LEAGUE OF NATIONS
INTERNATIONAL INSTITUTE IN ROME
FOR THE UNIFICATION OF PRIVATE LAW

DRAFT OF AN INTERNATIONAL LAW OF THE SALE OF GOODS

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INDEX

INTRODUCTION

THE COUNCIL of the International Institute in Rome for the Unification of Private Law resolved on the 29th of April, 1930 "to appoint a Committee, in which the various systems of law should be represented, for the purpose of preparing a draft uniform law of Sale".

The *permanent members* were:

Sir Cecil B. HURST, President of the Permanent Court of International Justice (Great Britain), *Chairman*,

Mr. BAGGE, Judge of the Supreme Court of Sweden (Sweden),

Mr. CAPITANT, Professor in the Faculty of Law of Paris, Membre de l'Institut (France),

Mr. FEHR, Rector of the High School of Commerce, Stockholm, Professor of Law, Advocate (Sweden),

Mr. GUTTERIDGE, Professor of Law in the University of Cambridge (Great Britain),

Mr. HAMEL, Professor in the Faculty of Law of Paris (France),

Mr. RABEL, Professor of Law in the University of Berlin (Germany).

Mr. FICKER, Assistant Secretary-General of the Institute.

The following gentlemen took part in several meetings of the Committee and assisted it by their advice:

USSING (Denmark), D'AYGURANDE, PERCEROU, TROULLIER, WAHL (France), ECKSTEIN, HESSE, HEYMANN, NEUNER, RHEINSTEIN, TITZE, WAHL, Martin WOLFF (Germany), CHORLEY (Great Britain), RUNDSTEIN (Poland), LLEWELLYN (U. S. A.);

Vittorio SCIALOJA, DE FRANCISCI, Mariano D'AMELIO, DAVID, BALDONI, CERULLI-IRELLI, MATTEUCCI, on behalf of the Institute of Rome.

This Committee met eleven times, once in 1930, four times in 1931, three times in 1932, twice in 1933 and once in 1934 *.

The preliminary studies of the Committee are contained in 90 documents.

The Committee has submitted to the Council of the Institute the *preliminary draft of an international law on the sale of goods (corporeal movables)*. with two annexes.

These annexes contain:

1. A draft law on sales with a reservation of property;
2. A report on letters of trust.

The draft of an international law of the sale of goods is independent of these annexes; it can therefore be adopted without them.

The Council of the Institute unanimously adopted the suggestions of the Committee and decided to apply Art. 9 of the Statutes of the Institute and forward the draft to the Council of the League of Nations, together with a Report adopted by the Committee.

(*) Mr. Rabel was not present at the last meeting of the Committee.

REPORT

PRELIMINARY OBSERVATIONS

It is not the purpose of this report to discuss the necessity and practicability of creating a uniform International Law of Sale. These questions were examined at the outset by the Council of the Institute and by the Committee for the unification of the Law of Sale, and it was because such a task was thought both practicable and necessary that its realisation was attempted. The reasons in favour of this unification were set out by a member of the Committee, Mr. Rabel, in the first Document on Sale and the observations there made were in essentials confirmed during the discussions. Reference should therefore be made to that document on all matters touching this basic question.

The purpose of this report is to explain the provisions of the draft separately and as a whole, and to set out the reasons why they are proposed by the Institute. Above all its purpose is to show that, so far from putting together a number of rules chosen eclectically from the various existing systems of law, the Institute has attempted to create a complete new system.

The Draft is limited to the unification of the Law of Sale alone.

Various national codes, such as the old German Commercial Code, the English, Scandinavian and United States Sale Acts have amply demonstrated that this limitation is possible and that the Law of Sale can be dealt with without regulating the general part of the Law of Obligations. It is, however, natural that in dealing with Sale the Institute should have discussed many questions touching obligations in general. Up to the last moment it thought of adding to the present Draft a chapter on the formation of contract, a project

which was ultimately abandoned to avoid over-burdening the Draft with questions of too general a character.

The Institute, on the other hand, as will appear from Article 5 of the Draft, has refrained from regulating questions concerning the transferring of the property in goods sold.

In its view the different solutions of this question found in the various systems of law are so closely bound up with dissimilar general principles that unification on this point is out of the question in a Draft limited to Sale.

Furthermore, the necessity for regulating the passing of the property was so small that, even on the question most closely related to it, viz., the passing of the risk, it was possible to frame rules independent of any rule concerning the property in the goods.

Nevertheless the Institute thought it desirable to regulate agreements in which the property in the goods is reserved to the seller ("*Pactum reservati dominii*") which are used in some countries and which are there regarded as of great importance for the security of credit, but it limited their application to machines, as being the class of goods to which they most often apply. To avoid overburdening the Draft with rules peculiar to these agreements the Institute has prepared a special draft law on the subject (Annexe No. 1).

With the twofold object of consolidating existing methods of guaranteeing credit and of introducing to the various countries other less known methods, the Institute thought it desirable to devote some consideration to a device used in Anglo-Saxon countries, viz., the "letter of trust", and to recommend its adoption by other countries and accordingly its adoption for international use. A report to this effect is appended hereto (Annexe No. 2), based on a communication made by a member of the Committee, Mr. Gutteridge.

The Institute has not as yet prepared a draft law on the "letter of trust", preferring that the questions involved should first

of all be examined by bankers. It has, however, already expressed the view that the codification of the "letter of trust" and its introduction into other countries besides Anglo-Saxon countries would considerably assist and facilitate credit in international trade.

CHAPTER I

(Article 1-8)

SCOPE OF THE LAW

The first chapter of the Draft fixes the limits of its scope as regards the subject matter of the contract (Articles 1 and 4), the content of the contractual obligations (Article 2) and the distinction between internal sales and international sales (Articles 6 and 7).

It also states that the Draft does not deal with the effect of sale on the passing of the property (Article 5).

Article 1 provides that the law applies solely to the Sale of Goods, thus conforming to the English and United States Sale of Goods Acts, which likewise apply only to sales of goods. The Draft, however, does not define the word "goods" but adds to it the expression "corporeal movables". It thereby excludes sales of immovables, the unification of which is unnecessary, sales of debts and sales of rights of all kinds.

Certain classes of movables (the Draft thereafter uses the term "goods" throughout) are expressly excluded and accordingly excepted from the scope of the law.

Paper securities of all kinds and money are excluded; the sale of paper securities is governed by special laws in all countries, and any unification of legal rules to govern dealings in paper securities would necessarily have to be distinct from a unification of

rules governing sales of goods. Article 1 also excludes from the scope of the Draft ships, vessels used for inland navigation, and aircraft, for the reason that in various national laws and several international agreements these are governed by special rules to which regard must be had.

Article 2 of the Draft, in accordance with a proposal made by the Conference on Private International Law at The Hague, assimilates to a pure contract of sale the contract where a person undertakes to manufacture or produce goods from raw materials furnished by himself. Most systems of law have found it necessary to make this assimilation, and a code of the Law of Sale would be deprived of an essential part of its usefulness if, for instance, it did not cover contracts for the supply of machines. Unlike German law, but like Scandinavian law, the provisions of the Draft apply to all contracts for the delivery of goods to be manufactured or produced including cases where such goods cannot be replaced.

This type of contract calls for special rules in one case only, viz., where the goods are manufactured in accordance with buyer's instructions in which event the seller has a right to remedy a defective execution of the order. This right will be examined below, along with the rules which deal with it (Article 56).

The contract to deliver goods to be manufactured or produced is again mentioned in Article 18 but only as a special instance of the Contract of Sale.

Article 3 provides that the law shall apply irrespective of the commercial character of either contracting party or of the contract itself. The Institute has thus given effect to the views which led the International Law Association and the Conference on Private International Law at The Hague to abandon the distinction between civil and commercial sales. Had this solution not been adopted, it

would have been necessary to consider the special position of those States which have no commercial law as distinct from common law. Furthermore the Institute had no desire to burden the Draft with the complicated distinctions which would have been necessary to define commercial persons and commercial transactions. It is, nevertheless, obvious that contracts which are classified as commercial contracts in countries where there is a special commercial law form the bulk of the contracts covered by the Draft.

It was not thought necessary to exclude sales of livestock altogether from the provisions of the Draft; but *Article 4* reserves to national laws the question of the undertaking against defects in sales of livestock. On this point, certain legal systems, e. g. French law and German law contain very detailed rules of a regional character which do not lend themselves to unification; on the other hand the general rules dealing with delivery, payment of the purchase price, and the passing of the risk are applicable to sales of livestock. This provision was included in Chapter I rather than in the chapter dealing with the undertaking against defects, because its effect is to limit the scope of the law.

The reasons which led the Institute to adopt *Article 5* have already been stated.

Article 6 states what kinds of sales are to be governed by the law. This fundamental question, which, from the standpoint of unification, is the most difficult one, was capable of two radically different solutions: either all contracts of sale could be governed by a uniform law, or the Draft could be confined to sales of an international character, leaving all other sales to be governed by national laws. Both methods have been followed in the various attempts at unification

in recent years, and each has its advantages and disadvantages. There is little doubt that an international law which governed all sales would correspond more closely with the purpose envisaged by the Institute and would avoid a complicated legal dualism which finds no favour in commercial circles and which gives rise to difficulties in defining the respective spheres of application of the two sets of laws.

But the Council of the Institute, while recognising the weight of these arguments, was from the outset of opinion that in certain countries at any rate the adoption of the uniform law would be greatly facilitated if it were confined to sales which were clearly of an international character.

The Institute, however, thought it would be desirable to propose at a subsequent stage of its work that steps be taken to extend the application of the international law to internal sales, and thus to follow the precedent first set by English law when it adopted the provisions of the Warsaw Air Convention of 1929 (Carriage by Air Act, 1932).

Having decided to confine the Draft to international sales, it then became necessary to define the distinguishing characteristics of such sales, a task which proved extremely difficult, since there is no general principle whereby to establish the international character of a contract.

The Institute decided to make the application of the law dependent on two principles: the one *subjective* and the other *objective*.

With reference to the subjective principle, the Draft provides that the nationality of the parties is immaterial. *Article 8* says in terms that nationality has no bearing on the question whether or not a sale is of an international character. The Draft relies rather on another subjective principle; the law is only to apply where the parties have their business establishments (in the wide sense of "établissement") or residences in different countries with dissimilar laws of sale. The Institute in this way avoided having recourse to the conception of domicile and adopted tests which

enable the courts to take into account all the facts of the case. In applying this subjective principle, the Draft recognises existing unifications of a regional character; hence the international law is only to apply where the parties have their business establishment or residence in countries "in which sales of goods are not governed by the same rules of law"; thus, if one of the parties resides in Denmark and the other in Sweden, the law does not apply because there is a common Scandinavian law of sale the existence of which precludes the application of the international law.

The second condition of the application of the law is found in a principle of an objective character; the goods sold must, under the contract, be destined to become or be already at the time of the sale the subject matter of international transport. By "international transport" is meant transport from one country to another. The scope of the law is thus confined to cases where goods are required to be dispatched. Sales of goods which are situated in, and are to remain within a given country are not subject to the law, notwithstanding that the buyer and seller have their business establishments in other and different countries.

The Institute originally intended the application of the law to depend on one only of these two requirements; the scope of the law would in that event have been very much wider. It also considered bringing within the scope of the law contracts under which an importer resells in his own country the goods imported, such contracts being often required in commercial practice to comply with the terms of the original contract under which the goods were imported. But in order to facilitate the accession of the various States, the Institute has confined itself for the time being to regulating those contracts of sale of an international character for which unification is doubly justified.

Nevertheless, parties may by agreement extend the scope of the uniform law. Likewise, on the principle that the parties are autonomous, they may restrict the scope of the law in accordance with Article 9.

Article 6, which defines the scope of the law, is elucidated in two respects by *Article 7*.

The first question is dealt with in the first paragraph of Article 7. Where several business establishments take part in negotiating a contract on behalf of one of the contracting parties and a doubt arises as to which establishment should be taken into account for the purposes of Article 6, the contract is deemed to be that of the establishment which dispatched the first communication, regarded as one of the legal elements in the formation of the contract. This rule applies to all kinds of commercial concerns, including associations which have no legal personality, such as the English "partnership" and the German "offene Handelsgesellschaft".

The second question, viz., agency, is dealt with in the second paragraph of Article 7: where a contract is concluded through an agent, the application of the International Law depends solely upon the business establishment of the principal. Accordingly, where a person, resident in a given country, contracts with a foreign firm through a branch of that firm resident in such country, the international law applies if that branch is not sufficiently independent to conclude the contract in its own name.

In this point the Institute has consciously departed from the propositions laid down by the Conference on International Law at The Hague. Those propositions take account in certain cases of the fact that the sale was concluded through an agent acting in the country of the buyer. But the question here is not whether the sale is more properly governed by the national law of the seller or that of the buyer, but what circumstances shall govern the application of an international law which is equally in force in the countries of both seller and buyer.

of parties is almost unrestricted in sales of movables. But if they were permitted simply to exclude the new law without substituting anything in its place we should be reverting to the present state of uncertainty. Hence the first paragraph requires parties who wish to exclude the application of the international law in its entirety to indicate expressly and unambiguously which national law they intend shall govern their contract. Otherwise the present law will apply in all cases within Article 6.

Where the parties desire to exclude only a part of the international law the position is a little different. In this case the international law remains as the general basis of the contract. In order, however, to supply the gap created by the exclusion of certain rules, a gap which the courts could not supply, Article 9, paragraph 2 lays it down that an agreement of this kind is not valid unless the parties specify what provisions are to replace those excluded. Obviously a mere word will suffice to derogate from a whole series of the provisions of the law, as is the case with many commercial clauses, e. g., c. i. f., f. o. b.

The next Article, i. e., *Article 10*, deals with commercial usages, and lays down three different rules.

Paragraph 3 again affirms the optional character of the law by providing that, in case of any conflict, usage shall prevail over the law.

Paragraph 1 deals with the relation between commercial usages and the agreement of the parties, and lays down that usage shall be valid between the parties notwithstanding that no mention of it is made in the contract, provided that the parties were or ought to have been aware of its existence. This provision is in accordance with the rule generally accepted among merchants. Although the paragraph does not expressly say so, the time ordinarily to be looked at in deciding whether the parties knew or must have known the usage is that when the contract was concluded. But the court

may exclude the application of an unreasonable usage if its content was not known to both parties at the time of the conclusion of the contract.

Paragraph 2 of Article 10 lays down a rule of construction. Where the parties employ clauses or regulations used in a trade, e. g., "fair average quality", or regulations such as those of the Corn Trade Association, such clauses or regulations are to be construed in accordance with the usage of the trade.

Article 11 states a general rule the purpose of which is to supply the gaps in the international law. The greatest difficulty in the way of preserving the real unity of the uniform law arises out of the differences in construction placed upon it by judges who have been trained in, and are accustomed to their own particular system of law. The difficulty is a serious one even when different judges are called upon to interpret the same rules of law, but it is still greater when judges are called upon not to interpret written law, but to make unwritten law to cover cases not expressly contemplated by that law. Only two solutions are possible, viz., the gaps in the law can be supplied either by having recourse to the national law (i. e., in the majority of cases, the *lex fori* or national law of the judge) or by following the general principles by which the international law is inspired. This being the problem, it seemed that the best way to preserve the uniformity of the law was to lay down the rule stated in Article 11, namely, that all cases not expressly covered by the international law, but which fall within its scope, shall be determined in accordance with the general principles by which the law is inspired.

In the wording of this Article the Institute followed Article 1, paragraph 2 of the Swiss Civil Code, except that there is a difference as to the source of law to which the judge may refer. Only in the cases expressly mentioned in the international law may the judge supply the gaps in that law by a reference to the national

law, which, by Article 14, shall be ascertained in accordance with the rules of private international law. The cases contemplated by this rule are chiefly those concerned with certain local usages for which unification is out of the question: e. g., Article 47, paragraph 2.

The three legal definitions which follow are intended to elucidate basic provisions of the law.

Article 12 states that a "communication without undue delay" means a communication made as soon as possible (dans un bref délai, unverzüglich). No form for the communication is prescribed by the Article; such form depends upon circumstances, and communications may accordingly be made by telegram, telephone, letter or even orally.

This definition is applicable, for instance, to the cases contemplated by Articles 25, 28, 48; cp. Article 69.

The notion of "current price" is particularly important in the Draft in its relation to damages; mention is made of it in Articles 37, 39, 40, 77, 79, 95. It is defined in *Article 13* by reference to the market to which the buyer ordinarily resorts to purchase the goods.

The term "market" must here be understood in a general sense as also including Exchanges. Markets, to an importer of raw materials, are those big commercial markets which quote prices for goods and where presumably his requirements are usually satisfied. The notion therefore takes into account the actual position of the buyer.

Article 14 provides that the term "national law" means the law of the country which is applicable according to the rules of private international law. This is the national law referred to in Articles 34, 36, 59, 74, 83. Article 11 limits the application of Article 14 to the cases expressly mentioned in these articles. These cases

must be distinguished from those mentioned in Articles 23, 24, 70, 85, which refer to the national law of the court trying the issue; in the latter cases the court is required to refer not to the rule of private international law but to the law governing the court itself, i. e., the "*lex fori*".

