SOME VIEWS ON THE SYSTEM OF REMEDIES IN THE UNIFORM LAW ON INTERNATIONAL SALES

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1. A unification of legislation governing the international sale of goods had been sought for approximately thirty years before a convention on the subject was successfully concluded in 1964. The Diplomatic Conference held at The Hague in that year adopted the Uniform Law on the International Sale of Goods. The draft texts submitted to the Conference aroused some criticism among the delegates and essential parts of them were redrafted. In consequence, the Convention is, in many respects, based upon compromise. In particular, it should be observed that the United States had not participated in the preparatory drafting of the text, but that during that time an important work of codification, the Uniform Commercial Code, had been issued in the United States and successively adopted by an increasing number of States. The experience on which this great work was based was hardly taken into account at all in the preparation of the final draft of the Uniform Law on International Sales. Thus the American delegation had particular grounds for adopting a critical attitude towards the draft.

On the other hand it may be observed that the Scandinavian Sale of Goods Acts have in several respects left their mark on the Uniform Law on Sales: even though the systematics of the Uniform Law are somewhat complex, many basic ideas can be traced back to the Scandinavian laws. British and German legal concepts have also influenced the Law, a point to which I shall return later.

It is my intention in what follows, first, to outline briefly the remedies provided by the Uniform Law for breaches of contract by either party and, secondly, to put forward some critical views on the system of remedies in that Law in the hope that these criticisms may ultimately help to bring about a reform of the Law.

2. Chapter III of the Uniform Law on International Sales relates to the obligations of the seller, Chapter IV deals with the obligations of the buyer, and Chapter V contains provisions applicable to the obligations of both seller and buyer. After setting

out the obligations of the seller and those of the buyer, the Law provides supplementary rules concerning the remedies for breach of contract by the seller and the buyer.

It may be mentioned, with regard to the seller's obligations, that the Uniform Law on Sales states in article 18 that the seller shall "effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law". The definition of "delivery of goods" is of significance for the further construction of the Law. It is stated in article 19(1) that "delivery consists in the handing over of goods which conform to the contract". This definition differs from the concept of "delivery" employed in the Scandinavian laws on sale in that it contains the requirement that the goods must conform to the contract. The term is, admittedly, not defined in the Scandinavian Sale of Goods Acts, but its tenor appears from the general regulation of the Acts and is presumed to be known in many provisions concerning the obligations of the seller.[1] In his lengthy commentary on the Swedish law on sale, Almén defines delivery as an act whereby the seller performs his contractual obligations in order that the buyer shall come into actual possession of the goods. This definition is intended as a practical working rule and has, as such, aroused some criticism. Hellner, for example, is of the opinion that delivery should be regarded as a technical legal term, the meaning of which appears from its function in a number of specific provisions. Delivery is most closely connected with the term "seller's delay", and thus denotes the event, the occurrence of which results in the seller's not being in default because of delay.[2]

The definition of the term "delivery" in the Uniform Law on Sales involves particular difficulties in the application of the rules concerning the transfer of risk (article 97), which will not be further considered here.

As for the seller's obligations with regard to the conformity of the goods, it is stipulated in article 33 that:

[1] See the Scandinavian Sale of Goods Acts, secs. 9–11, 62–65; Hellner, *Köprätt*, Stockholm 1961, pp. 39 ff., Almén–Eklund, *Om köp och byte av lös egendom*, 4th ed., Stockholm 1960, pp. 93 f.

[2] *Op. cit.*, p. 40. Hellner's definition has been criticized by Hj. Karlgren, *Sv.J.T.* 1963, p. 106.

See, with respect to the concept of "delivery" and its equivalents in other legal systems, G. Lagergren, *Delivery of the Goods and Transfer of Property and Risk in the Law on Sale*, Stockholm 1954.

> The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:
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> (a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
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> (b) goods which are not those to which the contract relates or goods of a different kind;
>
> (c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
>
> (d) goods which do not possess the qualities necessary for their ordinary or commercial use;
>
> (e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
>
> (f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.

Whether the goods are in conformity with the contract is to be determined by their condition at the time when the risk passes (article 35). However, when the risk does not pass to the buyer because he rescinds the contract or requires conforming goods (article 97(2), cf. article 35(1)), this principal rule is to be read with the provisions concerning the question when this passing is determined. The conformity of the goods has then to be determined by their condition at the time when the risk would have passed had the goods been in conformity with the contract. This is undeniably a case of arguing in a circle, and it appears to be due to the concept "delivery" as used in the Uniform Law.

