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Seventh session
Geneva, 5 January 1976

DRAFT COMMENTARY ON THE DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS

Note by the Secretary-General

1. At its sixth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a commentary on the draft convention on the international sale of goods based on the reports on the work of its sessions and the various studies made (A/CN.9/100, para. 119). The Working Group also requested the Secretariat to transmit a draft commentary to representatives for unofficial comments. This draft commentary has been prepared in response to that request.

2. The draft commentary has been prepared on the text of the draft convention as it appears in annex I to the report of the Working Group on the work of its sixth session (A/CN.9/100). With only a few minor exceptions the existence of square brackets in the draft convention or the possibility that the text of the draft convention might be amended has been ignored in the preparation of this draft commentary. The draft commentary explains the text as it currently exists. Naturally, the draft commentary will be amended to reflect subsequent changes made in the text of the draft convention.

3. A second working paper will be distributed to representatives prior to the seventh session of the Working Group (A/CN.9/WG.2/WP.23). That working paper will point out and explain some of the more significant statements in the draft commentary to which the Secretariat believes the Working Group may wish to give special consideration. It will also discuss and suggest possible solutions for a number of problems in the draft convention of both a drafting and a substantive nature which were encountered in the preparation of this draft commentary.

DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS

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DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS

Chapter I. Sphere of application

Article 1

(1) The present Convention shall apply to contracts of sales of goods entered into by parties whose places of business are in different States:

(a) When the States are both 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 shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.

PRIOR UNIFORM LAW

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

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

COMMENTARY

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

Basic criterion, paragraph (1)

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

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

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

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

(1) To reduce the necessity of resorting to the principles of private international law;

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

5. ULIS article 1, employs the same basic requirement. However, in ULIS the scope of application is further narrowed by a requirement that at least one of the three following cases also be present:

(1) 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; or

(2) The acts constituting the offer and the acceptance have been effected in the territories of different States; or

(3) 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.

6. The additional requirement in ULIS is intended to specify that in order for the sale to be "international", not only the parties but also the transaction must be international, either because the contract was formed by communications between different States or because the goods were in the process of moving or were to move from one State to another.

7. In fact, in most situations in which there is a contract of sale between persons whose places of business are in different States, one of these three additional requirements in ULIS article 1, is also met. However, it was found that in the fact situations described in the following three paragraphs these additional requirements gave rise to difficulties.

8. A sale of goods between two persons from different States made at a commercial fair, even if the fair is in a third country, would not be governed by ULIS if the buyer was to take delivery at the fair because every element of that transaction would have taken place in one country. It could be expected that under the rules of private international law the applicable law in such a case would be the law of the location of the fair as the country where the offer and acceptance were made and where the goods were to be handed over to the buyer. However, it would be more appropriate to apply a law intended for the international sale of goods, especially since it could be expected that the goods would be removed promptly after they had been handed over at the fair and that the payment or financing of the sale would be international.

9. Similarly, it was not clear whether under ULIS the use of a particular trade term, i.e., FOB, CIF, Delivered at, would affect the application of the Uniform Law because of the place at which the delivery was made.

Example 1 A: The contract of sale quoted the price on FOB terms. Therefore, delivery was "effected by handing over the goods to the carrier for transmission to the buyer", 2/ an act which would normally take place in the State of the seller. Accordingly, unless additional elements were present it would appear that a contract of sale FOB was not subject to ULIS. However, if the contract terms were Ex ship, delivery would be made in the port of destination and ULIS would normally be applicable.

10. A third case which caused difficulty was where the seller kept a stock of goods in the buyer's country in order to make quick deliveries. If at the time the contract was concluded the seller intended to supply the goods from the stock already in the buyer's country, ULIS would not apply. If the seller intended to supply the goods from his factory in his country, ULIS would apply. If at the time the contract was concluded the seller had not decided from which source he would supply the goods, it would be unclear whether ULIS applied or not.

11. In order to include all three of the above cases in the coverage of the present convention, the additional requirement of ULIS set out in paragraph 5, supra, has been eliminated from article 1 of the present convention.

12. Although the elimination of the additional requirement found in ULIS broadens the scope of application of this convention, the exclusion in article 2 of all sales "of goods bought for personal, family or household use" limits the application of this convention to commercial sales.

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

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

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

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

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

2/ ULIS article 19, para. 2. See also article 15 (a) of the present convention and paras. 6 to 8 of the commentary thereon.

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

16. A further application of this principle is that if the parties have designated the law of a contracting State as the law of the contract, this convention is applicable even though the parties have not specifically mentioned the convention.

17. The additional requirement that either both parties have their source of business in contracting States or that the rules of private international law lead to the application of the law of a contracting State is in sharp contrast to ULIS which applies to a contract of sale if the parties have their place of business in different States and one of the additional criteria set out in paragraph 5, supra, is met, even though neither the places of business of the parties nor the transaction has any contact with a contracting State.

Awareness of situation, paragraph (2)

18. The simplicity and clarity of the criteria for the application of the present convention are further enhanced by paragraph (2) of this article. Under paragraph (2) the convention will not be applicable if "the fact that the parties have their places of business in different States ... does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract". One example of such a situation is where the two parties appeared to have their places of business in the same State but one of the parties was acting as the agent for a foreign undisclosed principal. In such a situation paragraph (2) provides that the sale, which appears to be between two parties whose places of business are in the same State, will not be governed by the convention.

Article 2

The present Convention shall not apply to sales:

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

(b) By auction;

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

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

(e) Of ships, vessels or aircraft;

(f) Of electricity.

PRIOR UNIFORM LAW

ULIS, article 5.

Prescription Convention, article 4.

COMMENTARY

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

Exclusion of consumer sales, subparagraph (a)

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

3. The rationale for excluding consumer sales from the convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this convention. In addition, most consumer sales are domestic transactions and it was felt that the convention should not apply to the relatively few cases where consumer sales were international transactions (e.g. because the buyer was a tourist with his habitual residence in another country). 1/

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

Exclusion of sales by auction, subparagraph (b)

5. Subparagraph (b) of this article excludes from the scope of this convention sales by auction. Because sales by auction are often subject to special rules under the applicable national law, it was considered desirable that they should remain subject to these special rules. In addition, the application of this convention

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1/ See article 6 (b).

should not be dependent upon the location of the place of business of the successful bidder at an auction, since at the opening of the auction the seller could not know which buyer would make a particular purchase.

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

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

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

7. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments or money. 2/ Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries are subject to special mandatory rules.

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

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

9. This subparagraph excludes from the scope of the convention all sales of ships, vessels and aircraft. In some legal systems, there may be a question whether ships, vessels and aircraft are "goods". In most legal systems at least certain ships, vessels and aircraft are subject to special registration requirements. The rules specifying which ones must be registered differ widely. Since the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded in order to make uniform the application of this convention.

Exclusion of sales of electricity, subparagraph (f)

10. This subparagraph excludes sales of electricity from the scope of this convention on the ground that international sales of electricity present unique problems that are different from those presented by the usual international sales of goods.

2/ In some legal systems such commercial paper is not considered to be "goods". Without the exclusion of the sales of such paper, there might have been significant difference in interpretation of the present convention.

Article 3

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

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Convention unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

PRIOR UNIFORM LAW

ULIS, article 6.

Prescription Convention, article 6.

COMMENTARY

1. This article deals with two different situations relating to mixed contracts.

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

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

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

Supply of materials by the buyer, paragraph (2)

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

5. However, the concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for

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

Article 4

The present Convention shall also apply where it has been chosen as the law of the contract by the parties.

PRIOR UNIFORM LAW

ULIS, article 4.

COMMENTARY

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

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

3. The choice of this convention as the law of the contract would govern only the obligations of the seller and the buyer arising from the contract of sale. It would not affect any mandatory provisions of national law which would be applicable. 1/

1/ See article 7.

Article 5

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

PRIOR UNIFORM LAW

ULIS, article 3.

COMMENTARY

1. The non-mandatory character of the convention is explicitly stated in article 5. The parties may exclude its application entirely by choosing a law other than this convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the convention.

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

Article 6

For the purpose of the present Convention:

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

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

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

PRIOR UNIFORM LAW

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

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

COMMENTARY

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

Place of business, subparagraph (a)

2. This subparagraph deals with the situation where one of the parties to the international sales contract has places of business in more than one State. For the purpose of determining whether this convention applies no problem arises where all the places of business of one party (X) are situated in contracting States other than the one where the other party (Y) has his place of business. Whichever one is designated as the relevant place of business of X, the places of business of X and Y will be in different States. The problem arises only when one of X's places of business is situated either in the same State as the place of business of Y or in a non-contracting State. In such a case it becomes crucial to determine which of these different places of business is the relevant place of business within the meaning of article 1.

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

Habitual residence, subparagraph (b)

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

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

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

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

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

Article 7

The present Convention shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Convention 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.

PRIOR UNIFORM LAW

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

COMMENTARY

1. Article 7 specifies that the only obligations arising out of a contract of sale of goods which are governed by this convention are those of the buyer and seller. The article also makes it clear that, except as expressly provided elsewhere in the convention, the convention is not 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.

Formation and validity

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

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

Passing of property

4. This article makes it clear that the convention does not govern the passing of property in the goods sold. In some legal systems property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so since rules are provided in the convention for several questions linked, at least in certain legal systems, to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person not accepted by the buyer; 1/ the obligation of the buyer to pay the price; 2/ the passing of the risk of loss or damage to the goods; 3/ the obligation to preserve the goods. 4/

1/ Article 25.

2/ Article 39.

3/ Articles 66-69.

4/ Articles 61-65.

Chapter II. General provisions

Article 8

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

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

PRIOR UNIFORM LAW

ULIS, article 9.

COMMENTARY

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

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

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

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

5. Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy. 1/ Therefore, the provision in ULIS article 9, paragraph 2, that in the event of conflict between an applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, a provision regarded to be in conflict with the constitutional principles of some States and against public policy in others, has been eliminated as unnecessary.

6. This article does not provide any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade and for which the parties have given no interpretation. In some cases such an expression, provision or form of contract may be considered to be a usage or practice between the parties, in which case this article would be applied.

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1/ Article 5.

Article 9

A breach committed by one of the parties to the contract shall be regarded as fundamental if it results in substantial detriment to the other party and the party in breach had reason to foresee such a result.

PRIOR UNIFORM LAW

ULIS, article 10.

1. Article 9 defines "fundamental breach".

2. The definition of fundamental breach is important because various remedies of buyer and seller, 1/ as well as some aspects of the passing of the risk, 2/ rest upon it.

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

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

1/ See articles 27 (2), 29 (1), 30 (a), 32 (2), 45 (a) and 49.

2/ See article 69.

Article 10

Communications provided for by the present Convention shall be made by the means usual in the circumstances.

PRIOR UNIFORM LAW

ULIS, article 14.

COMMENTARY

1. Article 10 makes it clear that a party who is required by the present convention to send a communication must use the means usual in the circumstances. There may be more than one means of communication which is usual in the circumstances. In such a case the sender may use the one which is the most convenient for him.

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

3. If the sender uses another means of communication than that which is usual in the circumstances, he must suffer the consequences of loss or delay in transmission. 1/

Article 11

/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./

PRIOR UNIFORM LAW

ULIS, article 15.

Uniform Law on the Formation of Contracts, article 3.

COMMENTARY

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

1/ See article 23 (4) and paras. 10 and 11 of the commentary thereon.

2. Even though article 11 could be considered to relate to a matter of formation or validity, 1/ the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract led to the decision to include it in the present convention. Nevertheless, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against any party which concluded the non-written contract even though the contract itself would be enforceable between the parties.

Article 12

Where, in accordance with article 27, paragraph (1), or article 43, paragraph (2), 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 a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention.

PRIOR UNIFORM LAW

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

ULIS, article 16.

COMMENTARY

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

2. If the seller does not perform one of his obligations under the contract of sale or the present convention, article 27 provides that "the buyer has the right to require the seller to perform the contract". Similarly, article 43 authorizes the seller to "require the buyer to perform his obligation".

3. The question arises whether the injured party can obtain the aid of a court to enforce the obligation of the party in default to perform the contract. In some legal systems the courts are authorized to order specific performance of an obligation. In other legal systems courts are not authorized to order certain forms of specific performance and those States could not be expected to alter fundamental principles of their judicial procedure in order to bring this convention into force. Therefore, article 12 provides that a court shall not be

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

bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this convention, i.e., of domestic contracts of sale.

4. It would be easy to exaggerate the loss of uniformity or of effective relief to a litigant by virtue of this article. The provision relates only to one means of enforcing rights which remain in being and upon which the person entitled can rely in every other respect. 1/ Moreover, enforcing a right to specific performance through litigation is subject to the delays inherent in litigation. Since a party who is resisting performance will usually claim some justification, such as a dispute over the required quality or a breach by the buyer in providing for payment, the party seeking performance can seldom await a final decision by the trial and appellate courts and eventual coerced performance. Instead, an injured buyer will supply his needs elsewhere while a seller will sell the goods to a different purchaser. If damage results, the injured party can pursue his claim without interrupting his business activity. Hence, even in legal systems where specific performance is theoretically available in the normal case, this remedy is seldom invoked in legal proceedings involving the sale of goods.

