

THE
BUYER'S REMEDIES
FOR
SELLER'S NON-CONFORMING
DELIVERY

**A Comparative Study under English Law, the 1980 UN
Convention on Contracts for the International Sale of Goods
and *Shi'ah* Law**

by

Mirghasem Jafarzadeh (LL B. (Tehran University), LL M. (Shahid Beheshti
University), and LL M. (Sheffield University))

A thesis submitted to the Department of Law of the University of Sheffield for
the degree of Doctor of Philosophy in Law

March 1998



**IN THE NAME OF ALLAH
THE MOST COMPASSIONATE
THE MOST MERCIFUL**

**ALL PRAISE IS DUE TO ALLAH, THE LORD OF THE WORLDS,
AND HIS BLESSINGS BE ON THE PROPHET, MOHAMMAD (S.A.)
AND HIS HOLY FAMILY THE AHL-UL BAIT (A.S.)**

Abstract

The purpose of the thesis is to examine *Shi'ah* law, as an undeveloped system, in order to identify if it could be applied to modern sale transactions. The focus is on remedies in which *Shi'ah* jurists have done a great deal of work. The subject is first examined under English law and the UN Convention on Contracts for the International Sale of Goods (as two developed systems) to identify the issues which have to be dealt with and then under *Shi'ah* law in depth. An extensive examination shows that current *Shi'ah* law suffers from substantive gaps and uncertainty. It is suggested that the current situation is due to lack of applying an efficient methodology. Instead of dealing with the legal rules in respect of concrete issues, *Shi'ah* jurists tend to deal with traditional as well as hypothetical cases to derive further detailed rules. To present a sensible picture of this system, it is suggested that the law should be analysed in the light of studying developed systems. Relying on this method, attempts are made to systematise the relevant rules and answer the various questions these two modern systems deal with. *Shi'ah* law is then compared with English law and the Convention to highlight the existing gaps in *Shi'ah* law and to assess how it could be applied to modern sales. Comparative assessment of the three systems shows that while in English law primacy is given to damages and specific performance is rarely awarded, the Convention gives significance to both. Similarly, English law seems to permit termination more easily than the Convention. But unlike the Convention, it does not recognise price reduction as a separate remedy. Overall, it is shown that *Shi'ah* law is closer to the Convention than to English law. It attaches significance to both damages and specific performance, and entitles the buyer to reduce the contract price, but permits termination more easily than the Convention and less easily than English law. It is concluded that because of substantive gaps and uncertainty in current *Shi'ah* law it is not an appropriate system to govern modern sale transactions, but if the suggested methodology is applied it could be developed and fill in the gaps.

Table of Contents

Abstract	
Acknowledgement	
Dedication	
Table of Cases	
Transliteration	

INTRODUCTION

1. Purpose	1
2. Reasons for this Particular Choice	2
3. Scope of the Research	2
4. Thesis' Outline	4

CHAPTER ONE. SOURCES OF LAW AND METHODOLOGY

1. 0. Introduction	5
1. 1. Concept and Terminology	5
1. 2. Historical Background	5
2. 0. Sources of Law	8
2. 1. Formal Sources	8
2. 1. 1. Primary Sources	8
2. 1. 1. 1. Quran	9
2. 1. 1. 2. Sunnah	9
2. 1. 2. Secondary Sources	11
2. 1. 2. 1. <i>Ijm'a</i>	11
2. 1. 2. 2. <i>A'ql</i>	13
2. 2. Supplementary Sources	16
3. 0. Assessment	17
4. 0. <i>Shi'ah</i> Law and Modern Needs	19
4. 1. New Reading of the Traditional Sources	20

4. 2. New Reading of the Rational Analysis	24
5. 0. Summary and Conclusions of Sources of <i>Shi'ah</i> Law	25
6. 0. Methodology	25

CHAPTER TWO. ENGLISH LAW

Introduction	29
--------------	----

Section One. Withholding Performance and Termination

1. 0. Introduction	29
1. 1. Sketch of Discussion	29
1. 2. Classification of Contractual Terms	30
2. 0. Rejection and Termination	33
2. 1. Breach of Condition	33
2. 1. 1. Rejection and Termination, One Remedy or Two?	33
2. 1. 2. Relationship Between the Two Remedies	36
2. 1. 3. Seller's Right to Cure	39
2. 2. Breach of "Intermediate" Term	42
2. 2. 1. Description of the Doctrine	42
2. 2. 2. Operation of the Doctrine	43
2. 3. Special Cases	48
2. 3. 1. Breach of Severable Contracts	48
2. 3. 2. Breach of Time Stipulation	53
2. 3. 3. Breach of Quantity Stipulation	59
2. 3. 4. Breach of the Duty to Tender Shipping Documents	60
3. 0. Mechanism of Termination	63
3. 1. No Automatic Termination	63
3. 2. Election of Remedies	63
3. 2. 1. Election of Termination	64
3. 2. 1. 1. Declaration of Termination	64
3. 2. 1. 2. Communication of Termination to the Defaulting Party	65
3. 2. 2. Election of Affirmation	66
3. 2. 2. 1. Concept and Terminology	67
3. 2. 2. 2. Methods and Requirements of Acceptance	67
3. 2. 2. 3. Effects of Acceptance	71
4. 0. Effects of Termination	72
4. 1. Effects on the Contract	72
4. 2. Effects on Rights and Obligations	73

Section Two. Specific Performance

1. Introduction	73
2. Requirements for Resorting to the Remedy	74
2. 1. Where Goods are “Specific” or “Ascertained”	75
2. 1. 1. Specific Goods	75
2. 1. 2. Ascertained Goods	77
2. 1. 3. Specific Performance and Unascertained Goods	78
2. 2. When the Court Thinks Fit	80
3. Grounds for Refusing to Order Specific Performance	80
4. The Right to Demand Cure	83

Section Three. Monetary Relief

1. 0. Introduction	84
2. 0. Claim for Damages	85
2. 1. General Principles	85
2. 2. Grounds for Claim Damages	86
2. 3. Principles Restricting the Recovery of Damages	87
2. 3. 1. Causal Connection	87
2. 3. 2. Remoteness of Damage	88
2. 3. 2. 1. Single Rule or Two Separate Rules	89
2. 3. 2. 2. Necessity of Distinction	91
2.3.2.3. Degree of Foreseeability of Loss	92
2. 3. 3. Mitigation Principle	96
2. 3. 4. Relevance of Fault	98
2. 4. Measure of Damages	98
2. 4. 1. Non-Delivery	99
2. 4. 1. 1. Where There is an Available Market	100
2. 4. 1. 2. Where There is no Available Market	101
2. 4. 2. Non-Conforming Delivery	103
2. 4. 2. 1. Where There is an Available Market	103
2. 4. 2. 2. Where There is no Available Market	105
2. 4. 2. 3. Damages and the Defence of Set-off	106
2. 4. 3. Late Delivery	107
2. 4. 3. 1. Goods Purchased for Resale	107
2. 4. 3. 2. Goods Purchased for the Buyer’s Business	107
2. 4. 3. 3. Relevance of Actual Resale in Measuring Damages	108
2. 4. 5. Time of Assessment	110
2. 4. 6. Relevant Place	112
Conclusion	113

CHAPTER THREE. THE CONVENTION

Introduction	115
Section One: Withholding Performance and Termination	
1. 0. Introduction	116
2. 0. Part One. Withholding Performance	116
2. 1. Concept and Terminology	116
2. 2. Withholding Performance as a General Right	118
2. 2. 1. Prospective Non-Performance	119
2. 2. 2. Actual Non-Performance	119
2. 2. 3. Early or Excessive Delivery	121
2. 3. Withholding Performance for Partial Delivery and Partial Non-Conforming Delivery	124
2. 4. Grounds for the Right	124
2. 5. Right to refuse for Tender of Non-Conforming Documents	126
3. 0. Part Two. Termination of Contract	128
3. 1. Introduction	128
3. 2. Grounds for Termination	128
3. 2. 1. Fundamental Breach	129
3. 2. 1. 1. Significance and Concept of the Test	129
3. 2. 1. 2. Elements Constituting the Test	130
3. 2. 2. Nachfrist	139
3. 2. 3. Breach of Severable Contract	143
3. 2. 3. 1. Fundamental Breach and Severable Contracts	143
3. 2. 3. 2. Nachfrist Notice and Severable Contracts	144
3. 3. Buyer's Right to Terminate and the Seller's Right to Cure	145
3. 4. Mechanism of Termination	150
3. 4. 1. No Automatic Termination	150
3. 4. 2. Electing to Terminate the Contract	151
3. 4. 3. Election of Affirmation	152
3. 5. Effects of Termination	154
3. 5. 1. Effects on the Contract	154
3. 5. 2. Effects on the Duties and Rights	155
Section Two. Specific Performance	
1. 0. Introduction	156
2. 0. Specific Performance	156
3. 0. Right to Demand Cure	157

3. 1. Demand Substitute Goods	157
3. 2. Demand Repair	158
4. 0. Restrictions on the Remedy	160
4. 1. Resorting to an Inconsistent Remedy	160
4. 2. Forum Approach Rule	161
4. 3. Time Limit Restriction	163
4. 4. Whether Goods Must be Ascertained?	164
4. 5. Whether the Purchased Goods Should be Unavailable in the Market?	164
4. 6. Rule of Mitigation	165
Section Three. Monetary Relief	
1. 0. Sketch of Discussion	168
2. 0. Part One. Claim For Damages	168
2. 1. General Principle	168
2. 2. Grounds for Claim Damages	169
2. 3. Principles Restricting the Recoverable Losses	171
2. 3. 1. Causal Connection	171
2. 3. 2. Foreseeability of Loss	171
2.3.2.1. Degree of Foreseeability	172
2.3.2.2. Quantum or Type of Loss?	174
2. 3. 3. Mitigation Principle	174
2. 3. 4. Relevance of Fault	175
2. 4. Measure of Damages	176
2. 4. 1. General Formula	176
2. 4. 2. Special Formulae	178
2. 4. 2. 1. Sub-Contract Price Formula	178
2. 4. 2. 2. Current Price Formula	181
2. 5. Time of Assessment	183
3. 0. Part Two. Price Reduction	185
3. 1. Introduction	185
3. 2. Nature and Origin of the Remedy	186
3. 3. Price Reduction under the Convention	187
3. 4. Assessment of the Ratio of Reduced Price	190
3. 4. 1. Time of Assessment	191
3. 4. 2. Place for Assessment	192
3. 5. Restrictions on the Remedy	193
3. 6. Price Reduction and Damages	195
Conclusion	198