It is specified with regard to the buyer's obligations that he shall "pay the price for the goods and take delivery of them as required by the contract and the present Law" (article 56). It should be mentioned, in particular, that the buyer's obligation to take delivery is regarded as a real obligation with remedies for breach of contract (article 66). In this respect the regulation differs from legal systems in which *mora accipiendi* is not regarded as an actual breach of contract. This latter attitude has prevailed in the Scandinavian countries, where the Sale of Goods Acts do not regulate the matter except by a provision to the effect that the risk passes to the buyer if he fails to cooperate in the delivery of the goods. In addition the seller is, under certain conditions, entitled to sell the goods on behalf of the buyer (Scandinavian Sale of Goods Acts, sections 37, 33–4). However, the obligation most fully regulated in Scandinavia is the seller's duty to take care of the goods in a situation where they have not come into

the buyer's possession (sections 33–4).[3] G. Portin has recently attempted to develop a theory according to which the buyer's failure to cooperate is an actual breach of contract,[4] but this has mainly concerned Finnish law, which does not include any codified legislation on sales.

The system of remedies in the Uniform Law on Sales for the various breaches of contract follows certain parallel lines (see articles 24, 41; cf. articles 61, 66), which broadly resemble the system adopted in the Scandinavian Sale of Goods Acts (see sections 21, 23, 24, 43 and 44). The injured party is, in the first instance, given the choice between requiring performance of the contract by the other party or avoiding the contract; moreover, the buyer is entitled to reduce the price in case of any defect in the goods. In addition to these remedies the Uniform Law lays down an obligation to compensate damage suffered by the injured party on account of the breach of contract, in accordance with the provisions of article 82 or articles 84–7. Unlike the principle in Scandinavian law, liability to pay damages does not depend, even with regard to purchase of specific goods, on the negligence of the party who has not performed his contractual obligations. Article 74, however, opens up a certain possibility of exemptions: the contracting party is not liable for such non-performance if he can prove that it was due to circumstances that he was not bound to take into account or to avoid or overcome according to the intention of the parties at the time of the conclusion of the contract. Should it be impossible to prove such intention, regard must be paid to what reasonable persons would have intended in the same situation.

The more detailed rules on remedies depend for their application on whether the breach of contract is to be regarded as fundamental or not. A general provision on this point is included in article 10:

> For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever a party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.

[3] On this point see Hellner, *op. cit.*, pp. 108 ff., Almén–Eklund, *op. cit.*, pp. 440 ff.

[4] G. Portin, *Om köpares dröjsmål med särskild hänsyn till mora accipiendi*, Borgå 1962, pp. 158 ff., and Chapters VI and VII.

Article 28 contains a special provision on the fundamental breach of contract:

> Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

The distinction between a fundamental breach of contract and a non-fundamental breach is important mainly with regard to the remedy of contract rescission. According to the principal rule, a fundamental breach of contract is a prerequisite of avoidance. The Uniform Law, however, gives the injured party the right to grant the other party an additional period of time of reasonable length. A corresponding provision can be found in the German "Nachfrist" (articles 27(2), 31(2), 44(2), 62(2) and 66(2)). If the other party does not perform his contractual obligations within the period thus granted, the breach of contract is regarded as fundamental.

As stated above, the injured party has, in addition to the right to avoid the contract, the alternative of requiring performance. Where the seller's obligation is concerned, however, the possibility for the buyer to require specific performance is limited. When the Uniform Law was drafted, particular regard was paid to the British system, under which specific performance can be required only where the sale relates to specific goods, whereas the purchaser of generic goods has no other recourse than to claim damages (see Sale of Goods Act, 1893, section 52; cf. section 51). The provisions relating to specific performance were to a considerable extent redrafted at the Conference. In its final wording, the principal rule is contained in the Convention itself, in article VII, which reads:

> 1. Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law.
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> 2. The provisions of paragraph 1 of this Article shall not affect the obligations of a Contracting State resulting from any Convention, concluded or to be concluded, concerning the recognition and enforcement of judgments, awards and other formal instruments which have like force.[5]

[5] See *Convention sur la compétence du for contractuel en cas de vente à caractère international d'objets mobiliers corporels*, The Hague, April 15, 1958.