Article 13

In interpreting and applying the provisions of this convention, regard shall be had to its international character and to the need to promote uniformity.

PRIOR UNIFORM LAW

ULIS, article 17.

Prescription Convention, article 7.

COMMENTARY

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

1/ If the party in breach is requested to perform and does not do so, the other party "may resort to any remedy available to him under the present Convention" Articles 28 (1) and 44 (1). Therefore, if the remedy of judicially enforced specific performance is not available, the injured party may claim damages, reduce the price or avoid the contract. See the commentary on articles 28 and 44.

Chapter III. Obligations of the seller

Article 14

The seller shall deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present convention.

PRIOR UNIFORM LAW

ULIS, article 18.

COMMENTARY

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

Section I. Delivery of the goods and documents

A. Obligations of the seller as regards the date and place of delivery

Article 15

Delivery of the goods is effected:

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

(b) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unidentified goods to be drawn from a specific stock or to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

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

PRIOR UNIFORM LAW

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

COMMENTARY

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

2. The concept of "delivery" is less important in this convention than it is in ULIS as a tool for analysing the rights and obligations of the buyer and seller. In ULIS such matters as the passage of the risk of loss and the buyer's obligation to pay the contract price depend on the "delivery" of the goods. 1/ Delivery in turn "consists in the handing over of goods which conform with the contract". 2/ Therefore, under ULIS the use of the concept of delivery led to the result that risk of loss would not pass and the buyer would not be required to pay for the goods if the goods did not conform to the contract. However, since such a result was unacceptable if the buyer received and kept the goods, other provisions which did not rely on the concept of delivery were necessary. 3/

3. The present convention states rules as to the passage of the risk of loss and the buyer's obligation to pay the purchase price in terms of commercial events rather than in terms of the concept of delivery. 4/ Nevertheless, it was thought that delivery is a concept which cannot be avoided. It describes the act by which the seller makes the goods available to the buyer, thereby discharging his primary obligation under the contract. The word "delivery" is used on numerous occasions throughout this convention. 5/

1/ ULIS articles 71 and 97, para. 1.

2/ ULIS article 19, para. 1.

3/ ULIS articles 72 and 97, para. 2.

4/ Articles 39 and 67-69.

5/ In the English language text of the Draft Convention (A/CN.9/100, annex I), the word "delivery" in one of its forms is used in the following articles: 14, 15, 16 (1), 17, 18, 19 (1), 21, 25 (1), 25 (2), 27 (2), 28, 29 (1), 30 (b), 32 (2), 33 (1), 39 (3), 41, 48 (1), 48 (2), 52 (1), 53, 54 (2) (b), 57 (1), 57 (2), 61. In addition the buyer's obligation to "take delivery" is mentioned in articles 34, 41 and 43 (2). It should be noted that art. 15 contains only the seller's obligation to deliver as that term is used in the present convention. It does not govern the obligation of the carrier to deliver the goods to the consignee or other party authorized to receive the goods. Because of the difference in definitions of "delivery" in regard to different aspects of the total transaction, the same goods may be "delivered" to the buyer at different times and in different ways by the seller and by the carrier.

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

"The goods" which must be delivered

5. In order for the seller to deliver "the goods", in the case of specific goods, he must deliver the exact goods called for in the contract. In the case of unidentified goods, he must deliver goods which generally conform to the description of the type of goods called for by the contract. Therefore, if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes. However, the seller has delivered "the goods" if he does the appropriate act called for by subparagraphs (a) to (c) in respect of the specific goods described in the contract or, in the case of unidentified goods, of goods which conform to the generic description in the contract even though they are non-conforming or are not delivered at the time required or by the means of transportation specified. Therefore, the delivery of No. 3 grade corn when No. 2 grade was called for or the delivery of five tons when 10 tons were called for would constitute delivery of "the goods". Even though "the goods" had been "delivered", the buyer would be able to exercise any rights which he might have because of the seller's failure to "deliver the goods ... as required by the contract and the present Convention". 6/ Among the buyer's rights would be the right to avoid the contract where the failure of the seller amounted to a fundamental breach. 7/ Nevertheless, the seller would have "delivered the goods".

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

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

7. The contract of sale involves the carriage of goods if the seller is required or authorized to ship the goods to the buyer. Normally the determination whether the contract requires or authorizes the seller to ship the goods will follow from the trade term used. A CIF or C and F contract is always a shipment contract. A contract FOB (point of shipment) would also be a shipment contract. However, a contract Ex Ship would not be a shipment contract and would not fall under this subparagraph because in such a contract the seller's obligation is to make the goods available to the buyer at the port of destination.

6/ Article 14. Buyer's remedies for seller's breach are set forth in article 26.

7/ Article 30 (a). For the effect of a fundamental breach by seller on the passing of the risk of loss, see article 69.

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

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

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

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

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

12. If the goods are already in transit at the time of the conclusion of the contract, the contract of sale is not one which "involves" the carriage of goods under subparagraph (a) of this article but is one which involves goods which are at a particular place and which are therefore subject to this subparagraph. This is true whether the sale is of an entire shipment under a given bill of lading, in which case the goods are specified goods, or whether the sale is of only a part of the goods covered by a given bill of lading. Otherwise, if the contract of sale of goods already in transit were held to "involve the carriage of goods", thereby making it subject to article 15 (a), the seller would never "deliver the goods" because the goods would not be handed over to the carrier "for transmission to the buyer". However, by virtue of article 67 (2) the risk of loss would pass to the buyer at the time the goods were handed over to the /first/ carrier, even though the handing over took place prior to the conclusion of the contract of sale.

/...

13. Both parties must know of the location of the specific goods, of the location of the specific stock from which the goods to be delivered are to be drawn, or of the place at which the goods are to be manufactured or to be produced. Their knowledge must be express; it does not suffice if one or the other party ought to have had such knowledge but did not. Moreover, they must have this knowledge at the time of the conclusion of the contract.

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

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

In other cases, subparagraph (c)

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

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

Effect of reservation of title

18. Delivery is effected under this article and risk of loss passes under article 67 or 68 even though the seller reserves title to the goods or otherwise reserves an interest in the goods if such reservation of title or other interest is for the purpose of securing the payment of the price.

Article 16

(1) If the seller is bound to deliver the goods to a carrier, 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. Where the goods are not clearly marked with an address or otherwise identified to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

(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.

PRIOR UNIFORM LAW

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

COMMENTARY

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

Contract of carriage and identification, paragraph (1)

2. Article 16 (1) provides that "if the seller is bound to deliver the goods to a carrier", it is the seller's obligation to make the necessary contracts of carriage. The seller is bound to deliver the goods to a carrier if the contract of sale is, inter alia, CIF. C & F or FOB (point of shipment). He is not bound to deliver the goods to a carrier if the contract of sale is, inter alia, FAS. 1/ In this latter case it is the buyer's obligation to make the contract of carriage.

3. The rule that it is the seller's obligation to make the necessary contracts of carriage would appear to give a different result from that specified in Incoterms 1953 in respect of the contract FOB (point of shipment). Under Incoterms 1953 the FOB (point of shipment) contract places on the buyer the responsibility for chartering a vessel or reserving the necessary space on board a vessel. Therefore, if the parties specify in their contract that their FOB term is to be interpreted according to Incoterms 1953, article 16 (1) would not apply.

4. Where the seller is obligated to make the contract of carriage, he must make it in the usual way and on the usual terms for the type of goods in question and in the light of the other circumstances of the sale.

1/ These are the results in, for example, Incoterms 1953.

5. The second sentence of paragraph (1) applies to the situation in which a seller who is required or authorized by the contract of sale to ship the goods to the buyer loads goods on a carrier without specifying whose goods they are. This would most often occur when identical goods are being shipped to several buyers. The danger is that subsequent to the loading some of the goods will be damaged. Since article 67 (1) specifies that the risk of loss passes to the buyer when the goods are handed over to the /first/ carrier for transmission to the buyer, the seller would be in a position to determine which buyer would suffer the loss. Therefore, article 16 (1) requires the seller to identify which goods are those shipped pursuant to the contract by sending the buyer notice of the consignment and, if necessary, some document specifying the goods.

6. If the failure by the seller to fulfil his obligation to send notice of the consignment, including if necessary some document specifying the goods, constitutes a fundamental breach of the contract, the risk of loss does not pass to the buyer with respect to loss or deterioration resulting from such breach. 2/

Insurance, paragraph (2)

7. Either the seller or the buyer may be obligated under the contract of sale to procure insurance for loss of the goods during their carriage. This obligation will normally be determined by the trade term used in the contract of sale and is not governed by the passage of the risk of loss. For example, if the price is quoted CIF, the seller must procure the insurance even though the risk of loss passes to the buyer when the goods are handed over to the /first/ carrier for transmission to the buyer. 3/ If the price is quoted C and F or FOB, in the absence of other indications in the contract, it is the buyer's responsibility to procure any necessary insurance. 4/

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

2/ Article 69 (2).

3/ Article 67 (1).

4/ See, for example, Incoterms 1953.

Article 17

The seller shall deliver the goods:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

PRIOR UNIFORM LAW

ULIS, articles 20, 21 and 22.

COMMENTARY

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

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

Delivery on fixed or determinable date, subparagraph (a)

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

Delivery during a period, subparagraph (b)

4. In international trade it is common for the date of delivery to be fixed in terms of a period of time. This is generally to allow the seller some flexibility in preparing the goods for shipment and in providing for the necessary transportation. Therefore, it is normally the seller who would be

expected to fix the exact date for delivery. Subparagraph (b) recognizes this situation by providing that the seller shall deliver the goods within the period specified by agreement or usage "on a date chosen by the seller".

5. The seller may choose the delivery date by notifying the buyer of his intention to deliver on a date fixed in the future. He may also choose the delivery date by his actions. In either case once the seller has chosen a specific delivery date within the allowable period, that date becomes the delivery date. This principle is illustrated by the following examples:

Example 17A: Seller was to deliver "during the month of October". On 4 October seller notified buyer that he would deliver on 15 October. As from 4 October the delivery date was 15 October.

Example 17B: Pursuant to a CIF contract seller was to deliver "during the month of October". On 15 October seller handed the goods over to the carrier, thereby effecting delivery. 1/ By this act seller also chose the date of delivery as 15 October.

6. The major significance of the seller having chosen 15 October as the date of delivery in examples 17A and 17B is that if the goods were non-conforming, seller may wish to cure the defect. Prior to the date for delivery, seller's right to cure is absolute "provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense". 2/ After the date for delivery the buyer can terminate the seller's right to cure by declaring the contract avoided or by declaring the reduction of the price. 3/ Therefore, in the two examples given, the seller's right to cure can be terminated by the buyer as from 15 October rather than from 30 October.

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

8. Where the buyer is to choose the delivery date, the seller will need notice of that date in time to prepare the goods for shipment and to make any contracts of carriage he may be required to make under the contract of sale. 4/ If the buyer does not give such notice in adequate time, the seller would not be liable for his own non-performance to the extent he could prove that it was due to the buyer's fault and not his own. 5/

1/ Article 15 (a).

2/ Article 21.

3/ Article 29 (1).

4/ For the extent to which the seller is obligated to make the contract of carriage, see paras. 2 and 3 of commentary on article 16.

5/ See article 50 (1).

Delivery in other cases, subparagraph (c)

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

Article 18

Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage.

PRIOR UNIFORM LAW

ULIS, article 50.

COMMENTARY

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

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

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

4. Article 18 does not limit the right of the seller to withhold the documents until paid by the buyer when the contract calls for payment against documents. 1/

1/ Article 39.

B. Obligations of the seller as regards the conformity of the goods

Article 19

(1) The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract. Where not inconsistent with the contract the goods shall:

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

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

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

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

(2) The seller shall not be liable under subparagraphs (a) to (d) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect.

PRIOR UNIFORM LAW

ULIS, articles 33 and 36.

COMMENTARY

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

2. This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under the present convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality. 1/

1/ The necessity that the seller hand over or place at the buyer's disposal goods which meet the contract description in order to have "delivered the goods" is discussed in para. 5 of the commentary on article 15.

It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods. 2/

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

3. Paragraph (1) states the standards by which the seller's obligation to deliver goods which conform to the contract shall be measured. The first sentence emphasizes that the goods must conform to the quantity and quality and description required by the contract and be contained or packaged in the manner required by the contract. This provision recognizes that the overriding source for the standard of conformity is the contract between the parties. The remainder of this paragraph states specific obligations of the seller as to conformity "where not inconsistent with the contract".

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

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

5. The seller is not obligated to deliver goods which are fit for some special purpose which is not "a purpose for which goods of the same description are ordinarily used" unless the buyer has "expressly or impliedly made known to the seller at the time of contracting" of such intended use. 3/ This problem may arise if the buyer intends to use the goods for a purpose for which goods of this kind are sometimes, but not ordinarily used. In the absence of some indication from the buyer that such a particular purpose is intended, the seller would have no reason to attempt to supply goods appropriate for such purpose.

2/ Article 26 (1).

3/ Subpara. (1) (b).

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

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

7. The purpose must be made known to the seller at the time of contracting so that the seller can refuse to conclude the contract if he is unable to furnish goods adequate for that purpose.