CHAPTER FOUR. *SHI'AH* LAW

Sketch of Discussion	200
Section One: Withholding Performance and Termination	
1. 0. General Introduction	201
2. 0. Part One. Withholding Performance	201
2. 1. Introduction	201
2. 1. 1. Classification of Contracts	202
2. 1. 2. Classification of Contractual Obligations	203
2. 1. 2. 1. Eltezām-e-Asli (Principal Obligations)	203
2. 1. 2. 2. Eltezām-e-Fare'i (Subordinate Obligations)	204
2. 2. Buyer's Right to Withhold Performance	206
2. 2. 1. Theoretical Bases of the Right	206
2. 2. 2. When Can the Buyer Withhold?	208
2. 2. 2. 1. Non-Conforming Delivery	208
2. 2. 2. 2. Non-Conforming Delivery and the Theory of Eltezāmāt-e-Mua'wwad	209
2. 2. 2. 3. What Degree of Non-Conformity Gives Rise to the Right?	211
2. 2. 3. Delivery of Partial Non-Conforming Goods or Wrong Quantity	212
2. 2. 3. 1. Partial Non-Conforming Delivery	213
2. 2. 3. 2. Delivery of the Wrong Quantity	215
2. 2. 4. Seller's Failure as Regards the Shipping Documents	215
2. 2. 4. 1. Non-Delivery	216
2. 2. 4. 2. Non-Conforming Delivery	217
2. 2. 4. 3. Two Rights of Rejection	217
3. 0. Part Two. Termination of Contract	218
3. 1. Introduction	218
3. 2. Grounds for Termination	220
3. 2. 1. General Principle	220
3. 2. 2. Grounds for Kheyārāt	220
3. 2. 3. Relevant Kheyārāt	225
3. 2. 3. 1. Kheyār-e-Rū'yat	226
3. 2. 3. 2. Kheyār-e-Takhalluf an al- Wasf	229
3. 2. 3. 3. Kheyār-e-A'yb	231
3. 2. 3. 4. Kheyār-e-Takhalluf an al- Shart	232
3. 2. 4. Seller's Right to Cure	233
3. 2. 4. 1. Sale of Specific Goods	233
3. 2. 4. 2. Sale of Unascertained Goods	236
3. 2. 5. Special Cases	237
3. 2. 5. 1. Partial Non-Conforming Delivery	237
3. 2. 5. 2. Breach of Quantity Stipulations	239
3. 2. 5. 3. Breach of Time Stipulations	240

3. 3. Mechanism of Termination	243
3. 3. 1. No Automatic Termination	243
3. 3. 2. Election Termination	244
3.3. 2. 1. Declaration	244
3. 3. 2. 2. Communication	244
3. 3. 2. 3. Application for the Court's Judgment	245
3. 3. 3. Election of Affirmation	246
3. 3. 3. 1. Isqāt Sarih	246
3. 3.3. 2. Isqāt Ādemni	247
3. 4. Effects of Termination	254
3. 4. 1. Effects on Contract	254
3. 4. 2. Effects on Rights and Obligations	255
4.0. Summary and Conclusions	256

Section Two. Specific performance

1. 0. Introduction	259
2. 0. Specific performance as a General Remedy	259
3. 0. Reasons Justifying the Court's Intervention	260
4. 0. Right to Demand Cure	264
5. 0. Requirements of the Remedy	266
6.0. Summary and Conclusions	266

Section Three. Monetary Relief

1. 0. Sketch of Discussion	268
2. 0. Part One. Claim for Gharāmat	270
2. 1. Introduction	270
2. 2. General Principle	276
2. 2. 1. Principle of Itlāf	272
2. 2. 2. Principle of Tasbib	273
2. 2. 3. Principle of Lā Ādarar	274
2. 2. 4. Scope of The Principles of Tasbib and Lā Ādarar	278
2. 3. Principles Restricting Recoverable Losses	281
2. 3. 1. Causal Connection	282
2. 3. 2. Foreseeability Test	283
2. 3. 2. 1. Foreseeable Losses	283
2. 3. 2. 2. Degree of Foreseeability	285

2. 3. 2. 3. Time of Foreseeability	286
2. 3. 2. 3. Whose Foreseeability	286
2. 3. 3. Mitigation Principle	287
2. 3. 4. Relevance of Fault	287
2. 4. Assessment of Damages	288
2. 4. 1. Formulae for Assessment in Tort Cases	289
2. 4. 1. 1. Methli Property	289
2. 4. 1. 2. Qimi Property	290
2. 4. 2. Applicability of the Tort Formulae to Contract Cases	290
2. 4. 3. Time of Assessment	293
2. 4. 4. Place of Assessment	294
3. 0. Part Two. Claim for Arsh	295
3. 1. Introduction	295
3. 2. Concept and Nature	295
3. 2. 1. Nature of the Remedy	296
3. 2. 2. Scope of the Remedy	298
3. 3. Arsh as an Alternative or Separate Remedy	300
3. 4. Assessment of Arsh	302
3. 4. 1. Time of Assessment	302
3. 4. 2. Place of Assessment	304
3. 5. Restrictions on the Remedy	304
3. 5. 1. Delay in Claiming <i>Arsh</i>	305
3. 5. 2. Seller's Offer to Cure the Non-Conformity	305
3. 6. Arsh and Gharāmat	306
4.0. Summary and Conclusions	308

CHAPTER FIVE. COMPARATIVE ASSESSMENT

Introduction	311
1.0. Withholding performance and Termination	311
1.1. Withholding performance as a Separate Remedy	311
1.1.1. Delivery of Non-Conforming Goods	312
1.1.2. Tender of Non-Conforming Documents	314
1.1.3. Partial Non-Conforming Delivery and Delivery of Wrong Quantity	317
1.2. Relationship Between Withholding Performance and Termination	321

1.3. Seller's Right to Cure	336
1.4. Mechanism of Exercising the Right to Terminate	339
2.0. Specific Performance	343
3.0. Right to Claim for Damages	348
4.0. Right to Reduce the Contract Price	356
CHAPTER SIX. CONCLUSION	360
Bibliography	370

Acknowledgement

"Whoever does not thank the creature does not thank the creator (God)".

-The Prophet of Islam, S. A.

It is common that any author of an academic work expresses his thanks to all who helped him in various ways in completing the work. I cannot also ignore such a moral praiseworthy practice. It is thus my conscientious duty to thank all who assisted me during the preparation of this thesis.

It is firstly to express my sincere and profound thankfulness to my supervisor, Mr. Robert Bradgate, who helped me in preparation of this work by his spiritual supports, advice and giving the method of research. I am quite sure that without his generous assistance such a work could have never been successfully completed. Due thanks are also to Dr. Sayyed Muhammad Jawād Mirfakhrāei, senior lecturer of the University of Shahid Beheshti, Tehran and presently working as a legal advisor at the Iran-US Claims Tribunal at the Hague, who has afforded me a valuable assistance in translation of Islamic law terminology to English.

I would like also to thank the British Library at Boston Spa, The Institute of Advanced Legal Study of London, Peace Palace Library at the Hague, the libraries of Nottingham, Leicester and Birmingham Universities for their kind assistance in access to the required references and peculiar thanks are also due to the staffs of the Crookesmoor Library of the University of Sheffield for their merciful assistance in access to the relevant materials available in the Library and preparing the required references through the inter-loan library from this country as well as outside. Special appreciation and thanks also to the many who have helped me, directly and indirectly, in preparing this work, in particular, I would like to thank my friends and colleagues at the Bureau of International Legal Services, both in London and the Hague, who assisted me in providing a number of useful materials. Sincere thanks to the Bureau of International Legal Services of the Islamic Republic of Iran in giving me the grant for completion of the LL.M. and Ph.D. courses.

Finally, deep sincere thanks to my family, Wife and three children for their patience during the long period of residence at the UK and providing a proper environment for the LL.M. course and the present research.

To

The sacrificed for freedom and justice;

Shi'ah virtuous jurists who have secured the Prophet's Muhammad (S.A.) and his

Household's legacy;

my father and mother; my wife, Farideh, and three children, Muhammad, Tahereh and

Ali.

Table of Cases

(A) English Law

Adderley v. Dixon (1824) 1 C. & S. 607 (57 E.R. 239).

Afovos Shipping Co. v. Pagnan [1983] 1 W.L.R. 195.

Agricultores Federados Argentinos v. Ampro S.A [1965] 2 Lloyd's Rep. 157.

Alghussein Establishment v. Eton College [1988] 1 W.L.R. 587.

Arcos, Ltd. v. E.A. Ronaasen & Son [1933] A.C. 470.

Arpad, The [1934] P. 189.

Aryeh v. Lawrence Kostoris & Son Ltd. [1967] 1 Lloyd's Rep. 63.

Ashmore & Son v. C.S. Cox & Co. [1899] 1 Q.B. 436.

Attorney-General of Rep of Ghana v. Texaco Overseas Tankships Ltd. (The "Texaco Melbourne") [1993] 1 Lloyd's Rep. 471.

Avimex S.A. v. Dewulf & Cie [1979] 2 Lloyd's Rep. 57.

Barber v. NWS Bank plc. [1996] 1 All ER 906.

Behn v. Burness [1863] 3 B. and S. 751 (122 E.R. 281).

Behnke v. Bede Shipping Co. Ltd. [1927] 1 K. B. 649.

Bence Graphics International Ltd. v. Fasson UK Ltd., [1997] 1 All E.R. 979.

Bentsen v. Taylor, Sons & Co. [1893] 2 Q.B. 274.

Beswick v. Beswick [1968] A.C. 58.

Bernstein v. Pamson Motors (Golders Green) Ltd. [1987] 2 All E.R. 220.

Bettini v. Gye (1876) 1 Q.B.D. 183.

Blackburn Bobbin Co. Ltd. v. T. W. Allen & Sons, Ltd. [1918] 1 K.B. 540.

Borries v. Hutchinson (1865) 18 C. B. (N.S.) 445 (144 E.R. 518).

Borrowman Phillips & Co. v. Free & Hollis (1878) 4 Q.B.D. 500.

Bowes v. Shand (1877) 2 App. Cas. 455.

Bremer Handelsgesellschaft m. b.H. v. C. Mackprang Jnr. [1979] 1 Lloyd's Rep. 221.

Bremer Handelsgesellschaft m. b.H. v. J. H. Rayner & Co. Ltd. [1979] 2 Lloyd's Rep. 216.

Bremer Handelsgesellschaft m. b.H. v. Vanden Avenne-Izegem P.V.B.A. [1978] 2 Lloyd's Rep. 109.

- British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London [1912] A. C. 673.
- Bunge Corp v. Tradax Export S.A. [1980] 1 Lloyd's Rep. 294 (C.A.).
- Bunge Corp v. Tradax Export S. A. [1981] 1 W.L.R. 711 (H.L.).
- CN Marine Inc. v. Stena Line (The Stena Nautica no. 2) [1982] 2 Lloyd's Rep. 336.
- C. Sharpe & Co. Ltd. v. Nosawa [1917] 2 K. B. 814.
- Campbell Mostyn (Provisions) Ltd. v. Barnett Trading Co. [1954] 1 Lloyd's Rep. 65.
- Car & Universal Finance Co. Ltd. v. Caldwell [1965] 1 Q.B. 525.
- Carlos Federspiel & Co., S.A. v. Charles Twigg & Co. Ltd. [1957] 1 Lloyd's Rep. 240
- Cehave N.V. v. Bremer Handelsgesellschaft m. b. H. (The Hansa Nord) [1974] 2 Lloyd's L. R. 216.
- Cehave N.V. v. Bremer Handelsgesellschaft m. b. H. (The Hansa Nord) [1976] 1 Q.B. 44.
- Chanter v. Hopkins (1838) 4 M. and W. 399 (150 E.R., 1484).
- Chaplin v. Hicks [1911] 2 K.B. 786.
- Charles Rickards Ltd. v. Oppenheim [1950] 1 K.B. 616.
- Clare v. Maynard (1837) 6 Ad. & E. 519 (112 E.R. 198).
- Compagnie Commerciale Sucres Et Denrees v. C. Czarnikow Ltd. (The Naxos) [1989] 2 Lloyd's Rep. 462.
- Compagnie Commerciale Sucres Et Denrees v. C. Czarnikow Ltd. (The Naxos) [1991] 1 Lloyd's Rep. 29.
- Davis v. Hedges (1871) L.R. 6 Q. B. 687.
- Decro-Wall International S.A. v. Practitioners in Marketing Ltd. [1971] 1 W.L.R. 361.
- Denmark Productions Ltd. v. Boscobel Productions Ltd. [1969] 1 Q.B. 699.
- Dingle v. Hare (1859) 29 L.J.C.P. 143 (141 E.R. 770).
- Dodd Properties (Kent) Ltd. v. Canterbury City Council [1980] 1 All E.R. 928.
- Dyster v. Randall & Sons [1926] 1 Ch. 932.
- E. E. & Brian Smith (1928), Ltd. v. Wheatsheaf Mills. Ltd. [1939] 2 K.B. 302.
- Elbinger Actien-Gesellschaft v. Armstrong (1874) L.R. 9 Q.B. 473.
- Evans Marshall & Co. Ltd. v. Bertola S. A. [1973] 1 W. L. R. 349.
- Federal Commerce & Navigation v. Molena Alpha Inc. (The Nanfri) [1979] AC. 757.
- Fletcher v Tayleur (1855) 17 C.B. 21 (139 E.R. 973).

