984, at 1992. The compromise was criticized by some writers. Feltham, *ibid.*, prefers the compromise reached in art. 74 of *ULIS* and especially in para. (2); see also Note, *id.*, at 1993; Farnsworth, *ibid.*

more, in adjudicating international sales cases, courts in contracting states should have due regard for *The Convention's* international character rather than looking for guidance solely in the statutes, contract principles, and theories applicable under their own domestic laws.

Excusing a party from liability for damages is a troublesome task in itself. Any unification of exemption rules will have to overcome opposition rooted in the traditional approaches of different legal systems. This is a difficult problem and one should not expect *The Convention* to eliminate all of the uncertainties involved. Nonetheless, it is submitted that *The Convention* still provides the best possible solution and is a major improvement over *ULIS*. Furthermore, it is fair to look forward, at least in contracting states, to a uniform treatment of the problem of exemption from liability in international sales.

It may be concluded that French law is more precise in setting out the requirements of exemption from performance than is English law. In English law, there is no uniform rule applicable to frustration. This leaves the certainty of frustration somewhat in question. *The Convention* is more like French law than English law in terms of both its clarity and its content. Therefore, it is submitted, the doctrine of exemption under *The Convention* is superior to the English doctrine of frustration.

953 See Nicholas, *Impracticability*, *supra*, note 842, at 5-24.

Chapter VI

SUSPENSION OF PERFORMANCE

[196] *Introduction*

After a contract is made, the financial situation of one of the parties may sometimes deteriorate because of a subsequent event. This deterioration may raise doubts about that party's ability to perform his or her contractual obligations when they fall due. Suppose that, after the contract is entered into, either the seller becomes insolvent and cannot deliver the goods, or the buyer becomes insolvent and cannot pay the price. Since the event that brought about the deterioration occurs after the contract has been concluded but before it has been fully performed, the following question arises: what is the legal effect of the event upon the parties' contractual obligations? Does it discharge them, merely suspend them, or have no legal effect?

This chapter addresses the answers provided by *ULIS* and *The Convention* to this question. The present chapter is divided into three sections: the nature of and requirements for the remedy of suspension, the seller's right of stoppage *in transitu*, and the effects of the application of the remedy of suspension.

Section I

Suspension of performance: nature and requirements

[197] *The nature of the remedy of suspension*

The aggrieved party's right to suspend performance is confined to situations where "it becomes apparent" that the other party will not perform a substantial part of his or her obligations. The other party's non-performance may then be described as "prospective" rather than actual. The nature and consequences of the remedy are different from those of the doctrine of anticipatory breach.⁹⁵⁴ The distinction between the two rem-

⁹⁵⁴ See [55] - [62].

edies is crucial and caused many difficulties for the drafters of *The Convention*.⁹⁵⁵

Suspension of performance is more easily obtained than avoidance prior to the date fixed for performance, for the following three reasons. First, while Article 71(1) only requires that the breach be "apparent" in order to justify suspension, Article 72(1) permits a party to avoid the contract only when it is "clear" that the other party will commit a breach. Second, the degree of the impending breach needed to suspend performance under Article 71 is merely non-performance of a substantial part of a party's obligations; Article 72 requires the threat of a fundamental breach.⁹⁵⁶ Third, it appears that, under Article 71, a party is only entitled to avoid the contract if adequate assurance of performance is not provided by the other party. Under Article 72, in contrast, a party may immediately avoid the contract without seeking adequate assurance of performance by the other party, assuming, of course, that the requirements of the remedy are satisfied.

It is submitted that the remedy of suspension of performance is not applicable where the breach is actual. When such is the case, the aggrieved party has several choices. A seller, for example, is entitled not to dispatch the goods until the price is paid.⁹⁵⁷ An example in which a seller may be entitled to suspend is the buyer's failure to pay the price because his or her bank has failed to fulfil its obligations toward its customers. This constitutes a sufficient ground for concluding that the buyer will default on the obligation to pay the price.⁹⁵⁸

⁹⁵⁵ See, for example, the proposal at the Conference to combine the two remedies in note 974.

⁹⁵⁶ However, the same result would obtain under either test. The distinction between the two is therefore unlikely to be of much practical significance.

⁹⁵⁷ It was stated clearly in art. 71 of *ULIS* that delivery of the goods and payment of the price shall be "concurrent conditions." The term "concurrent conditions" was intentionally excluded from *The Convention* because it is a legal concept not readily understandable by merchants or even lawyers from different legal systems. "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* at 29, annex 4.

As for the buyer, he or she is entitled to suspend if the seller is unable to deliver because the buyer has been let down by suppliers or is unable to find the shipping space to get his or her goods to the agreed destination.⁹⁵⁹ Presumably, late delivery makes it apparent that the seller will not perform a substantial part of his or her obligations. In short, when the seller's breach is actual, the buyer is at least entitled not to pay the price. On this issue, all the laws considered in this study are in agreement. Indeed, the application of the remedy depends primarily on the terms of the contract. Clearly, then, the law applicable to the contract will play a major role in determining the availability of the remedy, provided that the general principles upon which *ULIS*⁹⁶⁰ and *The Convention*⁹⁶¹ are based do not provide a solution.

[198] *Grounds for suspension in general*

Under *ULIS*, two grounds for suspension are specified. First, suspension is possible "whenever, after the conclusion of the contract, the economic situation of a party appears to have become so difficult that there is good reason to fear that he or she will not perform a material part of his obligation."⁹⁶² Second, not only should the difficul-

⁹⁵⁸ In one English case, an instalment contract for the sale of goods called for payment in cash upon the delivery of each instalment. The seller was late in delivering one instalment and the buyer announced that in future he would only pay for each instalment when the *following* one was delivered. This declaration was held to justify the seller's refusal to make further deliveries, on the ground that it constituted evidence of "an intention no longer to be bound by the contract." See *Freeth v. Burr* (1874), L.R. 9 C.P. 208, at 213. See also *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App.Cas. 434 (H.L.). In this case, the buyer refused to pay for two instalments already delivered but expressed his willingness to accept delivery of and make payment for subsequent instalments. It was held that the breach did not evince an intention no longer to be bound by the contract, since the buyer had acted in good faith.

⁹⁵⁹ *Lewis Emanuel & Son Ltd. v. Sammut*, [1959] 2 Lloyd's Rep. 629.

⁹⁶⁰ *ULIS*, art. 17.

⁹⁶¹ *The Convention*, art. 7.

⁹⁶² *ULIS*, art. 73(1).

ties be relevant to the non-performance in order to justify suspension, they must also result in there being "good reason" to fear that the party experiencing them will not perform a material part of his or her obligations. In view of these two factors, the test is whether a merchant in a situation similar to that which faces the suspending party correctly believes that there is a good chance that the other party will not perform a material part of his or her obligations.⁹⁶³

Instead of adopting the *ULIS* requirement of a difficult "economic situation" as a basis for suspension, *The Convention* adopted, as Article 71(1) suggests, new and different grounds for suspension. Under *The Convention*, a party can suspend performance if, after the conclusion of the contract, "it becomes apparent" that the other party will not perform a substantial part of his or her obligations.⁹⁶⁴ This suggests that one has to look to the provisions of the contract in order to determine the sequence in which the parties' obligations are to be performed. As is often noted, sale of goods contracts impose obligations on both parties.⁹⁶⁵ This can be illustrated by the following example. The seller agrees to sell goods to the buyer for cash on delivery (and in the absence of a contrary provision it will be assumed that the sale is on these terms).⁹⁶⁶ In this case, delivery and payment are concurrent conditions, that is, each

⁹⁶³ Cohn, "The Defence of Uncertainty: A Study in the Interpretation of the Uniform Law On International Sale of Goods Act 1967" (1974), 23 *Int'l. and Comp. L. Q.* 520, at 523.

⁹⁶⁴ *The Convention*, art. 71(1). For a legislative history of the text see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, annex 4, para. 49 ff; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, paras. 100-101, and annex 1, art. 47; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, art. 47; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, paras. 398 ff and para. 35 (art. 48); "Report of UNCITRAL" 11th sess., (1978) 9 *UNCITRAL Yearbook* 11, para. 28 (art. 62); *Official Records*, *supra*, note 67, at 129-130, 374 ff, 419 ff, 162 (art. 62), 218-219, paras. 38 ff and 220 paras. 11 ff.

⁹⁶⁵ S. 28 of the *SGA*, 1979 states that unless otherwise agreed (e.g. where the seller gives credit to the buyer) payment of the price and delivery of the goods are concurrent conditions. See also note 957.

⁹⁶⁶ *Ibid.*

party can refuse to perform unless the other is ready and willing to do the same or is prevented from doing so by the wrongful refusal of the former to accept performance.⁹⁶⁷

The expression "it becomes apparent" in Article 71(1) of *The Convention* must be regarded as setting out an objective test. This means that the situation of the party facing difficulties must become known to a reasonable person experienced in the trade in the same position as the innocent party.

Two further problems call for consideration. The first is the requirement in *The Convention* that the inability to perform should result from a serious "deficiency."⁹⁶⁸ Examples of circumstances justifying suspension of performance by satisfying this requirement include outbreak of war⁹⁶⁹ and the imposition of exchange controls by the buyer's country that make payment impossible.

However, this requirement is vague.⁹⁷⁰ Suppose, for example, that a seller owns several factories, one of which is destroyed by fire. In such a case, the fire has not destroyed the seller's capacity to produce the goods he or she originally agreed to sell. The question then arises whether this amounts to a "serious deficiency" in his or her capacity to perform entitling the buyer to suspend under Article 71. It appears that courts in contracting states are to be the ultimate authority on this question. The buyer's suspension of performance will, no doubt, be subject to close judicial scrutiny.

⁹⁶⁷ *British and Beningtons Ltd. v. North Western Cachar Tea Co. Ltd.*, [1923] A.C. 48 (H.L.).

⁹⁶⁸ The word "deterioration" which appeared in the 1978 draft Convention was replaced at the Conference by the word "deficiency." See, however, the comments of both Honnold (U.S.A.) and Ziegel (Canada) on the latter word, *Official Records, supra*, note 67, at 375, paras. 51 and 58.

⁹⁶⁹ "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 2, comment to art. 47, para. 4; *The 1978 Draft Commentary, supra*, note 67, comment to art. 62, para. 4.

⁹⁷⁰ See also Vilus, *supra*, note 487, at 241 (arguing that determining what is to be regarded as "a serious deficiency" in a party's ability to perform may prove to be difficult).

Second, those steps that must be taken in preparation for the performance of a party's contractual obligations are, under *The Convention*, to be regarded as part of his or her obligations.⁹⁷¹ In principle, a party is entitled to suspend whether the other party's prospective breach is of an obligation in the strictest sense or of the duty to take such preliminary steps.

[199] *Grounds for suspension: ULIS and The Convention compared*

The foregoing discussion of the approaches of *ULIS* and *The Convention*, and of the different concepts and tests that they employ, reveals important differences between the two laws. In *The Convention*, a party can suspend performance if, after the conclusion of the contract, "it becomes apparent" that the other party will commit a breach of a substantial part of his or her obligations. In *ULIS*, there must be "good reason to fear a material breach."

Furthermore, *ULIS* recognizes only one possible cause for the prospective breach, namely, a bad "economic situation." *The Convention* recognizes four: (a) a serious deficiency in a party's ability to perform his or her obligations; (b) a serious deficiency in a party's creditworthiness; (c) a party's conduct in preparing to perform his or her obligation; and, (d) a party's conduct in performing his or her obligations. Accordingly, the non-performing party's conduct in performing or preparing to perform the contract might justify suspension under *The Convention* but not under *ULIS*. In order to constitute preparation for performance, conduct must be directly related to performance of the contract in question, such as manufacturing the goods for that contract or preparing them for shipment.

⁹⁷¹ For example, art. 54 states that "the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made."

[200] *Time of deterioration*

In order to justify suspension of performance by one party, the deterioration of the other party's financial position must occur after the conclusion of the contract but prior to the date of performance.⁹⁷² Once the time for performance has passed, a breach of contract authorizes the innocent party to employ other remedies, including avoidance. Suspension by one of the parties will, if the other party does not provide adequate assurance, usually be followed by other remedies.

But would it be possible for one of the parties to suspend if the deterioration in the capacity or creditworthiness of the other party occurred prior to the conclusion of the contract? This issue is very important in practice. Suppose that the financial situation of one of the parties, say the buyer, deteriorated significantly while the contract was still being negotiated. Suppose further that the seller became aware of this only after the conclusion of the contract. Can the seller suspend performance even though the buyer's position remains the same as it was at the time of the contract's conclusion. Or is he or she forbidden from doing so for failing to investigate the buyer's financial position before entering into the contract?

In determining whether suspension is justified, it seems that the suspending party's actual or presumed knowledge of the deterioration is the crucial factor.⁹⁷³ If that party knew about the deterioration but did not take it seriously, suspension will not be jus-

⁹⁷² Article 71(1) of *The Convention* expressly states that the situation must arise after the conclusion of the contract. It was suggested that the rule be revised to allow the deterioration to have occurred prior to the conclusion of the contract as long as the other party only became aware of it after the conclusion of the contract. "Analysis of Comments and Proposals by Governments and International Organizations on The 1978 Draft Convention", *Official Records, supra*, note 67, at 71 ff and 62.

⁹⁷³ According to one English case, if at the time of sale it was known to both parties that the goods could not be exported without licence, the seller is not normally bound to do more than to make a reasonable effort to get the licence. See *Re Anglo-Russian Merchant Traders Ltd., and John Batt & Co. (London) Ltd.*, [1917] 2 K.B. 679 (C.A.). If such an effort is made and fails, the buyer will not be entitled to suspend performance.

tified. Conversely, if that party enters the contract without knowledge of existing deteriorating circumstances, the right to suspend should not be affected.

If one of the parties knew of his or her difficulties but did not inform the other party, that party might be held liable for fraud. In such a case, the innocent party can rely on any remedy available under *The Convention*, including avoidance. Fraud is not governed by *The Convention*. It is governed, presumably, by the applicable domestic law.

[201] *Prospective non-performance of a substantial part of a party's obligations*

The expression "fundamental breach" has not been used in either *ULIS* or *The Convention* in respect of suspension of performance. Instead, the two uniform laws use, respectively, "material" and "substantial" part of a party's obligations. This distinguishes suspension from avoidance based on anticipatory breach, where the term "fundamental breach" is used. In any event, it is submitted that the difference between "fundamental" in Article 72 and "substantial" in Article 71 is immaterial. This is so even though the employment of different terminology in Articles 71 and 72 was intentional.⁹⁷⁴ Accordingly, a determination of whether a material or substantial part of a party's obligations has been performed does not depend upon the meaning of "fundamental breach." Apparently, this was the original intention of the drafters, who drew a distinction between substantial non-performance and fundamental breach in order to support those who had argued that a fundamental breach should be more than just a material breach.⁹⁷⁵

⁹⁷⁴ At the Vienna Conference, Egypt proposed that the rules on suspension and anticipatory breach (Articles 71 and 72) be combined. The amendment was rejected by a tied vote (of 19 for and 19 against). See *Official Records, supra*, note 67, at 418, SR. 34, paras. 53 ff and SR. 35, paras. 1 ff. The text of the amendment is produced in *Official Records, supra*, note 67, at 129, para. 10.

⁹⁷⁵ See [22] - [26].

Unlike "fundamental breach," the terms "material" and "substantial" are not defined in *ULIS* or *The Convention*. This makes it difficult to know when suspension is justified. Nevertheless, it may be suggested that late payment of the whole price by the buyer and late delivery of the goods by the seller constitute the breach of a substantial or material part of their obligations. This is because paying the price and delivering the goods form the core of the buyer's and seller's obligations respectively.

[202] *Suspension of performance under the selected domestic laws*

Except in respect of the seller's right of stoppage *in transitu*, which is discussed below,⁹⁷⁶ the remedy of suspension of performance in both *ULIS* and *The Convention* has no counterpart in Egyptian, English, or French law.

The remedy differs from the seller's right of lien and of withholding delivery, both of which are clearly established in English,⁹⁷⁷ French⁹⁷⁸ and Egyptian law.⁹⁷⁹ Section 41 of the English *Sale of Goods Act* gives an unpaid seller a lien over goods in his or her possession in three situations: (a) where the goods have been sold without any stipulation as to credit; (b) where the goods have been sold on credit and credit has expired; and, (c) where the buyer becomes insolvent.⁹⁸⁰

One situation in which the seller is entitled to withhold delivery or to exercise a right of stoppage, under sections 39(2) and 41(1) of the English *Sale of Goods Act*, is

⁹⁷⁶ See [203] - [207].

⁹⁷⁷ *SGA*, 1979, s. 41(1). See also the *UCC*, s. 2-703; *DUSA*, s. 9(8)(1).

⁹⁷⁸ The *French Civil Code*, art. 1612.

⁹⁷⁹ The *Egyptian Civil Code*, art. 459.

⁹⁸⁰ *SGA*, 1979, s. 41(1). It should be pointed out that the seller's lien is exercised in cases where the property has passed to the buyer. Where the property has not passed, the seller is given the right to withhold delivery, which is similar to and co-extensive with the rights of lien and stoppage *in transitu* that are given under s. 39(2) of the same Act.

when the buyer has become bankrupt or insolvent.⁹⁸¹ Egyptian and French law⁹⁸² contain an equivalent provision which, unlike English law, also stipulates that delivery may be withheld if the seller is in imminent danger of losing the price as a result of the buyer's insolvency. This differs markedly from the grounds for suspension under both *ULIS* and *The Convention*, where a party may suspend performance even if no question of bankruptcy or insolvency is involved. Moreover, Egyptian, English, and French law justify withholding delivery only when the bankruptcy or insolvency of the buyer occurs after the conclusion of the contract.⁹⁸³ *The Convention's* approach differs in this regard. It permits suspension to be based on events occurring before the contract was entered into, as long as these did not become apparent until after that time.⁹⁸⁴

It seems that the remedy of suspension of performance in English, Egyptian, and French law assumes that the delivery of the goods and payment of the price are "concurrent conditions," i.e. that the buyer has the right to refuse to pay the price as long as the seller delays in delivering the goods and that a seller may refuse to deliver the goods as long as the buyer delays in paying the price.

However, in Common law countries a party is required to continue with performance even though that party has reasonable grounds to believe that the other party may not be able to perform his or her obligations when they fall due.⁹⁸⁵ The same is true in French and Egyptian law. This differs from *ULIS* and *The Convention*, where there is a right to suspend performance if the other party's breach is prospective.

981 *SGA*, 1979, s. 41(1)(c). For a definition of insolvency, see s. 61(4) of the same Act.

982 *The Egyptian Civil Code*, art. 459(2). Also Faraj, *supra*, note 84, at 233. See the *French Civil Code*, art. 1613.

983 The buyer also need not pay the price in the circumstances set out in arts. 1653 of the *French Civil Code*, and 457(2)(3) of the *Egyptian Civil Code*.

984 See [200]. But see *ULIS*, art. 73.

985 See Treitel, *Remedies*, *supra*, note 69, para. 189.

Section 2-609 of the *UCC* appears to parallel Article 71. Section 2-609(1) states that when reasonable grounds for insecurity arise with respect to the performance of either party, the other party may, in writing, demand adequate assurance of due performance. Although section 2-609 protects both sellers and buyers,⁹⁸⁶ it differs from Article 71 in some respects. Section 2-609(4) states that a failure to meet a justified demand for adequate assurance is a repudiation of the contract. In contrast, Article 71 does not permit a party to treat the contract as avoided in such a case although, as will be seen in paragraph [211], a failure to receive adequate assurance may make it clear that a fundamental breach will occur. It seems, moreover, that the grounds for suspension under Article 71(1), as discussed above, are narrower than the "reasonable grounds for insecurity" that justify suspension under section 2-609(1) of the *UCC*.⁹⁸⁷ Suppose, for instance, that a buyer makes a statement that implies an intention not to pay the price. In such an event, the seller may be entitled to suspend under the *UCC* section 2-609(1) but not under Article 71(1) of *The Convention*, according to which a seller may suspend only if the buyer's statement constitutes "conduct in preparing to perform or in performing the contract."

⁹⁸⁶ OLRC, *Report on Sales*, at 529, regarded the *UCC* rule as one of the most useful innovations in Article 2 of the Code and recommended the incorporation of a similar provision in the revised Ontario Sale of Goods Act. The rule was incorporated in s. 8.7 of the *DUSA*, which is substantially similar to the *UCC* ss. 2-609(1), (3) and (4). See also the *German Civil Code* art. 321, where an analogous provision is found. Treitel (*Remedies, supra*, note 69, para. 189) discusses similar provisions in the *Swiss Code of Obligations*.

⁹⁸⁷ See Honnold, *Uniform Law, supra*, note 41, at 397.

Section II

The seller's right of stoppage in transitu

[203] *General principles*

Under Article 71(2) of *The Convention*, a seller that becomes aware of grounds for suspending performance after the goods have been dispatched may prevent the goods from being handed over to the buyer.⁹⁸⁸ Obviously, stoppage of goods *in transitu* is a remedy available only to the seller.⁹⁸⁹ Although the remedy is recognized by Common law countries⁹⁹⁰ as well as by various other legal systems,⁹⁹¹ there are differences among them as to the grounds entitling the exercise of this right. The location of the goods sold and the financial position of the buyer are, in all the laws considered in this study, the main factors involved.

As far as the location of the goods is concerned, the remedy assumes that they have been dispatched to the buyer but that they are still in transit. To be in transit, the goods must be in the possession of a carrier or other bailee for transmission to the buy-

⁹⁸⁸ *The Convention*, art. 71(2). The rule was stated in art. 73 (2) of *ULIS*. For a legislative history of the text, see the documents cited in note 964.

⁹⁸⁹ There was a proposal to extend the principle to the buyer on the ground that the payment of money to the seller is parallel to the delivery of the goods to the buyer, "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, at 45, paras. 412 ff. UNCITRAL decided not to implement this proposal. See *id.*, para. 415. This approach might cause inequality between the parties. Since it is presumed that the transmission of payment in international sales, unless made by irrevocable letter of credit or bill of exchange, can take a long time, just like the transit of the goods, the buyer should be given the right to stop payment. Despite this, the principle is not harmful to the buyer because payments in international sales are usually made by letter of credit. Further, with today's communications, even when other modes of payment are used, payment is likely to be made within two or three days. This is not the case with the transit of goods. Thus, in practice, only the seller has the time to exercise a right of stoppage *in transitu* effectively.

⁹⁹⁰ See, e.g. ss. 2-705 of the *UCC*, and 9.9 of *DUSA*.

⁹⁹¹ "Report of the Secretary-General" (1977), 8 *UNCITRAL Yearbook* at 171, annex 1, para. 2.4.4. in which many domestic laws are referred to.

er.

As to the buyer's financial position, French law requires bankruptcy.⁹⁹² In English law, the buyer must have become insolvent.⁹⁹³ Under the *UCC*, by way of contrast, the right of stoppage is not confined to the buyer's insolvency. It also arises under section 2-705(1), at least where the goods are in the hands of a carrier and involve a large ("carload, truckload, planeload or larger") shipment of express or freight (a) when the buyer repudiates or fails to make a payment before delivery; or, (b) "if for any other reason the seller has a right to withhold or retain the goods." Under *ULIS* and *The Convention*, as will be seen below, the right of stoppage is not confined to cases of insolvency or bankruptcy.

It should be noted that the main purpose of stoppage *in transitu* under all of the laws considered in this study is to give the seller a priority in respect of the goods over the general creditors of the buyer.⁹⁹⁴

In practice, the use of the seller's right of stopping goods in transit has decreased in international trade.⁹⁹⁵ This is due to the practice of requiring documentary credit to be confirmed by the correspondent bank.⁹⁹⁶ This allows the seller to retain control of the goods through the document of title until payment has been made, whether the buyer is insolvent or not. It is also due to the speed of modern international carriage. And finally, learning of the buyer's insolvency (or bankruptcy) before the goods are

⁹⁹² "Report of the Secretary-General" (1977), 8 *UNCITRAL Yearbook* at 171, para. 2.4.3.1. For further details, see [206].

⁹⁹³ *SGA*, 1979, s. 44; see also s. 61(4) of the same Act for a definition of insolvency. Also ss. 2-705(1) of the *UCC* and 9.9(1) of *DUSA*.

⁹⁹⁴ See Benjamin, *supra*, note 81, para. 1162.

⁹⁹⁵ See Atiyah, *supra*, note 171, at 348; see also Benjamin, *id.*, para. 1162; OLRC, *Report on Sales*, at 401; "Report by the Secretary-General" (1977), 8 *UNCITRAL Yearbook* at 171, para. 2.4.3.4.

⁹⁹⁶ Akroyd, *A Guide to Contracting for the Sale of Goods* (London: Routledge, 1984) at 147.

delivered, as some domestic laws require a seller to do, can often be difficult.

[204] *Grounds for stoppage in transitu: The Convention*

After dispatching the goods, the seller may prevent them from being handed over to the buyer even though the latter holds a document that entitles him or her to obtain them whenever (a) the goods leave the seller's possession before payment; and, (b) the seller subsequently receives information indicating that payment will never be forthcoming.

Clearly, the right of stoppage can be exercised while the goods are in transit, that is, during the period in which the goods have left the possession of the seller but have not yet reached the buyer. It follows that, under all the laws considered in this study, the right of stoppage applies whenever the goods are in the possession of a carrier or other bailee before there has been delivery by the seller to the buyer.

Bearing in mind the grounds for suspension previously discussed,⁹⁹⁷ two further points need consideration. First, only unpaid sellers can exercise the right of stoppage.⁹⁹⁸ However, neither *ULIS* nor *The Convention* use the term "unpaid seller" in giving the seller the right to stoppage. It follows that under both laws the seller may be able to stop the goods in transit even if the buyer has paid the whole price. However, the seller has no reason to stop the goods in transit once payment has been made in full. Furthermore, *ULIS* and *The Convention* draw a distinction between non-payment of the price and other breaches by the buyer. Therefore, the right of stoppage, under both laws, applies if the buyer fails to make a payment, or if, for any other reason, the seller has a right to reclaim the goods.

