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COMMON LAW INSTITUTIONS IN THE UNITED NATIONS SALES CONVENTION

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SUMMARY: *Introductory remarks;* I. *General Provisions,* 1. *The Principle of Good Faith (Article 7),* 2. *The "Reasonable Person" Criterion,* 3. *Usages;* II. *Formation of contract,* 1. *Revocation of Offer,* 2. *Additional Conditions at Acceptance;* III. *Sale of Goods,* 1. *Conformity of Goods with the Contract,* 2. *Fundamental Breach of Contract.*

Introductory remarks

To the great satisfaction of many, among whom by all means are Professor Barrera Graf and the author of this article, the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna in 1980 (and called because of that the Vienna Convention,[1] has entered into force on January 1, 1988. Among the states which have ratified this Convention until the end of 1986 was Yugoslavia and many are happy that Mexico recently ratified it too.

The draft of the Convention was prepared within the United Nations Commission on International Trade Law (UNCITRAL). Professor Barrera Graf was the chairman of the UNCITRAL working group form 1970 to 1977, which was entrusted the task of drafting the Convention, so that he deserves a great deal of credit for its creation. In spite of the fact that the existing Hague Uniform Law on International Sale of Goods of 1964 served as a starting point (which according to ones facillitated the matter, while according to others made it more difficult), there is no doubt that the task of the working group of drafting the Convention has been rather complex. Only exceptional knowledge of his own and the comparative commercial law,

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[1] This name, which has already became familiar in many parts of the world, may produce slight confusion unless the name Vienna Convention is added by the words "on International Sale of Goods" (or simply "Vienna Sales Convention"). The reason for this remark lies in the well known fact that the name Vienna Conventions for many years has widely been used for the conventions in the field of public international law adopted in Vienna in 1961 and 1963.

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coupled with high erudition, inviolable human integrity and enormous patience of Professor Barrera Graf have made it possible to finish successfully this job within a ten year period, which is not a long time for texts of such kind and importance.

The world has thus been presented in 1980 the Convention on International Sale of Goods, which in its major part was a compromise between the common law and civil law systems, although some provisions have been introduced into it as a concession to developing countries[2] or to the ones where the written form was required for contracts on international sale.[3]

Theoreticians were fast in explaining the provisions of the Convention, which was only natural to expect, primarily from those participating in its drafting and elaboration. The literature on the Convention is rather enormous in relatively short period of time. There are even a great number of commentaries which only witnesses to the significance ascribed to that document. One of the first commentaries has been writen (in 1981) by the author of this article,[4] while Professor Barrera Graf has participated in writing one of the last.[5] Probably it would not be surprising if a collection of articles in honour of this great world legal scholar would be a specific commentary of the UN Convention on International Sale of Goods, although all those knowing Professor Barrera Graf are aware of the fact that the field of his interests is much wider. He was active in the field of economic law, while also of contracts and civil law in general (both Mexican and comparative), doing that either by teaching the generations of students in Mexico or writing on various subjects of this wide field, providing thus his creative contribution to the development of this branch of law. All this he generously offered to the working group

[2] Article 44 of the Convention provides that in case when the buyer has "a reasonable excuse" he would be free from the consequences provided by the Convention in case when he fails to send the notice on non-conforming delivery.

[3] The written form of contract for the international sale of goods is required, for instance, by the law of the USSR. The Conference decided to draft a reserve clause to article 11 (which provides that "a contract of sale need not be concluded in or evidenced in writing"). The reverse is found in article 96 and it will enable the countries whose legislation requires the written form to ratify the Convention using the reserve.

[4] Vilus, J., *Commentary of the United Nations Convention on International Sale of Goods*, Zagreb, 1981. The Commentary is in Serbo-Croatian with the summary in English.

[5] *Commentary of the International Sales Law — the 1980 Vienna Sales Convention* (Milan 1987).

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helping it to avoid dangerous sandbars which from time to time threatened to jeopardize the whole project.

It is clear to all those dealing with the unification of Economic Law that no document (be it a convention, model law or uniform rules) is perfect. Sometimes it is faster (although difficult) to enact international rules for the areas (or questions) which are not regulated by national legislations, while at other times it is slower (and perhaps even more difficult) to unify different legal rules and the ones which are deeply rooted into legal systems of individual countries. All that, however, is not a barrier, if efforts and good will are invested (which is characteristic for the UNCITRAL activity since its creation), in elaborating efficient rules which are apt to serve international practice. There exists, on the other hand, also strong resistance to the process of unification. It is aleged, for instance, that it is better to leave international trade to merchants and businessmen, since they are capable to formulate their relations in trems of law. It is considered, namely, that any unification in that sphere can only hinder the development, so that it would be better not to raise barriers thereof, instead eventually only undertaking to elaborate unified rules relatin to the conflict of laws (i.e. to applicable law).

There exist in international market, as the argument goes on in relation to the above, numerous general terms and conditions, including the standard contract forms, which are formed not only by private trade companies and associations, but by numerous international organisations as well.[6] If the contracting parties do not refer to some of the existing general terms and conditions or to standard contract forms, the lacunae would be filled up by customs which are extremely important, since it is only understandable that contracting parties know of them, or that they had to know them because they are "widely known in international trade and are regularly honoured by contracting parties relating to contracts of the same kind in the respective trade".[7] These abundant and vorious legal sources are available to the contracting parties in international trade and they represent a genuine *lex mercatoria*, so that there is no need —as considered by a number of scholars studying and reviewing that "law" createad by practice— to create, by using the United Nations or other international organisations, supranational legal rules which, due to specific

[6] In this connection of special importance are so-called Geneva General Conditions prepared under the auspices of the United Nations Economic Comission of Europe.

[7] See article 9 of the Convention.

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(somewhat old-fashioned) way of enactment,[8] can not be amended easily or adapted to changes whicd are today more intensive than before.'

These opinions, undoubtedly interesting, may be contradicted in many ways, but this is not the purpose of the present article. They are stated here in order to better understand the need for unification. The real issue is, therefore, is the unification of the law of international sale necessary and if so, what are its advantages? Wouldn't it be better to go step by step and concentrate efforts to the unification of conflict of law rules in the sphere of international trade, since it would meet the suport by international business world?

