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FORMATION AND VALIDITY OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Report of the Secretary-General

Addendum

ANNEX II

UNIDROIT DRAFT OF A LAW FOR THE UNIFICATION OF CERTAIN RULES RELATING TO VALIDITY OF CONTRACTS OF INTERNATIONAL SALE OF GOODS: CRITICAL ANALYSIS

DRAFT OF A LAW FOR THE UNIFICATION OF CERTAIN RULES RELATING TO VALIDITY OF CONTRACTS OF INTERNATIONAL SALE OF GOODS a/

ARTICLE 1

1. The present law applies to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

(a) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;

(b) Where the acts constituting the offer and the acceptance have been defected in the territories of different States;

(c) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

3. The application of the present law shall not depend on the nationality of the parties.

4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under Article ... of the Convention dated ..... relating to a Law for the unification of certain rules relating to validity of contracts of international sale of goods is in force in respect of them.

6. The present Law shall not apply to contracts of sale:

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

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a/ The draft law is hereafter referred to as LUV in the commentaries. The English and French language versions are the texts approved by the Governing Council of UNIDROIT on 31 May 1972 and set out in the following bilingual publication of UNIDROIT: ETUDE XVI/B, Doc.22, U.D.P. 1972. The Russian and Spanish versions have been prepared by the United Nations Secretariat.

(b) Of any ship, vessel or aircraft, which is or will be subject to registration;

(c) Of electricity;

(d) By authority of law or on execution or distress.

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

8. The present law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

9. Rules of private international law shall be excluded for the purpose of the application of the present law, subject to any provision to the contrary in the said law.

COMMENTARY

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

2. If the Working Group decides to prepare a draft convention on validity of contracts for the international sale of goods, presumably article 1 would be redrafted to conform to the sphere of application of the Convention on the International Sale of Goods (CISG).

ARTICLE 2

1. The present law shall not apply to the extent that the parties have agreed, expressly or impliedly, that it is inapplicable.

2. However, in the case of fraud and in the case of threat, the present law may not be excluded or departed from to the detriment of the aggrieved party.

COMMENTARY

1. Article 2 (1) reiterates the principle of party autonomy in respect of the international sale of goods which is also found in article 2 (1) of the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 3 of the Uniform Law on the International Sale of Goods (ULIS) and article 5 of the draft CISG. However, article 2 (2) provides that the law cannot be excluded or

departed from to the detriment of the aggrieved party in the case of fraud or in the case of threat (duress). There is no bar to the inclusion of higher standards in respect of these matters in the contract.

2. It is submitted that article 2 gives a broader role to the principle of party autonomy than is warranted. Most of the rules in respect of validity of contracts are rules from which the parties should not be able to derogate. This applies in particular to such provisions in the LUV as the power of the court to determine the "actual common intent" of the parties in the case of a simulated contract, b/ the determination of whether a usage is valid, c/ or the criteria for the determination whether a contract can be avoided for mistake. d/

3. Certain rules in respect of the validity of contracts should be subject to the will of the parties. In such a case the substantive rule should reflect the extent to which the parties may affect the operation of the rule. The LUV already adopts that principle of drafting in such provisions as article 6 (b) which provides that a party may avoid a contract for mistake only if, inter alia, "the mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance".

ARTICLE 3

1. Statements by and acts of the parties shall be interpreted according to their actual common intent, where such an intent can be established.

2. If the actual common intent of the parties cannot be established, statements by and acts of the parties shall be interpreted according to the intent of one of the parties, where such an intent can be established and the other knew or ought to have known what that intent was.

3. If neither of the preceding paragraphs is applicable, the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties.

COMMENTARY

1. Article 3 sets out rules for the interpretation of the statements and acts of the parties to a contract of sale of goods to which the uniform law applies. The rules in article 3 are supplemented and expanded by those contained in article 4.

2. The report of the Max-Planck Institut für ausländisches und internationales Privatrecht (hereafter referred to as the Max-Planck report) states that the rules

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b/ Article 3 (1).

c/ Article 4 (3).

d/ Articles 6 to 9.