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

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

Sample or model, subparagraph (1) (c)

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

Packaging, subparagraph (1) (d)

11. Subparagraph (1) (d) makes it one of the seller's obligations in respect of the conformity of the goods that they shall "be contained or packaged in the manner usual for such goods". This provision is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging.

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

12. The obligations in respect of quality in subparagraphs (1) (a) to (d) are imposed on the seller by this convention because in the usual sale the buyer would

/...

legitimately expect the goods to have such qualities even if they were not explicitly stated in the contract. However, if at the time of contracting the buyer knew or could not have been unaware of a non-conformity in respect of one of those qualities, he could not later say that he had expected the goods to conform in that respect.

13. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore, subject to the first sentence of paragraph (1). Even if at the time of contracting the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate. 4/

Article 20

(1) The seller shall be liable in accordance with the contract and the present convention for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. /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 also be liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and is due to a breach of any of the obligations of the seller, including a breach of an express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period.

PRIOR UNIFORM LAW

ULIS, article 35.

COMMENTARY

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

4/ Article 26 (1).

Basic rule, paragraph (1)

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

3. Although the conformity of the goods is measured at the time the risk passes, the buyer may not know of a non-conformity until much later. This may occur because the non-conformity becomes evident only after the goods have been used. It may also occur because the contract involves the carriage of goods. In such a case the risk passes when the goods are handed over to the /first/ carrier for transmission to the buyer. 1/ The buyer, however, will normally not be able to examine the goods until after they have been handed over to him by the carrier at the point of destination, some time after the risk has passed. In either case if the non-conformity existed at the time the risk passed, the seller is liable.

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

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

4. The second sentence of paragraph (1) is intended to solve a problem which arises out of the rules on risk of loss. If the goods are so defective as to amount to a fundamental breach of contract, the risk does not pass to the buyer so long as he has the right to avoid the contract. The buyer has the right to avoid the contract until either (1) he fails to give the required notice of non-conformity 2/ or (2) declares a reduction of the price, 3/ a remedy which is inconsistent with a subsequent avoidance of the contract. Until one or the other of these two events occurred, risk would not have passed and, therefore

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1/ Article 67 (1).

2/ Article 23 and paras. 2 to 6 of the commentary thereon.

3/ Article 31. The other remedies open to buyer, damages (article 26 (1)) and specific performance of the contract (article 27), are not inconsistent with a subsequent avoidance of the contract by buyer. See article 51 (1).

under the first sentence of paragraph (1) the time for measuring the conformity of the goods would not arrive. The difficulties which would arise from such a situation are obviated by the second sentence of paragraph (1) which provides that "the conformity of the goods with the contract shall be determined by their condition at the time when the risk would have passed had they been in conformity with the contract".

Damage subsequent to passage of risk, paragraph (2)

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

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

Article 21

If the seller has delivered goods before the date for delivery 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 delivered, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 55.

PRIOR UNIFORM LAW

ULIS, article 37.

COMMENTARY

1. Article 21 deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but the

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goods delivered do not conform with the contract. 1/ It would be possible to say that the decision whether the goods conform to the requirements of the contract shall be made once and for all at the time delivery has been made. However, article 21 provides that the seller shall be given the opportunity to remedy the non-conformity by delivering any missing part or quantity of the goods, by delivering replacement goods which are in conformity with the contract, or by remedying any defect in the goods. 2/

2. The seller has the right to cure the non-conformity of the goods under article 21 only until the "date for delivery". After the date for delivery his right to cure is based on article 29. In those international sales which involve carriage of the goods, delivery is effected by handing over the goods to the first carrier. 3/ Therefore, in those contracts the date until which the seller may cure any non-conformity of the quantity or quality of the goods under article 21 is the date by which he was required by the contract to hand over the goods to the carrier.

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

4. These provisions are illustrated by the following examples:

Example 21A: By a CIF contract seller was to deliver 100 machine tools by 1 June. He shipped 75 by an appropriate carrier on 1 May which arrived on 15 June. He also shipped an additional 25 machine tools on 30 May which arrived on 15 July. Seller delivered all 100 machine tools in time by handing them over to the carrier before 1 June.

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

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

1/ The buyer is not required to take delivery of the goods prior to the delivery date: article 33 (1). However, article 21 also applies when the seller is obligated to deliver during a period of time and delivery has been made prior to the final day of that period. But see paras. 5 and 6 of the commentary on article 17.

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

3/ Article 15 (a).

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

Article 22

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

(2) In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

(3) If the goods are redispatched by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known at the time when the contract was concluded of the possibility of such redispatch, examination of the goods may be deferred until they arrive at the new destination.

PRIOR UNIFORM LAW

ULIS, article 38.

COMMENTARY

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

2. The examination which this article requires the buyer to make is one which is reasonable in the circumstances. The buyer is normally not required to make an examination which would reveal every possible defect. That which is reasonable in the circumstances will be determined by the individual contract and by custom in the trade and will depend on such factors as the type of goods and the

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1/ For the rule that the buyer may delay notifying the seller only of those defects which could not have been revealed by the examination of the goods, see article 23 (1) and para. 4 of the commentary thereon.

nature of the parties. Because of the international nature of the transaction, the determination of the type and scope of examination required should be made in the light of international practices and usages.

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

4. Paragraph (2) provides that if the contract of sale involves the carriage of goods "examination may be deferred until the goods arrive at the place of destination". This rule is necessary because, even though delivery is effected and risk of loss passes when the goods are handed over to the first carrier for transmission to the buyer, 2/ the buyer is normally not in a physical position to examine the goods until they arrive at the destination.

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

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

2/ Articles 15 (a) and 67 (1).

Article 23

(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 within a reasonable time 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 22 is found later, the buyer may none the less rely on that defect, provided that he gives the seller notice thereof within a reasonable time after its discovery. However, 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 at the latest within a period of two years from the date on which the goods were actually handed over.

(2) The parties may, in accordance with article 5, derogate from the provisions of the preceding paragraph by providing for a period of guarantee.

(3) In giving notice to the seller of any lack of conformity the buyer shall specify its nature.

(4) 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.

PRIOR UNIFORM LAW

ULIS, article 39.

Prescription Convention, articles 8 and 10, paragraph 2.

COMMENTARY

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

Obligation to give notice, paragraph (1)

2. Under paragraph (1) the buyer loses his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a specified time. If notice is not given within that time, the buyer can not claim damages under article 26 (1), require the seller to cure the lack of conformity under article 27, avoid the contract under article 30, declare a reduction of the price under article 31, or claim that the risk of loss had not passed to him under article 69.

3. The buyer must send the notice to the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. The buyer ought to have discovered the lack of conformity at the time he did examine the goods or was required to examine the goods under article 22, if the lack of conformity could have been revealed by the examination. If the lack of conformity could not have been revealed by the examination, the buyer must give notice "within a reasonable time after its discovery".

4. The determination whether the buyer could have discovered the lack of conformity must be made within the light of his obligation to make such an examination as is reasonable in the circumstances. The buyer does not lose his right to rely on the lack of conformity if he fails to give notice of a defect which could have been discovered only by an examination which would have been more intensive than that required under article 22.

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

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

Effect of guarantee, paragraph (2)

7. The overriding principle of the autonomy of the will of the parties recognized by article 5 would allow the parties to derogate from the general obligation to give the notice required by paragraph (1). However, in the absence of a special provision, it would not be clear whether the obligation to give notice in paragraph (1) was affected by an express guarantee that the goods would retain specified qualities or characteristics for a specified period. 1/

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

Paragraph (2) provides that such a guarantee may constitute a derogation from the two-year notice requirement of paragraph (1). Whether it does or not is a matter of interpretation of the guarantee.

8. The application of paragraph (2) may be illustrated by the following examples:

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

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

Example 23C: The contract provides that notice of a failure to produce at least 100 units per day must be given within 90 days of the date of delivery. Such an express clause would derogate from the two-year time-limit in paragraph (1).

Content of notice, paragraph (3)

9. The purpose of the notice is to inform the seller what he must do to cure the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Paragraph (1) recognizes this purpose of the notice by requiring that it be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it.

Paragraph (3) states the further requirement that the notice must specify the nature of the lack of conformity.

Risk in transmission, paragraph (4)

10. Paragraph (4) states that if the buyer has sent the notice to the seller by an 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". Therefore, the risk of the loss or delay in transmission of the notice required by this article falls on the seller.

11. The rule in this paragraph applies only to the notice of lack of conformity required by paragraph (1). No rule is given in this convention as to the risk of loss or delay in respect of other notices or communications required by the contract or this convention. It should be noted, however, that article 10 requires all communications to "be made by the means usual in the circumstances". If the usual means of communication are not used, it could be assumed that the risk of loss or delay falls on the sender.

Article 24

The seller shall not be entitled to rely on the provisions of articles 22 and 23 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.

PRIOR UNIFORM LAW

ULIS, article 40.

COMMENTARY

Article 24 relaxes the notice requirements of articles 22 and 23 where the lack of conformity relates to facts which the seller knew, or of which he could not have been unaware, and which he did not disclose. The seller has no reasonable basis for requiring the buyer to notify him of these facts.

Article 25

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

(2) Unless the seller already knows of the right or claim of the third person, the buyer may notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract.

PRIOR UNIFORM LAW

ULIS, article 52.

COMMENTARY

Claims of third persons, paragraph (1)

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

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

3. This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of the goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous. 1/ If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim in one of the ways discussed in paragraph 6 below.

4. Third-party rights and claims to which article 25 is addressed include only rights and claims which relate to property in the goods themselves by way of ownership, security interests in the goods, or the like. Article 25 does not refer to such matters as third-party claims that the goods infringe patents, copyrights or other industrial property rights or claims by the public authorities that the goods violate health or safety regulations and may not, therefore, be used or distributed. 2/

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

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

Notice, paragraph (2)

5. In most cases the seller would probably be aware of any outstanding right or claim of a third party. Therefore, paragraph (2) provides that where the seller does not know of the right or claim, the buyer may notify the seller of it and request that within a reasonable time either the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered. Of course, paragraph (2) does not prohibit a buyer from notifying a seller who already knows of the third-party claim. Indeed, such notification would be advisable because the special remedies available to the buyer in this article are dependent on such notification.

6. Although the seller may ultimately free the goods from the third party's right or claim by successful litigation, this could seldom be accomplished within a reasonable time from the buyer's point of view. When it cannot, the seller must either replace the goods, procure a certificate from the third party releasing the claim as it affects the goods in the hands of the buyer - either because the seller has satisfied the third party's claim or because by agreement between the seller and the third party the claim has been transferred to the proceeds from the sale of the goods to the buyer - or, provide the buyer with indemnity adequate to secure him against any potential loss arising out of the claim.

7. What is a "reasonable time" within which the seller must act pursuant to the buyer's request will depend on the circumstances. However, if the buyer specifies a particular period of time within which the seller should act, that period should normally be presumed to be reasonable since the buyer is merely requesting that the seller perform the original agreement by providing him with goods he can use freely as soon as possible after the contract date.

8. Failure by the seller to take appropriate action within the reasonable time as requested constitutes a fundamental breach even though the effect of the third-party claim itself would not be so serious as to constitute a fundamental breach under article 9. Therefore, in addition to any action for damages under article 55, the buyer would be able to avoid the contract under article 30. 3/ 4/

3/ As to whether the buyer could avoid the entire contract or only that portion as to which the third-party claim had been made, see article 32 (2) and para. 5 of the commentary on article 32.

4/ Even though the failure to take appropriate action would constitute a fundamental breach, the risk of loss provisions of article 69 (2) would not be affected since the exercise of a claim by a third party would not cause loss or damage to the goods in the sense meant by articles 67 to 69.

Section II. /Remedies for breach of contract by the seller/

Article 26

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

(a) Exercise the rights provided in articles 27 to 32;

(b) Claim damages as provided in articles 55 to 60.

(2) In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

PRIOR UNIFORM LAW

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

COMMENTARY

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

2. Article 26 (1) (a) provides that in case of the seller's breach, the buyer may "exercise the rights provided in articles 27 to 32". These articles provide that the buyer may (1) require the seller to perform the contract (article 27), (2) declare the contract avoided (article 30) or (3) declare a reduction of the price (article 31). The substantive conditions under which those remedies may be exercised are set forth in the articles cited.

3. In addition, article 26 (1) (b) provides that the buyer may "claim damages as provided in articles 55 to 60" "where the seller fails to perform any of his obligations under the contract of sale and the present Convention". In order to claim damages it is not necessary to prove a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfil his obligations. Articles 55 to 60, to which article 26 (1) (b) refers, do not provide the substantive conditions as to whether the claim for damages can be exercised but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the seller. 1/

1/ The remedies for seller's breach of the obligation to deliver goods free from the claims of a third party are set forth in article 25 (2). However, the remedies for seller's failure to take appropriate action after the buyer notifies the seller of the third-party claim are set forth in article 26 (1).

See also articles 21 and 51 (1) which speak of the remedy of damages.

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

5. Paragraph (2) states that the national provisions of law which provide for applications to courts or arbitral tribunals for periods of grace are not to be applied. Such a provision seems desirable in international commerce.

Article 27

(1) Subject to article 12, the buyer has the right to require the seller to perform the contract, unless the buyer has acted inconsistently with that right, in particular by avoiding the contract under article 44 or by reducing the price under article 31.

(2) However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after request made within a reasonable time.

