REPORT of M. GUTTERIDGE on the LEGAL EFFECTS of NON-DELIVERY by the SELLER

The majority of the questions which arise under this heading have received very full treatment in the reports which have been submitted by M. Hamel and M. Fehr. I propose therefore to adopt a course which I believe to be in accordance with the desires of the Committee and to confine myself to a general discussion of their proposals viewed more particularly from the angle of the probable attitude of the lawyers and men of business of the Anglo-Saxon Countries towards such proposals.

A word of explanation may be necessary as to the inclusion in this report of the question of Impossibility of Performance. Although it is not relevant, strictly speaking, to Part IV (c) of the Blue Report its exclusion appeared to render the discussion of the topic of non-delivery somewhat unsymmetrical and inconclusive.

I.- IMPOSSIBILITY of PERFORMANCE

The view is very widely but not universally held that it should be the policy of the legislator to hold the seller as strictly as possible to the performance of his contract, and this, no doubt, accounts for the fact that there are few questions arising out of this branch of law which presents so many divergences between the various legal systems as that of the seller's position when performance becomes impossible. The antithesis in such cases is between the physically impossible and the commercially impracticable. Where performance is not possible in the physical sense, and the seller is in no way to blame, all systems are agreed that the seller should be released from the contract. Certain systems, such as that of English law, have also placed legal impossibility (i.e. illegality according to the law of the place of performance) on the same footing as physical impossibility. When we come, however, to the matter of Commercial or temporary impossibility of performance, no two systems are in agreement and we are faced with such widely divergent points of view as those of the French and the German law. A further complication is introduced by the fact that Anglo-American law does not recognise the existence of "force majeure", and deals in an entirely different manner from the Continental systems with cases in which the seller is temporarily prevented from delivering by circumstances over which he has no control.

The task of reconciling all these conflicting theories is one of such grave difficulty, that the Committee were unanimous in deciding that it should not be attempted. The solution ultimately adopted was that a distinction should be drawn between absolute and temporary impossibility of performance. Where the impossibility is absolute, and is not due to any default on the part of the seller, the Committee were of opinion that he should be released from any further liability. The case of temporary or commercial impossibility was considered to raise so many problems that the wisest course would be to leave them to be solved by the national systems of law. If there should be a conflict of laws, the Committee considered that the law which was to apply should be determined in accordance with the rules of Private International Law, this question not being within the Competence of the Commettee.

It was suggested in the course of discussions of the Committee that it might perhaps be possible to frame rules dealing with certain specified cases of temporary impossibility of performance as, for example, where delivery was impeded by strikes. The Committee hold the view that no useful purpose would be served by attempting a solution of such questions which could in their opinion be dealt with more appropriately by clauses in individual contracts of sale. Any attempt to select special circumstances for individual treatment must inevitably raise very delicate problems as to what circumstances should be the subject matter of legislation, and what other circumstances should be ignored. Moreover questions of this description may very easily shade off into the further problem whether the risk of such occurrences is to fall on the seller or the buyer, a matter which has received the attention of the Committee at a subsequent stage of their deliberations.

II.- DELAY (MORA)

This matter has been dealt with so ably and exhaustively by M. Hamel in the annexed report that it would obviously be a mere waste of time to go over the same ground again. But in view of the fact that the proposals which have been adopted by the Committee contain certain elements which are unfamiliar to English lawyers and men of business, it may, perhaps, be useful to subject them to an analysis from the point of view of their possible reaction on English legal and commercial circles.

(1) The abandonment of the necessity for notice to the seller (interpellation) in the case of contracts of sale containing a term which fixes the date of delivery is a feature of the Committee's proposal which undoubtedly brings the Anglo-Saxon & Continental systems much nearer to one another, especially as the definition of a "fixed term" is construed so as to include not only those cases in which the contract fixes a definite date, but also those in which a fixed date is implied by custom. It may, perhaps, be mentioned in this connection that it was suggested that such terms as, for instance, "first open water" should be deemed to be equivalent to a fixed date, provided that the circumstances were such that the Court would be able to fix the precise date by evidence. The Committee did not however arrive at a definite decision on this point.