Opinions which are stated above denying the need of unification and its significance are justified to a degree. It is also true that the best European legal minds (such as E. Rabel, H. Capitant, H. C. Gutteridge, J. Hamel, to mention but a few names) have come long ago to the conclusion that it is legally illogical to subject international transactions, in the final analysis, to the provisions of national law (referred to by contracting parties in their contract as applicable law). That law, as considered by these legal scholars, is legally coherent, logical and clear, but it is connected to the country of its origin and is adapted to its needs and economic relations. That is why it was only natural that in thirties of the present century within the framework of the International Institute for the Unification of Private Law (UNIDROIT) in Rome[9] the idea has been born to attempt the elaboration of international rules in order to regulate international sale.[10]

[8] This concerns especially the international convention for whose adoption it is necessary to have a diplomatic conference (the same procedure is required for its changes). Whitin UNCITRAL there is quite a number of those who consider that the method of diplomatic conferences should be abandoned since it is not effective and it is very expensive. In case, however, that the convention would be considered as the best method of unification for a particular subject-matter, it is suggested that it should be adopted by UNCITRAL and then sent to the General Assembly of the United Nations which would either confirm the adoption by UNCITRAL or reject it. In case of the adoption the General Assembly would open the procedure for the ratification. This method in UNCITRAL was adopted for the first time in regard to draft Convention on international bills of exchange (1987/1988).

[9] Professor Barrera Graf is the member of the Governing Council of this Institute.

[10] This idea was realized in the Hague in 1964 when two Uniform Laws on International Sale of Goods were adopted.

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In addition to numerous advantages of general terms and conditions, as well as standard contract forms,[11] it is known that they set up frequently a certain form of dictation of the economically stronger party which is imposing such terms and conditions as a prerequisite for concluding the contract. The other (economically weaker) contracting party finds itself (either because the contracting partner has o monopoly or because the other partners offer the same terms and conditions) in a situation to accept *en bloc* the offered conditions. It is therefore not unusual that these rules are called adhesion contracts (or even more adequately-take-it-or-leave-it contracts). All who have studied these contracts and general terms and conditions are aware of the fact that economically stronger party imposes, as aplicable law, the one of his country or the one which suits him the best. The former experience has sufficiently clearly showed that in international transactions only the balance of power is that which gives the substance to legal institutions. It is therefore clear why contracting parties from the developing countries repeat at every gathering that economically unequal partners can not be in terms of law equal to the more powerful ones.

The UN Convention on Contracts for the International Sale of Goods has been greeted by many as a contribution to legal security and a specific step forward in creation of the new international economic order. There were, of course, other views, too. It is quite certain, however, that the UN Convention on International Sale has marked the "end" of the longrange efforts to regulate this important field by means of rules which have been meticulously considered and adopted under the aegis of the United Nations. It is safe to say that this Convention has been waited for fifty years, just as it is certain that there would be no new convention in the following fifty years. Accordingly, it is reasonable to expect that it shall become universal and that it shall strongly influence the conduct of contracting parties in international market in the way of making their contracts in harmony with the provisions of the Convention. Moreover, it is considered that this Convention may become universal rather soon.

[11] The author's doctor's thesis was entitled *Standardized contracts in the international sale of goods* (the thesis was published by the Institute of Comparative Law, Belgrade 1963). The author returned to the same topic once again in her book in which she analyzed in depth various features of *General conditions and standardized contracts* (Belgrade 1976). Both books have been published in Serbo-Croatian with summaries in English.

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All what has been stated above in favour of adopting the Convention does not mean that its rules are perfect and that they could not have been better.[12] This would undoubtedly be a topic of writing and discussion, especially after the Convention enters into force, when, among other questions, that of uniform interpretation would arise. But the time for that shall come and the generations of lawyers which were not engaged in the process of creation of these rules would probably be more impartial in assessing them. It is, however, certain that international arbitration tribunals shall play an important role in accepting and popularizing the Convention.

It is our aim to point out that the UN Convention has accepted numerous institutions of the common law system which would be hard to understand and even harder to accept by the civil law lawyers. The fact that basic institutions in this Convention have been taken over from the common law system (in their pure or somewhat changed form and substance) does not necessarily amount to criticism, although the lawyers of Europe, Latin America and other states having the civil law system would prefer the contrary solution. This should not probably mean a better approach for the international trade, but would certainly facilitate the job for the civil law lawyers. Why this had hapened and why the concessions have been made in favour of the common law system is difficcult to answer, but this is a well known fact. This has been emphasized by American lawyers in course of their struggle in the US Senate to ratify the Convention.[13] J. Honnold has thus pointed out on the occasion that approaches and solutions (results) of the Convention are closer to American Uniform Commercial Code than to any other legal system. And J. Honnold must be trusted in this respect.[14] This was also the standpoint of many other American lawyers.[15] Accordingly, "basic approaches and

[12] In spite of certain obvious shortcomings and weaknesses of the Hague Uniform Laws, some Yugoslav lawyers still are of the views that these laws in many of their provisions were superior to those of the UN Sales Convention.

[13] Treaty Doc. 98-9, Ninety-eigth Congress, April 4, 1984. Hearing before the Committee on Foreign Relations, United States Senate.

[14] At the mentioned session of the Committee on Foreign Relations of the American Senate Professor J. Honnold stated that France promptly ratified the Convention "although French lawyers will tell you that it does note resemble the "Code Napoleón" and, to their palate, has an American flavor" (p. 21).

[15] Therefore, to many it was a surprise that the United States at the time of ratification used the reserve concerning para. 1 of art. 1 of the Convention. According to the provisions of the mentioned paragraph the Convention applies to contracts of sale of goods between the parties in different states whose places of business are in different states:

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solutions (results)" of the UN Convention on International Sale of Goods are taken over from the common law system. When the consensus has been reached regarding these questions, all the rest was only the legal cosmetics and minor concessions.

The topic of the present article shall be the pointing out at the institutions of the common law system in the general provisions of the Convention, then in the part relating to formation of the contract, as well as in the part regulating the rights and duties of the contracting parties.

I. *General Provisions*

General provisions of the Convention begin with Article 7 which contains interpretation rules, which are considered particularly important, since they are aimed at safeguarding successful application of the Convention. The example of "bargaining" over the formulation relating to one of the basic principles (namely, the principle of good faith) would express not only the way of making concessions to the common law system but also how difficult it was to reach agreement over the issues which are otherwise known to all legal systems, but which are interpreted in different ways. The criterion of "reasonable person" which keeps recurring in the entire Convention is taken over from the common law system in its pure form. Usages shall be referred to in this part not because the relevant formulation was accepted from the American Uniform Commercial Code but because the usages are much more aplied and honoured in the common law system than in the civil law countries.

