

paragraph 3, which is so widely drafted as to include most alterations about which there could be any difference of opinion. Since even within domestic systems any solution to the problem is controversial, it was not to be expected that an international body, dealing with diverse legal systems, would be able to resolve the problem in a radical manner.

## **7. RIGHTS AND DUTIES OF THE BUYER AND SELLER**

### (a) Obligations of the seller

#### (1) Delivery of goods and handing over of documents

1.42 The general obligations of the seller are summed up in article 30 of the Convention. This provision contains detailed treatment of the seller's obligations in respect of delivery of the goods and their conformity with the contract. The seller must deliver the goods, hand over any documents relating to the goods and transfer the property in the goods. The seller is required to deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim (article 41). The goods must also be free from any right or claim of a third party based on industrial property or other intellectual property of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

- (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State, or
- (b) in any other case, under the law of the State where the buyer has his place of business (article 42(1)(a) and (b)). The obligation of the seller does not extend to cases where at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim or where the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer (article 42(2)(a) and (b)).

#### (2) Conformity of the goods

1.43 Article 35 of the Convention requires the seller to deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they

- (a) are fit for the purpose for which goods of the same description would ordinarily be used;

- (b) are fit for any particular purpose expressly or implicitly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skills and judgement;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; and
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a way adequate to preserve and protect the goods.

But the seller is not liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity. If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in the Convention (article 37).

1.44 The requirement of conformity must be satisfied at the moment that the risk passes, though the lack of conformity may become apparent only later (article 36(1)). The question of how long the conformity must last is dealt with in terms of a lack of conformity which occurs after the passing of the risk (article 36(2)). The seller is liable if this lack of conformity is due to a breach of any of the seller's obligations, including a breach of any guarantee that for a period of time the goods will remain fit. It is not made clear whether the "guarantee" can be implied or whether the "period of time" has to be fixed by the guarantee, but in the ordinary case it should be possible to attribute a failure of durability to a breach of the seller's obligation to deliver goods which are fit as defined in article 35.

1.45 There may be more difficulty with the provisions as to when the buyer will lose (wholly or in part) the right to rely on a lack of conformity. The common law with its complex inter-relationship between acceptance, examination and the doing of an act inconsistent with the ownership of the seller does not offer a persuasive model. Many civil law systems provide that the right to rely on a lack of conformity is lost by the lapse of time (either a fixed period or a reasonable period of time) either measured from delivery or from the moment when the buyer discovered or should have discovered the lack of conformity. Moreover, whereas under common law what is lost is the right to reject and to treat the contract as repudiated, in many civil law systems all remedies arising out of the lack of conformity are barred. Where the period of time in question is quite short and, particularly where the starting point is the moment of delivery, the effect on the buyer can therefore be harsh. On the other hand, the more the period is extended, the more insecure is the

position of the seller, particularly in the event of re-sales of the goods.

1.46 Under article 39(1) of the Convention, the basic rule is that the buyer must examine the goods as soon as is practicable. He loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. Nevertheless, the buyer may still reduce the price in accordance with article 50 of the Convention or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice (article 44). What is a reasonable time will obviously depend to some extent on the buyer's circumstances. To take advantage of this concession the buyer must therefore be able to show that, although he knew, or should have known, of the lack of conformity he nevertheless had a reasonable excuse for not giving notice. This combination of circumstances is not likely to occur frequently. What is more likely is that the buyer will show that he did not know and, while normally he should have known, in the specific case he had an excuse for not knowing.

1.47 The basic rule that the buyer must examine the goods as soon as is practicable receives some elaboration where the contract involves carriage of the goods and where the goods are redirected in transit or re-dispatched by him. In the first case the examination may be deferred until after the goods have arrived at their destination and in the second case until after they have arrived at the new destination, provided that "at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or re-dispatch" (article 38(2), (3)). However, in any case the buyer loses the right to rely on the lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time is inconsistent with a contractual period of guarantee.

(b) Obligations of the buyer

1.48 The provisions as to the buyers obligations are not likely to present difficulties to a common law lawyer as they are similar to those under the common law. The main obligations of the buyer under the Convention are to pay the price and to take delivery of the goods as required by the contract and the provisions of the Convention. The relevant provision is article 53 of the Convention. The buyer's obligation to take delivery consists of two elements. The first element is that he must do all the acts which could reasonably be expected of him in the contract or which are necessary in order to enable the seller to make delivery (article 60). The second element consists of taking over the goods.

1.49 The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made (article 54). Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered,

in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned (article 55). If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight (article 56). If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller at the seller's place of business or if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place. The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract (article 57). If the buyer is not bound to pay the price at any other specific time he must pay it when the seller places either the goods or documents controlling their dispositions at the buyer's disposal in accordance with the contract and the Convention. The seller may make such payment a condition for handing over the goods or documents. Where the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price. The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity (article 58). The buyer may pay the price on the date fixed by or determinable from the contract and the Convention without the need for any request or compliance with any formality on the part of the seller (article 59).