- Flint v. Brandon (1803) 8 Ves. Jun. 159 (32 E.R. 314).
- Garnac Co. v. H M F. Faure & Fairclough [1966] 1 Q.B. 650 (C.A.).
- Gee v. Lancashire and Yorkshire Railway Co. (1860) 6 H. & N. 211 (158 E.R. 87).
- Gertreide Import Gesellschaft mb H v Itoh & Co. (America) Inc. [1979] 1 Lloyd's Rep. 592.
- Gill & Duffus S.A. v. Berger & Co. Inc. [1984] A.C. 382.
- Gill and Duffus S.A. v. Societe Pour L' Exportation des Sucres S.A.[1986] 1 Lloyd's Rep. 322.
- Graanhandel T. Vink B.V. v. European Grain & Shipping Ltd. [1989] 2 Lloyd's Rep. 531.
- Grebert-Borgnis v. J. & W. Nugent (1885) 15 Q.B.D. 85.
- H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd, [1978] 1 Q.B. 791.
- Hadley v. Baxendale (1854) 9 Exch. 341 (156 E. R. 145).
- Hammond & Co. v. Bussey (1887) 20 Q.B.D. 79.
- Harnett v. Yielding [1805] 2 Sch. & Lef. 549 (Ch. 1805).
- Hart v. Herwig (1873) 8 Ch. App. 680.
- Hartley v. Hymans [1920] 3 K.B. 475.
- Heaven & Kesterton v. Etablissements Francois Albiac [1956] 2 Lloyd's Rep. 316.
- Heron II, The, Koufos v. C. Czarnikow Ltd. (The Heron II) [1969] 1 A.C. 350.
- Heyman v. Darwins Ltd. [1942] A.C. 356.
- Hinde v. Liddell (1875) L.R. 10 Q.B. 265.
- Honck v. Muller (1881) 7 Q.B.D. 92.
- HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26.
- Howell v. Coupland (1876) 1 Q.B.D. 258.
- Hydraulic Engineering Co. Ltd. v. McHaffie Goslett & Co. (1878) 4 Q.B.D. 670.
- In Re General Trading Co. & Van Stolk's Commissiehandel (1910) 16 Com. Cas. 95.
- In re Trent & Humber Co. Ex parte Cambrian Steam Packet Co. (1868) L.R. 4 Ch. App. 112.
- In re Wait [1927] 1 Ch. 606.
- Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd. [1989] 1 Q.B. 433.
- J. Aron & Co. v. Comptoir Wegimont [1921] 3 K.B. 435.
- Jackson v. Rotax Motor & Cycle Co. [1910] 2 K.B. 937.
- James Finlay and Co. Ltd. v. N. V. Kwik Hoo Tong Handel Maatschappij [1929] 1 K.B. 400.
- Johnson v. Agnew [1980] A.C. 367.

- Kanchenjunga, The. Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corpn of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391.
- Kwei Tek Chao v. British Traders & Shippers Ltd. [1954] 2 Q.B. 459.
- Laconia, The. Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia (The Laconia) [1977] A. C. 850.
- Lakshmijit v. Faiz Sherani (P.C.) [1974] A.C. 605.
- Lesters Leather & Skin Co. Ltd. v. Home & Overseas Brokers Ltd. (1948) 64 T. L. R. 569.
- Lloyds & Scottish Finance Ltd. v. Modern Cars & Caravans (Kingston) Ltd. [1966] 1 Q.B. 764.
- Longbottom v. Bass Walker [1922] W.N. 245.
- M.S.C. Mediterranean Shipping Co. S.A. v. B.R.E-Metro Ltd. [1985] 2 Lloyd's Rep. 239.
- Manbre Saccharine Co. Ltd. v. Corn Products Co. Ltd. [1919] 1 K.B. 198.
- Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd [1934] 1 K.B. 148.
- Maredelanto Compania Naviera SA v. Bergbau-Handel G m b H (The Mihalis Angelos) [1971] 1 Q.B. 164.
- Martindale v. Smith (1841) 1 Q.B. 389 (113 E. R. 1181).
- McDougall v. Aeromarine of Emsworth Ltd [1958] 3 All E.R. 431.
- Mediana, The. Owners of Steamship "Mediana" v. Owners, Master & Crew of Lightship "Comet" [1900] A.C. 113.
- Melachrino v. Nicholl & Knight [1920] 1 K.B. 693.
- Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 App. Cas, 434.
- Millett v. Van Heek & Co. [1920] 3 K.B. 535.
- Millett v. Van Heek & Co.[1921] 2 K.B. 369 (AC).
- Minster Trust Ltd. v. Traps Tractors Ltd. [1954] 3 All E.R. 136.
- Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B) [1949] A.C. 196.
- Mondel v. Steel (1841) 8 M. & W. 858 (151 E. R. 1288).
- Moschi v. Lep Air Services Ltd. [1973] A.C. 331 (H.L.).
- Naughton v. O'Callaghan [1990] 3 All E.R. 191.
- Panchaud Freres S.A. v. Etablissements General Grain Co. [1970] 1 Lloyd's Rep. 53.
- Payzu Ltd. v. Saunders [1919] 2 K.B. 581.
- Peyman v. Lanjani [1985] Ch. 457.
- Peter Lind & Co. Ltd. v. Constable Hart & Co. Ltd [1979] 2 Lloyd's Rep. 248

- Photo Production v. Securicor Transport [1980] A.C. 827.
- Pilkington v. Wood [1953] 1 Ch. 770.
- Playa Larga, The. Empresa Exportadora de Azucar v. Industria Azucareva Nacional S.A. (The "Playa Larga" and Marble Islands) [1983] 2 Lloyd's Rep. 171.
- R. & H. Hall Ltd. and W. H. Pim (Junior) & Co. Ltd. (1928) 33 Com. Cas. 324.
- Raineri v. Miles [1981] A.C. 1050.
- Reardon Smith Line v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989.
- Regent OHG Aisenstadt und Barig v. Francesco of Jermyn Street Ltd. [1981] 3 All ER 327.
- Reuter, Hufeland, & Co. v. Sala & Co. (1879) 4 C.P.D. 239.
- Robert A. Munro & Co. Ltd. v. Meyer [1930] 2 K.B. 312.
- Robinson v. Harman (1848) 1 Ex. 850 (154 E.R. 363).
- Rodocanachi v. Milburn (1886) 18 Q.B.D. 67.
- Ryan v Mutual Tontine Westminster Chamber Association [1893] 1 Ch. 116.
- S.I.A.T. Didal Ferro v. Tradax Overseas S.A [1980] 1 Lloyd's Rep. 53.
- Sealace Shipping Co. Ltd. v. Oceanvoice (The "Alecoss M") [1991] 1 Lloyd's Rep. 120.
- Shell UK Ltd. v. Lostock Garages Ltd. [1976] 1 W.L.R. 1187.
- Sky Petroleum Ltd. v. VIP Petroleum Ltd [1974] 1 All E. R. 954.
- Slater v. Hoyle & Smith [1920] 2 K.B. 11.
- Societe Des Industries Metallurgiques S.A. v. Bronx Engineering Co. Ltd. [1975] 1 Lloyd's Rep. 465.
- Sotiros Shipping Inc. v. Sameiet Solholt (The Solholt) [1983] 1 Lloyd's Rep. 605.
- State Trading Corp. of India Ltd. v. M. Golodetz Ltd. [1989] 2 Lloyd's Rep. 277.
- Steedman v. Drinkle [1916] A.C. 275.
- Stewart v. Kennedy (1890) 15 App. Cas. 75 (H.L.).
- Stewart Gill Ltd. v. Horatio Myer & Co. Ltd. [1992] 1 Q.B. 600.
- Stickney v. Keeble [1915] A.C. 386.
- Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] A.C. 361.
- Suzuki & Co. v. Burgett & Newsman (1922) 10 Ll. L.R. 223.
- Tamvaco v. Lucas (no. 1) [1859] 1 E & E 581 (120 E.R. 1027).
- Taylor & Sons, Ltd. v. Bank of Athens (1922) 27 Com. Cas. 142.

- Taylor v. Caldwell (1863) 3 B. & S. 826 (122 E.R. 309).
- Taylor v. Oakes, Roncoroni & Co. (1922) 127 L. T. 267 (C.A.).
- Taylor v. Oakes, Roncoroni & Co. (1922) 38 T.L.R. 349 (HL).
- Tetley v. Shand (1871) 25 L.T. 658.
- Thames Sack and Bag Co. Ltd. v. Knowles & Co. Ltd (1918) 119 L.T. 287.
- Thol v. Henderson (1881) 8 Q.B.D. 457.
- Thomas Borthwick (Glasgow) Ltd. v. Bunge & Co Ltd.[1969]1 Lloyd's Rep. 17.
- Thompson (W. L.) v. Robinson (Gunmakers) Ltd. [1955] 1 Ch. 177.
- Tito v. Waddell (No. 2) [1977] Ch. 106.
- Tradax Export S.A. European Grain & Shipping Ltd. [1983] 2 Lloyd's Rep. 100.
- Tradax Internacional S.A. v.Goldschmidt S.A. [1977] 2 Lloyd's Rep. 604.
- United Australia Ltd. v. Barclays Bank Ltd. [1941] A.C. 1.
- United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904.
- Universal Cargo Carriers Corp. v. Citati [1957] 2 Q. B. 401.
- Van Den Hurk v. R. Martens & Co. Ltd. [1920] 1 K.B. 850.
- Varley v. Whipp [1900] 1 Q.B. 513.
- Victoria Laundry (Windsor) v. Newman Industries Ltd [1949] 2 K.B. 528.
- Vitol SA v Norelf Ltd., The Santa Clara [1994] 4 All E R 109.
- Wait & James v. Midland Bank (1926) 31 Com. Cas. 172.
- Wallis, Son & Wells v. Pratt & Haynes[1910] 2 K.B. 1003 (C.A.).
- Warinco A. G. v. Samor S. p. A. [1977] 2 Lloyd's Rep. 582.
- Wertheim v. Chicoutimi Pulp Co. [1911] A.C. 301.
- White & Carter (Councils) Ltd. v. McGregor [1962] AC 413.
- Wickman Machine Tools Sales Ltd v. Schuler A.G. [1972] 1 W.L.R. 840.
- Wickman Machine Tools Sales Ltd v. Schuler A.G. [1974] A.C. 235.
- Wilson v. Northampton & Banbury Junction Railway Co. (1874) 9 Ch. App. 279.
- Williams Bros. v. Ed. T. Agius Ltd [1914] A.C. 510.
- Wroth v. Tyler [1974] 1 Ch. 30.