1. *The Principle of Good Faith (Article 7)*

According to Article 7, "in the interpretation of this Convention, regard is to be had to its international character and to the need to pro-

a) when the States are Contracting States, or
b) when the rules of private international law lead to the application of the law of a Contracting State.

The Conference adopted (and many regretted it profoundly) the reserve (art. 95) according to which "any State may declare..., that it will not be bound by subparagraph 1 (b) of article 1 of this Convention".

The USA used the reserve in art. 95, which means that instead of the Convention the American law will be applied (if the contract provides for its application) irrespective of the fact that the place of business of the other party is found in the State which, like the USA, ratified the Convention.

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mote uniformity in its application and the observance of good faith in international trade". In the second paragraph of that Article it is stated that "questions concerning matters governed by this Convention which are not expressly settled in it, are to be settled in conformity whit the general principles of the Convention, while in the absence of such principles, in conformity with the law applicable by virtue of the collision of law rules".

On this occasion there will be no discussion of the "general principles", altrough they will essential in the uniform interpretation of the Convention. Threre is still time to see the way of interpretation of these "general principles". It is perhaps interesting along these lines to point out that the entire Third Congress of the UNIDROIT[16] was dedicated to the question of interpretation of the uniform law. Both theoreticians and practicing lawyers have expressed on that occasion many views concerning various problems relating to interpretation of uniform law, which was significant primarily for the practice, but also for the destiny of the uniform text.[17]

Many remarks have been raised regarding the provision of paragraph 1 in Article 7 according to wich in the interpretation of the Convention regard is to be had also on "observing good faith in international trade", but that formulation was the only way to reach a compromise to be accepted by representatives of the common law system. Before pointing at previous (much more logic) formulations related to the principle of good faith, it is necessary to emphasize that this was the field where there was a conflict between legal traditions of the common and civil law systems. Lawyers from the common law system are resistant to legal standards and principles and, as a rule, are in favour of the restrictive interpretation of legal principles. On the contrary, the civil law system lawyers have been insisting that the principle of good faith be introduced into the Convention, provided it be related to the conduct of the parties in the sphere of formation and implementation of

[16] The third UNIDROIT Congress was held from 7-10 September 1987. Over 230 lawyers from all over world gathered in Rome to discuss the subyect of *Uniform Law in Practice*. In order to digest this complex subject-matter, it was wisely divided into three (equally interesting) parts: uniform law and its introduction into national law; uniform law and its application by judges and arbitrators and uniform law and its impact on business circles.

[17] For the third UNIDROIT Congress Professor Honnold presented the paper entitled *US Uniform Commercial Code; Interpretation by the Courts of the Union*. In the report he pointed out to difficulties of uniform interpretation of the UCC in the 5o States of the Union, on the basis of which he envisages that similar problems might also be expected in regard to interpretation of the UN Sales Convention.

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contract and not to interpretation of the Convention. That proposal, however, has not been accepted, so that the principle of good faith has been artificially grafted onto the principle of having regard "to international character and to the need to promote uniformity" —which shall undoubtedly provoke un necessary confusion in practice.

The intention of those who advocated that the principle of good faith be introduced into the Convention was clear and precise. Thus, one of the proposals (which had the suport of Yugoslavia, too) was formulated in the following manner: "While entering into contract (forming it), the parties have to take into account the principles of correct conduct and good faith".

The lawyers of the common law system have been energetically against introducing that principle into the Convention according to the above formulation. Their argumentation was that this was a principle of morality which had no status of a legal obligation, so that it could note be introduced into the Convention. They also pointed out that there is no definition of the notion of good faith,[18] that this rule is rather vague,[19] so that there is a possibility of discordant interpretation, which could only increase uncertainty in international trade. Due to impossibility to elaborate a system of sanctions against violation of that principle —as pointed out by the representatives of common law— the applicable law would be the national law, so that possibilities of dissimilar interpretation would become a rule. It was also stated that, if the prerequisite for any international business transaction is a conduct in good faith, then it is not necessary to expressly introduce that rule in the Convention.[20]

After the representatives of the civil law countries have understood that any insisting on their version was useless, they suggested that

[18] Those who wanted this principle to be introduced into the Convention pointed out that it would perhaps be difficult to state clearly when certain act is in conformity with it, but the judge or the arbitrator would easily establish when certain act is contrary to this principle.

[19] The representatives of the civil law system emphasized that "imprecision" is indeed very good aspect of this principle. The experience has shown, they stated, that this principle is clearly and easily applied at issues of the concrete cases.

[20] At the session of UNCITRAL in 1978, many were surprised with the strong reaction of the common law lawyers concerning the proposal to introduce this principle into the Convention. It is true, it was said, that this principle is found in many civil and commercial codes of the civil law countries, but it is equally true that it is found also in art. 1-203 of the American Uniform Commercial Code. According to UCC "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement". The good faith principle is found in many other articles of the UCC.

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the reffering to the principle of good faith should be ommitted from the text. It is a pity that they did not succeed in that. Instead, an unlucky combination has been adopted, an inconvenient compromise,[21] which was qualified (by the representative of the International Chamber of Commerce) [22] as being "damaging for the contract" and as "not being able to help the judge in impartial assessment of controversial facts".[23] The Commentary of the UNCITRAL, however, points at the benefit of introducing the good faith provision into the Convention —note only regarding Article 7 but also in relation to a series of other articles of the Convention.[24]

2. *The "Reasonable Person" Criterion*

The trem "reasonable person" is an institute of the common law system and after it has been introduced for the first time into the Hague Uniform Law on International Sale (ULIS),[25] it had provoked stormy reaction on the part of the lawyers of the civil law system. Professor A. Tunc in his Commentary of Article 9 of the ULIS considers that assessing the conduct of "a reasonable person" (reasonable man) according to "the situation proper to the other party" covers both the character and the factual situation that person is in.[26] Independently of unmerous remarks addressed to the UNCITRAL regarding the provision on "reasonable person" from the ULIS, that standard has remained also in the UN Convention on International Sale. Undoubtedly, in this respect the most significant is Article 8 by which criteria are determined for the interpretation of the contract.

[21] Eörsi, G. "Problems of Unifying Law on the Formation of Contracts of the International Sale of Goods", *The American Journal of Comparative Law*, 1979, no. 2-3, pp. 311-316.