⁹⁹⁷ See [198] - [202].

⁹⁹⁸ *SGA*, 1979, s. 38(1). For a definition of "unpaid seller," see s. 44 of the same Act.

Second, the ability of the seller to use the remedy of stoppage depends on the grounds becoming evident only after the dispatch of the goods. However, the stoppage would be justified if grounds existed before the dispatch that became evident only after that time. Section 44 of the English *Sale of Goods Act* is completely different. It restricts the right of stoppage to cases where the buyer's insolvency (or bankruptcy) occurs before the goods are delivered to the buyer.⁹⁹⁹

[205] *The rights of third parties in the event of stoppage in transitu*

Article 71(2) of *The Convention* permits the seller to intercept the goods even if the buyer holds a document that entitles that buyer to obtain them. This covers the situation in which the buyer holds a negotiable bill of lading covering the goods.¹⁰⁰⁰ This differs from section 2-705(2)(d) of the *UCC*, where the seller's right to stop goods in transit ceases upon "negotiation to the buyer of any negotiable document of title covering the goods."¹⁰⁰¹

ULIS differs from *The Convention* in one important respect: it extends the rule to a *bona fide* sub-purchaser of the goods. Under *ULIS*, the seller cannot stop the goods in transit when the goods are claimed by a third party that lawfully holds a document entitling that third party to obtain the goods.¹⁰⁰² This is the case when a buyer who holds a negotiable bill of lading representing the goods endorses it to a third party acting in good faith. In this case, the seller's right of stoppage is defeated and the third party acquires valid title to the goods. English law contains an equivalent provi-

⁹⁹⁹ See Benjamin, *supra*, note 81, paras. 1102 and 1162; Schmitthoff, *Sale, supra*, note 252, at 160, who considers that insolvency need not exist when the goods are shipped as long as it happens before arrival; and in *Export Trade, supra*, note 24, at 105-106.

¹⁰⁰⁰ See Honnold, *Uniform Law, supra*, note 41, at 397.

¹⁰⁰¹ The same principle is found in s. 9.9(2)(d) of *DUSA*.

¹⁰⁰² *ULIS*, art. 73(3).

sion.¹⁰⁰³ The third party must be the "lawful holder" of a document entitling him or her to obtain the goods. Exactly how this term should be interpreted is not answered by *ULIS*.

On the other hand, the last sentence of Article 71(2) of *The Convention* provides that stoppage *in transitu* relates only to the rights in the goods as between the buyer and seller.¹⁰⁰⁴ The Working Group accepted this approach at an early stage of drafting since it is difficult, within the scope of a uniform law on sales, to deal adequately with the rights of a carrier, bailee or other person to whom the bill of lading has been endorsed.¹⁰⁰⁵ This amounts to reaffirming the basic rule found in Article 4, namely, that *The Convention* only governs the rights and obligations of the buyer and seller.

If the application of *The Convention* is confined to relationships between buyers and sellers, the question arises as to what law governs third party rights. Is the carrier bound to obey the seller's order to stop in transit? It appears that the question of third party rights, or the question of whether the carrier is bound to obey the seller's order to withhold the goods, is governed by the relevant domestic law.¹⁰⁰⁶ It seems that the carrier, under all of the laws considered in this study, is required to obey a stop order after determining that the requirements of the remedy have been satisfied. Accordingly, a carrier who is permitted under the applicable domestic law to deliver the goods to a buyer who holds a negotiable document of title may do so even though the seller has a right of stoppage under Article 71(2) of *The Convention*.

¹⁰⁰³ *SGA*, 1979, s. 47(2). This rule was first established in *Lickbarrow v. Mason* (1794), 5 T.R. 683 (K.B.).

¹⁰⁰⁴ *The Convention*, art. 71(2).

¹⁰⁰⁵ See (1974), 5 *UNCITRAL Yearbook* at 89, para. 61.

¹⁰⁰⁶ See Sutton, *Part 3, supra*, note 487, at 109. See also Honnold *Uniform Law, supra*, note 41, at 397. But see Murray, "The Seller's Right to retain Possession, to Stop Delivery: A Comparative Study" (1981-82), 1-2 *J. B. and Comm.* 69, at 100 (suggesting that the issue is to be governed by some other conventions or by the law of place of delivery).

However, the right of the third party holding a document entitling him or her to obtain the goods might affect the seller's right of stoppage according to that law. The seller's right is merely to prevent the goods from being handed over to the buyer. Presumably, therefore, the seller loses the 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.¹⁰⁰⁷ Similarly, in English law, the holder of a document of title is not protected against the seller unless the document has been taken in good faith and for value.¹⁰⁰⁸

In short, carriers, forwarding agents, warehouse owners, and others, acquire their rights under the applicable domestic law. Any question regarding the seller's right of stoppage *in transitu* that has not been expressly resolved by *The Convention* is to be settled in accordance with the proper law of the contract, provided that the general principles on which *The Convention* is based do not produce a solution.¹⁰⁰⁹

[206] *Grounds for stoppage in transitu: domestic laws*

Although the remedy of stoppage *in transitu* is well established in Common law countries,¹⁰¹⁰ differences exist between English and American law on this issue. English law entitles the seller to stop the goods when they are in transit and retake possession if the buyer becomes insolvent.¹⁰¹¹ In contrast, the right of stoppage under the *UCC* is not confined to the buyer's insolvency. It also arises at least where the goods are in the hands of a carrier and involve a large ("carload, truckload, planeload or larger") shipment of express or freight (a) when the buyer repudiates the contract or fails to

¹⁰⁰⁷ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 62, para. 11.

¹⁰⁰⁸ *SGA*, 1979, s. 47(2). See also Schmitthoff, *Sale, supra*, note 252, at 220.

¹⁰⁰⁹ By virtue of art. 7(2) of *The Convention*.

¹⁰¹⁰ This can be found, for example, in the *Ontario Sale of Goods Act*, ss. 42 to 46.

¹⁰¹¹ *SGA*, 1979, s. 44.

make a payment due before delivery; or, (b) "if for any other reason the seller has a right to withhold or retain the goods."¹⁰¹² The application of stoppage to non-insolvency cases is intended to protect carriers. The seller is responsible for any charges or losses that the carrier may incur as a result of the stoppage. It is important to point out here that, under the *UCC*, delivery cannot be stopped once the buyer receives a negotiable document of title, such as a bill of lading.¹⁰¹³ This is completely different from Article 71(2) of *The Convention*, which permits the seller to intercept the goods "even though the buyer holds a document which entitles him to obtain them." Accordingly, it covers the situation where the buyer holds a negotiable bill of lading covering the goods.

Egyptian and French law grant the seller the right not to deliver the goods where the buyer fails to pay the price within the time agreed upon and the seller has not granted an extension for payment.¹⁰¹⁴ In such a case, the seller is no longer obligated to deliver, even when that seller has granted an additional time for payment, if the buyer became bankrupt or insolvent after the contract was concluded. As a result, the seller is in imminent danger of losing the price unless the buyer gives security that payment will be made on time.¹⁰¹⁵

Under the *French Commercial Code*, goods shipped to an insolvent buyer can be regained as long as they have not been delivered to the buyer's warehouse or to that of a commission merchant entrusted to sell them for his or her own account. However, the seller cannot regain the goods if the buyer sells them without fraud on invoices or

1012 The *UCC*, s. 2-705(1).

1013 See *id.*, s. 2-705(2)(d).

1014 The *Egyptian Civil Code*, art. 457; the *French Civil Code*, art. 1612; see also art. 1497 of *Québec Civil Code*. See also art. 1768 of the *Québec Draft Bill*, *supra*, note 93.

1015 The *French Civil Code*, arts. 457 and 613 respectively.

regular transport titles.¹⁰¹⁶

[207] *Stoppage in transitu: practical difficulties*

The application of the remedy of stoppage as adopted by both *ULIS* and *The Convention* is expected to be subject to difficulties of application and interpretation. Terms such as "dispatch" and "handing over," to which both laws refer, may be interpreted differently in different countries.

The term "dispatch" may refer to the commencement of actual transportation. The Commentary refers to the right of a seller who has shipped the goods to order the carrier not to hand over the goods to the buyer.¹⁰¹⁷ The question arises, then, whether there has been a "dispatch" if the goods are in the custody of a third party prior to actual transportation. This is the case where the goods are in the possession of another party, e.g. a shipping agent, who is, presumably, independent of both the seller and the carrier. English law takes the position that goods are deemed to be in transit from the time they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, but have not yet reached the buyer. Transit is thus the intermediate stage when the goods are in the custody of a neutral party, e.g. a carrier, shipping agent or other independent intermediary.¹⁰¹⁸

It seems that the term "dispatch," in *ULIS* and *The Convention*, refers to cases in which the goods are in the possession of a third party who holds them on the seller's behalf, so that there is no delivery or transfer of possession to the buyer. In this situation, denying the seller recourse to the remedy of stoppage is unsound since it is available while the goods are in transit. If the goods are damaged during transit, the seller

¹⁰¹⁶ The *French Commercial Code*, art. 62. Loi No. 67-563 du 13 Juillet 1967.

¹⁰¹⁷ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 62, para. 10.

¹⁰¹⁸ *SGA*, 1979, s. 45; Atiyah, *supra*, note 171, at 348-349; Benjamin, *supra*, note 81, para. 1166; Schmitthoff, *Sale*, *supra*, note 252, at 160.

has no claim in respect of such damage since the right to stop in transit is a right to stop the goods in whatever condition they are in.¹⁰¹⁹

Although it grants the seller the right to prevent the goods from being handed over to the buyer, *The Convention* provides no definition of the expression "handing over." It appears, however, that the term covers physical delivery of the goods by the carrier to the buyer or to an agent of the buyer at the place of destination. In practice, there are several events that are likely to take place before this stage is reached. It is unclear how many of them are covered by the term "handing over."¹⁰²⁰

In the absence of any guidance on this problem, it may be suggested that since the seller is given a right of stoppage even if the buyer holds a document entitling that buyer to obtain the goods, the seller is empowered to retain control over the goods after dispatching them. In fact, this right is held regardless of the conformity of the goods. It starts, moreover, after the seller has dispatched the goods by handing them over to the first carrier for transmission to the buyer.¹⁰²¹ Clearly, the right is terminated when, and only when, the whole goods are handed over to the buyer (or the buyer's agent). Handing over, according to this interpretation, means actual delivery to the buyer and not merely the constructive delivery that results from delivery to the first carrier for transmission to the buyer.¹⁰²² Nor does it include handing over the documents representing the goods.

¹⁰¹⁹ *Berndston v. Strang* (1868), L.R. 3 Ch.App. 588.

¹⁰²⁰ S. 45 of the *SGA*, 1979, gives several examples of these events: (a) the carrier's attornment to the buyer; (b) part delivery of goods effected by the carrier; (c) the carrier's (wrongful) refusal to deliver; and, (d) the buyer's rejection of goods while they continue to be in the carrier's possession.

¹⁰²¹ *The Convention*, art. 67.

¹⁰²² See *id.*, art. 31(a).

Here, it should be noted that the remedy of stoppage, in both *ULIS* and *The Convention*, does not regulate questions of agency. Accordingly, it seems that the applicable domestic law governs the issue of whether handing the goods to the buyer's agent terminates the seller's right of stoppage.

Section III

Effects of suspension

[208] *The right of the suspending party to discontinue performance*

Under Article 71 of *The Convention*, a party is entitled to suspend performance of one or more obligations if the test for suspending performance is satisfied.¹⁰²³ The seller, for example, is released from the obligation to deliver the goods or any part of them not yet delivered. The doctrine of suspension, under *ULIS* and *The Convention*, relieves the suspending party of all obligations to perform, or to prepare for performance, as of the time of the decision to suspend.¹⁰²⁴ Suppose, for example, that the buyer is under an obligation to provide the seller with certain specifications necessary for the production of a machine to be manufactured by the seller. In such a case, a buyer who suspends performance is relieved of all obligations, including the duty to provide such specifications. Similarly, a seller who is to pack the goods in a specified manner is entitled to suspend such packing upon the buyer's prospective non-payment or non-acceptance of the goods.

¹⁰²³ Cf. *DUSA*, s. 8.7(1), and s. 2-609(1) of the *UCC* (authorizing the aggrieved party to suspend any performance for which the agreed *quid pro quo* has not been received).

¹⁰²⁴ "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* at 87, annex 2, comment to art. 47, para. 8; *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 62, para. 8.

[209] *Notice by the suspending party*

Under *The Convention*, the suspending party "must immediately give notice of the suspension to the other party."¹⁰²⁵ This is an improvement over Article 73 of *ULIS*, which did not require the suspending party to communicate an intention to suspend.¹⁰²⁶ This requirement has no parallel in English law in respect of withholding delivery or stoppage *in transitu*.

The issue of risk in the transmission of communications has already been discussed.¹⁰²⁷ Here, however, two important points should be recalled. First, according to dispatch theory, the risk in transmitting a notice of suspension is to be borne by the party prospectively in breach and not by the suspending party. Second, whether or not the notice should be given immediately depends upon the circumstances of each case and is subject, therefore, to the interpretation of the courts in contracting states.¹⁰²⁸

There is no form required in order for the notice to be effective¹⁰²⁹ and no particular statement that it must contain. It is essential, however, that the intention of the suspending party be clear and that the grounds for suspension be stated, at least in general terms. This is of particular importance since the party receiving the notice has the right to know the reasons behind the suspension.

1025 *The Convention*, art. 71(3).

1026 The *ULIS* approach to the requirement of communication was criticized by Cohn as one of the gaps in the law, Cohn *supra*, note 963, at 527. He has observed, however, that *ULIS* contains a very large number of cases where notice by one party is required. See Graveson and Cohn, *supra*, note 134, at 30 ff for a list of provisions under which notices are required.

1027 See [90] - [92].

1028 In an earlier stage of drafting, the notice was to be given "promptly." This was subsequently changed to "immediately." "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook*, at 49, para. 101.

1029 See also [89]. Also the *UCC*, s. 2-609(1), and *DUSA*, s. 8.7(1), where a written notice is required.

Upon receiving the notice of suspension, the party in difficulty can show that the deficiency in his or her creditworthiness or ability to perform no longer exists and that he or she is ready, willing and able to perform his or her obligations. A buyer would have to show an ability to pay the price and take delivery and to carry out all other obligations as well. Likewise, a seller would have to demonstrate an ability to supply the contracted goods and a readiness to continue performance as stated in the contract. If the party facing difficulties gives adequate assurance of performance, the suspending party must continue to perform. If no adequate assurance is given, the latter is entitled to suspend and ultimately avoid the contract (bearing in mind that suspension is not the same as avoidance). Avoidance in such an event may be based either upon fundamental breach¹⁰³⁰ or upon the expiration of an additional time notice.¹⁰³¹

[210] *Adequate assurance of performance*

Article 71(3) of *The Convention* requires the suspending party to "continue with performance if the other party provides adequate assurance of his performance."¹⁰³² *ULIS* contains no similar provision. The notion of adequate assurance is known to several domestic laws. Egyptian¹⁰³³ and French¹⁰³⁴ law each contain a rule that the seller is no longer bound to make delivery if the buyer becomes insolvent or bankrupt, unless the buyer gives security for payment of the price. Under the *UCC*, the aggrieved party is entitled to seek adequate assurance of future performance when "reasonable grounds for insecurity arise with respect to the other party's performance."¹⁰³⁵ English

1030 See [20] - [26].

1031 See [41] - [53].

1032 By virtue of art. 71(3) of *The Convention*.

1033 The *Egyptian Civil Code*, art. 459.

1034 The *French Civil Code*, art. 1613.

1035 The *UCC*, s. 2-609(1).

law, in contrast, does not contain a provision entitling a party to seek adequate assurance of performance. A party is required, in English law, to continue performance even though he or she has reasonable grounds to believe that the prospect of receiving performance has been impaired.

Neither Article 71(3) of *The Convention* nor its drafting history provides much guidance as to what constitutes adequate assurance. It would have been helpful had examples been given of what constitutes the removal of a threat that a contracting party will not perform a substantial part of his or her obligations.¹⁰³⁶ In any event, adequate assurance differs depending upon whether it is the seller or the buyer who seeks it. It must give a party reasonable security either that performance will be rendered or that compensation will be received for all losses resulting from non-performance or delay in performance.¹⁰³⁷

The adequacy of the assurance depends, then, on the reasons for the non-performance and on the circumstances of the case. Thus, in some circumstances the assurance may be considered adequate even though it consists of nothing more than a simple letter stating an intention to perform, or a guarantee. Section 2-609(2) of the *UCC* stipulates that, in the case of merchants, the reasonableness of any grounds for insecurity and the adequacy of any assurance offered shall be determined according to the accepted commercial standard.¹⁰³⁸

1036 The Federal Republic of Germany, commenting on art. 62(3) of the 1978 Draft Convention, recommended that several examples be given as to what would be adequate assurance, such as, "by guarantees, documentary credit or otherwise." See *Official Records, supra*, note 67, at 80.

1037 See *The 1978 Draft Commentary, supra*, note 67, comment to art. 62, para. 13.

1038 In fact, Comment 4 to the *UCC*, ss. 2-609(2) and (4), states that what constitutes adequate assurance must be determined by the facts of each case and that the party seeking assurance must act in good faith and apply an objective test of what is adequate.

In short, *The Convention's* drafting history suggests that for an assurance to be adequate, it must give reasonable security to the first party either that the other party will in fact perform, or, if not, that the first party will be compensated for all losses suffered in consequence of going forward with his or her own performance.¹⁰³⁹

[211] *Failure to provide adequate assurance of performance*

Article 71 of *The Convention* does not permit a party to avoid the contract if the other party fails to provide adequate assurance. This is completely different from the *UCC*, which states that failure to provide such an assurance within a reasonable time not exceeding thirty days is a repudiation of the contract.¹⁰⁴⁰ It has been suggested by Honnold¹⁰⁴¹ that, under Article 71 of *The Convention*, the failure of a party to provide adequate assurance gives the other party good reason to believe that the former will commit a fundamental breach. This would enable a party who does not receive adequate assurance to avoid the contract under the doctrine of anticipatory breach.

The better view is that suspension of performance does not necessarily lead to avoidance.¹⁰⁴² This view is supported by *The Convention's* drafting history. The Commentary states that "failure by a party to give adequate assurance *may* make it clear that he will commit a fundamental breach."¹⁰⁴³ This suggests that failure to give adequate assurance may provide the suspending party with grounds for avoidance, but will not necessarily do so.

¹⁰³⁹ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 62, para. 13.

¹⁰⁴⁰ The *UCC*, s. 2-609(4); also *DUSA*, s. 8.7(3).

¹⁰⁴¹ See Honnold, *Uniform Law, supra*, note 41, at 400.

¹⁰⁴² As Ziegel puts it "failure to provide an assurance of performance is surely not unequivocal evidence of [one's] unwillingness to perform." See Ziegel, *The Remedial, supra*, note 62, at 9-35.

¹⁰⁴³ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 63, para. 2.

At the Vienna Conference, it was proposed that the failure of a party to provide adequate assurance of performance within a reasonable time should entitle the party requesting the assurance to avoid the contract.¹⁰⁴⁴ The proposal was rejected on the ground that it would enable the party requesting assurance to avoid the contract even "if the other party has asserted that there were no grounds for questioning his ability to perform."¹⁰⁴⁵

The results of a failure to give adequate assurance of performance are different under Article 71 than under Article 72. Under the former, this failure may or may not give good grounds for avoidance. Under the latter, future fundamental breach, which entitles a party to avoid, is always required. Presumably, the question of whether a failure to give adequate assurance justifies avoidance under Article 71 will be settled by courts in contracting states. Moreover, fundamental breach is essential for avoidance based on anticipatory breach under Article 72. In contrast, not all prospective breaches that justify suspension of performance under Article 71 are fundamental.

One last point should be considered. Even if the failure to provide adequate assurance does not justify avoidance, *The Convention* gives the suspending party the right to claim any damages flowing from the breach or from the inadequacy of the assurance.

¹⁰⁴⁴ See *Official Records, supra*, note 67, at 129, 377 and 378 for the discussion of this proposal (by Canada and Australia). In fact, art. 47(3) of *The 1976 Draft Convention* provided in its last sentence that "if the other party fails to provide such assurance within a reasonable time after he has received the notice, the party who suspends performance may avoid the contract." This sentence was deleted on the ground that there may be reasonable differences of opinion as to what constitutes adequate assurance in a particular case. "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, at 45, paras. 416 ff. The deletion of the sentence makes it clear that the failure to provide adequate assurance does not necessarily justify avoidance. Avoidance prior to the date of performance, including the grounds for such avoidance, is governed by art. 72.

¹⁰⁴⁵ See *id.*, at 378, para. 7.

[212] *Suspension of performance: conclusions*

In spite of the objectivity achieved by *The Convention's* approach,¹⁰⁴⁶ the doctrine of suspension may be subject to considerable confusion, at least at the practical level. Despite the fact that it may achieve justice in individual cases, by and large it is expected to be abused, at least in its present form. If the price of the goods changes or if one of the parties makes a bad bargain, it is likely that the doctrine will be invoked. It is therefore submitted that the power to decide whether suspension of performance is justified should be given in the first instance to courts in contracting states and not to the parties themselves.

In practice, the doctrine is likely to be applied more frequently by sellers than by buyers.¹⁰⁴⁷ In international sales, the buyer's primary obligation is to pay the price. This is most often done by irrevocable letter of credit. After arranging for payment in this way, and after advising the beneficiary, the buyer will not be able to suspend payment pursuant to Article 71(1) if good grounds for suspension should later arise.¹⁰⁴⁸ The rule is likely to be abused by sellers demanding that buyers allay all sorts of suspicions of non-performance.

1046 Whether *The Convention's* test has succeeded in achieving a higher degree of objectivity is a controversial issue among commentators. Ziegel believes that it has not, and that the right to suspend conferred by the rule is a very broad one. See Ziegel, *The Remedial*, *supra*, note 62, at 9-34; also Vilus, *supra*, note 487, at 242 (suggesting that the application of the rules may lead to abuse). But see Murray *supra*, note 1006, at 99 (arguing that a shift has been made from the subjective judgment of the suspending party to a more objective standard); also Honnold, *Uniform Law*, *supra*, note 41, at 389.

1047 See Sutton, *Part 3*, *supra*, note 487, at 107.

1048 It was held by an English court that "a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which imposed upon the banker an absolute obligation to pay, irrespective of any dispute there might be between the parties whether or not the goods were up to contract." *Hamzeh Malas & Sons v. British Imex Industries Ltd.*, [1958] 2 Q.B. 127 (C.A.).

In short, it seems that the demands for an objective test made during the drafting process were not that successful, although significant improvement over *ULIS* was achieved.

Chapter VII
PRICE REDUCTION

[213] *Introduction*

In general, delivery of goods occurs when the seller takes those steps necessary to enable the buyer to control the goods and benefit from their use. It is submitted that the seller's primary duty, in both international and domestic sales, is to deliver goods in conformity with their description under the contract. When non-conforming goods are delivered to the buyer, the question arises as to what remedies are available. When the seller delivers non-conforming goods, Article 50 of *The Convention* entitles the buyer to reduce the price.

In practice, non-conformity of the goods puts the buyer in an undesirable situation. This is because he or she may have paid the whole price for the goods before receiving an opportunity to inspect them and because the non-conformity, at least in some circumstances, may not constitute a fundamental breach enabling that buyer to avoid the contract.

In these and similar circumstances, the remedy of price reduction plays an important role by enabling the buyer to reduce the price and adapt the contract to the goods delivered. The remedy is based on the notion that it is unjust, in such circumstances, to require the buyer to pay the full price for non-conforming goods.

The price reduction remedy is derived from the Roman law remedy of *actio quanti minoris*.¹⁰⁴⁹ Although the remedy is well-established in Civil law systems,¹⁰⁵⁰ it is unknown in Common law countries. For this reason, it was very difficult to draft the remedy.¹⁰⁵¹

1049 See Treitel, *Remedies*, *supra*, note 69, at 42, para. 67.

1050 See, e.g. the *French Code Civil*, arts. 465, 472 and 487.

1051 But Bergsten and Miller note that at several stages of the drafting of the provision, Common law participants saw the provision as a type of set-off whereby the buyer was authorized to deduct damages from the price. Bergsten and Miller, "The Remedy of Reduction of Price" (1979), *27 Am. J. Comp. L.* 255, at 255.

Which remedy is more beneficial to the buyer — a remedy for reduction of price, or a claim for damages? What is the current value of the non-conforming goods? Has the price fallen or risen? Does the non-conformity of the goods constitute a fundamental breach of the contract? What is the relationship between the remedy of price reduction and that of contract avoidance? Was it a bad bargain from the buyer's point of view or not? It is the purpose of this chapter to present *The Convention's* answers, if any, to these questions.

The present chapter is divided into two sections. The first deals with the requirements of the remedy; the second covers its operation and effects. Before turning to the first section, the nature of the remedy and its relationship with other remedies will be introduced.

[214] *The nature of price reduction and its relation to other remedies*

Where the goods fail to conform to the contract, *The Convention* authorizes a price reduction "in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time."¹⁰⁵² For example, if the seller has agreed to deliver 100 tons of wheat but delivers only 95 tons, the buyer is not required to pay for the part not delivered. Likewise, if the seller delivers all of the wheat contracted for but part of it is not in conformity with the contract, the buyer may reduce the price in proportion to the reduction in the value of the goods at the time of contracting.