Article 15 provides that no particular form is required for the contract of sale either in relation to substantive law (paragraph 1) or in relation to procedure (paragraph 2); this eliminates a large number of existing difficulties which arise out of the varied requirements of national laws as to the form and proof of the contract of sale. English law still requires a "memorandum in writing" although the formalities necessary to constitute that memorandum have been reduced to a minimum. Likewise Article 1341 of the French Civil Code which applies solely to non-commercial sales, requires proof in writing. However, the Englis hand French members of the Committee on Sale find these restrictions upon methods of proof burdensome, and they hope that freedom of form as secured by German and Scandinavian law and the commercial laws of Latin countries will assist international commerce.

CHAPTER III

(Articles 16-61)

OBLIGATIONS OF THE SELLER

PRELIMINARY OBSERVATIONS

In framing the provisions dealing with the rights of parties the Institute sought as far as possible to preserve symmetry between the various chapters dealing therewith. A table of concordance of these provisions may assist the reader of the Draft.

Article 18 (place of delivery) corresponds to Article 67 (place of payment), Article 20 (fixed date for delivery) to Article 68 (date of payment), Article 22 (sale without fixed date for delivery) to Article 69 (credit sale without fixed date for payment), Article 23 summarises the sanctions in the event of non-delivery, Article 51 similarly summarises the sanctions in the event of non-payment of the price.

Articles 24 and 71 deal with the restricted cases in which parties may claim specific performance.

Articles 26, 61 paragraph 2, 72, and 80 deal with the right to avoid the contract, Articles 30, 54, and 73 deal with the special case of contracts for delivery by instalments.

Articles 34, 36, 59, 61, 74, and 83 employ identical terms to define the conditions in which a party who has not performed the contract may escape payment of damages.

Articles 33, 75, and 81 provide for damages for delay without avoidance of the contract. The following articles deal with the damages when the contract is not performed: Article 37, 58, 61 paragraph 4, 77 and 82 (abstract damages where there is a current price), Articles 38, 58, 61 paragraph 4, 78 and 82 (concrete damages where there is a current price), Articles 39, 58, 61 paragraph 4, 79 and 82 (no current price).

Articles 31 and 32 (partial delivery) apply to the part dealing with defects, as stated in Article 53.

The chapter on the obbligations of the seller is divided into three sections; the first deals with the principal obligation of the seller, viz., the duty to deliver (Article 16–40); the second relates to the seller's undertaking against defects (Articles 41–59); the third, entitled " Other obligations of the seller ", deals with his accessory obligations and chiefly lays down a general rule concerning sanctions (Articles 60 and 61).

SECTION I – DELIVERY

(Articles 16-40)

By *Article 16* the principal duty of the seller is to deliver the goods. As this is the basic principle of the whole law it merits a somewhat closer examination.

The French expression "délivrance" and the corresponding English and German expressions "delivery" and "Lieferung" are used, notwithstanding the variable meaning attached to them in present-day speech, to denote the purely material act whereby the seller divests himself of the goods in favour of the buyer. The conception is therefore quite independent of any legal system of transfer of movables. By virtue of this fact, it was possible to regulate in the Draft the modalities of the main obligation of the seller without touching even the purely terminological problems relating to the passing of the property and the transfer of possession. It may be added that this conception of delivery is quite well known to commerce, although perhaps the word is not very precisely used in commercial language. Lastly, it should be observed that its value is very well recognised in Scandinavian law.

Accordingly, the first sentence of *Article 17* defines delivery as "The doing of any act or acts which must be done by the seller in order to make it possible for the goods to be consigned to the buyer". This definition therefore does not require that the goods shall be actually consigned to the buyer. Indeed, Article 17 goes on to say that "the acts which are necessary for this purpose shall be determined in accordance with the nature of the contract", and paragraph 2 illustrates this rule by defining what constitutes delivery in the very frequent case where the place of delivery and the destination of the goods are not identical and the seller is required to dispatch the goods from one place to another; in this case delivery

is effected by consignment. This rule finds legal justification in the fact that consignment is there made in the interests of the buyer. It results therefrom, following a European custom of some antiquity, that the risk passes to the buyer as from the consignment of the goods; that is the rule adopted by the Draft in Article 103.

Paragraph 2 of Article 17 fixes the time of consignment by distinguishing between cases where transportation commences on land and those where it commences by sea; it draws a further distinction in the latter case between an ordinary bill of lading and the important exceptional case where the seller is entitled to present to the buyer a " received for shipment bill of lading ".

From these provisions it clearly follows that in the so-called sale " at destination " the seller does not effect delivery unless he ensures the arrival of the goods at the place of destination (port, quay, buyer's place of business, etc.). In those cases, on the other hand, which are subject to the entirely subsidiary rule in Article 18, where the buyer is bound to take possession of the goods at the place of business or residence of the seller, delivery is complete as soon as the seller places the goods at the disposal of the buyer and informs him of that fact. This follows from the definition of delivery given in Article 17. As regards unascertained goods, Article 105 completes the rule by providing that in order to pass the risk the seller must separate the goods sold by setting them aside on behalf of the buyer, and clearly appropriate them to the contract and notify buyer accordingly.

Paragraph 1 of the same article speaks of the acts of the buyer which may be necessary to enable the delivery itself to be effected, e. g. the buyer may have to furnish a vessel, waggons, boxes, bags, etc. Should the buyer through his own act or omission fail in his obligation to assist delivery, the risk likewise passes to the buyer.

Article 16, paragraph 2 deals with those things which must accompany the goods. These are their accessories and any documents which must be annexed to them by the usage of the trade.

A) *PLACE OF DELIVERY*

Generally speaking the place at which the seller is required to perform the various acts encumbent upon him is prescribed by the contract itself or by the usage of the trade. Rarely does it happen that there is no agreement express or implied on this point. In dealing with this matter, the Institute did not think fit to adopt the views of certain authors who consider it useless or even dangerous to lay down a legal rule fixing the place for the performance of the obligations. Certainly it would be impossible to attempt to localize all the various obligations of the seller in one and the same place; but it is indispensable to know at what precise place each one of them is to be performed. For instance, in dealing with the clearly defined obligation to deliver the goods, it would be wrong if this Law did not formulate a subsidiary rule fixing the place at which the goods are required to be found on the prescribed date. It was necessary to define this part of the obligation to deliver before it could be determined whether a seller had performed all the acts encumbent upon him or whether, on the other hand, he had been guilty of delay in delivery. Lastly, when once a rule has been formulated regarding the place of delivery, it is easy to link up therewith the rules as to risk, which, in the absence of the former, would be very difficult to establish.

The subsidiary rule stated in *Article 18* is the most widespread in codes of law; the buyer must take over the goods, or, more precisely, the seller must deliver the goods at his business establishment or ordinary residence, terms which were adopted for the reasons given above in connection with Article 6. If the goods were situated at the time of the sale in a place known to both parties, delivery must be made at that place (paragraph 2).

The rule in *Article 19* is a practical consequence of the fact that the sale with obligation to dispatch mentioned in Article 17, paragraph 2 is the most frequent kind of international sale. The Courts are sometimes called upon to determine whether the contract is a sale with obligation to dispatch (with delivery at the place of consignment) or a sale at destination (delivery at the place of destination, e. g. contracts with arrival guaranteed). Hence Article 19 creates a presumption in favour of the sale with obligation to dispatch: accordingly the onus is on the buyer to prove that he unequivocally agreed with the seller that the latter should deliver at the place of destination.

B) *DATE OF DELIVERY*

The provisions under this head (Articles 20–22) deal with three cases; a precise date is fixed for the performance of the contract (Article 20); a period of time is provided for delivery (Article 21); no precise date or fixed period of time is provided for delivery (Article 22).

This part of the Draft, like the preceding part, prepares the ground for the provisions defining the sanctions for failure to deliver.

To attain this end *Article 20* does not merely provide for a fixed date but it states the circumstances in which the date may be regarded as fixed. The date must be determined by the calendar (e. g. 14th October) or it must at least be determinable by the calendar (e. g. ten days after Easter 1935). Alternatively, it must be related to a definite event the exact date of which can be ascertained by the parties; as an example of the latter the article mentions an event which is familiar to Scandinavian countries, viz., the first open water, which event coincides with the thawing of the ice and occurs on a date which is published by newspapers in respect of each port.

In all these cases there is no need for the buyer to address any communication or demand to the seller; the latter is bound to deliver on that date.

Article 21 follows the precedent of Scandinavian laws. Where the contract provides for delivery during a certain period of time (May 1935, Spring 1936), it is for the seller to fix the exact date of delivery. On the other hand, it is open to the buyer to prove that the circumstances indicate that such choice was reserved to himself.

In Swedish law the effect of these presumptions is that the right to fix the exact date belongs to the party in whose favour the date was left open by the contract, i. e., to the party who, being bound to dispatch or to ship the goods, requires a certain period of time. In sales f. o. b., the buyer is the party entrusted with this duty, and he accordingly is entitled to fix the precise date; in sales c. i. f., the reverse is the case.

Article 22. For the case where no date for delivery has been fixed, the rule is taken from the well observed practice of the English Courts, viz., delivery must be made within a reasonable time. In such a case regard must be had to the nature of the goods and the whole of the circumstances to determine what constitutes a reasonable period of time between the conclusion of the contract and the date of delivery.

C) *SANCTIONS IN THE EVENT OF INFRINGEMENT OF THE RULES OF DELIVERY*

At the head of the title dealing with sanctions in the event of non-delivery (Article 23–40) a preliminary article, Article 23, summarises the three sanctions available to the buyer against the

seller, which form the subject of the subsequent articles: the right to specific performance (Articles 24 and 25), the right to avoid the contract (Articles 26–32), the right to claim damages (Articles 33–40).

The problems dealt with in this chapter are complex and controversial. This is true of almost all systems of Municipal law and these complications and controversies multiply the difficulties in the way of attempts at unification. Without entering into the theoretical problems which it was necessary to solve, at any rate in so far as the plan and terminology of the Draft depended upon them, we may note the following questions:

1) The question of liability;

2) The question of the effect of the expiration of the period for delivery;

3) The question of sanctions, with which are connected many doubtful points, such as specific performance, the relation between avoidance of the contract and damages and the method of calculating those damages (to be dealt with separately under letter c.)).

1. LIABILITY

At the outset regard should be had to the profound differences in importance attributed to the conception of fault (*culpa*) between those systems of law which have been influenced by the Roman Law and other systems. It is true that English Law and Scandinavian Law as well as French Law and German Law condemn the party in breach who has been guilty of fault (*faute*): fraud (*dolus*), gross negligence, negligence.

But in countries where the Roman Law has not exerted its fullest influence the liability of the party in breach is not usually restricted to cases where he has been guilty of fault. In accordance with an old principle, the party in breach in England was strictly regarded as having warranted the performance of his obligation in almost all cases. It is true that nowadays English Law admits many exceptions to this rule, but these exceptional cases are not attributed to a doctrine of no liability without fault; the conception

of fault is still avoided. To avoid disturbing this state of affairs the Draft likewise dispenses with this notion and simply defines the circumstances in which the seller escapes liability.

In this connection, however, there arise such considerable material difficulties that the Institute, much to its regret, has so far been unable to achieve a complete scheme of unification. Present-day systems of law are almost unanimous in declaring that the seller of specific goods is freed from his obligations by the restraint of princes or by a sudden natural catastrophe, both of which come within the notion of *vis major* in the strict sense of the word (*casus cui resisti non potest*). But outside this principle the tendency varies very much. In this connection may be recalled the well-known doctrine by which the "*Rebus sic stantibus*" clause is implied and the party in breach is excused liability not only by reason of impossibility but also, in certain circumstances, where performance has become excessively burdensome through supervening and unforeseeable causes. Even in the case of sales of unascertained goods, which are generally subject to much stricter rules, the laws vary a good deal. The Institute did not think fit to propose a general solution at this stage. It has confined itself for the time being to defining as it were a minimum number of grounds of exemption. In all sales, whether of specific or unascertained goods, the Draft requires as a condition of non liability of both seller and buyer that the performance of the contract shall have been prevented by an insurmountable obstacle which the party in breach was not bound to foresee at the time of the conclusion of the contract. Since the Draft thus restricts the ground of non-liability to a single somewhat strict condition, it was not possible to deny to national laws the possibility of adding further grounds of exemption. At the same time, however, the Institute is unanimous in declaring that it is highly desirable that subsequent efforts may lead to wider unification on this point.

This rule, which the Institute has adopted with the hope that it will not be regarded as a final solution, applies wherever either

party is declared to be liable in damages, and it has been repeated textually in all the relevant articles: see Articles 34, 36, 59, 61, 74 and 83. It was desired to show in this way the practical scope of this general rule so as to facilitate future revision. The same rule also applies as a defence to an action for specific performance of delivery, where such action is allowed. On the other hand, we shall see that the right to avoid the contract is given regardless of whether the seller is or is not liable for non-performance of the contract.

One last observation. In laying down as the rule the liability of the party in breach, a rule to which there are only certain more or less wide exceptions, it was not thought necessary to distinguish between the various kinds of obstacles to delivery for which the seller may be liable. In particular it was not thought necessary to create a gulf between impossibility of performance which definitely results in complete non-performance and delay in performance which nevertheless remains possible. Of course in certain respects special provisions are necessary for one or other of these two categories (see e. g. Article 23, paragraph 1 and Articles 33-35); but in general the Draft treats both "delay" and "default of delivery" on the same footing (Articles 31, 36, 37; cp. Article 76); the expression "default of delivery" may equally suffice to cover both notions.

Moreover, the word "delay" is used in the Draft in the purely objective sense. Here again the terminology based on the conception of fault is avoided; thus the word "delay" does not mean the *mora debitoris*, i. e., delay caused by the fault of the party in breach, but, merely the simple fact that performance has not been made in time.

2. THE EFFECT OF THE EXPIRATION OF THE TIME FOR DELIVERY ON THE RIGHTS OF THE BUYER

While the important question discussed in the preceding paragraph has not been perfectly solved the Institute has, on the other hand, succeeded in overcoming the profound differences which

still divide the legal world into two camps as to the right of a buyer to refuse goods which have not been delivered on the date fixed in the contract. The rules in relation to a seller who has allowed the period of time for delivery to expire vary from extreme severity to marked indulgence. In English and Scandinavian law the time fixed in the contract is deemed to be an essential condition in so-called commercial sales; accordingly, where the seller fails to deliver the goods at the time, the place, and in the conditions laid down by the contract, the buyer may refuse any later delivery. Conversely, the French Civil Code requires the buyer to submit the case to the court which may in its discretion either avoid the contract or grant a further period of grace.

The Institute has taken a middle course which is at the same time a new one. It is true that the requirements of present-day commerce are entirely opposed to giving courts power to extend the period of time; hence the provision at the end of *Article 23*: "In no event is the seller entitled to obtain a period of grace from the court". On the other hand, it seemed unduly severe to treat every period of time for delivery as an essential condition of the contract. This view is perfectly suitable to sales or goods whose prices change quickly and to such a considerable extent that they are of a highly speculative character, as is habitually the case with goods sold in bulk. It does not seem as justifiable in sales of industrial products or of agricultural products from a particular site. Hence the Draft draws a fundamental distinction between essential and non-essential periods of time. Following the French and German systems, it adopts as the rule that the date of delivery is not essential; the buyer must therefore prove that by reason of the circumstances of the case or the terms of the contract the date of delivery was an essential condition (*Article 26* No. 1). On the other hand, the governing principle of the English, Scandinavian and Swiss laws of commercial sale is adopted in *Article 29* in respect of goods for which there is a market available (from which the seller may obtain them) and for the delivery of which a period of time was fixed in the contract; accordingly

the stricter rule applies fairly widely, particularly as dates for delivery as fixed by Article 20 are not confined to those dates which are determined or determinable by the calendar.

The practical significance of this distinction is of course related to the question whether, after the expiration of such period, the seller has or has not the right to deliver the goods. Where the period of time is not an essential condition of the contract, the buyer must still accept the goods if they are delivered within a certain further period of time after the original date of delivery. The Draft enables the buyer to put an end to this further period of time: following the precedent of the Austrian, German and Swiss laws, the buyer may, in accordance with Article 27, fix to the seller a further period of time of reasonable duration.

Where on the other hand the date of delivery is essential, the buyer may treat the delay as a ground for enforcing all the sanctions given by the Draft in the event of non-performance. Hence Article 25 compels the buyer, if he elects to demand specific performance, to notify this fact to the seller without undue delay. This rule merely generalises the principle adopted by continental laws in relation to contracts to be performed within a certain period (Austria, Germany, Italy, Switzerland).

3. METHODS OF SANCTION

a) *SPECIFIC PERFORMANCE OF THE CONTRACT*

The Institute has been compelled to follow a double course. By the common law of Anglo-Saxon countries specific performance of the contract is not allowed; equity only admits such a claim in exceptional cases. But throughout the rest of the world, among other remedies, the relief of specific performance is granted by an action for an order to compel the party in breach to perform his contract, an order which may be enforced by legal process; this remedy is in accordance with the theory of a legal obligation. The Institute is of opinion that it is impossible entirely to reconcile

these two fundamentally opposed views. In order to ensure the accession of America and England the action for specific performance is not available whenever such action has to be taken in the American and English courts. This is the effect of Article 23, paragraph 1, with its emphasis on the procedural law of the court in which the action is brought (and not on the private international law administered by that court). But the Institute has gone even further along the line of British thought, being convinced that in a series of very important cases it is possible to dispense with claims for specific performance together with all orders and procedure relating thereto.