[22] International Chamber of Commerce proposed, together with others, that the reference to good faith in the way presented in the Convention should be deleted. The Chamber was of the opinion that "the way in which this article is drafted would be detrimental for contracts".

[23] Réczei, L. "The Rules of the Convention Relating to its Field of Application and its Interpretation", in *Unification of International Sales Law*, London 1980, p. 82.

[24] At p. 45 of UNCITRAL Commentary it is listed that the good faith principle is found in the draft Convention of the following articles: 14(2), 19(2), 27(2), 35, 38, 44, 45(2), 60(2), 67 and 75-77. At the same time the Commentary emphasizes that the good faith principle is "broader than these examples and applies to all aspects oh the interpretation and application of the provisions of this Convention".

[25] See art. 9 concerning the usages and their application in case when the contracting parties did not refer to them explicitly.

[26] Tunc, A. *Commentary of the Hague Convention on International Sale of Goods*, The Hague, 1966, p. 26.

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According to that article, "statements made by, and other conduct of, a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was". Further text in the same article goes on for the case of an impossibility to apply that rule while stating that "statements made by, and other conduct of, a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".

In contrast to that criterion which is taken over from the common law system, the civil law system usually speaks of "a *bonus pater familias*" or "good businessman".

One should emphasize that it is good that the criterion of "a reasonable person" is followed by the sentence according to which his conduct shall be assessed in conformity with the conduct of a person "of the same kind".[27] It was considered that these additional words would make the reasonable person criterion more impartial, since it was related to a person engaged in the same branch of business, or in the same trade, etc.

Professor Farnsworth considers that the formulation in paragraph 2 of Article 8 is good since it is not given in an abstract way, instead being specifically related to the conduct of the specific party. This author further elaborates that a judge shall have regard as to whether the other party is of the same technical quality, wheter he speaks the same language[28] and, altogether, wheter and to what degree there exists the similarity between the two persons whose conduct has to be compared with one another.

Additional criteria are formulated in paragraph 3 of Article 8 which are to be used while determining the conduct (intentions) of the other party and defining "a reasonable person of the same kind as the other party". Circumstances of the case, negotiations, practices and subsequent conduct of the parties are listed as *exempli causa*, namely as examples of additional criteria while determining the intents of the contracting parties which, however, does not mean that a judge or an arbitrator should not take into consideration some other facts, too, which according to their opinion could be relevant.[29]

[27] During the debate on this question the views were divided as to whether the English expression "acting in the same capacity" ia equivalen to the French expression referring to persons "de même qualité". One may wonder, indeed, as what will happen with the translation of these terms into the other languages.

[28] Farnsworth, A. *Interpretation of the Contract, supra* no. 5, at p. 99.

[29] Paragraph 3 of art. 8 of the UN Sales Convention was inspired by art. 9 (para.

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3. *Usages*

Usages and their significance in international trade are the topics of study to quite a degree. In Yugoslavia, and at international level as well, this issue has been treated mostly by Professor A. Goldštajn, who due to his role in long-term arbitration practice was able to conclude that the usages represent an important source of international *lex mercatoria*.[30]

In article 9, paragraph 2 of the ULIS it is provided that "in case of discord between these usages and the present law the usages shall apply, unless otherwise agreed".

Provisions of the ULIS formulated under the influence of the similar provisions of the American Uniform Commercial Code,[31] and they have found, later on, their position —in a somewhat changed form— also in the UN Convention, although there is no (in the Convention) provision relating to precedence of the usages over the Convention. That formulation, namely, was strongly opposed by the representatives of the developing countries, and it was pointed out that it was contrary to constitutional principles of some countries and to their public order.[32] Developing countries have advocated that usages in the world markets are created by economically stronger party, so that it would not be correct to give them in the Convention such a position of importance.[33] The representatives of these countries also emphasized that they had no opportunity to participate in the creation of these usages, so that such usages could not be considered as generally accepted. But, as Professor Goldštajn emphasizes, although all that is grounded, it is also true that other countries which did not take

3) of ULIS which laid down the instruction of interpretation of the "expressions, provisions or forms of contract commonly used in commercial practice". Their interpretation, according to ULIS, shall be "according to the meaning usually given to them in the trade concerned".

[30] Goldštajn A., "Usages of Trade and other Autonomous Rules of International Trade According to the UN (1980) Sales Convention", in *International Sale of Goods-Dubrovnik Lectures*, Oceana Publ., 1986, pp. 55-110. It is worth mentioning that Professor Goldštajn referred to 112 articles published on the same subjectmatter.

[31] In art. 1-205 (2) of the American UCC it is stated: "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question".

[32] UNCITRAL Commentary, p. 48.

[33] Date-Bah, S. K., "Problems of Unification of International Sales Law from the Standpoint of Developing Countries", in *Problems of Unification of International Sales Law*, London/Rome/New York, 1980, p. 46.

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part in their formulation, still, apply them widely since they find them useful and apt to express genuinely the existing practices, which are established in the sphere of sale of specific goods (especially raw materials). The same author points out, in relation to the above, at the ICC Uniform Customs and Practice for Documentary Credit, then to INCOTERMS as well as FIDIC general terms and conditions,[34] which documents have been accepted by professional organisations in seventy three countries, while many developing countries have taken over mentioned general terms and conditions and included them into their national legislations.[35] In addition, there are authors who consider that the system of market economy is better adapted to rules which are aimed at regulating the relations which emerge by forming the contracts on international sale.[36] Moreover, in many countries which are on the way of development legal infrastructure is lagging behind that of the developed countries, which also creates barriers to faster acceptance of certain useful rules of conduct in the world market.

Although the ULIS provision (in article 9), by which an express procedence is ascribed to usages as compared to the provisions of the Uniform Law, has been rejected in drafting the final version of the UN Convention, that does not mean that the contracting parties, if they so wish, can not give to usages the priority over the provisions of the Convention. They are able to do that while using article 6 by which the rule of dispositional use of provisions of the Convention is established. It is entirely certain, as emphasized in the UNCITRAL Commentary, that the parties shall, on the ground of autonomy of their wills, apply the usages and not vague or contradictory provisions of the Convention. Viewed from that angle, there are even no differences in treating usages between the ULIS and the Convention, which is only logical since it is really difficult to negate today the fact

[34] FIDIC is the abbreviation for the *Fédération Internationales des Ingénieurs-Conseils* which has its seat in the Hague. This Federation made several successful general conditions which are used in the international practice in connection with the contracts dealing with building or construction and with offering consulting services.

