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BY

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REMEDIES FOR BREACH OF CONTRACT UNDER THE UNIFORM COMMERCIAL CODE, THE GENERAL CONDITIONS OF DELIVERY GOODS OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

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# TABLE OF CONTENTS

## CHAPTER I
**INTRODUCTION**

## CHAPTER II
**EVOLUTION, SCOPE AND CHARACTERISTICS OF THE UNIFORM LAWS**

**A. THE UNIFORM COMMERCIAL CODE**

1. Background
2. General Characteristics of the UCC and Features Distinguishing it from the other Uniform Laws

**B. THE GENERAL CONDITIONS OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE**

1. The Law of Contract in the Socialist Legal System
2. Background of the General Conditions
3. Characteristic Features of the General Conditions

**C. THE UNITED NATIONS SALES CONVENTION**

1. Historical Background of the UN Sales Convention
2. Scope of the UN Sales Convention
3. The Convention and the National Laws
4. The Effect of Ratification of the Convention by the United States

## CHAPTER III
**DAMAGES AS REMEDY FOR BREACH OF CONTRACT IN THE UNIFORM LAW OF SALES**

**A. DAMAGES IN THE COMMON AND CIVIL LAW SYSTEMS**

**B. DAMAGES IN THE UNIFORM LAWS**
CHAPTER I

INTRODUCTION

This year marks the entry into force of the United Nations Convention on Contracts for the International Sale of Goods.¹ The Convention is the fruit of a prolonged and arduous work as it had to be created out of a compromise of divergent factors like the Common and Civil law traditions, the non-market Socialist and the free-market economies, the industrially developed and the developing countries and the existing regime of the Uniform Law for International Sales² and the provisions of the Convention itself. However, The Convention's entry into force is only a step towards its gaining worldwide acceptance.³ Its purpose of being a uniform law for a larger international community will depend on how many countries of the world choose to become parties to it.

While the Convention gains momentum, two uniform laws continue to function efficiently on a regional basis. For over twenty years, the Uniform Commercial Code has been providing the basis for the commercial law of all the U.S. states except for Louisiana. It has also been enacted in the District of Columbia and the Virgin Islands. The other
uniform law is the General Conditions of the Council for Mutual Economic Assistance, which for nearly thirty years has been governing the trade among a overwhelming majority of the Socialist countries. In contrast to the proposed goal of the Convention to become the law for a large number of countries without regard to their political, economic and legal systems, the two latter laws regulate the trade among groups of entities having the same political, economic and legal systems, which is one of the factors contributing to their effective functioning. Nevertheless, the experiences of the two latter uniform laws justify their comparison with the Convention for determining firstly, to what extent the latter follows the methods and principles of unification of either one of them, and secondly, how far compatible are the provisions of either one of them with those of the Convention. Apart from the value of such a comparison from an academic point of view, the need for such a study for the benefit of the international traders or practitioners of international trade law cannot be overemphasized.

This thesis attempts to examine and compare an important component of any law of contract for the sale of goods, namely, the remedies available to an aggrieved party following a breach of contract. The comparison is made between the two regional uniform laws and is based on the factors like the legal traditions, legal principles and the peculiar characteristics of the socio-economic systems which
explain the difference between the laws governing identical subject-matters. The relevant provision of the Convention is then compared against those of the above two.

The first part of the thesis deals with the historical background of the uniform laws, their scope and specific characteristics. The relationship between the national laws and the Convention and the effect of the United States' ratification of the UN Sales Convention are also discussed in this chapter.

The following chapters examine the status, role and significance of the two major remedies - the damages and specific performance, in the major legal systems and the uniform laws. A comparison of the remaining remedial provisions is made in the following chapter which precedes the conclusion that, although the major legal systems of the world have a converging tendency as far as the basic remedies for breach are concerned, the difference in the socio-economic systems stands out as the most formidable obstacle in the attempts to formulate a set of universally acceptable uniform rules for regulating the international sale of goods.

2. The Uniform Law for International Sale was drafted by the International Institute for the Unification of Private Law (UNIDROIT) and adopted by a conference convened by the Netherlands in 1964. However, only 8 countries became party to it.

3. The Convention needed only 12 ratification or accessions to it for its entry into force; see supra note 1, Art.99(1). Its success, however, will depend on whether or not it will gain the acceptance of a much larger number of nations.

A. THE UNIFORM COMMERCIAL CODE

1. BACKGROUND

In the United States, most commercial activities are regulated not by Federal law but by state laws. Therefore, in principle, all states of the nation have the prerogative of regulating commercial activities within their territories in an individual manner and irrespective of how the same matters are regulated elsewhere within the country. Given the reality of nationwide commercial activities, different individual state laws regulating the same subject-matter can hamper the commerce of the nation as a whole. This obvious disadvantage of the non-uniformity of the laws was felt as early as 1890 when efforts were first made to bring about a uniformity in the state laws dealing with commercial transactions.

The National Conference of Commissioners on Uniform State Laws, consisting of representatives from seven states, met for the first time in 1892 and immediately identified
the laws concerning the negotiable instruments as the most worthy of being the subject of unification. In 1896, they approved the final draft of the Uniform Negotiable Instruments Law, which was enacted by all the states, territories and insular possessions of the United States.

From 1906 to 1910, Professor Samuel Williston prepared four more drafts at the initiative of the Commissioners. These were drafts for the Uniform Law of Sales, Warehouse Receipts, Bills of Lading and Stock Transfers. These laws received recognition of a large number of U.S. jurisdictions and continued to be in force till about the middle of the twentieth century, when the Conference of Commissioners expressed the desirability of doing away with the piece-meal regulation of commercial transactions, as the substantial change in the latter had rendered such regulation inadequate.

William A. Schnader, the President of the Conference suggested at the 50th Annual Meeting of the Conference in 1940 that, instead of carrying out a revision of the existing laws individually, attempts should be made to create an up-to-date uniform law encompassing regulation of all aspects of commercial transactions. He visualized this law to be the uniform law of all the jurisdictions of the United States, which would come into force as a result of a minimum number of legislative Acts as opposed to the hundreds that would be necessary should different aspects of
commercial transactions be regulated through separate Acts.\footnote{7}

Professor Karl N. Llewellyn, who chaired the Uniform Commercial Acts Section of the Conference, presented to the same meeting a revised Uniform Sales Act intended to be enacted either as a single instrument or as a part of a broader Uniform Commercial Code.\footnote{8} The Executive Committee of the Conference approved the preparation of a Commercial Code as soon as sufficient fund for the project was available.\footnote{9} Since the American Law Institute was also engaged in preparing a restatement of the similar laws at that time, it was decided that the drafting of the Uniform Commercial Code should be carried out jointly with that organization.\footnote{10}

The World War II and the lack of adequate funds forced postponement of work on the Uniform Code till 1945 when serious work was undertaken by the Conference and ALI with the aim of completing the project within the next five years.\footnote{11} Professors Karl Llewellyn and Soya Mentschikoff served as the Chief and Associate Chief Reporters of the project.\footnote{12}

Intensive work of the drafters resulted in the completion of the draft and its approval by the Conference, ALI and the American Bar Association House of Delegation in 1951.\footnote{13} In the period following this approval, the Conference and ALI considered the options of either presenting the draft to the Congress as the basis for enactment of a Federal law, persuading the states to
conclude an interstate compact with regard to the adoption of the Code, or presenting the draft for the consideration of the state legislatures. Since the Congress is empowered by the Constitution to regulate only interstate commerce, the Code encompassing varied areas of commerce was not deemed suitable for a Federal legislation. Moreover, the Commissioners representing the states and mandated to facilitate adoption of uniform state laws preferred to present the Code to the state legislatures' consideration. An interstate compact was not found advantageous over this alternative.

Pursuant to the decision of the Commissioners to present the draft Code for the consideration of the state legislatures, the Code was introduced in the legislatures of California, Mississippi and New York in 1952. The draft Code was reintroduced in the California and Mississippi legislatures in 1953. The legislatures of Connecticut, Illinois, Indiana, Massachusetts, New Hampshire and Pennsylvania also reviewed the draft Code the same year. At the same time discussion in scholarly journals propagated for and against the adoption of the Code.

In accordance with the objections and suggestions that were made in connection with the Code's adoption, some amendments were made to it and the revised Code was published in two volumes in 1957. In course of the next ten years, the Code was reviewed and adopted by 48 States,
the District of Columbia and the Virgin Islands. Today, Louisiana remains the only state which has not enacted the Code as a whole. The Uniform Commercial Code is periodically revised by a Permanent Editorial Board. The most recent addition to the Code was made in 1986, whereby a provision was made for the uniform regulation of leases.

2. GENERAL CHARACTERISTICS OF THE UCC AND FEATURES DISTINGUISHING IT FROM THE OTHER UNIFORM LAWS

The Uniform Commercial Code is not a law by itself. It is only a model law upon which states may base their own commercial laws - deviating from its position whenever and wherever deemed necessary in view of overriding state interests. As early as 1967, therefore, 775 separate amendments were made to the Code by the jurisdictions enacting it. Apart from the variations initiated by the individual legislatures, there remains another reason for the non-uniformity. The Code on occasions provides optional provisions. Thus there may be occasions when different states may have different provisions while they are actually adhering to the UCC specimen provisions. Moreover, the so-called "open-ended" drafting of the Code also on occasions gives rise to different interpretation and, therefore, precedents, in different jurisdictions.

The UCC is a model uniform law for jurisdictions of the Common Law. Therefore, the general appearance of the
the Code has deviated from the Common Law to establish a UCC is not a restatement of the Common Law. In certain cases open to changes in customs and usages in trade. Article 1 of the Code (General Definitions and Principles of Interpretation) provides that usages of trade supplement or qualify terms of an agreement. Furthermore, the Code states that one of its underlying purposes and policies is to permit continued expansion of commercial practices through customs, usage and agreement of the parties. The Code's preference of its users customs and usages over the abstract principles of laws makes it a law for merchants as opposed to one for the lawyers.
Most of the UCC provisions are specimen for non-mandatory rules. Parties are free to either derogate from the rules enacted on their basis, or displace such rules altogether as the UCC recognizes freedom of contract as a basic principle.

The UCC is, as described above, a model law which is directed at the unification of laws of the Common Law jurisdictions. In addition, a third specific characteristic of the UCC that distinguishes it from the other uniform laws of sales, viz., the CMEA General Conditions of Delivery of Goods and the UN Convention on Contracts for the International Sale of Goods, is that its purpose is to unify laws of entities of a Federal state, rather than different sovereign states. One striking similarity, however, among all the three uniform laws is that there is no supreme arbiter or interpreter of any of these laws. The problems arising out of this feature in respect of the UCC has already been indicated. Those concerning the other uniform laws are discussed in the corresponding sections of this chapter.

B. THE GENERAL CONDITIONS OF THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE

The General Conditions of Delivery of Goods of the Council for Mutual Economic Assistance are the earliest uniform laws for the international sale of goods. Their
adoption in 1958 was seen as "a new and important development in international economic law, a development which presents an unmistakable challenge to Western jurists and traders." For nearly thirty years now the General Conditions have been successfully regulating trade among the Member Countries of the Council for Mutual Economic Assistance (CMEA). This success is due largely to the fact that the CMEA Member Countries have identical socio-economic systems which in turn insures the similarity in legal principles in these countries. An overview of the Socialist laws and its correlation with the larger Civil Law family in the following section indicates the importance of this factor for the successful functioning of the General Conditions.