(2) The question of "mise en demeure" in the case of contracts which do not specify a fixed date for delivery, was debated

by the Committee at great length. The difficulty which had to be overcome was the divergence which exists between Anglo-American and Continental law relating to the matter, each of the systems providing a solution on entirely different lines. In English law delivery must in such case be made within a reasonable time; in Continental law there is no obligation on the seller to deliver until he has been summoned to do so by the buyer (interpellation).

The difficulty of reconciling the two points of view appears from the following considerations.

To begin with it is almost impossible to translate the terms " Mora " " Demeure " or " Verzug " into English, and English law certainly contains no convenient equivalents for those terms. Moreover it is a cardinal principle of English law that a person who is under a contractual liability must take the initiative in performance. Thus, as is often said, the debtor must seek out his creditor. The creditor is under no obligation, with certain rare exceptions, to demand performance and may therefore remain passive without prejudicing any rights which accrue to him by reason of the non-performance of the contract. Further the notion of "reasonable time" applies not merely to contracts of sale, but to contracts of all description and must therefore be regarded as fundamental in character. "Reasonable time" works well in practice, and any proposal to abandon it would be certain to meet with strong opposition on the part of both the lawyers and men of business.

There are however certain considerations which suggest that it may perhaps be possible to arrive at a compromise. Even with the system of interpellation it is not possible to eliminate

the notion of reasonable time altogether, as is pointed out in M. Hamel's report (See p. 5 et seq.). Thus if a dispute arises between the seller and the buyer it may well be that the Court will, in certain circumstances, even under the system of " mise en demeure " be called upon to decide whether the date fixed for delivery by the buyer is one which can fairly and reasonably be said to be one which should bind the seller.

On the other hand there is considerable force in the argument that an expedient which requires the buyer to inform the seller of the date at which he expects delivery serves a useful purpose in assisting the parties to come to an agreement as to the time at which delivery ought to be made. As a matter of fact even in English practice it is not uncommon for the buyer to communicate with the seller for this very purpose and the cases in which a buyer seeks to enforce performance of the contract without some such preliminary notification are relatively rare.

The Committee consequently framed a proposal along the following lines, in the hope that it might be possible to find a solution which would be acceptable to the two opposing systems. It was decided to adopt the English notion of reasonable time in principle, i.e. to formulate a rule that where no definite date is fixed for delivery by the contract, the seller must deliver within a reasonable time.

In order, however, to facilitate the adoption of this rule by the Continental Countries, it was also decided that no right of action should accrue to the buyer in respect of a failure

to deliver after the lapse of a reasonable time, unless he had previously notified the seller that he required delivery by a certain date (interpellation).

It was agreed that such notice should be as informal in character as possible, and that a letter addressed to the seller would be sufficient.

It does not appear that there is any insuperable obstacle to unification along these lines, though it must be regarded as doubtful whether English and American lawyers and men of business can be brought without very considerable difficulty to concur in the imposition of an obligation on the buyer which they are almost certain to regard as a useless formality. But, seeing that contracts with a fixed date for delivery are somewhat rare in international commerce, it could be urged that the requirement of an "interpellation" in such cases is after all merely the consecration of an existing business practice by endowing it with legal consequences.

A matter which appears to call for comment is the position which arises in the event of the failure of the buyer to address an "interpellation" to the seller. According to English law if the buyer, without good cause, refuses to give instructions with regard to delivery, the seller is entitled to avail himself of the expedient known as "tender of performance". This consists in offering the goods to the buyer, or placing them at his disposal, at the place of delivery.

A mere intimation of readiness to deliver is insufficient. If the buyer then refuses to accept the goods, the seller is entitled to treat the contract as, at an end, to refrain from further performance, and to sue for damages. But if the principle of "mise en demeure" is adopted there seems to be no reason why the notion of tender should not in this particular instance give way to the proposals of the Committee (see M. Hamel's report at p. 9) which provide a much less cumbersome and inconvenient remedy.