(B) The Convention

N.B. All the cases referred to in the Convention Chapter as to the interpretation of the Convention provisions are cited from the Pace University School of Law, UNCITRAL's Home Pages and from UNILEX International Case Law & Bibliography on the UN Convention for the International Sale of Goods, edited by: Michael J. Bonell, et. al., Transnational Publishers, Inc. Irvington, New York, 1996.

(I) Austria

Austria 1 July 1994 Oberlandesgericht Innsbruck: Dansk Blumsterexport A/s v. Frick Blumenhandel (CLOUT abstract no. 107).

(II) Germany

Germany 31 August 1989 Landgericht Stuttgart (CLOUT abstract no. 4).

Germany 24 April 1990 Amtsgericht Oldenburg (CLOUT, abstract no. 7).

Germany 17 September 1991 Oberlandesgericht Frankfurt (CLOUT abstract no. 2).

Germany 8 January 1993 Oberlandesgericht Düsseldorf (CLOUT, abstract no. 48).

Germany 14 May 1993 Landgericht Aachen (CLOUT abstract no. 47).

Germany 2 July 1993 Oberlandesgericht Düsseldorf (CLOUT, abstract no. 49).

Germany 17 September 1993 Oberlandesgericht Koblenz.

Germany 10 February 1994 Oberlandesgericht Düsseldorf [6 U 32/93] (CLOUT, abstract no. 81).

Germany 20 April 1994 Oberlandesgericht Frankfurt (CLOUT, abstract no. 84).

Germany 8 March 1995 Bundesgerichtshof (CLOUT abstract no. 123).

Germany 24 May 1995 Oberlandesgericht Celle (CLOUT, abstract no. 136).

Germany 21 August 1995 Oberlandesgericht Stuttgart.

Germany 21 May 1996 Oberlandesgericht Köln (CLOUT abstract no. 168).

(III) Internation Chamber of Commerce (ICC)

ICC Arbitration Case No. 6281 of 26 August 1989 (CLOUT, Case No. 102).

ICC Arbitration Case No. 7585 of 1992.

ICC Arbitration Case No. 7531 of 1994.

(IV) Italy

Italy 24 November 1989 Pretura circondariale di Parma (Foliopack Ag v. Daniplast S.p.A)
(CLOUT, abstract no. 90).

(V) United States

United States 6 April 1994 U.S. Dist. Ct. (S.V. Braun, Inc. v. Alitalia Linee Aeree Italiane,
S.p.A.).

United States 9 September 1994 U.S. Dist. Ct. (Delchi Carrier S.p.A. v. Rotorex Corp.)
(CLOUT, abstract no. 85).

United States 6 December 1995 U.S. Cir. Ct. (Delchi Carrier, S.p.A. v. Rotorex Corp. (CLOUT,
abstract no. 138).

Transliteration and Style

Transliteration has normally been carried out in accordance with the schedule suggested by an English journal published in Tehran by Ahl al- Bayt World Assembly, i.e., “The Message of Thaqaalayn” vol. 3, Nos. 1 &2 (1996). However, the original attempt to apply this transliteration schedule strictly proved unsatisfactory. For this reason, some of these suggested styles have been modified in the text and bibliographical materials.

TRANSLITERATION

<i>Symbol</i>	<i>Transliteration</i>	<i>Symbol</i>	<i>Transliteration</i>
ا	ʾ	ل	l
ب	b	م	m
ت	t	ن	n
ث	th	و	w
ج	j	ه	h
ح	ḥ	ي	y
خ	kh	ة	ah
د	d	<i>Long Vowels</i>	
ذ	dh	ا	ā
ر	r	و	ū
ز	z	ى	ī
س	s	<i>Short Vowels</i>	
ش	sh	ا	a
ص	ṣ	و	u
ض	ḍ	ى	i
ط	ṭ	<i>Persian Letters</i>	
ظ	ẓ	پ	p
ع	ʿ	چ	ch
غ	gh	ژ	zh
ف	f	گ	g
ق	q		
ک	k		

INTRODUCTION

1. Purpose

Shi'ah Islamic law has not been getting its fair share of attention from comparative law students in the western countries. The issue has received a serious attention more recently when a broad revolution took place in one of the most strategic regions of the world, that is Iran, in the name of *Shi'ah* Islam. Immediately after the victory, the revolutionary leaders declared that the Iranian legal system must be regulated in accordance with *Shi'ah* Islamic Law. Subsequently, the constitution of the revolution was sanctioned by the Experts Council of the Constitution. The revolutionary constitution, in declaring the Islamic law predominant, provided:

“All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle shall absolutely and generally govern all the principles of the constitution as well as all other laws and regulations, and this shall be at the discretion of the jurists (*fuqahā*), members of the Guardian Council” (principle 4).¹

This declaration has raised a serious question for lawyers, in particular those educated in western countries, whether the existing *Shi'ah* Islamic law is able to tackle all legal issues. No comprehensive work has been made in this connection yet.

The primary purpose of this study is to show how *Shi'ah* law could regulate modern sale transactions. This purpose is twofold. First it is to show how the current *Shi'ah* law deals with the modern sale transactions. Second it is to examine how this system will be able to govern them. The question derives from the fact that *Shi'ah* Law is an entirely theoretical religious legal system and lacks a developed law of contracts. Although during the centuries, in particular the two recent centuries, a good deal work has been made in this context (particularly, in the area of sale contracts), the law relating to remedies available for an aggrieved party on account of the other party's breach of contract has not been properly gathered and classified by *Shi'ah* jurists. They have also not examined the applicability of various principles, which they have developed on the basis of Quranic verses and tradition (*sunnah*)² of the Prophet of Islam and his Twelve Successors (*Shi'ah* Imāms) to the modern complicated contracts. *Shi'ah* jurisprudence, in reflecting *Shi'ah* law, has only focused on a simple sale contract which is far removed from modern business activity.³ This caused a

¹ See also: principles 72 and 91.

² The term is discussed in Chapter One, 2. 1. 1. 2.

³ The idea of codification of Iranian civil law on the basis of *Shi'ah* jurists' judgements was a good starting point to assess the possibility of the adaptability of *Shi'ah* law to the domestic legal issues. However, the trend has not been further carried out thereafter until recently when the new Islamic Government seized power in Iran subsequent to the victory of Islamic Revolution in 1978. It is to be stressed that this problem is

number of important questions to be left unanswered and at the very beginning a researcher will find out that there are considerable gaps in this respect.

This study also intends to compare this traditional legal system with English sale of goods law and an important universal convention on the contracts for the international sale of goods prepared by the United Nations in 1980 (that is, the Convention on Contracts for the International Sale of Goods (hereinafter, the Convention) in order to assess this system, as it stands, and with that which is suggested in this study.

2. Reasons for this Particular Choice

The existence of a comprehensive codified rules on the sale of goods cases as well as a mass of decided cases on the issue and a long experience of English courts in applying customary law would itself justify the choice of this system for this study. As far as the Convention is concerned, it has developed over half of a century by working groups of international organisations and eminent lawyers from different legal systems, in particular Civil and Common law systems. It is therefore a product of a consolidation of different legal systems which can be a good example of a universal code of customary law in the *Shi'ah* law sense which is fully examined in the first chapter.

Among the various areas of law, what constitutes the core of this study is the law of remedies. However, it is not an appropriate place to cover the whole system of remedies in *Shi'ah* contract law. The purpose of this research can only be properly achieved when a particular area of law is specifically emphasised.

The importance of the law concerning the remedies for breach, of itself can, to a large extent, justify this particular choice, for it is an obvious fact that the question of breach of contract by one of the contracting parties and the other party's remedies for it is one of the important aspects of contract law. Moreover, choice of this part is in line with the purpose of this study, i.e., the capability of *Shi'ah* legal system to adapt to modern circumstances. *Shi'ah* jurists have done a great deal work in this part. Thus, examination of this part would effectively help to compare the theories and rules justifying the remedies available under English law and the Convention with those of *Shi'ah* law.

3. Scope of the Research

Among the various aspects of the law of remedies, the most controversial part of it is chosen, that is, the remedies available for a buyer where the seller has failed to perform his delivery

not confined to the particular area of the law of remedies but the position of the other contexts of the law of contracts are the same.

obligations in accordance with the contract. However, in any alleged breach situation in contracts for the sale of goods -where a buyer claims breach by seller and seeks a remedy as a result -there are three distinct basic issues:

- (1) Has there been any defective or non-performance *in fact* on the part of seller? This involves interpretation of the contract and answering questions such as, what was undertaken by the seller? Has the seller fulfilled that obligation?
- 2) If there has been a defective or non-performance in fact, *does it constitute a breach?* That is, was there any excuse or justification for his defective or non-performance?
- 3) If there is a breach, *what remedy or remedies are available* to the aggrieved buyer?⁴

The question whether there has been any *excuse* or *justification* for the seller's default is entirely beyond the scope of the present study. Similarly, the question what the seller has undertaken under the contract is excluded from this study. The present research is basically concerned with the third question, that is, assuming that the seller, without any exempting excuse and legal justification, has committed a breach of contract, what remedy or remedies are available for the injured buyer?

The main emphasis of this study is on the remedies available for seller's breach under the general law, where the parties have not provided what is to happen if the seller fails to perform his obligations. It therefore excludes cases where the parties have provided remedies for themselves under the contract, by express, implied agreement or by inference from usage.

The concept of breach comprises any unjustifiable refusal or failure by one party to a lawful and enforceable contract to perform any of the express or implied duties imposed on that party by the law, the contract, or by established practices or usage, normally by refusing to perform, failing to perform, performing late or badly. Accordingly, a seller may be regarded as guilty of breach of contract in various ways. After the contract is made but before performance is due, the seller may commit a so-called "anticipatory breach" or "repudiation". He may also be guilty of an actual breach by wholly failing to tender the goods or relevant documents; by failing to tender or ship at the time or place or in the manner specified in the

⁴ In view of terminology, there are two terms used occasionally instead of each other: "right" and "remedy". However, the term "right" is also employed to describe what at the same time is regarded the other's obligation. For instance, under a sale contract the seller has the obligation to deliver the goods and transfer the property in the goods. These are exactly the rights of the buyer: demanding delivery and the transfer of the property. These can be called the primary rights and obligations under a sale contract. However, in the case of breach of contract, additional rights and obligations arise which may be referred to as secondary rights and obligations (as Lord Diplock suggested in *Photo Production v. Securicor Ltd.* [1980] AC. 827 at 849). In some legal systems such as the Convention they appear under the heading "Remedies for breach of contract". Since the present research is concerned with the buyer's rights in the case of seller's failure to perform his obligation, in order to avoid confusion the expression "remedy" is chosen. Any use of the term "right" within the discussions refers to the secondary sense of the term.

contract; by tendering or delivering non-conforming goods or documents in breach of contractual requirements; or by failing to perform a subsequent obligation to repair or replace. Analysis of the law relating to the buyer's remedies under the all above-mentioned circumstances is not an easy work to be undertaken by research of the present nature. In the present study, the main emphasis is on examination of the law governing the remedies available for the buyer where the seller has performed his delivery obligations in a way which do not conform to the contract terms. Non-conformity, in this work, means that the performance rendered by the seller differs from that he has undertaken in point of view of quality, quantity, description and time.⁵ Accordingly, non-conformity in the sense that the goods are not free from the third party rights or claims or in that the seller has delivered goods as to which he has not had good title is in principle excluded from the study. The reason for exclusion of the latter issue, notwithstanding the term 'lack of conformity' may include it, is that under *Shi'ah* law a contract on a subject which the seller has no good title is invalid unless the owner or the beneficiary person approves it.