1. THE LAW OF CONTRACT IN THE SOCIALIST LEGAL SYSTEM

An overwhelming majority of the Socialist countries of Eastern Europe continue to follow the Romanist tradition in the law of contracts, modified wherever necessary due to exigencies of the Socialist system. The formal appearance of such laws does not show the change in their contents that the Socialist jurists vigorously claim to have been brought about, thus giving the Socialist laws an entirely different status, distinguishable from any of the traditional systems. However, be it due to the Romanist tradition or the actual nature of Socialism, the emphasis on specific
performance as a primary remedy in sales contracts in the laws of the Socialist countries is quite clear. In the Soviet Union, for instance, the law of contract "is based on the prerequisite that a contract concluded by parties must be performed by them." 38 To this end the Soviet civil legislation "create(s) the principle of real performance of a contract—the obligation to perform a contract actually." 39

There have been disagreements within the Socialist system as to whether the means of production in the Socialist economies gave birth to a new type of contracts—the "economic contracts" concluded between the Socialist enterprises. 40 The division of contracts into "economic" and "civil" ones, to be regulated respectively by "civil" and "economic" laws did not make a foothold either in the USSR or other Socialist countries except Czechoslovakia and GDR. 41 The fact that the Socialist system barely tolerates private property at all rules out the possibility of a large-scale "civil" contract-making. The contracts that are entered into, therefore, are essentially what would have been classified as "economic contracts". Specific performance of such contracts are a presupposed obligation of parties 43 and normally compensation of damages and payment of penalties will not relieve a party from actual performance. 44
2. BACKGROUND OF THE GENERAL CONDITIONS

The Council for Mutual Economic Assistance, more commonly known in the west by its acronym CMEA (or COMECON), was founded in 1946 by six Socialist countries of Western Europe in response to the Marshall Plan then being implemented in Western Europe. Today CMEA comprises of ten active Member Countries from three continents.

To facilitate bilateral trade among themselves, the European Socialist countries formulated General Conditions—bodies of permissive rules, providing for a framework within which the foreign trade organizations of these countries were to conduct trade with their counterparts.

The history of the General Conditions within the framework of the CMEA dates back to 1951 when the General Conditions of Commerce of the CMEA were adopted. These were model or specimen rules designed to provide guidance for bilateral trade between the Member Countries of the CMEA.

The first version of the General Conditions that are now in force today was adopted in 1958. These General Conditions focused mainly on the machine-building industry and generally underscored the notion that the law must "exert all its power for the performance of the contract and avoidance and cancellation of the contract should be severely restricted even in the event of a breach." The discussion of remedies for breach of contract in relation to
Foreign Trade of CMEA decided in 1962 to revise the 1958 version of the General Conditions.54

A working group of legal experts from the CMEA Member Countries produced a revised version of the General Conditions55 after six years of work in 1968, which after having been approved by the Standing Committee, entered into force on January 1, 1969.56

The 1968 version of the General Conditions was further modified and amended in 1975 and this later version came into force in 1976. Some amendments to this version were approved in 1978 and the amended version entered into force on January 1, 1979. This version, currently in force, is referred to as "The General Conditions of 1968/75 in the Wording of 1979."57

3. CHARACTERISTIC FEATURES OF THE GENERAL CONDITIONS

The General Conditions of 1968/75 in the Wording of 1979 are arranged in 110 Articles in 17 chapters dealing with a wide variety of topics like the conclusion, modification and termination of contracts,58 basis and dates of delivery,59 quality and quantity of the goods,60 packing and marking,61 general provisions of liability,62 claims for quality and quantity,63 and sanctions64 etc.

Despite their name, the General Conditions have the force of law as distinguished firstly from the early General Conditions of bilateral trade among the European Socialist
countries from which the former evolved and to which they owe their name, and secondly, from the General Conditions formulated by the United Nations Economic Commission for Europe (ECE) which are purely model rules. The General Conditions, from the international legal point of view, represent a multilateral Treaty. From the point of view of the national laws, they are substantive and procedural rules unified through an international agreement. The General Conditions received the force of national law through acts of the active Member Countries of the CMEA.

The General Conditions govern the foreign trade in goods of the CMEA Member Countries. Whether or not referred to in the contract, or in any other way adopted by the parties, the General Conditions apply to all contracts concerning such foreign trade. The General Conditions contain both imperative and permissive norms and for situations when a matter is not found to be regulated, they refer to the substantive provisions of the civil law of the seller's country. Departure from the General Conditions is severely restricted. Only in the "cases when the parties in making a contract come to the conclusion that because of the specific nature of the goods and/or peculiarities of their delivery, a departure from individual provisions of the General Conditions is required" that the parties are allowed to make such a departure.
The General Conditions are not the only uniform law for intra-CMEA transactions. In addition to these, there exist the General Conditions of Instalation, the General Conditions of Technical Assistance (Customer Service) and the General Conditions of Specialization and Cooperation in Production, all of which combine to provide a complex form of regulation of the many-faceted intra-CMEA transactions.\textsuperscript{72} Finally, these General Conditions mentioned above are to be distinguished from e.g., the COMECON-Finnish General Conditions of 1978\textsuperscript{73} which are recommended for optional use of the contracting parties in Finland and any CMEA Member Country. This type of General Conditions lack one vital characteristic of the former - they do not have the force of law. The same is true for the general conditions for trade among the CMEA Member Countries and Yugoslavia, which although a Socialist country, does not belong to the CMEA.

C. THE UNITED NATIONS SALES CONVENTION

The United Nations Convention on Contracts for the International Sale of Goods was adopted by a Diplomatic Conference in Vienna in April, 1980. The Convention has come into force on January 1, 1988.\textsuperscript{74} The Convention is the latest effort of the international community to work out a set of norms to regulate sale of goods among the nations of the world. The history of the endeavour to establish a uniform law for sale of goods is a long one which dates back
to the past century. A brief account of the events leading to the Convention precedes the discussion of the Convention itself in the following sections.

1. HISTORICAL BACKGROUND OF THE UN SALES CONVENTION

The history of the unification of private laws pertaining to the sale of goods dates back to as early as 1893 when a conference in the Hague adopted the Conventions on Civil Procedure and Personal Status which were later ratified by most of the European States. The next landmark in the process of unification is the beginning of work by the International Institute for Unification of Private Law (UNIDROIT) in this field under the auspices of the League of Nations in 1930. The drafting Committee of UNIDROIT prepared a preliminary draft of the Uniform Law on the International Sale of Goods (ULIS) in 1935. A revised draft was prepared by the same Committee in 1939, but further work had to be suspended due to the outbreak of World War II.

After the War, in 1951, a conference of 21 nations, convened by the Netherlands, appointed a Special Committee to continue working on the revised ULIS draft which it had approved. The Special Committee completed its own draft in 1956 and this draft, accompanied by a Report was sent by the Netherlands to other interested governments, inviting their comments. The Special Committee reviewed and modified the draft on the basis of the comments received in response.
The government of the Netherlands convened a second conference which was held at the Hague from April 2-25, 1964. This conference approved the ULIS draft and also reviewed and adopted a companion instrument to ULIS - the Uniform Law on Formation on Contracts for the International Sale of Goods (ULF), work on which had begun in 1936 by a committee which prepared the draft by correspondence.  

The United States joined the UNIDROIT in 1963, and participated in the 1964 Hague Conference. However, the United States did not become a party to ULIS which entered into force among some European and two developing countries. This lukewarm response to ULIS prompted the United Nations' entrusting the United Nations Commission on International Trade Law (UNCITRAL), formed in 1966, with the task of revising the ULIS so as to insure its wider acceptability. In 1977, UNCITRAL approved a text of a convention and added to it provisions on formation of contracts and interpretation in 1978. It was this draft that was approved by the Diplomatic Conference in Vienna in the Spring of 1980. The Conference which was participated by representatives of 67 States and many international organizations, also adopted a Protocol amending the Convention on the Limitation Period in the International Sale of Goods, which is annexed to the Final Act of the Conference as is the Convention itself. This Protocol amends the provisions of the Convention on the Limitation Period in
the International Sale of Goods of 1974 so as to allow conformity of its provisions with those of the Convention.

2. SCOPE OF THE UN SALES CONVENTION

The Convention becomes applicable to contracts for sale of goods among parties with a place of business in different States when either the concerned States are parties to it, or when the rules of private international law points to the application of the law of a Contracting State.\(^82\) It follows from this provision that the place of business of the parties, rather than their nationality, has to be different (i.e., in different States) for the Convention to become applicable to a contract between them. The applicability of the Convention to such contracts pursuant to this provision is automatic, i.e., the parties do not have to acknowledge or mention the Convention's applicability. However, they may opt to have their contract wholly or partially outside the ambit of the Convention.\(^83\)

The Convention limits its applicability firstly, to "only the formation of the contract of sale and rights and obligations of the buyer and seller arising from such a contract."\(^84\) Except when otherwise expressly provided in the Convention, "the validity of the contract or any of its provisions or of any usage"\(^85\) or "the effect which the contract may have in the goods sold"\(^86\) will not come under the purview of the Convention. Moreover, the Convention does
not address itself to the situation of injury or death caused by the goods sold.\textsuperscript{87}

As for the objects of regulation, the Convention does not concern itself with the contracts for goods bought for personal, family or household use with some exceptions,\textsuperscript{88} goods sold at auctions,\textsuperscript{89} or on execution by authority of law.\textsuperscript{90} Also excluded from the scope of the Convention are sale of stocks, shares, investment securities, negotiable instruments or money\textsuperscript{91} as well as that of ships, vessels, hovercraft or aircraft\textsuperscript{92} or electricity.\textsuperscript{93}

According to the Convention, the general principles on which it is based are to be used for resolving issues pertaining to matters that are governed by the Convention by not dealt with explicitly.\textsuperscript{94} These are the principles of good faith,\textsuperscript{95} adherence to the intent of the parties,\textsuperscript{96} reasonable interpretation of the parties conduct,\textsuperscript{97} and practices and usages of the parties.\textsuperscript{98} In the situation when such principles are found inadequate, the law applicable by virtue of the rules of private international law is to be applied.\textsuperscript{99}

3. THE CONVENTION AND THE NATIONAL LAWS

As stated above,\textsuperscript{100} the Convention becomes automatically applicable to contracts for sale of goods on fulfillment of the following conditions:
(1) That the parties have places of business in different States: and,

(2) Such States are parties to the Convention, or also when

(3) The rules of private international law lead to application of the law of one such State - party to the Convention.

On meeting these requirements, the provisions of the Convention become operative regardless of presence or absence of rules of national law of the concerned State(s).

The addition of the alternative method of ascertaining jurisdiction through the rules of private international law increases the possibility of a greater number of disputes being directed towards the Contracting States. These disputes will have to be resolved not by applying the law of the forum, but by application of the Convention's substantive provisions. Apart from that, this clause may result in parties finding themselves in situations which they did not contemplate. Two parties from two non-Contracting States may find their contract being governed by the Convention because of a remote relationship of the contract to a Contracting State.

To avoid such a situation, the Convention explicitly allows the Contracting States to make a declaration at the time of ratification or accession to the effect that they will not be bound by the provision of Art.1(1)(b) regarding
the indication of jurisdiction by the rules of private international law.\textsuperscript{101} The United States chose to make such a declaration upon depositing the instrument of ratification.\textsuperscript{102} This will enable the United States courts to apply the Uniform Commercial Code instead of the Convention when there is a considerable linkage of the contract to the United States and when at least one of the parties to the contract has his place of business in a non-Contracting State.

As for the group of States like the CMEA, which already have rules governing the identical matters dealt with by the Convention, the latter provides for a reservation to be made by such States which will insure operation of the current rules in the trade among these States.\textsuperscript{103} However, when the contract is concluded by one party belonging to this group and another outside this group, the provisions of the Convention become operative, provided the other requirements regarding the Convention's application are met.\textsuperscript{104}

4. THE EFFECT OF RATIFICATION OF THE CONVENTION BY THE UNITED STATES

As stated earlier,\textsuperscript{105} for the most part, commerce in the United States is regulated by the individual states rather than by Federal law. Thus, the ratification of the Convention by the United States, which denotes assumption by
the Federal government of international responsibility in respect of sale of goods covered by the Convention, may appear to challenge the state prerogative of regulating commerce, derived from the Constitution.