Indeed, *Article 24* further limits the right to specific performance; such right is excluded in cases where the sale relates to goods which the buyer can repurchase without appreciable inconvenience or expense or where he ought to repurchase them in accordance with the usage of the trade. Whether, in any given case, the buyer does or does not repurchase such goods is irrelevant to the application of the rule. This rule brings the Draft and the Anglo-Saxon laws closely together and will in effect considerably restrict the application of Article 23, paragraph 1.

Under the provisions of the Draft there will thus be only a limited number of cases where the position of the buyer will vary according to the court in which the action is brought. Moreover, it must not be thought that the provisions of the Draft concerning sanctions for non-delivery will in Anglo-American countries be inapplicable to those cases. The English common law also recognises the right of the buyer to delivery; it merely refuses him a right of action to compel such delivery. Moreover, the seller has in principle a right to effect delivery of the goods; it is therefore from the standpoint of when the buyer can put an end to this right of the seller that the articles dealing with avoidance of the contract have first of all to deal.

With reference to *Article* 25 see page 38.

It was from the outset recognised by the Institute that the world evolution of the Law of Sale had long since outstripped the historically interesting rule of the French Civil Code requiring the necessity of an action and a judgment for the avoidance of a contract. The German codes in particular have substituted for the requirement of the French Civil Code a simple unilateral declaration of intention addressed informally by the one party to the other. The Draft adopts such an act as the means of constituting avoidance (declaration of avoidance).

Article 27, paragraph 1 defines what the Draft means by avoidance of the contract. This expression is used in accordance with the French Civil Code simply to convey that, in consequence of the avoidance, the seller is no longer bound to deliver the goods and the buyer is no longer bound to take the goods and pay the purchase price. It does not mean that the contract no longer imposes an obligation to pay damages.

Indeed, the Draft recognises that the right to avoid the contract subsists whenever delivery is not made in accordance with the contract up to a certain decisive date. Accordingly, this right enures in favour of the buyer even where, in accordance with the exception to the rule, e. g. because of absolute and unforeseeable impossibility, the seller has incurred no liability. That is why the Draft entirely separates the conditions of avoidance from the question of damages for non-performance, which is therefore dealt with under a separate sub-title together with the question of damages for delay.

The combination of the remedy of avoidance with that of damages which is adopted by the Institute conflicts to a certain extent with the option which is open to the plaintiff in certain countries (Germany, Switzerland, U. S. A.). In these countries the plaintiff

is faced with the dilemma of a choice between two entirely distinct remedies: firstly, avoidance of the contract in the sense that the binding contract is completely destroyed, or, secondly, damages for non-performance. At the same time judicial decisions in those countries have considerably reduced the hardship and severity which this option may entail and have appreciably reconciled the two systems; there however remains a certain embarrassment for buyers who are still not in a position to make a proper estimate of their rights. Accordingly, the system of this single and elastic remedy has been thought preferable.

To sum up, the Institute has followed the precedent of the Scandinavian laws by borrowing from the German system the principle that a private and unilateral declaration is sufficient to transform the original structure of the contract; from the Latin group it has taken the combination of avoidance and damages. As to the conditions of the exercise by the buyer of his rights, it has already been observed that German law inspired the idea of a supplementary period of time for delivery as also the details contained in Article 27, whilst the Anglo-Saxon and Scandinavian laws are at the source of the severe treatment accorded by Article 29 to fixed time periods in certain contracts. The Scandinavian Law has again been imitated in dealing with the case of deliveries to be effected within a certain time. (Articles 21 and 26 No. 2).

The sub-title contemplates two cases: 1. The case where the date of delivery is essential; in this case the buyer may at once exercise his right of avoidance without further formality as soon as the time for delivery has expired (Article 26 No. 1 completed by Article 29); by No. 2 of Article 26 the date of delivery is also essential where the date is exactly fixed by the seller or by the buyer within the limits of a certain period of time stipulated in the contract;

2. The case where the date of delivery is not essential: in this case the buyer must before avoiding the contract first fix a further period of time (Article 27). Article 28 deals with the case where

the goods are delivered too late. The other provisions state special rules governing contracts for delivery by instalments (Article 30) and the case of partial delivery (Articles 31 and 32).

The aforegoing observations call for nothing further beyond a few remarks concerning some articles of a special character.

Article 28, unlike the previous articles, presupposes that goods have actually been delivered, but too late. The buyer receiving such goods is bound to elect without delay whether he will refuse or retain them. If he says nothing, he must retain them, and he may thereafter neither declare for avoidance under Article 26 and Article 27, paragraph 1, nor avail himself of avoidance which has supervened in accordance with Article 27, paragraph 2. This provision merely enacts a rule which is customary among honest merchants and which has already been embodied in the Scandinavian Law.

Articles 30, 31 and *32* form a group of provisions. Article 30, which deals with contracts for delivery by instalments, has a precedent or precursors in the majority of countries. It distinguishes between two cases. In the first, the buyer wishes to avoid the contract in respect of future instalments; he may do so where the breach is such that it destroys his confidence in the performance of the contract as a whole. In the second case, the buyer may return deliveries which have already been made where, by reason of the interrelation of such deliveries with those which have not been made, the deliveries already received are deprived of all value. Although the article does not expressly say so, the buyer may also avoid the contract in respect of future instalments if the conditions laid down in the second case are fulfilled; this follows from the whole of Articles 30 and 31

In order to avoid very difficult distinctions the Institute has laid down identical rules both for partial delivery of non-defective

goods (Articles 31 and 32) and for the delivery of goods which are partly defective (Article 53) so far as concerns avoidance of the contract and damages (Article 58 read together with Articles 37–39). For the regulation of the case of partial delivery comparative law offers a choice of two methods. Under the first method the contract is so to speak concentrated on the subsisting part, at any rate in the case of partial accidental loss, and under the second, the buyer is given a choice between delivery of the subsisting part and the avoidance of the whole contract. The Draft adopts the former, a distinction being drawn between essential and non–essential loss. Articles 31 and 32 of the Draft contemplate two cases: where the buyer can prove that "such partial delivery or partial delay constitutes a breach which goes to the root of the contract" he may avoid the whole contract (Article 31); where he fails to prove this, he may only avoid the contract in part and claim a proportionate reduction in the price. In the latter case his right to damages in respect of the part which has not been delivered to him is expressly reserved (Article 32).

c) *DAMAGES*

As stated above on page 34 et seq., the obligation to pay damages, unlike the right to avoid the contract, presupposes liability on the part of the seller, such liability, however, not being confined to cases where he or the person whom he employs to effect delivery has been guilty of default. It will also have been observed that the Draft gives a right to damages for delay in delivery concurrent with the right to delivery itself; this right is dealt with in Articles 33–35. As to the obligation to compensate the buyer for non–delivery (compensatory damages), this co–exists with the right to avoid the contract. The whole of this system is so simple that it will easily be visualised.

1. *Damages for delay in delivery*

Articles 33–35. The first group of articles deals with delay which does not affect the structure of the contract, the right and obligation to deliver remaining unaffected. These are the cases where the buyer has not taken advantage of the fact that the goods were not delivered in time and such default of delivery did not *ipso facto* amount to avoidance of the contract, secondly, where the seller has delivered within the further period of time mentioned in Article 27, and lastly, where the buyer has received the goods late but has not made the declaration contemplated by Article 28. In these cases the seller is liable for the damage resulting from the delay. The right to damages resulting from delay is recognised by all systems of law, which differ, if at all, only as to the method of assessing the damage. The Draft deals with the assessment of damages "*in concreto*", on the basis of *lucrum cessans* and *damnum emergens*, leaving it to the courts to decide what damage has in fact been suffered. Furthermore, following the precedent of French and Italian Law, the Draft limits the obligation to pay damages to those damages which the parties foresaw or might have foreseen at the time of conclusion of the contract. The practical consequences of this limitation are similar to those reached by English Law and in a certain sense to those adopted by German legal doctrine.

As to Article 34, which deals with the principle of liability, see above pages.

Article 35, paragraph 1, which was inserted for the purpose of limiting the damages of the buyer, requires the seller to notify the buyer as soon as possible that it will be impossible to deliver on the fixed date and to state the probable duration of the delay; if the seller in breach of this duty fails to make the notification, the buyer is entitled to claim special damages. If the seller is unable

to indicate the probable duration of the delay, the temporary impossibility is deemed to be final, in the sense that either party is then entitled to avoid the contract. The buyer further is entitled to damages from the seller if the latter is responsible for the delay.

2. *Damages for non-delivery*

Articles 36–40. These Articles deal with the case where the contract is avoided either for delay (e. g. belated delivery of goods in accordance with Article 28 and refusal by buyer to accept delivery declared without undue delay) or for failure to deliver. Article 36 states the principal rule and Articles 37–40 prescribe the method of calculation of the damages.

The method adopted in Articles 37, 38 and 39 for assessing the damages resulting from failure to deliver takes account of the different existing systems and applies them to the various cases dealt with in the Draft.

In cases where the goods have a current price the Draft assesses the damages *in abstracto*, by calculating the difference between the price agreed upon in the contract and the current price of the goods (Article 37).

This general principle is subject to the qualification that the actual damage suffered in the circumstances of each particular case (damages *in concreto*) may be taken into account if the seller foresaw or could at the time of the conclusion of the contract reasonably have foreseen the events to which such damage was due (Article 38).

Instead of claiming damages *in abstracto* (Article 37) the buyer may effect a re-purchase, and in this case the measure of damage is based on the price of such re-purchase, even though the resulting figure may be higher than that which would be arrived at under paragraph 1, subject always to the condition that the buyer has re-purchased the goods with due diligence and as a prudent man of business (Article 37, paragraph 2). This right on the part of the

buyer may turn out to be an obligation where he claims damages *in concreto:* the buyer is not entitled to claim the difference between the abstract and concrete damages where he fails to make a re-purchase when such re-purchase was possible (Article 38, paragraph 2).

In cases where the goods have no current price the damages are assessed *in concreto,* the task of arriving at the actual damage suffered by the buyer in any given case being left to the courts (Article 39), subject always to the qualification already noticed that the damage must have been foreseen or foreseeable; the wording of this qualification is the same as that in Article 33.

The principle stated in Article 40 must be read in conjunction with Article 101 of the Draft, which provides that, whenever either party so conducts himself as to disclose the intention to repudiate the contract (anticipatory breach of contract), the other party is entitled to avoid the contract, provided that he makes his intention known without undue delay. In addition to the right of avoidance the Draft gives a right to damages.

Following the English precedent, the damages in this case are variously calculated according to whether a period of time was or was not agreed upon for delivery. In the former case the damages are calculated on the basis of the current price of the goods on the last day of such period. In the latter case, the basis of the calculation is the current price on the day on which the buyer gave notice avoiding the contract in accordance with Article 101.

Article 40 deals only with damages *in abstracto,* and substitutes a special rule for Article 37, paragraph 1. In view of this relation between the two articles the buyer within Article 40 may effect a re-purchase under Article 37, paragraph 2 and claim the damages provided for in that paragraph; he may also claim concrete damages on the conditions laid down in Article 38.

SECTION II. — THE SELLER'S UNDERTAKING AGAINST DEFECTS IN THE GOODS

(Articles 41-59).

This section contains a general provision (Article 41) followed by three sub–titles: definition of defects (Articles 42–46), ascertainment and notification of defects (Articles 47–50), sanctions in case of defects (Articles 51–59).

Article 41 states the general principle; the word "defect" follows the terminology of the French Civil Code.

A) *DEFINITION OF DEFECTS*

The sub–title devoted to the definition of defects first defines the term defect, then deals with the special case of sales by sample or by model (Articles 43 and 44); it then states the rule as to the time at which the absence of defects is to be determined (Article 45) and lastly, it defines the exceptions to the undertaking of the selle (Article 46).

Article 42 confines the term "defect" to defects of quality defects of quantity are governed by Articles 31 and 32, which deal with avoidance on the ground of partial or total failure to deliver. Furthermore, the Draft does not deal with the question as to whether and when a difference in quality may amount to delivery of "*aliud pro alio*" so as to result in non–delivery.

The Draft seeks to harmonise the principles in force in continental countries with those of Anglo–Saxon laws. Thus the defects enumerated in Article 42 are grouped together in an appropriate system, regard being had to the usual method of grouping

in various systems of law. Likewise, with the object of attaining unification and simplification, the article includes within the seller's undertaking both an express and an implied undertaking, the former relating to qualities expressly agreed upon, and the latter to qualities necessary for the ordinary use of the goods or for a particular purpose expressly or impliedly contemplated by the parties.

Lastly, the Draft preserves the unity displayed by present-day laws as to sales of specific goods and sales of unascertained goods. This unity has recently been challenged. But the Institute considers it wise to preserve the principle incorporated in existing laws under which the buyer of unascertained goods is also entitled to the benefit of the undertaking against defects together with all the rights incidental thereto. It is true that alongside of this undertaking the Draft, following the precedents of German, Scandinavian and Swiss laws, empowers the buyer of unascertained goods, if he so desires, to treat the delivery of defective goods as a failure to deliver. The Institute nevertheless simplifies this situation in certain respects; in particular it assimilates the right of rejection (*actio redhibitoria*) for defects to the right of avoidance for non-delivery, so that the buyer's sole remedy, where he does not wish to retain the goods, is always the same, namely, avoidance of the contract.

The final paragraph of this article excludes all undertakings against defects of quality which do not appreciably diminish the value of the goods; this is in accordance with German law (B. G. B. Section 459) and is supported by Austrian and French authors.

The rules stated in Articles 43 and 44 as to sales by model or sample codify principles common to the principal systems of law and established in commercial practice.

Article 45 provides that the time to be taken into consideration in ascertaining the presence, or absence, of defects is that in which the risk passes, in accordance with Articles 103 et seq. An exception,

however, is laid down for the case of defects which occur after that moment and are caused by the act or omission of the seller or of persons for whose acts he is responsible. In such a case the seller is also liable for defects which occur after the passing of the risk.

Article 46 excludes the undertaking in the case of apparent defects, a principle which is dominant in the majority of legal systems. The second part of the article, however, provides for an undertaking against defects which the buyer would have discovered but for his gross negligence, provided that such defects relate to qualities which the seller expressly warranted; this rule follows the precedent of American, German and Swiss laws.

B) *ASCERTAINMENT AND NOTIFICATION OF DEFECTS*

This sub-title (Articles 47–50), deals with the obligation of the buyer to examine the goods (Article 47), and to notify their defects, if any, (Article 48), an obligation which he must fulfil before he can enforce his rights under the undertaking.

The rules relating to examination and notification contained in *Articles 47–48* correspond with those of most systems of commercial law. Certain points however are of special interest in an International Law. Thus the Draft contains rules concerning the place of the examination. As regards the form of the examination, the Institute does not consider that it can be unified. There exist upon this point appreciable differences between the laws of the various countries; some require a judicial enquiry by experts as a condition precedent in certain cases of avoidance of the contract by the buyer; others treat such an enquiry as a merely optional method of furnishing the buyer with evidence. Much consideration was given to the device used in certain overseas countries of

a so-called "survey" for imported goods. Accordingly, the Draft lays down that the form of the examination shall be determined by the agreement of the parties or, in default thereof, by the laws or usage of the place of examination.

The Draft, however, eliminates the danger involved in a reference to local laws and usages, which may not recognise all the undertakings necessary for the protection of the seller, by making it a condition precedent of the legal validity of the examination that the seller or his representative shall receive reasonable notice thereof (paragraph 3).

The right of the seller to replace defective goods by others free from defects (Article 49) constitutes a new remedy which is given to the seller for equitable reasons. It is clear from the provisions of the article that it applies only to unascertained goods. The seller will enjoy this right chiefly where he is in a position to procure other goods on advantageous terms; this provision is of the greatest importance to the overseas import trade.

Article 50 corresponds to a principle recognised by certain systems of law, according to which the obligation of the buyer to examine and notify defects in goods and the sanctions incidental thereto do not apply where the seller wilfully conceals such defects i. e. where there has been fraud on his part.

C) *SANCTIONS IN CASE OF DEFECTS*

This part includes Articles 51–59. Civil law countries give the buyer in all cases a choice between the *actio redhibitoria*, a sort of avoidance of the contract and the *actio quanti minoris*, i. e., in diminution of the purchase price. They also give an action for damages when the seller has been guilty of fraud or breach of an

express warranty; moreover, there is a strong tendency in modern judicial decisions to give the buyer damages in all cases where the seller has been guilty of fault. The Anglo–Saxon systems of law on the other hand adopt a very different and complicated method. The Draft attempts to satisfy as far as possible both these opposed views. Hence, it provides the following remedies.