¹⁰⁵² *The Convention*, art. 50. See also *ULIS*, art. 46. For a legislative history of the text, see the following documents: "Report of the W.G." 3th sess., (1972), 3 *UNCITRAL Yearbook* part two, 77, at 89, paras. 109 ff; (1974), 4 *UNCITRAL Yearbook* at 56-57, paras. 146 ff; "Report of the W.G." 4th sess., (1974), 4 *UNCITRAL Yearbook* 61, at 71, para. 125; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, at 92, art. 31; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, at 47, para. 31, art. 32; *The 1978 Draft Convention*, *supra*, note 47, art. 46; *Official Records*, *supra*, note 67, SR. 23 ff; *id.*, paras. 42 ff, 23 and 56 ff.

The remedy is well-established and accepted in international trade practice. It has, moreover, its own characteristics that distinguish it from both the remedy of specific performance and the remedy of avoidance. In addition, price reduction may be, at least in certain cases, the buyer's most appropriate remedy. Specific performance may not always satisfy the buyer's needs. For example, the application of specific performance may take a long time. Litigation is expensive and time-consuming. Thus, the buyer would lose the benefits he or she would have had if the seller had performed. This deficiency justifies the adoption of the remedy of price reduction.

As for the avoidance remedy, its application puts an end to the contractual relationship of the parties. The buyer's self-interest may, in certain situations, dictate resort to remedies other than avoidance since avoidance can result in greater loss than performing the contract.

Although reducing the price is one of the main remedies in *The Convention*, it does not apply to late delivery or to delivery at the wrong place. As Article 50 of *The Convention* states, it only applies to non-conforming goods. This is a sound approach, since the rationale of the remedy assumes non-conformity of the goods. This is clearly not the case in the other two breaches.

Price reduction should not be confused with a penalty that a seller must pay in the event of late delivery or delivery at the wrong place, even if these penalties are to be deducted from the contract price.¹⁰⁵³ That kind of penalty is not a reduction of price. It is part of the contractual agreement.

¹⁰⁵³ In English law, a contractual provision that calls for the payment of a sum of money in the event of a specified breach may be held to be a penalty clause, which will not be enforced. Instead, English courts will fix damages in the amount of the actual loss suffered. In contrast, French law permits penalty clauses to be enforced. Consequently, they are frequently inserted into contracts of sale as a means of (a) liquidating damages; (b) limiting the defaulting party's liability; or, (c) exerting pressure on the defaulting party. For more details, see the *French Civil Code*, arts. 1220, 1228, 1229, 1150 and 1152; see also Nicholas, *supra*, note 92, at 229 ff; de Vries, *Civil Law and the Anglo-American Lawyer* (New York: Oceana Publications, 1976), at 425 ff.

The remedy of price reduction stands alone as a remedy distinct from the remedy of damages, which is also available if the buyer so chooses. In English law, as well as in other Common law countries, reduction of price is nothing more than damages deducted from the contract price. There are, however, some differences between these two remedies, which will be seen from the following discussion.

[215] *Price reduction in French law*

Article 1641 of the *French Civil Code* creates an implied warranty against hidden defects.¹⁰⁵⁴ Where the seller delivers defective goods, the buyer may elect either to (a) return the defective goods and obtain repayment of the price, or (b) keep them and obtain repayment of that part of the price as shall be determined by experts to represent the value of the defect.¹⁰⁵⁵ If the seller was aware of the defects, he or she is liable in damages in addition to having to repay the price.¹⁰⁵⁶ If, on the other hand, that seller was unaware of the defect, he or she is liable only to repay the price and to compensate the buyer for the defect.¹⁰⁵⁷

1054 See also *Amos and Walton, supra*, note 92, at 361.

1055 The *French Civil Code*, art. 1644.

1056 See *id.*, art. 1645.

1057 See *id.*, art. 1646. See also *Amos and Walton, supra*, note 92, at 361.

Section I
Requirements

[216] *General principles*

Article 50 of *The Convention* authorizes the buyer, in the event that the goods fail to conform to the contract, to reduce the price in the same proportion that the value of the goods actually delivered bears to the value of the goods contracted for. Although the buyer can claim a partial refund where the price has already been paid,¹⁰⁵⁸ the remedy is of greater value to that buyer before the price has been paid. This is because after payment of the price legal action might be needed, especially if any disagreement exists concerning conformity of the goods.

One important point calls for consideration, namely, the buyer's entitlement, under *The Convention*, to claim damages without demonstrating the seller's fault. Obviously, the buyer chooses to claim damages or, alternatively, to reduce the price by evaluating the benefits of the bargain, whether or not there has been a consequential loss. As will be seen, the price reduction remedy does not require a court action. By way of contrast, in order to claim damages, court action is needed (unless, of course, the seller agrees on the amount claimed).

In Civil law systems, avoidance and price reduction are the usual remedies for a buyer who has received non-conforming goods. Damages are exceptional.¹⁰⁵⁹ Price reduction is available in Civil law countries whether or not the breaching party is at fault.

¹⁰⁵⁸ *The Convention*, art. 50, which contains the phrase "whether or not the price has already been paid."

¹⁰⁵⁹ See Bergsten and Miller, *supra*, note 1051, at 257.

[217] *Declaration of intent to reduce the price*

It is the buyer who decides whether or not to resort to the price reduction remedy. If he or she decides to do so, a declaration must be made to the seller that the price is to be reduced.¹⁰⁶⁰ No court action is required. In this regard, another difference between price reduction and damages emerges. While the former is effected by the unilateral declaration of the buyer, the latter must be assessed by a court.

As previously noted, the requirement for a notice of declaration of avoidance plays an important role in limiting the availability of the remedy of avoidance.¹⁰⁶¹ The remedy of price reduction has advance notice requirement. However, depending on the circumstances of the case, the buyer may notify the seller, within a reasonable time, of his or her intention to reduce the price, in order to avoid any unreasonable inconvenience to the seller. Otherwise, the court may conclude that the buyer has acted in bad faith. This is a shared position of all the laws considered in this study regarding "common principles and policies concerning disclosure of information between contracting parties."¹⁰⁶²

Under *The Convention*, the buyer is obliged to notify the seller of the lack of conformity of the goods within a reasonable time and, at the latest, within two years.¹⁰⁶³ However, the buyer may reduce the price or claim damages (except for loss of profit) if he or she has a reasonable excuse for failing to give the required notice.¹⁰⁶⁴

1060 See Enderlein, *supra*, note 70, at 197.

1061 See [86] - [91].

1062 See Honnold, *Uniform Law, supra*, note 41, at 131.

1063 *The Convention*, art. 39.

1064 See *id.*, art. 44.

[218] *Delivery of non-conforming goods*

The application of the remedy of price reduction presumes, in the language of *The Convention*, that "the goods do not conform with the contract" or, in the language of *ULIS*, that there is a lack of conformity. These words suggest that the price reduction remedy applies where goods are defective in quantity as well as in quality. Some systems apply different principles to defects of quality than to those of quantity.¹⁰⁶⁵ The principle of price reduction in cases of defects in quantity applies mostly to sales of land or to short delivery of goods.¹⁰⁶⁶ *The Convention* and *ULIS* make no distinction between qualitative and quantitative defects; instead, they distinguish between failure to deliver conforming goods and failure to deliver at the agreed time or place.¹⁰⁶⁷ As Article 50 of *The Convention* stands, the price reduction remedy applies whenever non-conforming goods are delivered and are accepted by the buyer.¹⁰⁶⁸ Consequently, it should be interpreted as applying to both qualitative and quantitative non-conformity.

¹⁰⁶⁵ The rule under both French and English Law is that the price is simply reduced in the proportion that the shortage bears to the full quantity contracted for. This price reduction is not based (as in the case of qualitative defects) on reduced value as such, though where the sale is at so much a unit this will often be the practical effect of the principle. See Treitel, *Remedies, supra*, note 69, at 43, para. 68. The distinction between qualitative and quantitative defects was not adopted in the *UCC*. See the *UCC*, s. 2-601, which gives rise to termination of contract if the goods or the tender of delivery fail in any respect to conform to the contract.

¹⁰⁶⁶ See Treitel, *id.*, at 44. Note also that arts. 1617 and 1618 of the *French Civil Code*, which deal with quantitative defects, refer expressly to land.

¹⁰⁶⁷ See Graveson and Cohn, *supra*, note 134, at 80; see also *Tunc's Commentary, supra*, note 35, at 377.

¹⁰⁶⁸ *The Convention*, art. 50.

[219] *Degree of breach*

In contrast to avoidance, the price reduction remedy in *ULIS* or *The Convention* does not accord the degree of breach a significant role. This point also differentiates damages from price reduction. Under Article 79 of *The Convention* and Article 74 of *ULIS*, even if the non-conformity constitutes a fundamental breach, the seller may, if certain requirements are met, be exempted from liability in damages.¹⁰⁶⁹ If the seller is exempted from liability, the buyer is not allowed to claim damages, but retains the right to reduce the price.

This approach is in conformity with the policy underlying the remedy of price reduction as adopted in some domestic laws. For example, under Article 472 of the *German Civil Code*, price reduction is possible only where the breach is not fundamental and, therefore, does not justify avoidance. By saving the contract from avoidance and minimizing losses resulting from defective delivery, the remedy of price reduction conforms with international trade practice. This ensures that the remedy will be resorted to in most cases of non-fundamental breach. It has been held in France that, according to commercial custom, a slight variance from the contract's description of the goods entitles the buyer to reduce the price but not to avoid the contract.¹⁰⁷⁰

Price reduction is one of the three main remedies available to the buyer, the others being specific performance and damages. Each has its own requirements and sphere of application. Fundamental breach plays a significant role in the avoidance remedy but not in specific performance or price reduction. Accordingly, if the breach is fundamental, the buyer may elect either specific performance or avoidance, but not price reduction. If the breach is not fundamental, avoidance is excluded and the buyer may choose either specific performance or price reduction. Clearly, the election will

¹⁰⁶⁹ This rule is discussed in [190].

¹⁰⁷⁰ Langen, *Transnational Commercial Law* (Leiden, Sijthoff, 1973), at 144.

depend on which remedy is the more advantageous.

[220] *Seller's readiness to cure*

Article 50 of *The Convention* provides that if the seller remedies any failure to perform, or if the buyer refuses to accept the cure offered by the seller, the buyer may not reduce the price. This language presupposes two facts: the delivery of defective goods and an offer to cure the defective delivery. Under *The Convention*, the seller has the right to cure even after the buyer has reduced the price.¹⁰⁷¹ This right may not be refused unless its exercise would cause the buyer unreasonable inconvenience or expense.

The Convention's approach, which allows the seller to remedy the non-conformity, differs from that of *ULIS*, where, in case of price reduction, the buyer is not required to mitigate any loss resulting from the breach. Under *ULIS*, only a claim for damages is subject to the mitigation requirement.¹⁰⁷² Thus, the remedies of price reduction and damages overlap more under *The Convention*, where the buyer is required to permit the seller to remedy any failure in accordance with Article 37 or 48, making price reduction subject to the mitigation principle.

[221] *Time of calculation of the reduction in price*

The time at which an assessment of conformity is to be made is crucial to the fair operation of the remedy of price reduction. Under *The Convention*, the price is reduced by the proportion that the value of non-conforming goods bears to the value of conforming goods, both measured at the time of delivery.¹⁰⁷³ This differs from *ULIS*, where the price reduction is based on the value of the goods at the time of the conclusion of the

1071 The cure remedy is discussed in ch. VIII.

1072 *ULIS*, art. 88.

1073 *The Convention*, art. 50.

contract.¹⁰⁷⁴ It also differs from the 1978 Draft Convention, where reference was made to the time of concluding the contract as the time for determining the reduction in price.¹⁰⁷⁵ This was changed at the Conference on the ground, *inter alia*, that a reduction based on the value of the goods at the time of delivery would be a more adequate substitute for damages.¹⁰⁷⁶ One commentator has suggested that this change avoided the construction of a "theoretical value for defective goods that might not exist at the time of the contract."¹⁰⁷⁷

In making the time of delivery the relevant time for assessing the value of the non-conformity, *The Convention* has adopted a mixed approach that brings the Civil law remedy of price reduction closer to the remedy of damages, that, it will be recalled, are also assessed at the time of delivery in the case of non-conforming goods.

[222] *Time of calculation of the reduction in price: evaluation*

Article 50 of *The Convention*, that assesses the value of non-conforming and conforming goods at the time of delivery, is unsatisfactory. The more appropriate time for calculating the reduction in price, it is submitted, is when the buyer first gets an opportunity to examine the goods. In cases where the seller is to deliver the goods to a carrier, rather than directly to the buyer, this opportunity will often not arise until after the goods have reached their final destination. Prior to that time, the buyer is not in a position to know about the existence of the defect, let alone its extent. The buyer cannot calculate the price reduction without this information. The test adopted in Article 50 can become quite complex if there are price changes between the time of delivery

1074 *ULIS*, art. 46.

1075 See *The 1978 Draft Convention*, *supra*, note 47, art. 46. It is worthy of note that art. 472 of the *German Civil Code* contains a similar rule.

1076 See *Official Records*, *supra*, note 67, (A./CONF.97/C.1/ L. 167), SR. 23 ff.

1077 Honnold, *Uniform Law*, *supra*, note 41, at 327.

and the time the non-conformity is discovered.

Unfortunately, *The Convention* does not specify the period within which the buyer must reduce the price. In contrast, it provides that the remedy of avoidance must be exercised within a reasonable period of time.¹⁰⁷⁸ However, it can be safely said that the right to reduce the price may be exercised immediately as long as no performance is required by the buyer.¹⁰⁷⁹ Moreover, the buyer loses this right if the seller has commenced performance before it is exercised.

[223] *Place of calculation of the reduction in price*

Article 50 of *The Convention* does not stipulate at which place or market the prices are to be compared.¹⁰⁸⁰ At the Vienna Conference, a proposal to ensure that the reduction in price took account of prevailing prices at or near the buyer's place of business was rejected.¹⁰⁸¹

It would have been more desirable had the place for assessing the value of the goods been specified. A buyer might have been better protected from loss resulting from the seller's delivery of non-conforming goods (and from unfair dealings when the defective goods are substituted for) had this been done. This may prove not to be a serious problem for buyers, however, since they are not excluded from considering the place of destination.¹⁰⁸² But this view, it is submitted, is misleading since it is at odds with *The Convention's* drafting history, and with the value of the goods actually supplied. In most cases, the place of calculation will be the seller's place of business and, in all cases, the time of calculation will be the time of delivery.

¹⁰⁷⁸ *The Convention*, arts. 49(2) and 64(2).

¹⁰⁷⁹ See Graveson and Cohn, *supra*, note 134, at 80.

¹⁰⁸⁰ See Enderlein, *supra*, note 70, at 197.

¹⁰⁸¹ *Official Records*, *supra*, note 67, at 23, paras. 42 ff (A/CONF.97/C.1/ L. 168).

¹⁰⁸² See Enderlein, *supra*, note 70, at 197.

Section II

Operation and effects of price reduction

[224] *Operation of price reduction*

The price reduction remedy in *The Convention* operates by reducing the price "in the same proportion as the value of the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time."¹⁰⁸³

The amount of the reduction permitted under *The Convention* may be calculated by using the following formula:

$$\text{reduced price} = \frac{\text{adjusted price} \times \text{value of non-conforming goods}}{\text{hypothetical value of conforming goods}}$$

The application of the formula is illustrated by the following example. If the contract price and the hypothetical value of conforming goods at time of delivery are both \$10,000, while the value of non-conforming goods at the time of delivery is one half of that amount, or \$5,000, the buyer may reduce the price by one-half. Thus, if the price of conforming goods at the time of delivery is the same as the contract price, there will be no difference between price reduction and damages. However, different results will occur if these two values are not the same.

How is the reduction to be calculated when the hypothetical value of conforming goods at the time of delivery exceeds the contract price? Assume, for example, the same contract price of \$10,000, but hypothetical value at the time of delivery of \$20,000 for conforming goods and \$10,000 for non-conforming goods. If the goods are not in conformity with the contract and the buyer selects the price reduction formula, he or she must pay \$5,000 (the contract price multiplied by the proportion the value of

¹⁰⁸³ *The Convention*, art. 50.

the goods actually delivered bears to the hypothetical value of conforming goods at the time of delivery).

It is submitted that it is more beneficial for the buyer to claim damages than to reduce the price in cases where the price of conforming goods at the time of delivery is greater than the contract price. If, on the other hand, it is less than the contract price, price reduction will yield the better result. However, one important point should be kept in mind: if a seller's non-performance is due to an impediment beyond his or her control, that seller is excused from paying damages. The buyer would therefore have to bear any consequential loss. Accordingly, under Article 74, the buyer may receive by way of damages the difference in value between the conforming goods and the goods actually delivered.

The advantages of claiming damages rather than reducing the price where the value of conforming goods at the time of delivery exceeds the contract price can be illustrated by the following example. The facts are the same as in the previous example. According to *The Convention's* formula, a buyer is entitled to receive goods worth \$20,000 at the time of delivery. If that buyer elects to keep the goods and claim damages, he or she can expect to be compensated for any loss suffered, including loss of profits.¹⁰⁸⁴ As the buyer received goods worth only \$10,000 (the value of non-conforming goods), the claim for damages would amount to \$10,000 (i.e. the difference between the value of conforming goods --\$20,000-- and the value of non-conforming goods --\$10,000-- at the time of delivery). He therefore pays \$10,000 (the contract price) and receives \$10,000 worth of non-conforming goods plus \$10,000 in damages, for a net gain of \$10,000. This, of course, is a good bargain for the buyer when compared to the price reduction remedy, under which \$5,000 must be paid for non-conforming goods worth \$10,000, a net gain of only \$5,000.

1084 *The Convention*, art. 74.

If, however, the price of conforming goods at the time of delivery is less than the contract price, the buyer is better off reducing the price. For instance, assume that at the time of delivery, the value of conforming goods is \$5,000, the contract price is still \$10,000 and the value of non-conforming goods is \$2500. In this situation, it is to the buyer's benefit to avoid the contract if at all possible. Clearly, he or she may elect not to accept the goods at all, in which case the price reduction remedy will not be available. If, however, the goods have already been delivered, the buyer may reduce the price. In such a case, the buyer is allowed, under *The Convention's* formula, to reduce the price from \$10,000 to \$5,000 (a \$5,000 reduction) and to pay \$5,000 for goods worth only \$2,500, a net loss of \$2,500. It is submitted that in these circumstances it is more beneficial for the buyer to reduce the price than to claim damages. This is because by opting to sue for damages instead, he or she could receive the difference between the value of conforming goods at the low price level (\$5,000) and the value of the goods delivered (\$2,500), a claim of \$2,500 as well as non-conforming goods worth \$2,500. However, the full contract price would have to be paid for the goods, for a net of \$5,000.

It is important to point out that the buyer's reduction of the price may, in certain cases, be subject to a later argument concerning the amount of the reduction. Sometimes this requires determination by an expert.¹⁰⁸⁵ Unfortunately, *The Convention* does not settle the issue of who is authorized to determine the amount of the reduction in the event of disagreement between the parties. However, courts in contracting states, it is submitted, will intervene if there is any disagreement on the part of the seller concerning the amount to be deducted from the contract price.

The *French Civil Code* simply refers, in such cases, to a price reduction as determined by experts (art. 1644). The process of making the reduction has been described

¹⁰⁸⁵ See Herber, *supra*, note 808, at 125.

as one of setting off damages against the price.¹⁰⁸⁶ In German law, too, the courts will intervene if the parties fail to agree on the actual market value of the defective goods.

In summary, if at the time of delivery the price of conforming goods is the same as the contract price, and if the buyer suffers no consequential damages, the remedies of price reduction and damages yield identical results.¹⁰⁸⁷ However, the amount of the price reduction will differ from the amount of damages awarded if the contract price differs from the value of conforming goods at the time of delivery.

[225] *Effects of price reduction*

The effects of price reduction differ from those of avoidance. While avoidance puts an end to the parties' contractual relationship and releases them from their obligations, either in whole or in part, the price reduction remedy does not affect the contractual relationship. The effects of reducing the price also differ from those of specific performance. The former involves accepting the seller's defective performance and compensating the buyer for it by reducing the price accordingly; the latter involves forcing the seller to perform his or her obligations in the manner set out in the contract, including repairing or replacing defective goods.

The main effect of price reduction in cases where the price has already been paid is to require the seller to make restitution to the buyer of the value of the non-conformity. The remedy is available whether or not the price has been paid. In any event, after payment of the price, legal action is needed, especially if any disagreement exists between the parties concerning conformity of the goods. This makes the remedy dependent, under *The Convention* as in French law, on the discretionary power of the

¹⁰⁸⁶ See Treitel, *Remedies*, *supra*, note 69, at 42, para. 67.

¹⁰⁸⁷ See Bergsten and Miller, *supra*, note 1051, at 260. See also Ziontz, *supra*, note 132, at 171.

judge.

If the whole price has been paid, a seller is indebted for a sum equal to the amount of the price reduction. Otherwise, that seller would be holding funds without a legal basis for doing so (i.e. unjust enrichment). The seller's refusal to make restitution of such an amount does, it is submitted, entitle the buyer to avoid the contract. The seller is under a duty not only to deliver conforming goods, but also to act in good faith and to deal fairly with the buyer. If this duty is not fulfilled, the buyer is entitled to sell the goods in his or her domestic market. In any event, the buyer is entitled to claim damages in addition to declaring the price reduced upon establishing the existence of additional loss.¹⁰⁸⁸

[226] *The remedy of price reduction: conclusions*

Civil law is reflected to a greater degree in *ULIS* than in *The Convention*. Price reduction is a well-established Civil law remedy.¹⁰⁸⁹ The conflicting approaches to the remedy taken by Civil and Common law legal systems forced the drafters to arrive at a compromise. Because the buyer is not required to demonstrate that the non-conformity was a result of the seller's fault, *The Convention* accepts the Common law rule that damages are available for any defective performance even if the non-performing party was not at fault.¹⁰⁹⁰ In this respect, the remedy loses one of its primary theoretical justifications and becomes an alternative type of monetary relief to the buyer.¹⁰⁹¹

1088 See (1973), 4 *UNCITRAL YEARBOOK* at 56-57, paras. 146 ff.

1089 See Ziontz, *supra*, note 132, at 172.

1090 See Bergsten and Miller, *supra*, note 1051, at 258-259.

1091 See *id.*, at 274.

Compromise is a necessary evil in any effort to achieve a text acceptable to various legal systems.¹⁰⁹² The compromise reached in Article 50, however, is one that legal practitioners and traders in both the Civil and Common law systems should be able to live with.¹⁰⁹³ Some legal systems see price reduction as a form of damages.¹⁰⁹⁴ However, price reduction and damages are two distinct remedies, even though, as we have seen, they lead to the same result in some situations.¹⁰⁹⁵ Thirty years ago, a thorough study of commercial practices and mercantile rules led to the conclusion that there was "a marked tendency, particularly in the basic raw commodity market, expressly to limit the remedy of rejection, and to substitute price adjustment."¹⁰⁹⁶

The preceding analysis suggests that the primary function of the price reduction remedy is to provide the buyer with a practical, effective remedy and to limit the availability of avoidance.¹⁰⁹⁷ The remedy tends to encourage acceptance of goods by the

¹⁰⁹² See Ziontz, *supra*, note 132, at 172.

¹⁰⁹³ The compromise reached by *The Convention* has been criticized because it creates a law unknown to any legal system. See Note, *supra*, note 952, at 1994. The note explains further that Common law lawyers or judges may misconstrue reduction of price as a damage remedy, and both Civil law lawyers and judges may misperceive legal doctrine in light of the compromise. However, this view is not shared by a majority of Common law scholars. See, for example, Winship, "New Rules for International Sales" (1982), 62 *Am. Bar Assoc. J.* 1231, at 1233 (considering price reduction as a remedy that "operates in the same way as the buyer's deduction of damages from any part of the price still due -- a self help remedy explicitly authorized by the *UCC*").

¹⁰⁹⁴ In its report on sales, the Québec Committee on the Contract of Sale expressed the view that the remedy ought not to be limited to price reduction. The Committee proposed in art. 37 that damages for non-fulfillment may be claimed by way of reduction of the price or otherwise. The comments on the article explain that "a purchaser is not obliged to refuse the non-conforming goods, although he may retain them and have their price reduced. An action *quantum minoris* does not differ from an action for damages." See *Québec Report on Obligations*, at 63; See also *Québec Draft Bill*, *supra*, note 93, arts. 1488 and 1490. But see art. 1526 of the *Québec Civil Code*.

¹⁰⁹⁵ See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 46, para. 3.

¹⁰⁹⁶ See Michida, *supra*, note 73, at 280.

buyer and to reduce the instances of rejection -- always a favourable commercial result.¹⁰⁹⁸ In this way, price reduction can prevent unjust enrichment by the seller, who might otherwise receive the full price for defective goods.¹⁰⁹⁹ There is no doubt that the remedy of price reduction reflects international commercial practice. Most general conditions relating to agricultural products and other goods sold in bulk contain a provision that makes price reduction the primary remedy in the event of non-conformity.¹¹⁰⁰

1097 See Bergsten and Miller, *supra*, note 1051, at 173.

1098 See Zientz, *supra*, note 132, at 172-173.

1099 See Honnold, *Uniform Law, supra*, note 41, at 326.

1100 See (1974), 4 *UNCITRAL Yearbook*, at 94, paras. 154 ff.

Chapter VIII

THE SELLER'S RIGHT TO CURE

[227] *Introduction*

Article 37, together with Article 48, confers on the seller a right to rectify or "cure" a defective or incomplete delivery of documents or goods either before or after the date stipulated in the contract for such delivery. Giving the seller an opportunity to cure a defective delivery, especially of technological instruments and industrial machines, is a very important aspect of international sales transactions. It serves the primary interests of the parties, particularly in preserving the contract. In addition, it may reduce the loss suffered by the buyer and preserve the seller's rights under the contract by precluding the buyer from avoiding the contract.¹¹⁰¹ Furthermore, the remedy is less costly to the seller than if other remedies, e.g. contract avoidance, are resorted to.