4. Thesis' Outline

No one can comprehensively present a real picture of *Shi'ah* law without looking at the main sources of the law and the method of exploiting the rules relating to the issue in question. However, there is obviously no room in this study for a complete exposition of the relevant sources except in a summary form. A general introduction to the sources on which the law relating to the issue in question is based, the method of exploiting the law governing the issue and the methodology employed to perform this study are allocated to the First Chapter. The main body of this work, which constitutes a large part of this thesis, i.e., dealing with the rules relating to the buyer's remedies under the three systems, is covered by the Second, Third and Fourth Chapters. A necessary part of a study of such a nature is first to compare the various solutions adopted in developed legal systems on the problems in question in a short form to highlight the gaps in the undeveloped system and then to compare them with it in order to assess how it works. The Fifth Chapter is allotted to this purpose. The Final Chapter will highlight the general conclusions obtained from this study.

⁵ The study will also not cover the buyer's remedies for seller's pre-contractual misstatements as to the goods when they are incorporated into the contract as a contractual terms. As far as English law is concerned, the issue is regulated by the Misrepresentation Act 1967.

CHAPTER ONE

SOURCES OF LAW

AND

METHODOLOGY

1.0. Introduction

1.1. Concept and Terminology

Shi'ah law, as exists today, consists of mass of the qualified *Shi'ah* jurists' *fatāwā* (pl. of *fatwā*, religious judgement) reflected in *Shi'ah feqh* (jurisprudence).¹ As a legal example, that is those rules to which the principle 167 of the Iranian Constitution refers:

“The judge is bound to endeavour to judge each case on the basis of the codified law. In the case of absence of any such law, he has to deliver his judgment on the basis of *authoritative Islamic sources and authentic fatāwā*. ...” (italic added).²

1.2. Historical Background

To understand *Shi'ah* law as a separate legal system, one has to bear in mind the history of emergence of *Shi'ah* school of thought as a separate Islamic school. Emergence of different Islamic schools of thought has a long and complex history. It originates in the question of succession to the Prophet of Islam, when he passed away in the Islamic *Hijrah* (lunar) year 11/AD 632.³ Before his passing away, all Muslims were unanimous that the primary source of law was Quran and in the case of doubt the case must have been referred to the Prophet's view. However, after his death differences emerged between his followers. The majority took the view that the Prophet did not specifically designate his successor but left the issue of succession to Muslims themselves to elect their own religious leader. However, the minority Muslims argued that the Prophet in several occasions did explicitly and implicitly specify his successor who was Ali ibn Abitalib (the Fourth Caliph in view of the Majority) and his decisions should have been observed by the Muslim community as the Prophet's decisions. They also argued that the question of *Imāmah* (divine leadership) of the Muslim community was not an issue to be left to Muslims themselves. God had to specify a particular person to lead and administer Muslim community under the divine law. On these textual and logical

¹ As a matter of terminology two expressions are used here interchangeably: *shari'ah* and *feqh*. However, they are to be distinguished from each other. *Feqh* is more closer than *shari'ah* to the concept of 'law' in English. The former, in spite of having a narrower ambit than *shari'ah*, covers a much broader area than law *stricto sensu*. A substantial part of *feqh*, however, correlates to the present-day concept of the law. A further term used here is *faqih*. The term '*faqih*, sing.; *fuqahā*, pl' (sometimes *mujtahed* sing.; *mujtahedin*, pl.) is used to refer to a scholar who is versed in *feqh* to infer detailed rules from the sources concerned. He is a religious jurist, and is required to be pious and observant. For the convenience, in this research the term *feqh* is translated into 'jurisprudence' with reference to the overall context of *shari'ah* and with stress on the jurisprudential or theological aspect of the law and *faqih* is translated to 'jurist' with reference to the essential religious requirements the term contains. For detail discussion of these terms, see, Fyzee, Asaf, A. A., (1974) at 16-18, 23; Badr, G. M., (1978) at 188-189; A'mid Zanjāni, A. A., (1993) at 130-131; Mallat, C., (1993) at 2-3; Owsia, P., (1994) at 17; Jannāti, M. E., (1372 H.S.) at 80-83

² See also, the Iranian Constitution, Principles 4, 61, 72 and 170.

³ For a detailed discussion of the issue see, Urduni, A. H. Y., (1372 H.S.) at 184-210.

bases, they believed that the leadership of Muslim community devolved, upon Ali's martyrdom in 40/661, successively on Ali's two sons Hassan and Hussain. Thereafter it continued on the hereditary line through Ali's second son, Hussain the Third Imām, in the Prophetic House until the Twelfth Imām, al- Mahdi became the last who is still alive and remained in "occultation" (*ghaybah*) or hiding and will appear one day as the saviour.⁴

Upon this difference, two schools of thought emerged between Muslims community. Upon the first which was followed by the majority, it was held that in any case where there was a statement from the Quran or the Prophet it must be followed, otherwise the case must have been referred to the secondary sources. From then the majority of Muslims have gradually tried to develop some reliable sources upon which the Islamic faith should have been based and subsequently their school of thought was formed. This particular form of thought is commonly called the "Sunni school of thought". However, the minority of Muslims disagreed with that view and gave to the words, actions and *taqrir* (approval) of *Shi'ah* Imāms (they are usually called the "Household of the Prophet") the same religious validity all Muslims agreed to give to the words, actions and *taqrir* of the Prophet.⁵ On this basis, a separate school of thought was formed with its own methodology. This is commonly called the "Shi'ah school of thought".⁶

Following the emergence of difference between *Sunni* and *Shi'ah* scholars in respect of the sources upon which any particular religious view must have been based it was inevitable that there had to emerge two separate schools of *Sunni* and *Shi'ah feqh*. *Sunni* scholars went their own way and gradually established their own methodology of inferring the law of *Shari'ah*. However, the *Shi'ah* community did not feel such necessity at the period of *Imāmah*. In any new situation the case was referred to the living Imām and any answer given by him was considered as the law of *Shari'ah*.⁷

Although at the period of *Imāmah* of *Shi'ah* Imāms some essential features of the theory of *Imāmah* developed and a notable legal heritage was left, they were mostly oral and not systematic. For this reason, after the Occultation of the Twelfth Imām (starting from

⁴ In this respect see, Urduni, A. H. Y., (1372 H.S.) at 201-202; Al- Balāgh Foundation, (1992) at 95-99; Owsia, P., (1994) at 18-19; Gurgi, A., (1997) at 45-46.

⁵ See also, A'mid Zanjāni, A. A., (1993) at 134. For a detailed discussion of the authenticity of the *Sunnah* of *Shi'ah* Imāms as a source of Islamic law, see, Tabātabāei, S. M. H., (1995) at 95; Jannāti, M. E., (1370 HS) at 85 and *seq.*

⁶ There are five major Islamic 'schools' today four of which are orthodox *Sunni* and the fifth is *Shi'ah*. The four major *Sunni* schools are the *Hanafi*, founded by *Abu Hanifah* (d. 150/767); the *Maliki*, founded by *Malik ibn Anas* (d. 180/796); the *Shafei*, founded by *ibn Idris shafei* (d. 204/820); and the *Hanbali*, founded by *Ahmad ibn al-Muhammad ibn Hanbal* (d. 240/855). The *Shi'ah* school has a number sub-systems the major branch of it is the *Ithnā Ashari* (literally Twelver) *Shi'ah* which is the official religion in Iran (see the Principle 12 of the Iranian Constitution 1979). See in this respect Owsia, P., (1994) at 17-20. For a detailed information of the emergence of *Sunni* schools see, Muslehuddin, M., at 67 and *seq.*; Fyzee, Asaf A. A., (1974) at 32 and *seq.*

⁷ Jannāti, M. E., (1372 H.S.) at 89; Gurgi, A., (1997) at 113.

265/879, particularly, after the permanent Occultation commenced from 329/941) *Shi'ah* scholars felt the need to systematise their own *feqh*.⁸ For this purpose, they began to establish their own methodology which is known as the *e'lm al usūl* (Discipline of Principles or Science of Roots).⁹ Under *e'lm al usūl*, they have gradually developed a particular methodology by which a jurist would be able to infer the law of *Shari'ah*. Under this methodology, any jurist seeking the law of *Shari'ah* must base his judgement on at least one source whose authoritativeness is established in *e'lm al usūl*.¹⁰

Bearing the aforesaid point in mind, to perform a study of the nature of the present one may seem somewhat hard at first glance unless a general picture of the sources upon which the rules of this legal system should be based is presented. Identification of these sources and close understanding of their position in inferring the law of *Shari'ah* seems very significant. It enables a researcher not to fall into mere imitation and adoption of a particular legal view without a satisfactory justification. This may not be the case with respect to the legal systems which possess a well-classified as well as a developed codified legal system. However, the case is significant in respect of *Shi'ah* law. Talking of this legal system is not so easy as it may appear. When speaking of this system one must make a distinction between the principles which constitute the basic foundations of it and what has gradually developed over centuries from the emergence of Islam by *Shi'ah* scholars as *Shi'ah* jurisprudence. This is an important as well as a difficult task for a person who is interested in studying *Shi'ah* law. There are certain well-accepted sources which constitute the basic framework for understanding this legal system. Whatever is said on the part of a *Shi'ah* jurist must be justified by at least one of those well-accepted sources, otherwise it has no Islamic value. Accordingly, a legal view will have an authoritative value for *Shi'ah* community if it accords with those original sources.

However, dealing in detail with all legal sources upon which *Shi'ah* law is built is not feasible within the study of this type. What is said below is only a general examination of the sources upon which any legal rule should be founded in order to show how far this system of law could answer modern questions within its methodology.

⁸ Jannāti, M. E., (1372 H.S.) at 149; Gurgi, A., (1997) at 124 and *seq.*, particularly, at 136.

⁹ For detailed information about the history of formation and development of *Shi'ah* jurisprudence see, Owsia, P., (1994) at 22 and *seq.*; Shahābi, M., (1372 H.S.) vols, 1, 2 and 3; Jannāti, M. E., (1372 HS); Gurgi, A., (1997).

¹⁰ It is to be noted that Islamic *feqh* is divided into two portions: *usūl* and *furū'*. *Usūl* literally means the 'roots' or 'foundations' of the law, while '*furū'* literally means 'branches' or 'applications', of the law. The science of *usūl* deals with the sources of the law and the principles of interpretation, while the science of *furū'* deals with *ahkām*, pl. of *hukm*, (the particular injunctions, that is, the law as it is actually applicable in the courts). See also, Mutahhari, M., (1361 H.S.) at 8 and *seq.*; Fyzee, Asaf A. A., (1974) at 23. For detailed information about the history of formation and development of *E'lm al- Usūl* in *Shi'ah feqh* see, Gurgi, A., (1997) at 299 and *seq.*

2. 0. Sources of Law

Conventionally, it is said that *Shi'ah* law comprises the aggregate of divinely-ordained rules which are to be inferred by the qualified jurists.¹¹ The role of jurist in *Shi'ah* law is not to make the law. What he judges is a simple announcement of the law of *Shari'ah* he discovers from the recognised sources.¹² In any particular case he has to endeavour to base his judgement on one of the sources which are prescribed below. The process of inference of detailed rules from the recognised sources is called "*ijtehād*" (literally, "endeavour" or "self-exertion").¹³ On this view, it is held that the primary source is the Muslim Holy Book "Quran". The second source, in practice the most important one, is the *Sunnah*. Two further sources are also recognised by *Shi'ah* jurists, that is, *ijmā'* and *a'ql*. No further source is formally recognised. However, as will be shown below, certain supplementary sources have been, albeit in varying degrees, used by the jurists in justifying their judgements.