The Convention recognizes the possibility of a discord between the federal and constituent entities in a federal system on the assumption of international responsibility and provides that in such a situation, a contracting federal State may specify the area of the application of the Convention within its territory. The area specified as one excluded from the Convention's application will be considered as a non-Contracting State for the purpose of the Convention when one of the parties has his place of business in such an area. When no such declaration is made, the Convention is assumed to be applicable in respect of all the territorial units of the Contracting State. Federal systems like Canada may find making of such a declaration in respect of territorial scope of the Convention appropriate. However, the United States need not make such a declaration since the Convention concerns international sales, which by the virtue of the Commerce and Treaty clauses of the Constitution, are subject matters of Federal regulation. On this premise, no declaration concerning the limitation of territorial application of the Convention was made by the United States upon ratification of the Convention. Therefore, the territorial scope of the Convention extends
to all territories under the jurisdiction of the United States.
1. The exception being the interstate commerce which by the authority of the Constitution, is a subject-matter of Federal regulation. U.S. Const. Art. I, Sec. 8, Cl.2.

2. The seven states to send Commissioners to the first Conference in 1892 were Delaware, Georgia, Massachusetts, Michigan, New York, New Jersey and Pennsylvania.


4. Id., at 368.


7. Id.

8. Id.

9. Id.


11. See Bane, supra note 3, at 370.


13. See Bane, supra, note 3, at 371.

14. See supra note 1 on the Commerce Clause.

15. See Bane, supra note 3, at 371.

16. See Braucher, supra note 12, at 800-801.

17. Id.


19. See Braucher, supra note 12, at 804.

20. See U.C.C. Rep. Serv. (Callaghan), State Correlation Table.

21. However, Louisiana has enacted Articles 1, 3, 4, 5, 7 and 8 in substance. Id. La 1.


23. The Uniform Commercial Code (Official Text of 1972 as amended up to 1986, hereinafter cited as the UCC), § 2-318 (Third Party Beneficiaries of Warranties Express or Implied), for e.g., offers three alternatives, and any of the United States jurisdictions enacting a law on the basis of the UCC can adopt any one of them which gives rise to the possibility that there may be three different variants of these regulation in effect at the same time.

24. E.g., the use of phrases like "commercial reasonableness" or "good faith" in Articles 2 and 9 by the drafters may lead to interpretation of these phrases by courts of different jurisdictions in different ways. See generally, Note, Disparate Judicial Construction of the Uniform Commercial Code-The Need for Federal Legislation, 1969 Utah L. Rev. 722 for a narrative of conflicting interpretation and construction of the same provision of the Code.


27. The UCC, supra note 23, § 1-205(3).

28. Id., § 1-102(2)(b).


33. See supra note 24 with accompanying text.


35. The lone outsider to this group is Czechoslovakia which tried to introduce new forms in the law of contracts, see, J. Hazard, Communists and Their Laws 311 (1969).

36. Id.


See also, Szabo, Theoretical Questions of Comparative Law, in A Socialist Approach to Comparative Law 15-16 (1977).


39. Id.; Art. 168 of the Civil Code of the Russian Soviet Federated Socialist Republic partly states:" An obligation must be performed in the proper manner and within the prescribed period of time, in accordance with the provisions of law, the planning directive or the contract, or in the absence of such provisions, in accordance with customary demands." Compare Art. 242 of the German Civil Code (BGB):"The debtor is bound to effect the performance according to the requirements of good faith, ordinary usage being taken into consideration."

40. See Hazard, supra note 33, at 313-314.
41. Id.; See also Eörsi, Contractual Remedies in Socialist Legal Systems, VII Int'l Encycl. Comp. L. 154 (1976). But cf Ioffe, The Experience of the Soviet Union, VII-5 Int'l Encycl. Comp. L. (Contracts in the Socialist Economy) 18, 27: "The majority of the Soviet scholars considers the concept (of economic contracts) to be useful not only as a scientific category but also practically since very nearly all questions relating to contractual obligations deriving from contracts embraced by this concept are resolved very differently from questions relating to other civil law contracts".

42. E.g., the Constitution of the USSR recognizes only two forms of property:

(1) State property
(2) Property of the collective farms and cooperatives;

USSR Const. (Fundamental Law), Art. 10.

43. See supra notes 38-39 with accompanying text.


45. See Hoya, supra note 31, at 4. See also, the International Yearbook and Statesmen's Who's Who 1987 at IV: The press release of the Moscow Conference of the representatives of Bulgaria, Hungary, Poland, Rumania, the USSR and Czechoslovakia dated January 25, 1949, stated that the aim of the establishment of the CMEA was to promote larger scale economic cooperation between the Socialist nations on the basis of fair representation. This was necessitated by the fact that "the governments of the United States, Britain and several other West European countries are in fact boycotting trade with the countries of Peoples' Democracy and the USSR." This is an allusion to the restrictive terms concerning trade with the East European countries contained in the Marshall Plan.

46. Albania and the German Democratic Republic joined the original six in 1950. Mongolia was admitted in 1962, Cuba in 1972 and Vietnam in 1978. Since 1962 Albania does not take part in the operations of the CMEA.

Yugoslavia maintains special contractual links with the CMEA. The Organization has reached agreements on cooperation with Finland (1973), Iraq and Mexico (1975), Nicaragua (1983) and Mozambique (1985).

48. An elaborate discussion on this document can be found in A. Kolenko, Torgoviye Dogovori i Soglaschenia SSSR s Inostrannimi Gosudarstvami (Commercial Treaties and Agreements of the USSR with Foreign States) 172-208 (Moscow, 1953).

49. See Szász, supra note 47 at 5.

50. An English translation of the text of this document can be found in Berman, supra note 34.

51. See Szász, supra note 47, at 37.

52. Hoya, supra note 31, at 91.


54. Id., at 244.


56. All the Member-Countries of the CMEA with the exception of Czechoslovakia approved the new version already in 1968. Czechoslovakia approved the new version on January 15, 1969.

57. The text of the General Conditions in Hoya, supra note 31, is accompanied by notes on changes since 1958.

58. The General Conditions, supra note 31, Ch. I.

59. Id., Chapters II and III.

60. Id., Chapters IV and V.

61. Id., Ch. VI.

62. Id., Ch. XII.

63. Id., Ch. XIII.

64. Id., Ch. XIV.
65. E.g., the General Conditions for the Supply of Plant and Machinery for export (Nos. 188 and 574) and the General Conditions for the Supply and Erection of Machinery for Import and Export (nos. 188/a and 574/a); the General Conditions of Sale for the Import and Export of Durable Consumer Goods and other Engineering Stock Articles (No. 730) etc.


67. See Szász, supra note 47, at 55.

68. See Hoya, supra note 31, at 97.

69. See Rosenberg, supra note 66, at 90-91.

70. The General Conditions, supra note 31, Art. 110.

71. Id., Preamble.

72. See Szász, supra note 47, at 50.

73. The text of this document is appended to Hoya, supra note 31 (appx. II).

74. The United States, Italy and China deposited the instrument of ratification of the Convention in December, 1986, bringing the total number of parties to the Convention to thirteen. See 52 Fed. Reg. 40, 6262 (March 2, 1987).

Art. 99(1) of the Convention, supra note 32, states that the Convention would enter into force on the first day of the month following a twelve-month period from the day of the submission of the 12th instrument of ratification or accession.


76. See Farnsworth, the Vienna Convention: History and Scope, 18 Int'l. Law. 17 (1984).


78. See Farnsworth, supra note 76, at 17.
79. Id., at 17-18.

80. Id.


82. The Convention, supra note 32, Art.1 (1), (1)(a) and (1)(b).

83. "The parties may exclude the application of this Convention, or subject to article 12, derogate from or vary the effect of any of its provisions." The Convention, supra note 32, Art.6.

84. The Convention, supra note 32, Art.4.

85. Id., Art.4(a).

86. Id., Art.4(b).

87. Id., Art.5.

88. Id., Art.2(a).

89. Id., Art.2(b).

90. Id., Art.2(c).

91. Id., Art.2(d).

92. Id., Art.2(e).

93. Id., Art.2(f).

94. Id., Art.7(2) partially states: "Questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based...".

95. Id., Art.7(1).

96. Id., Art.8(1).

97. Id., Art.8(2).

98. Id., Art.8(3).

99. Id., Art.7(2).

100. See supra note 82 with accompanying text.
101. The Convention, supra note 32, Art. 95 states that "Any State may declare at the time of deposit of its instrument of ratification or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."


103. The Convention, supra note 32, Art. 94(1) provides: "Two or more Contracting States which has the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations."

104. See supra note 82 with accompanying text.

105. See supra note 1 with accompanying text.

106. The Convention, supra note 32, Art. 93(1) states: "If a Contracting State has two or more federal units in which, according to its Constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or to one or more of them, and may amend its declaration by submitting another declaration at any time."

107. Id., Art.93(3).

108. Id., Art.93(4).


110. U.S. Const. Art.II §2; Art.VI.

111. 52 Fed. Reg. 40, 6262 (1987); the only declaration that was made concerned Art.1(1)(b), see supra note 102 with accompanying text.
CHAPTER III

DAMAGES AS REMEDY FOR BREACH OF CONTRACT UNDER
THE UNIFORM LAWS OF SALES

That the function of the law of contract is to specify which of the agreements are binding and which are not, define rights and duties of parties under enforceable but unclear contract terms and indicate the consequences of unexcused breaches of agreements is a generally agreed proposition.¹ These three functions of the contract law can be assigned to its provisions regarding the formation, interpretation and remedies for breach respectively. Remedies thus constitute one of the vital elements of contract law.

The remedies are called upon to protect one or more of the following interests of the parties to a contract:²

(a) the expectation interest, i.e., the claim to benefit of the transaction itself;
(b) the reliance interest, i.e., the claim to the reimbursement of losses caused by relying on the existence of the contract; and
(c) the restitution interest, i.e., the claim to
Various remedies are offered by different legal systems for protection of such interests. The two most important among them are money-damages and specific performance. These remedies however, do not occupy the same position in the hierarchy of remedies in all the legal systems. The following section concentrates on damages as a remedy of breach of contract under the two major legal systems, i.e., the Common Law and the Civil Law.

A. DAMAGES IN THE COMMON AND CIVIL LAW SYSTEMS

Damages have been traditionally identified as the preferred remedy in the Common Law. The reason for this is that in the Common Law system, "the purpose of contract remedies is not the compulsion of the promisor to perform, but compensation to the promisee for his loss from the breach."³ The Common Law courts saw their function in placing the victim of a breach "in the same situation as if the contract has been performed"⁴ rather than decreeing specific performance by the obligor of his obligations. This can be accomplished conveniently only through the award of money-damages. Hence the predominant role of damages in the Common Law.

Until about the 12th century, however, the Common Law was not familiar with the money-damages as we know them
today. The history of damages goes back to the medieval England, where the Common Law courts were frequently at odds with the courts of Chancery, run by the ecclesiastics. The courts of Chancery, and later, the courts of Equity granted specific performance for breach of contract. The Common Law courts, on the other hand, designated specific performance an inferior role, making it available only as an exception-in cases where the aggrieved party could prove the inadequateness of money-damages for his losses. To this day, specific performance continues to play a less significant role in the Common Law jurisdictions.

The predominant role of damages in the Common Law has been defended primarily on the ground of economic efficiency. In general terms, when a seller sells goods at a higher-than-contract price to a person other than the buyer despite his contractual obligations to the latter, and compensates him for his losses which is less than the actual selling price of the goods, economic efficiency is said to have been achieved through the diversion of the goods to a more valuable use from a less valuable one - while both the original parties profit. The seller profits from the difference between the actual price and the contract price plus the losses of the buyer under the contract. The latter profits from receiving back the contract price plus compensation for the projected profit. Finally, the increase in the value of goods benefits the society as a whole.
In the Civil Law, damages are a familiar phenomenon although the position of this remedy does not correspond to the predominant role it is accorded in the Common Law. In the French Law, where a distinction is drawn between an "agreement by which one or more persons bind themselves towards one or more persons to give..." and one binding such persons "...to do or not to do something," damages are prescribed as a remedy for breach of the latter. Moreover, an aggrieved party to the second type of contract may be authorized to effect the same results as if the contract is performed at the expense of the obligor.