III.- THE REMEDIES OF THE BUYER IN RESPECT OF NON-DELIVERY

Assuming that the failure to deliver the goods has taken place in circumstances which furnish no basis for the exoneration of the seller from liability, it becomes necessary to consider the nature and extent of the rights of the buyer. An analysis of the situation which arises in this event reveals the possibility that the following remedies may be available to the disappointed buyer:

(a) A right to withhold performance on his part (i.e. the payment of the price etc.) until such time as the seller has performed his obligation to deliver (exceptio non adimpleti contractus).

The Committee were unanimous in holding that this right should receive full recognition in any system of unification. The justice and expediency of such a rule is so obvious as to require no comment.

It is doubtful however whether English lawyers would be prepared to accept the further proposal (Resume N°. 55) that where one party has reason to fear that the other party is not going to perform his part of the contract, he may withhold performance even though his promise to perform is independent in point of time of any performance by the other contracting party.

(b) The right to cancel the contract:

This is a matter which is somewhat more complicated. There was general agreement that, if it is established that the seller has been guilty of some breach of an essential obligation on his part which shows that he cannot or does not intend to

perform his part of the contract, the buyer ought to be entitled to put an end to the contract forthwith. It was also agreed that the buyer should not in such a case be under any compulsion to institute legal proceedings for the purpose of obtaining the declaration of a court of law of his right to cancel the contract, but that it should rest entirely with him to decide at his own risk whether he would cancel the contract or not. Moreover, the Committee were of opinion that the buyer should have the right to cancel whenever there has been a failure to deliver some essential part of the contractual goods. It would be idle to allow the seller to escape from the consequences where he has delivered a portion of the contractual goods which is, in effect, useless to the buyer e.g. where he has contracted to sell a machine and only delivers part of it. The case of the failure of the seller to deliver one or more instalments under a contract providing for sale by instalments was also discussed and the Committee formulated the rule that where there has been a failure to deliver an instalment the buyer can cancel the contract as regards the future, if the failure to deliver is such as to lead him to fear that the seller does not propose to make any further deliveries under the contract. He may also cancel the contract as regards past deliveries if the instalments are so interconnected that the deliveries already made to him will be useless to him unless supplemented by the delivery of the future instalments. This is the rule of Scandinavian law and the Committee were informed that it works well in practice.

A further question which was discussed was whether a buyer who claims the right to cancel the contract should also be entitled to sue for damages for non-performance of the contract, or whether the two remedies should be treated as alternative. It was decided that a buyer who exercises his right to cancel should also be in a position to claim any damages to which he might be entitled, as no logical grounds exists for a rule which would compel him to exercise his option between two forms of remedy, in spite of the apparent inconsistency of the formulation of a claim for damages on the basis of the breach of a contract which by virtue of the cancellation is no longer in existence.

It was also agreed that if part delivery is made, the buyer should be entitled to retain the goods which he has received without prejudice to any rights which he might have in respect of the seller's breach of contract, as regards the failure to deliver the balance.

Subject to the questions arising out of "reasonable time" and the necessity for "interpellation" there would seem in principle to be no insuperable obstacle to the reconciliation of the rules of Anglo-American Law on the subject of cancellation with the proposals of the Committee. As I read the proposals they do not conflict with the fundamental rule of the English law of sale which permits the cancellation of the contract by the buyer, whenever the seller has been guilty of the breach of a term of the contract which goes to the root of the matter.

Further there would appear to be no difficulty from the Anglo-Saxon point of view in accepting the proposal of the Committee that delay in delivery should in all circumastances entitle the buyer to cancel the contract. Time of delivery is almost always of the essence in contracts of sale according to English law, and if the due date for delivery has gone by, a buyer who is requested to accept and pay for the goods can plead that he is released from his obligations because the seller cannot prove that he was "ready and willing" to perform the contract in accordance with its terms. The English and Scandinavian systems are substantially at one on this question, and even if the seller can show that the delay was not due to any fault on his part, he cannot compel the buyer to take delivery after the due date.