2. 1. Formal Sources

Although the four aforementioned sources are formally recognised in *Shi'ah* law as the valid source for inferring the law of *Shari'ah*, they are not employed at the same degree. There is a strict hierarchical order between them and are divided into two categories: primary and secondary.

2. 1. 1. Primary Sources

Quran and *Sunnah* are held to constitute the primary sources for inferring the law of *Shari'ah*. Since the rules prescribed therein are written down, they are commonly described as

¹¹ See e.g., Mutahhari, M., (1361 H.S.) at 7; Jannāti, M. E., (1372 H.S.) at 33. The same view is true as to *Sunni* law. See in this respect, Coulson, N. J., (1964) at 1-2 and 75; Muslehuddin, M., at 55 and *seq.*; Anderson, J. N. D., (1959) at 17.

¹² This is based on a well-accepted theological belief that human community is not able independently to make the law since he cannot realise the *masāleh* (interests) and *mafāsed* (ugliness) of his conduct and behaviour and to find out how they may affect its life in the other world so as to make the proper law in any case. In this respect, he has to be guided and assisted by who has divine knowledge and is able precisely to realise what is in favour of man and his community and what may be against him in the next world. *Shi'ah* school holds, as a matter of theological belief, that God and those who are given divine knowledge are the only persons who are able to do this. On this theological belief, legislation should be made by God directly or at least by those persons who are given such a power. In *Shi'ah* belief those are the Prophet and Twelve Imāms. On this view, any legal opinion should be based on a specific or at least a general approval of God or the Prophet and Imāms. See in this respect, Ezzati, A., (1976), chapter 16; Daftar Hamkāri Huzah wa Dāneshgāh, (1368 H.S.) at 296 and *seq.* in which the question was examined in detail in view of *Shi'ah* scholars. *Shi'ah* jurisprudence is based on such a theological belief. This is the reason why in any case the jurists make efforts to base their judgements on at least one explicit or implicit approval from God and his appointees.

¹³ For detailed information about the meaning of "*Ijtehād*" and its English equivalent see, Weiss, B., (1978) 199, particularly, at 200-201; Ezzati, A., (1976) chapter 12. See Also, Jannāti, M. E., (1372 H.S.) at 1 and *seq.*

nass (sing.; *nusūs*, pl.), which can be translated as Script or Text, forming the ‘written’ authority.¹⁴

2.1.1.1. Quran

The Quran is the principal source of every form of Islamic thought. It is the Quran which gives religious validity and authenticity to every other religious source in Islam.¹⁵ This source is often called “*ketāb*” (the book). It consists of over 6000 *āyah* (sing.; *āyāt*, pl.; literally, verses)¹⁶ divided into 114 *sūrah* (literally, chapters). The individual verses were pronounced over 23 years of Muhammad’s Prophethood as *wahy* (revelation) of God’s commandments. Among more than 6000 verses of the Quran only about 500 of its individual verses are said to be concerned with the legal issues.¹⁷ However, they contain certain general principles from which a number of detailed rules can be derived. It is to be mentioned that since a mass of *rewāyāt* are available in respect of the Quranic rules, any jurist is required to take into account those part of *rewāyāt* which elaborated the contents of these Quranic verses when inferring the relevant religious precepts.¹⁸

2.1.1.2. Sunnah

The other source upon which a legal view can be based is *Sunnah*. In the terminology of Islamic jurists, the term “*Sunnah*” (sometimes it is called “*sirah*”) means¹⁹ words (*qūl*), action (*fe‘al*) and *taqrir* (implicitly approval)²⁰ transmitted from the Prophet which can be translated into “tradition”. This source was spelt out by means which is called “*hadith*”, pl. “*ahādith*”, “*rewāyah*”, pl. “*rewāyāt*”, or “*khabar*”, pl. “*akhbār*”.²¹

¹⁴ See also, Fyzee, Asaf A. A., (1974) at 20; Owsia, P. (1994) at 68. It is to be noted that although theologically the words of God (Quran) and the *Sunnah* of the Prophet and Imāms are considered the law itself by *Shi‘ah* Muslims, they are jurisprudentially referred to as the ‘source of law’ rather than the law itself. This is because they are the scattered texts from which the law is not entirely self-evident. They do not, as a rule, state the law in a strictly legal sense, as a code or similar instrument which states the law. They do, however, contain the law. Since the law is buried within the (legally) imprecise and sometimes ambiguous language of the scattered texts, it is said to be extracted from the texts, and it is for this reason that the texts are to be considered sources of the law rather than the law itself.

¹⁵ For a detailed discussion see, Al- Balāgh Foundation, (1992), at 83-88; Tabātabāei, S. M. H., (1995) at 94; Jannāti, M. E., (1370 H.S.) at 77 and *seq.*

¹⁶ Great differences exist between Islam believers as to the number of the Quranic verses, ranging between 6000, 6204, 6214, 6219, 6225, 6323 and 6660. However, these differences are for the reason of procedural rules of reading not for the contents. See in this respect, Mutahhari, M., (1361 H.S.) at 12; Gurgy, A., (1997) at 17.

¹⁷ See, Shahābi, M., (11369 H.S.) vol. 2 at 15 and *seq.* (in which he explains briefly all the normative verses).

¹⁸ See in this respect, Khurāsāni, (1364 H.Q.), vol. 2 at 58 and *seq.*

¹⁹ The term “*Sunnah*” has different meanings. But in this study it is used in the sense which the jurists used in *e‘lm al- usūl*. For a detailed discussion see, Jannāti, M. E., (1370 H.S.) at 73 and *seq.*

²⁰ *Taqrir* means keeping silent vis-à-vis the actions and deeds of others, so much it signifies the consent and agreement of the M’sūm (infallible Imām or Prophet) with them. See, Mutahhari, M., (1361 H.S.) at 14; Jannāti, M. E., (1370 H.S.) at 75 and 155 and *seq.*

²¹ See Jannāti, M. E., (1370 H.S.) at 162. It is to be mentioned that the word “*Sunnah*” is technically to be distinguished from the terms such as “*hadith*”, and etc. The latter is the story of a particular occurrence,

To explain, at the time when the Prophet was living, his followers referred queries and disputes to him and he answered their questions, adjudicated their disputes and pronounced rulings. Sometimes he acted with the intention of teaching his followers the law of *Shari'ah* or a particular action or behaviour was made and the Prophet did not object while he was realising that action or behaviour. His words, deeds and approvals were remembered by his followers and subsequently recorded in writing as the Prophet's *Sunnah*.²²

To that extent *Shi'ah* and *Sunni* schools are common, although they depart from each other in the way of narrating the Prophet's *Sunnah*. However, these two schools depart from each other in that *Sunni* school restricts *Sunnah* to sayings, deeds and approvals of the Prophet, while *Shi'ah* school extends it to include the sayings, deeds and approvals of the Twelve *Shi'ah* Imāms. In this way, the *Shi'ah* school inserted into the category of *Sunnah* a mass of words, deeds and approvals transmitted from the Twelve Imāms of *Shi'ah* after the death of the Prophet as a primary source of law.²³

Accordingly, a *Shi'ah* jurist when relying on *Sunnah* has to look at those *rewāyāt* narrated from the Prophet and Twelve *Shi'ah* Imāms and establish whether or not the particular rule was pronounced by the Prophet or Imāms.²⁴ After he establishes the attribution of the statement to the Prophet or one of Imāms, he should try to understand his real behaviour. By understanding that he tries to derive the relevant religious rules.²⁵

while the former, the rule of law deduced from it, is the 'practice' of the Prophet or Imām, that is, their 'model behaviour'. It is to be noted that when referring to the means of reporting the "Sunnah" (tradition), the expression "rewāyah", pl. "rewāyāt", will be used throughout this study.

²² For a detailed discussion on the history of gathering and classification of *Sunnah* see, Jannāti, M. E, (1370 H.S.) at 127 and *seq.* Likewise, for a detailed discussion of the Prophet's *Sunnah* in *Shi'ah's* view see, Al-Balāgh Foundation, (1992) at 83 and *seq.*

²³ See in this respect, Tabātabāei, S. M. H., (1995) at 95; Jannāti, M. E, (1370 HS) at 85 and *seq.*

²⁴ In order to verify the reliability of the *rewāyāt* any jurist must first make sure that they are the words, actions or approvals of the Prophet or Imāms. For this purpose, *Shi'ah* (as well as *Sunni*) jurists have made great efforts to verify the reliability of the transmitters of the *rewāyāt* and thereby determined the various degree of authenticity of the *rewāyāt* by establishing two interrelated disciplines: *E'lm al- Rejāl* (The Science of Persons) which concerns biographical notations on the religious creditability of the transmitters, and *E'lm al- Derāyah* (The Science of Considered Appraisal) which classifies the *rewāyāt* into different categories of authority according to the chain(s) of transmitters. Basing on the creditability of the transmitters, and the complete or incomplete chains of transmitters the narrated *rewāyāt* are divided into different categories. See in this respect, Jannāti, M. E, (1370 H.S.) at 114-115, 146, 164 and *seq.*

²⁵ A considerable authoritative sources have over centuries undertaken to gather and classify these statements citing the words, actions and approvals of the Prophet and His Twelve Successors. These are in two sets. The main and the primary set consists of four, collectively known as The Four Books (*Kutub al- Arba'ah*), produced over a century and a half in the fourth to mid fifth/tenth to mid eleventh century; while the secondary set, consisting of a further four collections, is of later periods spread over almost two centuries, from the eleventh to early fourteenth/seventeenth to late nineteenth centuries. The first set are as follows: Bābeway, Muhammad ibn Ali ibn (Shaykh Sadūq), *Man lā Yaḍūr al- Faqih*; Kulayni, Muhammad ibn Yaqub, *al- Kafī*; Tūsi, Muhammad ibn Hassan, *Tahdhib al- Ahkām*, and, *al- Istebṣār*; Āmeli, Shaykh Hurr, *Wasāel al- Shi'ah*; Fayz Kāshāni, Muhsen, *al- Wāfi*; Nūri Tabarasi, Mirzā Hussain, *Mustadrak al- Wasāel*.

2. 1. 2. Secondary Sources

There are some other sources which are formally recognised by *Shi'ah* jurists as the source of the law of *Shari'ah*. However, the same validity is not given to these sources as to the two previous sources. Thus, in the case of conflict between a source of the second type with that of first type no value is given to the secondary source. These sources are *ijmā'* and *a'ql*.