The seller's right to cure must be distinguished from the buyer's right to demand that the seller repair or replace defective goods under Article 46. The seller is free to cure whenever he or she is able. Sometimes it will be more advantageous to pay damages than to cure.

This chapter examines the approach to cure taken by the various laws considered in this study. Section I considers the requirements of the remedy. In this section, examples are given of the various forms that cure could take. The remedy's effects are dealt with in section II. The chapter concludes that the adoption of a right to cure, particularly one that may be exercised after the time of delivery specified in the contract, is, in certain circumstances, a very useful remedy. It minimizes the loss incurred by the buyer and preserves the seller's rights under the contract by precluding the buyer from avoiding.

¹¹⁰¹ Lawrence, "Cure after Breach of Contract Under the Restatement (Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code" (1986), 70 *Minnesota L. Rev.* 713, at 714.

Section I

Requirements for cure

[228] *Cure before the date set for delivery*

Under Article 37(1) of *The Convention*, a seller who has made an early delivery can cure any defects up to the date for delivery specified in the contract.¹¹⁰² This covers any failure to perform. The right to cure may therefore take various forms. It may involve delivery of a missing part of a machine or making up a deficiency in the quantity of the goods delivered. It may also involve delivery of goods in replacement of any non-conforming goods or remedying of a lack of conformity in the goods delivered. If, on the other hand, the buyer elects to accept non-conforming goods, he or she is not required to accept an offer from the seller to cure.¹¹⁰³ Likewise, if the buyer has avoided the contract, the seller loses the right to cure the defective delivery.

It is important to note that Article 34 gives the seller a similar right to cure in cases of early delivery of non-conforming documents.¹¹⁰⁴ These documents may control delivery of the goods, such as a bill of lading or warehouse receipt; or they may include the insurance policy, invoice, or certificate of origin. Curing defective documents may take the form of supplying missing documents or exchanging documents delivered in the wrong language or mailed to the wrong address.

¹¹⁰² *The Convention*, art. 37. Art. 37 of *ULIS* in substance is the same. For a legislative history of the text, see the following documents: "Report of the Secretary-General" (1973), 4 *UNCITRAL Yearbook* 36, at 65; "Report of the W.G." 4th sess., (1973), 4 *UNCITRAL Yearbook* 61, at 65, para. 55; "Revised text of The Convention on the International Sale of Goods as Approved by the W.G." (1975), 6 *UNCITRAL Yearbook* 63, at 65, art. 21.

¹¹⁰³ See also the *UCC*, s. 601.

¹¹⁰⁴ The same principle is adopted in *DUSA*, s. 7.7(b). See also the *UCC*, s. 508(1).

Two questions arise with respect to the place and date of delivery. This is because Article 37 refers to the delivery of the goods before the delivery date set by the contract. Therefore, the decision whether the goods are in conformity with the contract, or whether the seller is entitled to cure (aside from the right to cure after the delivery date), has to be made at that time.¹¹⁰⁵ As for the place of delivery, a distinction should be made between three situations. First, when the contract requires carriage of goods, the seller must deliver the goods to the first carrier for transmission to the buyer.¹¹⁰⁶ Second, when the contract does not involve carriage and relates to specific goods or to unidentified goods from a specific stock, the seller need only place the goods at the buyer's disposal at the place of manufacture.¹¹⁰⁷ Third, in all other cases, the seller meets the obligation to deliver by making the goods available to the buyer at the place where the seller had his or her place of business at the time of the conclusion of the contract.¹¹⁰⁸

As for the time of delivery, Article 33 of *The Convention* provides that the seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.¹¹⁰⁹

¹¹⁰⁵ See Enderlein, *supra*, note 70, at 164 (arguing that the principle presupposes the seller's knowledge of the non-conformity).

¹¹⁰⁶ *The Convention*, art. 31(a); *ULIS*, art. 23(1). See also the *UCC*, s. 2-508(1) ("a period no longer than the remaining contract time").

¹¹⁰⁷ *The Convention*, arts. 31(b); *ULIS*, art. 23 (2).

¹¹⁰⁸ *The Convention*, art. 31(c).

¹¹⁰⁹ See *id.*, art. 33.

Paragraph (b) may be helpful to the seller as it may allow an opportunity to cure before the date set for delivery. Suppose, for example, that the contract calls for the seller to deliver within a fixed period, say two months, and that the goods are handed over to the first carrier at the beginning of that period. In such a case, that seller will be able, subject to what is said below, to cure any misperformance before the end of the period. This is a good illustration of the kind of case in which the seller may be considered to be using the right to cure before the date set for delivery.

Article 37 may not, it is submitted, be helpful to sellers engaged in international sales transactions that involve the carriage of goods. Although delivery is effected by handing over the goods to the first carrier, the journey may take a considerable period of time as a result of the distance separating the parties. The buyer is usually unable to examine the goods until their arrival at their destination. Consequently, it is difficult to cure any defect in the goods (and therefore to rely on Article 37) after delivery of the goods to the first carrier. In such a case, it is advisable to rely on Article 48, which, as will be seen below, allows the seller to cure any misperformance after the date set for delivery.

[229] *Cure after the date set for delivery*

Article 48 of *The Convention* governs the right to cure after the date fixed for the delivery of the goods.¹¹¹⁰ As in Article 37, this right extends to all of the seller's obligations. Accordingly, the remedy may take the form of tendering missing parts, delivering other goods or conforming documents or paying a money allowance or other form of adjustment for non-conformity.

In practice, it is submitted, if the seller has delivered the goods after the date fixed for delivery in the contract it could be difficult to cure. The fact that the parties are in different countries is an obstacle to cure. Suppose, for example, that the con-

¹¹¹⁰ *The Convention*, art. 48; also *ULIS*, art. 44(1).

tract has fixed a delivery date of December 1 and that the seller fails to deliver by this date. It is possible for the seller to cure this non-delivery by delivering the goods after December 1. If the goods are delivered on December 10, but these are defective either in quality or quantity, it is still possible to cure by replacing the defective goods or remedying the shortfall. However, in both cases, the seller may only cure if (a) this can be done without unreasonable delay, and without causing the buyer unreasonable inconvenience or without causing the buyer uncertainty of reimbursement of any expenses incurred as a result of the seller's improper performance; and, (b) the buyer has not avoided the contract.¹¹¹¹

If the seller requests information about the buyer's intention to accept a second attempt at a cure on a specified date after December 10 and the buyer fails to respond by that date, the seller can¹¹¹² perform at any time up to and including that date. The buyer, by failing to respond, will have lost the right to avoid the contract until after the specified date. That seller will, however, retain the right to claim damages.

A question, to be discussed in paragraph [234], concerns the relationship between cure and contract avoidance. Suffice it to say here that the seller's ability to cure after the date fixed for delivery depends, *inter alia*, on the availability of the avoidance remedy to the buyer.¹¹¹³ If the buyer does not have legal grounds to avoid the contract, or has legal grounds but has not yet acted on them, the seller's chances of being permitted to cure are dramatically improved.

¹¹¹¹ See [234].

¹¹¹² As will be seen in paragraph [233].

¹¹¹³ Under the *UCC*, s. 2-601, the buyer must exercise the right to reject before the seller can have any right to cure. This rejection must occur within a reasonable time after tender and the seller must be notified of the rejection in a reasonable manner. See the *UCC*, 2-602(1).

Here another question arises: does the right to cure oblige the seller to tender perfect goods the second time? To better understand the issue involved, consider the following illustration: A contract involves the sale of fifty television sets of a specified kind. The seller tenders to the buyer on time but with sets of another kind. Recognizing the error, the seller offers new and conforming sets. Inspection of the new sets reveals major cracks in the screens of five sets. Can the buyer refuse to accept the newly tendered sets on the ground that they do not comply perfectly with the contract?

The issue of whether the cure must be perfect and, if not, what constitutes an adequate cure, has not been settled either by *ULIS* or by *The Convention*. This has led to conflicting views among scholars.¹¹¹⁴ It is submitted that the seller is not required to make a perfect delivery.¹¹¹⁵ Under both laws, the seriousness of the breach seems to be irrelevant. Thus, the seller's right to cure applies to any type of defect. The only limitation imposed on the seller is not to cause unreasonable inconvenience to the buyer.

[230] *The seller's right to cure: English law*

The seller's right to cure is not entirely foreign to English law, although the English *Sale of Goods Act* contains no express right to cure equivalent to section 2-508 of the *UCC*, or to Articles 34, 37 and 48 of *The Convention*.¹¹¹⁶ Consideration of the right

¹¹¹⁴ See Honnold, *Uniform Law, supra*, note 41, at 272 (suggesting that "allowing the seller to cure 'any' deficiency or lack of conformity unless this causes 'unreasonable' inconvenience or expense, and preserving the buyer's right to claim damages indicates that perfection with respect to the second tender may not be required"). See also Enderlein, *supra*, note 70, at 164. But see Schlechtriem, *supra*, note 509, at 6-28.

¹¹¹⁵ This differs from the *UCC*, s. 508(2), which seems to oblige the seller to make a new and conforming tender. See also OLRG, *Report on Sales*, at 455.

¹¹¹⁶ OLRG, *Report on Sales*, at 444 ff, also favoured the introduction of a cure principle. The following reasons were given for such support. The right to cure provides the seller with an important opportunity to remedy the breach without unreasonable prejudice to the buyer's expectations and without causing that buyer risk or inconvenience. In addition, cure provisions are common in contracts

to cure under English law requires a distinction among three situations. First, a right to cure if the date for performance has not yet passed was recognized in the leading case of *Borrowman Phillips & Co. v. Free & Hollis*.¹¹¹⁷ The rule has been followed in a number of other English cases.¹¹¹⁸ The buyer may only avoid the contract before the delivery date if the seller's early delivery amounted to a repudiation of the contract.¹¹¹⁹

Second, English law allows a seller to cure any failure to perform when the time for performance has passed if time is not of the essence.¹¹²⁰ Again, the seller is entitled to cure unless the breach amounts to a repudiation. The seller remains, however, liable in damages for late delivery.

Finally, once the time for delivery has expired, the right to cure is available in exceptional cases only. This is because after the date set for delivery the buyer is entitled either to (a) repudiate and sue in damages; or, (b) accept the non-conforming performance and sue in damages.¹¹²¹ In any event, as far as cure after the date set for

entered into by Ontario manufacturers. The provision proposed by the Commission differs from both *ULIS* and *The Convention* by not making any distinction between breaches prior to delivery and breaches after that date.

1117 (1878), 4 Q.B.D. 500 (C.A.). It was held in another case that the seller is not prevented, if time allows, from tendering another parcel of goods, which, if in conformity with the contract, the buyer must accept and pay for. See *E.E. & Brian Smith (1928) Ltd. v. Wheatsheaf Mills Ltd.*, [1939] 2 K.B. 302, at 314. See also Beale, *supra*, note 261, at 91; Schmitthoff, *Sales, supra*, note 252, at 148; OLRC, *Report on Sales*, at 449-450.

1118 *Ashmore & Son v. S.C. Cox and Co.*, [1899] 1 Q.B. 436, at 440-441; *Longbottom & Co. Ltd. v. Bass, Walker & Co.*, [1922] W.N. 245, at 246 (C.A.); *E.E. & Brian Smith* case, *id.* *McDougall v. Aeromarine of Emsworth Ltd.*, [1958] 3 All E.R. 431, at 438; *Agricultores Federados Argentinos v. Ampro S.A. Commerciale, Industrielle et Financière*, [1965] 2 Lloyd's Rep. 157, at 167.

1119 See Treitel, *Remedies, supra*, note 69, at 136, para. 174.

1120 For further details, see Beale, *supra*, note 261, at 92; see also Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 326.

1121 The approach of English law was criticized by Beale. He has observed that "it seems particularly harsh where a seller delivers goods which he honestly thought would be acceptable despite a non-conformity which amounts to a breach of

delivery is concerned, the following rules are well established in English law. First, as time is of the essence with respect to delivery, the failure of the seller to deliver on time is a breach of condition, and the buyer may reject the goods although no loss has been suffered.¹¹²²

Second, the buyer is only entitled to reject non-conforming goods where the non-conformity amounts to a breach of an essential term of the contract or when the nature and consequences of a breach violate an innominate term.¹¹²³ It should be remembered that breach of an innominate term allows rejection of the goods only where it goes to the root of the contract. If the buyer does reject, the buyer is not bound to give the seller an opportunity to cure the non-conformity, that is, to accept the second tender. Third, the mitigation principle obliges the buyer to accept an offer to cure (a) if the non-conformity does not amount to a breach of an essential term of the contract; or, (b) if the buyer has elected to keep the goods. The last rule applies, however, only in so far as the buyer may wish to press a claim for damages.

Article 48 of *The Convention* leads to the same result as English law. Under both laws, once the buyer has avoided the contract the seller loses the right to cure. However, English law goes further than *The Convention* and states that the buyer is expected, at least in some cases, to accept the seller's offer to cure, even after the contract has been avoided, as a reasonable means of mitigating damages.¹¹²⁴ It is doubtful

condition." See Beale, *supra*, note 261, at 96.

1122 It was held by an English court that stipulation as to time will usually be treated as a condition, so that even a small delay will give the innocent party a right to terminate the agreement. The assumption is that, in the interest of certainty, a stipulation as to time is to be strictly construed. *Bunge Corporation, New York v. Tradax Export S.A., Panama*, [1981] 2 All E.R. 513 (C.A.).

1123 See Atiyah, *supra*, note 171, at 390; see also *Cheshire, supra*, note 108, at 488.

1124 Cf. *Payzu Ltd. v. Saunders*, [1919] 2 K.B. 581 (C.A.). In that case, a seller wrongfully refused to deliver goods on credit but offered to sell them for cash at the original contract price. The buyer refused the offer and it was held that he could not recover the cost of buying replacements at the higher market price.

that the mitigation rule in Article 77 of *The Convention* imposes a similar duty on the buyer.¹¹²⁵

In short, although the English *Sale of Goods Act* contains no provision giving the seller the right to cure, case law has supported a right to cure up to the date set for delivery.¹¹²⁶ English courts have not developed a concept of the seller's right to cure after the time for delivery has expired. It is suggested that the question of a second tender following a non-conforming tender should be expressly regulated by the English *Sale of Goods Act*.

[231] *The seller's right to cure: Egyptian and French law*

Although no provision of the *French Civil Code* deals expressly with the right to cure,¹¹²⁷ by using their discretionary power, French courts may give the party committing the breach the right to cure.¹¹²⁸ The same is true in Egyptian law. Still, the buyer under Egyptian and French law is entitled to ask the seller to cure his or her misperformance only when a cure is possible and would not cause unreasonable expenses. This leads to the possibility of replacement, particularly of fungible goods. The buyer, in such cases, is entitled to claim damages under the general principles governing both laws.¹¹²⁹

1125 See [125] - [129].

1126 See Benjamin *supra*, note 81, para. 896.

1127 See, however, art. 1646(1) of the Code, where the buyer of an immovable has a right to have the defect cured and a right to terminate the contract and to recover the price paid if cure is not effected. But there is no occasion for rescission or for diminution of the price before giving the seller an opportunity to cure the defects (para. 4 of the same article).

1128 See *Planiol et Ripert, supra*, note 84, para. 135, at 155.

1129 See Sanhoury, *supra*, note 343, at 743, para. 374.

As avoidance in both laws is a judicial remedy, the aggrieved party must justify his or her avoidance before a court. The court can exercise its discretion by granting the seller either the right to cure or a *délai de grâce*.

[232] *The seller's right to cure: American law*

Section 2-508(1) of the *UCC* gives a seller of goods a right to cure a non-conforming tender by making a conforming one within the contract period. Section 2-508(2), on the other hand, entitles the seller to cure even after the contract period where he or she "had reasonable grounds to believe" that the tender would in fact be accepted.¹¹³⁰ The *UCC*'s approach of permitting a seller to cure within a reasonable time after the date for performance, an approach adopted in Article 48 of *The Convention*, is preferable to that of the English *Sale of Goods Act*, which contains no similar provision. An express provision on cure adds certainty to the contractual relationship by giving the seller the right to cure the defective performance, thereby preventing the buyer from avoiding the contract.

Unlike *The Convention*, the *UCC* requires the seller to notify the buyer of his or her intention to cure. The seller's right to cure under the *UCC*, also differs in that it apparently requires a higher standard of behavior than does *The Convention*. The seller's right to cure after the date for performance, under the *Code*, is available only if the seller "had reasonable grounds to believe" that this tender would be acceptable with or without money allowance.¹¹³¹ This is not the case in *The Convention*, where the seller's cure remedy is restricted to cases where its exercise would not cause the buyer unreasonable inconvenience or expense.

¹¹³⁰ See the *UCC*, s. 2-508(2), which states that, where the buyer rejects a non-conforming tender that the seller has reasonable grounds to believe would be acceptable with or without a money allowance, the seller may, if he or she reasonably notifies the buyer, have a further reasonable time to substitute a conforming tender.

¹¹³¹ *Ibid.*

[233] *The seller's request that the buyer indicate
whether the offer to cure will be accepted*

A notice by the seller of an intention to cure within a specified period of time is assumed, under *The Convention*, to include a request that the buyer intimate his or her decision to accept or reject the offer to cure.¹¹³² When such a notice is given, the buyer may (a) accept the offer and notify the seller of this decision; (b) refuse the offer; or, (c) remain silent. If the buyer does not respond to the request within a reasonable time, the seller may, under Article 48(2), perform within the time indicated in the request or within a reasonable period of time.

In general, in international sales transactions, co-operation and continued communication between the parties is important in ensuring the performance of the contract. It is submitted that good communication is particularly important when a party fails to perform properly. The seller is well advised to communicate his or her intention to cure to the buyer before the latter takes any action inconsistent with cure. The seller's notification of an intention to cure, when it is given before the buyer takes action, has the legal effect of suspending the buyer's right to resort to any remedy inconsistent with performance by the seller.¹¹³³ Moreover, where the seller has made a request under Article 48(2), the buyer's reasonable time for avoidance begins to run after the additional period indicated by the seller or after the buyer declares that the proposed cure will not be accepted.¹¹³⁴

1132 *The Convention*, art. 48(3).

1133 See *id.*, art. 48(2); *ULIS*, art. 44(2).

1134 *The Convention*, art. 49(2)(b)(iii).

[234] *The relationship between cure and contract avoidance*

The most important question concerning the seller's offer to cure is whether it restricts the buyer's right to avoid. The cure remedy has the advantage over the avoidance remedy of avoiding waste by allowing further performance by the seller. There is no doubt that avoidance in international sales transactions results in hardship to the participants. A party in breach who is allowed to cure can mitigate damages more effectively. As previously noted,¹¹³⁵ *The Convention's* approach to the definition of "fundamental breach" makes it difficult for the buyer to justify avoidance. Therefore, cure achieves two important goals of the seller: precluding avoidance and minimizing damages.

The seller's right to cure before the date set for delivery, under Articles 34 and 37, is a limit on the buyer's right to avoid the contract.¹¹³⁶ In other words, unless it is clear that the seller will not cure, the buyer cannot avoid the contract until the date for delivery has passed.¹¹³⁷ It is worth mentioning that the buyer need not take delivery prior to the contract date.¹¹³⁸ The buyer is, however, under a duty to preserve the goods.¹¹³⁹

As to the right to cure after the delivery date, it remains unclear whether Article 48(1) prohibits the buyer from avoiding the contract after being notified of the seller's intention to cure. During the process of drafting *The Convention*, it was proposed that the definition of "fundamental breach" be amended to define more clearly the relation-

1135 See [22] - [26].

1136 OLRC, *Report on Sales*, at 465, recommended that the cure provision should entitle the buyer to suspend performance until the non-conformity has been cured.

1137 See Honnold, *Uniform Law*, *supra*, note 41, at 271.

1138 *The Convention*, art. 52(1); *ULIS*, art. 29.

1139 *The Convention*, art. 86; *ULIS*, art. 92.

ship between cure and avoidance.¹¹⁴⁰ The purpose of this proposal was to protect both the seller and the buyer against any technical avoidance of the contract declared by the other party when there had been an offer to cure.¹¹⁴¹ After a thorough discussion, UNCITRAL decided that such an amendment would have been superfluous.¹¹⁴²

The rejection of this proposal may be criticized on the ground that the remedy of cure is available only to the seller, while the proposal was designed to extend similar protection to the buyer.¹¹⁴³ In order to better balance the interests of the parties it would have been preferable for the proposal to have been adopted.¹¹⁴⁴ As with the seller's right to cure, giving the buyer the right to rectify his or her defective performance may save the contract, one of the main policy goals of *The Convention*. In any event, the buyer is clearly protected by Article 46, which entitles the buyer to request the seller to deliver substitute goods or remedy any lack of conformity.¹¹⁴⁵

It is important to point out that Article 44(1) of the 1978 Draft Convention opened with the phrase "unless the buyer has declared the contract avoided." At the Conference, this clause was deleted and replaced by "subject to Article 49."¹¹⁴⁶ This change is unfortunate since the draft formulation would have clarified the relationship between cure and avoidance. The following example illustrates the issue. Assume, for instance, that the seller delivers the contracted goods to the buyer on time. Shortly

¹¹⁴⁰ For more details, see (1977), 8 *UNCITRAL Yearbook* at 31, para. 93.

¹¹⁴¹ Michida, *supra*, note 73, at 287-288.

¹¹⁴² See (1977), 8 *UNCITRAL Yearbook* Annex 1, at 31-32, paras. 93 ff.

¹¹⁴³ See Michida, *supra*, note 73, at 288.

¹¹⁴⁴ OLRC, *Report on Sales*, in s. 7.7(3)(b), favoured the introduction of a provision entitling the buyer to require the non-conformity to be cured within a reasonable time and making clear that the seller's failure to cure entitles rejection of the tender or delivery. The OLRC also proposed to give the seller the right to demand the buyer to cure any failure to pay or to take delivery (s. 9.4).

¹¹⁴⁵ See [163] - [166].

¹¹⁴⁶ See *Official Records*, *supra*, note 67, at 351.

after delivery, the buyer discovers various defects amounting to a fundamental breach and notifies the seller, who offers to cure the defects. The buyer chooses not to accept the seller's offer to cure, claiming instead that the seller's breach is fundamental and declares the contract avoided.

In this case, the buyer's avoidance will be justified since the seller's breach is fundamental. However, if the seller offers to cure, then although the breach is fundamental, the buyer's avoidance would, it is submitted, be difficult to justify. Under *ULIS* and *The Convention*, the breaching seller has a right to correct at least some of the deficiencies in his or her performance and to thereby lessen the extent of the buyer's loss. It can certainly be said that a buyer who interferes with the free exercise of the seller's right to cure, assuming the requirements of the remedy are satisfied, is undermining the rationale for the cure remedy -- avoiding the waste of resources, minimizing damages and precluding avoidance. *The Convention's* cure provisions are part of a series of provisions intended to preserve the contract, while still balancing the rights of the buyer and seller.

In short, it is submitted that where there is a genuine offer to cure, it will be difficult for the buyer to justify refusing the offer and avoiding the contract, even after the date for delivery has passed. Moreover, it is submitted that an offer to cure should have the legal effect of suspending the buyer's right to avoid (a) in cases where the offer is made prior to the date for delivery until that date; and, (b) in cases where the offer is made after the date for delivery, until the date specified in the offer, as long as it is reasonable.

[235] *Must the seller notify the buyer of the intention to cure?*

Under Articles 37 and 48, the seller is not required to inform the buyer of his or her intention to cure prior to doing so.¹¹⁴⁷ However, as will be seen below, an attempt to cure without notice under either Article will be barred if it would cause the buyer unreasonable inconvenience or expense.¹¹⁴⁸ Moreover, the seller is well advised to give the notice in order to prevent the buyer from exercising the right to avoid the contract. If the seller fails to do so, the right to cure is, presumably, lost.

[236] *Limitations on the right to cure*

The seller's right to cure, either before or after the date fixed for delivery, is subject to certain limitations. Under Articles 37 and 48, the right to cure is lost if the actions needed to effect the cure would cause the buyer unreasonable inconvenience or expense.¹¹⁴⁹ Just what actions might cause the buyer unreasonable inconvenience are not clear, and courts in contracting states may reach different conclusions. It will depend on the circumstances of each case.¹¹⁵⁰ At any rate, a seller who does not comply is punished through the denial of an opportunity to cure.

In English law, the seller's right to cure, particularly where the time for delivery has not passed, is not expressly restricted, as it is in *The Convention*, to cases where its exercise would not prejudice the buyer's interests.¹¹⁵¹ Nonetheless, one would

1147 This differs from the *UCC*, s. 2-508(1), and *DUSA*, s. 7.7(2)(b).

1148 See Honnold, *Uniform Law, supra*, note 41, at 273.

1149 S. 2-508(2) of the *UCC* restricts the seller's right to cure to cases in which he or she had reasonable grounds to believe that the non-conforming tender would be acceptable. Comment 2 to the section explains that such reasonable grounds can lie "in prior course of dealing, course of performance or usage of trade as well as in the particular circumstances surrounding the making of the contract." See also *DUSA*, s. 7.7(2)(a).

1150 See Enderlein, *supra*, note 70, at 165.

1151 But see the *UCC*, s. 2-508, and *DUSA*, s. 7.7(2)(a).

expect English courts to deny the right to cure in such cases.

Section II
Effects of cure

[237] *The effect of cure on damages*

Under Articles 37 and 48 of *The Convention* the buyer retains the right to claim damages. The seller does not commit an actual breach until the delivery date has passed. The extent of the expenses that the buyer may recover depends on whether these are suffered before or after the date fixed for delivery. The damages recoverable, under Article 37, comprise only the buyer's expenses incurred in making repairs or returning non-conforming goods, but not those flowing from the non-conformity itself.¹¹⁵² Therefore, damages may be recovered in respect of any losses from resale at a lower price only where the grounds of anticipatory, but not actual, breach are satisfied.¹¹⁵³

After the delivery date has passed, the seller's breach is likely to be fundamental. The goods were not in conformity with the contract at the time of delivery.¹¹⁵⁴ In such a case, the buyer may recover damages for losses resulting from the non-conformity itself, in addition to those attributable to the cure.¹¹⁵⁵

¹¹⁵² See Schlechtriem, *supra*, note 509, at 6-28.