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of interpretation are necessary (i) to establish whether there is a contract in order to ascertain whether it may be avoided for fraud, threat or mistake, (ii) to establish which facts entitle a party to avoid a contract and (iii) to ascertain the importance of the mistake. e/

3. Although the report goes on to state that "the import of the rules on interpretation is limited to the present draft", f/ it would appear that the text of neither article 3 nor article 4 so limits their application. Articles 3 and 4 contain rules of interpretation to be used for all purposes for which the contract must be interpreted. Moreover, it would be inappropriate to have more than one set of rules of interpretation to be applied to a single contract. But this may occur if article 3 is retained as its rules differ from the more limited rules of interpretation contained in the draft CISG.

4. The rules of interpretation set forth in article 3 are, in general, appropriate so far as they go. However, it should be noted that, according to article 3 (3), unless there can be determined the actual common intent of the parties or the actual intent of one party which the other knew or of which he ought to have known, the statements and acts of the parties are to be interpreted "according to the intent that reasonable persons would have had in the same situation". Since in most difficult questions of interpretation there will be neither a common intention of the parties nor an intention of one party of which the other party knew or ought to have known, it follows that the test in article 3 (3) will be the primary tool of interpretation used by a tribunal to resolve such questions.

5. It may be suggested that a major difficulty with article 3 (3) is that the two parties to the contract are in different situations and consequently two "reasonable persons", one in the situation of the buyer and the other in the situation of the seller, might well have the same disagreement over the interpretation of the contract as the parties themselves. While this is also true of two parties within a given country, the problem is accentuated in international transactions. Different ways of doing business, different legal and economic systems and even the possibility of two different texts of the contract (if the contract is in two languages and the translation is inadequate) may render any objective interpretation of the contract impossible. In such a situation, article 3 gives no aid to a tribunal as to how to resolve the difficulty.

ARTICLE 4

1. In applying the preceding Article due consideration shall be given to all relevant circumstances, including any negotiations between the parties, any practices which they have established between themselves, any usages which reasonable persons in the same situation as the parties usually consider to be

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e/ ETUDE XVI/B, Doc.22, U.D.P. 1972, pp. 21 and 23. All page references given below in foot-notes pertain to the English language version of the Max-Planck report reproduced in that publication.

f/ P.23.

applicable, the meaning usually given in any trade concerned to any expressions, provisions or contractual forms which are commonly used, and any conduct of the parties subsequent to the conclusion of the contract.

2. Such circumstances shall be considered, even though they have not been embodied in writing or in any other special form; in particular, they may be proved by witnesses.

3. The validity of any usage shall be governed by the applicable law.

COMMENTARY

1. Article 4 (1) is similar to article 4 (2) of ULF. If a text on validity of contracts were to be adopted, it should be redrafted to conform to that adopted for the formation of contracts.

2. The Max-Planck report notes that a member of the committee that prepared the draft uniform law on validity considered that it might cause problems in some common law jurisdictions to provide that a contract could be interpreted by a tribunal in the light of "any conduct of the parties subsequent to the conclusion of the contract". However, as that report notes, the rule in the uniform law, if adopted by a given country, would supersede any contrary rule in municipal law. g/ Furthermore, at least one common law country has adopted a rule by statute that the conduct of the parties in performing their obligations under the contract is relevant in determining the meaning of the contract. h/

3. Article 4 (2) would seem to be a self-evident provision since several of the sources mentioned in article 4 (1) by their very nature would often not be in writing.

4. Article 4 (3) is a reiteration of what the law would be without the provision. The only other alternative would be to set forth the criteria for the validity of a usage.

5. It should be noted that under article 2 the parties appear to have the power to determine their own tests for the validity of a usage.

ARTICLE 5

There is no contract if, under the provisions of the preceding articles, an agreement between the parties cannot be established.

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g/ P. 25.

h/ Sect. 2-208 (1), Uniform Commercial Code, United States.