PRIOR UNIFORM LAW

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

COMMENTARY

1. Article 27 describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed. It should be noted that this article does not relate to breaches of contract in which the non-conformity was the existence of third-party rights in the goods. The remedies and time-limits for such a breach of contract are covered in article 25 (2).

General rule, paragraph (1)

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

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

4. The right granted to the buyer by article 27 (1) is a remedy which the buyer may exercise at his discretion. He is not required to exercise his rights under this article as a prerequisite to the exercise of the other remedies available to him under this convention. This rule is contrary to the rule in some countries which require the buyer to make demand on the seller to perform within a particular period of time (Nachfrist) before the buyer can exercise any other remedy.

5. It would appear that, in addition to the right to require performance of the contract, the buyer can recover any damages he may have suffered as a result of the delay in the seller's performance.

6. It may at times be difficult to know whether the buyer has made demand that the seller perform under this article or whether the buyer has voluntarily modified the contract by accepting late performance. The application of paragraphs 5 and 6 can be illustrated as follows:

Example 27A: When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller "Your failure to deliver on 1 July as promised may not be too serious for us but we certainly will need the goods by 15 July." Seller subsequently delivered the goods on 15 July. It is difficult to tell whether Buyer's statement was a demand for performance by 15 July or a modification of the contract delivery date from 1 July to 15 July. If it is interpreted as a demand for performance, Buyer can recover any damages he may have suffered as a result of the late delivery. If Buyer's statement is interpreted as a modification of the delivery date, Buyer could receive no damages for late delivery.

7. In order for the buyer to exercise the right to require performance of the contract, he must not have acted inconsistently with that right, in particular by declaring the contract avoided under article 30 or by declaring a reduction of the price under article 31.

8. Although the buyer has a right under this convention to require the seller to perform the contract, article 12 provides that "a court shall not be bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention". In order to be sure that this important limitation on the buyer's right is not overlooked, paragraph (1) makes a specific reference to it.

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

Example 27B: The contract price for the goods was $60,000. The defects in the goods delivered reduced their value by $100. It would cost Seller $5,000 to cure the defect. Buyer had the right to require Seller to cure the defect.

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10. It would be a matter of national law whether a court would require specific performance of the contract in this situation. 1/ If a court would not enforce the buyer's right to require cure in example 27B, the buyer's damages under article 55 would be limited to the loss he suffered, i.e., $100.

Substitute goods, paragraph (2)

11. If the goods which have been delivered do not conform to the contract, the buyer may want the seller to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after request made within a reasonable time". Such a request would normally be made in conjunction with the notice of non-conformity required under article 23 or within a reasonable time thereafter.

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

Buyer's right to cure

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

Article 28

> Where the buyer requests the seller to perform, the buyer may fix an additional period of time of reasonable length for delivery or for curing of the defect or other breach. If the seller does not comply with the request within the additional period, or where the buyer has not fixed such a period, within a period of reasonable time, or if the seller already before the expiration of the relevant period of time declares that he will not comply with the request, the buyer may resort to any remedy available to him under the present Convention.

1/ Para. 8, supra.

PRIOR UNIFORM LAW

ULIS, article 44, paragraph 2.

COMMENTARY

1. Article 28 states the additional period of time within which the seller, having previously breached the contract, can be required by the buyer to perform pursuant to article 27.

2. The seller must perform the contract within an additional period of reasonable time. This period can only be determined from the circumstances of the case but the primary consideration should be buyer's need to receive as soon as possible the goods in the quantity and quality agreed. The first sentence recognizes this primacy of the buyer's needs by stating that "the buyer may fix an additional period of time of reasonable length for delivery or for curing the defect or other breach". If the buyer did not fix such an additional period in his demand, this article requires the seller to comply with the demand "within a period of reasonable time".

3. The second sentence of this article provides that "if the seller does not comply with the request within the additional period, ... the buyer may resort to any remedy available to him under the present Convention". One consequence of this provision is that once the buyer has made a demand on the seller that he perform, the buyer's right to resort to any other remedy is suspended until the end of the additional period. If this were not the case, the seller might prepare to remedy his defective performance as demanded by the buyer, perhaps at considerable expense, with no assurance that the buyer might not render such preparations useless.

4. If, by the end of the additional period of time, the seller has not performed, the buyer may resort to any other applicable remedy i.e. bring an action for damages, 1/ reduce the price, 2/ avoid the contract, 3/ or bring an action for specific performance if such an action is allowed by the law of the forum. 4/

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

Article 29

(1) The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable

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1/ Article 26 (1) (b).

2/ Article 31.

3/ Article 30 (b).

4/ See article 12.

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inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

(2) If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision.

PRIOR UNIFORM LAW

ULIS, articles 43 and 44, paragraph 1.

COMMENTARY

1. Article 29 regulates the right of the seller to cure any failure to perform his obligations under the contract and the present convention after the date for delivery. It is a companion article to article 21 which regulates the right of the seller to cure any failure to perform his obligations prior to the date for delivery and to articles 25 (2), 27 and 28 which regulate the buyer's right to require performance. The date for delivery is established in accordance with article 17.

General rule, paragraph (1)

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

3. It should be noted that the seller may cure under this article even though non-conformity itself amounted to a fundamental breach. For example, even though

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1/ If the seller has completed curing the defect, it is too late for the buyer to declare the contract avoided or declare the reduction of the price. If the seller commenced curing the defect and so notified the buyer, such a notice would appear to constitute the notice described in the second sentence of para. (2). See para. 5 infra. Therefore, for a reasonable time after receipt of the notice the buyer could not declare the contract avoided or reduce the price. The conclusion follows that in the absence of a notice to him, the buyer can terminate the seller's right to cure by declaring the contract avoided or the price reduced even though the seller has commenced curing the defect.

the delivery of machinery which did not operate might constitute a fundamental breach of contract, the seller could cure the defect by repairing or replacing the machinery. Naturally, the buyer would still have his right to claim damages for any loss caused him by the original breach or by the seller's actions in curing the non-conformity.

Notice by the seller, paragraph (2)

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

5. Paragraph (2) provides that if the seller sends the buyer such a notice, the buyer must reply within a reasonable time. If the buyer does not reply, the seller may perform and the buyer may not avoid the contract or reduce the price during the period of time the seller indicated in the notice would be necessary to cure the defect or, if no time was stated, during a reasonable time. Even if the seller's notice said only that he would perform the contract within a stated period, the buyer must either declare the contract avoided, declare the price reduced or protest the cure proposed or else he will be bound by the terms of the seller's notice.

Article 30

The buyer may declare the contract avoided:

(a) Where the failure by the seller to perform any of his obligations under the contract of sale and the present Convention amounts to a fundamental breach of contract, or

(b) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 28.

PRIOR UNIFORM LAW

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

COMMENTARY

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

2. The contract is avoided as a result of the seller's breach only if "the buyer ... declare/s/ the contract avoided". This narrows the rule from that found in articles 26 and 30 of ULIS which provided for an automatic or ipso facto avoidance in certain circumstances in addition to avoidance by declaration of the buyer. Automatic or ipso facto avoidance was deleted from the remedial system in the present

convention because it led to great uncertainty whether the contract was still in force or whether it had been ipso facto avoided. Under article 30 of the present convention the contract is still in force unless the buyer has affirmatively declared its avoidance. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the avoidance of the contract.

Fundamental breach, subparagraph (a)

3. The typical situation in which the buyer may declare the contract avoided is where the failure by the seller to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 9. 1/

Seller's delay in curing, subparagraph (b)

4. Subparagraph (b) allows the buyer to avoid the contract when the seller fails to cure a defect by delivering the goods within the time specified by the buyer pursuant to article 28.

Loss or suspension of right to avoid

5. Article 52 provides that "the buyer shall lose his right to declare the contract avoided ... where it is impossible for him to return the goods substantially in the condition in which he received them" unless the impossibility is excused for one of the three reasons listed in article 52 (2).

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

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

8. Similarly, if it is the seller who wishes to cure any defect after the delivery date, the buyer's right to avoid the contract may be suspended for the period of time indicated by the seller as necessary to effect the cure. 2/

1/ See also article 25 (2).

2/ See para. 5 to the commentary on article 29.

Right to avoid prior to the date of delivery

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

Effects of avoidance

10. The effects of avoidance are described in articles 51 to 54. The most significant consequence of avoidance for the buyer is that he is no longer obligated to receive and pay for the goods. However, avoidance of the contract does not terminate either the seller's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes. 3/ Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

Article 31

Where the goods do not conform with the contract, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity.

PRIOR UNIFORM LAW

ULIS, article 46.

COMMENTARY

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

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

3. The remedy of reduction of the price is in effect a partial avoidance of the contract. The price may be reduced for any non-conformity of the goods, whether the non-conformity be of quantity or quality. Similar to that which prevails in respect of avoidance, the amount of monetary relief which is granted the buyer is measured in terms of the contract price which need not be paid (or which can be recovered from the seller if already paid), and not in terms of monetary loss which has been caused to the buyer.

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

3/ Article 51 (1).

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

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

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

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

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

Example 31D: Seller contracted to furnish decorative wall panels of a certain design for use by buyer in an office building being constructed by buyer. The wall panels delivered by seller were of a less attractive design than those ordered. Buyer has the right to "declare the price ... reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity".

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

8. It should also be noted that the calculation is based on the extent to which the value of the goods "at the time of contracting" has been diminished. The calculation of the reduction of the price does not take into consideration events which occurred after the time of contracting as does the calculation of damages under articles 55 to 60. In the case envisaged in example 31D this would

normally cause no difficulties because the extent of lost value would probably have been the same at the time of contracting and at the time of the non-conforming delivery. However, if there has been a price change in the goods between the time of contracting and the time of the non-conforming delivery, different results are achieved if the buyer declares the price reduced under this article rather than if the buyer claims damages. These differences are illustrated by the following examples:

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

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

Example 31F: If the reverse were to happen so that at the time of delivery of the non-conforming goods the market price of No. 1 corn had doubled to $400 a ton and that of No. 3 corn to $300 a ton, buyer's damages under article 55 would be $100 a ton or $1,000. In this case it would be more advantageous to buyer to claim damages under article 55 than to reduce the price under article 31. 1/

9. It should be noted that the results in examples 31E and 31F are caused by the fact that the remedy of reducing the price acts as a partial avoidance of the contract. The same result occurs in even greater degree if the buyer totally avoids the contract as is illustrated in the following example:

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

10. Except for example 31D, all of the examples above have assumed a fungible commodity for which substitute goods were freely available thereby making it

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1/ But see para. 11.

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feasible for the buyer to avoid the contract, providing a ready market price as a means of measuring damages, and precluding any additional damages by way of lost profits or otherwise. If there is not such a ready market for the goods, the problems of evaluation are more difficult and the possibility of additional damages is greater. These factors do not change the means by which article 31 works but they may change the relative advantage to the buyer of one remedy rather than another.

11. It would appear that the buyer can claim damages in addition to declaring the reduction of the price in those cases where, as in example 31F, reducing the price does not give as much monetary relief as would an action for damages.

Article 32

(1) Where the seller has handed over part only of the goods of an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles 28 to 31 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.

PRIOR UNIFORM LAW

ULIS, article 45.

COMMENTARY

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

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

2. Paragraph (1) provides that if the seller has failed to perform a part only of his obligations under the contract by handing over a part only of the goods or by handing over some goods which do not conform to the contract, the provisions of articles 28 to 31 shall apply in respect of the quantity which is missing or which does not conform to the contract. In effect, this paragraph provides that the buyer can avoid a part of the contract under article 30 if the non-conformity amounts to a fundamental breach as to the part of the goods in question or if, after buyer's request pursuant to article 25 (2) or 27 that seller perform the contract by delivering the missing quantity or substitute goods, the seller has not delivered the goods within the additional period of time fixed by the buyer. This rule was necessary because in some legal systems

a party cannot avoid part only of the contract. In those legal systems the conditions for determining whether the contract can be avoided at all must be determined by reference to the entire contract. However, under article 32 (1) it is clear that under the present convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part.

3. In respect of articles 28, 29 and 31 to which article 32 (1) also refers in addition to article 30 on avoidance of contracts, the provision gives the same result which would have been achieved by the application of those provisions to the entire contract.

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

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

5. The use of the word "only" in article 32 (2) also has the effect of negating the implication which might have been thought to flow from article 30 (b) that the entire contract could be avoided on the grounds that the seller failed to deliver a part only of the goods within the additional period of time fixed by the buyer in accordance with article 25 (2) or 28 even though such failure to deliver did not in itself amount to a fundamental breach of the entire contract.

Article 33

(1) Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) Where the seller has proferred to the buyer a quantity of 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 55. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

PRIOR UNIFORM LAW

ULIS, articles 29 and 47.

COMMENTARY

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

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Early delivery, paragraph (1)

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

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

4. However, where the buyer does refuse to take delivery of the goods under article 33 (1), according to article 62 (2) he will still be bound to take possession of them on behalf of the seller if the following four conditions are met: (1) the goods have been placed at his disposal at their place of destination, (2) he can take possession without payment of the price, e.g., the contract of sale does not require payment in order for the buyer to take possession of the documents covering the goods, (3) taking possession would not cause the buyer unreasonable inconvenience or unreasonable expense, and (4) neither the seller nor a person authorized to take possession of the goods on his behalf is present at the destination of the goods.