Damages are exceptional remedies in the German Law. Their use is authorized in case of an injury to a person or damage to a thing, or when a specific performance is impossible or inadequate, or when the aggrieved party gave a notice demanding money-damages and fixed a reasonable time in which the performance might have been rendered. Finally, damages are available also when a performance requires disproportionate expenditure. The aggrieved party's seeking money damages is conditional upon his formally demanding performance through a notice and in some cases, the court's appointing a time for performance. However, in case of sale of goods, money-damages are awarded in a large number of cases despite these restrictions.
B. DAMAGES IN THE UNIFORM LAWS

1. THE UNIFORM COMMERCIAL CODE

Although the Uniform Commercial Code was designed to bring about a uniformity in the commercial laws of a group of Common Law jurisdictions, it is not a restatement of the Common Law. The emphasis laid by its drafters on the practical aspects like customs and usages of trade on occasions resulted in innovation and consequently, deviation, from the Common law.20 The UCC has thus been praised for having "the great merit of evincing a thoroughly practical spirit, a merit that cannot be overrated in a commercial codification."21

As concerns damages as a remedy for breach of contract however, the UCC undoubtedly recognizes its primacy. This is because damages serve best the UCC drafters' intention to have the remedial provisions "liberally administered to the end that the aggrieved party may be put in as good a position as if the other party has fully performed...."22 The language of this provision makes it sufficiently clear that the drafters, in agreement with the Common Law compensatory principle, envisaged a breach being remedied first and foremost by allowing substitutionary relief - in money damages. The following enumeration of the occasions when damages are prescribed by the UCC will further substantiate this proposition.
Section 2-711 of the UCC allows the buyer to cancel the contract, recover the price where appropriate, make "cover" (purchase substitute goods), and recover damages in addition to these measures in case of a breach of the seller. The damages may be the difference between the higher purchase price and the lower contract price in case of a "cover", the difference between the higher market price and the lower contract price in case of non-delivery of goods or repudiation by the seller, the losses sustained due to the non-conformity of the accepted goods or breach of warranty and the incidental and consequential damages as described in § 2-715. The aggrieved buyer may, in applicable cases, deduct all or part of such damages from the price on notifying the seller of his intention to do so. The buyer also has a right to cure by the seller of improper tender, or, by the construction of § 2-508(2), accept such a tender with a compensation for the non-conformity, or have the goods substituted. In case of the failure of the seller to cure or substitute the non-conforming tender, the buyer may reject the tender or revoke acceptance, cancel the contract and recover damages.

An aggrieved seller, under the UCC, may in appropriate cases, withhold delivery of goods, stop the goods in transit, identify the goods to the contract and resell them with recovery of damages, recover damages for non-
acceptance of a proper tender or have the price paid\textsuperscript{37} and cancel the contract.\textsuperscript{38}

The seller's damages include the difference between the higher contract price and lower resale price\textsuperscript{39} which may be even at a scrap or salvage value,\textsuperscript{40} the difference between the lower market price and the higher contract price in case of non-acceptance or repudiation by the buyer,\textsuperscript{41} the expected profit that would have resulted from the full performance of the buyer,\textsuperscript{42} and incidental expenses wherever appropriate.\textsuperscript{43}

There is no provision in the UCC whereby a seller can compel the buyer to perform by accepting a proper tender. However, there is a possibility of securing buyer's performance in terms of payment of price.\textsuperscript{44} This remedy is available only in a very limited number of cases as discussed later.\textsuperscript{45}

The remedies described above do conform to the stated UCC principle of putting the aggrieved party in a position where he would have been had the other party performed. This is a workable principle for protecting the expectation and reliance interests in a market-economy like the United States, where both procurement of substitute goods ("cover") and disposal of excess goods (resale) are feasible. Without this precondition, however, the effectiveness of this remedy in respect of the goal of protection of these interests is hardly possible. The following section deals with a
situation where damages are inadequate and unacceptable as the primary remedy for breach. This concerns the trade among a group of non-market economies - the CMEA.

2. THE GENERAL CONDITIONS OF THE CMEA

As mentioned earlier, the General Conditions of the CMEA have been subject to revision in 1968, 1975 and 1979. It is possible that the provisions most affected by these revisions are those concerning the remedies. The changes brought about by the revisions have been attributed to the changes in the economic circumstances of the Member Countries of the CMEA, which in turn demanded that the General Conditions "guarantee the further development of the system of remedies, the reinforcement of contractual discipline, the precise performance of contractual undertakings and the indemnification of the party suffering a loss to non-performance."

The role of damages in the remedial provisions of the General Conditions is insignificant compared to that of specific performance. However, the changes mentioned above have a distinct bearing on the status of damages under the General Conditions.

Except for breaches of a contract for a time, damages were available only in a limited number of occasions under the 1958 version of the General Conditions. These were the breaches whereby the buyer changed the data previously
furnished in connection with production resulting "in substantial difficulties for the seller" or when the seller does not comply with the buyer's shipping instructions. The first revision of the General Conditions added to this the possibility of recovering damages for actual losses when bilateral agreements between the governments of the parties' countries included such a provision.

The place of damages was substantially elevated by the 1975 and 1979 versions of the General Conditions. While the former established damages as a basic remedy and dealt with it in a relatively detailed manner, the latter recognized damages as one of the two "forms of substantive liability."

The General Conditions now allow recovery of damages for which penalty has not been provided as a remedy, for breach of contract for a time, for non-compliance of notice requirements, and non-delivery, the last being an important addition to the list in the 1979 version.

The progressive enhancement of the role of damages do indicate the possibility of widening of the grounds for its recovery in course of further development of the General Conditions. However, evidently at this stage, the damages continue to play by far a lesser role as compared that of damages under the UCC. The General Conditions treat damages even more sparingly than do the individual Socialist
countries where the principle that "the party in breach must pay full compensation consisting of damnum emergens and lucrum cessans (positive interest)." However, it should be noted that specific performance, and not damages, remain the main remedy in the Socialist countries. The General Conditions' limiting the availability of damages have been attributed to the absence of a convertible currency in the intra-CMEA trade, which renders damages a relatively ineffective remedy. This is an addition to the argument that the planned economies under Socialism in general require fulfillment of contractual obligations as a vehicle for achieving planned targets, and secondly, in such non-market economies, compensation does not provide protection of the expectation and reliance interests. These two considerations are as applicable for the domestic contracts as for the international sales contracts of the Socialist countries. It is therefore doubtful that the availability of a convertible currency alone would have resulted in a more prominent role for damages in the system of remedies under the General Conditions.

3. THE UN SALES CONVENTION

Both the buyer and the seller under the United Nations Convention on Contracts for the International Sale of Goods are allowed to recover damages for breach of contract. However, the Convention clearly prefers specific
performance to damages as the primary remedy\textsuperscript{65} and intends
the recovery of damages to accompany the demand for specific
performance.\textsuperscript{66}

Both the buyer and the seller are referred to the
common provisions for damages\textsuperscript{67} whereas all other remedies
are separately listed for each of the parties.\textsuperscript{68}

Under the Convention, a buyer is entitled to claim
damages for the delay in performance by the seller even when
the former had allowed a reasonable time for performance.\textsuperscript{69}
Likewise, he may also claim damages when the seller
belatedly remedies any failure to perform.\textsuperscript{70} The buyer is
entitled to cancel the contract when there is a fundamental
breach\textsuperscript{71} or in other specified situations like non-
performance even after the allowance of a grace period,\textsuperscript{72}
and claim damages.\textsuperscript{73}

The seller is entitled to damages in case of a breach
of the buyer to the same extent as the latter would have
been entitled to had he been the aggrieved party.\textsuperscript{74} Just
like the aggrieved buyer, the aggrieved seller may also
allow a grace period to the buyer to perform and claim
damages for delay.\textsuperscript{75} He may also cancel the contract\textsuperscript{76} under
the identical conditions\textsuperscript{77} set out for the aggrieved buyer
and claim damages.\textsuperscript{78}

Damages, according to the Convention, are a sum equal
to the loss, including loss of profit, suffered by "...(a)
party as a consequence of breach."\textsuperscript{79} The damages, however,
"may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known as a possible consequence of the breach of contract." The introduction of limitation in recovering damages may prevent creditors from claiming unjustifiable amount of damages. Moreover, both the subjective ("foresaw") and the objective ("ought to have foreseen") criteria established by this provision are likely to assist courts in drawing lines between claimed and recoverable damages.

Among the other Convention provisions concerning damages, perhaps the most notable is Art. 75 which appears to consolidate the contents of the UCC provisions on resale and cover. However, the aggrieved parties may recover as damages the difference between the market price and the contract price without having to resell or cover. This provision of the Convention is comparable to the UCC provisions on the seller's damages for non-acceptance or repudiation and the buyer's damages for the same type of breach which are offered as alternatives to resale and cover.

Under the Convention, mitigation of damages is a duty of the aggrieved party. Mitigation of damages is an obligation of the party seeking damages also under the UCC.
Damages as a remedy occupy a distinctly different position in the three uniform laws of sales under discussion.

In case of the UCC, the damages are the generally available remedy. For every form of breach the aggrieved party must resort to damages to be compensated for the actual losses or lost profits. Deviation from this general regime is allowed only under exceptional circumstances.90

Almost a diametrically opposite attitude towards the damages is shown by the General Conditions, where firstly, damages, until the latest revision, played only a marginal role. Secondly, for commonly occurring breaches like delayed delivery, insistence on specific performance, accompanied by penalties,91 remains the only recourse available to the aggrieved party. The position of the General Conditions can be explained partly by the legal traditions the Socialist countries follow, but mostly by the priorities and limitations of the non-market economic system.92

The United Nations Convention on Contracts for the International Sale of Goods by contrast contain a relatively elaborate mechanism for claiming and recovering damages for breach which occasionally resemble some of the key UCC remedy provisions. However, the fundamental difference between the provisions of these two instruments is that, unlike under the UCC, damages are not the primary remedy under the Convention.93 They play a supplementary role under
the Convention much like the ones under the General Conditions do.

2. See The Restatement (Second) of Contracts, § 344 (1979). See also Von Mehren, A General View of Contracts, VII-1 Int'l. Encycl. Comp. L. 85: Of the Civil Law system, the German Law distinguishes between the expectation interest (positive interest), reliance interest (negative interest) and restitution interest, whereas the distinction between these interests are relatively underdeveloped in the French Law. See Treitel, Remedies for Breach of Contract (Courses of Action Open to a Party Aggrieved) VII-16, Int'l. Encycl. Comp. L. 32-33.


This principle is clearly illustrated in the remark of Holmes: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,-and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and this is all the difference." Holmes, The Path of Law, 10 Harv. L. Rev. 457, 462 (1897).


6. See Worley, supra note 3, at 129.

7. The elevation of the role of specific performance by the Uniform Commercial Code in the United States is discussed in Ch. IV, § B.1. infra.


9. Id. at 90.

10. The French Civil Code, Art. 1101; articles 1136-41 further consider the agreements to give, i.e., to transfer specific assets.

11. Id., Art. 1101; articles 1142-45 further consider the agreements to do or not to do.
12. Id., Art. 1142 provides: "Every obligation to do or not to do is resolved in damages in case of non-performance by the obligor."

13. Id., Articles 1143-44.


15. Id., Art. 251.

16. Id., Articles 250, 283 and 326.

17. Id., Art. 252.2.

18. Dawson, supra note 5 at 529-530.

19. Id., at 530.

20. See infra Ch. IV, § B.1., on the treatment of specific performance by the UCC which is illustrative of such deviation.