COMMENTARY

1. Article 5 completes the set of three articles on interpretation by providing that no contract exists if no agreement between the parties can be established from the statements and acts of the parties as properly interpreted according to articles 3 and 4. It should be noted that the consequence which follows from the finding of a mistake under articles 6 to 9, fraud under article 10 or improper threat under article 11 is the right of the mistaken, defrauded or threatened party to avoid the contract.

2. If a provision such as that in article 5 is thought to be desirable, it may perhaps better be placed with the provisions on formation of the contract rather than with the provisions on validity of contracts.

ARTICLE 6

A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

(a) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

(b) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance; and

(c) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

COMMENTARY

1. Article 6 is the first of four articles dealing with mistake and is the basic article in which the major policy decisions taken by UNIDROIT in respect of mistake are to be found.

2. Article 6 presents a number of problems, some of which may be inherent in a text on the unification of the law on mistake.

3. The first test that a mistake must satisfy to enable avoidance of the contract is that it be of such importance that the contract would not have been concluded on the same terms if the truth had been known. A problem with this formulation is that whenever there is a mistake, at least some of the terms of the contract would probably have been altered in at least a minor respect if the party that had made the mistake had been aware of that mistake. Such a result is clearly not intended. i/

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i/ It should also be noted that article 10 allows a party to avoid the contract for fraud only if the mistake caused by the fraud was sufficiently important as to induce him to conclude the contract.

4. A similar problem was faced by the Working Group in defining the concept of "fundamental breach" in the draft CISG. In article 10 of ULIS a breach is regarded as fundamental "wherever the party in breach, knew, or ought to have known at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects". This definition has been changed in article 9 of the draft CISG so that a breach is fundamental "if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result".

5. Article 6 (b) requires a determination whether the party claiming avoidance of the contract for mistake had expressly or impliedly assumed the risk of the mistake. While it is certainly correct that a party who has assumed the risk that a mistake may exist should not be able to avoid the contract for that mistake, the text gives no assistance in determining under what circumstances it should be held that a party assumed the risk of mistake.

6. Article 6 (c) sets forth a further requirement for the avoidance of the contract. The party not claiming avoidance must either (i) have made the same mistake, or (ii) have caused the mistake, or (iii) have known or ought to have known of the mistake and not have told the party claiming avoidance even though it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

7. It is doubtful if a uniform body of interpretation could be developed as to the circumstances under which one party may be held to have caused the other party to be mistaken. It is also doubtful whether a uniform body of interpretation could be developed as to whether the other party should have known of the mistake or whether reasonable commercial standards of fair dealing would require him to notify the mistaken party of the error.

8. Articles 6 and 14 (3) provide that the remedy available to a mistaken party is to avoid the contract and, to the extent permitted by the applicable law, to claim damages. In addition, article 15 recognizes that if the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. However, if there is no acquiescence on the part of the other party, no possibility of reforming the contract is possible.

9. It may be observed that article 14 (4) provides that if the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the mistaken party who avoided the contract.

ARTICLE 7

1. A mistake of law shall be treated in the same way as a mistake of fact.

2. A mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated.

COMMENTARY

1. Although many legal systems do not consider a mistake of law to have the same legal effect as a mistake of fact, it is reasonable to do so in respect of a contract of international sale of goods. The legal rules governing such contracts are voluminous and complex and at least in part will be rules of a foreign legal system. It would be unreasonable to assume knowledge by the parties of the existence and effect of all such laws.

2. The rule in article 7 (2) that a mistake in the expression or transmission of a statement of intention shall be considered as the mistake of him from whom the statement emanated appears to place the consequences of the mistake on the party who chose the means of communication. However, the result is the opposite since it is only the party who is mistaken, i.e., the party who sends the message, who can avoid the contract under article 6 (2). The practical consequence is that if an offeror-seller offered to sell goods at 8 per unit but the message was transmitted to the offeree-buyer as 7 per unit and he accepted at that price, the offeror-seller could avoid the contract. However, if the message was transmitted at 9 per unit and the offeree-seller accepted at that price, the offeror-seller would have no reason to avoid the contract and the offeree-buyer could not do so.