Furthermore, article 16 of the Uniform Law refers to the provision quoted above. However, in addition to this the Law also contains a substantive rule of its own on exceptions from the right to require specific performance. Article 25, which belongs to the section containing the general provisions on remedies for the seller's failure to perform his obligations as regards the date and place of delivery, provides that "the buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates". In this case the contract is *ipso facto* avoided as from the time when such purchase should be effected. This suggests that the only remaining alternative for the buyer is to declare the contract avoided.

The above-mentioned provision in article VII of the Convention is general and, thus, also refers to the right of the seller to require performance. In this respect the Law also contains a complementary rule in article 61(2), which establishes an exception to the general rule of article 61(1). The entire article 61 is as follows:

> 1. If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation.
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> 2. The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected.

Thus, the Uniform Law imposes rather far-reaching restrictions on the right of the contracting parties to require specific performance, and it may be asked whether the entire regulation of this question is not a word game rather than a recognition of the accepted Nordic and Continental principle according to which a right to claim specific performance exists notwithstanding any special circumstances attending the other party's breach of the contract. In Scandinavian law, the right to require specific performance is regarded as being based on the contract of sale, and the fact that the seller, for example, does not perform his undertaking at the time agreed upon does not exempt him from the obligation of performance. The contract continues in effect to have binding force. It is similarly considered that the buyer's right to require specific performance also serves the purpose of pinpointing the

actual damages which the seller may be obliged to pay later, e.g., if the proceedings between the parties take a long time.[6]

In Nordic law specific performance is usually only referred to in connection with the seller's performance.[7] The buyer's obligations amount to payment in money and no particular problems arise when adjudging money claims. If, however, a judgment should involve the delivery of a piece of goods or the performance of some work, certain complications arise in connection with its execution. In Finland and in Sweden such a decision may be executed through the instrumentality of the superior executive authorities. Thus, it is laid down in Chapter 3, section 3, of the Finnish Execution Act that if the judgment enforces a duty to perform something which can also be performed by someone other than the party upon whom the duty is laid, the superior executory authority shall authorize the successful party to see to the performance himself, or to let someone else attend to it at the opposite party's expense. Should only the unsuccessful party himself be able to perform the adjudged obligation, the superior executory authority may oblige him to perform it under penalty of a fine or arrest (cf. the Swedish Execution Act, section 33).[8]

The Uniform Law avoids the term "specific performance", and the concept of performing the seller's or buyer's obligation (see, e.g., article 24(1); cf. article 61(1)) is used instead. But when the matter is brought to a head in respect of the possibilities of obtaining execution, it has not been possible to avoid the common term "specific performance" (or in the French text "exécution en nature"; see article 16). However, in spite of its general character, article 16 appears to refer only to the performance of the seller.

3. After this general survey of the system of remedies in the Uniform Law on International Sales I proceed to a closer analysis of the purpose and the expediency of the rules.

[6] On this point see Seve Ljungman, *Om prestation in natura*, Uppsala 1948, pp. 23 ff. See, on the buyer's right to require specific performance, Alménn–Eklund, *op. cit.*, pp. 234 ff. Cf. Hellner, *op. cit.*, pp. 71 f.

[7] Ljungman, *op. cit.*, p. 15. Cf. G. Portin, *op. cit.*, pp. 59 ff.

[8] Thus it is, as Hellner correctly points out, easier and more convenient for the buyer to obtain execution of a money claim. In point of fact, the claim for performance turns, sooner or later, into a claim for damages. The real importance of the buyer's right to require performance lies in the fact that the buyer does not have immediately to declare the contract avoided, but may continue to demand performance, with the effect that damages will rise in the event of a rise in prices. The right to require performance thus constitutes an important part of the rules concerning the assessement of damages in respect of delivery agreements. See Hellner, *op. cit.*, pp. 72 and 96 f.

(i) I wish first to refer to the definition of the concept "international sale of goods" in article 1 of the Law. It is not a necessary condition for the applicability of the Law that the goods shall be carried from the territory of one State to that of another; delivery can certainly take place within the territory of the same State, i.e., within the territory where the goods were located at the time of the conclusion of the contract of sale, provided, in that case, that the parties were in different States when concluding the contract. As a rule, however, carriage of goods from one State to another is characteristic of the international sale of goods. It should also be observed that if the goods are sold under the commercial clauses CIF, FAS, or FOB, the delivery will certainly be judged according to these clauses—the goods travel at buyer's risk—but this circumstance does not, as such, imply that application of the Uniform Law on Sales would be out of the question. Its provisions will, according to article 3, be modified only to the extent called for by the commercial clause which is used. And even if the goods are delivered to a carrier in the seller's State and the seller has thus performed his obligation, the goods are actually the object of carriage from one State to another. It is this, and only this, condition which is required for application of the Law.