¹¹⁵³ *Ibid.*

¹¹⁵⁴ The same principle is adopted in *DUSA*, s. 7.7(4).

¹¹⁵⁵ See Schlechtriem, *supra*, note 509, at 6-28.

[238] *When does an offer to cure become effective?*

ULIS has no rule concerning when a valid notice becomes effective. Therefore, the point has to be settled according to the general principles on which *ULIS* is based.¹¹⁵⁶ This issue was addressed earlier in this study.¹¹⁵⁷

In *The Convention*, Article 48(4) addresses the issue of when a request or a notice by the seller, under paragraphs (2) and (3) of the Article, is effective. It is not effective until it has been received by the buyer.¹¹⁵⁸ This means that if the seller, either before or after the date set for delivery, asks the buyer to make known his or her attitude toward the proposed cure, the buyer is under no obligation to respond unless he or she has received the notice.

Article 48(4) lays down a rule different from the general rule embodied in Article 27.¹¹⁵⁹ Article 27 provides that any delay or error in transmission of a communication, or its failure to arrive, does not deprive the sending party of the right to rely on the communication.¹¹⁶⁰ This means that sending the notice by any appropriate means discharges the duty to notify, whether or not the notice actually reaches the other party. Accordingly, if the buyer rejects the seller's offer to cure without undue delay and by a reasonable means of transmission, there is no right to cure, although the buyer may be liable in damages for refusing the seller the opportunity to cure. This is because, under Article 27, the buyer's response to the proposal to cure is effective upon dispatch and not upon receipt.

1156 *ULIS*, art. 17.

1157 See [90] - [92].

1158 *The Convention*, art. 48(4).

1159 See Enderlein, *supra*, note 70, at 194.

1160 *The Convention*, art. 27.

[239] *Evaluation of Article 48(4) of The Convention*

The approach taken by *The Convention* fails to adequately balance the interests of the buyer and seller. Unlike Article 48(4), where the receipt rule was adopted, Article 27 uses the dispatch rule. The receipt rule favours the buyer's interests over those of the seller. It is unreasonable that the seller should run the risk of the buyer's response not reaching him or her on time. Subsequent performance by the seller avoids the buyer's loss associated with the seller's non-performance. The buyer, on the other hand, is entitled to damages for any loss caused by the breach. The seller is able to reduce the amount of damages for which he or she would otherwise be liable as a result of the breach.

In any event, this inconsistent approach is alleviated by the fact that the buyer must, under Article 48(2), communicate the decision within a reasonable time or within the time indicated in the request, failing which the buyer will be bound by the terms of the seller's notice. Moreover, the buyer may be required to compensate the seller in damages for any loss occasioned by a denial of the opportunity to exercise the right to cure. However, the buyer may be able to show that, under the circumstances, the seller's notice should not be treated as including a request to the buyer to respond.¹¹⁶¹

[240] *The effect of cure on price reduction*

Under *ULIS* and *The Convention*, if the seller remedies any failure to perform in accordance with the cure principle, or if the buyer refuses to accept performance by the seller in accordance with the cure principle, either before or after the date set for delivery, the buyer is not permitted to reduce the price.¹¹⁶² This encourages the buyer to accept the seller's offer to cure. It is advisable for the buyer, then, to look closely at

¹¹⁶¹ See *The 1978 Draft Commentary*, *supra*, note 67, commentary to art. 45, comment 16.

¹¹⁶² *The Convention*, art. 50; *ULIS*, art. 46.

the circumstances of the case and at the consequences of any intended refusal before rejecting the seller's offer to cure.

[241] *The seller's right to cure: conclusions*

The preceding analysis demonstrates that *The Convention's* approach of providing the seller with the right to cure both before and after the date of delivery fixed by the contract, an approach also adopted in the *UCC* and in *ULIS*, is, in general, satisfactory. The adoption of a similar rule in Egyptian, English and French law is clearly desirable. The remedy encourages the parties to communicate and to seek a solution to the seller's defective performance that is satisfactory to both parties. Furthermore, it avoids economic waste by mitigating damages that would otherwise be recoverable against the seller. At the same time, however, it does not prejudice the interests of the buyer since he or she may still recover damages in respect of any loss not remedied or prevented by cure. *The Convention's* approach, subject to what has been said in paragraph [239], balances the interests of both parties effectively.

Despite the desirability of the cure remedy, *The Convention's* approach may not be that helpful to the seller after the date set for delivery. Although it is consistent with the recent trend in some domestic laws, the physical distance separating the parties in international sales makes such transactions different from domestic sales. Therefore, it is unlikely that a cure can be effected without causing the buyer unreasonable inconvenience. Furthermore, the buyer is, as a rule, entitled to avoid the contract whenever there has been a fundamental breach even if the seller can cure without delay and without causing unreasonable inconvenience or uncertainty to the buyer. However, the rule will be helpful to the seller if the intention to cure can be communicated before the buyer avoids the contract. In view of the benefits accruing to the parties under the remedy, the seller's right to cure within the limitations of *The Convention* should prove to be both workable and acceptable.

Chapter IX

PRESERVATION OF THE GOODS

[242] *Introduction*

Articles 85-88 of *The Convention* impose a duty to preserve the goods from loss or deterioration on the party who is in the better position to do so, so as to minimize losses that would otherwise occur. In practice, international sales participants already take steps to preserve the goods, whether under a duty to do so or not. The duty does not depend on whether a party is in breach but on whether that party is in a good position to preserve the goods. Preserving the goods means taking the steps necessary to protect and secure them by doing one or more of the following: (a) keeping custody of them; (b) depositing them in a warehouse; or, (c) selling them if this is necessary to secure them from deterioration.

In the following discussion, these considerations will be examined in two sections. The first examines the nature and extent of the duty to preserve; the second deals with the methods of discharging this duty.

Section I

The duty to Preserve the goods

[243] *The seller's duty to preserve the goods*

If a buyer delays in taking delivery or fails to pay the price in a cash sale, Article 85 of *The Convention* requires the aggrieved seller to take reasonable steps to preserve the goods for as long as they remain in his or her possession or control.¹¹⁶³ The seller is

¹¹⁶³ *The Convention*, art. 85; *ULIS*, art. 91. For a legislative history of the rule, see the following documents: "Report of the W.G." 5th sess., (1974), 5 *UNCITRAL Yearbook* 29, paras. 202 ff; "Report of the W.G." 6th sess., (1975), 6 *UNCITRAL Yearbook* 49, annex 1, art. 61; "Report of the W.G." 7th sess., (1976), 7 *UNCITRAL Yearbook* 87, annex 1, art. 60; "Report of UNCITRAL" 10th sess., (1977), 8 *UNCITRAL Yearbook* 11, annex 1, paras. 514 f; "Report of UNCITRAL" 11th sess., (1978), 9 *UNCITRAL Yearbook* 11, para. 28 (art. 74). At the Conference, the rule was broadened to cover cases of non-payment of the price. The previous draft dealt only with taking delivery. See the propo-

entitled to be compensated for all reasonable expenses of preservation, and can retain the goods until reimbursed.¹¹⁶⁴

Unlike *ULIS* and *The Convention*, English law does not, in general, impose a duty upon the seller to take reasonable steps to preserve the goods.¹¹⁶⁵ However, by virtue of section 37 of the English *Sale of Goods Act*, the buyer is liable for any loss resulting from his or her neglect or refusal to take delivery within a reasonable time after being requested to do so by the seller. The buyer is also liable to pay any reasonable charges for the care and custody of the goods.¹¹⁶⁶ In any case, section 37 of the English *Sale of Goods Act* is not of general application. It does not apply where the buyer may reject the goods.

Egyptian and French law are in agreement with *ULIS* and *The Convention* in imposing upon the seller a duty to preserve the goods. However, the principle is located under the general rules on obligations in the *Egyptian Civil Code*,¹¹⁶⁷ and in Chapter IV on the obligations of the seller in the *French Civil Code*.¹¹⁶⁸

In general, the seller's duty to preserve arises (a) when the buyer is required by the contract to take delivery of the goods from the seller's warehouse but fails to do so; and, (b) when the seller hands over the goods to the first carrier as provided for in the contract and the letter of credit is then dishonoured. In the latter situation, although the risk passes to the buyer, it is the seller who retains control of the goods since he or

sal of the Federal Republic of Germany in *Official Records*, *supra*, note 67, at 174 and the discussion of this proposal at 398.

1164 *The Convention*, art. 85.

1165 See Graveson and Cohn, *supra*, note 134, at 104.

1166 *SGA*, 1979, s. 37; see also Atiyah, *supra*, note 171, at 371; OILRC, *Report on Sales*, at 390-391.

1167 See the *Egyptian Civil Code*, art. 206, which states that the duty to deliver the goods includes a duty to preserve the goods until delivery is made.

1168 The *French Civil Code*, art. 1607.

she remains in possession of the bill of lading and other documents. However, once the letter of credit is honoured by the buyer's bank, it is the bank or the buyer, and not the seller, who controls the goods during transit.

The application of the principle assumes that the risk of loss has passed to the buyer.¹¹⁶⁹ Otherwise, any steps taken by the seller to preserve the goods are undertaken on his or her own behalf. Accordingly, whether or not the risk of loss has passed, all losses resulting from the seller's failure to preserve are borne by the seller, not by the buyer. Depending on the mode of transportation, in most cases risk of loss passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.¹¹⁷⁰ In some cases, the risk passes when the buyer fails to take possession of the goods at the seller's place of business. The determination as to who bears the risk of loss is therefore significant in the application of the principle.

Under *ULIS* and *The Convention*, the seller is entitled to retain the goods pending reimbursement by the buyer of all reasonable expenses of preservation.¹¹⁷¹ This means that the seller is given a possessory lien over the goods for expenses incurred even if the buyer has paid the full price. In contrast, a seller's lien in English law is for the price of the goods only. It cannot be exercised in respect of any other expenses, such as storage charges and the like.¹¹⁷²

1169 See Sutton, *Part 3, supra*, note 487, at 115.

1170 *The Convention*, art. 67.

1171 The same principle is stated in *DUSA*, s. 9.8(2).

1172 *Somes v. British Empire Shipping Co.* (1860), 8 H.L.Cas. 338, at 345; see also OLRC, *Report on Sales*, at 399-400.

[244] *The buyer's duty to preserve the goods*

Under *ULIS* and *The Convention*, the buyer is under a duty to preserve the goods if he or she has received them and intends to exercise a right to reject them.¹¹⁷³ As with the seller, the buyer may retain the goods pending reimbursement of all reasonable expenses of preservation.¹¹⁷⁴ As with the seller, English law does not, in general, impose a duty upon the buyer to preserve rejected goods. Section 36 of the English *Sale of Goods Act* provides that the buyer is not obliged to return the goods to the seller if he or she is entitled to reject. But it is not clear from this section whether the buyer is at liberty to return or store the goods at the seller's expense or to sell them if perishable.

In general, the buyer is obliged to preserve the goods under Article 86(1) of *The Convention* if he or she has received the goods and intends to reject them. However, unlike the case of a seller's duty to preserve, there is no reference to goods being in the possession or control of the buyer. This means that until the buyer has received the goods, he or she is under no duty to preserve them. It is not always clear whether the buyer has received the goods, even when they are subject to his control¹¹⁷⁵ (such as when the goods are placed in the possession of a customs or forwarding agent at the point of destination). In such a case, the goods are under the buyer's control but are not in his or her possession.

Under *ULIS* and *The Convention*, if goods have been placed at the buyer's disposal at their destination, the buyer is obliged to take possession of them even if he or she exercises the right to reject them. The rationale underlying the obligation in this case

¹¹⁷³ *The Convention*, art. 86(1), and art. 92 of *ULIS*. For a legislative history of the text, see the documents cited in note 1163 *mutatis mutandis*. See also *Official Records*, *supra*, note 67, at 139, SR. 30, paras. 89 ff, SR. 31, and 399-400, para. 1014.

¹¹⁷⁴ *The Convention*, art. 86(1).

¹¹⁷⁵ See Sutton, *Part 3*, *supra*, note 487, at 115-116.

is that it is difficult for a seller to preserve and dispose of goods rejected at a remote destination.¹¹⁷⁶

Under *The Convention*, the buyer has the right to avoid the contract if the seller commits a fundamental breach. If such a breach occurs before the buyer has received the goods but after he or she has received documents that disclose the seriousness of the breach, then even though the buyer may avoid the contract, that buyer is obliged to take possession of and preserve the goods, provided that (a) this can be done without unreasonable inconvenience or expense;¹¹⁷⁷ and, (b) the seller (or his or her representative) is not present at the place of destination.¹¹⁷⁸

Sections 2-603 and 2-604 of the *UCC* differ from their counterparts in *ULIS* and *The Convention*. Under the *UCC*, s. 2-603(1), the buyer is bound to follow any reasonable instructions received from the seller concerning the goods. If no such instructions are received, the buyer must make a reasonable effort to sell the goods if they are perishable or otherwise subject to rapid deterioration. The buyer is entitled to be reimbursed by the seller for all reasonable expenses incurred in caring for and selling the goods. Under section 2-604, in the case of goods that are not perishable, if the seller gives no instructions within a reasonable time after notification of rejection, the buyer may store the goods, ship them back to the seller, or resell them, all for the seller's account, subject to reimbursement of expenses.¹¹⁷⁹ This, as will become clearer in the following discussion, is not the case under either *ULIS* or *The Convention*.

¹¹⁷⁶ See Honnold *Uniform Law*, *supra*, note 41, at 460.

¹¹⁷⁷ Tunc has pointed out that the rule assumes that the buyer will "ordinarily be better placed than the seller to take care" of the goods. See *Tunc's Commentary*, *supra*, note 35, at 98.

¹¹⁷⁸ *The Convention*, art. 86(2).

¹¹⁷⁹ See also s. 8.5.(1)(b) of *DUSA*. Also OLRG, *Report on Sales*, at 408 ff and 475 ff.

Section II

The duty to preserve the goods: methods of fulfilment

[245] *Depositing the goods with a third party*

After setting out the circumstances under which the buyer and seller are under a duty to preserve the goods, *ULIS* and *The Convention* explain how this duty may be fulfilled. One of the methods of discharging the duty is depositing the goods in the warehouse of a third party. Once this is done, all storage expenses are to be borne by the other party to the contract, provided that they are not unreasonable.¹¹⁸⁰

It is worthy of note that the provisions of *ULIS* and *The Convention* that establish the right to discharge the duty to preserve by depositing the goods in the warehouse of a third party govern the relationship between the buyer and the seller only.¹¹⁸¹ They do not govern the relationship between the third party, such as a bailee, and either the buyer or the seller.¹¹⁸² This is because the seller is acting on his or her own behalf and not on behalf of the buyer.

The rule that entitles one of the parties to deposit the goods in a warehouse as a way of discharging the duty to preserve is found in many domestic laws.¹¹⁸³ It is straightforward and requires no further comment.

1180 Art. 87 of *The Convention* is the same as art. 93 of *ULIS*.

1181 See Graveson and Cohn, *supra*, note 134, at 105.

1182 By virtue of the general rule as stated in *ULIS*, art. 8; *The Convention*, art. 4.

1183 See Vilus, *supra*, note 487, at 261.

[246] *The right to sell the goods*

Another way a party may fulfill his duty to preserve the goods is by selling them.¹¹⁸⁴ A buyer or a seller is entitled, under both *ULIS* and *The Convention*, to sell the goods "by any appropriate means" if, and only if, there has been unreasonable delay by the other party in (a) taking possession of the goods; (b) paying the price; or, (c) reimbursing the cost of preservation.¹¹⁸⁵ In contrast, English law gives the right of resale to an unpaid seller only.¹¹⁸⁶

The primary function of giving the party in possession the right to sell the goods is to provide a convenient mechanism for that party to divest him- or herself of the burden of preservation whenever there has been unreasonable delay in taking possession of the goods, in taking them back, or in paying the price or the cost of preservation.

The expression "by any appropriate means" is not defined in *ULIS* or *The Convention*. It should, however, be taken to mean any means reasonable in the circumstances, including any means considered sufficient in similar circumstances under the law of the country where the sale takes place.¹¹⁸⁷

Under *The Convention*, a party can resell only after giving the other party reasonable notice of his intention to sell. In English law, aside from the right to resell perishable goods, an unpaid seller is entitled to resell whenever that seller gives the buyer notice of his or her intention to do so and the buyer does not pay or tender the price within a reasonable period of time.¹¹⁸⁸ Presumably, the purpose of a notice require-

1184 *The Convention*, art. 88; *ULIS*, arts. 94 and 95; for a legislative history of the text, see the documents cited in note 1163 *mutatis mutandis*. See also *Official Records*, *supra* note 67, at 413-414, SR. 33, paras. 51 ff, and 400-401, paras. 1 ff.

1185 *The Convention*, art. 88(1).

1186 *SGA*, 1979, s. 48(3). For a definition of the unpaid seller, see s. 38(1) of the same Act. See also Benjamin, *supra*, note 81, para. 1116.

1187 See *The 1978 Draft Commentary*, *supra*, note 67, comment to art. 77, para. 3.

ment is to enable the other party to cure the default by taking appropriate action. This action may include paying the expenses of preservation, taking possession of the goods or fulfilling any other obligation.

Two further points call for consideration. First, the notice of an intention to sell must be given a reasonable length of time before the proposed sale is to take place.¹¹⁸⁹ Second, no particular form need be followed in order for the notice to be effective. However, neither *ULIS* nor *The Convention* specifies the consequences of a party failing to give reasonable notice, giving an inaccurate notice, or sending the notice to the wrong address. Accordingly, it seems that the whole issue is a question of fact to be decided in the light of the circumstances of each case.

[247] *Duty to sell the goods*

Under *ULIS* and *The Convention*, a party who is bound to preserve the goods must take reasonable measures to sell them if the goods are subject to rapid deterioration or if their preservation would involve unreasonable expense.¹¹⁹⁰

The phrases "must take reasonable measures to sell them" (in *The Convention*) and "bound to sell them" (in *ULIS*) make it clear that a party who is obliged to preserve the goods has a duty, and not merely a right, to endeavour to sell the goods.¹¹⁹¹

1188 *SGA*, 1979, s. 48(3). See also Benjamin, *supra*, note 81, para. 1222, *OLRC, Report on Sales*, at 412-413, did not recommend that the seller be required to notify the buyer of his or her intention to resell. The seller is required to give reasonable notification of his or her intention to resell under the *UCC*, s. 2-706(3), only where the sale is made privately. Both sellers and buyers are placed under a duty to act in good faith and with reasonable care. See the *UCC*, ss. 2-706 and 2-603(3) respectively.

1189 The length and content of the notice of the intention to sell was discussed thoroughly at the Conference. This resulted in the addition of the word "reasonable" before "notice." See *Official Records, supra*, note 67, at 400-401, paras. 16 ff, and at 413-414, paras. 51 ff.

1190 *The Convention*, art. 88(2); *ULIS*, art. 95.

1191 See Sutton, *Part 3, supra*, note 487, at 116.

The language of *The Convention* is preferable to that of *ULIS*. In some situations, it may be difficult to sell the goods. In such a case, it is better to require a party to make reasonable efforts rather than to impose an absolute duty to sell the goods.

The reasonableness of the measures depends on the conditions and on the nature of the goods. Fresh fruits and vegetables are more subject to rapid deterioration than other kinds of goods. The concept of rapid deterioration includes not only physical deterioration but a decline in the value of the goods as well.¹¹⁹²

A duty to give notice under *The Convention* is imposed only when notice is possible. Under *ULIS*, on the other hand, "due notice" to the other party is required.¹¹⁹³ In English law, an unpaid seller is not required to give the buyer notice of his or her intention to sell if the goods are perishable.¹¹⁹⁴ *The Convention* appears to have adopted a compromise between *ULIS*, which requires such notice, and other domestic laws, which do not require it.

As with the right to sell, it is not clear under *The Convention* what consequences flow from a failure to comply with the duty to sell. It seems, however, that the party in default is liable for any loss or deterioration resulting from his or her failure to sell the goods.¹¹⁹⁵

[248] *Effects of sale*

Article 88(3) of *The Convention* permits a party selling goods to be reimbursed for all reasonable expenses of preserving the goods and of selling them. That party must, however, account for the balance to the other party.¹¹⁹⁶ Neither *ULIS* nor *The Con-*

¹¹⁹² See *The 1978 Draft Commentary, supra*, note 67, comment to art. 77, para. 6.

¹¹⁹³ *ULIS*, art. 94.

¹¹⁹⁴ *SGA*, 1979, s. 48(3).

¹¹⁹⁵ See *The 1978 Draft Commentary, supra*, note 67, comment to art. 77, para. 8.

¹¹⁹⁶ *The Convention*, art. 88(3); *ULIS*, art. 94(2).

vention contains a rule that a rejecting or revoking buyer is permitted to set off the payment made to the seller against the proceeds of resale.¹¹⁹⁷ Similarly, neither law makes it clear whether a seller is entitled to deduct the unpaid price from the proceeds of sale. However, *The Convention's* drafting history suggests that if the party selling the goods has other claims arising out of the contract or its breach under the applicable domestic law, he or she may defer the transmission of the balance until these claims have been settled.¹¹⁹⁸

The effects of a sale differ under *ULIS* and *The Convention*, on the one hand, and English law on the other. Under both uniform laws, the party selling the goods is accountable to the other party for the proceeds of sale after making any necessary deductions.¹¹⁹⁹ In the meantime, the original sale is not terminated by the resale. Section 48(4) of the English *Sale of Goods Act*, on the other hand, expressly provides that resale pursuant to an express contractual right rescinds the original contract of sale, but without prejudice to any claim the seller may have for damages. It has been held that a resale under section 48(3) has the same effect.¹²⁰⁰ Here, two points should be remembered. First, rescinding the contract in this context is a case of termination for breach, not rescission *ab initio* as in the case of misrepresentation. Second, the resale in this situation is different from a substitute transaction under the remedy of damages (Article 76 of *The Convention*) in that it is carried out pursuant to a duty.¹²⁰¹

1197 A similar rule to this effect is contained in the *UCC* ss. 2-711(3) and 2-706(6).

1198 See *The 1978 Draft Commentary, supra*, note 67, comment to art. 77, para. 9.

1199 This is different from the *UCC*, s. 2-706(6) and *DUSA*, s. 9.10(7), which do not entitle the buyer to claim the surplus proceeds from the seller. Again, a rejecting or revoking buyer is entitled, under both sections, to offset the payment made to the seller against the proceeds of resale.

1200 *R.V. Ward Ltd. v. Bignall*, [1967] 1 Q.B. 534 (C.A.); see also Schmitthoff, *Export Sales, supra*, note 24, at 108.

1201 See [141] - [148].

Chapter X

CONCLUSIONS OF THE STUDY

[249] *The strengths of The Convention as a whole
and of its remedial provisions in particular*

The major conclusions to be drawn from the foregoing analysis are that *The Convention* represents (a) the most well-received set of unified rules; and, (b) the best means available of achieving uniformity in the field of international sales law. It is beyond question, moreover, that such a law is required, and that there is a strong need to continue these developments in order to meet the changing demands of modern international trade.

The application of *The Convention* to an international sale of goods contract minimizes the difficulties arising from the insistence of each party on the application of his or her own national law, thereby permitting a fair balancing of the rights and obligations of sellers and buyers. Furthermore, *The Convention* provides international sales participants with a single set of rules on which they can rely, thus sparing them laborious searches through various domestic laws for solutions to particular legal problems.

The trend within the international business community is to avoid the application of any national law, if possible. *The Convention* supports this trend in three ways. First, it honours any contractual dispute settlement provision even if the contract has been declared avoided by one of the parties.¹²⁰² Second, it provides international commercial arbitrators with a set of rules consistent with current trade practices. This is true whether or not *The Convention* applies to the transaction, in the absence of a contrary intention. Third, arbitrators can rely on *The Convention* to create certainty in the case of a contract that is ambiguous or does not deal with certain contingencies. Under *The Convention*, parties are bound by any trade usage agreed upon and established in their own trade.¹²⁰³ In fact, such usage is to be considered part of the con-

1202 *The Convention*, art. 81(1).

1203 *See id.*, art. 9(1).

tract whenever the parties knew or ought to have known of it.¹²⁰⁴

It is submitted that *The Convention* addresses the need for unification of international sales law by effectively solving many of the problems facing participants in international sales. The passage of time will support this set of rules and remedy the objections to some of the provisions.

The Convention provides two sets of remedies: one for the seller and one for the buyer. There are also remedies common to both parties. Compared to *ULIS*, which provides each obligation with a corresponding remedy, this approach simplifies and clarifies the system of remedies. The structure and wording of *The Convention's* remedial provisions can serve the interests of international sales participants by harmonizing international trade practice. Furthermore, these provisions are well adapted to existing international trade practice. It is fair to conclude, then, that international trade participants will, in the near future, come to rely on *The Convention's* coherent system of remedies.

To be sure, some of *The Convention's* remedial provisions (for example, those dealing with notice of avoidance, the seller's request to cure and notice fixing an additional time notice) are so far-reaching that parties and their lawyers must pay close attention to them in order to avoid being trapped. Knowledge of other provisions, such as those dealing with the doctrine of fundamental breach, the circumstances justifying suspension of performance, and the correct calculation of damages, are neither helpful nor sufficient. Here, courts in contracting states must weigh competing interests and, except in clear-cut cases, no one can predict the results. From comparing similar provisions in selected domestic laws, it can be concluded that *The Convention's* remedial provisions, on the whole, constitute workable rules if interpreted in good faith and in conformity with the general principles underlying *The Convention*.