Article 51, No. 1. The right to avoid a sale solely on the ground that the goods are defective is, in principle, given to the buyer in all countries. It is true that in England this right disappears as soon as the buyer has accepted the goods or has re–sold them, even if only in part. In a qualified form, these restrictions appear in the Draft. Indeed, the acceptance of the goods may, in certain circumstances, amount to a waiver either of all the rights under the undertaking against defects or merely of the right of avoidance alone. A re–sale by the buyer to a third party brings Article 99 into operation.

The buyer retains his right under the Draft to avoid the contract even as against a seller of unascertained goods who has delivered defective goods. But in this case the practical result of the rule is appreciably qualified by Article 49, which gives the seller the right to deliver other goods within the time fixed by the contract for delivery.

Article 51, No. 2. The right to claim a reduction of the price. On this point there is a difference between Anglo–Saxon laws and those founded on the Roman Law. The latter provide a specific action for a reduction of the price and seek to preserve in force the fundamental basis of the contract which may be more favourable to one or other of the contracting parties. The Anglo–Saxon systems of law, on the other hand, look first not at the price fixed in the contract but at the value of the goods on the agreed date of delivery; it is on the basis of that value that they determine the rights of the buyer where defective goods are delivered.

Article 55 of the Draft adopts the continental method. At the same time [Article 57 ¡No. 4, gives the buyer the right to claim damages, notwithstanding that he keeps the goods.

Article 51, No. 3. The Draft here adopts two remedies. The right to have the goods replaced, i. e. the right to claim delivery of other goods, has its origin in German and Scandinavian law and applies to unascertained goods. The buyer may, accordingly, treat the delivery as not having been made and claim delivery in accordance with the contract.

The other right given to the buyer, namely, the right to claim the repair of the defective goods is dealt with in more detail in *Article 56.* Whilst French law gives the buyer a right to claim the repair of defective goods, other systems of law restrict this right to cases of *locatio operis.* For international sales, which so often involve overseas transport, it was out of the question to generalise this right. But in the case contemplated by Article 56, where the seller is bound to produce or manufacture goods to the orders of the buyer, it was not possible to restrict the right to repair defects to the buyer alone, such right had likewise to be given to the seller. Article 56 contains detailed rules to this effect.

Article 51, paragraph 2; articles 57–59. The right to damages.

Article 57 gives the buyer a right to damages in four cases. Article 59 treats the right of the buyer to damages as the rule, and the non-liability of the seller as the exception, an exception which is worded similarly to Article 34, which deals with non-delivery. The question of damages touches one of the two or three great points of difference which separate the various national laws on this subject. Under the Civil law system such an obligation does not arise except where there has been fraud or an express warranty by the seller; recent judicial decisions, it is true, have in France,

Germany and other countries imposed a similar liability on the seller where he has been guilty of fault. In England and U. S. A. such liability is unconditional. The Draft adopts the latter system but, at the same time, recognises all the grounds of non-liability admitted by the various countries. In short, unification on this point is, as stated above, incomplete.

Of the four cases contemplated by Article 57, Nos. 1 and 4 resemble the provisions of Anglo-American laws. The damages in these cases are of a twofold nature: either the buyer retains the goods and claims compensation for the difference in their value (Article 57, No. 4; Article 58, second sentence); or he refuses delivery altogether, which refusal is tantamount, under the Draft, to avoidance of the contract (Article 57 No. 1), and claims damages equal to the value which the goods would have had if they were not defective, less the amount of the purchase price. In the second case, the Draft gives the ordinary damages for non-delivery (Article 58, first sentence).

In the other two cases contemplated by Article 57 the damages are intended to compensate for the loss resulting from the delay in the delivery of other goods (Article 57, No. 2) or from an initial defective delivery (Article 57, No. 3).

Article 52. The period within which a claim may be made under the undertaking has been fixed at two years. The fact that the period has expired cannot be set up by a seller who has prevented the action being brought earlier by his own fraud.

On the other hand no place is found in the Draft for the rule adopted by some legal systems under which the buyer, even after the expiration of the period in which he can bring his action, may still set up the defects of the goods by way of defence to a claim by the seller for payment of the purchase price, subject only to the defect having been notified within a reasonable time. This rule was rejected in order clearly to establish the legal position of the parties after the expiration of the period fixed by Article 52.

Article 53 deals with defects affecting only a part of the goods by a reference to the rules concerning partial delivery.

Article 54 relating to contracts for delivery by instalments follows the wording of Article 30.

SECTION III. — OTHER OBLIGATIONS OF THE SELLER

(Articles 60-61).

Article 60 is derived from American and English law, under which the seller is bound in certain cases to furnish the buyer with the information requisite to effect insurance of the goods during transit; in English Law this obligation is confined to transit by sea. The wording is taken from American Law.

Article 61 enunciates a general rule to cover all cases of non-performance by the seller of obligations which do not come within the two foregoing cases (defective delivery and defects of the goods), and which entitle the buyer to claim damages, and, in some cases also, to avoid the contract.

As to damages, the same wording has been used as in the provisions dealing with sanctions for non-performance; Article 61 also contains a reference to cases of *vis major*, in accordance with the wording of Articles 33 and 34. The buyer may further, in addition to claiming damages, avoid the contract if the obligation not performed by the seller is an essential one. In accordance with the principles observed by the Draft such avoidance does not deprive him of his right to damages. The last paragraph of the article provides that an obligation is essential where it appears that the buyer would not have concluded the contract without such an undertaking.

CHAPTER IV

(Articles 62-85).

OBLIGATIONS OF THE BUYER

The introductory article states the two principal obligations of the buyer. The first, payment of the price, is dealt with in the first section (Articles 63–79); the second, taking delivery of the goods, is dealt with, together with the special case of sale by specification, in the second section (Articles 80–85).

The obligation to pay the price is inherent in the nature of the contract for sale. On the other hand, the Institute discussed at engthwhether it should introduce as the buyer's second obligation his duty to take delivery of the goods; it decided to do so subject o special rules as to sanctions for non–performance of this obligation.

SECTION I. — PAYMENT OF THE PRICE

(Articles 63–79).

The first article of this chapter, Article 63, contains a provision concerning the extent of the obligation with which it deals. Three sub–titles follow: the first relates to the fixing of the price, the second lo the place and date of payment, and the third to sanctions in the tvent of non–payment or delay.

Article 63 specifies, without limiting, those accessory duties which, in accordance with the contract or with usage, accompany the payment of the price: e. g., the acceptance of a Bill of Exchange.

The sub-title on the fixing of the price contains provisions dealing with cases where the price has not been fixed, where the price is fixed according to weight, and with apportionment of customs duties between the parties when such duties have increased after the conclusion of the contract.

A) *FIXING OF THE PRICE*

Article 64 touches on a question which systems of law have solved in markedly different ways. Anglo-American law, for instance, treats the contract as valid even in the absence of a determined or determinable price, and lays down that in such a case the purchaser must pay a reasonable price. Similar solutions have been adopted in Austria, Germany and Scandinavia. Civil law countries on the other hand — with the exception of a few South American countries — require, for a valid contract, that the price shall have been fixed by the parties or that it can be determined in accordance with the contract.

The Institute has adopted almost word for word Article 5 of the Scandinavian law of Sale, which leaves the seller free within equitable limits to fix the price.

On the other hand, the expression "reasonable price", which appears in the article, is taken from Anglo-American Law. The solution adopted thus combines the provisions of Anglo-Saxon, German and Scandinavian law.

Article 65 provides that, where the price is to be ascertained by reference to the weight of the goods, it shall be payable on the net weight. This rule, which does not figure in Anglo-American Law, appears in the other laws.

The purpose of *Article 66* is to fix the position of the parties in certain cases which frequently occur in international sales, namely,

where customs duties are increased after the conclusion of the contract; the rule reproduces a provision of the English Finance Act, 1901.

B) *PLACE AND DATE OF PAYMENT*

The first article of this sub-title states the principle that payment of the price must be made at the residence of the seller; accordingly the risks of dispatching the price fall on the buyer. There is an express provision negativing this rule where the contract contains clauses such as "payment against tender of documents", and the parties have agreed to fulfil their mutual obligations elsewhere. The second paragraph of *Article 67* qualifies the rule by providing an equitable limitation in favour of the buyer where the expense of dispatching the price has been increased through unforeseen causes attributable to the seller.

Article 68 corresponds with Article 20; it lays down that where the date for payment has been agreed the buyer must pay the price without any further formality or demand from the seller.

Article 69 provides a rule for the special, but somewhat frequent, case where goods are sold on credit without any date being fixed for payment of the price; in such a case the buyer is bound to pay the price without undue delay (defined in accordance with Article 12) after receipt of the goods or of the documents.

C) *SANCTIONS IN THE EVENT OF NON-PAYMENT OR DELAY*

The sanctions against the buyer in case of non-payment or delay (Articles 70–79) are based on the same principles as the sanctions for non-performance by the seller of his obligations (Articles 23–40).

As in the latter case, one provision states the general principles applicable to the rights of the seller, and three sub-titles contain special provisions. The general provision, for the reasons stated above in connection with Article 23, recognises the seller's right to claim specific performance, subject to the same qualifications as those which apply to his obligations.

The provision in paragraph 4, denying courts the right to give the buyer a period of grace for payment of the purchase price, is a rule expressly recognised by various systems of law, particularly in commercial matters; it corresponds with the last paragraph of Article 23.

a) *SPECIFIC PERFORMANCE OF THE CONTRACT*

Article 71, which somewhat resembles Article 24, deals with the seller's obligation to effect a re-sale by a reference to the usage of the trade. Where there is such obligation, he is not entitled to payment of the whole price, but only to the difference in respect of which he is out of pocket.

b) *AVOIDANCE OF THE CONTRACT*

Article 72 lays down the principal rule concerning avoidance of the contract for non-payment of the price: the seller is entitled to avoid the contract. It has already been pointed out that a simple declaration is sufficiently formal for this purpose.

The qualification on this right of avoidance, contained in the second sentence of Article 72, embodies a principle common to numerous systems of law: the seller is not entitled to avoid the contract where he has himself performed his obligation without reserving this right.

The provision of *Article 73* deals with contracts for delivery by instalments in a manner similar to Article 30.

Avoidance in respect of deliveries already made, which is dealt with in Articles 30 and 54, does not require treatment in connection with payment of the price.

c) *DAMAGES.*

Article 74 reproduces the provision in Articles 34, 36, 59, and 67. The sub-title then goes on to deal with two cases: the first, where, notwithstanding the delay of the buyer in paying the price, the contract remains in force, and the second, where the contract is avoided.

Article 75. With regard to the first case it may be noted that all present-day systems of law recognise the right of the seller to be indemnified for the loss caused to him by the delay of the buyer in paying the price. English law used to make an exception in this case, but since the Law Reform Act 1934, the English courts may, in assessing the damages, include a sum in respect of interest. Whilst some systems of law allow only interest on arrears, others include, where necessary, a greater sum for compensation; but even the laws and judicial decisions of countries of the former type reveal a tendency in certain cases to augment the damages. Having regard to this fact the Institute has adopted the second system.

Paragraph 2 of Article 75 states that the rate of interest shall be equal to the official discount rate of the country where the buyer has his business establishment or ordinary residence plus 1 per cent. Compound interest shall not be allowed except where there is a current account between the buyer and the seller.

Articles 76–79. In determining the method of assessing the damages in cases where the contract has been avoided, the Institute

has followed the provisions of Articles 37, 38 and 39 of the Draft, which deal with non-delivery of goods. Avoidance of the contract may therefore co-exist with a claim for damages, wherever the buyer is not excused damages by an event within Article 34. The damages are in principle assessed *in abstracto*, etc.

SECTION II. — OTHER OBLIGATIONS OF THE BUYER (Articles 80-85).

Articles 80-84 deal with the second of the buyer's obligations, namely, the duty to take delivery of the goods; these provisions restrict the sanctions generally given for non-performance to cases where the refusal to take delivery of the goods jeopardises the essential basis of the contract.

Accordingly, in framing *Article 80* the Institute did not think fit to adopt in its entirety the rule enforced in some countries by which the seller is *ipso jure* entitled to avoid the contract if the buyer fails to take delivery of the goods on the agreed date or subordinates acceptance of the goods to certain conditions. The seller may not avoid the contract unless acceptance of the goods was an essential condition of the contract, or unless the refusal to take delivery affects the principal obligation of the buyer, namely, to pay the price. Moreover, a seller has always at his disposal a simpler and more expeditious remedy: he may deposit the goods with a third party and effect a re-sale in accordance with Articles 94 and 95 of the Draft.

Articles 81-83 deal with the subject of damages along the lines of the general principles of the Draft.

By *Article 84* a buyer who is late in taking delivery is entitled to ascertain, by the simple method of a request addressed to the seller, whether the latter intends to exercise his right to avoid the contract.

Article 85 deals with the case where the buyer fails to perform his duty under the contract to submit a specification of the goods (sale by specification). The system of the German commercial code (section 375) has been adopted. The seller is entitled either to make the specification himself and then afford the buyer a period of time within which to make a different specification, or to treat the contract as not performed by the buyer, after having fixed a period of time; however, the Draft qualifies the former system by making it a condition that the national law administered by the court should allow specific performance of the contract. This qualification was inserted because Anglo-Saxon law, as already stated, grants this relief only in exceptional cases.

CHAPTER V.

(Articles 86–102)

PROVISIONS COMMON TO THE OBLIGATIONS BOTH OF THE SELLER AND THE BUYER.

This Chapter contains three sections:

The first deals with the relation of reciprocity between the two principal obligations of the parties, namely, delivery of the goods and the payment of the price.

The second defines the accessory obligations of the parties in the case where the contract of sale develops irregularly.

The third contains provisions of a general character relating to the obligations of both parties.

SECTION I. — COINCIDENCE BETWEEN DELIVERY AND PAYMENT OF THE PRICE

(Articles 86–91)

The first section is concerned with the legal doctrine known as "synallagma", i. e., the mutuality of contractual obligations. It was somewhat difficult to find an adequate place for these provisions within the scheme of the Draft. The Institute thought it better to place them after the provisions dealing with the obligations themselves.

The section contemplates three sorts of possible relations between the obligations of the parties. Article 86 lays down the fundamental rule that the duties of the parties are concurrent; Article 88 deals with sales on credit, and Article 90 with sales where the price is paid in advance.

Article 86 lays down that, in the absence of agreement between the parties, delivery must be made at the time of payment of the purchase price, a rule which is expressly or impliedly followed by almost all legal systems.

Article 87. In the normal case, the consequence of this fundamental rule is that each party is entitled, in the event of non–performance of the contract, to suspend performance of his duties thereunder until the other party shall have performed his part.

In the case of sales where there is an obligation to dispatch the goods, the solution is more difficult.

The Institute was inspired by the principles of the Scandinavian law of sale in dealing with cases where the seller retains a right of disposal of the goods. The rule suggested is that the seller may

in no case postpone dispatch of the goods on the grounds that the price has not been paid. It is true that by Article 67 the buyer is bound to pay the price at the establishment or ordinary residence of the seller, but, notwithstanding default in payment, the suggested rule imposes on the seller the obligation to make delivery in accordance with Article 16 et seq. But regard must be had to the buyer's right under Article 92 to examine the goods; accordingly, it was thought desirable to enlarge the obligations of the seller or rather to increase the rights of the buyer by placing on the seller's right of retention a qualification which is recognised by various systems of law.

The Draft recognises that in the normal case failure to make payment is justified (Article 91, paragraph 1) where the buyer has not had an opportunity of examining the goods; accordingly, where there is an obligation to dispatch the goods, if the seller is not paid at the time when the goods are to be dispatched, he is not allowed to take steps which might cause very serious damage to the buyer, such as a refusal to dispatch the goods. The seller, however, is protected by the fact that he is not bound to deliver the goods to the buyer at their destination unless he receives payment of the price, provided he has retained a right of disposal over the goods. This latter right, with the limitations it involves, is dealt with in very different ways by the various laws relating to carriage of goods; accordingly, the Institute, not wishing to run counter to, or encroach upon their sphere of application, has confined itself to laying down the rule that the seller may exercise his right of retention at the place of destination, if he is entitled to do so under the law governing the contract of carriage or under the special provisions of the contract of carriage itself. This solution takes a middle course between two difficulties: namely, that caused by the differences between the laws concerning carriage of goods, and that which arises from the fact that in a sale with an obligation to dispatch, there is a period of time between the moment when the seller performs his obligation and the moment when the buyer is in a position to examine the goods.

Articles 88 and 89 are intended to protect the seller against the danger of the bad financial position of the buyer, particularly in sales on credit. The seller ought not to be given this special relief except against losses which threaten him after the conclusion of the contract; where he has given credit to a buyer who was in a state of insolvency at the time of the conclusion of the contract, he should receive no further protection beyond that given by the common law (mistake, fraud, etc.).