3. There is a difficulty in determining on what occasions the receiver of a message may have impliedly assumed the risk of mistake as provided in article 6 (b). The Max-Planck report suggests that this will occur in "some cases" without specifying what those cases might be. j/

ARTICLE 8

A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded.

COMMENTARY

1. Article 8 serves as a rule delimiting the scope of application of the LUV in relation to mistake. The LUV does not apply to a mistake in respect of an event which occurs after the conclusion of the contract. The LUV does apply to a mistake in respect of an event which occurs before the conclusion of the contract, unless the mistake is one which falls under article 9 or 16.

2. The effect of articles 9 and 16 is that if the mistake goes to the non-conformity of the goods or the rights of third parties in the goods or if the mistake relates to the impossibility of performing the assumed contractual obligation, LUV does not permit avoidance of the contract. Presumably such cases would be governed by the substantive law of sales.

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j/ P. 35.

ARTICLE 9

The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods.

COMMENTARY

1. Article 9 does not permit avoidance of the contract for mistake when the buyer has a remedy based on the non-conformity of the goods or on the existence of rights of third parties. The Max-Planck report indicates that article 9 also prohibits avoidance of the contract in "those cases in which the buyer might have relied on a remedy under /the draft CISG/ if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice ...)". k/ It would seem that this interpretation of article 9 leads to the conclusion that the LUV is never applicable to a mistake as to the quality of the goods or as to the rights of third parties. In all such cases the substantive law of sales would have to apply.

2. The scope of application of article 9 would have to be carefully defined if article 7 (2) of the draft CISG, which was left in square brackets by the Working Group, is retained. 1/

ARTICLE 10

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided for fraud if the other contracting party knew or ought to have known of the fraud.

COMMENTARY

1. Article 10 deals with avoidance of the contract for fraud.

2. According to the Max-Planck report, in contrast to a "simple" mistake under

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k/ Pp. 37-39.

1/ Article 7 (2) provides that CISG does not govern the rights and obligations which might arise between buyer and seller because of the existence in any person of rights or claims which relate to intellectual or industrial property or the like.

article 6, the mistake which was fraudulently caused need not have been "essential" to authorize the defrauded party to avoid the contract. m/ However, it may be noted that in article 6 (a) the "simple" mistake need only be "of such importance that the contract would not have been concluded on the same terms if the truth had been known" whereas under article 10 the fraudulently caused mistake must have induced the other party to conclude the contract. It is evident that the mistake must be more serious to induce the conclusion of the contract than to cause it to be concluded on different terms than it would have been if the truth had been known.

3. It is intended that "mere puff in advertising or negotiations in itself does not suffice" to constitute fraud. n/ The text of article 10 does not furnish the basis on which to distinguish between those advertising claims which are "mere puff" and those which constitute fraud.

ARTICLE 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

COMMENTARY

1. Article 11 does not attempt to describe what kind of threats would be "unjustifiable". As stated in the Max-Planck report, "in deciding when a threat is justifiable and when it is not, due consideration must be given to the entire contractual context and to the purposes that the person uttering the threat thereby sought to achieve". o/

2. Nevertheless, if would seem necessary to determine what forms and what degree of pressure are acceptable in order to determine what kinds of threats are unjustifiable. It can be expected that there would be a wide range of views on the forms and degree of pressure which are acceptable as a means of inducing the conclusion of a contract.

3. In all legal systems a threat of physical harm is unjustifiable, and this is, indeed, the classical example of duress. There is probably also agreement that it is justifiable to threaten civil action to enforce an obligation which the claimant believes in good faith to be due. However, there would probably be no agreement at what point, if any, the threat of civil action or of attachment of goods or of similar proceedings in connexion with a civil action would become unjustified harassment. Other typical threats which might be viewed as justifiable in some legal systems, but as unjustifiable in others, would include a refusal by a bailee to surrender goods on the owner's demand unless paid a sum which is not due but which the bailee believes in good faith to be due, and the threat to start a criminal prosecution for the purpose of collecting a private claim.

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m/ P. 39.

n/ Ibid.

o/ P. 41.