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

6. If the buyer does take early delivery of the goods, he may claim from the seller for any damages he may have suffered. 1/

Excess quantity, paragraph (2)

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

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

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

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

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Chapter IV. Obligations of the buyer

Article 34

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

PRIOR UNIFORM LAW

ULIS, article 56.

COMMENTARY

Article 34 states the principal obligations of the buyer and introduces chapter IV of the convention. The principal obligations of the buyer are to pay the price for the goods and to take delivery of them. The buyer must carry out his obligations "as required by the contract and the present Convention". Since article 5 of this convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the convention the buyer must fulfil his obligations as required by the contract.

Section I. Payment of the price

Article 35

The buyer shall take steps which are necessary in accordance with the contract, with the laws and regulations in force or with usage, to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a bankers' guarantee.

PRIOR UNIFORM LAW

ULIS, article 69.

COMMENTARY

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

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

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

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

A. Fixing the price

Article 36

When a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under the comparable circumstances at that time.

PRIOR UNIFORM LAW

ULIS, article 57.

COMMENTARY

1. Article 36 provides a means for the determination of the price when a contract has been concluded which does not state a price or expressly or impliedly make provision for its determination.

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

Formation and validity of the contract

3. Even though article 36 provides a means for the determination of the price, the absence of an explicit or implicit price term in the contract may indicate that the

parties had not completed the process of negotiation. The court or arbitration tribunal must determine in each case whether the absence of a price or of an express or implied means of determining the price indicates that the parties had not yet reached agreement on the existence of a contract.

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

5. Article 36 can be applied to determine the price only if the applicable national law recognizes the existence and validity of the contract. 1/

Determination of the price

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

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

8. If there is no price generally charged by the seller for the sale of goods of the type in question, "the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time".

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

Time of calculation of price

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

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

1/ Article 7 specifies that the present convention is not concerned with the formation of the contract or with its validity.

Article 37

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

PRIOR UNIFORM LAW

ULIS, article 58.

COMMENTARY

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

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

B. Place and date of payment

Article 38

(1) The buyer shall pay the price to the seller at the seller's place of business 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.

PRIOR UNIFORM LAW

ULIS, article 59.

COMMENTARY

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

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

3. The present convention does not govern the extent to which exchange control regulations or other rules of economic public order may modify the obligations of the buyer to pay the seller at a particular time or place or by a particular means. The buyer's obligations to take the steps which are necessary to enable the price to be paid are set forth in article 35. The extent to which the buyer who has fulfilled his obligations under article 35 may be relieved of liability for damages for his failure to pay as agreed because of exchange control regulations or the like is governed by article 50. 2/

Place of payment, paragraph (1)

4. Article 38 (1) provides that if the payment is to be made against the handing over of the goods or of documents, the payment shall be made at the place where the

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1/ Article 5.

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

handing over takes place. This rule will be applied most often in the case of a contract stipulation for payment against documents. 3/ The documents may be handed over directly to the buyer, but they are often handed over to a bank which represents the buyer in the transaction. The "handing over" may take place in either the buyer's or the seller's country or even in a third country.

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

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

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

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

Article 39

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

(2) Where the contract involves the carriage of goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination against payment of the price.

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

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

PRIOR UNIFORM LAW

ULIS, articles 71 and 72.

COMMENTARY

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

General rule, paragraph (1)

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

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

3. Paragraph (2) states a specific rule in implementation of paragraph (1) where the contract of sale involves the carriage of goods. In such a case "the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will be handed over to the buyer at the place of destination /only/ against payment of the price". The goods may be so dispatched unless there is a clause in the contract providing otherwise, in particular by providing for credit.

Payment and examination of the goods, paragraph (3)

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

5. Where the contract of sale involves the carriage of goods and the seller wishes to exercise his right under article 39 (2) to ship the goods on terms whereby neither the goods nor the documents will be handed over to the buyer prior to payment, the seller must preserve the buyer's right to examine the goods. Since the buyer normally examines the goods at the place of destination, 1/ the seller may be required to make special arrangements with the carrier to allow the buyer access to the goods at the destination prior to the time the goods or documents are handed over in order to allow for the buyer's examination.

6. The buyer loses the right to examine the goods prior to payment where "the procedures for delivery or payment agreed upon by the parties are inconsistent with

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1/ Article 22 (2)

such opportunity". The present Convention does not set forth which procedures for delivery or payment are inconsistent with the buyer's right to examine the goods prior to payment. However, the most common example is the agreement that payment of the price is due against the handing over of the documents controlling the disposition of the goods whether or not the goods have arrived. The quotation of the price on CIF terms contains such an agreement. 2/

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

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

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

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

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

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

Example 39C: The contract of sale provided for payment of the price on presentation of the documents at the point of arrival of the goods but only after the arrival of the goods. In this case the procedures for delivery and payment expressly stipulated by the parties are not inconsistent with the right of the Buyer to examine the goods prior to payment even though the price was to be paid against the presentation of the documents.

Article 40

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.

PRIOR UNIFORM LAW

ULIS, article 60.

COMMENTARY

Article 40 provides that the Buyer is required to pay the price on the date which has been fixed by the parties without the need for any formalities. This rule is intended to deny the applicability of the rule in some national legal systems which states that in order for the payment to become due, the seller must make a formal demand for it from the Buyer. In line with article 8, a date for payment established by usage has the same result as a date for payment established by agreement of the parties.

Section II. Taking delivery

Article 41

The Buyer's obligation to take delivery consists in doing all such acts which could reasonably be expected of him in order to enable the seller to effect delivery, and also taking over the goods.

PRIOR UNIFORM LAW

ULIS, article 65.

COMMENTARY

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

2. The Buyer's obligation to take delivery consists of two elements. The first element is that he must do "all such acts which could reasonably be expected of him in order to enable the seller to effect delivery". For example, if under the

contract of sale the buyer is to arrange for the carriage of the goods, he must make the necessary contracts of carriage so as to permit the seller to "/hand/ the goods over to the first carrier for transmission to the buyer". 1/

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

4. The second element of the buyer's obligation to take delivery consists of his "taking over the goods". This aspect of the obligation to take delivery is of importance where the contract calls for the seller to effect delivery by placing the goods at the buyer's disposal at a particular place or at the seller's place of business. 2/ In such case the buyer must physically remove the goods from that place. 3/

1/ Article 15 (a). Cf. article 16 (1).

2/ Article 15 (b) and (c).

3/ Cf. the buyer's obligation under article 62 (2) to take possession on behalf of the seller of goods which have been dispatched to and have been put at the disposal of the buyer at the place of destination and of which the buyer has exercised his right to reject.

/Section III. Remedies for breach of contract by the buyer/

Article 42

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

(a) Exercise the rights provided in articles 43 to 46;

(b) Claim damages as provided in articles 55 to 60.

(2) In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

PRIOR UNIFORM LAW

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

COMMENTARY

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

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

3. Article 42 (1) (b) provides that the seller may "claim damages as provided in articles 55 to 60" "where the buyer fails to perform any of his obligations under the contract of sale and the present Convention". In order to claim damages it is not necessary to prove a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the buyer to fulfill his obligations. Articles 55 to 60, to which article 42 (1) (b) refers, do not provide the substantive conditions for the exercise of a claim for damages but the rules for the calculation of the amount of damages. In particular, article 56 gives a minimum measure of damages where the breach of contract consists of delay in the payment of the price.

4. As is stated above in respect of the provisions on the remedies available to the buyer, 1/ the system of remedies available to the seller which is introduced by article 42 (1) is a substantial consolidation and simplification of the remedy scheme contained in chapters IV to VI of ULIS. ULIS contains separate remedial provisions for particular types of breaches by the buyer, remedies which often differ from each other in ways that appear accidental and the boundary lines between which are not always clear.

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

6. Paragraph (2) states that the national provisions of law which provide for applications to courts or arbitral tribunals for periods of grace are not to be applied. Such a provision seems desirable in international commerce.

Article 43

(1) If the buyer fails to pay the price, the seller may require the buyer to perform his obligation.

(2) Subject to the provisions of article 12, if the buyer fails to take delivery or to perform any other obligation in accordance with the contract and this Convention, the seller may require the buyer to perform his obligation.

(3) The seller cannot require performance of the buyer's obligations where he has acted inconsistently with such right by avoiding the contract under article 45.

PRIOR UNIFORM LAW

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

COMMENTARY

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

1/ Paras. 4 and 5 of the commentary on article 26.

Failure to pay the price, paragraph (1)

2. Paragraph (1) recognizes that the seller's primary concern is that the buyer pay the price at the time it is due. If the buyer does not do so, this paragraph authorizes the seller to require the buyer to pay the price within the period of time provided in article 44.

3. Although the seller can act to recover the purchase price under article 43 where the buyer has refused to pay it, it is unlikely that the seller will sue for the price under paragraph (1) unless either the buyer has taken delivery of the goods or the goods have been damaged or destroyed after the risk of loss has passed to the buyer. 1/ So long as the seller either has not yet delivered the goods 2/ or, having delivered the goods by handing them over to the first carrier, 3/ the seller has dispatched them to the buyer on terms whereby neither the goods nor the documents controlling their disposition would be handed over to the buyer unless payment was made, 4/ the seller would normally refuse delivery, keep the goods and sue for damages 5/ or resell the goods and sue for the difference between the contract price and that obtained by the resale. 6/

Failure to perform other obligations, paragraph (2)

4. Paragraph (2) goes on to authorize the seller to require the buyer "to take delivery or to perform any other obligation in accordance with the contract and this Convention" within the time-limits prescribed in article 44. 7/

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

1/ Article 66.

2/ The means by which the seller delivers the goods are set forth in article 15.

3/ Article 15 (a).

4/ Article 39 (2).

5/ Articles 42 (1) (b), 55 and 57.

6/ Article 58.

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

6. Although the seller has a right under paragraph (2) to require the buyer to perform the contract, article 12 provides that "a court shall not be bound to enter a judgement providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention". In order to be sure that this important limitation on the buyer's right is not overlooked, paragraph (2) makes a specific reference to it. This limitation does not apply to the seller's action for the price under paragraph (1).

7. The right granted to the seller by article 43 is a remedy which the seller may exercise at his discretion. He is not required to demand performance by the buyer under this article as a prerequisite to the exercise of the other remedies available to him under this Convention. This rule is contrary to the rule in some countries which require the seller to make demand on the buyer to perform within a particular period of time (Nachfrist) before the seller can exercise any other remedy. It is also contrary to the rule sometimes invoked that the seller must resell the goods if it is reasonably possible for him to do so and sue the buyer for the difference between the contract price and the resale price.

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

Inconsistent acts by the seller, paragraph (3)

9. Paragraph (3) provides that in order for the seller to exercise the right to require performance of the contract he must not have acted inconsistently with that right by avoiding the contract under article 45.

Article 44

Where the seller requests the buyer to perform, the seller may fix an additional period of time of reasonable length for such performance. If the buyer does not comply with the request within the additional period, or where the seller has not fixed such a period, within a period of reasonable time, or if the buyer already before the expiration of the relevant period of time declares that he will not comply with the request, the seller may resort to any remedy available to him under the present Convention.

PRIOR UNIFORM LAW

ULIS, article 66, paragraph 2.

COMMENTARY

1. Article 44 states the additional period of time within which the buyer, having previously breached the contract, can be required by the seller to perform pursuant to article 43.

2. Where the seller requests the buyer to perform his obligations under the contract "the seller may fix an additional period of time of reasonable length for such performance". This language makes it clear that, although this period can only be determined from the circumstances of the case, the primary consideration is the seller's need to receive as soon as possible the payment or performance of the buyer's other obligations. If the seller does not fix such an additional period of time in his demand, this article requires the buyer to comply with the demand "within a reasonable time".

3. The second sentence of this article provides that "if the buyer does not comply with the seller's demand within the /relevant/ period, ... the seller may resort to any remedy available to him under the present Convention". One consequence of this provision is that once the seller has made a demand on the buyer that he perform, the seller's right to resort to any other remedy is suspended until the end of the additional period. Although the problem is not as acute as it is where the buyer has made demand on the seller to perform pursuant to articles 27 and 28, the reason for this suspension is that once the seller has made demand on the buyer to perform, the buyer might incur expenses preparatory to performance with no assurances that the seller might not render such expenses useless.

4. If by the end of the relevant period of time, the buyer has not performed, the seller may resort to any other applicable remedy, i.e., sue for the price or for specific performance, 1/ bring an action for damages 2/ or avoid the contract. 3/

Article 45

The seller may declare the contract avoided:

(a) Where the failure by the buyer to perform any of his obligations under the contract of sale and the present Convention amounts to a fundamental breach of contract, or

(b) Where the buyer has not performed the contract within an additional period of time fixed by the seller in accordance with article 44.

1/ Cf. article 12.

2/ Article 42 (1) (b).

3/ Article 45 (b).

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PRIOR UNIFORM LAW

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

COMMENTARY

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

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

Fundamental breach, subparagraph (a)

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

Buyer's delay in curing, subparagraph (b)

4. Subparagraph (b) allows the seller to avoid the contract when the buyer fails to perform one of his obligations under the contract within the additional period of time fixed by the seller in accordance with article 44 regardless of whether that failure to perform constituted a fundamental breach of the contract. This provision differs from that in article 30 (b) where the buyer may avoid the contract only for the seller's failure to deliver the goods within the additional period of time. The seller's failure to perform other obligations within the additional period of time gives rise to avoidance only under article 30 (a), i.e., only if the failure constitutes a fundamental breach of contract.