It is with regard to the carriage of the goods from one State to another that I wish to express some doubts as to whether the Uniform Law on Sales has in fact solved the problems connected with the buyer's rights where the seller fails to perform his obligations in accordance with the contract and the law. Reasonably, one should start from the fact that the goods have been the object of carriage and that a possible carriage back to the seller—as a result of avoidance of the contract—would involve further carriage charges on the goods unless it were possible for the seller to dispose of the goods in the buyer's country. Although it is required in cases of this kind that the buyer shall act promptly (see articles 26(3), 30(3) and 43), this does not prevent avoidance from imposing an unreasonably heavy burden on the seller in certain cases. It may, of course, be objected that it would have been possible for the seller to make reservations against such a result when concluding the contract of sale. While this is quite correct, the situation requires a choice of which rule is appropriate for general application in connection with the international sale of goods. It seems, in fact, as if the entire system of remedies in the Uniform Law has been drafted with too much regard for traditional pat-

terns of national legislation. The injured party has been granted an unconditional right of avoidance as soon as the failure of the other party amounts to a fundamental breach of contract. However, international trade is to a very considerable extent carried on in accordance with standard contracts which have in many cases developed out of cooperation between organizations which represent the sellers on the one hand and the buyers on the other, a situation which is less common within national boundaries.

I propose first to demonstrate this phenomenon with a discussion of the standard contracts which have been drawn up within the Finnish and Swedish timber trade in cooperation with businessmen from various foreign countries.[9] I will then touch upon the standard contracts and other general terms of delivery which have been formulated within the Economic Commission for Europe (E.C.E.), in some cases with special regard to the trade between East and West.

(ii) There are, however, reasons for emphasizing that standard contracts and general terms of delivery do not regulate the legal relationship between seller and buyer exhaustively. Therefore, it may in some situations lead one into error merely to refer to a certain clause without undertaking a complete analysis of the contents of the contract and in the process filling up such gaps as may be found. The following study does not claim to be complete, and consequently the construction of cited clauses presented in this paper is subject to reservations. However, I think that the conclusion about a marked tendency in these clauses is essentially correct, even if it is necessary to make distinctions between contracts in different trades as regards the sanctions for breach of contract, particularly by the seller. To give one example, it is by no means certain that the solution which is adequate in con-

[9] These standard contracts and general terms of delivery are cited in what follows according to their latest version. It should, however, be pointed out that they can be traced back to earlier versions and that the history of the use of such standard contracts and general terms of delivery already covers at least four decades. See Carl Berg, *Kommentar till de år 1934 i bruk varande trävarukontrakt, som antagits av Svenska trävaruexportföreningen,* 2nd ed., Uppsala 1934. It would be an interesting task to map the development of this law of forms. In order to obtain a correct conception of the background of the various provisions it would, however, be necessary also to take into account the economic development in the timber trade. The successive sellers' or buyers' markets have probably left their traces in the clauses of the contracts.

On the sale of machines, see G. von Sydow and T. Anderson, *Allmänna leveransbestämmelser för export av maskiner — utarbetade inom Förenta Nationernas ekonomiska kommission för Europa* 1955.

tracts within the timber trade is equally acceptable in respect of large-scale sales of machinery manufactured to order.

I shall first examine the standard contract indicated by the code name "UNIFIN, 1959" with the general terms, conditions, and warranties attached thereto. The contract has been adopted by the Timber Trade Federation of the United Kingdom and the Finnish Sawmill Owners' Association and is based on the FAS clause. It appears from a closer study of the general terms of delivery that only such seller's delays as are due to events beyond the seller's control and are referred to in Item 11 (Exceptions) have been taken into account. Only in such events do sellers have the right to perform the contract during the extended time limit stated in the contract, or, in the absence of an agreement, within six weeks. While the obstacle to performance remains, the seller is not responsible for any damage arising therefrom, provided immediate notice by telegram is given to the buyer. Should a seller be unable to deliver within the extended time, however, he must declare his inability to do so and, on receipt of the seller's declaration, the buyer has the option, which must be promptly declared, of cancelling the contract or postponing it to such date of delivery as may be mutually agreed upon, but in any event not later than the following free open water. It seems that this clause should be compared with the provision in Item 20 (Rejection) which reads:

> Buyers' right of rejection shall not be exercised where the claim is limited to questions of dimensions and/or quality unless the shipment or Bill of Lading as whole (if the claim is to reject such shipment or Bill of Lading) or the item or part item (if the claim is to reject such item or part item) is not in respect of such heads of claim a fair delivery under the contract from a commercial standpoint, of which, in the event of dispute, the Arbitrator(s) or Umpire are to be the sole and final judges.