22. The Uniform Commercial Code (Official Text of 1972 as amended up to 1986, hereinafter cited the UCC) § 1-106(1) (emphasis added); compare the Robinson ruling, supra note 4 with accompanying text.

23. The UCC, § 2-711(1)(a) and (b); this section, dealing with the seller's breach in general, makes damages available to the buyer for non-delivery and repudiation by the seller and proper rejection and justifiable revocation by the buyer in addition to cancellation by him of the contract, recovery of price paid or procurement of substitute goods.

Exceptions to this rule are provided in sub-sections 2-711(2)(a) and (b) for cases when the goods have been identified to the contract or when recovery of the goods is permissible under the UCC § 2-502 (Buyer's Right to Goods on Seller's Insolvency) or 2-716 (Buyer's Right to Specific Performance or Replevin).

24. Id., § 2-712(2).

25. Id., § 2-713(1).

26. Id., § 2-714(1).

27. Id., § 2-714(2).
28. Id., § 2-715.

29. Id., § 2-717.

30. Id., § 2-508(1); the cure must be effected within the time for delivery.

31. Id., § 2-508(2); when the seller believed that his tender would be acceptable with or without money allowance, he may substitute the goods on rejection by the buyer within a further reasonable time.

32. Id.

33. Id., § 2-703(a).

34. Id., §§ 2-703(b) and 2-705.

35. Id., § 2-703(c).

36. Id., §§ 2-703(d) and 2-706.

37. Id., §§ 2-703(e) and 2-709.

38. Id., § 2-703(f).

39. Id., § 2-706(1).

40. Id., § 2-704(2).

41. Id., § 2-708(1).

42. Id., § 2-708(2).

43. Id., § 2-710.

44. Id., § 2-709.

45. See Chapter IV. § B.1. infra.


47. Id.

A contract for a time is one "...containing an express indication, or from whose contents it clearly follows, that upon violation of the time of delivery the contract is automatically rescinded or the buyer has the right immediately to rescind the contract." This type of contracts are rarely concluded in the intra-CMEA trade. See T. Hoya, supra, at 212.


50. Id., Art. 29.


52. See Hoya, supra note 48, at 213-214.

53. The General Conditions, supra note 48, § 67-A(2) states in part: "The forms of substantive liability are: ...b) compensation by the debtor to the creditor of damages."

54. Id., § 67-c(2); § 67-c(1) deals with the situations where only the penalty is applicable.

55. Id., §§ 77(1) and 86(2).

56. Id., §§ 69(3) and 87(2).

57. Id., § 85(4).

58. See Hoya, supra note 48, at 215.

59. Id., at 214.


61. Id., at 153.

62. Id.

64. Id., Art. 61(1)(b).

65. See infra Chapter IV, § A.3.

66. The Convention, supra note 55, Article 45(2) states; "The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." See also infra note 68-69 with accompanying text.

67. The Convention, supra note 63, Articles 74-77 (damages).

68. Id., Articles 45-52 and 61-65 deal with remedies for the buyer and the seller respectively.

69. Id., Art. 47.

70. Id., Art. 48(1).

71. Id., Art. 49(1)(a): Id., Art. 25 defines fundamental breach as one which "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

72. Id., Art. 49(1)(b).

73. Id., Articles 45(1)(b), 45(2), 74-76.

74. Id., Articles 61(1)(b) and 61(2) which are identical to articles 45(1)(b) and 45(2) respectively, the latter pair establishing the aggrieved buyer's right to damages.

75. Id., Art. 63 is identical to Art. 47 concerning the buyer's remedy. See supra note 69 with accompanying text.

76. Id., Art. 64.

77. See supra note 71-72 with accompanying text.

78. The Convention, supra note 63, Articles 61(1)(b), 61(2) and 74-76.

79. Id., Art. 74.
80. Id.: This provision is comparable to the foreseeability test established by the ruling in Hadley v. Baxendale [156 E. R. 145 (Ex. 1854)].

81. The UCC, supra note 22, § 2-706.

82. Id., § 2-712; The Convention, supra note 63, Art. 75 states: "If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement, or the seller has sold goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction, as well as any further damages recoverable under article 74."

83. The Convention, supra note 63, Art. 76.

84. The UCC, supra note 22, § 2-708.

85. Id., § 2-713.

86. Id., § 2-708, comment 2.

87. Id., § 2-713, comment 5.

88. The Convention, supra note 63, Art. 77.

89. E.g., the UCC, supra note 22, § 2-715(2). Comment 2 to this section provides that the section modifies the "prior uniform statutory provision as to consequential damages resulting from breach of warranty...by requiring first that the buyer attempt to minimize his damages in good faith, either by cover or otherwise."

90. See Ch. IV, § B.1. infra.

91. The role of penalties in the General Conditions is discussed in Ch. V, § A infra.

92. This proposition is discussed more elaborately in Chapter IV infra.

CHAPTER IV

SPECIFIC PERFORMANCE

A. SPECIFIC PERFORMANCE IN THE CIVIL AND COMMON LAWS

The major difference between the remedy provisions of the Civil and Common Law systems is that the former places more emphasis on specific performance as a generally available remedy rather than on damages. The advantages of specific performance are that this remedy avoids the difficult task of measuring damages and it comes as close as feasible to giving an aggrieved party what he bargained for, leaving the possibility of supplementing this remedy by damages. Moreover, this remedy prevents the obligor from being burdened disproportionately to the reward he bargained for while the obligee is prevented from receiving a windfall gain.

The Civil Law preference for specific performance is thought to have originated from the Roman Law. The Roman Law, however, like the English Law, practiced what it relegated to a secondary position later. The classical Roman Law was familiar with only money-judgement. Specific performance did not have itself accepted as the primary remedy even under the medieval Roman Law. It is only
towards the middle of the 14th century that specific performance became well-rooted in the Roman Law as the primary remedy.\textsuperscript{6} Since that time to the present day, specific performance has played the dominant role in the system of remedies of the Civil Law system.\textsuperscript{7}

In the Common Law system, the role of specific performance has been completely different from the one it plays in the Civil Law system. This is because "traditional goal of contract remedies has not been compulsion of the promisor to perform his promise, but compensation of the promisee for the loss resulting from breach."\textsuperscript{8} Damages were found to be adequate for achieving this goal. Therefore, the Common Law will not endorse specific performance so long as "damages would be adequate to protect the expectation interest of the injured party."\textsuperscript{9} The remedy of specific performance remains an exceptional one, available only through the court's discretion.\textsuperscript{10}

The limitation on availability of specific performance in the Common Law through the sufficiency of damages\textsuperscript{11} is not exhaustive. Specific performance will not be granted in case of uncertain terms of contract on which the remedy would have to be based.\textsuperscript{12} The remedy may also be refused "if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court."\textsuperscript{13} Furthermore, specific performance will not be
decreed if it will result in unfairness because of the contract's having been induced by mistake, or the unreasonable hardship or loss to the obligor or a third person, or when the exchange is grossly inadequate or other terms of the contract unfair. However, specific performance, otherwise available, will not be denied in spite of the terms of the agreement if its denial will cause unreasonable hardship or loss to the aggrieved party. Specific performance will be denied also when such a performance is deemed difficult to be supervised or when in the cost-benefit analysis, such a supervision of the performance is found disadvantageous.

The disparity in treatment of specific performance in the two legal systems, however, is not as much in practice as in theory. This is because in the Civil Law jurisdictions an aggrieved party will prefer not "to bring a claim for specific performance, waiting to obtain a judgement and then attempting to levy execution. This would be much too expensive in terms of time, effort and money. Rather, an aggrieved party will procure a substitute performance and then claim damages. In practice, he thus will act like his brother in England or in the United States."

On the other hand, the restrictions on the availability of specific performance lost some of their severity in the Common Law jurisdictions, particularly in the United States, where the Uniform Commercial Code provides for a broader application of the remedy then in Common Law.
B. SPECIFIC PERFORMANCE IN THE UNIFORM LAWS

1. THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code is thought to have expanded the availability of specific performance in the United States.\(^21\) Indeed, the UCC § 2-716, besides authorizing replevin, allows a decree of specific performance not only where the goods are "unique", but also in "other proper circumstances".\(^22\) The drafters of the UCC expressly wished this provision to "further a more liberal attitude than some courts have shown in connection with specific performance of contracts of sale."\(^23\)

The scope of the "other proper circumstances" which warrant specific performance under the UCC was perceived by the Code's drafters to be broad. The inability of an aggrieved buyer to cover, in the opinion of the drafters, is a "strong evidence of other proper circumstances."\(^24\) This apparently indicates the actual or potential broadening of the sphere of application of specific performance.\(^25\)

Apart from the UCC § 2-716, there is another provision which gives the result of specific performance when the breach becomes evident due to the insolvency of the seller. In this case, the UCC § 2-502 gives the aggrieved party the right to recover goods identified to the contract within ten days after the seller has received the first instalment of the price and became insolvent.\(^26\) The first limitation to this remedy is clear. The ten-day period is a short time for
the goods to be identified when they have not been identified to the contract earlier. If a buyer advances money for the manufacture of goods, the identification is most likely to occur too late for the buyer to benefit from the provision of § 2-502.27 The buyer's right under this provision is also likely to be limited by the possibility that such rights will be subordinated to the rights of trustees or other creditors in case of bankruptcy of the seller.28

Finally, specific performance by the buyer in terms of payment of the contract price can also be secured under the UCC.29 This remedy, however, is limited to cases where resale is impracticable except when the buyer has either accepted the goods or the goods are destroyed after the risk of loss has passed to him.30

The history of the application of the specific performance provisions of the UCC, therefore, points to a two-way tendency. While there is no doubt that the drafters of the UCC sought to expand the availability of the remedy, there has not been a complete turn-about from the Common-law reluctance towards enforcing specific performance either because the courts have not met the expectations of the UCC drafters, or that the limitations on the availability of the remedy31 are too stringent to allow a wider access to it. This is probably best explained by the fact that the drafters of the UCC did not intend to bring about a
revolutionary change in favor of specific performance.32 Rather, they intended to initiate "an evolutionary liberalization of specific performance in Llewellyn's 'grand style' of the common law...(which) favors a case by case development attuned to modern business needs which change as those needs change."33

2. THE GENERAL CONDITIONS OF THE CMEA

In the context of the role of remedies for breach of contract in the intra-CMEA trade, an important distinguishing feature of the CMEA needs to be noted in the very beginning. The "main goal of economic integration (in the Socialist system) is not so much the creation of a common market,34 but rather the coordination of national planning."35 Hence, most contracts are concluded between the foreign trade organizations of the CMEA Member Countries on the basis of agreements between States, which in turn are the results of such States' endeavour to conduct external (as opposed to domestic) economic activities which are in harmony with their national economic plans. This serves as a ground for the demand of "real performance" of contracts. As in the case of domestic contracts, in the event of a breach of contract in the intra-CMEA trade, both the aggrieved party and the party in breach would "deviate from their planned tasks if one does not perform and the other does not insist on performance."36
insistence on specific performance of contracts in the Socialist system is explained by the very term "non-market economy" attributed to a Socialist State. There is no market for facilitating either cover or resale in a Socialist economy. An aggrieved buyer does not have a market from where he can procure substitute goods and claim damages nor can an aggrieved seller dispose of his goods in a resale. The following remark of a Socialist jurist clarifies further the significance of specific performance for the CMEA:

"The fundamental principle on which the contractual relations of the enterprises of the socialist countries rely is that of 'real performance' (specific performance). This will say the purpose of a contract is the satisfaction of real, i.e., genuine needs: buyer's interest is attached to the delivery of goods specified by the contract. Notwithstanding any disturbance interfering with performance, the parties have to adhere to real, actual performance, for which no substitute, no 'ersatz' such as cash or damages will do."\(^{37}\)

The diametrically opposite stand of this position to that of the Common Law on specific performance is evident. Therefore, it follows that, under the General Conditions, specific performance is the basic remedy for breach - damages being an exception.