Suspension of right to avoid

5. If the seller has requested the buyer to perform his obligations pursuant to articles 43 and 44, the seller may not resort to the remedies for breach, including a declaration of avoidance of the contract under article 45, until the expiration of the period fixed by the seller or, where the seller has not fixed such a period, until the expiration of a reasonable period of time unless within that period the buyer has declared that he will not comply with the request to perform.

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Right to avoid prior to the date for performance

6. For the seller's right to avoid prior to the contract date of performance, see article 49 and the commentary thereon.

Effects of avoidance

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

8. Avoidance of the contract does not terminate either the buyer's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes. 1/ Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, which usually means arbitration clauses, terminate with the rest of the contract.

Article 46

(1) If the contract envisages that the buyer will subsequently 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, without prejudice to any other rights he may have under the contract and this Convention, make the specification himself in accordance with any requirement of the buyer that may be 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.

PRIOR UNIFORM LAW

ULIS, article 67.

COMMENTARY

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

1/ Article 51 (1).

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

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

Seller's remedies, paragraph (1)

4. Article 46 rejects any suggestion that the contract is not complete until the buyer has notified the seller of the specification or that the buyer's notification of the specification is a condition to seller's right to deliver the goods and demand payment of the price.

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

6. If the buyer's failure to make the specification constituted a breach of contract, the seller could pursue his remedies for that breach in place of or in addition to making the specification himself under article 46. Therefore, the seller could (1) sue for damages under article 42 (1) (b), (2) if the buyer's failure to make the required specification amounted to a fundamental breach of contract, avoid the contract under article 45 (a) and sue for any damages, 1/ or (3) request the buyer to perform his obligation pursuant to articles 43 (2) and 44. If, pursuant to article 43 (2) the seller requests the buyer to perform by making the specification and the buyer does not do so within the time required under article 44, the seller could avoid the contract under article 45 (b) and sue for any damages even if the buyer's failure to make the specification did not constitute a fundamental breach of contract.

1/ Article 51 (1) preserves the right to sue for damages even though the contract has been avoided.

7. If the seller chooses to exercise his right to make the specification himself pursuant to article 46 (1), he may do so immediately upon the passage of the date expressly or impliedly agreed upon in the contract as the date by which the buyer would make the specification. Alternatively, the seller may request the specification from the buyer, in which case the seller must await a reasonable time after the buyer has received the request from the seller before he can make the specification himself. 2/

Notice to the buyer, paragraph (2)

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

2/ It should be noted that the request for specification here is pursuant to article 46 (1) and not pursuant to articles 43 and 44 as discussed in para. 6 supra.

Chapter V. Provisions common to the obligations of the seller and of the buyer

Section I. Anticipatory breach

Article 47

(1) A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph 1 become 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. The provision of the present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, shall immediately notify the other party thereof, and shall continue with performance if the other party provides adequate assurance of his performance. On the failure by the other party, within a reasonable time after notice, to provide such assurance, the party who suspended performance may avoid the contract.

PRIOR UNIFORM LAW

ULIS, article 73.

COMMENTARY

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

Right to suspend performance, paragraph (1)

2. Paragraph (1) provides that a party may suspend the performance of his obligations if, after the conclusion of the contract, the deterioration of the other party's ability or willingness to perform "gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations". The deterioration in ability or willingness must have taken place after the conclusion of the contract. If at the time of the conclusion of the contract a party's ability or willingness to perform was already in doubt, the other party may not later rely on that doubt as a basis for suspending the performance of his own obligations

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under the contract. This is true even though the other party learned of the circumstances which lead to the doubts only after the conclusion of the contract. 1/

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

4. The circumstances which justify suspension may relate to general conditions so long as those general conditions affect the other party's ability to perform. For example, the outbreak of war or the imposition of an export embargo may give reasonable grounds to conclude that the party from that country will not be able to perform his obligations.

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

6. These rules are illustrated by the following examples:

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

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

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

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

8. If the criteria discussed in paragraphs 2 to 4 above are met, the party "may suspend the performance of his obligation". A party who is authorized to suspend performance is freed both from the obligation to render performance to the other party and from the obligation to prepare to perform. 2/

9. If an obligation is suspended for a period of time and then reinstated pursuant to article 47 (3), the date required for performance will be extended for the period of the suspension. This principle is illustrated by the following examples:

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

Stoppage in transit, paragraph (2)

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

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

12. Since the present convention governs the rights in the goods only between the buyer and the seller, 3/ the question whether the carrier must or is permitted

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

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

to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question. 4/

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

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

Example 47D: The contract of sale provided that Buyer would pay for the goods 30 days after their arrival at Buyer's place of business. After the conclusion of the contract Seller received information which gave him reasonable grounds to doubt Buyer's creditworthiness. After he suspended performance and so notified Buyer, Buyer offered either (1) a new payment term so that he would pay against documents, or (2) a letter of credit issued by a reputable bank, or (3) a guarantee by a reputable bank or other such party that it would pay if Buyer did not, or (4) a security interest in sufficient goods owned by Buyer to assure Seller of reimbursement. Since any one of these four alternatives would probably give Seller adequate assurances of being paid, 5/ Seller would be required to continue performance.

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

When Buyer received information giving him reasonable grounds to conclude

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

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

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

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

14. Article 51 (1) preserves the right of a party who avoids the contract pursuant to article 47 (3) to claim any damages which may occur from the breach of contract. For example, if the buyer in example 47E purchased substitute goods elsewhere at a higher price, he can recover the difference between his repurchase price and the contract price. 6/ This is true even though it turns out that at the time performance was due under the original contract the seller could have performed provided that the assurances furnished by the seller were in fact not adequate.

Article 48

(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 a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

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

PRIOR UNIFORM LAW

ULIS, article 75.

COMMENTARY

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

6/ Article 58.

2. The contract calls for the delivery by instalments if it requires or authorizes the delivery fo goods in separate lots. Such a contract is a contract for delivery by instalments even though it contains a clause stating that "each delivery is a separate contract".

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

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

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

Avoidance of past deliveries, paragraph (2)

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

Avoidance in instalment contracts under other provisions

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

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

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

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

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

Article 49

Where prior to the date 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.

PRIOR UNIFORM LAW

ULIS, article 76.

COMMENTARY

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

2. The future fundamental breach of contract may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance. 1/

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

3. Article 49 should be contrasted with article 47. Under article 47, where the existence of certain enumerated conditions "gives reasonable grounds to conclude that /one/ party will not perform a substantial part of his obligations", the other party may suspend the performance of his own obligations. He must notify the first party of the suspension and wait for a reasonable period of time for the possibility that adequate assurances of performance will be provided. He may avoid the contract if such assurances are not provided within that period.

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

5. A party who intends to declare the contract avoided pursuant to article 49 should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation was not "clear" and, since there was no authorization to avoid the contract, the declaration of avoidance would itself be void. Therefore, the party who attempted to avoid would be in breach of the contract for his own failure to perform. If there is any doubt whether a fundamental breach of contract will occur, the party who intends to declare the contract avoided should, if it is possible, proceed under article 47. 2/

6. Where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 59 may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance. 3/

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

3/ See para. 4 of the commentary on article 59 and examples 59A and 59B.

Section II. Exemptions

Article 50

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

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

(3) The exemption provided by this article shall have effect only for the period before the impediment is removed.

(4) The non-performing party shall notify the other party of the impediment and its effect on his ability to perform. If he fails to do so within a reasonable time after he knows or ought to have known of the impediment, he shall be liable for the damage resulting from this failure.

PRIOR UNIFORM LAW

ULIS, article 74.

COMMENTARY

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

General rule, paragraph (1)

2. Paragraph (1) specifies that a party shall not be liable in damages for not performing one of his obligations "if he proves that /the non-performance/ was due

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1/ This commentary has been prepared on the assumption that the second sentence of paragraph (1) should read as follows: "For this purpose there shall be deemed to be fault unless the non-performing party proves that he could not reasonably have been expected to take the impediment into account and that he could neither avoid nor overcome it".

to an impediment which has occurred without fault on his part". The second sentence goes on to state that "unless the non-performing party proves that he could not reasonably have been expected to take the impediment into account and that he could neither avoid nor overcome it", there shall be deemed to be fault on his part.

3. The impediment to performance must have occurred after the conclusion of the contract in order for the non-performing party to be exonerated by article 50 (1). However, if at the time of the conclusion of the contract there was an existing impediment to performance, the national law applicable to the formation or the validity of the contract may provide either that no contract was concluded or that it was invalid by reason of the mistake or fraud of the parties. 2/

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

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

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

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

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

8. If the party who is required to overcome an impediment does so by furnishing a commercially reasonable substitute, the other party could not avoid the contract and thereby reject the substitute performance on the grounds that there was a fundamental breach of contract.

Example 50A: The contract called for the delivery of specific goods. Prior to the time when the risk of loss would have passed pursuant to article 67 or 68 the goods were destroyed by a fire for which Seller was not responsible. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.

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

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

Example 50D: The contract called for the goods to be packed in plastic containers. At the time the packing should have been accomplished, plastic containers were not available for reasons which Seller could not have avoided. However, if other commercially reasonable packing materials were available, Seller must overcome the impediment by using those materials rather than refuse to deliver the goods. Since the Seller would not have committed a fundamental breach if the goods were packed in commercially reasonable substitute packing materials, the Buyer could neither avoid the contract nor require a substitute shipment and would, therefore, be required to accept the substituted performance.

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

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9. It should be noted that article 50 (1) only exonerates the non-performing party from liability for damages. All of the other remedies are available to the other party, i.e., demand for performance, 3/ reduction of the price or avoidance of the contract.

Non-performance by subcontractor, paragraph (2)

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

Temporary impediment, paragraph (3)

11. Paragraph (3) provides that an impediment which prevents a party from performing for only a temporary period of time shall exempt the non-performing party from liability for damages only for the period before the impediment is removed.

12. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence 4/ and the removal of the impediment reinstates the obligations of both parties under the contract.

Example 50F: Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1). Seller's plant was rebuilt in two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and Buyer was obligated to take delivery and to pay the contract price. 5/

3/ If there is an impediment to the performance of an obligation, it will do little good for the other party to demand performance of that obligation. He may, however, demand a substitute performance. The fact that the obligee of the performance makes such a demand would be an element in the determination whether the indicated substitute performance would be commercially reasonable.

4/ See para. 2 of the commentary on article 30 and para. 2 of the commentary on article 45.

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

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Duty to notify, paragraph (4)

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

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

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Section III. Effects of avoidance

Article 51

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

(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.

PRIOR UNIFORM LAW

ULIS, article 78.

COMMENTARY

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

Effect of avoidance, paragraph (1)

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

3. Partial avoidance of the contract under article 32 or 48 releases both parties from their obligations as to the part of the contract which has been avoided and gives rise to restitution under paragraph (2) as to that part.

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

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

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such a clause was not otherwise valid under the applicable national law. Article 51 (1) only states that such a provision is not terminated by the avoidance of the contract.

6. The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the avoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this convention. For example, article 62 provides that "where the goods have been received by the buyer, he shall take reasonable steps to preserve them" and article 52 (2) permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself 1/ or may arise out of the necessities of justice.

Restitution, paragraph (2)

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

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

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

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

1/ Article 5.

11. The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 59 of the party who relies on the breach of the contract to "adopt such measures as may be reasonable in the circumstances to mitigate the loss" may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market if such resale would adequately protect the seller at a lower net cost. 2/

Article 52

(1) The buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods substantially in the condition in which he received them.

(2) Nevertheless the preceding paragraph shall not apply:

(a) If the impossibility of returning the goods is not due to the act of the buyer;

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

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

PRIOR UNIFORM LAW

ULIS, article 79.

COMMENTARY

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

1. Article 52 states that "the buyer shall lose his right to declare the contract avoided or to require the seller to deliver substitute goods where it is impossible for him to return the goods substantially in the condition in which he received them".

2/ Cf. articles 64 and 65 on the authority of certain parties who hold goods for the account of the other party to sell the goods for the account of the other party.

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

3. It is not necessary that the goods be in the identical condition in which they were received; they need be only in "substantially" the same condition. Although the term "substantially" is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract. 1/

Exceptions, paragraph (2)

4. Paragraph (2) states three exceptions to the above rule. The buyer should be able to avoid the contract or require substitute goods even though he cannot return the goods substantially in the condition in which he received them (1) where the impossibility of returning them is not due to his own act, (2) where the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 22, and (3) where part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

Article 53

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods by virtue of article 52 shall retain all the other rights conferred on him by the present Convention.

PRIOR UNIFORM LAW

ULIS, article 80.

COMMENTARY

Article 53 makes it clear that the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods because he cannot

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

return the goods substantially in the condition in which he received them does not deprive the buyer of the right to claim damages under article 26 (1) (b), to require that any defects be cured under article 27, or to declare the reduction of the price under article 31.

Article 54

(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 56, 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 he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

PRIOR UNIFORM LAW

ULIS, article 81.