(c) Remedies for breach of contract by the buyer and seller

(1) Specific performance

1.50 Article 46(1) establishes the principle that the seller is expected to perform the contract as he agreed. Specifically, article 46(1) provides that the buyer may require the seller to perform his obligations. The rule extends to all situations of non-performance by the seller. Where as in common law systems the right to require performance is considered to be a discretionary remedy to be requested from the court,<sup>19</sup> in civil law systems generally the right to require the seller to perform is considered to be a natural consequence of the contract. This is the point of view adopted by the Convention. But enforcement of that right by a court is limited by article 28, which states that a court does not have to order specific performance if it would not do so in similar cases governed by domestic law<sup>20</sup>. Therefore, in common law countries the general rules on the granting of specific performance will continue in force. In civil law countries there are also rules that limit the extent to which

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19 Paget v Marshall (1884) 28 ChD 225 and Powell v Smith (1872) L.R.14/E/Q.85.

20 Ibid. Under article 28, rules of domestic law on specific performance can prevail over the rules of the Convention.

a court will enforce the buyers right to performance of the contract, and those limitations are also preserved by article 28. The right to specific performance is also limited by the rule that the buyer loses the right to obtain specific performance if he has resorted to a remedy which is inconsistent with this requirement, such as avoidance of the contract or reduction of the price.

(2) Delivery of substitute goods or cure of defects

1.51 The Convention, in article 46(2) provides that, if the goods do not conform with the contract, the buyer may require delivery of substitute goods if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice of non-conformity under article 39 or within a reasonable time thereafter. The buyer may also require the seller under article 46(3) to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances, but a request for repair must be made either in conjunction with notice of non-conformity of the goods given under article 39(1) or within a reasonable time thereafter. The remedies of repair or delivery of substitute goods are unknown to the common law, although they are common means of remedying the defects in practice. In both cases the buyer's request must be made in conjunction with the notice of lack of conformity that is required by article 39 or within a reasonable time thereafter. The buyer who contemplates resorting to these remedies obviously takes the risk that, if the matter comes to litigation, the court may hold that to require repair was unreasonable or that the lack of conformity was not sufficiently serious to constitute a fundamental breach. The rule is based on the idea that the buyer must not aggravate the seller's circumstances.

1.52 Until the buyer has effectively avoided the contract - even after the deadline for delivery has passed - the seller can subject to article 49, still "cure", that is, deliver the goods, make repairs, or replace parts or goods. However, he may not take an unreasonable time to do so or cause the buyer unreasonable inconvenience or uncertainty about the reimbursement of expenses advanced by the buyer article 48(1). The buyer retains his right to claim damages caused by the delay, even if, as a result of his cure, the seller fully performs his obligations (article 42(2)). In addition to the right to cure under article 48(1), which theoretically could be cancelled by the buyer's avoidance of the contract, article 48(2) permits the seller, by sending a request (which is effective upon receipt) together with an indication of the date by which he intends to fulfill his obligations, to ask for clarification as to whether he the buyer will accept the cure. If the buyer does not respond to this request, he may not resort to any remedies inconsistent with performance by the seller before his deadline (article 48(2) and (3)).

(3) Partial or excessive performance

1.53 Articles 51 and 52 deal with remedies in cases of partial performance or excessive performance. The cases dealt with here are those in which the seller (a) delivers only part of the

goods, (b) delivers all the goods but some are non-conforming, (c) delivers before the date fixed, (d) delivers more than was contracted for. As far as (a) and (b) are concerned, article 51 provides that the remedies discussed in articles 46 to 50 apply in respect of the undelivered or non-conforming part. In the case of (c) the buyer may refuse to take delivery of the goods (article 52(1)), but, if he does so, he may be obliged to take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense (article 86(2)). If he takes possession, he must take such steps to preserve them as are reasonable in the circumstances (article 86(1)). In case (d), where delivery of more than the contract occurs, the buyer may take delivery of the whole or may reject the excess. If he takes delivery of any part of the excess he must pay for it at the contract rate (article 52). It may be impracticable to take physical possession only of the contract quantity. However, it would be possible for the buyer to take possession of the excess amount in the name of the seller (article 86(1)). If the burden that would be thrown on the buyer if he were to take the entire delivery was substantial, the excess delivery may constitute a fundamental breach.