Item 19 (Claims) seems, judging from the Finnish and Swedish translations, to relate only to the seller's liability to pay damages for the quality and/or condition of the goods as well as for non-delivery for which the seller is liable, in which case the seller must pay to the buyer in full and final settlement as liquidated damages a sum equal to 10% of the CIF value of the goods. No right for the buyer to reject the goods and to declare the contract avoided in case of delayed delivery is mentioned in the general terms of delivery. The right of avoidance in the event of defects in the goods is limited as appears from Item 20, quoted above.

It may be said on the basis of the provisions of "UNIFIN, 1959", analysed above, that the tendency of the general terms is to "save the contract". If the contracting parties are unable to settle a dispute amicably, the dispute must, according to Item 21, be submitted to arbitration.

This tendency appears very distinctly in other timber contracts. Item 17 (Arbitration, shipped goods) of "DUTCHFAS, 1952", which has been adopted by the Timber Trade Association of Holland, the Swedish Wood Exporters' Association and the Finnish Sawmill Owners' Association, runs as follows:

> 17. In the event of any dispute and/or claim regarding shipped goods, Buyers shall not reject the goods, or any part of them, nor refuse acceptance or payment in terms of contract, but all questions in dispute, not solved amicably within 10 days after the claim has been communicated to the other party or his Agent by wire or registered letter, shall be settled by arbitration in Amsterdam in accordance with the following rules . . .

In "GALLIA, 1952" (FAS form), adopted by the Fédération Nationale des Importateurs de Bois du Nord des Ports Français and the above-mentioned Swedish and Finnish associations, the corresponding provisions in Item 16 (Litiges, bois expédiés) have the following contents:

> 16. Si un différend quelconque concernant la marchandise s'élève au sujet du présent contrat, l'acheteur ne pourra ni refuser la marchandise specifiée et facturée conformément au contrat, ni refuser de la payer selon les conditions de ce contrat, mais toutes contestations devront être réglées à l'amiable ou par arbitrage.

Similar provisions may also be found in other standard contracts and general terms of delivery belonging to this group.[1]

In Item 14 (Cancellation) of the plywood CIF contract form 1957 "PLYCIF" the same tendency finds expression in a formulation which is directly concerned with the seller's delays. It is stipulated in this item:

> 14. Should shipment be delayed beyond the time stipulated, Buyers shall have the right (without prejudice to their rights under this

[1] For more detailed information see the Finnish Timber and Paper Calendar 1962/1963, published by the *Finnish Paper and Timber Journal*, Helsinki, 1963. The calendar includes, in addition to the above-mentioned contracts, the contracts "ALBIFIN, 1959", which corresponds to the above-mentioned contract "UNIFIN, 1959", "GERMANIA, 1952" which, in Item 18, includes a brief provision to the effect that if the goods are "hinsichtlich der Spezifikation dem Vertrag entsprechend verladen" the buyer does not have the right to reject the goods, as well as an arbitration clause in Item 19, etc.

> contract) to cancel such part of the contract goods as are not shipped by the stipulated date, provided they give notice in writing to the Agents who shall immediately cable Sellers accordingly. If the goods concerned have already been despatched from the mill at the time of receipt by Sellers of such notice of cancellation, then they shall, within three clear days of such time, notify Buyers through the Agents. ... In such event time for shipment of press sizes shall be extended for a period of 17 days from the date goods left the mill. ...

A similar provision is included in "HOLPLYCIF" (1962), Item 13 (Cancellation), in "BREMENSIA 1957", Item 9 (Annullierung), in "BELPLY, 1953", Item 9 (Annulation). In respect of the buyer's obligation not to reject defective goods the same terms apply according to these standard contracts, e.g. in "GALLIA, 1952", quoted above.