2. 1. 2. 1. *Ijmā'*

The term *ijmā'* literally means 'intention to do something'²⁶ and technically, signifies the unanimous convergence of the views of all reputable jurists of a particular era on a given point of law.²⁷ No direct Quranic text or tradition, however, exists on the authority of *ijmā'* as a source of law.²⁸ Accordingly, the mere fact that a particular view is taken by all the qualified jurists of an era on a particular issue does not suffice to make it binding on the qualified jurists of another era. For this reason, *Shi'ah* jurists have not attached significant contribution to *ijmā'* as a source of law. In their view, *ijmā'* may be seen as a separate source of law where two requirements are met. First, there is no specific authority on a given point of law in either the Quran or the tradition. Second, it has to be possible to demonstrate that this unanimous view did in fact emanate from the Prophet or an Imām, for example because it was based on a particular *rewāyat* from the Prophet or Imām on the issue but which was not recorded in writing.²⁹

Such a definition makes the scope of *ijmā'* as a source of law much too narrow. It is in fact an indication of, and its authority is due to, the view of the Prophet or Imāms which makes it at best a special appendix to the second source of the law, the tradition rather than a separate source of law.³⁰ On this construction, unanimous convergence of the jurists on a legal view after the era of *Imāmah* cannot in principle be binding on the jurists of the later time.³¹

Nevertheless, some jurists have tried to establish that the consensus of *Shi'ah* jurists living in any given era on a particular question of law should be followed as a source of law. In giving validity to such a broad consensus, they linked it to the theory of *Imāmah* and

²⁶ See also, Jannāti, M. E., (1370 H.S.) at 182.

²⁷ Various definitions are offered to describe the term *ijmā'*. See in this respect, Ansāri, M., (1991) vol. 1 at 79-80; Jannāti, M. E., (1370 H.S.) at 182-184; ; Muslehuddin, M., at 146-147.

²⁸ However, Sunni scholars have relied on a number of the Quranic verses and *rewāyat* from the Prophet to demonstrate that *Ijmā'* should be followed. For a detailed discussion on the reasons for validity of *Ijma'* in *Sunni* view, see, Jannāti, M. E., (1370 H.S.) at 190-197; Owsia, P., (1994) at 71, Coulson, N. J., (1964) at 77. For a detailed discussion of the history of emergence of *ijmā'* as a source of law see, Jannāti, M. E., (1370 H.S.) at 185-187.

²⁹ See also, Ansāri, M., (1991) vol. 1 at 80; Jannāti, M. E., (1370 H.S.) at 188 and 199.

³⁰ In order to show how the consensus is capable of indicating the view of the Prophet or Imām various methods are rendered. See in this respect, Jannāti, M. E., (1370 H.S.) at 199 and *seq.*

³¹ See in this respect, Mutahhari, M., (1361 H.S.) at 16.

argued that its authority derives from the view of the Absent Imām since a consensus of *Shi'ah* jurists reflects in fact his view. Historically, *Shi'ah* jurists have relied on three significant successive theories to demonstrate such a broad construction.³² First, consensus creates the 'feeling' (*hess*) that the absent Imām agrees with it.³³ Second, had the absent Imām not agreed with the point at issue, he would, by his 'grace' (*lutf*), have prevented the formation of the consensus on a wrong opinion.³⁴ Third, it generates a 'conjecture' (*hads*), that it accords with the view of the absent Imām.³⁵

However, although *ijmā'* in the strict sense may be possible at the period of the Prophet or Imāms since the Muslim community had directly obtained the religious precept from the Prophet or Imāms, it is arguable in the broad sense. It has rightly been submitted³⁶ that the theory of *ijmā'* in the latter sense as a source of law was taken out of the *Sunni* framework and transported with modification into the *Shi'ah* context. It hardly accords with other tenets of *Shi'ah* law. Treating *ijmā'* in this sense as a source of law will generate inconsistencies, if not some inherent contradictions, within the distinct *Shi'ah* doctrine of *Ijتهād* which generally forbids jurists qualified as *Mujtahed* to follow others.³⁷ Moreover, unanimous view may be based on their understanding from a particular *rewāyat* which is not received later by other jurists or was based on supplementary sources such as *banā al- u'qalā* which will be discussed later.³⁸

Given the above discussion, it can be said that a particular view being popular among most *Shi'ah* jurists (which is technically called in *Shi'ah* jurisprudence "*shuhrat fatwā'ei*") should not *a fortiori* be regarded as an authority for others, although it may be a persuasive source depending on the degree of eminence of the concurring jurists.³⁹

³² To know the other theories see, Jannāti, M. E., (1370 H.S.) at 210-211.

³³ This theory was suggested by some eminent *Shi'ah* jurists in the early century of development of *Shi'ah feqh* such as, Shaykh Mufid, Tūsi and Sayyed Murtaḍā (as cited in: Jannāti, M. E., (1370 H.S.) at 202).

³⁴ This theory is attributed to Shaykh Tūsi in his leading book, *U'ddah al- Usūl* (see, Jannāti, M. E., (1370 H.S.) at 203).

³⁵ This theory was offered by Mirzā Abulqāsem Gumi (see Jannāti, M. E., (1370 H.S.) at 207). See also, Ansāri, M., (1991) vol. 1 at 83 and *seq.*; Khurāsāni, M. K., (1364 H.Q.) 16 vol. 2 at 68 and *seq.*

³⁶ Owsia, P. (1994) at 72.

³⁷ *Ibid.* See also, Ansāri, M. (1991) vol. 1 at 79. For detailed information see, Khurāsāni, (1364 H.Q.) vol. 2 at 74.

³⁸ For more criticisms on treatment of *Ijma'* as a source of law see, Jannāti, M. E., (1370 H.S.) 209-210 in which the author himself after rejecting the various methods concludes that *Ijma'* cannot be regarded as a separate source of law at all (see *ibid.*, at 213).

³⁹ See in this respect, Ansāri, M., (1991) vol. 1 at 105 and *seq.*; Khurāsāni, M. K., (1364 H.Q.) vol. 2 at 77 and *seq.* However, some eminent *Shi'ah* jurists have recognised it as a separate source of law. See Makki, Jamāl al- Din Muhammad ibn (Shahid Awwal), *Dhekra al- Shi'ah fi al- Ahkām al- Shari'ah*, as cited in: Jannāti, M. E., (1370 H.S.) at 116.

2.1.2.2. *A'ql*

Historically, relying on *a'ql* (literally, the act of withholding or restraining and in terminology of the jurists, 'human intellect', 'reason') as a source for inferring the law of *Shari'ah* comes back to the early centuries of the development of Islamic law. However, it has formally been recognised by *Shi'ah* jurists later than *Sunni* jurists.⁴⁰ During the period of *Imāmah* of *Shi'ah* Imāms since *Shi'ah* scholars could easily refer the new cases to the Imām and ask the relevant religious precept (*hukm*), they did not feel the necessity to consider whether human intellect could be relied as a source of the law of *Shari'ah*, albeit some eminent *Shi'ah* scholars relied on their rational analysis to extract the detailed rules from the primary sources at a very limited scale. It was only after the Occultation of the Twelfth Imām that the *Shi'ah* community was forced to infer independently the detailed rules from the primary sources. Yet, up to the early fifth/tenth century no express mention can be found in *Shi'ah* scholars' works in respect of the 'reason' as a source of law. Some eminent *Shi'ah* jurists occasionally employed 'reason' for the purpose of inferring detailed rules from the textual authorities but they did not consider it as an independent but only as an ancillary source of law. It was often used in the field of theology (*e'lm al-kalām*) rather than *feqh*. The late Ibn Idris (558-598/1163-1203) was perhaps the first *Shi'ah* jurist who addressed specifically *a'ql* as a source of law of *Shari'ah* in *Shi'ah* jurisprudence.⁴¹ After him the jurists started to examine it as a source of law in the methodology of *feqh* (*e'lm usūl*) and currently almost all *Shi'ah* jurists formally recognise *a'ql* as a source of law.⁴²

An examination of *Shi'ah* jurists' discussions in respect of the reliability of *a'ql* as a source of law in the *e'lm al-usūl* shows that the primary use of this source is where there is no textual source (*nass*).⁴³ Where no textual authority is available on a legal point it is

⁴⁰ For a detailed analysis of the issue see, Jannāti, M. E. (1370 H.S.) at 224 and *seq.*; Ezzati, A., (1375 HS) at 134 and *seq.*

⁴¹ Jannāti, M. E. (1370 H.S.) at 224.

⁴² It should be mentioned that in the course of evolution of Islamic schools of thought two basic approaches crystallised and have subsequently settled throughout the history of Islamic law: the so-called Traditionalist and Rationalist trends. Emergence of these two opposing approaches appeared between both *Sunni* and *Shi'ah* scholars in the early centuries of formation of Islamic law. In the history of *Shi'ah* law the Traditionalist approach (which is called "*hadithi*" and "*akhbāri*") appeared in two different eras. The first was the early century of formation of *Shi'ah feqh* (third/tenth century) and the second commenced from the early eleventh/ seventeenth century. These two trends are derived from respective views on the sources of the law. Next to the Quran as the foremost source, Traditionalist approach confined the jurist almost entirely to tradition as a source of law, while the Rationalist approach supplements these sources with certain rational (*a'qli*) Principles. The supporters of the former approach also went further and maintained that the only source should be tradition and no value had to be given to the other sources, that is, the Quran and *Ijmā'* (for detailed information see, Gurgy, A., (1997) at 236-239, 245). However, in both periods due to the heavy pressure on the part of the Rationalist jurists (who are called "*usūliyin*" or "*mujtahidin*") they were gradually disappeared. For a detail discussion of the emergence of akhbārism approach in the history of *Shi'ah* law and its gradual decline see, Jannāti, M. E., (1372 H.S.) at 307 and *seq.* See also, Mallat, C., (1993) at 28 and *seq.*

⁴³ In any case in which a reliable textual authority exists *a'ql* can only be relied on to support it. Whatever is the content of the *nass* it should be followed. However, where the generality (*u'mūm*) or unqualified (*itlāq*) of

generally held that whatever *a'ql* judges with respect to that issue, *shāre'* (the Islamic-law maker) would judge the same. The rule is technically called "*qāedah al- mulāzemah*". The rule is based on two well-settled principles in the *Shi'ah* school of thought. The First is that "all religious precepts derive from a real interest or expedient (*maslahat*) and *mafsadah* (ugliness). That is, in any case in which a particular act is required it is so for a *maslahat*, or, in any case in which a particular act is prohibited it is so for a *mafsadah*. Second is that the human intellect in some cases is able to find out certainly what is "good" (*hasan*) and "evil" (*qabih*), without being guided by religious rules.⁴⁴ In any case where no particular *nass* exists and the jurist by taking into account the results of scientific research and rational analysis makes certain that a particular act has a *maslahat* which is to be observed or has a *mafsadah* which is to be avoided he can judge that that particular act is to be done or avoided (as the case may be).⁴⁵

A'ql is further used to find out the *manāt* (*ratio*) of the existing rule. That is, if a jurist, by examining the authority, nature and the circumstances in which an existing religious precept was ruled and stripping off the surrounding particularities, can with certainty identify the general philosophy behind the *hukm*, he would be allowed to apply it at similar situations. The process of finding out the *manāt*, which closely resembles the English law *ratio decidendi*, is called "*tanqih al- manāt*" (cleaning out the quintessential or the prime criterion).⁴⁶

The third case in which *a'ql* is used as an authority is where the jurists are seeking to establish general principles upon which the detailed rules can be inferred. Mention may be made here, as examples, of the practical or rational principles (*usūl al- a'maliyah* or *al- a'qliyah*).⁴⁷ It is also employed to support textual authorities which are available on a specific issue and to understand the real intention of the Islamic-law maker by interpretation of the

a *rewāyat* seems contrary to certain commands of *a'ql* it will be qualified and sometimes cease to be applied (see in this respect, Shaykh Mufid, *Tashih al- I'teqad*, at 34, 35, as cited in: Gurgy, A., (1997) at 237; see also, Ansāri, M., (1991) vol. 1 at 18). To that extent, *a'ql* will be employed as a tool to find out the real intention of a the Prophet or Imām as narrated by *hadith*.