COMMENTARY

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

2. Where the seller is under an obligation to refund the price, he must pay interest from the date of payment to the date of refund at the interest rate fixed by article 56. The obligation to pay interest is automatic because it is assumed that the seller has benefited from being in possession of the purchase price during this period.

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

1/ See article 51 (2) and para. 9 of the commentary thereon.

Section IV. Supplementary rules concerning damages

Article 55

Damages for breach of contract by one party shall 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 shall not exceed the loss which the party in breach had foreseen or 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 contract.

PRIOR UNIFORM LAW

ULIS, article 82.

COMMENTARY

1. Article 55 introduces the section containing supplementary rules on damages in case of a claim under article 26 (1) (b) or article 42 (1) (b) by setting forth the basic rule for the calculation of those damages. Articles 56, 59 and 60 provide supplementary provisions to the rule in article 55 and articles 57 and 58 provide alternative means of calculating the damages in certain situations at the discretion of the injured party.

Basic damages

2. Article 55 provides that the injured party may recover as damages "a sum equal to the loss, including loss of profit, suffered ... as a consequence of the breach". This makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed.

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

4. Where the breach consists of a refusal of the buyer to take the goods, article 55 would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had made in the performance of the

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contract. 1/ The profit lost because of the buyer's breach includes any contribution to overhead which would have resulted from the performance of the contract.

Example 55A: The contract provided for the sale of 100 machine tools for $50,000 FOB. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of $45,000 of which $40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and $5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated the contract, Seller did not expend the $40,000 in costs which would have been incurred by reason of the existence of this contract. However, the $5,000 of overhead which were allocated to this contract were for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of the Buyer's breach the Seller has lost the allocation of $5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is $10,000.

Contract price	$50,000
Expenses of performance which could be saved	$40,000
Loss arising out of breach	$10,000

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

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

5. Where the seller delivers and the buyer retains defective goods, 2/ the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the value of any production lost during the period the tools could not be used.

1/ At his discretion in this situation the seller might choose to proceed under article 57 or 58.

2/ If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract and measure his damages under article 57 or 58.

/...

6. If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract as measured at the time and place the buyer /took delivery 3//. 4/ Since this formula is intended to restore him to the economic position he would have been in at the time and place /he took delivery/ of the goods if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages. To the amount as calculated above there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach. 5/

Example 55D: The contract provided for the sale of 100 tons of grain for a total price of $50,000 FOB. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to the Buyer of drying the grain was $1,500. If the grain had been as contracted its value at the time and place /of delivery/ would have been $55,000, but because of the deterioration caused by the moisture it was worth only $51,000.

Contract price	$50,000
Value the grain would have had at time and place buyer /took delivery/ if as contracted	$55,000
Value of grain as delivered at time and place buyer /took delivery/	$51,000
	$ 4,000
Extra expenses of drying the grain	$ 1,500
	$ 5,500

Foreseeability

7. The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can

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/3/ Article 55 gives no indication of the time and place at which "the loss" to the injured party should be measured. Presumably it should be at the same time and place specified in article 57 (1)./

4/ The means by which the buyer takes delivery are set forth in article 41.

5/ These additional elements of the buyer's damages will often be limited by the requirement of foreseeability discussed in para. 7 infra.

/...

be recovered by the party not in breach "shall not exceed the loss which the party in breach had foreseen or 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 contract". Should a party at the time of conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principles of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

8. In some legal systems the limitation of damages to those "which the party in breach had foreseen or ought to have foreseen at the time of the conclusion of the contract" will not be applicable if the non-performance of the contract was due to the fraud of the non-performing party. 6/

Article 56

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 is in arrears at a rate equal to the official discount rate in the country where he has his place of business plus 1 per cent but his entitlement shall not be lower than the rate applied to unsecured short-term commercial credits in the seller's country.

PRIOR UNIFORM LAW

ULIS, article 83.

OTHER UNCITRAL DRAFT CONVENTIONS

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

6/ See article 60 and the commentary thereon.

COMMENTARY

1. Article 56 states a rule for the calculation of the minimum amount of damages which may be recovered by the seller where the breach of contract consists of the buyer's delay in the payment of the price. 1/ In such a case the seller shall be entitled to recover the higher of (1) the official discount rate in the country where the seller has his place of business plus 1 per cent or (2) the rate e applied to unsecured short-term commercial credits in the seller's country.

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

3. The fact that the buyer will have to pay the official discount rate plus 1 per cent or the rate applied to unsecured short-term credit whichever is higher, assures that the buyer will have little or no incentive to delay payment in order to take advantage of an interest rate which is less than the rate at which he would have had to borrow. The existence of the two alternatives also assures that a formula for the calculation of interest will be available in those countries in which there is no official discount rate.

4. The interest rate formula set forth in article 56 is available to the seller "in any event". This makes it clear that pursuant to article 55 the seller can claim any other loss over and above the loss of interestxif he can prove the loss was caused him by the delay in paying the price.

Article 57

(1) In case of avoidance of the contract, the party claiming damages may rely upon the provisions of article 55 or, where there is a current price for the goods, recover the difference between the price fixed by the contract and the current price on the date /on which delivery was or should have been effected/ /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 at the place where delivery of the goods is to be effected or, if there is no such current price, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

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

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PRIOR UNIFORM LAW

ULIS, article 84.

COMMENTARY

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

2. Where the contract has been avoided, both parties are released from any future performance of their obligations 1/ and restitution of that which has already been delivered may be required. 2/ Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price.

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

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

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

1/ Article 51 (1).

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

3/ If the seller has a finite supply of the goods in question or the buyer has a finite need for such goods, it may be clear that the seller has resold or that the buyer has made a cover purchase, as the case may be. However, if the injured party is constantly in the market for goods of the type in question, it may be difficult or impossible to determine which of the many contracts of purchase or sale was the one in replacement of the contract which was breached. In such a case the use of article 58 may be impossible and article 57 may be particularly useful.

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

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

/8. In addition, the injured party may claim any reasonable expenses incurred as a result of the breach less any expenses saved as a consequence of the breach. 4/ /

Example 57A: The contract price was $50,000 CIF. The Seller avoided the contract because of the Buyer's fundamental breach. The current price on the date /on which delivery was or should have been effected/ /on which the contract was avoided/ for goods of the contract description at the place where the goods were to be handed over to the first carrier was $45,000. The Seller's damages under article 57 were $5,000.

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

Article 58

If the contract is avoided and, 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, he may, instead of claiming damages under articles 55 or 57, recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.

PRIOR UNIFORM LAW

ULIS, article 85.

4/ Para. 8 cannot be supported by any language in the draft convention. However, it appears to have been the intentions of the Working Group to include such a provision. bArticle 86 of ULIS which gave such a result was deleted at the Fifth Session of the Working Group "on the grounds that the revised text of article 82 /current article 55/ made article 86 unnecessary" (A/CN.9/87, paras. 184-185). The discussion at the fifth session did not consider the effect of deleting ULIS article 86 on current articles 57 and 58./

COMMENTARY

1. Article 58 sets forth an alternative means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.

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

/3. In addition, the injured party may claim any reasonable expenses incurred as a result of the breach less any expenses saved as a consequence of the breach. 1/ /

4. Article 58 provides that the injured party can rely on the price paid for the goods bought in replacement or that obtained by the resale only if the resale or cover purchase were made "in a reasonable manner and within a reasonable time after avoidance". If the resale or cover purchase were not made in such time and manner, the injured party must rely on article 55 or 57 for the calculation of the damages.

Article 59

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

PRIOR UNIFORM LAW

ULIS, article 88.

COMMENTARY

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

/ 1/ See the commentary on article 57, foot-note 4./

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

3. It will be noted that article 59 applies only to the injured party's obligation to mitigate his own loss. It does not require him to choose the remedy which would be the least expensive to the party in breach or the formula for the calculation of damages under article 55, 57 or 58, which would result in the lowest amount of damages. 2/ If two or more remedies or damage formulas are applicable to a breach of the contract, the injured party may choose the one most beneficial to himself. It should be noted, however, that the injured party can require the delivery of substitute goods or, in most cases, declare the avoidance of the contract with the consequential choice of damage formulas only if there has been a fundamental breach of the contract. 3/

4. The duty to mitigate applies to an anticipatory breach of contract under article 49 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise. The use of the procedure set forth in article 47, if applicable, would be a reasonable measure even though it may delay the avoidance of the contract and the cover purchase, resale of the goods or otherwise, beyond the date on which such actions would otherwise have been required.

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

1/ Under articles 61 to 65 the party in possession of goods has a duty under certain circumstances to preserve these goods and to sell them for the benefit of the party who has breached the contract, even though the risk of loss is on the party in breach.

2/ See paras. 9 and 10 of the commentary on article 27 and example 27B.

3/ Articles 25 (2), 27 (2), 30 (a), 32, 45 (a), 47 (3), 48 and 49 provide for the delivery of substitute goods or the avoidance of the contract. A party who has avoided the contract can calculate his damages under article 55, 57 or 58 at his option.

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

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

Article 60

In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Convention.

PRIOR UNIFORM LAW

ULIS, article 89.

COMMENTARY

1. Article 60 provides that the amount of damages for breach of contract involving fraud "shall be determined by the rules applicable in respect of contracts of sale not governed by the present Convention".

2. The fraud to which article 60 refers may be present either at the conclusion of the contract or at the time of breach.

3. Article 60 does not govern the question whether fraud at the time of the conclusion of the contract affects the existence of the contract. 1/ However, if there was fraud at the time of the conclusion of the contract which did not prevent the formation of the contract, article 60 states that the damages shall be determined by the rules in respect of contracts of sale which are not governed by the present Convention.

4. Similarly, if there was fraud in the performance of the contract, article 60 refers to the rules applicable to contracts of sale not governed by the present convention to determine the damages. In some countries the rule that damages are limited to those which are foreseen or foreseeable at the time of the conclusion of the contract does not apply if the breach of contract was fraudulent. In other countries exemplary damages may be allowable if the breach was fraudulent. In still other countries the existence of fraud or bad faith in the performance of the contract is irrelevant to the measure of damages.

1/ Article 7.

5. The applicable national law governs not only the extent to which the existence of fraud affects the measure of damages but also the definition of fraud. In some countries fraud requires an active intent to do a wrongful act. In other countries a breach caused by gross negligence on the part of the non-performing party, even though unintentional, has been treated as fraud.

6. With such a wide range of rules on the definition and interpretation of fraud and of its consequences on damages, rules which are so closely connected to public policy, it was thought to be inappropriate to make them the subject of regulation in a convention on the international sale of goods.

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Section V. Preservation of the goods

Article 61

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 expenses by the buyer.

PRIOR UNIFORM LAW

ULIS, article 91.

COMMENTARY

1. Article 61 states the obligation of the seller to preserve the goods where the buyer is in delay in taking delivery of the goods or in paying the price.

2. Article 61 envisages the situation in which the risk of loss has passed to the buyer under article 67 or 68 even though (1) the buyer is in delay in taking delivery of the goods or in paying the price and (2) the seller is in physical possession of the goods or the seller is in a position to control the disposition of the goods which are in the possession of a third person. In such a case it is appropriate that the seller be required to take reasonable steps to preserve the goods for the benefit of the buyer. It is also appropriate that the seller "have the right to retain" /the goods/ "until he has been reimbursed his reasonable expenses by the buyer", as is provided in article 61.

Example 61A: The contract provided that Buyer was to take delivery of the goods 1/ at the Seller's warehouse during the month of October. Seller effected delivery on 1 October by placing the goods at Buyer's disposal. 2/ On 1 November, the day when Buyer was in breach of his obligation to take delivery and the day on which the risk of loss passed to the Buyer, 3/ Seller shifted the goods to a portion of the warehouse which was less appropriate for the storage of such goods. On 15 November Buyer took delivery of the goods at which time the goods were damaged because of the inadequacies of the portion of the warehouse to which they had been shifted. In spite of the fact that the risk of loss had passed to Buyer on 1 November, Seller is liable for the damage to the goods which occurred between 1 November and 15 November by reason of the breach of his obligation to preserve them.

1/ The buyer's obligation to take delivery is set forth in article 41.

2/ See article 15 (b) and 15 (c).

3/ Article 68 (2).

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Example 61B: The contract called for delivery on CIF terms. Buyer wrongfully dishonoured the bill of exchange when it was presented to him. As a result, the bill of lading and other documents relating to the goods were not handed over to Buyer. Article 61 provides that in this case Seller, who is in a position to control the disposition of the goods through his possession of the bill of lading, is obligated to preserve the goods when they are discharged at the port of destination. 4/

4/ Compare example 62C.

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Article 62

(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 dispatched 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 authorized to take charge of the goods on his behalf is present at such destination.

PRIOR UNIFORM LAW

ULIS, article 92.

COMMENTARY

1. Article 62 sets forth the buyer's obligation to preserve goods which he intends to reject.

2. Paragraph (1) provides that where the goods have been received by the buyer and he intends to reject them, he shall take reasonable steps to preserve them. The buyer has the right to retain those goods until he has been reimbursed his reasonable expenses by the seller.