Under the General Conditions, a buyer is entitled to a penalty from the seller for the latter's delay in delivery.\(^{38}\) A delay in delivery of technical documents without which the capital items delivered are inoperable also entails payment of a penalty by the seller in the same manner as in the case of delayed delivery of goods.\(^{39}\)
The same procedure is to be followed where the two delays occur in the reverse order, i.e., the delay in the delivery of goods is followed by a delay in the presentation of technical documents. A penalty is levied also in case of a delay in presentation by the seller of a certificate of analysis of goods intended for processing without which the goods cannot be used. A seller may seek exemption from the payment of penalty on grounds that relieve him from obligation in case of a delay in delivery, although he remains bound by the contractual obligations even if he is wholly or partially exempted from the payment of penalty.

The buyer is allowed to rescind the contract when the delay in question exceeds 4 to 6 months depending on the nature of goods. The buyer is not required to wait for this period if the seller informs him of his inability to deliver within this time.

In case of delivery of complete plants and installations, the parties are required to stipulate times for renunciation in each individual case.

The General Conditions do not require a buyer to prove his cessation of interest to renounce the contract once the mandatory waiting period expires. On the other hand, cessation of interest does not authorize renunciation by the buyer before the expiry of the waiting period. This is a deviating position from that of the national laws of the CMEA Member Countries.
On renunciation of the contract, the buyer may either accept a 8% penalty for a delay, or bring in a claim for damages which will be at least 4% of the value of the goods unless a higher loss is proven.49

In case of a short-delivery, the buyer may either demand the delivery of the missing quantity or return of the amount paid for it.50

In case of a delivery of defective goods, the buyer may either demand remedy of the defects, or a corresponding reduction in price.51 When the defective goods cannot be used for their designated purpose without repair, and the buyer opts to demand repair from the seller, the former is entitled to make a claim for penalty in accordance with the schedule52 with the date of claim as the starting point and the date of completion as the limit for the purpose of calculation of the penalty.53 The General Conditions do not authorize a rescission of the contract for delivery of defective goods,54 unless otherwise provided in a bilateral agreement or contract.55

The seller may receive a penalty equivalent to 2% of the returned goods if the buyer refuses to accept.56 The possibility of the breach of non-payment of the price by the buyer is practically ruled out in the intra-CMEA trade where the general mode of payment is cash against documents.57 In case when the payment is made through a letter of credit, the buyer must pay a penalty of 0.05% of the value of the
letter of credit for each day of delay in its opening.\textsuperscript{58} The seller may rescind the contract if the buyer fails to open the letter of credit within an additional time which he is obliged to allow.\textsuperscript{59}

Therefore, the remedy provisions of the General Conditions, although not explicitly mentioning specific performance, establish a regime whereby the parties are obligated to perform, which can be supplemented by payment of penalties for delays, or repair/replacement of goods as well as non-payment for the corresponding part of short-delivered goods etc. Only under extremely rare circumstances are the parties allowed to claim damages, terminate the contract or be exempted from performance.\textsuperscript{60}

3. THE UN SALES CONVENTION

The United Nations Convention on Contracts for the International Sale of Goods expressly places specific performance at the head of the list of available remedies for breach of contract.\textsuperscript{61} Article 46(1) of the Convention, dealing with the buyer's remedies, states in clear terms that "(t)he buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."\textsuperscript{62} The preference of the Convention of specific performance is put in more concrete terms in the sub-sections following this\textsuperscript{63} which provide that where the goods do not conform and such a
non-conformity constitutes a fundamental breach, the buyer may either require delivery of substitute goods, may effect the repair himself, or require the seller to repair unless other circumstances make this demand unreasonable.

As for the seller's remedies, the Convention is also clear in its preference of specific performance. Art. 6264 of the Convention authorizes the seller to require from the buyer the payment of the price, acceptance of delivery and performance of other obligations.

That the Convention and the Common law provisions on remedies run counter to each other in terms of preference for one or the other remedy is evident. Even with the attempt by the Uniform Commercial Code at liberalizing the courts' attitude towards specific performance falls far short of the Convention's success in having specific performance established as a generally available remedy in international trade under it.

The adoption by the drafters of the Convention of provisions establishing specific performance as the primary remedy can be explained, ironically not by the advantages on grounds of its merit, but simply by the fact that the Civil Law and Socialist jurisdictions prevailed over others in assigning specific performance a dominant role in the system of remedies under the Convention.65 This is not to say that the drafters were motivated by selfish or nationalistic considerations. It is not unnatural, concedes a participant
of the drafting process, for the drafters to "assume what is familiar is probably better than what is new and strange." Furthermore, there is the practical consideration that "(i)n international trade the law of one's own country gives those familiar with that law substantial 'know how' advantages." However, the Convention attempts to mitigate the burden on the Common Law jurisdictions regarding the enforcement of specific performance through its Article 28 which provides that "(i)f, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

This compromise position, however, has been subjected to criticism, understandably from the supporters of specific performance first and foremost. It did not ensure the full satisfaction of the representatives of the Common Law jurisdictions either. The fact remains, however, that the divergent trends of Art. 28 vis-a-vis the remedy clauses may encourage forum shopping by the parties. On the other hand, the parties who intend to avoid the Convention's provisions which are unfavorable to them or unsuitable to their business, are anyway free to do so under the authority of Art. 6, which provides that "(t)he parties may exclude the
application of this Convention, or subject to article 12, derogate or vary from the effect of any of its provisions."

Specific performance, the preferred remedy under the Civil Law and Socialist jurisdictions, has also been accepted as the preferred remedy under the Convention. However, the Convention is not as rigid as the General Conditions of the CMEA in requiring specific performance. Firstly, there are more allowances for claiming of damages under the Convention than there are under the General Conditions. Secondly, in trying to accommodate the major legal systems' traditions, the Convention left a possibility for the Common Law jurisdictions to continue denying specific performance in a case tried under the provisions of the Convention. This makes the Convention a relatively weaker uniform law compared to the General Conditions. However, the closeness of the legal and economic systems of the Member Countries of the CMEA is a significant element contributing to the uniformity and consistency in the provisions of the General Conditions, which is not the case with the Convention. Therefore, the Convention, representing a much broader spectrum of social and legal systems, cannot be expected to establish the kind of uniformity that the General Conditions have been successful in bringing about.


3. Id.


5. Id., at 503.

6. Id.

7. See generally, Szladits, the Concept of Specific Performance in Civil Law, 4 Am. J. Comp. L. 208 (1955).

8. Restatement (second) of Contracts, Ch. 16, topic 5 (1979); emphasis added.

9. Id., § 359(1).

10. H. Beale, Remedies for Breach of Contract 125-126 (1980); Illustrative is the ruling in Public Water Supply Dist. v. Fowlkes (407 S.W. 2d 642, 647 Mo. App. 1966): "(I)t must be remembered that specific performance is not a matter of right, even when plaintiff's evidence establishes a contract valid at law and sufficient for recovery of damages. Ordering specific performance is a matter within sound judicial discretion of the court..."

     See also Restatement, supra note 8, § 357: "Subject to the rules stated in sections 359-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or threatening to commit a breach of duty."

11. See supra note 9 with accompanying text.

12. The Restatement, supra note 8, § 362.

13. Id., § 263.


15. Id., § 364(1)(b).
16. Id., § 364(1)(c).
17. Id., § 364(2).
18. Id., § 366.

See also § B.1. infra.
21. See Worley, supra note 1 at 129.
22. The Uniform Commercial Code (Official Text of 1972 as amended upto 1986, hereinafter cited as the UCC), § 2-716(1); "Uniqueness" has a broader meaning under the UCC: "Output and requirement contracts involving a particular or peculiarly available source or market" provide ground for the availability of specific performance. This expands the understanding of "uniqueness" which would under the Common law apply only to the like of heirlooms and precious objects of art. See comment 2. The opinion in Eastern Airlines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D.Fla. 1975), e.g., is based on this interpretation.

For an illustration of "other proper circumstances" see the opinion in Colorado-Ute Electric Ass'n v. Envirotech Corp., 524 F. Supp. 1152, 1159 (D. Colo. 1981) (Specific performance granted in case of a contract for sale of a precipitator, extremely large, complex, technically intricate and essentially irreplaceable after put into place).

23. Id., Comment 1 to § 2-716.
24. Id., Comment 2; this was followed e.g., in Kaiser Trading Co. v. Associated Metals and Minerals Corp., 321 F. Supp. 923 (N.D. Cal. 1970), appeal dismissed 443 F.2d 1364 (9th Cir. 1971).

25. However, disappointments have been voiced that this is actually not the case. Analyzing the outcome of three cases White and Summers point out that "(t)he outcome of these cases are correct under the Code, but the direction in which they point is unclear... (i)f other courts persist in similar resurrection of common law
and equity doctrine of this kind, it seems likely that
the Code will meet with no more success than the USA
(Uniform Sales Act) did in its attempt to expand the
availability of specific performance." J. White & R.


27. See White & Summers, supra note 25, at 239.

28. Id.

29. The UCC, supra note 22, § 2-709.

30. Id., comment 2.

31. E.g., that of the ten-day limit in case of the UCC § 2-
502; see supra notes 26-28 with accompanying text.

32. See Greenberg, Specific Performance Under Section 2-716
of the Uniform Commercial Code: "A More Liberal
Attitude" in the "Grand Style", 17 New Eng. L. Rev. 321,
353 (1982).

33. Id.

34. Compare the aim of European Economic Community:
"The Community shall have its task, by establishing a
common market and progressively approximating the
economic policies of Member States, to promote
throughout the Community a harmonious development of
economic activities, a continuous and balanced
expansion, an increase in stability, an accelerated
raising of the standard of living and closer relations
between the States belonging to it." See the Treaty
establishing the European Economic Community, Article 2.

35. Eörsi, Contractual Remedies in Socialist Legal Systems,


37. I. Szász, the CMEA Uniform Law for International Sales
167 (1985), (hereinafter cited as Szász).

38. The General Conditions for the Delivery of Goods between
Organizations of Member-Countries of the Council for
Mutual Economic Assistance (GCD CMEA, 1968/75, in the
Wording of 1979), § 83(1); (hereinafter cited as the
General Conditions). An English translation of the text
of the General Conditions is appended to T. Hoya, East-
The rate of the penalty is fixed by § 83(2) as follows:
- for the first 30 days after the due date has expired...0.05% of the value of undelivered goods per day
- for the next 30 days...0.08%
- thereafter...0.12%

The total amount of penalty however, may not exceed 8% of the value of goods involved. Id., § 83(3).

For a fixed term contract, the penalty is 5% of the value of undelivered goods, unless otherwise provided under a bilateral agreement or contract. Id., § 86(1).

39. Id., § 84; if the delay in presentation of the document occurs after the delay in delivery of the goods themselves, the former is considered to be a continuation of the delay for the purpose of calculation of the penalty.

40. Id.

41. Id., §§ 84-A(1) and 84-A(2).

42. See, Szász, supra note 37, at 159.

43. The General Condition, supra note 38, § 85(1).

44. Id., § 85(2).

45. Id., § 85(3).

46. See Hoya, supra note 38, at 194.

47. See Szász, supra note 37, at 160.

48. E.g., § 225 of the Civil Code of the Russian Soviet Federated Socialist Republic (RSFSR) provides inter alia that "(i)f the performance is no longer of interest to the creditor because of delay on the part of the debtor, the creditor may refuse to accept the performance and may demand compensation for damages."

49. The General Conditions, supra note 38, § 85(4): The right to damages, however, remains restricted to attributable delay, see Szász, supra note 37, at 160.