[35] Goldštajn, A., *supra* no. 30, at p. 85 refers to the article by Horn, N., "Uniformity and Diversity in the Law of International Contracts", in *Transnational Law of International Commercial Transactions*, Deventer, 1982.

[36] Goldštajn, A., *supra* no. 30, at p. 85 and reference to article by Lando, O., "Unification of Commercial Law between Societies of Equal and Different Level of Industrial and Social Development", in *Legal Organization of Commerce*, Aarhus, 1979, pp. 28-29.

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that usages are considered an independent source of international law of contracts and a significant aspect of the *lex mercatoria*.

II. *Formation of Contract*

Provisions relating to formation of contract in the UN Convention follow the classical pattern of offer and acceptance, although considerable number of contracts is not formed in that way. There are no, for instance, provisions which would refer to standard contracts and general conditions which are a component part of quite a number of contracts of international character. In contrast to national regulations where the moment of agreement between the wills of the parties is the element of insisting in the sphere of formation of contract, the Convention, which relates to international sale, attaches more importance to notifications, which undoubtedly contributes to greater legal security. In relation to that, compromises have been made between the theory of dispatch and the acceptance[37] which are, in fact, key elements in the offer and acceptance mechanism. Due to greater legal security which is achieved by applying the acceptance theory the Convention opted for that principle, providing article 24 the prerequisites for considering an offer, statement of acceptance or any other expression of intent, as "arriving" to the offeree. The provisions of article 24 shall certainly eliminate misunderstandings which may take place due to different time being considered relevant in various legal systems. It is considered that the Convention has suprassed in that part on formation of contract the differences which otherwise existed in comparative law, and that it has offered to the business world solutions which best reflect the needs of practice.[38] It remains, naturally, to see whether this optimism is realistic. One should not forget that the phase of entering into contract (formation) is exceptionally important and that the success of business deal depends to a great extent on that phase.

Within the part on formation of contract and influences of the common law regarding the solutions found in that part, of special interest are provisions relating to the revocation of offer (Article 16),

[37] The dispatch theory is the prevailing principle in the common law countries. while in the most civil law countries the time relevant for the creation of any obligation (and especially the acceptance of an offer) is the time of the receipt.

[38] Sono, K., "Formation of International Contracts under the Vienna Convention: a Shift above the Comparative Law", in *International Sale of Goods-Dubrovnik Lectures, supra* no. 30, at p. 113.

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as well as to the question of additional terms concerning acceptance (Article 19).

1. *Revocation of Offer*

The UN Convention, in its Article 16, begins with the common law principle that every offer may be revoked, provided "the revocation reaches the offeree before he has dispatched an acceptance". Civil law begins with the standpoint according to which an offer once made is irrevocable, because that rule increases the security of international trade.

While not entering here into the history of Article 16 of the Convention, assessed by Professor Eörsi as dramatic,[39] it is worthwile emphasizing that the protagonists of the common law have energetically defended the need of introducing into the Convention the rule known by their system and which derives from the dispatch theory, otherwise incorporated in the entire system of the law of contracts of the common law. Any other solution, as pointed out by American lawyers, would be contrary to the principle of freedom of contract which takes the highest position in the hierarchy of legal principles of most legal systems. All these or similar arguments were offered also by the representatives of civil law countries, while advocating (although without success) the principle according to which an offer which has been dispatched should be irrevocable. They had even the support by the International Chamber of Commerce which undoubtedly is qualified as an expert body in the sphere of international trade. A rather convincing argument in favour of accepting the principle of irrevocability of an offer once dispatched related to pointing out that "revocability creates uncertainty on the part of the offeree". In other words, one should not forget that he has frequently, within the delay left to him for acceptance, to negotiate, make preparations or to enter into contracts with his suppliers or eventual buyers and, in general, to make corresponding inquiries in order to be able to reach a decision on accepting or rejecting the offer.

All these arguments, however, were not sufficient. Consensus has been "reached" by pointing out as a principle in Article 16 that "an offer may be revoked" if "the revocation reaches the offeree before he has dispatched his acceptance". The application of that rule may provoke an absurd situation, namely, it would be possible that the

[39] Eörsi, G., *supra* no. 5, at p. 150.

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rule is valid if, for instance, an offer is dispatched by mail, while the offer or has revoked it by telephone or telegram before the offer has reached the offeree at all. It is argued that in such a case it would be more correct from the legal point of view to speak about the withdrawal (and not about revocation of the offer), since the offer did not, in fact, become legally relevant.[40]

The exception to the irrevocability of an offer is found in paragraph 2 of Article 16 and it relates to two cases, namely: if it is indicated in the offer, whether by stating a fixed time for acceptance or otherwise, that the offer is irrevocable, or "if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer". So, the Convention accepts the principle of revocability and combines it with the elements, one of which relates to the so-callet firm offer, while the other to the uncertain common law principle of taking into account the offerree's conduct, which may provoke difficulties in practice.

a) *Firm (Binding) Offer*

An offer may be made irrevocable in several ways. The most obvious one is to state in it that it is firm and irrevocable for a definite time, while the same aim may be reached if the offer has an indication on specific time for its acceptance. According to the UNCITRAL Commentary, the formulation of sub-paragraph a) of paragraph 2 in Article 16 should not be conceived as the one binding the offeror to promise not to revoke his offer, nor binding the offeree to give any promise, to act or to refrain from acting in order for the ofter to be deemed irrevocable. That formulation simply reflects the usual practice in international business relations, namely, that the offer shall be considered open whitin certain time limit.[41] According to the conception of common law lawyers, "indicating a specific time limit for acceptance does not mean, by itself, that the offer is irrevocable". The fact of its being considered irrevocable has to be clearly indicated. A proposal to supplement this formulation in order to make it clearer in the common law countries was not accepted, but it was evident that this provision would be interpreted in different ways.

[40] Hartley, T. C., *A Study of the Uniform Law and the Draft Convention prepared by UNCITRAL*, Bruxelles 1979, vol. I, p. 4/4.
[41] UNCITRAL Commentary, p. 60.

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b) *Offeree's Conduct*

The other exception to the rule according to which an offer is always revocable refers to a situation where it was "reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer" (paragraph 2 b/of Article 16). This exception, which is known in the common law system, was qualified by the civil law lawyers as unclear, non-specific and apt to provoke uncertainty in practice. The problems may apear in practical implementation first of all since the judge or an arbitrator would not be able to determine easily when the offeree had "reasonably relied on the fact that the offer was irrevocable" and just what was his conduct "while relying on the offer". The situation is even more difficult since the Convention (reasons which are justified) does not contain criteria or indications as to the assessment of such situations.