Article 88 follows the wording of the corresponding provisions of most systems of law. The conditions entitling the buyer to withhold performance are less severe than those of some laws, e. g. English and French law, which require insolvency, bankruptcy (faillite), or compositions with creditors (déconfiture); this is explained by the fact that the Institute wished to avoid introducing matters relating to the law of bankruptcy into the international law, and preferred a more elastic principle which would be valid in all countries. It may often happen that the situation of a buyer without amounting to insolvency may, nevertheless, have become so difficult, that the seller ought not to be held to his obligation to deliver goods on credit. Accordingly, the Institute has adopted the terms of Article 88, repeated in Article 90, giving the seller the right to withhold the performance whenever the position of the buyer has, subsequent to the conclusion of the contract, become so difficult that the seller has good reason to fear that payment will not be made on the agreed date.

This provision applies primarily to sales on credit; it may, however, also apply in accordance with Article 87, to cash sales where the latter include an obligation to dispatch the goods.

Where the conditions laid down in Article 88 are fulfilled the seller is not bound to dispatch the goods as required by Article 87, paragraph 2, but may withhold dispatch. This follows from the

fact that Article 89 deals only with the case where the goods have already been dispatched; where this is not the case Article 88 applies.

Where the goods have already been dispatched and the position of the buyer thereafter becomes uncertain, *Article 89* applies.

This provision deals with the seller's right of stoppage in a manner very favourable to the latter and in a way similar to that adopted by the Scandinavian law (section 39). This Article, like Article 88, merely requires that the financial position of the buyer should have deteriorated since the goods were dispatched, and the right of the seller is to be effective even though the buyer is already entitled to dispose of the goods by virtue of his possession of a bill of lading or other document of title. Unlike some laws, e. g. German law, the article enables the seller to prevent delivery of the goods notwithstanding any right which the buyer may have under laws of carriage of goods to obtain possession of them himself.

Where the document of title is in the hands of a third party, paragraph 2 protects such party in preference to a seller who has imprudently parted with the document before receiving the price, unless such document contains reservations concerning its negotiation or unless there has been fraudulent collusion between the buyer and the holder of the document.

Article 90, by analogy with Article 88, fixes the right of a buyer who has undertaken to pay the price in advance to a seller who turns out to be in a bad financial position. This rule will be of rarer application than Articles 88 and 89 and does not give rise to the same difficulties as those presented by sales with an obligation to dispatch.

Article 91 states the rule that the buyer is entitled to examine the goods before paying for them.

In sales which are completed on the spot this rule presents no difficulties. The same applies to sales with an obligation to dispatch, thanks to the provisions of Article 87 paragraph 2.

On the other hand, where the contract provides for payment against tender of documents, a special rule is necessary, suggested by universal practice and formulated in the Scandinavian law; this is expressed in paragraph 2: the buyer is bound to pay the price although he has had no opportunity of examining the goods.

The clause in question need not be express. Where a bill of lading or other similar document is drawn up at the time when the sale is concluded, a presumption arises that the contract includes this clause, and the right to suspend payment until the goods have been examined disappears together.

SECTION II. — SUPPLEMENTARY RULES REGARDING DELAY AND AVOIDANCE OF THE CONTRACT

(Articles 92–99).

This Section contains rules taken from Scandinavian law concerning the accessory obligations of the parties in case of delay in performance or of avoidance of the contract of sale. They were collected in this Chapter so as to avoid repeating them two or three times in the Draft.

Articles 92–96 deal with the obligation of the parties in certain cases to preserve the goods and with the circumstances in which they may be released from this obligation. Articles 97–99 deal with the settlement of the contractual relationships where the contract is avoided by one of the parties.

In the circumstances contemplated by *Article 92* the risk has already passed to the buyer, according to Article 105; it was therefore thought necessary to insert an express provision obliging the seller to preserve the goods.

Similarly, *Article 93* lays down a rule concerning the obligation of the buyer to preserve the goods, where he has received them but wishes to reject them, by way of avoidance of the contract or in order to demand other goods under Article 51 No. 3 or because he has received *aliud pro alio*. The rule in paragraph 1 assumes that the buyer has taken possession of the goods. Paragraph 2 deals with the further case where the goods, having been the subject of transportation, reach the buyer and the seller is not represented on the spot. In this case the buyer is bound to take possession of the goods and to preserve them, provided that this may be done without considerable expense.

Articles 94–96 indicate how the parties may release themselves from the obligation to preserve the goods where such obligation is unduly burdensome. In all such cases they may, in accordance with *Article 94*, store the goods with a third party and in particular in a warehouse. The Draft imposes no special obligation on the third party. The cost of such storage and preservation falls, of course, on the other party.

Articles 95 and *96* relate to the sale of goods which have been preserved in accordance with the preceding Articles. A distinction is drawn between two cases, according to whether the party for whom the goods are preserved is merely entitled to sell them (Article 95), or is bound to sell them (Article 96). The latter Article imposes an obligation to sell:

1. Where the goods are subject to rapid loss or deterioration;

2. Where their preservation would involve unreasonable expense. The party who sold the goods without notification must prove that notification was not necessary.

Where there is a current price for the goods, they may be sold only at such price through a broker officially authorised to conduct such sales or through a duly qualified public auctioneer. Where there is no current price for the goods, the party who is under a duty to preserve them may sell them by private treaty.

In neither case are the goods bound to be sold by public auction. The difficulty which might arise from the fact that goods for which there is no current price may be sold by private treaty is met in the Draft by giving the interested party a right to recover the difference in price if he can prove that the goods could have been sold at a higher price.

Article 97 defines the consequences of avoidance of the contract. Both parties are released from their obligations thereunder. The Article provides that avoidance of the contract shall not prejudice any claim to damages (Articles 36, 57, 76). If both parties have performed their part of the contract both of them must simultaneously make restitution in accordance with the principle of coincidence. Should the buyer have already paid the purchase price the seller must repay him with interest from the date of payment (*Article 98*).

Article 99 governs the case where the buyer still retains his right to avoid contract, notwithstanding that he may not be in a position to restore the goods entirely or in their original state. Three cases are envisaged: The first arises from the fact that when the buyer has still a right to avoid the contract the risk is on the seller although the goods are already in the hands of the buyer. Under this provision, where goods, which the buyer is bound temporarily to preserve, perish without any fault on his part or on the part of any person for whom he is

responsible, the buyer may claim to be refunded the price, notwithstanding that he is unable to return the goods; where the goods have deteriorated without his fault, the buyer is bound to return the deteriorated goods and he is entitled to a refund of the whole of the purchase price.

The second case, dealt with in Article 99, is where the goods contain a latent defect which could not be discovered before the goods had been transformed. The seller, who is answerable for this defect under Article 48, must retake the goods in their transformed state and at the same time refund the purchase price.

Lastly, the third case is intended to prevent a seller taking advantage of an immaterial modification.

SECTION III. — MISCELLANEOUS PROVISIONS

(Articles 100–102).

This section contains three rules which have been grouped together so as to avoid their repetition in other parts of the Draft.

The rule in *Article 100* lays down that a party who sets up a breach of contract is bound as far as possible to mitigate the loss which has occurred provided that he can do so without appreciable inconvenience or cost. Otherwise, he is only entitled to be indemnified for loss he could not have avoided. (Paragraph 2). This rule applies even where the breach is due to the fault of the other party.

Article 101 deals with the cases known in English law as "anticipatory breach of contract" (this is dealt with above in relation to Article 40).

As regards the question of expenses, the Draft is confined to stating a very general rule (*Article 102*), since parties usually insert special clauses on this point. There is a further reference here to the conception of "delivery" (Article 17), and it is laid down that all the expenses of delivery shall be borne by the seller, whilst all expenses incurred thereafter shall be borne by the buyer.

CHAPTER VI

(Articles 103–108).

THE PASSING OF THE RISK

The first article of this Chapter, Article 103, lays down the fundamental rule as to the passing of the risk; this article is completed by Article 105, which deals with the case of delay by the buyer in taking delivery. Articles 106 and 107 lay down rules of construction regarding the passing of the risk in contracts containing f. o. b. and c. i. f. clauses, whilst Article 104 provides that terms relating exclusively to expenses shall have no bearing on the question of the passing of the risk. The Chapter ends with a provision concerning the question of risk in the case of goods shipped in bulk.

It has already been observed in the preliminary observations that the two questions of the passing of the risk and the passing of the property are, and should be, separate.

The Institute has dealt with the passing of the risk by a reference to the notion of *delivery* and has disregarded all questions relating to real rights. This basic principle was defined and elucidated in the Chapter on the obligations of the seller (Article 17).

Article 103 provides that the risk passes to the buyer at the time of delivery; the latter thereafter is bound to pay the price notwithstanding that the goods deteriorate or are lost.

As regards the exact moment of the passing of the risk, the distinctions which are drawn follow from Article 17. In particular, it is necessary to distinguish between the case where the seller is bound to dispatch the goods from the place of delivery (Article 17, paragraph 2), and the case where he is not so bound (Article 17, paragraph 1).

Under the latter head are included all sales which are completed on the spot as well as sales where the seller is bound to deliver at the place of destination; in such cases the risk passes when the seller has performed all the acts necessary to enable the goods to be consigned to the buyer. In this way the Institute has adopted a middle course between those systems of law where in accordance with the principle "*periculum est emptoris*" the risk passes to the buyer at the time of the conclusion of the contract of sale (England, France, Italy, U. S. A.), and those systems where the risk passes on handing over of the goods (traditio) (Austria, Germany). The solution adopted by the Institute resembles that of Scandinavian law.

In the case of a sale with obligation to dispatch, i. e. where the seller who is bound to dispatch the goods fulfils the obligation of delivery by consigning the goods to the first carrier (Article 17 paragraph 2), the risk passes to the buyer at that moment; where the transportation commences by sea, the decisive moment is that when the goods are placed on board and the documents transmitted to the buyer. This solution is adopted by most systems of law, at any rate in sales of unascertained goods.

Of course, parties may derogate from or modify the provisions of Article 103 as much as they desire. Where, for instance, they insert clauses such as "delivered weight and sound delivered" or the "deficiency clause" the risk of diminution in the value of the goods by loss of weight must be borne by the seller, notwithstanding that the risk of general loss of value has already passed to the buyer.

Article 104 merely reproduces an old rule of European case law.

Article 105, paragraph 1 extends the principle of Article 103 to the case where the failure of the seller to do all that is requisite to comply with his obligation to deliver is due to the act or omission of the buyer. In this case the seller is protected in the same way and as from the same time as if delivery had actually been made.

However, in the case of unascertained goods, the buyer requires to be protected against the fraud of a seller who might falsely pretend that the goods intended for the buyer have accidentally perished. Accordingly, paragraph 2 of Article 105 lays down three conditions for the passing of the risk in sales of unascertained goods:

a) the goods must have been clearly appropriated to the buyer;

b) the goods must have been set aside for the buyer;

c) the buyer must have been notified of the facts under *a*) and *b*).

The goods are thus earmarked by a unilateral act of the seller which is clearly and outwardly apparent.

This rule is in accordance with the laws of Austria, Germany, Scandinavia, Switzerland and with recent Italian judicial decisions, whilst French law requires in theory that the buyer should take part in the earmarking of the goods.

Where the seller can establish that it was impossible for him to make a specification of the goods sold, for instance, in the case of liquid for which the seller has no vessel available to contain the quantity sold, the Institute, in response to an English suggestion, has laid down the rule that the risk passes to the buyer from the time when the seller has done all that he can do to effect delivery.

As regards the familiar clauses in international sales which are dealt with in Articles 106 and 107, the Institute was doubtful whether it was necessary to define their effects in detail; the happy precedents of Scandinavian law suggested a complete regulation of these clauses. The Institute, however, fearing that such rules might very soon become obsolete in practice, confined itself to regulating the more familiar clauses solely as regards the passing of the risk, leaving the other questions to be dealt with by commercial practice.

Hence, the Draft contains no general rules concerning the contract f. o. b. (free on board, franco à bord, frei bord, in America f. o. b. Vessel).

But *Article 106*, at any rate, makes it clear at what moment in this contract the risk passes to the buyer. By Article 17, paragraph 2, where the transportation commences by sea, delivery is effected by placing the goods on board the vessel, i. e. when it is over the ship's rail; accordingly, this is the moment when, in accordance with Article 103, the risk passes to the buyer. But, notwithstanding the provisions of Article 103, Article 106 provides that, even if the seller is obliged to dispatch the goods to the port of loading from the place where delivery is due, the risk does not pass to the buyer until they are placed on board the vessel.

The second paragraph of Article 106 lays down an exception to this rule, in accordance with Article 17 paragraph 2, in the case of a " received for shipment bill of lading ".

The foregoing remarks apply equally to sales c. i. f.; this is expressly stated in *Article 107*.

In adopting Article 107, paragraph 2 the Institute has sought to take into account the requirements of wholesale trade and to encourage the use of documents of title covering the whole of the transit.

The rule is justified by the fact that a seller who lives in the interior of a country is in a better position than the overseas buyer to know which is the better route by which to transport the goods to the port of loading: hence the provision of Article 107, paragraph 1. But where the buyer agrees to take a document of title covering the whole transit, and where, accordingly, he agrees to the transit being treated as a whole, it follows that that part of the transit covering the journey from the place of dispatch to the port of loading is sufficiently international in character to be deemed to be adequately under the control of the buyer.

Article 108. In wholesale trades goods are frequently shipped in bulk particularly grain, coal, timber and oil; the question of the passing of the risk in the case of bulk cargoes has frequently claimed the attention of lawyers in various countries; the Institute has thus thought it desirable to put an end to the doubts which exist on this point. Difficulties on this question arise chiefly in connection with the technical rules relating to insurance against total or partial loss of the goods. The difficulties are caused because the buyer owns only a part of the bulk shipment and the final earmarking of the goods does not take place until they reach the port of destination. The Institute here adopts an exception to the principle that complete specification of the goods is a condition precedent of the passing of the risk, and lays it down that in this case it shall be sufficient to pass the risk for the seller to specify the buyer's proportion of the bulk and to send the latter a bill of lading or give notice of shipment in some other way. It therefore suffices to pass the risk in this case for a seller to dispatch such notice.

Just as the earmarking of the goods is incomplete so the placing of the risk on each separate buyer is incomplete. Whilst the risk is no longer on the seller it is equally not on each buyer individually, but passes to all the buyers interested in the goods shipped in bulk. The latter form a community of risks and the damage resulting from the loss of the goods in transit, unless it is imputable to a particular buyer, is divided proportionately between them. In laying down this rule the Institute has merely formulated a solution which has been reached by the courts of numerous countries.

DRAFT

TEXT OF THE LAW

CHAPTER I

THE SCOPE OF THE LAW

Article 1. The present law applies to sales of goods (corporeal movables). It does not apply to sales of:

a) stocks or shares, negotiable instruments or money;

b) ships, or vessels used in inland navigation or aircraft.

Article 2. For the purposes of the present law, contracts for the delivery of goods (corporeal movables) to be manufactured or produced are deemed to be sales, if the party undertaking delivery is required to supply the raw materials necessary for such manufacture or production.

Article 3. The present law shall apply regardless of the commercial or civil character of the parties or of the contract.

Article 4. The provisions of this law concerning defects in goods shall not apply to sales of living animals.

Article 5. The present law does not deal with the effects of the conclusion of the contract on the ownership of the goods.

Article 6. The present law shall apply where the parties have their business establishment or, in default thereof, their habitual residence in the territory of countries in which sales of goods are not governed by the same rules of law, and the goods are destined by virtue of the contract to become or are at the time

of the conclusion of the contract the subject matter of international transport. International transport means transport from the territory of one State to the territory of another.

Article 7. Where a corporation or an association or a person having several business establishments becomes a party to the contract the business establishment to be taken into consideration shall be that from which the first communication is despatched.

Where a contract is concluded through an agent the business establishment or residence to be taken into consideration shall be that of his principal.

Article 8. The nationality of the parties is immaterial.

CHAPTER II.

GENERAL PROVISIONS

Article 9. The parties may entirely exclude the application of the present law provided that they expressly mention the law of the country, which is to govern their contract.

The parties may derogate in part from the provisions of the present law provided that they agree on alternative provisions, either by expressly mentioning them or by referring to specific rules.

Article 10. The parties shall be bound by usages the existence of which is or ought to be known to them. The Court may disregard

a usage which is unreasonable if its purport was unknown to one of the parties when he entered into the contract.

Where clauses or regulations used in a trade are employed the Court shall interpret them in accordance with the usage of the trade.

In case of any conflict between the present law and usage of the trade the usage shall override the present law.

Article 11. If a question arises which is not expressly covered by the provisions of the present law, and the present law does not expressly refer such question to the provisions of the national law, the Court shall apply the general principles by which the present law is inspired.

Article 12. The expression "communication without undue delay" means a communication which is made as soon as possible having regard to the usual means of communication employed in similar circumstances.

Article 13. A current price is the price on the market to which the buyer would resort in the ordinary course of business to satisfy his requirements in that class of goods which is the subject matter of the contract.

Article 14. National law, within the meaning of the present law, is the law of the country which is applicable according to the rules of private international law.

Article 15. No particular form is required for a contract of sale; oral evidence shall be admissible.

CHAPTER III

THE OBLIGATIONS OF THE SELLER

SECTION I. – DELIVERY

Article 16. The seller undertakes to deliver the goods to the buyer. The seller is bound to consign to the buyer, simultaneously with the goods, their accessories and any documents concerning the goods which must be annexed to them by the usage of the trade.