50. Id., § 75(1).
51. *Id.*, § 75(2); if the aggrieved buyer demands repair of defective goods, the seller is to effect the repair immediately at his own expense, or replace the defective goods. *Id.*, § 75(3).

52. *Id.*, § 83(2), see supra note 38.

53. *Id.*, § 75(4).

54. This is another case of departure from the national laws of the CMEA Member Countries. The Civil Code of RSFSR, supra note 46, § 246 e.g., provides that in case of a delivery of defective goods, "...the buyer may, at his election, demand either substitution of a proper article...for the article of improper quality; or a proportionate decrease in the purchase price; or removal of the defects...or rescission of the contract with compensation to the buyer for the damages..."

55. The General Conditions, supra note 38, § 75(4).

56. *Id.*, § 86-A; this sub-section refers to the goods in respect of which the buyer has presented a claim. He is not allowed to return the goods without the seller's consent, except in the case of a continued shipment by the seller despite repeated protests. *Id.*, § 78(2).

57. See Szász, supra note 37, at 178.

58. The General Conditions, supra note 38, § 67(1).

59. *Id.*, § 67(3).

60. *Id.*, §§ 68(1) and 68(2): The grounds for exemption are partial or complete non-performance due to circumstances of insuperable force, i.e., "circumstances which arose after the conclusion of the contract as results of events of an extraordinary character, unforeseen and unavoidable by a party."

The Parties are also relieved of their liability if the non-performance occurred following a: "bilateral agreement, or from the contract or from the substantive law of the seller's country applicable to a given contract." *Id.*, § 68(3).


Art. 46(1); (hereinafter cited as the Convention).

63. Id., Articles 46(2) and 46(3).

64. Id., Art. 62 states: "The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this remedy."

65. See Farnsworth, Damages and Specific Relief, 27 Am. J. Comp. L. 247, 249 (1979).

66. Eörsi, Problems of Unifying Law on the Formation of Contracts for International Sale of Goods, 27 Am. J. Comp. L. 311, 315 (1979); Mr. Eörsi (Hungary) was closely connected with the drafting of the Convention and was elected the President of the Diplomatic Conference that adopted the Convention in 1980. See UN Doc. A/CONF. 97/18 of April 10, 1980.

67. Eörsi, Id.

68. The Convention, supra note 62, Art. 28.


70. See Farnsworth, supra note 65, at 249: Professor Farnsworth expresses his surprise that "it has not been possible to work out a compromise that would be satisfactory to countries with other legal traditions and different economies (than that of the Civil law and Socialist countries).

71. The Convention, supra note 62, Art. 12 concerns the statute of fraud, and as such does not concern the subject under discussion.
CHAPTER V

OTHER REMEDIAL PROVISIONS IN THE UNIFORM LAWS

A. LIQUIDATED DAMAGES AND PENALTY

Motivated either by the inconvenience and difficulty in proving a loss, or apprehending improbability of obtaining an adequate remedy in case of a breach and to limit liability to a known quantified figure, the parties to a contract may choose to include therein a provision stipulating the payment of a fixed sum of money in case of a default. Such stipulations, when valid under the law, are termed as clauses for "liquidated damages" in the Common Law. Identical stipulations, but void under law, are known as "penalties".¹

In agreement with the compensatory principle of the Common Law, stipulation for the payment of a fixed sum of money by the debtor in case of a breach is enforceable but only if the amount thus stipulated reflects a just compensation, not an inducement to perform or punishment for non-performance.² However, the task of distinguishing a compensatory clause from a punitive one is not an easy one.³ The Uniform Commercial Code⁴ provides the following guidelines for valid liquidated damages:

74
1) The damages must be a reasonable amount in the light of anticipated or actual harm,
2) the loss must be difficult to prove, and
3) the possibility of obtaining an adequate remedy otherwise must be inconvenient or unfeasible.

An unreasonably large amount of damages is a suspect as penalty, and therefore, void under the UCC. An unreasonably small sum may also lead to the stipulation being declared as unconscionable, hence void.

While the emphasis on the reasonableness of the agreed sum is quite pronounced in the UCC, the difficulty or impossibility of proving losses does not appear to be an essential element. While the former alone can lead to the clause declared void, the latter itself does not always constitute a sufficient basis for such a declaration. Moreover, since the possibility of proving damages would proportionately decrease the necessity for stipulating liquidated damages, this requirement is somewhat superfluous. The same rationale may be applied to the third requirement, i.e, the inconvenience or unfeasibility of obtaining adequate damages. Easier access to adequate damages would also render such a stipulation unnecessary.

Therefore, it is the reasonableness test that stands clearly as the key factor in determining whether a stipulation for liquidated damages is valid in accordance
with the just compensation principle, or void as a penalty or safeguard for securing performance.

The UCC allows parties to limit their liabilities exclusively\(^8\) to liquidated damages if they so wish, and limit or exclude consequential damages unless this is unconscionable.\(^9\) In the case of consumer goods, for instance, the limitation of consequential damages for injury to the person is \textit{prima facie} unconscionable\(^10\) but that of a loss in the sphere of commercial transactions is not.\(^11\) The UCC expressly intends to leave the parties "free to shape their remedies to their particular requirements,"\(^12\) and give effect to "reasonable agreements limiting or modifying remedies."\(^13\)

Under the General Conditions of the CMEA,\(^14\) the fixed payment by the parties have two prominent characteristics that distinguish them from the category of liquidated damages as understood in the Common law or the UCC. Firstly, the fixed-payment is generally set not by the parties but by the General Conditions.\(^15\) The party in default is required to pay a set percentage of the value of goods involved in breach of late delivery of goods, technical documents without which the goods cannot be used for their designated purpose, or certificate of analysis for goods intended for processing, if agreed upon furnishing of the same by the seller,\(^16\) or delivery of qualitatively non-conforming and unusable goods, \(^17\) and for the period the buyer rightfully
abstains from taking repeated deliveries of non-conforming goods. A set percentage of the sum involved either in a delayed opening of letter of credit or wrongful demand of return of the paid amount is also payable as a penalty by the party in default. The upper limit of the penalty of the first category is 8% of the value of goods involved, whereas that of the second category is 5%. These set amounts obviously do not reflect either a just compensation or the appreciation of the difficulty of proving losses. They are, in marked contrast to the liquidated damages under the UCC or the Common Law, mechanisms for exhorting performance and discouraging cancellation of the contract. Penalty for all the above breaches are exclusive; the aggrieved party is not entitled to claim damages in these cases. The General Conditions also contain provisions for penalty in case of the buyer's returning without the seller's consent, defective goods in respect of which he has brought a claim and in case of failure of the seller to notify or delayed notification by him of shipment of goods.

Penalties have been held to be characteristic of remedial provisions of the Socialist system. However, the concept of penalties are not altogether unfamiliar also in the Civil Law system. This is explained by the fact that both these systems emphasize on performance of contractual obligations, rather than payment of damages in case of a
breach. The penalties serve as important factors in insuring such performance and avoiding cancellation as long as possible.

The UN Sales Convention\textsuperscript{28}, departing from the remedy provisions of the General Conditions in this respect, does not provide for any penalties.\textsuperscript{29} This is a major difference between the remedy provisions of the two instruments\textsuperscript{30} both of which prefer specific performance over damages as remedies. This is one of the rare instances the position of the Convention on remedies coincides with that of the UCC.

B. GRAÇE PERIOD

The "grace period", over and above the stipulated time allowed to a party in minor breaches for performance within that time is a feature of the German law.\textsuperscript{31} The UCC contains a roughly comparable provision whereby the seller is to be allowed "a further reasonable time" to substitute goods upon seasonably notifying the buyer of his intention to do so.\textsuperscript{32} However, this allowance is conditional upon the seller's having had reasonable grounds to believe that his tender would be acceptable with or without money damages.\textsuperscript{33}

Although in the Socialist system, the practice of agreeing upon a new delivery date after the expiry of the stipulated one is known,\textsuperscript{34} the General Conditions do not contain any provision pertaining to the grace period. However, the mandatory waiting periods for completion of
delayed performance envisaged in the General Conditions\textsuperscript{35} appear to pursue the same goal as that of the grace period in the Civil Law, i.e., inducing performance. On the other hand, the General Conditions impose a penalty on the belatedly performing party which makes their relevant provision different from the grace period.

The Convention has adopted the concept of grace period to facilitate performance in the events of breaches which are not fundamental.\textsuperscript{36} The grace period in the Convention has a two-fold purpose. First, it allows the breaching party to perform his obligations even after a delay. On the other hand, this serves as a first step for the aggrieved party to cancel a contract\textsuperscript{37} since once the grace period has expired, or when the party in breach expresses his inability to perform within the grace period, the former can cancel the contract.\textsuperscript{38}

The Convention does not bar the parties' claim to damages for delay while the grace period is in effect.\textsuperscript{39} However, the courts or tribunals adjudicating a dispute may not grant any grace period to a breaching party when the aggrieved party resorts to a remedy.\textsuperscript{40}

C. REDUCTION OF PRICE

The reduction of price is one of the self-help remedies allowed both under the General Conditions\textsuperscript{41} and the Convention.\textsuperscript{42} The former allows reduction of price as an
alternative to the demand by an aggrieved buyer for rectifying the defects of the delivered goods. The reduction of price may include a penalty subject to the agreement of the parties. The Convention allows the buyer to reduce the price proportionately to the value of the goods involved at the time of delivery. However, unlike the General Conditions, the Convention does not authorize reduction as an alternative to the demand for rectifying the defects. The buyer may not reduce the price if the seller can replace the goods within the delivery time without causing the buyer any unreasonable inconvenience or unreasonable expense. Under the same conditions, the seller may also correct the non-conformity even after the delivery.

The difference between these provisions and the nearest provision of the UCC is that a reduction in price is allowed under the latter for any breach, and the price deducted represents either whole or partial damages of the buyer.

C. RESCISSION, CANCELLATION, REVOCATION OF ACCEPTANCE AND AVOIDANCE

The term rescission has been used by the Common Law courts at different times to mean different things. On various different occasions, the term was used in the sense of rejection and revocation of acceptance as understood by
the UCC, or the act of the buyer's returning the goods, or the buyer's cancellation of the executory terms of the contract and his cause for action of fraud. The UCC recognizes the confusion surrounding these terms and introduces different categories to explain the separate effects of these terms so as to protect a party from unintentionally losing his rights through "ill-advised use of such terms as 'cancellation', 'rescission' or the like."53

Under the UCC, the parties to a contract may "terminate" a contract pursuant to a contractual or legal provision with the effect that all of the remaining obligations of the parties after termination are nullified, but the rights arising from prior breach or performance remain valid.

Distinguishable from "termination" is "cancellation", which occurs due to a breach committed by anyone of the parties. In case of a cancellation, the party undertaking the action retains the rights to remedy based on the whole of the contract, and the balance performance. However, if expressed in sufficiently clear terms, claims of damages for antecedent breaches may also be discharged upon cancellation.

"Rejection" and "revocation of acceptance" are identical in their effects. The difference between these two terms are that the first is an action taken before the
acceptance has occurred. The UCC states that unlike in the pre-Code situations, a buyer is not obliged to choose from rejection or revocation of acceptance as appropriate, and claim for damages.58

In the Socialist doctrine, rescission is a "unilateral declaration, whereby the contract is terminated ab initio,"59 i.e., the contract is treated as if it never existed.60 Rescission is a final step, resorted to when specific performance appears unfeasible or inappropriate.61

The "termination by notice" is also a "unilateral action whereby the contract is voided ex nunc." 62 The remaining performance, however, is subject to restoration if necessary.63

The General Conditions, which unequivocally emphasize the obligations of the parties to perform, are generally hostile to rescission. Nevertheless, they do authorize rescission and cancellation under certain circumstances.