4. Although the examples given may be peripheral problems in the context of international trade, the question as to whether a contract was concluded by reason of economic duress has a potentially greater significance. p/ Many legal systems have rejected the concept of economic duress. Nevertheless, many of those same legal systems have reached results similar to those which would result from an acceptance of a concept of economic duress. However, such concepts are closely linked to the particular notions of public policy that prevail in each individual legal system. It is thus difficult to anticipate agreement on the nature of the economic threats that would be considered to be "unjustifiable" under article 11.

ARTICLE 12

1. Avoidance of a contract must be by express notice to the other party.

2. In the case of mistake or fraud, the notice must be given promptly, with due regard to the circumstances, after the party relying on it knew of it.

3. In the case of threat, the notice must be given promptly, with due regard to the circumstances, after the threat has ceased.

COMMENTARY

1. The requirement that a contract can be avoided only by express notice to the other party is in accord with article 10 (2) of the draft CISG. The requirement that the notice be given within a restricted time-limit is in accord with articles 30 (2) and 45 (2) of the draft CISG, but the exact wording of the time-limit is somewhat different.

2. It might be remarked that a remedy system which seeks to provide relief in the case of fraud should not require as an absolute prerequisite to that relief that avoidance must be by express notice which is received by the other party for, on occasion, a fraudulent party may be difficult to locate.

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p/ It is doubtful whether the drafters of article 11 intended that economic duress be included. The Max-Planck report points out that a provision was discussed by the UNIDROIT committee which prepared the draft LUV which would have permitted "the avoidance of a contract if there is an obvious inequality between the contractual performances required of the parties and if one party has been led to enter into the contract by an abusive exploitation of his personal or economic situation" (pp. 17-19). The majority of the committee rejected this rule because of the uncertainty it would introduce into international trade since uniformity in its application would be unlikely.

ARTICLE 13

1. In case of mistake, any notice of avoidance shall only be effective if it reaches the other party promptly.

2. In any event, the notice shall only be effective if it reaches the other party within two years after the conclusion of the contract in the case of mistake or within five years after the conclusion of the contract in the other cases.

COMMENTARY

1. Article 13 adopts a reception theory in respect of notices in contrast with article 10 (3) of the draft CISG which gives effect to a notice which has been sent by appropriate means within the required time even if that notice fails to arrive or fails to arrive within the required time or even if the contents of the notice have been inaccurately transmitted.

2. The point of time at which the period of five years commences during which, at a maximum, the notice of avoidance must be received by the other party in case of fraud differs from the point of time at which the four year period of limitation begins under the Convention on the Limitation Period in the International Sale of Goods. Article 10 (3) of that Convention recognizes the special character of fraud by providing that a claim based on fraud accrues on the date on which the fraud was or reasonably could have been discovered. However, article 13 (2) of LUV provides that a notice of avoidance of the contract for fraud must be given within five years from the conclusion of the contract.

ARTICLE 14

1. Notice of avoidance shall take effect retroactively, subject to any rights of third parties.

2. The parties may recover whatever they have supplied or paid in accordance with the provisions of the applicable law.

3. Where a party avoids a contract for mistake, fraud or threat, he may claim damages according to the applicable law.

4. If the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake.

COMMENTARY

1. Article 14 deals with the effects of avoidance. It reaches results which are similar to, but slightly different from, those reached under articles 51 to 54 of the draft CISG.

2. Article 14 (1) provides that the avoidance of the contract is retroactive, i.e. that the contract is regarded as never having existed. The natural consequences of this rule would seem to be that there should be mutual restitution of any goods or money handed over to the other party. Article 51 (2) of the draft CISG specifically provides such a requirement in respect of an avoidance of a contract under that text. However, article 14 (2) of LUV provides for restitution only "in accordance with the provisions of the applicable law".

3. Article 14 (1) notes that even though a contract which is avoided is treated as though it never existed, the rights of third parties may not be affected. Although there is no provision exactly comparable in the draft CISG, article 52 (2) (c) of the draft CISG recognizes that a buyer may not be able to make restitution of goods delivered to him because they have been sold in the normal course of business, thereby recognizing the right of the third-party purchaser to retain them.