In the contract types envisaged, the buyer's right would seem to depend upon whether or not the goods have already been dispatched by the seller. If the seller can invoke no valid reasons for his delay, it is obvious that the buyer is normally entitled to avoid the contract. If, on the other hand, the seller has already dispatched the goods to the buyer, the right of avoidance is normally out of the question. This would seem to illustrate the tendency to settle disputes by other means than the avoidance of the contract.

The use of standard contracts in the Swedish-Finnish timber trade is not a new phenomenon. Such contracts were already in use more than four decades ago. Standard contracts have also been used to a considerable extent in other branches of trade, e.g. in the paper, cellulose, rubber, coal, machinery and other trades. However, since the last World War the formulation of standard contracts has taken a new turn. In the E.C.E., which was established in 1947 within the U.N., a number of general terms of delivery and standard forms for contracts have been drawn up with regard to, *inter alia,* the divergences in legal concepts between States in the East and in the West. The purpose of these —as that of Incoterms, 1953, which was prepared by the International Chamber of Commerce—is to facilitate the international sale of goods and to avoid uncertainty in respect of what legal rules shall apply when contracts are concluded between buyers and sellers from different States. Further, they are intended to prevent difficulties arising in connection with the application of private international law, according to which evidence has to be

produced in one country concerning the law in force in another. Thus, the purpose of these general terms of delivery and standard contract forms is on the whole the same as that of the Uniform Law on International Sales, the subject of the present analysis; the experience gained from the use of these terms and forms should therefore be of considerable interest in the present context.

The provisions in these standard contracts are frequently extremely detailed, so that it is not possible to describe fully those which may be of significance for this discussion. Briefly, however, it can be said that the tendency seems to be that, in case of non-performance by the seller, the buyer is entitled either to require the full performance of the obligations or to declare the contract avoided if the non-performance is not due to circumstances of a force-majeure character, as set out in the specific provisions of the contract. If such circumstances do exist, the seller's obligation to perform is postponed while the obstacle remains. An example of a clause of this kind may be found in the standard contract 410, "General conditions for export and import of sawn softwood" (1956), Item 14 (Delay in delivery), which contains, *inter alia,* the following provisions:

> 14.1. A seller obliged to provide the means of transport shall be allowed an additional period for delivery, to be specified in the contract.
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> 14.2. Where the seller fails to deliver the goods in conformity either with the provisions of the contract or with the agreed terms of sale, on the agreed date or on expiry of the additional period, as the case may be, and the delay is not due to the fault of the buyer or to any of the circumstances of which article 18 (Cases of relief) applies, the buyer may choose between maintaining the contract subject to the seller's liability for any additional expense which is justified resulting from the delay, or terminating it *ipso jure.* Should the buyer decide to terminate the contract he must give notice to the seller by registered letter or telegram within 15 calendar days from the contractual delivery date, indicating the date when he will consider the contract as discharged.

The provision in Item 14, paragraph 1, which calls upon the parties to agree on an additional period of delivery is also of interest in this connection. The provision is designed to stress that the contract should not be terminated unnecessarily. This desideratum is even more strongly emphasized in some other standard contracts. An example of a clause of this kind can be found in the

standard contract 574, "General conditions for the supply of plant and machinery for export" (1957). Clause 7 (Delivery) provides as follows:

> 7.2. Should delay in delivery be caused by any of the circumstances mentioned in Clause 10 (Reliefs) or by an act or omission of the Purchaser and whether such cause occur before or after the time or extended time for delivery, there shall be granted subject to the provisions of paragraph 5 hereof such extension of the delivery period as is reasonable, having regard to all the circumstances of the case.
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> 7.3. If a fixed time for delivery is provided for in the Contract and the Vendor fails to deliver within such time or any extension thereof granted under paragraph 2 hereof, the Purchaser shall be entitled, on giving to the Vendor within a reasonable time notice in writing, to claim a reduction of the price payable under the Contract, unless it can be reasonably concluded from the circumstances of the particular case that the Purchaser has suffered no loss. Such reduction shall equal the percentage named in paragraph A of the Appendix of that part of the price payable under the Contract which is properly attributable to such portion of the plant as cannot in consequence of the said failure be put to the use intended for each complete week of delay commencing on the due date of delivery, but shall not exceed the maximum percentage named in paragraph B of the Appendix. Such reduction shall be allowed when a payment becomes due on or after delivery. Save as provided in paragraph 5 hereof, such reduction of price shall be to the exclusion of any other remedy of the Purchaser in respect of the Vendor's failure to deliver as aforesaid.