In case of a fixed-term contract,64 the buyer is authorized to rescind the contract, if he so chooses, for a defective delivery if the goods are not either replaced or repaired within the due date of delivery.65 He can then demand a penalty from the seller or require him to pay compensation for losses, if the latter is not prohibited by a bilateral agreement or the contract.66 Also in case of a fixed-term contract, the buyer may rescind the contract for late delivery and demand penalty or damages.67
Under the General Conditions, the rights of the buyer to reject delivery in an installment contract is severely restricted. A claim in respect of one of the consignments does not entitle the buyer to reject subsequent consignments, unless the seller repeatedly delivers defective goods. The buyer is expressly forbidden to return the goods in respect of which he has lodged a claim, without the consent of the seller. A violation of this provision renders the buyer being penalized to the amount of 2% of the value of returned goods. Only upon repeated deliveries by the seller of defective goods despite the buyer's demand to suspend delivery will entitle the buyer to a waiver of this requirement.

Rescission of a contract for qualitatively non-conforming delivery is authorized under the General Conditions if a bilateral agreement or the contract gives the buyer a right to cancel but does not specify the conditions for his exercising this right. Such a cancellation, however, is conditional upon either the seller's inability to remedy a defect, or the buyer's inability to use the goods for their designated purpose even on reduction of the price.

For a delayed delivery, the buyer may cancel the contract upon expiry of a mandatory waiting period for performance. However, if the seller in writing notifies his inability to perform during that period, the buyer can
also cancel the contract before the expiry of such a period. The buyer may then demand the maximum penalty amount for delay (8% of the value of the goods involved) or damages, which is limited to 4% of the value of goods unless the buyer can prove a higher loss.

The Convention uses the term "avoidance" of contract which has the effect cancellation. The buyer or seller can recover the difference between the market price and the contract price whether or not a substitute purchase or a resale has been actually made. The grounds for avoidance are a) fundamental breach and b) the expiry of the grace period within which the other party has not performed. The avoiding party does not have to wait for the expiry of the grace period if the other expresses his inability to perform within that time. Like the UCC, the Convention authorizes avoidance in case of breaches other than delay (for which a grace period is already a reasonable allowance) only when the aggrieved party avoids the contract within a reasonable time after the breach has been or ought to have been discovered by him. For breaches other than late delivery, when a grace period had been granted and which expired, the provision applicable to the former, i.e., avoidance following expiry of the grace period for delivery will also apply to the latter.
1. The Common Law terminology concerning these stipulations may give rise to confusion, especially in a comparative study which includes the Civil Law system as one of the subjects of comparison. The German and French terms for such stipulations, in principle enforceable by courts, are \textit{vertragsstrafe} (contractual penalty) and \textit{clause pénale} (penal clause). Therefore, the Civil Law penalty provisions are comparable to those of liquidated damages in the Common Law and at the same time, those of penalties. See Treitel, Remedies for Breach of Contract (courses of Actions Open to the Part Aggrieved), VII-16 Int'l. Encycl. Comp. L. 90. See also infra notes 2 and 5, and 27 with accompanying text on the voidability of penalties in the Common Law and its use in the Civil Law respectively.

2. Damages are not recoverable if they represent a penalty because the purpose of awarding the contract damages is to "compensate the injured party", \textit{Restatement (Second) of Contracts} §355, comment (a). Moreover, penalty clauses are also "unenforceable on the ground of public policy". \textit{Id.}, §356 (1). See also, \textit{Id.} comment (a). Furthermore, the liquidated damages are not to be used as a deterrent against non-performance. See Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554, 555 (1977).


5. \textit{Id.}, \textit{See} also comment 1 to § 2-718.

6. \textit{Id.},; the Restatement position on this is identical, \textit{see} Restatement, § 356, comment (d).

7. See Goetz & Scott, supra note 2, at 559: Most of the dealing with liquidated damages emphasize on the reasonable of the damages, sometimes hardly touching upon the issue of difficulty of proving a loss; see \textit{e.g.}, the opinion in Equitable Lumber Corp. v. IPA Land Develop. Corp., 381 N.Y.S. 2d 459, 344 N.E. 2d 391 (1976).

8. The UCC, supra note 4, §§ 2-719(1)(a), (b) and 2-719(2).

9. \textit{Id.}, § 2-719(3).
10. Id.

11. Id.

12. Id., comment 1 to § 2-719.

13. Id.


16. The General Conditions, supra note 14, §§ 83, 84 and 84-A.

17. Id., § 75.

18. Id., §§ 80(2) and 80(3).

19. Id., §§ 67(1) and 67(3).

20. Id., § 58.

21. Id., § 83(3).

22. Id., §§ 67(1) and 58.

23. Id., § 67-C; there are however breaches that can be remedied by payment of damages instead of penalty. E.g., when the buyer cancels a contract after protracted delay, he can either accept the maximum 8% penalty for delay, or receive damages up to 4% of the value of non-delivered goods unless he proves a higher damage, id., § 85(4). There are also situations when the aggrieved party can demand only damages and no penalty; see Hoya, supra note 14, at 215.

24. See infra notes 60-63 with accompanying text.

25. The General Conditions, supra note 14, § 87(1); the amount of the penalty is 0.1% of the value of goods, but not less than 10 rubles or more than 100 rubles per shipment.


27. E.g., the French Civil Code Art. 1152 and the German Civil Code Art. 342 both authorize stipulation of penalty terms, the difference between these provisions and those of the General Conditions being that the penalties are set by the parties in the former whereas the latter sets the penalties as part of the relevant provisions.


29. Id., Art. 45 (buyer's remedies) and Art. 61 (seller's remedies) which serve as indices for the remedies do not contain any provision for penalty.


31. The concept of "Nachfrist" in the German Law provides that so long as performance remains possible, the creditor may give the debtor a notice requiring performance within a reasonable time, after which he is free not to accept performance (The German Civil Code, Article 326). See also Treitel, supra note 1, at 115. The French Law has a slightly different version of the same concept under which the courts may authorize such an additional time for performance (delai de grace), id. at 118.

32. The UCC, § 2-508(2).

33. Id.


35. The General Conditions, supra note 14, § 83(2).

36. The Convention, supra note 28, Articles 49(1)(a) and 47 for the seller's breach and Articles 64(1)(a) and 63 for the buyer's breach.

37. Id., Articles 49(1)(b) and 64(1)(b).
See infra notes 80-82 with accompanying text.


39. The Convention, supra note 28, Articles 47(2) and 63 (2).

40. Id., Articles 45(3) and 61(3).

41. The General Conditions, supra note 14, § 75(2).

42. The Convention, supra note 28, Art. 50.

43. The General Conditions, supra note 14, § 75(2).

44. The General Conditions, supra note 14, § 75(6).

45. The Convention, supra note 28, Art. 50.

46. Id., Articles 50 and 37.

47. Id., Articles 50 and 48(1).

48. The UCC, supra note 4, §2-717: If, however, a contract provides for repair or replacement by the seller of defective goods in accordance with § 2-719 (1)(a)and (b), the buyer is obliged to allow the seller to do so before he can reduce the price.


50. The UCC, §§ 2-601 and 2-608.

51. See White & Summers, supra note 49, at 295.

52. See The UCC, supra note 4, § 2-608, comment 1.

53. Id., § 2-720, comment.

54. Id., § 2-106(3).

55. Id., § 2-106(4).

56. Id.; see also id., § 2-711(1).

57. Id., § 2-720, comment; for such an effect, the cancellation of the contract must accompany an express declaration that the action taken is "without reservation of rights" or an equivalent clause.

58. Id., § 2-601, comment 1, and §2-608, comment 1.
59. See Börsi, supra note 26, at 162.

60. However, the General Conditions appear to deviate from this. The term rescission frequently appear to imply the same effects that cancellation has under the UCC, see supra notes 55-57 with accompanying text. See also infra note 73.

61. See Börsi, supra note 26, at 162-163.

62. Id., at 162.

63. Id.

64. The fixed-term contracts are those contracts "by virtue of an express stipulation therein or from the content thereof it clearly follows that in case of violation of the time of delivery the contract shall be rescinded automatically or the buyer shall have the right to renounce the contract immediately." The General Conditions, supra note 14, § 11-A. The fixed-terms contracts are concluded in the intra-CMEA trade on relatively rare occasions; see Hoya, supra note 14, at 194.

65. The General Conditions, supra note 14, § 77(1).

66. Id.

67. Id., §§ 86(1) and 86(2).

68. Id., § 80(1).

69. Id., § 78(1).

70. Id., § 86-A.

71. Id., § 78(2).

72. Id., § 75(7); this provision is a recent addition to the General Conditions, having been included in 1975. See Hoya, supra note 14, at 210. A similar provision is contained in the General Conditions in respect of discovery of the defects during a guarantee (warranty) period; see The General Conditions, supra note 14, § 31(8).

73. Id., § 85(1); although the General Conditions use the term "renounce" instead of "cancel" in this case, the penalty/damages provisions listed in notes 75-76 infra indicate that the effect of the action coincides with that of cancellation in general.
74. Id., §85(2).
75. Id., § 85(4).
76. Id.

77. The Convention, supra note 28, Articles 49 and 64.
78. Id., Articles 75 and 76(1).

79. The Convention, supra note 28, Article 25 defines a fundamental breach as one which "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the other party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

80. See supra § B.
81. Id., Articles 49(1)(b) and 64(1)(b).
82. The UCC, supra note 4, §§ 2-602(1) and 2-608(2).
83. The Convention, supra note 28, Articles 49(2)(b)(1) and 64(2)(b)(i).
84. Id., Articles 49(2)(b)(ii) and 64(2)(b)(ii).
CHAPTER VI

CONCLUSION

The foregoing enumeration and analysis of the remedial provisions of the three major uniform laws and the legal systems concerning the sale of goods amply indicate that the two major remedies for breach of contract, namely, damages and the specific performance occupy markedly different positions in the hierarchy of remedies in the Common Law and the UCC on one hand, and the Civil Law, the Socialist Law, the General Conditions and the Convention on the other. However, there are differences in the treatment of these remedies within these groups themselves.

Damages are the primary remedy both under the Common Law and the UCC. However, the UCC is more open to specific performance as a remedy than is the Common Law. At the same time, although the Civil Law recognizes the primacy of specific performance, in practice damages are awarded by the courts in a large number of cases. Therefore, there is a distinct tendency in these two groups of laws towards the closing the gap in the usage of these remedies. The Socialist legal system in general puts more restrictions on substituting specific performance with damages. The General
Conditions are stricter than any one of these laws in enforcing specific performance. Although even the General Conditions are progressively recognizing the importance of damages as a viable alternative to specific performance for remedying certain kinds of breach, it remains by far the most restrictive of all the legal systems examined as far as the award of damages is concerned.

The Convention's approach towards these two remedies is more balanced than that of any of the legal systems or the uniform laws, although its preference for specific performance is quite pronounced. Moreover, the Convention leaves the possibility open for the courts of the Common Law jurisdictions to deny specific performance unless they would have granted the same under their own laws.

The accommodative approach of the Convention which some perceive as its weakness, nevertheless insures a broader acceptability of the Convention. Since without the escape clause on the specific performance, the parties accustomed to the award of damages could derogate from specific provisions of the Convention or exclude its applicability altogether, the inclusion of the former is somewhat superfluous.

Despite the shortcoming mentioned above, however, the Convention appears to have chosen a cautious but generally agreeable approach to deal with one of the most difficult
problems of unification of international sales law - that concerning the remedies for breach of contract.

As concerns the other uniform laws, there are distinct signs that the change in the economic strength and priorities of the Socialist countries have given rise to the necessity of gradually relaxing the restrictions on the availability of damages under the General Conditions, whereas the UCC in the United States urges a more liberal allowance of specific performance. These factors indicate that in the future, perhaps not too remote, the approximation of the remedial provisions of these two apparently contradicting systems will come about as a result of the endeavour of these laws to seek more pragmatic and efficient solutions to the problems of international sale of goods that are endemic to any legal system.