Article 17. By delivery is meant the doing of any act or acts which must be done by the seller in order to make it possible for the goods to be consigned to the buyer. The acts which are necessary for this purpose shall be determined in accordance with the nature of the contract.

In the case of a sale with obligation to dispatch the goods from the place where the goods are to be delivered, delivery shall be effected by consigning the goods to the first carrier or forwarding agent, or, if the first part of the journey is by sea, by placing them on board ship and sending to the buyer such documents as will enable him to obtain the goods on arrival. Where, under the contract or by usage of the trade, the seller is entitled to present a received for shipment bill of lading to the buyer it shall be sufficient to deliver the goods to the shipowner.

A) *PLACE OF DELIVERY*

Article 18. The seller is bound to deliver the goods at the place where, at the time of the conclusion of the contract, he has his business establishment or, in default thereof, at his ordinary residence.

If the contract be for the sale of specific goods which, to the knowledge of the parties at the time of the conclusion of the contract, are in some other place, such place is the place of delivery. The same rule applies where the contract is for the sale of unascertained goods which are to be taken from a given stock or bulk, or which the seller undertakes to produce or manufacture in a certain place.

Article 19. Where there is a doubt as to whether goods are to be delivered at the place of dispatch or at their destination, it shall be presumed that the parties intended delivery to be made at the place from which the goods are to be dispatched.

B) *DATE OF DELIVERY*

Article 20. Where the parties have agreed on a date for delivery, or where such date is fixed by usage of the trade, such agreement or usage shall conclusively and without any other formality fix the date at which the seller is bound to deliver the goods, provided that the date thus fixed is determined or determinable by the calendar or is related to a definite event the exact date of which can be ascertained by the parties (*e. g.* first open water).

Article 21. Where a period of time within which delivery must take place is agreed upon (*e. g.* a particular month or a certain season of the year) the seller may fix the precise date of delivery unless the circumstances indicate that such choice was reserved to the buyer.

Article 22. Where the date of delivery has not been fixed in accordance with the provisions of Articles 20 and 21 the seller is bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and the circumstances.

C) *SANCTIONS IN THE EVENT OF NON-DELIVERY OR DELAY IN DELIVERY*

Article 23. In the event of total or partial failure to deliver or of delay in delivery the buyer may, subject to the provisions of Articles 24 and 25, require specific performance of the contract, provided that specific performance is possible and is recognised by the national law of the Court in which the action is brought.

The buyer may, subject to the provisions of Articles 26 to 32, avoid the contract by a simple statement to that effect.

He may also sue for damages as provided by Articles 33 to 40.

In no event is the seller entitled to obtain a period of grace from the Court.

a) SPECIFIC PERFORMANCE OF THE CONTRACT

Article 24. Notwithstanding that the national law of the Court recognises his right to require delivery of the goods, the buyer shall not be entitled to require such delivery where it is in accordance with the usage of the trade to repurchase the goods or where he can repurchase them without appreciable inconvenience or expense.

Article 25. If, in circumstances other than those contemplated by Article 27, the buyer elects to demand specific performance of the contract, he must notify the seller to this effect without undue delay; otherwise he will only be entitled to avoid the contract, as provided by the present law, without prejudice to his claim to damages.

b) AVOIDANCE OF THE CONTRACT

Article 26. Where delivery has not been made on the date or during the period agreed upon or fixed by usage of the trade or

at the expiration of the reasonable time provided for in Article 22, the buyer can only avoid the contract:

1. if he proves that by reason of the circumstances of the case or the terms of the contract the date of delivery was an essential condition of the contract, or

2. if the date of delivery has been fixed by the seller or by the buyer in the case contemplated by Article 21.

Article 27. Where the date of delivery is not an essential condition of the contract and where it has not been determined as provided by Article 21, the buyer may allow the seller a further period of time for delivery of reasonable duration, stating that on the expiration of that period he will refuse to accept the goods. If the period thus fixed by the buyer is not of reasonable duration, the seller must, without undue delay, notify the buyer that he will only deliver at the expiration of a reasonable period. Failing such notification the seller shall be deemed to accept the period fixed by the buyer.

Should the seller not deliver the goods at the expiration of the further period the contract shall *ipso facto* be avoided.

Article 28. Where the goods are delivered by the seller on a date later than that fixed by the contract, or by usage of the trade, or by the present law, a buyer who is entitled by the provisions of the present law to avoid the contract must give notice of avoidance without undue delay.

Article 29. Terms in a contract relating to the date of delivery of goods for which there is a market available where the seller may procure them shall be deemed to be of the essence for the purposes indicated in the three preceding articles.

Article 30. In contracts for delivery by instalments, the buyer shall be entitled to avoid the contract, as regards future instalments, if by reason of default in delivery of an instalment already due, he has good reason to fear that future instalments will not be delivered; but he shall not be entitled to avoid the contract in respect of deliveries already received, unless he proves that by reason of the interdependence of all the deliveries stipulated for in the contract, the absence of certain deliveries deprives the deliveries already received of all value to him.

Article 31. In the event of partial default in delivery or of delay in delivery of part of the goods the buyer shall not be entitled to avoid the contract as a whole unless he can prove that such partial delivery or partial delay constitutes a breach which goes to the root of the contract.

Article 32. Where the buyer is not entitled to avoid the whole of the contract he may avoid it in part, and only pay so much of the price as is proportionate to the value of the part which has been delivered to him, without prejudice to his right to claim damages in respect of the part which has not been delivered to him, calculated in accordance with the provisions of Articles 36 to 40.

c) *DAMAGES*

1. *The case of delay in delivery without avoidance of the contract*

Article 33. Where delivery of the goods, or part of the goods, has been delayed, the seller shall, notwithstanding that the time for delivery has been extended in accordance with Article 27, be liable in damages equal to the actual loss suffered by the buyer,

including any profit of which he has been deprived, provided that such damages shall not be greater than those which result from circumstances which could reasonably have been foreseen at the time of the conclusion of the contract.

Article 34. The seller shall not be liable for the damages contemplated in the preceding article if he proves that the delay was due to an event which constituted an insurmountable obstacle which he was not bound to foresee at the time of the conclusion of the contract.

Whether and how far events other than those specified in the preceding paragraph may relieve the seller from liability for damages shall be determined by the national law.

Article 35. In the case referred to in the preceding article, it shall be the duty of the seller, as soon as he can foresee the delay, to notify the buyer that it will be impossible to deliver on the fixed date and to state the probable duration of the delay. The seller will be responsible for any damage caused to the buyer by any breach of this duty.

Where the seller in notifying the buyer of the impossibility to deliver on the fixed date, is unable on reasonable grounds to indicate the probable duration of the delay, the impossibility shall be deemed to be final, and either the seller or the buyer may avoid the contract. In that event the seller may claim exception from damages as provided by Article 36.

2. *The case of avoidance on the ground of delay or failure to deliver*

Article 36. Where the contract is avoided on account of delay or default in delivery of the goods the seller shall make good any loss caused to the buyer by non-delivery, unless he proves that

such non-delivery was due to an event which constituted an insurmountable obstacle which he was not bound to foresee at the time of the conclusion of the contract.

Whether and how far events other than those specified in the preceding paragraph may relieve the seller from liability for damages shall be determined by the national law.

Article 37. Where the contract is avoided on account of delay or default in the delivery of goods for which there is a current price, the damages payable by the seller shall equal the difference between the price fixed by the contract and the current price which prevails immediately after the date upon which the buyer was entitled to avoid the contract, or upon which the contract was *ipso facto* avoided. Regard shall further be had to the normal cost of a repurchase.

If the buyer has repurchased the goods with due diligence and as a prudent man of business, the price of such repurchase shall be taken into account in the calculation of the damages.

Article 38. The damages fixed in accordance with the preceding Article may be increased so as to cover the loss actually suffered by the buyer if the buyer can prove that at the time of the conclusion of the contract the seller foresaw or could reasonably have foreseen the events to which such loss is due.

The buyer shall, nevertheless, not be entitled to claim the above-mentioned increase if he has failed to make a repurchase without delay in any case in which repurchase is required by the usage of the trade or could be effected without appreciable inconvenience or cost.

Article 39. Where there is no current price for the goods the damages shall be equal to the loss actually suffered by the buyer inclusive of any profit which he has lost owing to non-performance

of the contract, provided that such damages shall not be greater than those which are the result of circumstances which could reasonably have been foreseen at the time of the conclusion of the contract.

Article 40. Where a period of time is fixed by the contract or by usage of the trade for the delivery of goods for which there is a current price, and where, before the expiration of such period, the seller has notified the buyer that he will not deliver the goods or has acted in such a way as to show that he does not intend to perform the contract, the damages shall be calculated on the basis of the current price of the goods on the last day of such period.

Where no period of time has been fixed by the contract or by the usage of the trade, the damages shall be calculated on the basis of the current price on the day on which the buyer has given notice of avoidance of the contract.

SECTION II. – THE SELLER'S UNDERTAKING AGAINST DEFECTS IN THE GOODS

Article 41. The seller undertakes that the goods shall be free from defects.

A) *DEFINITION OF DEFECTS*

Article 42. The undertaking shall apply:

1) where the goods do not possess the qualities necessary for their ordinary or commercial use;

2) where the goods do not possess the qualities necessary for a particular purpose expressly or impliedly contemplated by the contract;

3) where the goods do not possess the qualities and characteristics described in the contract including any express undertaking contained therein.

The absence of any immaterial quality or characteristic shall not be taken into account.

Article 43. In sales by sample or by model the undertaking shall extend to all want of correspondence between the goods and the sample or model.

Strict correspondence is not necessary, however, unless the parties have made a clear stipulation to that effect.

Where the sample is inconsistent with the description of the goods in the contract, the sample shall prevail; where the two are different but not inconsistent, the goods must combine the qualities of both.

Article 44. There is no sale by sample or model where the seller proves that such sample or model was merely submitted to the buyer by way of information without any undertaking that the goods would correspond thereto.

Article 45. Whether the goods are defective, or whether they correspond to the sample or model, is to be determined by their condition at the time when risk passes. Nevertheless, where defects which occur thereafter are due to the act or omission of the seller or a person for whose acts he is responsible the seller shall be liable for such defects.

Article 46. The seller shall not be liable for defects which he proves to have been within the knowledge of the buyer at the time of the conclusion of the contract. The same rule shall apply where the buyer has been grossly negligent in not being aware of such defects.

In the latter case, however, the seller shall nevertheless be bound by his undertaking if he has promised qualities which do not exist, or if he has in bad faith concealed the existence of defects; the burden of proof shall be on the buyer.

A) *ASCERTAINMENT AND NOTIFICATION OF DEFECTS*

Article 47. On receipt of the goods the buyer is bound to examine them or to cause them to be examined without undue delay.

Where the goods have been transported, the buyer is bound to examine them, without undue delay, at their destination. Where the goods are re-dispatched by the buyer they must be examined at the first place where such examination is reasonably possible. The form of the examination shall be determined by agreement between the parties or, in default of such agreement, by the laws or usage of the place of examination.

Where the buyer intends to rely on such examination, he must give reasonable notice to the seller or his representative to be present thereat, unless the goods are in danger of perishing.

Article 48. Where the examination reveals a defect in the goods, the buyer is bound to notify the seller of the defect without undue delay.

Where the buyer fails to give such notice he shall not be entitled to rely on any defects. Nevertheless, where a defect subsequently appears which could not have been discovered by a mere examination, the buyer may rely thereon, provided he notifies the seller thereof without undue delay after its discovery. In notifying the defect the buyer must state its exact nature in accordance with the usage of the trade and good faith.

Article 49. The seller may deliver other goods in place of those which have been notified by the buyer as being defective, provided that delivery takes place within the time fixed by the contract.

Article 50. The seller shall not be entitled to rely on the provisions of Articles 47 to 49 if he has fraudulently concealed any defect.

C) *SANCTIONS IN CASE OF DEFECTS*

Article 51. A buyer who has duly notified the existence of defects may elect:

1) either to avoid the contract, or

2) to claim a reduction of price, or

3) where in a sale of unascertained goods he would be entitled to specific performance if the goods had not been delivered, to claim the delivery of other goods or the repair of the defective goods.

He may also claim damages.

Article 52. The buyer must bring his action within two years from the date at which the goods were tendered to him, except where he is prevented from doing so by the fraud of the seller. After the expiration of this period the buyer cannot rely on a defect even by way of defence to an action.

Article 53. When only part of the goods are defective the buyer may treat the delivery as a partial delivery in accordance with Articles 31 and 32.

Article 54. In the case of contracts for delivery by instalments the buyer may avoid the contract as regards future instalments, on the ground of defects ascertained in one or more of the previous deliveries, whenever he has good reason to fear that future deliveries will also be defective; but he shall not be entitled to avoid the contract in respect of previous deliveries already received which are not defective, except where he proves that, by reason of the interdependence of all the deliveries stipulated for in the contract, the defects in certain deliveries deprive the deliveries which were not defective of all their value.

Article 55. Where the buyer elects not to avoid the contract he may claim a reduction in price corresponding to the diminution in value caused to the goods by the defect having regard to the value of the goods at the time of the conclusion of the contract.

Article 56. Where under the contract the seller is bound to produce or manufacture goods in accordance with the special orders of the buyer, he shall be bound to make good within a reasonable time any defect of which he has been notified. He also has the right to make good within a reasonable time any such defect, provided that no appreciable inconvenience or expense is caused thereby to the buyer.

The buyer may thereupon exercise the rights respecting defects in goods which are given to him by Article 51 hereof but only after the expiration of the reasonable time referred to in the preceding paragraph. He may also claim any damages to which he may be entitled by reason of the loss which he has suffered through the first defective delivery.

Article 57. The buyer is entitled to damages:

1) where he avoids the contract;

2) where in a sale of unascertained goods he demands delivery by the seller of other goods free from defects and this fur-

ther delivery is not effected within the time prescribed for delivery;

3) where the defect is repaired but the defective delivery has involved him in loss;

4) where without avoiding the contract or claiming a reduction of price he desires to obtain compensation for loss which the defect has caused to him.

Article 58. Where the contract is avoided damages shall be assessed in accordance with the provisions of Articles 37 to 39. Where the buyer, without avoiding the contract, claims compensation for loss sustained by delay resulting from a further delivery or for loss arising from the defect itself the damages shall be assessed in accordance with Article 33.

Article 59. The buyer shall not be entitled to damages where the seller proves that the defective delivery of the goods was due to circumstances which constituted an insurmountable obstacle which he was not bound to foresee at the time of the conclusion of the contract.

Whether and how far circumstances other than those specified in the preceding paragraph may exempt the seller from liability for damages shall be determined by the national law.

SECTION III. - OTHER OBLIGATIONS OF THE SELLER

Article 60. Where the seller should be aware from the circumstances that it is usual to insure the goods and is not bound to effect such insurance himself, he shall furnish the buyer with the information requisite to effect insurance of the goods during transit.

Article 61. The non-performance of the obligations of the seller other than those of delivery and of the undertaking against defects in the goods, whether they are imposed on the seller by the present law or by usage of the trade or by the contract shall confer on the buyer a right to damages, unless performance has been prevented by an event constituting an insurmountable obstacle which the seller was not bound to foresee at the time of the conclusion of the contract.

Whether and how far circumstances other than those specified in the preceding paragraph may exempt the seller from liability for damages shall be determined by the national law.

These damages shall be equal to the actual loss sustained but may never exceed the amount of damages resulting from events which have been or could reasonably have been foreseen at the time of the conclusion of the contract.

If the obligation which is not performed is an essential one, the buyer may avoid the contract, without losing his right to damages in accordance with Articles 36 to 39.

An obligation is essential where it appears that the buyer would not have concluded the contract without such an undertaking.

CHAPTER IV

OBLIGATIONS OF THE BUYER

Article 62. The buyer is bound to take delivery of the goods and to pay the price.

SECTION I. - PAYMENT OF THE PRICE

Article 63. The obligation to pay the price includes an obligation to take all steps required by the contract or usage of the trade for

the purpose of providing for or guaranteeing payment, such as the acceptance of a bill of exchange, the opening of a documentary credit, the giving of a banker's guarantee or the like.

A) *FIXING OF THE PRICE*

Article 64. Where a sale is concluded but no price is fixed the buyer is bound to pay the price demanded by the seller. Where, however, the buyer shows that such price is excessive, he is bound to pay the price usually demanded by the seller or, if the seller fails to prove the existence of such a price, a reasonable price estimated, if possible, by the prices generally charged for such goods.

Article 65. Where the price is payable according to weight, then the price shall be payable on the net weight.

Article 66. Where import duties are payable by the seller, and where, after the conclusion of the contract, such duties are increased, the amount of such increase shall be added to the price.

Nevertheless if the delivery of the goods on which the duties are payable has been delayed by an act or omission on the part of the seller or of some person for whom he is responsible, the increase in the duties shall be payable by the seller whenever the buyer can prove that the increase would not have been payable if delivery had been made punctually in accordance with Articles 20 to 22.

Reductions in customs duties payable by the seller shall be deducted from the price.