The first exception to these proposals mentioned in M. Hamel's report also appears to be free from difficulty, but the second exception seems to be one which will call for very careful drafting on points of detail, as the machinery proposed for the protection of the buyer imposes a duty on the seller which might not be very favourably received by men of business, unless it is made clear that the risk of safe arrival of the despatch note does not fall on the seller.

(c) The right to specific performance (execution):

One of the most difficult of the various problems which have confronted the Committee has been that of endeavouring to find some means of surmounting the gap which exists between the

Anglo-Saxon and the Continental systems on the question of the buyer's right to insist on specific delivery of the goods forming the subject matter of the contract of sale. The root of the difficulty lies in the fact that the remedy by way of specific performance is regarded in the Anglo-Saxon systems as one which should only be granted in very exceptional circumstances as, for instance, where the goods are of such a character that the payment of a sum of money would not compensate the buyer for the failure to deliver the goods, so that justice can only be done by ordering the seller to hand the goods over to the buyer. An illustration of the kind of circumastances in which such an order would be made by an English Court is where the goods are of exceptional rarity, as, for instance, where a ship is sold which is of unique construction and cannot be procured elsewhere, and such ship is essential to the purposes which the buyer had in view when entering into the contract. This attitude which is firmly embedded in Anglo-Saxon legal doctrine is based on the fact that the remedy by way of specific performance has always been regarded traditionally, not as the normal remedy, but as one of an entirely exceptional character. Moreover, an order for specific performance, is enforced, if necessary, by imprisonment for contempt of Court, and this has always made the English and American judges extremely reluctant in commercial litigation to resort to this form of remedy, if it can possibly be avoided. On the other hand specific performance is regarded by the continental systems as a normal form of remedy, and for this reason it would be to demand a great sacrifice from them if

they were to be required to abandon it. Therefore the problem before the Committee was to endeavour to discover some compromise by which these two opposite points of view could be reconciled.

Up to a point a reconciliation should not be too difficult. It may be doubted whether any useful purpose is served by insisting on specific performance in the case of generic goods (marchandises de genre). In such a case damages will almost always in practice be an adequate remedy for the disappointed buyer, because he can go into the market and purchase similar goods at once. The only detriment which he suffers is that the price which he has to pay in the market may be greater than the contract price, but this is a matter which is amply covered by an award of money compensation. There may, it is true, be cases in which generic goods cannot easily be procured, but such cases only occur in practice very exceptionally, and it might be wise to disregard them, if by doing so the process of unification of the different systems of law would be facilitated. But when we come to deal with specific goods, the problem which faces the Committee is one of extreme difficulty. Where such goods are of exceptional rarity all systems of law concur in giving the buyer a right to specific performance, but with this exception, the Anglo Saxon and Continental systems are diametrically opposed to one another, and the question really is whether it would be expedient to request either of these systems to surrender principles which are regarded as fundamental. One method of arriving at a modus vivendi might be to lay down a rule that the remedy of specific performance should

not apply to any case in which the goods are such that they are obtainable in the open market, but that in all other cases the buyer should have the right to demand specific performance of the contract. The objection to this solution is that it would almost certainly not be acceptable to the Anglo-Saxon countries. Its adoption by them would involve a breach with existing legal traditions and the abandonment of a doctrine which is deeply rooted in the mentality of Anglo-Saxon lawyers. Further, it would also lead to a possibility which both Englishmen and Americans would regard with repugnance, namely, that it might often become necessary in many cases, to enforce a commercial contract by imprisoning the recalcitrant party. The only escape from this situation would be to invite the Anglo-Saxon countries to alter their laws by providing some other method for the enforcement of an order for specific performance at all events in the case of international contracts for the sale of goods as, for instance, some proceeding in the nature of the "Astreinte" of French law, but this would probably meet with so much opposition that the scheme of unification as a whole would be endangered. It would therefore seem to be desirable to leave the question of the specific performance of contracts of sale to be determined by the lex fori especially in view of the fact that even in certain jurisdictions im which no obstacles exist to the enforcement of a contract in this manner (e.g. in France) the remedy appears to be one which in practice is not resorted to very frequently. In fact if the goods cannot be obtained in the market it is highly improbable in the great majority of cases that the seller will be

in a position to make delivery, so that the practical importance of the question in relation to an international code may perhaps not be so great as would appear to be the case at first sight.