What remedy should be applied in each individual case apparently depends on the nature of the object of the sale. When this consists of sawn goods the seller can, if the contract is terminated, dispose of the goods elsewhere. It is, on the other hand, an entirely different matter if the contract concerns the supply and erection of plant and machinery. In that case termination of the contract would put the seller in a very difficult position. Accordingly, in the regulation of the remedies for delay in delivery in the standard contracts, regard is paid to the actual requirements within different branches of trade.

The situation arising in the event of defects in delivered goods may appropriately be regulated without granting the buyer any right of cancellation of the contract. Thus, in Clause 17 (Claims) of the above-mentioned standard contract 410 it is provided as follows:

17.2. A buyer making a claim shall take into store the goods in respect of which the claim is made. He may not refuse to make payments due. The parties may, however, agree in their contract on a guarantee to be given by the seller to the buyer for payments made in respect of the disputed goods, any expenses of the guarantee being borne by the seller if the claim is allowed and by the buyer if it is rejected.

In the standard contract 574 in Clause 9 (Guarantee) it is stipulated:

9.1. Subject as hereinafter set out, the Vendor undertakes to remedy any defect from faulty design, materials or workmanship.

9.2. This liability is limited to defects which appear during the period (hereinafter called "the Guarantee Period") specified in paragraph G of the Appendix.

9.13. If the Vendor refuses to fulfil his obligations under this Clause or fails to proceed with due diligence after being required so to do, the Purchaser may proceed to do the necessary work at the Vendor's risk and expense, provided that he does so in a reasonable manner.

Certain special provisions, apparently adapted to the branch of trade in question, are included in the contracts for the sale of cereals CIF (maritime) of 1957 in which the clause on default by either party provides the injured party with various alternatives. Standard contract No. 1 A, Clause 18, stipulates:

18.1. Where either party fails to fulfil his obligations within the time allowed by the contract, the non-defaulting party may choose between:

(a) merely repudiating the contract without applying to a Court, or an arbitral body, neither party being liable for damages;

(b) within a time-limit of one week from the notification to the other party of his choice, selling or purchasing as the case may be, the goods or documents, or the contract, at the risk of the defaulting party;

(c) having the goods valued by arbitration and forthwith claiming from the defaulting party the resulting difference in price, without having to resell or repurchase the goods.

(iii) I shall now return to the system of remedies for breach of contract in the Uniform Law on International Sales, restricting myself, to begin with, to breaches of contract by the seller. It has already been mentioned that the option granted the buyer between requiring performance of the contract by the seller and declaring the contract avoided in the event of a fundamental

breach of contract is in many cases illusory, since the possibility of obtaining a judgment of specific performance depends on a special regulation. Primarily, the buyer has an unconditional right to specific performance only when the sale relates to specific goods. His right obviously depends, *in casu*, to which legal system the contract relates. The Uniform Law is designed to exclude in principle the application of rules of private international law (article 2), but where the dispute between the parties is settled in court in a country which does not recognize the possibility of a judgment of specific performance for the sale of generic goods (as is the case, for example, in England) the rules of law of that country must, by implication, be applied (cf. article 16 and the Convention's article VII). The extent to which this will occur depends on which States ratify the convention.

If the breach of contract is non-fundamental, the seller retains the right to effect delivery (articles 27(1), 31(1)), to deliver any missing part or quantity of the goods, to deliver other goods which are in conformity with the contract, or to remedy any defect in the goods handed over (article 44(1)), provided always that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer may, however, grant the seller an additional period of time of reasonable length within which to effect delivery, thus putting to an end the latter's right to perform his obligations (articles 27(2), 31(2), 44(2)).

The interrelation between the rules concerning the remedies for fundamental breaches of contract and those governing non-fundamental breaches depends ultimately on the judge's opinion of the character of the breach. The "reasonable person" standard contained in article 10 merely ensures that the judge's subjective opinion will play a part in any decision.[2] An injured party who misapprehends the seriousness of his injury may, as a result, find his choice of remedies substantially narrowed because he considers the breach to be less extensive than does the judge. If the breach of contract is non-fundamental, according to article 27(1) the buyer retains the right to require performance of the contract by the seller. No option is granted here and, therefore, there is no need to communicate with the seller. But if the breach is fundamental

[2] Cf. in this regard Lord Wright, *Legal Essays & Addresses*, 1939, p. 253: "This whole doctrine of frustration has been described as a reading into the contract of implied terms to give effect to the intention of the parties. It would be truer to say that the Court in the absence of express intention of the parties determines what is just."

and the buyer fails to inform the seller within a reasonable time of his decision to require performance, he may discover that the contract is regarded as *ipso facto* avoided in accordance with article 26(1).