#### (4) Damages

1.54 Article 45(1)(b) and (2) introduces the important remedy of damages. Sub-paragraph (1)(b) and paragraph (2) go together. The first establishes the legal basis of the claim for damages, and the second clarifies its relationship to the remaining remedies. A claim for damages lies whenever the seller fails to perform one of his obligations under the contract or the Convention. Article 45(1) and (2) raises three issues: the notion of breach of contract in general, the relationship between damages and other remedies, and the absence of any notion of fault in the remedy of damages. The notion of breach of contract, the substantive condition for claiming damages, is identical with the non-fulfillment of any of the seller's obligations. It refers to all obligations no matter whether they be of major or minor importance. Paragraph (2) emphasizes that by resorting to any other remedy the buyer is not precluded from claiming damages. Consequently, the buyer who avoids the contract may both recover the purchase price and claim any additional damages. Damages are available independent of any fault. This is in line with the common law approach whereby an objective failure on the part of the seller to fulfill any of his obligations provides the buyer with a claim for damages<sup>21</sup>.

1.55 Damages are defined in Article 74 as a sum equal to the loss, including loss of profit, suffered by a party in consequence of a breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew, or ought to have known, as a possible consequence of the breach of contract. All the

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21 Hadley v Baxendale (1854) 9 Exch.341. See also Bays v Chaplin [1968] 1 Q B.1 and Chaplin v Hick [1911] 2 K.B.788.

circumstances of the case must be taken into account. Where the breach consists in delay in payment of the price, the seller is entitled to interest without prejudice to any claim for damages (article 78). There should be no difficulty with this approach as it embraces the applicable common law principles<sup>22</sup>.

1.56 Where the contract is avoided and the aggrieved party has made a substitute transaction, article 75 of the Convention states that the party claiming damages may obtain the difference between the contract price and the price under the substitute transaction and any further damages recoverable under the general principle. In theory at least, therefore, the law of the convention diverges from the common law in cases to which article 75 applies, i.e. when there has been a substitute transaction<sup>23</sup>. The divergence will, however, be limited by the requirement that the substitute transaction must have been made in a reasonable manner and within a reasonable time. For if the seller resells at less than the market price (or the buyer makes a cover purchase at more than the market price), he will have difficulty in showing that he acted reasonably. On the other hand, if the seller resells at more than the market price, the Convention (article 76(1)) debars him from having recourse to the abstract measure. If the substitute transaction cannot be identified, the abstract measure of article 76 will apply. If there is no substitute transaction, article 76(1) lays down the rule that the damages will be equal to the difference between the contract price and the current price at the time when the party obtaining damages declared the contract avoided. Article 76(2) defines current price as the price prevailing at the place where delivery of the goods should have been made or, if there was no current price at that place, the price at another place which serves as a reasonable substitute, making the allowance for differences in the cost of transporting the goods. This abstract method of calculating damages contained in article 76 is applied where the contract has been avoided, but there has been no substitute transaction.

1.57 The moment at which the market price is to be calculated is in general the time of the avoidance of the contract (article 76(1)). To this general rule there is an exception for the case in which the aggrieved party has avoided the contract after taking over the goods. In this case the market price is to be calculated at the time of that taking over (article 76(2)). The purpose of the rule is to prevent the buyer from speculating at the expense of the seller by holding defective goods until a fall in the market makes avoidance advantageous. The risk of such speculation is, however, small in view of the fact that the buyer will lose his right to avoid if he does not do so within a reasonable time after he knew or ought to have known of the breach (article 49(2)). Moreover, if the buyer neither knew nor ought to have known of the breach until some time after the taking over, the value of the goods is to be assessed by

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22 M.P. Furmston. *Cheshire and Fifoots Law of Contract*, supra, p.177.

23 *Ibid*, p.545.

reference to a time when the buyer could not have avoided the contract. In all the cases governed by articles 75 and 76 further damages may, of course, be recovered under article 74. Article 77 of the Convention imposes a duty to mitigate the damage and as under the common law if the innocent party fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated<sup>24</sup>.

#### (5) Reduction of price

1.58 Where the goods do not conform with the contract, Article 50 of the Convention gives the buyer the right to reduce the price<sup>25</sup>. Whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery to the value that conforming goods would have had at that time. In order to invoke the reduction the buyer need only dispatch notice thereof. Of course, a price reduction is unavailable if the seller completely performs his obligations by curing or if the buyer unjustifiably declines to accept the cure (article 50). This remedy is unfamiliar to common law lawyers. Normally the remedy will be advantageous only if the breach is not fundamental. It has, however, the advantage over damages that (assuming the price not to have been paid in advance) the buyer does not need to resort to a court because he can act unilaterally by proffering the reduced price. A more important, though rarer, situation will arise when the buyer cannot resort to the remedy of damages because the lack of conformity is due to an impediment beyond his control (article 79(5)). In this situation the restitutionary remedy of reduction of price protects the buyer. Resort to the remedy of reduction of price is not an obstacle to a claim for damages (article 45).