3. Paragraph (2) provides for the same result where goods which have been dispatched to the buyer have been put at his disposal at their place of destination and he exercises his right to reject them. /1/ However, since the goods are not in the buyer's physical possesion at the time he exercises his right to reject them, it is not as clear that he should be required to take possession of them on behalf of the seller. Therefore, paragragh (2) specifies that he need take possesion only if "this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense" and only if the seller or a person authorized to take charge of the goods for him is not present at the place of destination.

4. Paragraph (2) is applicable only where goods which have been dispatched to the buyer "have been put at his disposal at their place of destination". Therefore,

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/1/ Para. (2) states only that the buyer is "bound to take possession of /the goods/ on behalf of the seller", but it is assumed that it is the intention of the Working Group that the buyer is obligated to take reasonable steps to preserve them and that he has a right to reimbursement for his expenses, as in para. (1)./

/...

the buyer is obligated to take possession of the goods only if the goods have physically arrived at their place of destination prior to his rejection of them. He is not obligated to take possession of the goods under paragraph (2) if before the arrival of the goods he rejects the shipping documents because they indicate that the goods do not conform to the contract.

Example 62A: After the goods were received by the buyer he rejected them because of their failure to conform to the contract. The buyer is required by article 62 (1) to preserve the goods for the seller.

Example 62B: The goods were shipped to the buyer by railroad. Prior to taking possession, buyer found on examination of the goods that there was a fundamental breach of the contract in respect of their quality. Even though buyer has the right to avoid the contract under article 30 (a), by virtue of article 62 (2) he is obligated to take possession of the goods and preserve them, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense and provided that the seller or a person authorized to take possession on his behalf is not present at the place of destination.

Example 62C: The contract provided for delivery on CIF terms. When the bill of exchange was presented to the buyer, he dishonoured it because the accompanying documents were not in conformity with the contract of sale.

In this example buyer is not obligated to take possession of the goods for two reasons. If the goods have not arrived and been put at his disposal at the place of destination at the time the buyer dishonours the bill of exchange, the provisions of article 62 (2) do not apply at all. Even if article 62 (2) were to apply, because the buyer could take possession of the goods only by paying the bill of exchange, he would not be required by article 62 (2) to take possession and preserve the goods. 2/

Article 63

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 expense incurred is not unreasonable.

PRIOR UNIFORM LAW

ULIS, article 93.

COMMENTARY

1. Article 63 permits a party who is under an obligation to take steps to

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2/ Compare example 61B.

preserve the goods to discharge his obligation by depositing them in the warehouse of a third person.

2. The warehouse must be appropriate for the storage of goods of the type in question, the expense of storage must not be unreasonable, and the party who deposits the goods must notify the other party of the deposit.

3. If the national law gives the warehouse the right to sell goods stored therein in order to collect the storage charges, it is the obligation of the party who deposits the goods to see that the other party is given notice prior to any such sale by the warehouse. The party who deposits the goods has fulfilled that obligation if he has given the warehouse the name and address of the other party and if under the national law the warehouse is obligated to give to the other party due notice of his intention to sell the goods.

Article 64

(1) The party who, in the cases to which articles 61 and 62 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.

PRIOR UNIFORM LAW

ULIS, article 94.

COMMENTARY

1. Article 64 sets forth the right to sell the goods by the party who is under an obligation to preserve them.

2. This right to sell the goods arises where there has been an unreasonable delay by the other party in accepting them or taking them back or in paying the cost of preservation.

3. The sale may be by "any appropriate means". The convention does not specify what are appropriate means because conditions vary in different countries. To determine whether the means used are appropriate, reference should be made to the means required for sales under similar circumstances under the law of the country where the sale takes place.

4. Prior to the sale the party selling the goods must give the other party "due notice ... of the intention to sell". To constitute "due notice", the notice must indicate what form the intended sale will take and give the time and place of the sale. The notice must be given in sufficient time for the other party to accept the goods, take them back or pay the cost of preservation, as the case may be, prior to the date of sale.

5. The law of the State where the sale under this article takes place will determine whether the sale passes a good title to the purchaser if the party selling the goods has not complied with the requirements of this article. 1/

6. The party selling the goods may reimburse himself from the proceeds of the sale for all reasonable costs of preserving the goods and selling them. Any balance must be transmitted to the other party.

1/ Article 7.

Article 65

Where, in the cases to which articles 61 and 62 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 64.

PRIOR UNIFORM LAW

ULIS, article 95.

COMMENTARY

1. Article 65 imposes a duty of sale on the party who is under an obligation to preserve the goods if (1) the goods are subject to loss or rapid deterioration or (2) their preservation would involve unreasonable expense.

2. The most obvious example of goods which must be sold because they are subject to loss or rapid deterioration is fresh fruits and vegetables. However, the concept of "loss" is not limited to a physical deterioration or loss of the goods. The goods may also be subject to such loss as to require sale under article 65 if they threaten to decline rapidly in value because of changes in the market.

3. Article 65 requires the sale to be made in accordance with article 64. Therefore, "due notice" must be given of the intention to sell and the sale must be made by "appropriate means". 1/ However, the determination whether due notice has been given and appropriate means have been used must be made in the light of the need to sell which are losing their value, perhaps at a rapid rate. In particular it may not be possible to give notice of an intention to sell in sufficient time prior to the actual sale of the goods to allow the other party to react. In such a case, "due notice" would require that notice of the sale and the conditions under which the sale was made be given as soon as possible.

4. If the party obligated to sell the goods under this article does not do so, he is liable for any loss or deterioration arising out of his failure to act.

5. Because article 65 creates an affirmative duty to sell, as contrasted with the right to sell recognized by article 64, the party who has made the decision to sell should be held only to a good faith determination that he had to proceed promptly under this article rather than proceed under article 64.

1/ See para. 3 of the commentary on article 64.

Chapter VI. Passing of the risk

Article 66

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.

PRIOR UNIFORM LAW

ULIS, article 96.

COMMENTARY

1. Article 66 introduces the provisions in the convention that regulate the passing of the risk of loss.

2. The question whether the buyer or the seller must bear the risk of loss is one of the most important problems to be solved by the law of sales. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement with its attendant strain on current assets, and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the allocation of the risk has an even sharper impact.

3. Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C and F may specify the moment when the risk of loss passes from the seller to the buyer. 1/ Where the contract sets forth rules for the determination of the risk of loss by the use of trade terms or otherwise, those rules will prevail over the rules set forth in the present convention. 2/

4. Article 66 states the main consequence of the passing of the risk. Once the risk has passed to the buyer, the buyer is obligated to pay for the goods

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1/ E.g., Incoterms 1953, FOB, A4 and B2; CIF, A6 and B3; C and F, A4 and B2 provide that the seller bears the risk until the goods pass the ship's rail from which time the risk is borne by the buyer.

The use of such terms in a contract without specific reference to Incoterms or to some other similar definition and without a specific provision in the contract as to the moment when risk passes may nevertheless be sufficient to indicate that moment if the court or arbitral tribunal finds the existence of a usage. See para. 6 of the Commentary to article 8.

2/ Article 5.

notwithstanding subsequent loss or deterioration of the goods. This is the converse of the rule stated in article 20 that "the seller shall be liable ... for any lack of conformity which exists at the time when the risk passes".

5. The buyer's obligation to pay the price where the risk has passed notwithstanding the loss or deterioration of the goods is subject to the qualification that the loss or deterioration not be due "to the act of the seller". The loss or deterioration is due to the act of the seller if it was due to a defect which existed at the time the risk passed even though that defect was hidden.

6. Similarly, the buyer may be exonerated from paying the price if the loss or deterioration was in violation of an express guarantee given by the seller.

Article 67

(1) Where the contract of sale involves carriage of the goods, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.

(2) The first paragraph shall also apply if at the time of the conclusion of the contract the goods are already in transit. However, if the seller at that time knew or ought to have known that the goods had been lost or had deteriorated, the risk of this loss or deterioration shall remain with him, unless he discloses such fact to the buyer.

PRIOR UNIFORM LAW

ULIS, articles 19 paragraph 2, 97 paragraph 1, 99 and 100.

COMMENTARY

1. Article 67 governs the passage of the risk of loss where the contract of sale involves the carriage of the goods or where the goods are in transit at the time of the sale. 1/

Where the contract involves the carriage of the goods, paragraph (1)

2. Where the contract of sale involves the carriage of goods, the risk of loss passes when the goods are handed over to the /first/ carrier. The contract of sale involves the carriage of goods if the seller is required or authorized to

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1/ Article 69 applies if there has been a fundamental breach of contract as to the conformity of the goods or if the loss results from a fundamental breach other than for the non-conformity of the goods.

ship the goods to the buyer but the contract does not require the seller to make the goods available to the buyer at the point of destination. 2/ The goods are handed over to the carrier at the time physical possession is given to the carrier, whether or not they are then on board the vessel which will transport them to the buyer.

/3. If the goods are to be transported by two or more carriers, "the risk shall pass when the goods are handed over to the /first/ carrier for transmission to the buyer". Therefore, if the goods are shipped from an inland point by rail or truck to a port where they are loaded aboard a ship, the risk of loss passes when the goods are handed over to the railroad or trucking firm. 3/ /

Goods in transit, paragraph (2)

4. If the goods were in transit at the time the contract of sale was concluded, the risk of loss is deemed retroactively to have passed at the time the goods were handed over to the /first/ carrier, as in paragraph (1). This rule that the risk of loss passes prior to the making of the contract arises out of purely practical concerns. It would normally be difficult or even impossible to determine at what precise moment in time damage known to have occurred during the carriage of the goods in fact occurred. It is simpler if the risk of loss is deemed to have passed at a time when the condition of the goods was known. In addition, it will usually be more convenient for the buyer, who is in physical possession of the goods, to make claim against the carrier and the insurance company.

5. This rule of retroactive passage of the risk of loss does not apply "if 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 ... unless he discloses such fact to the buyer".

2/ See para. 7 of the commentary on article 15.

/ 3/ This paragraph has been inserted on the assumption that the Working Group insert the word "first" before the word "carrier" so as to make article 67 (1) consistent with article 15 (a)./

Article 68

(1) In cases not covered by article 67 the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him.

(2) When the goods have been placed at the disposal of the buyer but have not been taken over or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk shall pass to the buyer as from the last moment when he could have taken the goods over without committing a breach of the contract. /However, where the contract relates to the sale of goods not then identified, the goods shall not be deemed to be placed at the disposal of the buyer until they have been clearly identified to the contract and the buyer has been informed of such identification./

PRIOR UNIFORM LAW

ULIS, articles 97 and 98.

COMMENTARY

Risk of loss in cases not governed by article 67 - paragraph (1)

1. Article 68 (1) governs the risk of loss in all cases in which article 67 does not apply. 1/ In such case "the risk shall pass to the buyer as from the time when the goods were placed at his disposal and taken over by him."

2. In order for the risk to pass under article 68(1), the buyer must take over the goods. The goods are taken over when the buyer either takes physical possession or, if the goods are in the hands of a third person, when the appropriate act has occurred after which the third person is liable to the buyer for the goods. Such act includes the handing over of a negotiable document of title (e.g., negotiable warehouse receipt) or the acknowledgement by the third person that he holds the goods for the benefit of the buyer.

Where the buyer has wrongfully not taken over the goods, paragraph (2)

3. Since article 68 (1) shifts the risk of loss to the buyer only when the buyer has taken over the goods, article 68 (2) is necessary to provide for the situation in which the goods are placed at the buyer's disposal but he wrongfully fails to take them over. Article 68 (2) provides that in such a case "the risk shall pass to the buyer as from the last moment when he could have taken the goods over without committing a breach of the contract".

1/ Article 69 applies if there has been a fundamental breach of contract as to the conformity of the goods or if the loss results from a fundamental breach other than for the non-conformity of the goods.

/...

4. Article 68 (2) goes on to specify that the risk of loss of goods not identified to the contract at the time of the conclusion of the contract does not pass until the goods have been clearly identified to the contract and the buyer has been informed of such identification. This provision is intended to assure that the seller cannot identify goods to the contract which were damaged after the risk of loss would have passed under article 68 (1).

/Article 69

(1) Where the goods do not conform to the contract and such non-conformity constitutes a fundamental breach, the risk does not pass to the buyer so long as he has the right to avoid the contract.

(2) In the case of a fundamental breach of contract other than for non-conformity of the goods, the risk does not pass to the buyer with respect to loss or deterioration resulting from such breach./

PRIOR UNIFORM LAW

ULIS, article 97, paragraph (2)

COMMENTARY

1. Article 69 governs the effect of fundamental breach on the passing of the risk of loss.

Non-conformity of the goods, paragraph (1)

2. Paragraph (1) provides that "where the goods do not conform to the contract and such non-conformity constitutes a fundamental breach, the risk does not pass to the buyer so long as he has the right to avoid the contract". If the contract is avoided, the risk never passes to the buyer. On the other hand, the risk of loss passes to the buyer at the time he loses his right to avoid the contract. 1/

Other fundamental breaches, paragraph (2)

3. If the seller has committed a fundamental breach other than in respect of lack of conformity of the goods "the risk does not pass to the buyer with respect to loss or deterioration resulting from such breach". The risk of loss or deterioration of the goods which is unrelated to the fundamental breach by the seller will pass in accordance with the provisions of article 67 or 68.

1/ The situations in which the buyer loses the right to avoid the contract are set forth in paras. 5 and 6 of the commentary on article 30.