One further point remains to be considered in connection with the question of specific performance, namely, in what circumstances will the buyer be deemed to have abandoned his right to this remedy, and to have elected to be content with the cancellation of the contract and tho award of damages ? This is a matter which is intimately connected with the proposals relating to "mise en demeure".

It will suffice to state here that the Committee adopted two principles (1) where the contract fixes no period for delivery and the buyer has intimated to the seller that he will not accept delivery after a named date, the right of the buyer to demand specific performanco must be regarded as abandoned (2). If the seller has, in the case of a contract of this kind, called upon the buyer to state whether he will accept delivery or not, the buyer will lose his right to specific performance if he fails to declare his intentions.

So far as the Anglo-Saxon point of view is concerned, these proposals appear to be unimpeachable, provided that the other proposals of the Committee as to specific performance and "mise en demeure" form part of a scheme of unification.

(d) The right to "buy in" against the contract (Achat de remplacement)

The points which arose for discussion in this connection were (1) as to the right of the seller to insist that the

buyer should repurchase the goods, if possible, in the event of a failure to deliver (2) as to whether "buying in" should be informal or whether it should take place under the supervision of the Court. The Committee decided that it would be oppressive to require the buyer to re-purchase the goods in all cases, and they were of opinion that the obligation to "buy in" should be confined to cases in which it was necessary in order to secure the mitigation of damages. They were also of opinion that the regulation of the process of "buying in" by the Courts was unnecessary, in view of the fact that the Courts would have ample opportunities of repressing an improper use of the process by the buyer when he came to present his claim for damages. It was also decided that the buyer should always be at liberty to "buy in" if he wished to adopt this course. The decisions of the Committee on these points do not appear to be in conflict with any principles of Anglo American Law.

(e) Damages.

The very careful report which has been submitted by M. Fehr renders it unnecessary to deal with this question in detail. It may be observed that the proposals of the Committee (see Resume pp. 13 and 14) are based on the general scheme of the English Sale of Goods Act, and have as their object to achieve simplicity as far as possible in the regulation of this somewhat undeveloped branch of the law of sale.

Criticism from the Anglo-Saxon point of view is consequently more or less superfluous, but it may be useful, perhaps, to call attention to certain questions which are not free from difficulty.

1.- It is not altogether clear that the proposals of the Committee cover sufficient ground. The circumstances in which a claim to damages arises in modern practice are often extremely complicated (e.g. the case of a "contrat filaire" or "string" contract) and it is not easy to avoid a feeling that situations may arise which will not be satisfactorily covered by the proposals. Moreover the proposals do not appear to deal with the problems which arise when the price has been paid in advance, or when the seller repudiates the contract before the time for performance has arrived (anticipatory breach).

2.- The proposal that the damages should in principle be calculated "in abstracto" is acceptable so far as English law is concerned because it embodies the practice of the English Courts which in fact though perhaps not in theory is sanctioned by the Sale of Goods Act 1893. On the other hand opposition will probably be offered to the proposal that the moment for calculation of the damages should be a date subsequent to the breach.

The theory of English law is that the disappointed lawyer goes at once into the market and covers himself by a repurchase. If the date of breach is adhered to as the moment for calculation of the damages neither the buyer nor the seller can complain that he too has suffered any hardship which may arise from fluctuating market prices. But if the date of calculation is postponed and the market is rising, the seller is prejudiced; if it is falling, the buyer will not receive adequate compensation. For these reasons

it would seem to be opportune that the question of the date of the calculation of damages should be reconsidered. The notion of a market price presupposes the existence of a price from day to day; and nothing would appear to be gained by taking some date other than that of the breach.

3.- It is not possible to say how the proposal for the application of the doctrine of subrogation to the question of damages would be received in English legal and commercial circles. It is not necessary however to pursue this question, as it has been reserved by the Committee (see Resume N°. 70).