B) *PLACE AND DATE OF PAYMENT*

Article 67. The buyer is bound to pay the price at the place of business or residence of the seller, except where payment is not due until tender of the goods or the documents, and the parties have agreed to fulfil their mutual obligations elsewhere.

If, in consequence of a change in the business establishment or habitual residence of the seller subsequent to the conclusion of the contract the cost of consignment is increased, such increase shall be borne by the seller.

Article 68. Where the parties have agreed on a date for payment, or where such date is fixed by the usage of the trade, such agreement or usage shall itself conclusively fix the date of payment without the need for any further formality.

Article 69. Where in a sale on credit, the date of payment has not been fixed in accordance with the preceding article, the buyer is bound to pay the price without undue delay after receipt of the goods or of the documents enabling him to obtain delivery thereof.

C) *SANCTIONS IN THE EVENT OF NON-PAYMENT OR DELAY*

Article 70. Where the buyer fails to pay the price in accordance with the terms of the contract, the seller shall be entitled to sue for the price if his right to do so is recognised by the national law of the Court to which he applies.

Instead of demanding payment of the price, the seller may avoid the contract in accordance with the provisions of Articles 72 and 73.

In either event the seller shall be entitled to damages in accordance with Articles 74 to 79.

In no event may the buyer obtain a period of grace from the Court.

a) SPECIFIC PERFORMANCE OF THE CONTRACT

Article 71. The seller is only entitled to claim payment of the price if the sale is of goods which are such that there is no usage of the trade to effect a resale.

b) AVOIDANCE OF THE CONTRACT

Article 72. Where the buyer has failed to pay the purchase price the contract may be avoided by a mere declaration to that effect by the seller. Where, however, the goods have been delivered unconditionally to the buyer the seller cannot avoid the contract.

Article 73. Where the contract provides for delivery by instalments the seller is entitled to avoid the contract as regards future instalments on the ground of failure to pay for instalments already delivered if he has good reason to fear that future payments will not be made.

c) DAMAGES

Article 74. Whenever the buyer is liable in damages under the following Articles he shall, nevertheless, be relieved of such liability if he proves that the delay in payment or failure to pay the price is due to an event which constituted an insurmountable obstacle which he was not bound to foresee at the time of the conclusion of the contract.

Whether and how far events other than those specified in the preceding paragraph may relieve the buyer from liability to damages shall be determined by the national law.

1. *Delay in payment of the price without avoidance of the contract*

Article 75. In case of delay in payment the seller is entitled to interest on the arrears of the price. If the seller, by reason of the delay, has suffered damage (including loss of profit) in excess of interest on the arrears, the buyer shall compensate the seller in so far as the buyer foresaw or at the time of the conclusion of the contract could reasonably have foreseen the events causing the damage.

The rate of interest shall be equal to the official discount rate of the country of the buyer plus 1 %. Compound interest shall not be allowed except where there is a current account between the buyer and the seller.

2. *Avoidance for delay in or default of payment*

Article 76. Where the contract is avoided on account of delay in or default of payment the buyer is liable for the damage thereby resulting to the seller.

Article 77. Where there is a current price for the goods the damages payable by the buyer shall equal the difference between the price fixed by the contract and the current price prevailing immediately after the date upon which the seller was entitled to avoid the contract or upon which the contract was *ipso facto* avoided.

If the seller has resold the goods with due diligence and as a prudent man of business the price realised by such resale shall be taken into account in the calculation of the damages.

Article 78. The damages fixed in accordance with the preceding Article may be increased so as to cover the loss actually suffered by the seller if the seller can prove that the buyer at the time of the conclusion of the contract foresaw or could reasonably have foreseen the events to which such loss is due.

The seller shall, nevertheless, not be entitled to claim the above mentioned increase if he has failed to resell the goods in any case in which a resale is required by the usage of the trade or could be effected without appreciable inconvenience or cost.

Article 79. Where there is no current price for the goods the damages shall be equal to the loss actually suffered by the seller inclusive of any profit which he has lost owing to non-performance of the contract, provided always that such damages shall not exceed those due to events which were or could reasonably have been foreseen at the time of the conclusion of the contract.

SECTION II. - OTHER OBLIGATIONS OF THE BUYER

Article 80. Where the buyer fails to take delivery of the goods in accordance with the terms of the contract, the seller shall be entitled to avoid the contract if the default on the part of the buyer is ground for thinking that he will not pay the price, or if it appears from the circumstances that acceptance of the goods was an essential condition of the contract.

Article 81. In the event of delay in acceptance of the goods the seller may, without avoidance of the contract, claim damages equal to the loss he has suffered owing to the delay.

Article 82. Where the seller has avoided the contract on the ground of delay in or default of acceptance of the goods the buyer is liable to make good the damage which is caused to the seller by the avoidance of the contract. The amount of such damage shall be assessed in accordance with the provisions of Articles 76 to 79.

Article 83. In the circumstances contemplated by the two preceding Articles, the buyer shall not be liable to damages, if he can prove that the delay in or default of acceptance is due to an event which constituted an insurmountable obstacle which he was not bound to foresee at the time of the conclusion of the contract.

Whether and how far events other than those specified in the preceding paragraph may relieve the buyer from liability for damages shall be determined by the national law.

Article 84. Where the buyer is guilty of delay in accepting the goods and requests the seller to state whether he is still ready and willing to deliver, the contract shall be determined *ipso facto* if the seller does not reply without undue delay.

Article 85. Where the contract reserves to the buyer a right subsequently to determine the form, measurement or other feature of the goods (sale by specification) but he fails to make such specification, either on the date expressly or impliedly agreed upon, or after receipt of a communication from the seller made after the lapse of a reasonable time, the seller may avoid the contract and claim damages in accordance with Articles 76 to 79 without making any specification himself.

Where the national law administered by the Court allows specific performance of the contract, the seller may also make the specification himself in accordance with the requirements of the buyer as known to himself.

The seller shall in this event inform the buyer of the contents of the specification which he has made and shall afford the buyer a reasonable opportunity to submit a different specification. Should the buyer not avail himself of such opportunity, the specification made by the seller shall be binding.

CHAPTER V

PROVISIONS COMMON TO THE OBLIGATIONS BOTH OF THE SELLER AND THE BUYER

SECTION I. – COINCIDENCE BETWEEN DELIVERY AND PAYMENT OF THE PRICE

Article 86. Unless otherwise provided by the contract or by the usage of the trade, delivery of the goods and payment of the price are concurrent conditions.

Article 87. Where delivery of the goods is required to be concurrent with payment of the price, the seller shall be entitled to withhold the goods until payment of the price, and the buyer shall be entitled to withhold the price until delivery of the goods.

Where the goods are to be dispatched from the place of deliveey, the seller shall not be entitled to postpone dispatch on the ground that the price has not been paid. Nevertheless, if under the law which governs the contract of carriage or under the provisions of the contract of carriage itself, the seller retains the right of disposal over the goods during transit he shall not be bound to tender the goods to the buyer at destination until the price is paid.

Article 88. The seller, notwithstanding that the buyer is entitled to time for payment of the price, may postpone delivery of the goods until the buyer shall give him adequate security for payment whenever the financial position of the buyer has, subsequent to the conclusion of the contract, become so difficult that the seller has good reason to fear that payment will not be made on the agreed date.

Article 89. If, in the circumstances detailed in the preceding Article, the seller has undertaken to send the goods to the buyer and has already sent them, the seller upon learning the change in the buyer's position, may stop the goods from being tendered to the buyer notwithstanding that the buyer already holds a bill of lading or other document of title to the goods.

Nevertheless, the seller shall not be entitled to withhold the goods if they are claimed by a third party who is the lawful holder of the bill of lading or other document of title, unless the said bill of lading or document of title contains reservations concerning the effects of its negotiation or transfer, or unless the seller can establish that there has been collusion between the buyer and the holder of the said bill of lading or document of title.

Article 90. Where the buyer is bound under the contract to pay the price before receipt of the goods or documents, he may postpone payment until the seller shall give him adequate security for due delivery, whenever the financial position of the seller has, subsequent to the conclusion of the contract, become so difficult that the buyer has good reason to fear that delivery will not be made on the agreed date.

Article 91. The buyer is not bound to pay the price until he has had an opportunity of examining the goods, notwithstanding that payment and delivery are to be concurrent.

Where the seller must dispatch the goods from the place where delivery is to be made and a bill of lading or any other document of title is issued which gives the holder the right to obtain the goods and precludes the seller from disposing of the goods, the contract shall be deemed to be one providing for payment against documents; in this event the buyer shall not be entitled to withhold payment on the ground he has not had an opportunity of examining the goods.

SECTION II. – SUPPLEMENTARY RULES REGARDING DELAY AND AVOIDANCE OF THE CONTRACT

Article 92. Where the buyer is guilty of delay in acceptance of the goods or in payment of the price, it shall be the duty of the seller to preserve the goods on behalf of the buyer. He has the right to retain them until he shall have recovered from the buyer the cost of preserving them.

Article 93. Where the goods have been received by the buyer it shall be his duty, if he intends to reject them, to preserve them on behalf of the seller. He has the right to retain them until he shall have recovered from the seller the cost of preserving them.

Where goods dispatched to the buyer have been placed at his disposal at their destination, the buyer, should he refuse to accept them, is bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without appreciable inconvenience or cost. This provision does not apply where the seller or a person authorised to take charge of the goods on his behalf is present at such destination.

Article 94. The party who is under a duty to preserve the goods may deposit them in the warehouse of a third party at the expense of the party in default.

Article 95. Where there is a current price for the goods, the party who, in the circumstances contemplated by Articles 92 and 93, is under a duty to preserve them, may, after giving notice, sell them at the current price on behalf of the other party either through a broker officially authorised to conduct such sales or through a duly qualified public auctioneer.

Where there is no current price for the goods the party who, in the circumstances contemplated by Articles 92 and 93, is under a duty to preserve them may, after giving notice, sell them by private treaty. Should the other party prove that the party under a duty to preserve the goods could have sold them at a higher price, he shall be entitled to recover such price.

Article 96. Where, in the circumstances contemplated by Articles 92 and 93, the goods are subject to rapid loss or deterioration, or where their preservation would involve unreasonable expense, the party under the duty to preserve them is bound to sell them in accordance with the preceding Article.

Article 97. The avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due.

Where either party has performed his part of the contract either wholly or partially, such party may claim restitution.

Where there has been performance by both parties each may withhold restitution until the other shall make restitution.

Article 98. The purchase price shall carry interest, to be calculated from the day of payment, in all cases where the seller is bound to refund it.

Article 99. Although he may not be in a position to return the goods in the condition in which he received them the buyer retains his right to avoid the contract:

1) where the goods or part of the goods have perished or deteriorated without any fault on his part or on the part of any person for whom he is responsible;

2) where the goods or part of the goods have been transformed by him before he was able to discover the defect upon which he relies for avoidance of the contract;

3) where the change which the goods have undergone is immaterial.

SECTION III - MISCELLANEOUS PROVISIONS

Article 100. The party who sets up a breach of the contract is under a duty to adopt all reasonable measures in order to mitigate the loss which has occurred, provided that he can do so without appreciable inconvenience or cost. Should he fail to do so, the party guilty of the breach may claim a reduction in the damages.

Article 101. Where prior to the date agreed upon for performance of the contract either party so conducts himself as to disclose an intention to repudiate the contract, the other party may avoid the contract provided that he makes his intention known without undue delay.

Article 102. The expenses of delivery, such as measuring or weighing, shall be borne by the seller. All expenses incurred after delivery shall be borne by the buyer.

CHAPTER VI

THE PASSING OF THE RISK

Article 103. Once the goods are delivered the risk passes to the buyer, who, accordingly, notwithstanding that any of the goods perish, deteriorate or are otherwise diminished in value, is bound to pay the purchase price.

Article 104. The mere fact that the parties have inserted terms in their contract concerning expenses, and in particular the fact that they shall have agreed that such expenses shall be borne by the seller, shall not of itself suffice to pass the risk.

Article 105. Where the failure of the seller to do all that is requisite to comply with his obligation to deliver is due to the act or omission of the buyer the risk shall pass to the buyer as from the date at which delivery should have taken place.

This provision shall not apply to unascertained goods unless goods clearly appropriated to the contract have been set aside on behalf of the buyer, and the seller has notified the buyer accordingly. Where the goods are unascertained and form part of an undivided whole and are of such a nature that the seller cannot set part of them aside until delivery is taken by the buyer, it shall be sufficient if the seller has done all the acts which are required in order to enable the buyer to take delivery.

Article 106. Notwithstanding the provisions of Article 103 where goods are sold free on board, the risk does not pass to the buyer until they are placed on board the vessel, even if the seller is

obliged to dispatch them to the port of loading from the place where delivery is due.

Where under the terms of the contract or by virtue of a trade usage, the seller is entitled to tender a received for shipment bill of lading to the buyer, the risk shall pass when the goods are handed over to the shipowner.

Article 107. Where the goods are sold on cost and freight or cost, insurance and freight terms the risk shall pass to the buyer as detailed in the preceding Article.

In the case of a through transit commencing by land, where, under the contract or by a usage of the trade the seller is entitled to tender to the buyer a through bill of lading or other document of title covering the transit, the risk shall pass to the buyer as soon as the goods are in the hands of a forwarding agent or carrier in the manner mentioned in Article 17 second paragraph.

Article 108. Where goods are shipped in bulk the risk shall pass to each of the buyers, in proportion to his share of the bulk, as soon as the seller has sent to him the bill of lading or given notice of shipment in some other way.

ANNEXES

ANNEXE I

CONTRACTS OF SALE WITH A RESERVATION OF THE PROPERTY IN GOODS

Article 1. This Annexe shall only apply to cases which are governed by the international law of the sale of goods.

Article 2. The following Articles shall apply to sales of machines, including automobiles, provided always that the thing sold has not become an immovable according to the law of the country of importation. As regards all other goods the law of the country of importation shall apply.

Article 3. The parties may agree in writing that the buyer shall not acquire any right of property in the thing sold until the whole of the price has been paid (agreement of reservation of property).

Article 4. Any provisions of the law of the country of importation, which require registration of an agreement of reservation of property or other measures of publicity in order to give validity to it, or to enable it to be set up against third parties, must be complied with.

Article 5. Where the seller knows that the goods are purchased for resale, the property shall remain vested in him by virtue of an agreement of reservation of property until the sub-purchaser has received either the goods themselves or a document enabling him to dispose of them.

Article 6. An agreement reserving property to the seller as aforesaid shall take effect notwithstanding the bankruptcy of the buyer or the seizure of the goods in execution by creditors of the buyer.

The term "bankruptcy" includes all forms of procedure which contemplate an organised distribution of assets amongst creditors.

Article 7. Apart from the cases mentioned in Articles 5 and 6 the competent national law shall determine whether and in what circumstances third parties can acquire rights over the goods in priority to the property reserved to the seller.

Article 8. In default of payment of the price or of payment on account the seller may only retake the goods in pursuance of agreement of reservation of property if he is entitled to avoid the contract of sale and has already done so.

Article 9. Any right of lien or charge created in favour of the seller by the national law shall remain in being, together with the rights, given by an agreement of reservation of property.

ANNEXE II

THE LETTERS OF TRUST

The letter of trust is an expedient which is in common use in Great Britain and the United States in connection with agreements by which the price of imported goods is to be paid by a banker, who issues a letter of credit in favour of the seller for that purpose. In such cases the documents of title to the goods are retained by the banker as security for the reimbursement of the monies which he advances to the importer, and a situation frequently arises in which it would be advantageous both to the financing banker and the importer that the importer should warehouse the goods on arrival and should sell them and deliver them in his own name to the ultimate buyer. The difficulty is that if this is done and the documents of title are surrendered to the importer by the banker for that purpose, the security of the banker, which is dependent on possession of the documents, ceases to be effective in law.

The procedure by way of letter of trust has been adopted in order to meet this difficulty, and to enable the banker to give possession of the goods or of the documents of title to his customer, the importer, for the purpose of facilitating the warehousing or sale of the goods, and at the same time to retain his security unimpaired.

The procedure adopted is broadly speaking as follows. On arrival of the goods the banker hands the documents to the importer in exchange for the letter of trust. This is a letter signed by the importer and addressed to the banker which is usually expressed in the following terms:

" I undertake to hold the documents of title and the goods when received and the proceeds thereof when sold as trustee for the bank. [1]

[1] Although the word " trust " is used in this connection this is technically inaccurate as the transaction is not the creation of a trust. See GUTTERIDGE, *Banker's Commercial Credits*, p. 75; also FREDERICK, *The Trust Receipt as Security*, a brochure published by the American Acceptance Council.

" *A*) As I require the said documents in order *to obtain delivery of the goods* [1] I undertake to warehouse them in the name of the bank and to hand the warrants to the bank forthwith; also to insure the goods against fire to their full insurable value and to hold the policies on behalf of the bank and in case of loss to pay the insurance monies to the bank.

" *B*) As I require the said documents in order *to deliver the goods* [1] to the buyer I undertake to pay the proceeds of sale to the bank without deduction immediately on receipt thereof within..... days from this date and to furnish the bank on request with full authority to receive the purchase price from any person or persons. In the meantime I undertake to hold the goods on trust for the bank. [2] The bank may at any time cancel this letter and take possession of the goods until they have been delivered to the purchasers and the price has been received from them and may collect the price if the same has not been paid by the purchasers ".