If the buyer grants the seller an additional period of time of reasonable length upon a non-fundamental breach of contract in order to enable the seller to perform his obligation (articles 27(2), 31(2), 44(2)), and the seller fails to deliver within such period, his failure to do so amounts to a fundamental breach of contract. In this situation the buyer has, in principle, the option between requiring performance and avoiding the contract, but if he does not inform the seller of his option within a reasonable time (article 30(1) etc.), the contract is also apparently *ipso facto* avoided.

Thus it appears that in many cases the Uniform Law on Sales provides for the avoidance of the contract *ipso facto*. This method seems to be diametrically opposed to the tendency evident in the above-mentioned standard contracts and general terms of delivery. If the Uniform Law on Sales is ratified by a sufficient number of States and comes into force it may, therefore, be expected that, at least within all the more important branches of international trade, the contracting parties will regulate their contractual relationship outside the purview of the provisions of that Law. It may be observed that this is also the case in respect of the system of remedies in Scandinavian law. The general terms of delivery adopted by the exporters in Sweden and Finland and the importers in other countries deviate from the regulations in the Scandinavian Sale of Goods Acts.[3] At the Scandinavian Jurists' Conference in Reykjavik (1963) a prospective reform of the Scandinavian Sale of Goods Acts was discussed. There was no pronounced tendency in favour of an amendment of the Acts in the respect dealt with here.[4] This circumstance seems to indicate that it is appropriate to provide an essentially traditional solution in the actual statute text and to leave it to contracting practice to shape rules which are practicable within each individual branch of trade. If this is the case, the regulation in the Uniform Law is perhaps appropriate—subject to the qualification that it would have been

[3] See Knut Rodhe, "De nordiska köplagarna och affärslivets avtalspraxis", *F.J.F.T.* 1957, pp. 6–14.

[4] See Proceedings of the Scandinavian Jurists' Conference (1960). Introductory Address by Anders Vinding Kruse, "Bør de nordiske købelove revideres?", *Förhandlingarna å det tjugoandra nordiska juristmötet i Reykjavik* (1963), Bilaga II.

preferable if the rules had been worded more simply, without the existing repetitions in the text.[5]

(iv) I will now make some brief remarks upon the question of the buyer's right to reduce the price (article 41(1)(c)). The buyer is granted this right if the goods fail to conform to the contract, as an alternative to the rights to require performance of the contract by the seller and to declare the contract avoided. Article 46 lays down in detail the conditions for this right to reduce the price:

> When the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.

The provision seems clear and explicit and is, by the exclusions noted in it, connected with the rule in article 41(1). Nevertheless, the construction of the provision is attended by certain difficulties. Is a fundamental breach of contract the requirement which must be present if the buyer is to be able to assert his right to reduce the price? Article 41(1) provides only a survey of the remedies for lack of conformity, referring to the provisions contained in articles 42–6 as regards the conditions for claiming these remedies. The difficulty of construction is due to the provision in article 44 which regulates the situation where the failure of the goods to conform to the contract and also the failure to deliver on the date fixed do not amount to fundamental breaches of the contract (cf. article 43). In this situation the seller retains, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or otherwise remedy the matter, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The

[5] Many objections had been raised against the 1956 draft of a Uniform Law on the International Sale of Goods to the effect that the systematics of the law were unnecessarily complex and that a considerable simplification would be desirable. The special commission appointed by the Hague Conference on the Sale of Goods was, however, of the opinion that the legal technicalities of a uniform law are necessarily different from those of a national law, as the uniform law cannot be construed against the background of already existing legal rules and institutions. The Uniform Law must, therefore, be precise to the extreme in its expressions, particularly since such a law has been inspired by institutions not familiar to the law of the country in which the law will perhaps be applied. See "Note de la commission spéciale sur les observations présentées par divers gouvernements sur le projet de loi uniforme sur la vente internationale des objets mobiliers corporels", *Doc./V/Prép./3*, 1963, p. 1.