#### (6) Avoidance

1.59 The buyer may under article 49(1) declare the contract avoided only if the failure by the seller to perform any of his obligations under the contract or the Convention amounts to a fundamental breach of contract or in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article/47 or declares that he will not deliver within the period so fixed. A fundamental breach is defined in article 25 as a breach which "results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result". Under article 49(1) of the Convention, when the grounds of avoidance tabulated in article 49 exist and the buyer wishes the contract avoided, he must make a declaration of avoidance. A declaration of avoidance of the contract is

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24 Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd. [1949] 2/K/B/528; The Heron II [1969] A.C. 350 and the Wagon Mound [1961] A.C. 388.

25 See E Bergsten and A.J. Miller, The Remedy of Reduction of Price, 27 Am J. Comp. L.255 (1979).

effective only if made by notice to the other party (article 26). The buyer in article 49(2)(a)(b) loses his right to avoid the contract unless he makes his declaration within a reasonable time after he has become aware that delivery has been made in cases where the seller has delivered the goods and in respect of any other breach other than late delivery, within a reasonable time after he knew or ought to have known of the breach.

1.60 The buyer further loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them (article 82(1)). By virtue of article 82(2), this does not apply if (a) the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission, (b) the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38 of the Convention or (c) the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in normal use before he discovered or ought to have discovered the lack of conformity. There are a number of exceptions to the rule in article 82 of the Convention. For example, even if the buyer who has the right to avoid the contract loses the right to declare the contract avoided because he cannot make restitution, and does not come within any of the exceptions, he may still claim any other remedy such as damages, specific performance or a reduction in the price. This is provided for in Article 83 of the Convention. When restitution is made, article 84(2) of the Convention provides that the party must return what he has received and must also account to the other party for the benefits.

1.61 The seller may under article 64(1)(a) declare the contract avoided if the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The seller or buyer may fix an additional period of time of reasonable length for performance by the other party (articles 47(1), 49(1)(b), 63(1), 64(1)(b)). This procedure will be unfamiliar to common law lawyers. During the period named the party fixing the period cannot resort to any remedy for breach of contract. Apart from this the direct legal effect is confined to cases of failure by the seller to deliver or by the buyer to take delivery or to pay the price. In these three cases, if the failure remains unremedied on the expiry of the additional period, the other party is entitled to avoid the contract regardless of whether the breach is fundamental or not. In other words, the additional period relieves that party from the risk that the original breach might be held not to have been fundamental (or rather substitutes for that risk the smaller risk that the length of the additional period itself may be held to be unreasonable). A party may fix an additional period in other cases also, but the only advantage is to give him time to consider what course of action to adopt in relation to the breach and to encourage the other party to perform.

1.62 Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due (article 81(1)). It does not affect any provision of the contract

for the settlement of disputes governing the respective rights and obligations of the parties consequent upon the avoidance of the contract. A party who has performed in whole or in part may claim restitution of anything supplied or paid. If both parties are bound to make restitution, they must do so concurrently. In form this entitles the seller to the return of goods delivered and is therefore wider than under the common law,<sup>26</sup> but the extent to which this is attainable in practice will be limited by the restriction on specific remedies in article 28 and by the fact that any question of the property in the goods or of the rights of creditors will be governed by domestic law (article 4 and 82(2)(c)).

## **8. GENERAL PROVISIONS ON RIGHTS AND DUTIES OF PARTIES**

### (a) Passing of risk

1.63 The general principle in the Convention is that risk passes when goods are taken over by the buyer (article 67(1)). The Convention provides in article 67 a primary rule for cases in which the sale involves carriage of the goods (which is obviously the typical situation in international sales), a special rule for goods sold while in transit (article 68) and, in article 69, a rule for other cases. The passing of property is irrelevant to the passing of risk under the convention.

1.64 Article 67(1) deals only with cases of contracts of sale which involve carriage of goods. In such cases if the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk. (If the contract of sale involves carriage, but requires the seller to cause the goods to be handed over to the buyer at a particular place, the matter is governed by article 69 and the risk will pass when the buyer takes over the goods.) The policy of the article is that risk should pass at the beginning of the agreed transit, since the buyer is normally in a better position than the seller to assess any damage which has occurred in transit and to pursue claims in respect of it. If the seller is not obliged by the terms of the contract to insure the goods, he is obliged by article 32(3) of the Convention at the buyers request, to provide him with all available information necessary to enable him to effect such insurance. But article 67(2) states that the risk does not pass to the buyer until the goods are clearly identified to the contract.

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26 British Westinghouse Electric and Manufacutring Co. v Underground Electric Rly. Co. of London [1912] A.C. 673 and Payzu Ltd. v Saunders [1919] 2 K.B. 581.