¹²⁰⁴ See *id.*, art. 9(2).

[250] *The weaknesses of The Convention as a whole
and of its remedial provisions in particular*

As noted throughout this study, *The Convention* leaves several issues to be decided according to the domestic laws of contracting states. This will result in inconsistency of interpretation since Common and Civil law courts will construe the rules of *The Convention* according to their own peculiar traditions and practices. While this prospect may not deter nations from adopting *The Convention*, it may well dissuade parties in the various contracting states from permitting its non-mandatory provisions to govern their contracts.¹²⁰⁵ It may even raise doubts about whether the laws of different jurisdictions can be truly unified.

This study's analysis of the remedies shows that a fusion of Common law and Civil law principles has not always been possible. Nonetheless, principles from both systems have been incorporated into *The Convention*. Clearly, *The Convention's* remedial provisions could not have been expected to reflect all the needs of the legal systems of those countries subscribing to Common or Civil law. Therefore, it is important to consider *The Convention* on its own merits and not in terms of legal concepts used in various domestic laws. Seen in this light, it may then be concluded that the remedies available to both parties will, in most cases, serve the interests of sellers and buyers by reducing uncertainty surrounding their transactions.

Some of the remedies provided in *The Convention* successfully balance the interests of both parties. However, the application of other remedies is expected to cause difficulties. Remedies like specific performance and price reduction, for example, are well established in the Civil law traditions but not in countries based on Common law. Likewise, price reduction is unknown to English law, which deals with the problem of defective goods by way of damages. Price reduction differs from damages in several

¹²⁰⁵ See *id.*, art. 6.

respects. Furthermore, French and Egyptian law require a court judgment in case of avoidance whereas *The Convention* does not.

[251] *Future developments: short term*

The most important and immediate practical consequence of *The Convention*, now that it has entered into force, is its automatic application to all international sales contracts, between traders in contracting states, from which its application has not been excluded. Therefore, lawyers who give advice concerning the international sale of goods must be acquainted with *The Convention*. Moreover, exporters and importers must address an important question: Is it better to exclude the application of *The Convention* and have their contracts governed by another law or to permit *The Convention's* rules to apply? Finally, courts in contracting states will have to determine whether *The Convention* is applicable to particular international sales contracts.

The Convention's remedial provisions are likely to be the focus of most of the discussion concerning *The Convention's* application. Comparison with domestic laws is inevitable. Such comparisons, although perhaps unfavourable at first, will nonetheless increase the chances that the rules of *The Convention*, now unfamiliar to many, will be understood by legal communities all over the world. The contribution of this study is to give parties and their lawyers the opportunity to study these remedies closely and to refine them to suit particular transactions. In addition, this study gives the legal profession in all countries whose laws have been considered, as well as in countries where the laws of England and France have been followed, a significant opportunity to assess the future impact of these rules on the business communities in these countries. Moreover, it provides a detailed analysis of *The Convention's* remedial provisions that includes an understanding of their drafting history and underlying rationale.

This study has recommended that *The Convention* be interpreted according to its own terms, as a new international sales law. It has advanced the theory that courts, lawyers and traders should avoid interpreting *The Convention* in the light of other laws, and should instead interpret it in such a way as to foster *The Convention's* goal of uniformity. This will help to promote the development of a consistent international jurisprudence surrounding *The Convention*. It is imperative, then, that cases decided under *The Convention* and the work of legal scholars in various countries be carefully considered. This study concludes by advocating such an approach and by endeavouring to encourage courts, lawyers, traders, and scholars to advance the goals of uniformity, certainty, and equity in the law of international sales.¹²⁰⁶

This kind of interpretation will undoubtedly prove difficult for courts, lawyers, and traders since it requires them to take account of *The Convention's* remedial provisions, their drafting history and their underlying rationale without regard to their own domestic laws. However, when faced with the choice of existing remedial provisions in the sales law of a developing country, a Civil law jurisdiction, or a Common law jurisdiction, *The Convention's* remedial provisions would appear to be the clear choice of any lawyer or trader rather than his or her own law.

[252] *Future developments: long term*

For at least the next few years, legal practitioners can be expected to try to secure clauses invoking their own domestic laws, with which, of course, they are familiar. But this may change in the long term. Courts' decisions and arbitral tribunals' awards, addressing issues governed by *The Convention*, will be subjected to close examination

¹²⁰⁶ Probably, no project for the unification of domestic laws has ever been accompanied by a more extensive *travaux préparatoires* or one to which more state delegations representing all the regions of the world have contributed. This is demonstrated by the considerable participation of other organizations active in the unification of international trade law and by the abundance of written materials published in the UNCITRAL Yearbook. See also note 7.

by legal scholars. In order to make these decisions and awards more accessible, UNCITRAL should publish case reports in its yearbook. This would help courts and lawyers in various countries to understand the manner in which the courts of other countries are interpreting *The Convention*. Only when these decisions and awards are made available to interested persons all over the world can a uniform interpretation of *The Convention's* provisions be developed. UNCITRAL must encourage more cooperation among contracting states with the purpose of developing such a uniform interpretation. UNCITRAL also is in a position to convene another conference with a view to adopting any necessary amendments to *The Convention*.¹²⁰⁷

If another conference is convened, the adoption of the following modifications is highly recommended.

1. A definition of "fundamental breach" that contains more objective elements should be adopted, ideally along the lines of the definition proposed in this study. If this is not possible, the substantial detriment test and consideration of the innocent party's expectations under the contract should be retained but the foreseeability test should be eliminated.

2. The doctrine of suspension of performance and the concept of anticipatory breach should be eliminated. Instead, an approach should be adopted, in cases of apparent implicit repudiation, whereby the innocent party must wait until the time for performance has arrived and then resort to any remedy available, unless the other party has expressly refused to perform before the time for performance arrives. This would add more stability to the contractual relationship in international sales.

3. The additional time notice procedure should be available for *all* breaches of contract. It should not be restricted to cases of non-delivery or non-payment. This would benefit both parties. The innocent party would get what he or she wants and the

¹²⁰⁷ Art. XIV of *ULIS* provides for a review three years after its entry into force. At this time, amendments are to be considered to remedy any difficulties arising in the application and interpretation of the uniform law.

breaching party would be provided with an additional time for performance.

4. Article 28 of *The Convention*, which limits the availability of the remedy of specific performance, should be eliminated. Specific performance should be available to the innocent party for *any* breach committed by the other party. This would reduce the need for resort to avoidance, with its attendant drastic effects on the contractual relationship. It would also allow the innocent party to receive the bargain contracted for.

5. The time for reducing the price should be changed from the time of delivery to the time when the buyer is given an opportunity to inspect the goods.

Other provisions are straightforward and well adapted to international trade practice. In this regard, one important point should be kept in mind. Whether or not a rule accords with one's own legal system should be irrelevant. The rules of *The Convention* are unique and differ from those of the domestic laws of many contracting states. However, it falls upon the legal profession to adjust domestic laws to *The Convention's* rules. Hopefully, this can be done without much difficulty.

At any rate, it is unclear, at least for now, whether the legal advisors responsible for the international trade of their enterprises will favour adopting *The Convention* as the basis for their companies' international sales transactions. However, the signs are encouraging. The rate of trade among merchants from different countries has created a climate in which *The Convention* may be accepted overwhelmingly. The fact that the adoption of *The Convention* is so widely favoured suggests that it will be effective and successful in the future. Moreover, new legal issues are facing international traders and their legal counsel with this intensive volume of trade. This is precisely the time when they ought to be familiar with the rules of *The Convention*.

Enterprises in developed countries are urged to breathe life into *The Convention* by adopting it as the governing law in their international sales contracts. This is particularly important for American enterprises because (a) the U.S. has ratified *The Con-*

vention; and, (b) they play a major role in international trade. In cases where *The Convention* has already been excluded from their standard form contracts, these enterprises are encouraged to make an effort to understand *The Convention's* rules, with a view to reconsidering these exclusions.

If business enterprises are not prepared to adopt *The Convention* as a whole, they may still gradually adopt those individual provisions that meet their particular needs. Provisions dealing with the seller's right to cure, price reduction, the giving of an additional time notice, and exemption from performance are well adapted to international trade. The gradual adoption of individual provisions could eventually result in widespread adoption of *The Convention* as a whole.

It is important that developing countries ratify *The Convention*, for the following reasons. First, in many developing countries, the law relating to international trade is out-dated and constitutes a real barrier to trade.¹²⁰⁸ The legislators in these countries may be able to follow the model established by a unified sales law. At the very least, *The Convention* provides an excellent opportunity for reform and reassessment of domestic laws. Second, there is a lack of familiarity and experience in developing countries with the new, more complicated commercial dealings. *The Convention* helps to ease this problem by providing the business communities of developing countries with a text that is easy to understand. And finally, in order to achieve a fair balancing of interests in international transactions involving developing countries, developing countries should participate in the drafting of any international convention, uniform law or standard form contract that is applicable to their international trade. *The Con-*

¹²⁰⁸ Egypt, for example, considered modifying its civil and commercial laws twice since 1949. The first time occurred when a committee was formed to review the Civil Code and spent nearly four years doing so (from 1962 to 1966), but never completed its work. Another commission was set up in 1978 to consider reforms in all areas of Egyptian law. It produced draft codes of civil law, commercial law, penal law, and procedural law. These draft codes were presented to the Parliament but have since been shelved, and it is not clear if and when they will come into force.

vention meets this requirement, having been drafted with the participation of the representatives of many developing countries.

[253] *Summary of conclusions*

In sum, then, the main contribution of this thesis is to provide traders and their lawyers with an accurate analysis and assessment of *The Convention's* remedial provisions, including recommendations for their development. It remains to be seen how the new law will be greeted by those for whom it was created. Will enterprises in contracting states base their international sales transactions on *The Convention*? Just as important is the question of whether, and if so how, national courts will apply *The Convention* when it is applicable. Certainly, after a few years, new research on these questions will be needed in order to assess the practical consequences of *The Convention*.¹²⁰⁹

For the moment, it can be said that it is unlikely that a uniform interpretation will be reached in the short term. In the long term, however, greater understanding of *The Convention's* provisions will probably result in increased certainty about the way in which it operates. Indeed, the next few years will be a trial period for *The Convention*. Only after this trial period has passed will it be possible to decide whether *The Convention* will indeed achieve its goal of removing or easing the practical difficulties currently besetting international sales transactions.

¹²⁰⁹ For preliminary assessment, see appendix 1 of this study where the results of an empirical survey conducted for this study concerning the attitude of international trade associations toward *The Convention* are produced and analyzed.

APPENDIX 1

*THE ATTITUDE OF INTERNATIONAL TRADE ASSOCIATIONS
TOWARD THE CONVENTION: AN EMPIRICAL SURVEY*

[254] *Introduction*

It was noted in paragraph [4] that the first impression a neutral observer gathers is that *ULIS* and *The Convention* are not very well known in the international business community. Legal advisors or managers responsible for the international trade of their enterprises are not expected, at least in the near future, to favour *The Convention* as a basis for their international sales transactions. Accordingly, the standard form contracts¹²¹⁰ of business enterprises and of international trade associations may frequently exclude *The Convention*, if they mention it at all. Until now, no research has been conducted into the practice of international trade associations with respect to *The Convention*.

To check the accuracy of the impression that *The Convention* is not well known, and to answer some of the questions raised in paragraph [253] concerning the conclusions of this study, an empirical inquiry focusing upon international trade associations' views of *The Convention* was conducted for the present study. When the inquiry was conducted, *The Convention* had been in force for nearly sixteen months. The present appendix begins with an overview of the questionnaire and of the method followed in this inquiry. Next, the results of surveying fifteen American and fifteen British trade associations are reported and analyzed. From that analysis conclusions and recommendations are drawn. Before turning to the first section, it should be noted that the survey is not intended to be reliable in the statistical sense, only to provide an indication of the reception *The Convention* is receiving.

¹²¹⁰ The term "standard form contract" or "standard contract form," as used throughout this appendix, can be described as a written form whose terms are always prepared in advance by an international trade association to be used by traders dealing in particular trade. Such a contract is submitted in this form by one of the contracting parties to the other.

Section I

Method of analysis

[255] *The questionnaire*

Information was gathered through a mail survey¹²¹¹ of fifteen American and fifteen British trade associations.¹²¹² In some cases, follow-up letters were sent, to which another copy of the questionnaire was attached. Thirteen responses were obtained, a response rate of approximately 43.3 percent. The format of the questionnaire was intended to facilitate ease of answering. The associations were requested to attach with their responses copies of their standard form contracts. Some associations, such as the Federation of Oils, Seeds and Fats Association Limited, have between fifty and sixty standard forms. For this reason, only four associations attached sample form contracts to their responses. For the purposes of this survey, these samples are probably similar to all form contracts used by the individual organizations.

The questionnaire consisted of seven questions. Question One asked whether the associations were aware of *The Convention*. In Question Two, associations were requested to state if *The Convention* suits the interests of their members. Questions Three and Four asked if the associations, in their present standard form contracts, excluded *The Convention* from governing disputes arising between their members and, if so, which law did govern these disputes. Question Five asked associations to state the methods specified, in their form contracts, for solving disputes between members: arbitration, litigation, or another mechanism. Questions Six and Seven requested associations to state whether they intended to advise their members to have their sales contracts governed by *The Convention* in the future.

1211 The questionnaire is attached to this appendix as annex 1.

1212 A list of these organizations is attached to this appendix as annex 2.

UNCITRAL's office in Vienna was asked by letter to check whether UNCITRAL officials were aware of any international association that has advised its members to exclude the application of *The Convention* in its present standard form contracts. This letter was followed up by two telephone interviews with UNCITRAL officials.

[256] *Common features of the selected associations*

Commodity markets, which grew up in London and continental Europe, have been one principal area in which the law of international sales has developed. The basic products are handled by specialized trade associations. The selected trade associations have a number of common features.

First, they deal in products produced in many parts of the world to be shipped to destinations throughout the world. The members of the associations represented in the survey trade in coal, coffee, cocoa, corn, cotton, fur, grain, lumber, oils and fats, rice, silk, soybeans, supima, tea, wheat, wood and wool.

Second, these trade associations normally recommend the use of their own contract forms. These forms of contract differ not only from trade to trade but from country to country. Each instrument was drafted with only one law in mind, namely, that of the country of the association that wrote them.

Third, the general form contracts of the selected trade associations determine the principal rights and obligations of sellers and buyers in international and domestic sales transactions. The international trade associations represented in this inquiry have formulated their own standard conditions to be incorporated in sales contracts to which their members are a party. As a result, the parties, either members or non-members, will by agreement be bound, either expressly or by implication, to a set of detailed rules. Disputes generally involve either questions of fact or the interpretation of particular clauses. The number of members in the selected associations varies from four

(London Rice Brokers Association) to 29,000 companies (American Soybean Association).¹²¹³

Finally, the governing bodies of these international trade associations are often dominated by individuals who control each organization through their personal prestige and authority. Where these individuals have a long association either with buyers or sellers, the organization may inadvertently favour either buyers or sellers.

[257] *Reasons for selecting the organizations surveyed*

Standard form contracts used in international trade may be adopted (a) by individual business enterprises; (b) by international organizations, such as the United Nations Economic Commission for Europe (ECE);¹²¹⁴ or, (c) by international trade associations. This survey focused on the standard form contracts of international trade associations. Standard form contracts regulating the rights and duties of contracting parties in a specific international trade are optional. They can only apply when the parties expressly adopt them.

The standard form contracts of international business enterprises and international organizations are not considered in this survey for three basic reasons.

First, contracts that adopt the standard forms of individual business enterprises are sometimes contracts of adhesion, in which one party proposes the form contract. The other may "take it or leave it" and cannot negotiate the contract's terms and conditions except in respect of trifling details. Sometimes, each party will have its own standard form. In addition, because many of these standard forms are used in domestic markets, enterprises may be reluctant to draft new forms for contracting with another party whose principal place of business is in another country.

¹²¹³ For the number of members of the responding associations, see Annex 2 to this appendix.

¹²¹⁴ For further details about the ECC, see note 25.

Second, standard form contracts drafted by the ECE are of worldwide interest, and are acceptable to and often referred to in contracts between merchants in different regions of the world. Both *The Convention* and these kinds of contracts are needed to advance the unification of international sales law, and to facilitate international trade. However, unlike *The Convention*, whose goal is to unify sales law worldwide, the ECE aims to raise the level of economic activity in Europe and to strengthen economic relations at both the intraregional and interregional level.

Third, and most important, large trade associations, such as those selected in this survey, have sometimes operated as a brake on the progress of the unification of international sales law. This is because they are entirely satisfied with their own standard forms and practices. In other words, these organizations feared that a uniform international law, such as *The Convention*, would threaten their privileges. Thus, their positions toward *The Convention*, which on the whole is widely favoured,¹²¹⁵ represent the most extreme opposition to unification.

¹²¹⁵ In the United States, the following associations have taken a favorable attitudes toward *The Convention*: the American Bar Association, the National Association of Manufacturers, the National Lawyers' Committee for *The Convention*, and four U.S. business organizations especially focused on U.S. international trade, the National Foreign Trade Council, the American Association of Exporters and Importers, Business International, and the U.S. Council for International Business. In Canada, the Export development Corporation expressed support for *The Convention*. Further, the Canadian Chamber of Commerce sees no reason why Canada should not ratify *The Convention* (telephone interview with Chantal Bernier, Department of Justice, Canada, June 8, 1989). The International Chamber of Commerce (ICC) encourages ratification of *The Convention* by all its member countries. Among the bodies around the world that are reported to have urged *The Convention's* adoption are the Council of Mutual Economic Assistance (CMEA) and the Asian-African Consultative Committee. The Nordic countries have also agreed that they will enact *The Convention*; Norway even intending to implement it as national law.

Section II

Findings of the survey

[258] *Awareness of The Convention*

Four of the thirteen responding associations (31 percent of respondents) were aware of the existence of *The Convention*.¹²¹⁶ Nine (69 percent of respondents) were not.¹²¹⁷ Obviously, this indicates that awareness of *The Convention* is not widespread.

Those associations that indicated an awareness of *The Convention* were asked in Question Two whether or not *The Convention*, in their view, is a workable unified sales law and serves the interests of their members. One organization, the Federation of Oils, Seeds and Fats Association Limited, stated that *The Convention* does not suit the interests of its members but gave no further explanation. Another association, the Confederation of British Wool Textiles Ltd., expressly stated that *The Convention* does not suit the interests of its members because some of its provisions are at odds with English law. Article 17, which states that an offer is terminated when a rejection reaches the offeror, was given as an example.

This particular finding is surprising given that *The Convention*, as was noted by the former secretary of UNCITRAL,¹²¹⁸ "enjoys praise throughout the world as a workmanlike attempt to advise legal rules and practical procedures for international sales transactions."¹²¹⁹

1216 These associations are: Federation of Oils, Seeds and Fats Associations Limited; The Confederation of British Wool Textiles Ltd.; The Refined Sugar Association; and The Grain & Feed Trade Association.

1217 These associations are: The Rubber Trade Association of London; The Silk Association of Great Britain; The National Hay Association, Inc.; The Coffee, Sugar & Cocoa Exchange, Inc.; The American Cotton Shippers Association; The New York Cotton Exchange; The American Soybean Association; The London Rice Brokers Association and The Supima Association of America.

1218 Sono, "UNCITRAL and the Vienna Sales Convention", 18 *Int'l Law.* 7, at 13.

1219 For more details about other associations appraising *The Convention*, see note

Bergsten, the present Secretary of UNCITRAL, has emphasized that a campaign is now being conducted by UNCITRAL to promote the adoption of *The Convention*, particularly in Asian, African and Latin American states. He also reports that most industrialized countries are expected to ratify *The Convention* within a few years.¹²²⁰ While these promotional activities of UNCITRAL are worthwhile, the results of this survey indicate that they should be extended to the business communities of industrialized countries. If implemented, such a programme would increase business communities' awareness of *The Convention*. This may, in turn, encourage them to make greater use of *The Convention*, which was, after all, drafted to satisfy the needs of traders and to facilitate trade. It is submitted that as familiarity with *The Convention* grows the attitude of international trade associations regarding its acceptance may change.

[259] *Express exclusion of The Convention from standard form contracts*

Since *The Convention* has been in force now for sixteen months, one would predict that international trade associations will soon decide whether or not to exclude its application. If the application of *The Convention* is excluded, a contract must include a governing law clause to specify which law will apply. Accordingly, associations were asked in Questions Three and Four to state (a) if the application of *The Convention* has been excluded in their standard form contracts; and, (b) if so, which law is applicable.

Eight of the thirteen responding associations (61.4 percent) indicated that their standard form contracts do not exclude *The Convention*¹²²¹ and continued to be gov-

1215.

1220 Bergsten, "The Future of the United Nations Convention on Contracts for the International Sale of Goods From the Perspectives of UNCITRAL", *Ottawa Conference, supra*, note 54, 201, at 205-206.

1221 These associations are: Silk Association of Great Britain; The National Hay Association, Inc.; New York Cotton Exchange; Coffee, Sugar & Cocoa Exchange, Inc.; London Rice Brokers Association; American Soybean Associa-

erned by either English (for British associations) or American (for American Associations) law. However, one association, the American Cotton Shippers Association, indicated that its standard form contracts are governed by the rules of various domestic trade associations, e.g. Rules of the Liverpool Cotton Association, England and of the Bermen Cotton Exchange, Germany, and associations in other countries that have their own rules, such as Belgium, Holland, Italy, France, Poland and Spain.

Five associations (38.4 percent) had excluded the application of *The Convention* in their standard form contracts.¹²²² Surprisingly enough, one association, The Rubber Trade Association of London, though not aware of the existence of *The Convention*, included a clause in one of its standard form contracts (Contract No. 3) excluding the application of all uniform laws on international sale of goods, including, presumably, *The Convention*, *ULIS* and *ULIF*. Another association, the American Cotton Shippers Association, claimed to have excluded the application of *The Convention* without being aware of its existence. However, its standard form contract mentioned nothing in this regard. Surprisingly, UNCITRAL officials were not aware that the application of *The Convention* had been excluded in the standard form contracts of any association.

Unfortunately, none of the responding associations has chosen *The Convention* as the law of their standard form contracts. There would appear to be two main reasons for this: first, a lack of knowledge of *The Convention*; and second, uncertainty concerning the results of its application.

tion; Confederation of British Wool Textiles Ltd.; and Supima Association of America.

¹²²² These associations are: Federation of Oil, Seed and Fats Association Limited; The Rubber Trade Association of London; American Cotton Shippers Association; The Refined Sugar Association; and The Grain & Feed Trade Association.

The exclusion of the application of *The Convention* is expected to cause problems for courts and parties in contracting states. Freedom of contract is one of the essential principles of *The Convention*. The parties can freely exclude the application of *The Convention* or derogate from or vary the effect of any of its provisions.¹²²³ If the parties opt out but do not provide a choice of law, the rules of private international law determine the applicable law. Thus, if the standard form contract has expressly excluded, derogated from, or varied the terms of *The Convention*, normally no question arises. But *The Convention* leaves unclear whether or not its application may be excluded *by implication* and, if so, which circumstances implicitly exclude *The Convention*.

For example, if an association selects either English law or American law (probably the *UCC*) as the governing law for its form contracts, as is often the case, but does not expressly exclude the application of *The Convention*, does English (or American) domestic law apply, or does *The Convention*? It is submitted that, in this situation, *The Convention* should prevail over American domestic law but not over English domestic law, unless the parties to the particular contract specifically exclude its application in accordance with Article 6 of *The Convention*. There are three reasons for this view.

First, the U.S. has ratified *The Convention*, but Britain has not. Accordingly, *The Convention* applies if the American party's foreign business partner has a place of business in another contracting state.¹²²⁴ This is so since the U.S., by reservation under Article 95, excluded the application of Article 1(1)(b), which states that *The Convention* will also apply "when the rules of private international law lead to the application of the law of a contracting state."

¹²²³ *The Convention*, art. 6.

¹²²⁴ *Id.*, art. 1(1)(a).

Second, *The Convention* is the special domestic law applicable to all international sales transactions that fall within its sphere of application. Therefore, if an American law is the governing law of the contract, the applicable domestic law is *The Convention*. Only if English law is the law chosen in the standard form contract does English domestic law come into operation, because Britain is not yet a contracting state.¹²²⁵

Third, *The Convention's* drafting history suggests that courts in contracting states should be slow to conclude "on insufficient grounds, that *The Convention* has been wholly excluded."¹²²⁶ Therefore, the selection of American law without express exclusion of *The Convention* should not, it is submitted, be given effect as an exclusion of *The Convention*.

Similar problems arise if the association has incorporated an arbitration clause into its standard form contracts that either specifies a place of arbitration in the U.S. (or any other contracting state) or refers to the law of a *Convention* state as the applicable law. It is submitted that courts and arbitral tribunals will probably conclude that the domestic law of the place of arbitration or chosen in the arbitration clause is the applicable law. An available inference is that the parties must have intended the contract to be governed by the law of the place of arbitration, as that is the law with which the arbitrator will be most familiar. Here again, the question might arise as to whether such domestic law or *The Convention* is the applicable law. Once again, courts or

¹²²⁵ British reaction to *The Convention* seems to be less favorable than that of the U.S. The British Law Society objected to *The Convention* on the ground that: (1) *The Convention* will have little impact on sophisticated commercial traders, (2) what impact it does have may be due to *The Convention's* "opt out" feature, resulting in application by default, (3) uniformity will be illusory because *The Convention* will be subject to divergent national interpretations and (4) if ratified, *The Convention* would likely result in a diminished role for English law in international trade, particularly as it relates to commercial arbitration. See "1980 Convention on Contracts for the International Sale of Goods-Comments by the Council's Law Reform Committee Report of the British Law Society", reprinted in *International Sale of Goods: Hearing on Treaty Doc. 98-9 Before the [U.S.] Senate Committee on Foreign Relations*, 9th Congress 2nd sess. 837 (1984), at 43-44. See also Feltham, *supra*, note 149.