Professor Eörsi at the beginning criticized that principle considering that the offeree would be better protected if the conception of the civil law system had been accepted accordind to which a revocation is forbidden which is done in bad faith.[42] However, later on, that author has come to the conclusion that this principle referred to so-called "soft law" and that it represented extraordinary protection of those believing in something while acting accordingly. In other words, as concluded by Professor Eörsi, this provision is an instrument of protection of those "whose frustrated hopes were not only legal but also reasonable in a given situation".[43] It would be good that these subsequent considerations would prove justified, although it is difficult to think that this principle would be applied in practice without problems. But there is still hope that problems would not be numerous.

2. *Additional Conditions at Acceptance*

The rule that acceptance must completely correspond to the offer is almost generally accepted and it is considered as the one which is safest from the legal point of view. According to that system, if the acceptance should contain modifications or additions of the offer, it would be considered that the offeree has rejected the offer and that by his modifications he has made a counter-offer (namely, a new offer). That rule has been introduced into the Convention in Article

[42] Eörsi, G., *supra* no. 21, at p. 321.
[43] Eörsi, G., *supra* no. 5, at p. 158.

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19, paragraph 1. The American Uniform Commercial Code differs from that system since it begins with the principle that additional provisions in the acceptance are considered "proposals to amend the contract" so that they become a component part of the contract if "...they do not substantially alter the contract".[44] This rule has been introduced, at the proposal by the American delegation, at the Vienna Conference, into paragraph 2 of Article 9 of the Convention.

It has been pointed out in discussing that formulation that this rule is applied not only in the United States of America but also by many courts in the civil law countries. It is considered that this rule is useful, that it is *in favorem contractus* and that it eliminates unnecessary procedure and corresponding between business partners.[45] All that may lead to delaying the concluding of the contract which, as pointed out by US lawyers, is not in the interest of neither party. Since these arguments sounded convincingly, the provision has entered into the Convention with the following formulation: "additional or different terms which do not materially alter the terms of the offer constitute an acceptance".

Although these provisions may have positive effect in the practice, they may also provoke problems since it would not be always possible to determine whether alterations have been of a "substantial" or material nature while changing the terms of the offer. If the contracting parties do not assess these modifications in the same way, it could happen that the offeree considers the contract concluded, while the offeror could think that his offer has been rejected. True, the Convention provides for a possibility for the offeror to reject the acceptance with amendments, provided he does that "without undue delay" orally or dispatching a notice to that effect. If he does not act accordingly, namely "without undue delay", "the terms of the contract are the terms of the offer with the modifications contained in the acceptance".

The aforementioned provisions of Article 19 provide ground for the conclusion that it contains several notions which are subject to dif-

[44] See art. 2-307 of the American UCC.

[45] Professor Eörsi considers that these reasons are valid, since the businessmen are professionals, they are usually in contact with each other and that it would not be difficult for them to discover a minor non-conformity (especially if it is a tipographical error). The solutions in the Convention, according to his views, are good although he emphasized that in developing countries and the socialist too "security is a regarded as a value higher then speed". Eörsi, G., "Formation of Contract", in *The 1980 Vienna Convention on the International Sale of Goods*, Zürich, Lausanne Colloquium, 1980, p. 51

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ferent interpretations. This, first of all, relates to the qualification of the term "material alterations", then to determining the moment of offeror's waiting "unduly" long for raising an objection concerning differences in the acceptance he does not agree with, as well as to the kind of "terms" which may be tolerated while not being treated as provisions "materially" altering the offer. In order to aid the practice in solving such situations, the Convention (in paragraph 3 of Article 19) provides (while stating the examples thereof) for the terms which are deemed as not materially altering the terms of the offer. These are the terms which relate "among other things, to the price, payment, quantity of goods, place and time of delivery, extent of liability of one of the parties toward the other party or the settlement of disputes". Although the majority of participants in the discussion over the formulation of that article considered that these cases narrow down the possibility to introduce into the acceptance provisions which could alter the offer, there were also opinions according to which such listing was at the same time unneeded and insufficient. There was, for instance, a question as to why the terms of transport, guaranties and some other relevant elements were not included which also may be of essential importance for the offeror.

Some of these difficulties are treated by Professor Farnsworth who thinks that provisions of paragraph 2 of Article 19 make possible for an unfair offeror to speculate in case of a maket fluctuation. The offeror may, namely, as pointed out by that author, decide whether to bind himself in the offered time limit within which the offeree is unable to withdraw his acceptance. Possibilities of that kind are, however, rare since the time limit provided for in the Convention is relatively short, so that the offeror would not want to engage in speculations of the kind.[46]

III. *Sale of Goods*

The part relating to the sale of goods deals with rights and obligations of the contracting parties, so that it is considered the most important part of the Convention. The basic question here is undoubtedly the liability of the contracting parties for the obligations as-

[46] Farnsworth, A., *supra* no. 5, at p. 184. In order to avoid misunderstanding it should be stated that Professor Farnsworth considers this to be a good principle and that one should not fear any difficulties in practice. He, in fact, thinks that probably there will not be too many situation of this kind, but nevertheless he is of the opinion that it is good to have the rule for such cases in the Convention.

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sumed, while within the context of the present article it is necessary to state that the Convention has made in that respect a grea concession to the common law system, since it adopted the principle according to which the liability is to be assessed in relation to the contract. If one contracting party does not perform its obligation as provided for by the contract, it commits a breach of contract and that breach, according to the original taken over from English law, may be either essential or non-essential. After this principle has been adopted at the Hague Conference, it was clear to everybody that all provisions regulating the consequences of non-performance of contract will have to be assessed by applying that principle.

Unknown in many parts of the world, that principle is essential for the system of legal consequences, for the fate of the contract, for its life or deth —as written by Professor Will at the very beginning of his commentary of Article 25 of the UN Convention.[47] We have to agree with that statement since the principle of fundamental brech of contract is undoubtedly "suporting wall" of the entire construction of the UN Convention. Everything is dominated by that principle, so that it is understandable that both in the Hague and in Vienna the discussion was concentrated over the definition of that notion in order to facilitate its implementation in practice. And there will be problems in practice since businessmen, legal profession and judges of the civil law system shall face serious difficulties in that respect. This notion is new to them, unknown and contrary to the one they are used to in the sphere of assessing the liability of the seller and buyer. This, naturally, does not mean that the system known in the civil law countries is better, but only that many consider even after the Vienna Conference, that there will be difficulties in practical implementation of Article 25 of the Convention.