Letters of trust in this form have been treated as valid by the Courts of law in Great Britain and the United States though the juridical basis of such recognition is still a matter of some uncertainty. [3] An importer who has signed a letter of trust and deals fraudulently with the goods also commits a crime for which he can be punished. It is believed that letters of trust in a modified form are in use at Le Havre in connection with the importation of grain, sugar and tobacco, though only to a limited extent because their validity is doubtful according to French law. We have also been informed that documents of this nature are employed in

[1] *A* and *B* are alternative and one or other will apply according as it is desired either that the importer should merely warehouse the goods or that he should deliver them to the ultimate buyer.

[2] The importer is sometimes required to declare that he is not indebted to the seller of the goods.

[3] See GUTTERIDGE, *op. cit.*; FREDERICK, *op. cit.*

The Committee were also informed that they have been recognised as valid by the Brazilian Courts.

Germany, but have no information before us as to their exact nature or as to their validity in German law. In Great Britain and the United States they operate not merely to keep the banker's security in existence, notwithstanding the fact that he has parted with the documents, but to enable the banker to enforce such security as against the other creditors of the importer in the event of his insolvency. They are ineffective, however, against the claims of a purchaser who has received the goods and paid the price without notice of the existence of a letter of trust.

Although they are chiefly used in connection with the importation of goods from abroad they are sometimes used in the United States, but not in Great Britain, in connection with domestic transactions, *e. g.*, the sale of automobiles.

That letters of trust serve a valuable purpose in international commerce cannot be doubted. They relieve bankers of the trouble and expense of warehousing the goods on arrival and they enable the goods to be marketed by the person who is, as a rule, best able to sell them to advantage, *i. e.*, the importer, without causing the loss of commercial prestige which might result if it were apparent that he was trading with borrowed funds. It seems that they would be utilised to a wide extent if their validity was admitted by all systems of law. The question of the legal recognition of letters of trust is one which, in our opinion, calls for serious and immediate consideration from an international point of view. It would be a misfortune if the matter were left to be dealt with by isolated action on the part of the countries concerned. This would lead to a regrettable diversity of laws which we think can be avoided if an effort is made now to secure the co-ordination of legislation on the question.

We do not, however, consider that the international code of the law of sale should deal with this transaction, which is of a somewhat special character. In any event any attempt on our part to frame international rules governing letters of trust would, in our opinion, be premature, as the legal problems involved call for

careful study in their relation to the rules of the different systems of law which are concerned. So far as it is possible, at present, to envisage the nature of these problems the difficulties which will be encountered are the following:

1) The banker must be vested with property in the documents which will be adequate in order to enable him to control the sale of the goods until such time as his claims are satisfied by the importer;

2) His right of property must not be destroyed by the surrender of the documents to the importer;

3) He must be protected, in the event of the importer's insolvency, against claims by the general body of creditors.

The matter is also one which must be explored in its relation to the business practice of bankers throughout the world and regard must no doubt also be had to other economic aspects of the question.

We, therefore, confine ourselves to addressing an invitation to the Council to take such steps as they may consider to be advisable for the purpose.

RESERVATIONS

RESERVATIONS

All the dispositions of the preliminary draft were accepted by the members of the Committee excepting those which were expressly reserved by the following members:

1. - MM. CAPITANT AND HAMEL:

Article 72 (the second sentence) because this provision in effect deprives an unpaid seller of his right to avoid the contract in the case of sales on credit and is therefore incompatible with Article 1656 of the French Civil Code.

2. - MM. BAGGE AND FEHR:

a) The last part of Article 6 beginning with the words "and the goods are destined...." down to the end of the Article should be deleted and replaced by the words "provided that all the acts of the parties relating to offer and acceptance are not done in the same country and that the goods are not handed over or dispatched in the same country".

b) The rules contained in Articles 26 and 27 should not be applicable except in cases where the seller has undertaken to produce or manufacture the goods.

Article 26 should read as follows:

"If the seller has undertaken to produce or manufacture the goods and delivery has not taken place either at the date contemplated by Article 20 or at the expiration of the period contemplated by Article 22, the buyer may not avoid the contract unless he proves that by reason of the circumstances or of the terms of the contract the date of delivery was of the essence of the contract".

Article 27 should begin with the following words:

"If in the case contemplated by the preceding Article the buyer is not in a position to avoid the contract he may fix a supplementary period for delivery by the seller".

The rules proposed not being applicable except to cases in which the seller has undertaken to produce or manufacture the goods, it becomes necessary to delete Article 29.

APPENDIX

OBSERVATIONS ON THE UTILITY OF UNIFYING THE LAW OF SALE FROM THE STANDPOINT OF THE NEEDS OF INTERNATIONAL COMMERCE

by ERNST RABEL [1]

As I had occasion to state during the discussions before the Council of the Institute, we may expect certain commercial circles to question the utility of attempting an international unification of the Law of Sale. Furthermore, in view of the fact that we have decided to take the first step towards this unification by adopting as a point of departure the laws and judicial decisions in force in the principal countries, there are some who will perhaps feel bound to object that the legal actualities of commercial life are not to be found in that quarter.

These two possible, and — judging by certain answers furnished to the Netherlands Government in reply to No. 16 of its Questionnaire — even probable objections, appear to rest on the same foundation; both are based on the undoubted fact that international commerce has been organised on a basis which is more or less divorced from national laws and private international law, namely, on an elaborate system of trade clauses or regulations and model-contracts. It is necessary at the outset to consider the bearing of this fact on our task.

1. Actually, international commerce, at any rate in so far as the relations of Europe with the rest of the world and European relations themselves are concerned, is to a very large extent governed by model trade regulations and contracts. These may be used by a business concern — producer, shipper, broker or buyer — either alone or in agreement with its competitors. Alternatively, they may be agreed between a group of persons interested in the

[1] These observations (See also p. 15) were submitted by Mr. Rabel to the Council of the Institute in 1929.

same line of business, such as the Verein der Getreidehändler der Hamburger Börse (1868), the Bremer Baumwollbörse (1872), the Silk Association of America (1873), the London Corn Trade Association (1877) and numerous similar associations established at a later date.

Is is said that for raw material sold in bulk — such as grain and seed, cotton, manures, rubber, coffee, sugar — the market is ruled entirely by these trade regulations; for other raw materials — such as timber, meat, hides, silk, furs, fats and tea — the regulations contain gaps, which, however, are tending to disappear. Finally, in the manufactured goods business this system is still far from being completely applied, although it is in course of development. These regulations usually deal with all those matters which experience has shown are likely to give rise to disputes, and particularly with the quality of the goods, the time and place of delivery, the apportionment of the various expenses between the parties, the obligations of the parties as regards shipment, risks, insurance, documents of title, etc. and, finally, with the proof of shipment or of the obstacles impeding shipment and of the quality and weight of the goods. In sales of raw materials the arbitration clause is usual. Such a clause is frequently developed, so to speak, into a code of procedure, whilst in the industrial goods market arbitration is the exception and not the rule. Moreover, the amplitude and precision of these model-contracts vary; in England they often run into volumes.

In the considerable present-day trade in goods shipped in bulk, and in the trade in most other raw materials, trade regulations more or less hold the field, and are very markedly independent both of national laws and, thanks to arbitration, of the ordinary tribunals. Recent works point out that commercial men and arbitrators are little inclined to bother with any legislation whatever. It is also contended that the divergences between the national laws appear insignificant in comparison with the clash of economic interests of producers, exporters, importers and buyers, and in

comparison with the divergences resulting from the diversity of goods. As regards the latter divergence, the more or less individual nature of the goods determines the essence of the contract, and the rules must vary: according to the quality of the goods, as regards time for delivery (it is important to know, for example, whether the goods are or are not subject to deterioration, whether they may easily be diverted, etc.), according to the method and the time within which the goods may be verified (for instance, according to the nature of the goods: samples taken from a bulk, chemical analysis, defects not ascertainable until the goods have been used), according to the obligation of the buyer to accept goods with a reduction in the price (for example, the trade in Chinese yolk of egg, where this reduction amounts to 25%).

Admirable though this original enterprise on the part of business men may be, it is not without very appreciable difficulties. Some go so far as to speak of anarchy or even lawlessness. Many model-contracts are devised mechanically and are full of gaps and inconsistencies. Parties do not read the voluminous conditions which they sign, and, being ignorant of legal matters, with the exception of the few universally recognised rules, they have but a very limited notion of the meaning of the clauses which they use, unless those relate directly to the subject matter of the delivery. Moreover, the majority of the regulations in these contracts can hardly be described as usages of trade properly so called.

It is true that model-contracts which have been agreed upon between groups with opposed interests are the very contracts which tend to throw the greatest light on the uncertainties prevalent even in the best informed circles. In any event the attitude at present taken by business people appears to support those who think that this state of affairs can only be remedied by allowing commerce ultimately to rule its own affairs.

Whilst the knowledge of parties who use these model-contracts is often rather vague, the clauses in them are on the other hand construed very strictly whenever a speculation has miscarried and

the other party commits the slightest breach of his obligations. This is particularly the case with the obligation of the seller to ship goods within a prescribed time. This strict construction appears to be sanctioned by the Courts of various countries and cannot in itself be separately assailed, notwithstanding that it causes lawyers trained in the civil law to ponder.

Lastly, in sales of manufactured goods, which are not subject to such considerable variations in price, we find fewer fixed clauses but also fewer legal uncertainties. On the other hand, the seller in these cases often complains of the arbitrary way in which the overseas buyer profits from the economic advantage which he enjoys under present-day conditions. The consequence is the same as that which arises from the legal uncertainties which affect other branches of world trade, namely, business men dispense with the uncertain hazards of litigation, which sometimes appear suspect to them, and endeavour, often at all costs, to compromise with their opponents. Here again some people think that the evil is not one which can be cured by a law of sale.

It will therefore readily be understood why certain jurists, who, with mingled admiration and astonishment, have been closely studying this living and would-be autonomous body of law, tend to deny that anything is to be gained by internationalising the law of obligations.

2. This tendency recently revealed itself in connexion with the c. i. f. rules which are in course of elaboration by the International Law Association. Notwi[illegible]standing that business men are very well represented on this body and that the International Chamber of Commerce is taking part in its deliberations on the subject, the Warsaw Rules are encountering a certain opposition, which threatens to deprive them of any practical significance, because the requirements of each branch of commerce are specialised, and each branch prefers the usages which have been derived from its own practice and experience.

Despite this prophecy the deliberations are continuing and many authorised commercial delegations are taking part in them. Recently

the associations in the U. S. A. have acceeded to the fundamental principles of the Warsaw Rules.

It will be seen, therefore, that the utility of attempts at unification, even when they are undertaken by business men and are aimed at establishing not rigid laws but merely model transactions, are affected by doubts similar to those which confront us.

Optimism seems to prevail at the moment, and perhaps it is justified. It is obvious, however, that the difficulties encountered during the deliberations of the I. L. A. and the poor reception given to the c. i. f. rules in certain quarters point to the very important conclusion that it seems impossible to base a uniform law on the usual trade clauses. Even if, despite all the obstacles, good results were attainable by means of a general model-contract, the same does not apply to a uniform law, which would have to conform with the various systems of national law. Again, if we succeeded in covering some of the innumerable categories of commercial sales, others would be left outside its scope, and above all, such a uniform law would be incapable of adapting itself to the continual changes in commercial life.

3. It follows from these conclusions that the only advisable method of attaining a uniform law is to base our task on the fundamental rules of private law, derived from a careful comparison of the various national laws, regard being had to the requirements of commerce.

Such a course, notwithstanding all that has been said with a view to dispelling dangerous illusions, would not be entirely without practical value.

a) First of all we may note, but not conclusively, that in present-day commercial clauses, even as improved and still further elaborated, there are, and always will be gaps. These gaps exist both in relation to the subject matters of sales and in relation to the matters which fall to be regulated. For certain manufactured goods and for cattle, pictures etc. there can be no general trade clauses or regulations. As to the fact that in some branches

the usual clauses cover almost all the disputes which arise in practice, it may be noted that in other branches they often leave a gap, which is due not to accidental and temporary causes but to the impossibility of providing in model-contracts against unusual contingencies. The less likely the particular obstacle to correct delivery, the less likely are the parties to know of it in advance and to provide against it. Thus model-contracts for overseas sales provide against perils of the sea, whilst many contracts for inland sales hardly deal in detail with the question of risk. The list of matters which are unregulated or insufficiently regulated by trade clauses would be a long one. Certainly it would contain matters which are scattered and which bear no relation one to another.

b) But the merits of a uniform law would be more clearly evident if it laid down rules on those matters which are imperative or which lie at least partially beyond the autonomy of the parties.

Thus it was rightly pointed out during the preparatory work on the c. i. f. rules that it was most desirable to reach a decision on the question of the passing of the property, and that this question, together with the question of risk, was perhaps the most important of all. A model-contract, however, could at best furnish only a partial solution, and even that possibility has been challenged. A uniform law which was capable of altering the various national laws of property would not encounter such serious difficulties. It is true that the diversity of the various national systems of property law makes the obtacles more formidable. This problem, nevertheless, deserves careful study.

The rules of law governing mistake and prescription are in the same category.

Lastly, the form and formation of contract, being to some extent at least extraneous to the matters which contracts regulate, are hardly touched by trade clauses.

Accordingly, if our efforts are to have an immediate practical value, it seems necessary to extend somewhat our field of study.

The most important subjects from the practical standpoint are the following:

1. The passing of the property;
2. The passing of the risk;
3. Defects;
4. The form and formation of contract;
5. The domicile of the party in breach and its consequences;
6. The assessment of damages;
7. Mistake.

Numbers 2–6 having been dealt with in my Report, I thought it right to add here the study of the question of the passing of the property.

c) But the matter does not stop there. However pessimistic one may feel in view of the hostility of business people towards legislation, there are many enlightened business men who would willingly collaborate wisely and intelligently with the lawyers. The work of the I. L. A. is proof of this. Necessity alone, caused by the very multiplicity and weakness of national laws, and by the chaotic, obsolete and obscure character of many of them, has driven international commerce to fall back so wildly on a method of regulation, which, because of its extra-legal nature, gives rise to another series of uncertainties. The cleavage between municipal law and commercial life is not ideal and ought not to be allowed to continue. Business people should be persuaded that lawyers have no intention of jeopardising their business, and we ought in common with them to try to place that business on a solid and general foundation.

Moreover the formation and construction of the clauses are often influenced by the different national laws. It would not be correct to say that international mercantile law is entirely divorced from national laws and judicial decisions. In so far as these trade regulations are intimately related to English legal ideas, those ideas will have to be reconciled with the continental points of view. Since the variance between systems of law has disturbed

many clauses and introduced confusion into their application, the substitution of a single law for national laws would necessarily involve amendments in accordance with circumstances.

d) It is true that commerce is more and more abandoning, not only the civil and commercial laws, but also the Courts of the various countries. Are not arbitrators tending to ignore even the most fundamental rules of national laws? What use would there be in substituting a new world law for these national laws when both are condemned in advance to remain a dead letter?

This is not the place to examine closely the wide question of arbitrations and the confused position which they still occupy today. We must avoid exaggerating in one direction or another. On this subject a very big commercial association has recently expressed the view that arbitrators, giving quick decisions in accordance with what appears to be equitable, are very suited to decide day-to-day questions, but that they must give way to the slower but more sure tribunals for disputes involving considerable interests. In this connection may be mentioned the English device of a "Special Case", which indicates that in England arbitration is not considered suitable for cases in which difficult legal questions arise. Moreover many arbitration clauses are by their terms limited to disputes in which the sum involved does not exceed a certain figure.

Furthermore, litigation is not the only matter to consider. For the more or less friendly negotiations, which in these days so often take the place of litigation, either because the business man does not wish to lose his customer or his time, or because he mistrusts the tribunals of another country, a clear legal ruling sanctioned by a world law would possess overwhelming authority.

e) Lastly it is contended that a uniform law would be valueless so long as there were no unity of jurisdiction, i. e., so long as there were no world courts administering private law. This is another exaggeration. Experience shows that international conventions, such as the convention on railway transport have resulted

in essentially similar decisions in the various countries. A sound decision is at once followed, and a body of case law common to several advanced countries is intrinsically strong enough to be emulated in the other countries and to prevent any arbitrary and contrary construction.

4. To conclude these short observations I may summarise the position as follows: It is very important to appreciate carefully the immense body of trade regulations and model-contracts which hold the field today, and which apparently will go on growing. A world law neither should nor could incorporate these detailed regulations, which are intended for the requirements of isolated goods. Moreover it might be vain to seek to influence their development directly by means of a uniform law.

Yet the value of our work is not thereby destroyed. If it succeeded with the agreement of business men, not only would it supply certain gaps, but it would exert an influence upon thinking people. Its authority would certainly be increased if it embraced the maximum possible number of matters which fall outside the autonomous intentions of parties.

For the rest, we must not forget that our ultimate goal is an ideal. We are seeking to open a way for a world law of all obligations. The task is a slow one, but the devotion given to it will be powerful in itself.