¹²²⁶ See (1976), 7 *UNCITRAL Yearbook* at 96 and 99.

arbitral tribunals should, it is submitted, apply *The Convention* instead of the applicable domestic law.

In summary, only if the standard form contract is clearly based on a particular domestic law and *The Convention* is expressly excluded as a whole should there be a total derogation from *The Convention*. For American associations that have not expressly excluded *The Convention*, ignorance of *The Convention's* existence and of its ratification by the U.S. cannot prevent *The Convention* from governing disputes arising from contracts concluded on the basis of standard forms sponsored by them. As to British associations, only if English law is the law of the standard form contract, and only if Britain remains a non-ratifying state, will this mean exclusion of the application of *The Convention*.

[260] *Preferred dispute resolution mechanisms*

Respondents were asked to indicate the method (or methods) adopted in their standard form contracts for dispute settlement, in particular whether it is arbitration, litigation or some other method. The responses indicate that the respondents are sensitive to the issue of the appropriate dispute settlement mechanism. Arbitration, not litigation, is regarded as the most efficient system for resolving most disputes among their members. Ten associations (76.8 percent) adopted arbitration as the principal dispute settlement mechanism in their standard form contracts.¹²²⁷ This particular finding is consistent with recent trends in international trade practice. One association, the American Cotton Shippers Association, stipulated that the parties had to resort to amicable settlement before resorting to arbitration. Two associations, the American Soybean Associ-

¹²²⁷ These associations are: Federation of Oils, Seeds and Fats Associations Limited; The Rubber Trade Association of London; The National Hay Association, Inc.; American Cotton Shippers Association; Coffee, Sugar & Cocoa Exchange, Inc.; New York Cotton Exchange; London Rice Brokers Association; Confederation of British Wool Textiles Ltd.; The Refined Sugar Association and The Grain & Feed Trade Association.

ation and the Supima Association of America, did not answer the question.

None of the respondent associations selected litigation as a favoured method of solving disputes between its members. However, four associations, The Rubber Trade Association, Federation of Oils, Seeds and Fats Associations Limited, American Cotton Shippers Association and London Rice Brokers Association, indicated that an award from the arbitrators, umpire or Board of Appeal is a condition precedent to the right to litigate. This indicates that litigation is regarded as a last resort and that few disputes concerning contracts within the aegis of a particular trade association are likely to come before a court in the country of the association.

Therefore, disputes concerning contracts within the jurisdiction of a particular trade association are, in most cases, solved by arbitration.¹²²⁸ Each association usually has a panel of arbitrators engaged in the trade that can be called upon to arbitrate at short notice if required, for a comparatively small fee. Most arbitration clauses contained in general form contracts sponsored by the selected associations require cases to be referred to a specified institutional arbitration tribunal. One calls for *ad hoc* arbitration. Arbitrators, far from making awards *ex aequo et bono*, regularly apply the rules, usages and customs formulated by the organizations themselves. Most associations have their own appeal procedures. The parties usually have a strong desire to subject the contract to the rules of the particular association concerned, and to its established arbitration procedure in cases of dispute. In this way, some uniformity in the interpretation of their standard form contracts is maintained. However, any divergence in the interpretation of standard form contracts does not become widely known since arbitration proceedings are normally private and awards are not published.

¹²²⁸ For instance, the standard contracts of the Federation of Oils, Seed Association Limited contain a clause according to which all disputes arising in connection with the contract are to be brought before the arbitration tribunal of that association (see, for example, clause 27 of Contract No. 54 for Vegetable and Marine Oil (in Bulk) CIF Terms). Similar clauses are also found in the form contracts of other large trade associations.

[261] *Recommendations*

Five associations, namely, the Federation of Oils, Seeds and Fats Associations Limited, Rubber Trade Association of London, Confederation of British Wool Textiles Ltd., Refined Sugar Association and American Cotton Shippers Association, clearly stated that they did not intend to advise their members in the near future to subject their contracts to *The Convention*. Thus, there was no need for them to answer Question Seven, which applies only if Question Six is answered in the affirmative. Interestingly enough, the same organizations, with the exception of the Confederation of British Wool Textiles Ltd., have excluded the application of *The Convention* in their standard form contracts.

In general, these associations did not give reasons for their positions. However, one association, the American Cotton Shippers Association, gave as its reasons (a) the fact that cotton merchandising is a business in which conditions change quickly, sometimes hour-by-hour; and, (b) their experience with the manner in which things progress in the United Nations. Another association, the Confederation of British Wool Textiles Ltd., expressly stated that it prefers the rules of the International Wool Textile Organization, which are more directly relevant to its industry. This appears to be the most likely reason for the positions taken by the other three associations as well. The rest of the responding associations (eight) did not answer either Question Six or Question Seven. In any event, the following recommendations might encourage trade associations to change their attitudes toward *The Convention*.

First, international associations should play a more active role in the process of unifying international sales law. The skills of both the American and British associations could be utilized to this end. They could suggest appropriate amendments to *The Convention* where necessary. However, three important points should be noted. First, each individual trade association seemed to be concerned primarily with the unification

of the law governing their particular trade rather than of international trade law in general. Second, the governing bodies of some associations favour either the buyer or the seller, depending on the balance of power in the particular association. Third, the selected international trade associations concentrated their efforts, at least in their early years, on domestic trade in a specific commodity or goods, rather than on international trade in all goods and commodities -- the concern of *The Convention*.

Second, American and British trade associations should become better informed about *The Convention*. Both groups would agree, it is submitted, that the task of increasing knowledge of *The Convention* and its application should be given immediate attention by UNCITRAL. They should be constantly reminded that (a) *The Convention* represents, on the whole, a better balancing of interests between sellers and buyers than their standard form contracts; and, (b) instead of referring to general principles of English or American law to fill any gaps in their standard form contracts (as they often do), they should look to *The Convention* for this purpose.

The adoption of these recommendations may encourage international trade associations to change their attitudes towards *The Convention* and to accept it as a unified sales law. Academic writings, such as this study, and the promotional campaign being conducted by UNCITRAL, can play a major role in achieving this goal by helping these associations to understand *The Convention's* rules. The fear that *The Convention* will threaten their privileges will, in most cases, prove unfounded. However, more co-operation between UNCITRAL and international trade associations is recommended in order to achieve a better understanding of the relationship between *The Convention* and standard form contracts sponsored by these associations. This point cannot be emphasized enough in view of this survey's finding that the application of *The Convention* has been excluded by those associations that are aware of its existence.¹²²⁹

¹²²⁹ Except in the case of the Federation of British Wool textiles Ltd. Compare note 1216 for a list of the organizations that are aware of *The Convention* with note 1222 for a list of the organizations that have excluded its application in the

As long as uncertainty surrounding the application of *The Convention* persists, international trade associations will not be willing to accept it as the governing law in their standard form contracts.

[262] *Conclusions of the survey*

It is possible to draw certain conclusions from the above inquiry concerning the positions of international trade associations toward *The Convention*. First, after having been in force for nearly sixteen months, *The Convention* has not met with as much enthusiasm from those for whom it was created as one would have expected. Traders are reluctant to base their international sales transactions on *The Convention*. If at all aware of *The Convention*, they regularly exclude it or view it as inapplicable. Uncertainty concerning the results of its application, ignorance of its existence, and satisfaction and familiarity with traditional practices are the main impediments to more frequent application of *The Convention* by international trade associations.

Overall, the results of the survey show that many international traders are still unaware of *The Convention's* existence. Both the conclusions of this study and the results of the survey show that more time is needed before *The Convention* will be widely accepted and applied by courts, traders and their lawyers. The exact meaning of *The Convention's* provisions remains unclear until determined by courts in contracting states. However, one important point should be borne in mind. The survey chronicles the beginning of a transition period and, for the most part, reflects attitudes that are by no means inflexible. This survey demonstrates that the international business community, and particularly international trade associations, will probably change their attitudes towards *The Convention* as they become more familiar with it. If this is true, *The Convention's* significance in international commercial practice can only increase with time.

ANNEX 1

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915 Elmsmere Rd.
Unit 217
Gloucester, Ontario K1J 8H8
CANADA
Tel: (613) 745-3582

INTERNATIONAL TRADE ASSOCIATIONS QUESTIONNAIRE

I am conducting an empirical survey as part of my Ph.D. dissertation entitled "The Remedies Regime Under the United Nations Convention on Contracts for the International Sale of Goods." The information required from you is badly needed for the completion of my thesis and your help in this matter is vital. Could you be kind enough to answer the following questions as soon as possible?

Name of the association: _____

Address: _____

Telephone: _____

Number of members: _____

Please indicate your name and position in the association:

1. Are you aware of the 1980 Vienna Convention, which came into force in January 1988?

a) Yes ----

b) No ----

2. If yes, do you think it is a workable Convention and suits the interests of your members?

3. In your present standard form contracts, has your association excluded *The Convention* from governing disputes arising between your members?

Yes _____

No _____

4. If yes, what law governs these disputes?

5. Which of the following methods of solving disputes has your association adopted in its standard form contracts?

a) Litigation: _____

b) Arbitration: _____

c) Other: _____

6. Would you advise your members now or in the near future to have their contracts governed by *The Convention*?

ANNEX 2

A List of International Trade Associations

American Associations

1. American Corn Millers Federation
Suite 760, 1030 15th St.
N.W. Washington DC 20005
U.S.A.
Tel: (202) 296-5488
2. American Cotton Shippers Association, Inc.,
Suite 1 - Mezzanine- Cotton Exchange Bldg.,
65 Union Avenue
P.O. Box 3366,
Memphis, TN 38103
U.S.A.
(Members: 560 companies)
3. American Soybean Association
1300 L street, NW #950
Washington DC 20005
U.S.A.
(Members: 29,000 companies)
4. Coal Exporters Association of the United States, Inc.,
1130 17th st. N.W.
Washington DC 200036
U.S.A.
Tel: (202) 463-2639
5. Coffee, Sugar and Cocoa Exchange Inc.,
4 World Trade Center,
S.E. New York, NY 10048
U.S.A.
Tel: (212) 938-2800
(Members: 603 companies)
6. Grain Sorghum Producers Association
1708-A 15th St,
Lubbock TX 79401
U.S.A
Tel: (806) 763-4425
7. National Association of Wheat Growers
415 Second Street, N.E. # 300,
Washington DC 20002
U.S.A.
Tel: (202) 547-7800

8. National Grain and Feed Association
500 Folger Bldg.,
725 15th st.
N.W. Washington DC 20005
U.S.A.
Tel: (202) 283-2024
9. National Hay Association
P.O. Box 1059
Jackson, ME 49204
U.S.A.
Tel: (517) 782-2688
(Members: 325 companies)
10. National Lumber Exporters Association
805 Sterick Bldg.,
Memphis, TN 38103
U.S.A.
Tel: (901) 525-8221
11. National Rice Growers Association
Route 1, Box 166,
Branch LA 70516
U.S.A.
Tel: (318) 824-2437
12. National Sugar Brokers Association, Inc.,
Suite 5011, One World Center
New York, NY 10048
U.S.A.
Tel: (212) 938-0990
13. New York Cotton Exchange, Inc.,
8th Floor, 4 World Trade Center,
New York, NY 10048
U.S.A.
Tel: (212) 938-2650
(Members: 450 companies)
14. Supima Association of America
4141 East Broadway Rd.,
Phoenix AZ 85040
U.S.A.
Tel: (602) 266-2495
(Members: 2,000 companies)
15. United States Feed Grains Council
Suite 1000, 1575 1St.,
N.W. Washington DC 20005
U.S.A.
Tel: (202) 789-0789

British Associations

1. British Cotton Growing Association
3 Shortlands, London, W6 8RT
Telex: 298965
Fax: 01846 0950
2. Cocoa Association of London
1 Commodity Quay St. Catherines Docks, London
Tel: 01-481 2080 Telex: 884370
3. Coffee Trade Federation
C/o RE Shimell, Artillery House,
Artillery Row, London, SW1P 1PT
Tel: 01-481 3681
Telex: 8812939
4. Confederation of British Wool Textiles Ltd.
60 Toller Lane, Bradford, W. York, BD8 9B2
Tel: 0274 491241
(Members: 320 companies)
5. Federation of Oils, Seeds and Fats Associations Ltd. (FOSFA)
24 St Mary Axe, London, EC3A 8ER
Tel: 01-283-2707
Telex: 8812757
(Members: 450 companies)
6. Grain and Feed Trade Association (GAFTA)
24 St Mary Axe, London, EC3A 8ED
Tel: 01-283 5146
Telex: 886984
(Members: 525 companies)
7. International Fur Trade Federation
20-21 Queenhithe, London, EC4V 3AA
Tel: 01-489 8159
Telex: 917513
8. London Jute Association
4th Floor, Artillery House,
Artillery Row, Westminster, 01-222 0940
England
Tel. 01-222 0940
NO TELEX OR FAX
9. London Rice Brokers Association
Prince Rupert House, 9-10 College Hill,
London, EC4R 1AS
Tel: 01248 7241
Telex: 8952627
(Members: 4 companies)

10. London Sugar Brokers' Association
66 Mark Lane, London, EC3R 7HS
Tel: 01-480 9339
Telex: 885011
11. Refined Sugar Association
C/o DG Moon, Plantation House,
Mincing Lane, London, EC3M 3HT
Tel: 01-626 1745
Telex: 8956965
(Members: 80 companies)
12. Rubber Trade Association of London
1st Floor Wignham House 16-30, Wakering Rd.,
Barkin, Essex, IG11 8PG
Tel: 01594 5346
Telex: 22561
(Members: 102: companies)
13. Silk Association of Great Britain
Morely Rd, Tonbridge, Kent, TN9 1RN
Tel: 0732 3513527
Telex: 95311
Fax: 0732770217
(Members: 40 companies)
14. Tea Producers Association
Central House, 32-66 High St. London, E15 2PS
Tel: 01-519 4872
Telex: 8814115
Fax: 01-519 5483
15. United Kingdom Wool Growers Federation
17 Waterloo Place, Leamington Spa,
Warwicks, CV32 5LA
Tel: 0926 450445

APPENDIX 2

*UNITED NATIONS CONVENTION ON CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (1980)*

Appendix 2

United Nations Convention on Contracts for the International Sale of Goods

THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

PART I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter 1 SPHERE OF APPLICATION

Article 1

1. This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
 - a. When the States are Contracting States; or
 - b. when the rules of private international law lead to the application of the law of a Contracting State.
2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

- a. of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew or ought to have known that the goods were bought for any such use;
- b. by auction;
- c. on execution or otherwise by authority of law;
- d. of stocks, shares, investment securities, negotiable instruments or money;
- e. of ships, vessels, hovercraft or aircraft;
- f. of electricity.

Article 3

1. Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.
2. This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

1. the validity of the contract or of any of its provisions or of any usage;
2. the effect which the contract may have on the property in the goods sold.

Article 5

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

Article 6

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

Chapter II GENERAL PROVISIONS

Article 7

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

1. For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
2. If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
3. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

- a. if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- b. if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

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

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

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

**PART III
FORMATION OF THE CONTRACT**

Article 14

1. A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or impliedly fixes or makes provision for determining the quantity and the price.
2. A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

1. An offer becomes effective when it reaches the offeree.
2. An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

1. Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has despatched an acceptance.
2. However, an offer cannot be revoked:
 - a. if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
 - b. if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

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

Article 18

1. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
2. An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances

of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

3. However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the despatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

1. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
2. However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or despatches a notice to that effect. If he does not so object, the terms of the contract are terms of the offer with the modifications contained in the acceptance.
3. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

1. A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for despatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelop. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.
2. Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

1. A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or despatches a notice to that effect.
2. If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or despatches a notice to that effect.

Article 22

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

Article 23

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

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III SALE OF GOODS

Chapter 1 GENERAL PROVISIONS

Article 25

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

Article 26

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

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

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

Article 29

1. A contract may be modified or terminated by the mere agreement of the parties.
2. A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II OBLIGATIONS OF THE SELLER

Article 30

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

Section I.
Delivery of the goods and handing
over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- a. if the contract of sale involves carriage of the goods- in handing the goods over to the first carrier for transmission to the buyer;
- b. if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stocks or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place- in placing the goods at the buyer's disposal at that place;
- c. in other cases- in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

1. If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
2. If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms of such transportation.
3. If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

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

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

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II. Conformity of the goods and third party claims

Article 35

1. The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
2. Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
 - a. are fit for the purposes for which goods of the same description would ordinarily be used;
 - b. are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;
 - c. possess the qualities of goods which the seller has held out to the buyer as a sample or model;
 - d. are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
3. The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

1. The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.
2. The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

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

Article 38

1. The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
3. If the goods are redirected in transit or redespached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redespach, examination may be deferred until after the goods have arrived at the new destination.

Article 39

1. The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
2. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

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

Article 42

1. The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
 - a. under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
 - b. in any other case, under the law of the State where the buyer has his place of business.
2. The obligation of the seller under the preceding paragraph does not extend to cases where:
 - a. at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
 - b. the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

1. The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.
2. The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

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

Section III. Remedies for breach of contract by the seller

Article 45

1. If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
 - a. exercise the rights provided in articles 46 to 52;
 - b. claim damages as provided in articles 74 to 77.
2. The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
3. No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

1. The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.
2. If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.
3. If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

1. The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.
2. Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

1. Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
2. If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
3. A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
4. A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

1. The buyer may declare the contract avoided:
 - a. if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
 - b. in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
2. However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

- a. in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- b. in respect of any breach other than late delivery, within a reasonable time:
 - i. after he knew or ought to have known of the breach;
 - ii. after the expiration on any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
 - iii. after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

1. If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.
2. The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

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

Chapter III
OBLIGATIONS OF THE BUYER

Article 53

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

Section I.
Payment of the price

Article 54

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

Article 55

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

Article 56

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

Article 57

1. If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
 - a. at the seller's place of business; or
 - b. if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.
2. The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

1. If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.
2. If the contract involves carriage of the goods, the seller may despatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.
3. The buyer is not bound to pay the price until he has an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II. Taking delivery

Article 60

The buyer's obligation to take delivery consists:

- a. in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- b. in taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 61

1. If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:
 - a. exercise the rights provided in articles 62 to 65;
 - b. claim damages as provided in articles 74 to 77;

2. The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
3. No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

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

Article 63

1. The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
2. Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

1. The seller may declare the contract avoided:
 - a. if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
 - b. if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
2. However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
 - a. in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
 - b. in respect of any breach other than late performance by the buyer, within a reasonable time:
 - i. after the seller knew or ought to have known of the breach; or
 - ii. after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or

after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

1. If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.
2. If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Chapter IV PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

1. If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.
2. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

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

Article 69

1. In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.
2. However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.
3. If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

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

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

Section I. Anticipatory breach and instalment contracts

Article 71

1. A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:
 - a. a serious deficiency in his ability to perform or in his creditworthiness; or
 - b. his conduct in preparing to perform or in performing the contract.

2. If the seller has already despatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.
3. A party suspending performance, whether before or after despatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

1. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
2. If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
3. The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

1. In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.
2. If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
3. A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II.
Damages

Article 74

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

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

1. If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.
2. For the purpose of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

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

Section III.
Interest

Article 78

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

Section IV
Exemptions

Article 79

1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
2. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
 - a. he is exempt under the preceding paragraph; and
 - b. the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
3. The exemption provided by this article has effect for the period during which the impediment exists.
4. The party who fails to perform must give notice to the other party of the impediment and its effects on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
5. Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

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

Section V.
Effects of avoidance

Article 81

1. Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.
2. A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

1. The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
2. The preceding paragraph does not apply:
 - a. if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
 - b. if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
 - c. if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

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

Article 84

1. If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.
2. The buyer must account to the seller for all benefits which he has derived from the goods or part of them:
 - a. if he must make restitution of the goods or part of them; or
 - b. if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI. Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

1. If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has reimbursed his reasonable expenses by the seller.
2. If goods despatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

1. A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.
2. If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.
3. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

PART IV FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depository for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

1. This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all states at the Headquarters of the United Nations, New York until 30 September 1981.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.
2. A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

1. If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depository and are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention extends to one or more but not to all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.
2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or

to their formation where the parties have their places of business in those States.

3. If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

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

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

1. Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Declaration and confirmation of declarations are to be in writing and be formally notified to the depository.
3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depository receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depository. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depository.
4. Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depository. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depository.
5. A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under this article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

1. This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.
2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.
3. A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.
4. A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.
5. A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.
6. For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

Article 100

1. This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.
2. This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting States referred to in subparagraph (1)(b) of article 1.

Article 101

1. A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a normal notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

APPENDIX 3

*CONVENTION RELATING TO A UNIFORM LAW ON
THE INTERNATIONAL SALE OF GOODS*

Appendix 3

Convention Relating to a Uniform Law on the International Sale of Goods

THE States signatory to the present Convention,

Desiring to establish a uniform law on the international sale of goods,

Have resolved to conclude a convention to this effect and have agreed upon the following provisions:

Article I

1. Each Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of the entry into force of the present Convention in respect of that State, the Uniform Law on the International Sale of Goods (hereinafter referred to as "the uniform Law") forming the Annex to the present Convention.
2. Each Contracting State may incorporate the Uniform Law into its own legislation either in one of the authentic texts or in a translation into its own language or languages.
3. Each Contracting State shall communicate to the Government of the Netherlands the texts which it has incorporated into its legislation to give effect to the present Convention.

Article II

1. Two or more Contracting States may declare that they agree not to consider themselves as different States for the purpose of the requirements as to place or business of habitual residence laid down in paragraphs 1 and 2 of Article 1 of the Uniform Law because they apply to sales which in the absence of such a declaration would be governed by the Uniform Law, the same or closely related legal rules.
2. Any Contracting State may declare that it does not consider one or more non-Contracting States as different States from itself for the purpose of the requirements of the Uniform Law, which are referred to in paragraph 1 of this Article because such States apply to sales which in the absence of such a declaration would be governed by the Uniform Law, legal rules which are the same as or closely related to its own.
3. If a State which is the object of a declaration made under paragraph 2 of this Article subsequently ratifies or accedes to the present Convention, the declaration shall remain in effect unless the ratifying or acceding State declares that it cannot accept it.

4. Declarations under paragraph 1, 2 or 3 of this Article may be made by the States concerned at the time of the deposit of their instrument of ratification of or accession to the present Convention or at any time thereafter and shall be addressed to the Government of the Netherlands. They shall take effect three months after the date of their receipt by the Government of the Netherlands or, if at the end of this period the present Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

Article III

By way of derogation from Article 1 of the Uniform Law, any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law only if each of the parties to the contract of sale has his place of business or, if he has no place of business, his habitual residence in the territory of a different Contracting State, an in consequence may insert the word "Contracting" before the word "States" where the latter word first occurs in paragraph 1 of Article 1 of the Uniform Law.

Article IV

1. Any State which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself requires the application of the uniform Law.
2. Any State which makes a declaration under paragraph 1 of this Article shall inform the Government of the Netherlands of the Convention or the Conventions referred to in that declaration.

Article V

Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention declare, by a notification addressed to the Government of the Netherlands, that it will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of Article 4 of the Uniform Law, chosen that Law as the Law of the contract.

Article VI

Any State which has made a declaration under paragraphs 1 or 2 of Article II, Article III, Article IV or Article V of the present Convention may withdraw it at any time by a notification addressed to the Government of the Netherlands. Such withdrawal shall take effect three months after the date of the receipt of the notification by the Government of the Netherlands and, in the case of a declaration made under paragraph 1 of Article II, shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State.

Article VII

1. Where under the provisions of the uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law.
2. The Provisions of paragraph 1 of this Article shall not affect the obligations of a Contracting State resulting from any Convention, concluded or to be concluded, concerning the recognition and enforcement of judgments, awards and other formal instruments which have like force.

Article VIII

1. The present Convention shall remain open until the 31st day of December 1965 for signature by the States represented at the Hague Conference of 1964 on the Unification of Law governing the International Sale of Goods.
2. The present Convention shall be ratified.
3. The instruments of ratification shall be deposited with the Government of the Netherlands.

Article IX

1. The present Convention shall be open to accession by all States members of the United Nations or any of its Specialized Agencies.
2. The instruments of accession shall be deposited with the Government of the Netherlands.

Article X

1. The present Convention shall come into force six months after the date of the deposit of the fifth instrument of ratification or accession
2. In respect of a State that ratifies or accedes to the present Convention after the deposit of the fifth instrument of ratification or accession, the Convention shall come into force six months after the date of the deposit of its instrument of ratification or accession.

Article XI

Each Contracting State shall apply the provisions incorporated into its legislation in pursuance of the present Convention to contracts of sale to which the Uniform Law applies and which are concluded on or after the date of the entry into force of the Convention in respect of that State.

Article XII

1. Any Contracting State may denounce the present Convention by notifying the Government of the Netherlands to that effect.
2. The denunciation shall take effect twelve months after receipt of the notification by the Government of the Netherlands.

Article XIII

1. Any State may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare, by means of a notification addressed to the Government of the Netherlands, that the present Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect six months after the date of receipt of the notification by the Government of the Netherlands, or, if at the end of that period the Convention has not yet come into force, from the date of its entry into force.
2. Any Contracting State which has made a declaration pursuant to paragraph 1 of this Article may, in accordance with Article XII, denounce the Convention in respect of all or any of the territories concerned.

Article XIV

1. After the present Convention has been in force for three years, any Contracting State may, by a notification addressed to the Government of the Netherlands, request the convening of a conference for the purpose of revising the Convention or its Annex. Notice of this request shall be given to all Contracting States by the Government of the Netherlands, which shall convene a conference for the purpose of such revision if, within a period of six months from the date of such notice, at least one quarter of the Contracting States notify the said Government of their agreement with the request.
2. States invited to the Conference, other than Contracting States, shall have the status of observers unless the Contracting States at the conference decide otherwise by a majority vote. Observers shall have all rights of participation except that of voting.
3. The Government of the Netherlands shall request all States invited to the conference to submit such proposals as they may wish the conference to examine. The Government of the Netherlands shall notify all States invited of the provisional agenda for the Conference and of the texts of all the proposals which have been submitted.