In addition to the principle "of fundamental breach of contract", Part III of the Convention contains the important principle of "conformity of goods with the contract", which again is taken over from the common law system, where all activities of the contracting parties are assessed in relation to the contract. Although the Convention contains at first the definition of the term "fundamental breach of contract" (in its Article 25), to be followed by pointing at obligations of the buyer and the seller, it would be of importance to enlighten the common law principle of conformity of goods with the contract in

[47] Will, M., *supra* no. 5, at p. 205.

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order to continue with more detailed explanation of the principle of fundamental breach of contract.

1. *Conformity of Goods with the Contract*

According to Article 35 of the Convention, delivered goods must conform to the contract as to the quantity, quality, kind and packaging. Although that principle is borrowed from the common law system, it will undoubtedly be easily incorporated into the civil law system, and more particularly into international business, since it is logical and clear. Although the civil law system begins with the defects of the goods and with their classification into apparent and hidden (which has its advantages since the time limits should not be the same regarding both kinds of defects), the principle of conformity of goods with the contract has been accepted in the Hague without confrontation and counter-arguments. Moreover, there were opinions that this system is celar, simple and therefore easily understandable to every businessman. Professor Kahn emphasizes that the idea of conformity of goods with the contract is one of the most fruitful original creations of the ULIS, since by means of applying that principle, although with an exception, the lack of conformity is assessed specifically in relation to the contract and not in an abstract manner by applying some conception or theory.[48] As pointed out in the UNCITRAL Commentary, the conception of conformity of goods with the contract is but a logical consequence of the standpoint according to which all rights and obligations of the contracting parties have to be evaluated according to the text of the contract and according to what is implied in it. In this way the Convention has, in fact, confirmed the basic attitude of the drafters that the contract is the dominant source for determining the legal position of the contracting parties.[49]

Conformity with the contract, according to Article 35 of the Convention, may be in relation to ordinary use of the goods, then to particular purpose, or to possessing qualities corresponding to a sample or model, if this was the ground for entering into contract. By the provisions of Article 35 it is provided that nonconforming shall also be the goods "which are not packaged or preserved in the manner usual for such goods, or, where there is no such manner, in a manner adequate to preserve and protect the goods".

[48] Kahn, Ph., *Etude comparée des Conventions de la Haye et Projet de Convention preparée par CNUDCI*, Bruxelles 1979, pp. 49-51.
[49] UNCITRAL Commentary, p. 92.

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The UN Convention does not contain provisions relating to eventual obligation of the seller, if there are no specific provisions regarding the quality of goods in the contract itself, to deliver goods of average quality —which would by all means be useful. It was even possible to set up a definition of the term "average quality", since such provisions do exist in many codes of the civil law countries. There are also no specific provisions regarding the conformity of goods for further sale (so-called merchantable quality), which is found in the US Uniform Commercial Code,[50] but it was considered that there is no need for that, since such quality is understood on the ground of provisions on conformity of goods for ordinary use. There are also no provisions regarding the lack of conformity if related to deliveries of greater or smaller quantities than the ones contracted, while also to those regarding eventual delivery of some other thing than the one contracted *(aliud)*.

Professor Bianca points to yea another problem related to the principle of conformity of goods. He, namely, thinks that the Convention omitted to formulate a rule on seller's obligation to deliver the goods in conformity with mandatory law of the country the goods are to be delivered in, or that where the goods shall be used. In such cases, as considered by that author, the court will have to take into consideration all relevant circumstances of the case, as well as to take into account the provisions of Article 42 of the Convention. The liability of seller could be raised if, depending on circumstances, it would be reasonable to expect from him that these regulations were known to him. It is a pity, as concluded by that author, that the Convention is silent in this respect, since various assumptions may arise as to whether the seller was bound to know of such regulations or, as the case may be, whether the buyer had to inform the seller accordingly on such regulations.[51]

According to Article 36 of the Convention, the seller is liable for the lack of conformity "which existed at the time of passing the risk to the buyer, even though the lack of conformity has become apparent only after that time". It is considered that this solution is adequate, since in international trade the time is exactly known of passing the risk to the buyer (particularly if the contracting parties refer to the INCOTERMS or general terms, where there are provisions relating to the time of passing the risk). The UN Convention

[50] See art. 2-314 of the American UCC.
[51] Bianca, C. M., *supra* no. 5, at p. 282.

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does not begin with the apparent and hidden defects (as is the case in the civil law system), but with the fact of whether the delivered goods were in conformity with the contract at the moment of passing the risk. The seller is not liable for defects which are the consequence of reasons which did not exist at the moment of passing the risk (it is, namely, considered that such defects are the consequence of the way the buyer has used the goods).

According to Article 67 of the Convention, if contracting parties have not specified the risk provisions, and if it is necessary, according to the contract, to effect carriage of goods, "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract". This article does not contain provisions regarding non-conformity in delivery, so that one may conclude that the risk has passed from the seller to the buyer "when the goods are handed over to the first carrier" even if they were not in conformity with the contract. However, this would not happen in reality, since the buyer is able to use the provisions of Article 70 which provide for that the provision on the risk does not prevent the buyer to use remedies recognized to him by the Convention in case of "a seller committing a material breach of contract".

While in the majority of the civil law countries it is considered that a buyer discontent with the delivery is bound to notify the seller "immediately", "without delay", "within short time limit" on defects he has established, the Convention provides (in Article 39) that the buyer who discovers defects in conformity is bound to notify accordingly the seller "within a reasonable time after he has discovered them or ought to have discovered them". Similar provision is found also in the US Uniform Commercial Code.[52]

Certainly, longer time limits suit the buyers in developing countries, just as it is certain that the speed, which is characteristic for contemporary international trade, requires that the time for giving notice of the lack of conformity be as short as possible, since this is the way of utmost protection of interests of both contracting parties. With all the understanding for the problems characteristic for developing countries, one is right in accepting the attitude according to which Article 44,[53] by means of which a consession has been

[52] According to art. 2-607 (3) of the American UCC "the buyer must within the reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy".