4. The Max-Planck report points out that avoidance nullifies the entire contract. However, the report also takes the view that in the case of a complex contract having several objects or parties, only some of which are effected by the mistake, fraud or threat, the contract "may be considered severable so that avoidance of one contract need not affect the other". q/ Although such a result is reasonable and can be attained in similar circumstances under the draft CISG, r/ it does not follow from the text of the LUV.

5. Article 14 (3) recognizes that the grounds which justify the avoidance of a contract for mistake, fraud or threat may also justify a claim for damages. However, article 14 (3) does not decide either the circumstances under which damages may be claimed or the amount of such damages but refers both matters to the applicable law.

6. Since LUV allows a party to avoid the contract for mistake even though the mistake was at least in part his own fault, article 14 (4) provides that in such a circumstance the party who has avoided the contract may be obligated to pay damages to the other party. The amount of the damages is to be determined by considering all the circumstances, "including the conduct of each party leading to the mistake". Therefore, the amount of damages is to be determined not only by the amount of loss suffered, but by the comparative fault of the parties.

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q/ P. 45

r/ Articles 32 and 48 (1).

ARTICLE 15

1. If the co-contractant of the mistaken party declares himself willing to perform the contract as it was understood by the mistaken party, the contract shall be considered to have been concluded as the latter understood it. He must make such a declaration promptly after having been informed of the manner in which the mistaken party had understood the contract.

2. If such a declaration is made, the mistaken party shall thereupon lose his right to avoid the contract and any other remedy. Any declaration already made by him with a view to avoiding the contract on the ground of mistake shall be ineffective.

COMMENTARY

1. Article 15 applies only in cases of mistake and not to cases of fraud or threat. It allows the co-contractant of the mistaken party to preserve the contract by agreeing to perform the contract as it was understood by the mistaken party. This not only allows a reformation of the contract but also precludes the mistaken party from using the mistake as a spurious means of avoiding the contract.

2. It may be noted that in fact the mistaken party has a similar option, i.e. he can agree to perform the contract as it was concluded and not exercise his right to avoid the contract. However, the mistaken party has no right to have the contract reformed to that which it would have been had there been no mistake.

3. Article 15 (2) provides that if a declaration is made under article 15 (1), the mistaken party not only loses his right to avoid the contract but also loses any other remedy he may have. In addition, any declaration of avoidance by the mistaken party is ineffective.

4. This drastic provision not only precludes avoidance of the contract but also takes away from the mistaken party any right to damages that he may have had under national law. It should be noted that this result is achieved even in those cases in which the mistaken party is left with a loss which is not eliminated by his co-contractant's declaration that he is willing to abide by the contract as it was understood by the mistaken party.

ARTICLE 16

1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller.

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COMMENTARY

1. Article 16 serves to delimit the scope of LUV and does not serve as a substantive provision. As a result of article 16 the consequences arising out of the non-performance of an obligation which was impossible at the time of the conclusion of the contract or the sale of goods that do not belong to the seller is to be governed by the substantive law of sales and not by the LUV.

2. The Max-Planck report points out that, "following judicial practice and advanced modern doctrines":

> "There appears to be no reason to make the validity of the contract depend upon the accidental fact that the object sold has perished before or after the conclusion of the contract. The impossibility of delivery of the perished goods should leave the door open to determine the rights and obligations of the parties according to the flexible rules on non-performance." s/

3. The approach taken by article 16 assumes that the doctrines of non-performance in the applicable substantive law of sales would apply to an impossibility of performance existing at the time of the conclusion of the contract. However, the Max-Planck Report notes that "most legal systems declare a contract of sale to be void if the specific object sold had already perished at the time of the conclusion of the contract". t/ Similarly article 50 of the draft CISG proceeds on the basis that the impediment to performance which exempts the non-performing party from liability in damages for his non-performance must have occurred after the conclusion of the contract. u/ Therefore, the adoption of article 16 in its current form would leave a gap in the law in many countries between the LUV and the substantive law of sales.

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s/ P. 49.

t/ Ibid.

u/ A/CN.9/116, annex II, para. 3 of commentary on article 50.