4. The Government of the Netherlands shall communicate to the International Institute for the Unification of Private Law the proposals concerning revision which are submitted to it in accordance with paragraph 3 of this Article.

Article XV

The Government of the Netherlands shall notify the Signatory and Acceding States and the International Institute for the Unification of Private Law of:

- a. the communications received in accordance with paragraph 3 of Article I;
- b. the declarations and notifications made in accordance with Articles II, III, IV, V and VI;
- c. the ratifications and accessions deposited in accordance with Articles VIII and IX;
- d. the dates on which the present Convention will come into force in accordance with Article X;
- e. the denunciations received in accordance with Article XII;
- f. the notifications received in accordance with Article XIII;

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

DONE at THE HAGUE, this first day of July one thousand nine hundred and sixty-four, in the French and English languages, both texts being equally authentic.

The original of the present Convention shall be deposited with the Government of the Netherlands, which shall furnish certified copies to each of the Signatory and Acceding States and to the International Institute for the Unification of Private Law.

ANNEX UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS

CHAPTER I SPHERE OF APPLICATION OF THE LAW

Article 1

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:
 - a. where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

- b. where the acts constituting the offer and the acceptance have been effected in the territories of different States;
 - c. where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.
- 2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.
- 3. The application of the present Law shall not depend on the nationality of the parties.
- 4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.
- 5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods is in force in respect of them.

Article 2

Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law.

Article 3

The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied.

Article 4

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

Article 5

- 1. The present Law shall not apply to sales:
 - a. of stocks, shares, investment securities, negotiable instruments or money;

- b. of any ship, vessel or aircraft, which is or will be subject to registration;
 - c. of electricity;
 - d. by authority of law or on execution or distress.
2. The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments.

Article 6

Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

Article 7

The present Law shall apply to sales regardless of the commercial or civil character of the parties or of the contract.

Article 8

The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be 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.

CHAPTER II GENERAL PROVISIONS

Article 9

1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.
2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.
3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.

Article 10

For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

Article 11

Where under the present Law an act is required to be performed "promptly", it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed.

Article 12

For the purposes of the present Law, the expression "current price" means a price based upon an official market quotation, or, in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price.

Article 13

For the purposes of the present Law, the expression "a party knew or ought to have known", or any similar expression, refers to what should have been known to a reasonable person in the same situation.

Article 14

Communications provided for by the present Law shall be made by the means usual in the circumstances.

Article 15

A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.

Article 16

Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods.

Article 17

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

CHAPTER III
OBLIGATIONS OF THE SELLER

Article 18

The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law.

SECTION I.
DELIVERY OF THE GOODS

Article 19

1. Delivery consists in the handing over of goods which conform with the contract.
2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer.
3. Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods.

Sub-section 1
Obligations of the seller as regards
the date and place of delivery

A. Date of delivery

Article 20

Where the parties have agreed upon a date for delivery or where such date is fixed by usage, the seller shall, without the need for any other formality, be bound to deliver the goods at that date, provided that the date thus fixed is determined or determinable by the calendar or is fixed in relation to a definite event, the date of which can be ascertained by the parties.

Article 21

Where by agreement of the parties or by usage delivery shall be effected within a certain period (such as a particular month or season), the seller may fix the precise date of delivery, unless the circumstances indicate that the fixing of the date was reserved to the buyer.

Article 22

Where the date of delivery has not been determined in accordance with the provisions of Article 20 or 21, the seller shall be bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and to the circumstances.

B. Place of delivery

Article 23

1. Where the contract of sale does not involve carriage of the goods, the seller shall deliver the goods at the place where he carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence.
2. If the sale relates to specific goods and the parties knew that the goods were at a certain place at the time of the conclusion of the contract, the seller shall deliver the goods at that place. The same rule shall apply if the goods sold are unascertained goods to be taken from a specified stock or if they are to be manufactured or produced at a place known to the parties at the time of the conclusion of the contract.

C. Remedies for the seller's failure to perform his obligations as regards the date and place of delivery

Article 24

1. Where the seller fails to perform his obligations as regards the date or the place of delivery, the buyer may, as provided in Articles 25 to 32:
 - a. require performance of the contract by the seller;
 - b. declare the contract avoided.
2. The buyer may also claim damages as provided in Article 82 or in Articles 84 to 87.
3. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

Article 25

The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected.

a) Remedies as regards the date of delivery

Article 26

1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.
2. If the seller requests the buyer to make known his decision under paragraph 1 of this Article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided.
3. If the seller has effected delivery before the buyer has made known his decision under paragraph 1 of this Article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided.
4. Where the buyer has chosen performance of the contract and does not obtain it within a reasonable time, he may declare the contract avoided.

Article 27

1. Where failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller.
2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period shall amount to a fundamental breach of the contract.

Article 28

Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

Article 29

Where the seller tenders delivery of the goods before the date fixed, the buyer may accept or reject delivery; if he accepts, he may reserve the right to claim damages in accordance with Article 82.

b) Remedies as regards the place of delivery

Article 30

1. Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. The buyer shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.
2. If the seller requests the buyer to make known his decision under paragraph 1 of this Article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided.
3. If the seller has transported the goods to the place fixed before the buyer has made known his decision under paragraph 1 of this Article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided.

Article 31

1. In cases not provided for in Article 30, the seller shall retain the right to effect delivery at the place fixed and the buyer shall retain the right to require performance of the contract by the seller.
2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period at the place fixed shall amount to a fundamental breach of the contract.

Article 32

1. If delivery is to be effected by handing over the goods to a carrier and the goods have been handed over at a place other than that fixed, the buyer may declare the contract avoided, whenever the failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract. He shall lose this right if he has not promptly declared the contract avoided.
2. The buyer shall have the same right, in the circumstances and on the conditions provided in paragraph 1 of this Article, if the goods have been despatched to some place other than that fixed.

3. If despatch from a place or to a place other than that fixed does not amount to a fundamental breach of the contract, the buyer may only claim damages in accordance with Article 82.

Sub-section 2
Obligations of the seller as regards the
conformity of the goods

A. Lack of conformity

Article 33

1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:
 - a. part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
 - b. goods which are not those to which the contract relates or goods of a different kind;
 - c. goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
 - d. goods which do not possess the qualities necessary for their ordinary or commercial use;
 - e. goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
 - f. in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.
2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.

Article 34

In the cases to which Article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods.

Article 35

1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes. However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.
2. The seller shall be liable for the consequences of any lack of conformity occurring after the time fixed in paragraph 1 of this Article if it was due to an act of the seller or of a person for whose conduct he is responsible.

Article 36

The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in sub-paragraphs d), e), or f) of paragraph 1 of Article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity.

Article 37

If the seller has handed over goods before the date fixed for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

B. Ascertainment and notification of lack of conformity

Article 38

1. The buyer shall examine the goods, or cause them to be examined, promptly.
2. In case of carriage of the goods the buyer shall examine them at the place of destination.
3. If the goods are redespached by the buyer without transshipment and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redespach, examination of the goods may be deferred until they arrive at the new destination.
4. The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.

Article 39

1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.
2. In giving notice to the seller of any lack of conformity, the buyer shall specify its nature and invite the seller to examine the goods or to cause them to be examined by his agent.
3. Where any notice referred to in paragraph 1 of this Article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.

Article 40

The seller shall not be entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose.

C. Remedies for lack of conformity

Article 41

1. Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may, as provided in Articles 42 to 46:
 - a. require performance of the contract by the seller;
 - b. declare the contract avoided;
 - c. reduce the price.
2. The buyer may also claim damages as provided in Article 82 or in Articles 84 to 87.

Article 42

1. The buyer may require the seller to perform the contract:
 - a. if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects;
 - b. if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;
 - c. if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible.
2. If the buyer does not obtain performance of the contract by the seller within a reasonable time, he shall retain the rights provided in Articles 43 to 46.

Article 43

The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in the case to which paragraph 2 of Article 42 applies, after the expiration of the period referred to in that paragraph.

Article 44

1. In cases not provided for in Article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.
2. The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided.

Article 45

1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of Articles 43 and 44 shall apply in respect of the part or quantity which is missing or which does not conform with the contract.
2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

Article 46

Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.

Article 47

Where the seller has proffered to the buyer a quantity of unascertained goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with Article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

Article 48

The buyer may exercise the rights provided in Articles 43 to 46, even before the time fixed for delivery, if it is clear that goods which would be handed over would not be in conformity with the contract.

Article 49

1. The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in Article 39, unless he has been prevented from exercising his right because of fraud on the part of the seller.
2. After the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. Nevertheless, if the buyer has not paid for the goods and provided that he has given due notice of the lack of conformity promptly, as provided in Article 39, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages.

Section II.
HANDING OVER OF DOCUMENTS

Article 50

Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.

Article 51

If the seller fails to hand over documents as provided in Article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under Articles 24 to 32 or under Articles 41 to 49, as the case may be.

SECTION III.
TRANSFER OF PROPERTY

Article 52

1. Where the goods are subject to a right or claim of a third person, the buyer, unless he agreed to take the goods subject to such right or claim, shall notify the seller of such right or claim, unless the seller already knows thereof, and request that the goods should be freed therefrom within a reasonable time or that other goods free from all rights and claims of third persons be delivered to him by the seller.
2. If the seller complies with a request made under paragraph 1 of this Article and the buyer nevertheless suffers a loss, the buyer may claim damages in accordance with Article 82.
3. If the seller fails to comply with a request made under paragraph 1 of this Article and a fundamental breach of the contract results thereby, the buyer may declare the contract avoided and claim damages in accordance with Articles 84 to 87. If the buyer does not declare the contract avoided or if there is no fundamental breach of the contract, the buyer shall have the right to claim damages in accordance with Article 82.
4. The buyer shall lose his right to declare the contract avoided if he fails to act in accordance with paragraph 1 of this Article within a reasonable time from the moment when he became aware or ought to have become aware of the right or claim of the third person in respect of the goods.

Article 53

The rights conferred on the buyer by Article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person.

Section IV. OTHER OBLIGATIONS OF THE SELLER

Article 54

1. If the seller is bound to despatch the goods to the buyer, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed.
2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.

Article 55

1. If the seller fails to perform any obligation other than those referred to in Articles 22 to 53, the buyer may:
 - a. where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with Articles 84 to 87, or
 - b. in any other case, claim damages in accordance with Article 82.
2. The buyer may also require performance by the seller of his obligations, unless the contract is avoided.

CHAPTER IV OBLIGATIONS OF THE BUYER

Article 56

The buyer shall pay the price for the goods and take delivery of them as required by the contract and the present Law.

Section I
PAYMENT OF THE PRICE

A. Fixing the price

Article 57

Where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract.

Article 58

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

B. Place and date of payment

Article 59

1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place.
2. Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller.

Article 60

Where the parties have agreed upon a date for the payment of the price or where such date is fixed by usage, the buyer shall, without the need for any other formality, pay the price at that date.

C. Remedies for non-payment

Article 61

1. If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation.
2. The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected.

Article 62

1. Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.
2. Where the failure to pay the price at the date fixed does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or, provided that he does so promptly, declare the contract avoided.

Article 63

1. Where the contract is avoided because of failure to pay the price, the seller shall have the right to claim damages in accordance with Articles 84 to 87.
2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with Articles 82 and 83.

Article 64

In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace for the payment of the price.

Section II. TAKING DELIVERY

Article 65

Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over.

Article 66

1. Where the buyer's failure to take delivery of the goods in accordance with the contract amounts to a fundamental breach of the contract or gives the seller good grounds for fearing that the buyer will not pay the price, the seller may declare the contract avoided.
2. Where the failure to take delivery of the goods does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not taken delivery of the goods at the expiration of the additional period, the seller may declare the contract avoided, provided that he does so promptly.

Article 67

1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) 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 declare the contract avoided, provided that he does so promptly, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.
2. If the seller makes the specification himself, he shall inform the buyer of the details thereof and shall fix a reasonable period of time within which the buyer may submit a different specification. If the buyer fails to do so the specification made by the seller shall be binding.

Article 68

1. Where the contract is avoided because of the failure of the buyer to accept delivery of the goods or to make a specification, the seller shall have the right to claim damages in accordance with Articles 84 to 87.
2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with Article 82.

SECTION III. OTHER OBLIGATIONS OF THE BUYER

Article 69

The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee.

Article 70

1. If the buyer fails to perform any obligation other than those referred to in Sections I and II of this Chapter, the seller may:
 - a. where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with Articles 84 to 87; or
 - b. in any other case, claim damages in accordance with Article 82.
2. The seller may also require performance by the buyer of his obligation, unless the contract is avoided.

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

**Section I.
CONCURRENCE BETWEEN DELIVERY OF THE
GOODS AND PAYMENT OF THE PRICE**

Article 71

Except as otherwise provided in Article 72, delivery of the goods and payment of the price shall be concurrent conditions. Nevertheless, the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods.

Article 72

1. Where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of Article 19, effected by handing over the goods to the carrier, the seller may either postpone despatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. In the latter case, he may require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.
2. Nevertheless, when the contract requires payment against documents, the buyer shall not be entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods.

Article 73

1. Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations.
2. If the seller has already despatched the goods before the economic situation of the buyer described in paragraph 1 of this Article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.
3. Nevertheless, the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods, unless the document contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the documents when he acquired it, knowingly acted to the detriment of the seller.

Section II.
Exemptions

Article 74

1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended
2. Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by contract.
3. The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible.

SECTION III.
SUPPLEMENTARY RULES CONCERNING THE
AVOIDANCE OF 'THE CONTRACT'

A. Supplementary grounds for avoidance

Article 75

1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment, the other party has good reason to fear failure of performance in respect of future instalments, he may declare the contract avoided for the future, provided that he does so promptly.
2. The buyer may also, provided that he does so promptly, declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their interdependence such deliveries would be worthless to him.

Article 76

Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided.

Article 77

Where the contract has been avoided under Article 75 or Article 76, the party declaring the contract avoided may claim damages in accordance with Articles 84 to 87.

B. Effects of avoidance

Article 78

1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due.
2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently.

Article 79

1. The buyer shall lose his right to declare the contract avoided where it is impossible for him to return the goods in the condition in which he received them.
2. Nevertheless, the buyer may declare the contract avoided:
 - a. if the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance;
 - b. if the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in Article 38;
 - c. if part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered;
 - d. if the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer or of some other person for whose conduct he is responsible;
 - e. if the deterioration or transformation of the goods is unimportant.

Article 80

The buyer who lost the right to declare the contract avoided by virtue of Article 79 shall retain all the other rights conferred on him by the present Law.

Article 81

1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by Article 83, as from the date of payment.
2. The buyer shall be liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be:
 - a. where he is under an obligation to return the goods or part of them; or
 - b. where it is impossible for him to return the goods or part of them, but the contract is nevertheless avoided.

SECTION IV. SUPPLEMENTARY RULES CONCERNING DAMAGES

A. Damages where the contract is not avoided

Article 82

Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract.

Article 83

Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as in arrears at a rate equal to the official discount rate in the country where he has his place of business or, if has no place of business, his habitual residence, plus 1 percent.

B. Damages where the contract is avoided

Article 84

1. In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to 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 shall be that prevailing in the market in which the transaction took place or, if there is no such current price or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 85

If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

Article 86

The damages referred to in Articles 84 and 85 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract, in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract.

Article 87

If there is no current price for the goods, damages shall be calculated on the same basis as that provided in Article 82.

C. General provisions concerning damages

Article 88

The party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages.

Article 89

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law.

SECTION V. EXPENSES

Article 90

The expenses of delivery shall be borne by the seller; all expenses after delivery shall be borne by the buyer.

SECTION VI. PRESERVATION OF THE GOODS

Article 91

Where the buyer is in delay in taking delivery of the goods or in paying the price, the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expense by the buyer.

Article 92

1. Where the goods have been received by the buyer, he shall take reasonable steps to preserve them if he intends to reject them; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the seller.
2. Where goods despatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorised to take charge of the goods on his behalf is present at such destination.

Article 93

The party who is under an obligation to take steps to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expenses incurred is not unreasonable.

Article 94

1. The party who, in the cases to which Articles 91 and 92 apply, is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation and provided that due notice has been given to the other party of the intention to sell.
2. The party selling the goods shall have 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 and shall transmit the balance to the other party.

Article 95

Where, in the cases to which Articles 91 and 92 apply, the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with Article 94.

CHAPTER VI

PASSING OF THE RISK

Article 96

Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible.

Article 97

1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law.
2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has either declared the contract avoided nor required goods in replacement.

Article 98

1. Where the handing over of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.
2. Where the contract relates to a sale of unascertained goods, delay on the part of the buyer shall cause the risk to pass only when the seller has set aside

goods manifestly appropriated to the contract and has notified the buyer that this has been done.

3. Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery.

Article 99

1. Where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.
2. Where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract.

Article 100

If, in a case to which paragraph 3 of Article 19 applies, the seller, at the time of sending the notice or other document referred to in that paragraph, knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document.

Article 101

The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses.

*CONVENTION RELATING TO A UNIFORM LAW ON
THE FORMATION OF CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS (1964)*

Appendix 4

Convention Relating to a Uniform Law on The Formation of Contracts for the International Sale of Goods (1964)

The States signatory to the present Convention,

Desiring to establish a uniform law on the formation of contracts for the international sale of goods,

Have resolved to conclude a convention to this effect and have agreed upon the following provisions:

Article I

1. Each Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure, not later than the date of the entry into force of the present Convention in respect of that State, the Uniform Law on the Formation of Contracts for the International Sale of goods (hereinafter referred to as "the Uniform Law") forming Annex I to the present Convention.
2. Each Contracting State may incorporate the Uniform Law into its own legislation either in one of the authentic texts or in a translation into its own language or languages.
3. Each Contracting State which is also a Contracting State to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods shall incorporate into its legislation the Articles set forth in Annex II to the present Convention in place of Articles 1 and 4 as set forth in Annex I to the present Convention.
4. Each Contracting State shall communicate to the Government of the Netherlands the texts which it has incorporated into its legislation to give effect to the present Convention.

Article II

1. Two or more Contracting States may declare that they agree not to consider themselves as different States for the purpose of the requirements as to place of business or habitual residence laid down in paragraphs 1 and 2 of Article 1 of the Uniform Law, because they apply to the formation of contracts of sale which in the absence of such a declaration would be governed by the Uniform Law the same or closely related legal rules.
2. Any contracting State may declare that it does not consider one or more non-Contracting States as different States from itself for the purpose of the requirements of the Uniform Law which are referred to in paragraph 1 of this

Article, because such States apply to the formation of contracts of sale which in the absence of such a declaration would be governed by the Uniform Law legal rules which are the same as or closely related to its own.

3. If a State which is the object of a declaration made under paragraph 2 of this Article subsequently ratifies or accedes to the present Convention, the declaration shall remain in effect unless the ratifying or acceding State declares that it cannot accept it.
4. Declarations under paragraphs 1, 2 or 3 of this Article may be made by the State concerned at the time of the deposit of its instrument of ratification or accession to the present Convention or at any time thereafter and shall be addressed to the Government of the Netherlands. The declaration shall take effect three months after the date of its receipt by the Government of the Netherlands or, if at the end of this period the present Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

Article III

By way of derogation from Article I of the Uniform Law, any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law only if each of the parties to the contract of sale has his place of business or, if he has no place of business, his habitual residence in the territory of a different Contracting State, and in consequence may insert the word "Contracting" before the word "States" where the latter word first occurs in paragraph 1 of Article I of the Uniform Law.

Article IV

1. Any State which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the formation of contracts for the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those previous Conventions only if that Convention itself requires the application of the Uniform Law.
2. Any State which makes a declaration under paragraph 1 of this Article, shall inform the Government of the Netherlands of the Convention or the Conventions referred to in that declaration.

Article V

Any State which has made a declaration under paragraphs 1 or 2 of Article II, Article III or Article IV of the present Convention may withdraw it at any time by a notification addressed to the Government of the Netherlands. Such withdrawal shall take effect three months after the date of the receipt of the notification by the Government of the Netherlands and, in the case of a declaration made under paragraph 1 of Article II, shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State.

Article VI

1. The present Convention shall remain open for signature until the 31st day of December 1965 by the States represented at The Hague Conference of 1964 on the Unification of Law governing the International Sale of Goods.
2. The present Convention shall be ratified.
3. The instruments of ratification shall be deposited with the Government of the Netherlands.

Article VII

1. The present Convention shall be open to accession by all States members of the United Nations or any of its Specialized Agencies.
2. The instruments of accession shall be deposited with the Government of the Netherlands.

Article VIII

1. The present Convention shall come into force six months after the date of the deposit of the fifth instrument of ratification or accession.
2. In respect of a State that ratifies or accedes to the present Convention after the deposit of the fifth instrument of ratification or accession, the Convention shall come into force six months after the date of the deposit of its instrument of ratification or accession.

Article IX

Each Contracting State shall apply the provisions incorporated into its legislation in pursuance of the present Convention to offers, replies and acceptances to which the Uniform Law applies and which are made on or after the date of the entry into force of the Convention in respect of that State.

Article X

1. Any Contracting State may denounce the present Convention by notifying the Government of the Netherlands to that effect.
2. The denunciation shall take effect twelve months after receipt of the notification by the Government of the Netherlands.

Article XI

1. Any State may, at the time of the deposit of its instrument or ratification or accession or at any time thereafter, declare, by means of a notification addressed to the Government of the Netherlands, that the present Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect six months after the date of receipt of the notification by the Government of the Netherlands, or, if at the end of that period the Convention has not yet come into force, from the date of its entry into force.
2. Any Contracting State which has made a declaration pursuant to paragraph 1 of this Article may, in accordance with Article X, denounce the Convention in respect of all or any of the territories concerned.

Article XII

1. After the present Convention has been in force for three years, any Contracting State may, by a notification addressed to the Government of the Netherlands, request the convening of a conference for the purpose of revising the Convention or its Annexes. Notice of this request shall be given to all Contracting States by the Government of the Netherlands which shall convene a conference for the purpose of such revision if, within a period of six months from the date of such notice, at least one quarter of the Contracting States notify the said Government of their agreement with the request.
2. States invited to the conference, other than Contracting States, shall have the status of observers unless the Contracting States at the conference decide otherwise by a majority vote. Observers shall have all rights of participation except that of voting.
3. The Government of the Netherlands shall request all States invited to the conference to submit such proposals as they may wish the conference to examine. The Government of the Netherlands shall notify all States invited of the provisional agenda for the conference and of the texts of all the proposals which have been submitted.
4. The Government of the Netherlands shall communicate to the International Institute for the Unification of private Law the proposals concerning revision submitted to it in accordance with paragraph 3 of this Article.

Article XIII

The Government of the Netherlands shall notify the Signatory and Acceding States and the International Institute for the Unification of Private Law of:

- a. the communications received in accordance with paragraph 4 of Article I;

- b. the declarations and notifications made in accordance with Articles II, III, IV and V;
- c. the ratifications and accessions deposited in accordance with Articles VI and VII;
- d. the dates on which this Convention will come into force in accordance with Article VIII;
- e. the denunciations received in accordance with Article X;
- f. the notifications received in accordance with Article XI;

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.

DONE at THE HAGUE, this first day of July one thousand nine hundred and sixty-four, in the French and English languages, both texts being equally authentic.

The original of the present Convention shall be deposited with the Government of the Netherlands, which shall furnish certified copies to each of the Signatory and Acceding States and to the International Institute for the Unification of Private Law.

ANNEX I
UNIFORM LAW ON THE FORMATION OF CONTRACTS
FOR THE INTERNATIONAL SALE OF GOODS

Article 1

1. The present Law shall apply to the formation of contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:
 - a. where the offer or the reply relates to goods which are in the course of carriage or will be carried from the territory of one State to the territory of another;
 - b. where the acts constituting the offer and the acceptance are effected in the territories of different States;
 - c. where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance are effected.
2. Where a party does not have a place of business, reference shall be made to his habitual residence.
3. The application of the present Law shall not depend on the nationality of the parties.

4. Offer and acceptance shall be considered to be effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them are sent and received in the territory of that State.
5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods is in force in respect of them.
6. The present Law shall not apply to the formation of contract of sale:
 - a. of stocks, shares, investment securities, negotiable instruments or money;
 - b. of any ship, vessel or aircraft, which is or will be subject to registration;
 - c. of electricity;
 - d. by authority of law or on execution of distress.
7. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.
8. The present Law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.
9. Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law.

Article 2

1. The provisions of the following Articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.
2. However, a term of the offer stipulating that silence shall amount to acceptance is invalid.

Article 3

An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.

Article 4

1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.
2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale.

Article 5

1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.
2. After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.
3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.
4. A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under paragraph 2 of Article 6.

Article 6

1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.
2. Acceptance may also consist of the despatch of the goods or of the price or of any other act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage.

Article 7

1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.
2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.

Article 8

1. A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror, and usage. In the case of an oral offer, the acceptance shall be immediate, if the circumstances do not show that the offeree shall have time for reflection.
2. If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the hour of the day the telegram was handed in for despatch.
3. If an acceptance consists of an act referred to in paragraph 2 of Article 6, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present Article.

Article 9

1. If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.
2. If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed.

Article 10

An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance.

Article 11

The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction.

Article 12

1. For the purposes of the present Law, the expression "to be communicated" means to be delivered at the address of the person to whom the communication is directed.
2. Communications provided for by the present Law shall be made by the means usual in the circumstances.

Article 13

1. Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract.
2. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.

ANNEX II

Article 1

The present Law shall apply to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods.

Article 4

1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.
2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and the provisions of the Uniform Law on the International Sale of Goods.

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