[53] Art. 44 of the UN Sales Convention provides that the buyer will not be

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ceded to these countries, has weakened the efficiency of the Convention. One should hope that fair dealers would rarely use that provision. One should not forget, namely, that these provisions are only *prima facie* in favour of the buyer. It is normal to expect, as stated by a Yugoslav author, that the seller will satisfy his interests through the price. It is realistic, as reasoned by that author, that the longer the delay for giving the notice regarding non-conformity by the buyer is, the higher the price. Due to that, as concluded by the same author, it can not be considered that the arguments forwarding the endeavours of the Convention-makers to protect the buyer will go to the detriment of the seller.[54]

2. *Fundamental Breach of Contract*

As stated above, the principle of fundamental brach of contract is undoubtedly one of the most important in the entire Convention. The Convention has taken it over from the ULIS, and it has been included into that latter document at the proposal of British lawyers. In English law, namely, there is a distinction between conditions and warranties in a contract. The breach of the first ones (which are fundamental) entitles one to avoid the contract, while the breach of the second ones enables the innocent party to use other legal remedies, and more particularly the right to damages (compensation of damage in the common law system has absolute priority over the other legal remedies in case of a contract not being avoided).[55]

The formulation of fundamental breach of contract in the ULIS[56] has been the subject of many critical remarks which particularly related to the definition of a "reasonable person" and to *ipso facto*

barred from the rights under the Convention in case of non-conformity (except for loss of profit) "if he has a reasonable excuse for his failure to give the required notice".

[54] Jankovec, I., "Non-conformity of the goods in the international sale of goods", paper presented at the colloquium in Belgrade 1986.

[55] The common law lawyers, for instance, could not understand why the civil law lawyers were insisting to introduce into the Convention the remedy called diminishing of price in case of a breach of contract since, according to their views, the same results could much better be achieved by the remedy of damages.

[56] According to art 1o. of ULIS "a breach of contract shall be regarded as fundamental wherever the party knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had forseen the breach and its effects".

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avoidance of contract,[57] which was blamed, and rightly so, to be apt to provoke a chaos in the sphere of international trade. Automatic avoidance of contract is not, fortunately, provided for in the Convention for the case of a fundamental breach of contract, but still many open issues and perplexities have remained in connection to the definition of the fundamental breach of contract.

According to Article 25 of the UN Convention, "a breach of contract committed by one of the parties is fundamental if it 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 nod foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

While referring to the statement by Professor Eörsi according to which the conception of fundamental breach of contract is "a fruit of world-wide compromise of an 'unlucky moment'," Professor Will also considers that the definition in Article 25 is complicated and not easy of applying, "and foreseeably may give rise to divergent interpretation and continuous controversy".[58]

There is no doubt that a definition of the fundamental breach of contract was needed in the Convention. It is also certain that enormous efforts have been applied to reach a consensus and this was achieved only after long and painful negotiations. However, one has to say openly that the definition in article 25 is far from making precise the term "detriment",[59] and the same may be said for eh circumstances which would deprive the other party of what (?) "he is entitled to expect under the contract". All these are unsufficiently clear notions which may be interpreted, both from the subjective as well as the objective standpoint, in divergent manner. It was held at

[57] See arts. 25 and 26 of ULIS. According to art. 25 "the buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usages and reasonably, possible for the buyer to purchase the goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected".

[58] Will, M., *supra* no. 5, at p. 205. The author's reluctance as to the effectiveness of a definition in art. 25 of the Convention and his fears in regard to its application, has already been mentioned (see footnote 47).

[59] Many regretfully concluded that it was a pity that the Conference in Vienna did not accept the proposal by the working group of UNCITRAL according to which the breach of contract should be considered as fundamental "if it results in substantial detriment to the other party unless the party in breach did not forsee and had no reason to forsee such a result". Difficulties in this definition, however, related to the questions of "knowledge", "substantial detriment" as well as to the "time relevant" for determining these terms.

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the Vienna Conference that inserting in the last sentence of the formulation "a reasonable person of the same kind in the same circumstances" has made the definition better, since an impartial criterion has been accepted in assesing the conduct of a person committing the breach of contract, but there were not too many to believe in it.

The burden of proof of unforseability obviously rests with the party in breach which is a fair solution, only it would be hard to expect the party in breach to admit that he forsaw the results which were detrimental to the other party. Since it was considered that this definition might cause difficulties in practice, the "objective" test of a reasonable person "of the same kind" was introduced. Without going into detailed anlyses, one may wonder as to how the judge or the arbitrator will interpret the notion of a reasonable person "of the same kind". To many the French wording referring to the person *de même qualité* was better and it is not quite clear wheather those two expressions are identical.[60]

Tired from long discussions and various proposals in relation to the definition of that notion, which from the very begining was foreign and unclear to many, the delegates have finally accepted the provisions of Article 25, al rtough no one was very satisfied with the definition.[61] Those not satisfied were even the English, who claimed that the version adopted in the Convention "has no connection whatsoever" with their notion of conditions and warranties.[62]

In concluding, the author would express her doubts and even fears that the notion of the fundamental breach might be interpreted differently, especially in the civil law countries which are not familiar with it. Such situation, in return, may prove to be "detrimental" to uniformity which is one of the principal aims of the Convention. It is needless to say that the author would be happy if her fears would prove to be superfluous. Practical businessmen and lawyers helping

[60] See footnote 27 above and the reference to persons of the "same kind" which is far from being precise.

[61] Professor Will (*supra* no. 5, at p. 209) points out that "meditation over terms as pregnant with connotations as "fundamental", "substantial" or "forseable" never ends, nor does the controversy about their meaning". At the oppening words of his commentary of art 25 (at p. 205) he rightly states that the concept of "fundamental breach" though "unfamiliar in many parts of the world is fundamental to the Convention's remedy system".

[62] The English doctrine on conditions and warranties, the English lawyers argued, has developed together with the question of exemptions, and the definition of a fundamental breach of contract (as definied in art 1o. of ULIS) "only bears the name of a fundamental breach of contract while in fact it represents a variation of a French doctrine of the error in the substance *(erreur sur la substance)*".

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them with their contracts might not face difficulties in interpreting Article 25, However, it is necessary to emphasize once again the importance of Article 25, since the whole system of remedies will depend on how the committed breach of contract would be qualified.

Whether the provisions of the Convention will be of greater help and whether its application would bring solutions which could be judged as better than those based on a particular national system of laws it is left for the future to reveal it. Those who participated in the "delivery" of the Convention know that it was not an easy birth. At the same time the great majority believed that it would be "reasonable" to expect that the Convention will have a long and fruitful life.

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