⁴⁴ See in this respect, Jannāti, M. E., (1370 H.S.) at 238; Weiss, B., (1978) at 211.

⁴⁵ See e.g., Allāmah Helli, *Tahdhib al- Usūl*, at 6, and, Qumi, Mirzā Abulqāsem, *Qawānin al- Usūl*, at 257 (cited in: Ezzati, A., (1375 H.S.) at 138, 141 respectively); Mutahhari, M., (1361 H.S.) at 38-40. For a detail discussion see, Jannāti, M. E., (1370 H.S.) at 228 and *seq.*, 238 and *seq.*

⁴⁶ See e.g., Mutahhari, M., (1361 H.S.) at 40; Jannāti, M. E., (1370 H.S.) at 300-31. It is to be noted that in this case a jurist may face two types of religious rules. First are those rules provided for particular occasions, and second, are those announced as general rules. Accordingly, a difficult task is to distinguish these two rules, like *obiter dicta* and statement of law in English law. The method of *tanqih al- manāt* would only work in respect of the second category. For a detail comparison between English and *Shi'ah* law approaches see, Owsia, P., (1994) at 111-112.

⁴⁷ See e.g., Ansāri, M., (1991) vol. 1 at 335 (in respect of *asl al- barāah* (acquittal)); Khurāsāni, M. K., (1364 H.Q.) vol. 2 at 179 (in respect of "*asl al- barāah*"), 185 (in respect of *asl al- ihteyāt*) and 224 (in respect of *asl al- takhyir* (choice)).

textual authorities (*nusūṣ*)⁴⁸, and, find out the rational requirements (*lawāzim -e- a'qli*) of the existing rules.⁴⁹

However, in spite of the fact that *Shi'ah* jurists have formally recognised *a'ql* as an independent source of the law of *Shari'ah* and have examined it in detail in the methodology of the jurisprudence (*usūl al- feqh*) with strong support, they are very cautious and little use can be found in practice.⁵⁰ For this reason, few cases can be found in *Shi'ah* jurisprudence in which they have relied solely on *a'ql* as a source to infer the relevant religious precept. In any jurisprudential case where some jurists relied on *a'ql* as an authority it is in fact employed to support some textual authority (*nass*) available on the issue. Even in the methodology of *feqh* where it is often relied on as an authority to establish general principles from which detailed rules can be inferred, it is used as an ancillary authority to support textual authority. No general principle can be found which is solely based on 'reason'. The use of *a'ql* as a tool to identify *manāṭ al- hukm* is also subject to a rigid limitation, it must be *qate'i* (certain) in the mathematical sense.⁵¹ Any uncertainty would make it unreliable.⁵² Accordingly, the so-called Rationalist approach is not in the final analysis, a licence to an independent and free rational argument but is in fact an allowance for the limited exercise of 'reason' within the pre-established bounds of basic dogmas. Upon this source it cannot be said that *a'ql* judges as an independent source, but it is employed as a tool to discover the intention of the Islamic-law maker where there is no direct authority under any of the preceding three sources, to identify the rational requirements (*lawāzim -e- a'qli*) and the philosophy (*manāṭ*) of the existing rules,

⁴⁸ This role of *a'ql* can be found in *Mabhath al- Alfāz* (Discourse on Words) of the *e'lm al- usūl*. See also, Owsia, P., (1994) at 73; Ezzati, A., (1375 H.S.) at 142. Most of the topics on Words (*alfāz*) cover different detailed rules of interpretation (for a detailed discussion of these topics see, Khurāsāni, M. K., (1364 H.Q.) vol. 1). These rules have been developed mainly to resolve problems of approach to the first two primary sources of the law, Quran and the tradition, and the relation within and between their perspective precepts. Treatment of the topics contained in this part of *e'lm al- usūl* and of interpretational technical devices is almost free from religious prejudices (Owsia, P., *ibid.*). Mention can be made, as examples, of *qiyās mansūs al- e'llah* and *qiyās al- ulaweyyeh* (see Jannāti, M. E., (1370 H.S.) at 298-299.

⁴⁹ See e.g., Mutahhari, M., (1361 H.S.) at 41-43 in which he mentions a number of technical examples (such as *muqaddemah wājeb*, *trattub* and *ijtemā' amr wa nahy*).

⁵⁰ To know of such a rigid caution, see: Jannāti, M. E., (1370 H.S.) at 249.

⁵¹ This is because it is commonly held that the only way to infer the law of *Shari'ah* is *qat'* (complete juristic certainty or certain knowledge) or through a *ẓann* (conjecture) provided that it is certified by an *e'lmi* (certain) authority. See in this respect, Ansāri, M., (1991) vol. 1 at 1 and *seq.*; Khurāsāni, M. K., (1364 H.Q.) vol. 2 at 55 and *seq.* This rigid qualification, as will be seen in more detail, caused certain formal and supplementary sources unreliable in practice.

⁵² For instance, the late Shaykh Murtadā Ansāri, an eminent *Shi'ah* Rationalist jurist, says: "Yes, but fairly relying on *a'ql* to find out the philosophy of the existing rules (*manātāt al- ahkām*) in order to extend the rules obtained thus to similar situations causes the jurist to err frequently in fact" (Ansāri, M., (1991) vol. 1 at 20-21. See also, Mutahhari, M., (1361 H.S.) at 40; Jannāti, M. E., (1370 H.S.) at 243, in which he says: "Any rational judgement which is influenced by personal, social emotional and habitual affairs has no legal value". It is perhaps for the above reasons why some contemporary jurists asserted that *a'ql* is a *potential* source for the law of *Shari'ah* and in practice no jurist requires it because of tradition! In other words, on their view, *Shi'ah* law has recognised *a'ql* as a potential source for inferring the law of *Shari'ah* but up to now no one was forced to refer it for inferring the law for the lack of textual authorities.

philosophy (*manā*) of the existing rules, to understand the real intention of *shāre'* by interpretation of his words and deeds or to support the contents of textual authorities.

2.2. Supplementary Sources

Although it is commonly said that the only sources within which the jurist is required to infer the law of *Shari'ah* are those described above, these sources have been, and are still being, supplemented by the working of other sources. Among these *u'rf* (custom), sometimes called *banā'āt al- u'qalā*,⁵³ is of particular significance in practice.⁵⁴

The role of community practice (custom) as a supplementary tool in the process of inferring the law of *Shari'ah* is, in principle, undeniable. In two cases custom is commonly relied on by the jurists.⁵⁵ First is where the Islamic-law maker impliedly referred to the custom. This is where the subject of religious precepts is a customary matter. Reference can be made to those authorities which contained terms such as *a'qd* (contract), *bay'* (sale), *a'yb* (defect), *ḍarar* (harm) and so on without any reference to the standard of determination of those terms. The second is to find out the concept of words of written authorities (Quran and tradition). To that extent, the jurists accept custom as a source of law without any doubt. But in those cases custom is not relied on to infer the law of *Shari'ah* but used to identify the object (*mesdāq*) of the prescribed religious rule or to show the concepts and meanings of the words used in the written authorities so as to establish what is the 'appearance' (*ẓuhūr*) of the authorities.⁵⁶

However, a controversial question is whether local or national customs can be relied on as a separate source of the law of *Shari'ah*, particularly where there is no authority from the

⁵³ Technically, a number of terms are used by the jurists which need some clarification. These terms are "*u'rf*", "*sirah al- mutasharri'ah* (the continuous practice of those who abide by the religious law) which is sometimes called "*sirah al- muslimin* (the continuous practice of Muslims community) and *banā' al- u'qalā'* (the continuous practice of the learned) which also is called *sirah al- u'qalā'* (tradition of the learned). However, there is a slight divergence between the latter four usages. The first two expressions are used to refer to those practices formed by Muslim community, while the two others are employed to describe any common practice, whether formed within a non-Muslim community or both. For more information about the concept and different types of custom see, Jannāti, M. E., (1370 H.S.) at 391 and *seq.*; Sadr, S. M. B., (1994) at 211-212.

⁵⁴ One may suggest that factors such as *ensāf* (literally, equity) and *adālat* (justice) could be regarded, to some extent, as sources of law. As an example, in the leading text book of Makāsib, the late Ansāri in a number of occasions relies on 'equity' to suggest an opinion which is apparently contrary to the results of rational analysis of the existing authorities. The same can be true as to 'justice'. As to the latter see, Mutahhari, M., (1409 HQ) at 14, 27; Mehrizi, M., (1997) at 184 (in which the author has made great efforts to identify some *Shi'ah* jurists who have relied on 'justice' in some occasions to justify their judgements. However, since no jurist has addressed these possible sources in the methodology of 'jurisprudence, they are not examined here. Moreover, neither Ansāri himself nor any other jurist has addressed what the term 'ensāf' means and how it could be relied on as a separate source of law.

⁵⁵ See e.g., Jannāti, M. E., (1370 H.S.) at 397, 408; Sadr, S. M. B., (1994) at 197-199; Mara'shi, S. M. H., (1994) at 101; Ma'rafat, M. H., (1994) at 106;.

⁵⁶ In this sense, custom, as the late Shahid Sadr points out, does not require to be approved by the Islamic-law maker (see, Sadr, S. M. B., (1994) at 197-198).

sources already discussed. In this regard a distinction has been made between those practices which were existent or gradually formed at the time of the Prophet and *Shi'ah* Imāms and those modified or formed later. *Shi'ah* scholars accept the fact that a number of Quranic rules have their origin in pre-Islamic Arabian customs.⁵⁷ The same is true as to the *Sunnah*. On this fact, it is a well-accepted view that the early Islamic rules, whether prescribed by Quran or contained in the tradition, are divided into 'affirmatory' (*imḍāei*) and 'foundational' (*ta'sisi*) precepts, being, respectively, those already existing and upheld and those freshly laid down.⁵⁸ On this view, if any particular custom at any era could be linked to the era of the Prophet or Imāms it would be reliable even there is no particular formal authority on the issue. However, it is in fact an indication of *Sunnah* rather than a separate source of law.⁵⁹

The significant question is how far customs formed after the period of *Imāmah* can be relied on by the jurist in inferring the law of *Shari'ah*. The jurists commonly cast doubt on the authority of such customs as a source of law. According to them the community practice has to follow and accord with the religious rules. The mere fact that a particular act or behaviour becomes a social and legal norm in a society or a local community does not suffice *per se* to say that it is religiously binding. It could have derived from various factors which were beyond the scope of religion and do not clearly indicate that the Islamic-law maker consented to it. A particular custom will be regarded as a binding religious rule where it is proved that it was formed at the period of the Prophet or one of the Imāms and approved by them, whether expressly or impliedly.⁶⁰

3.0. Assessment

The arrangement of sources according to their formal binding force does not necessarily reflect the respective order and significance of the contribution they have to the development of the law under this system. For instance, although the Quran is considered the God-given law and formally remains uppermost,⁶¹ the normative verses (*āyāt al-ahkām*) constitute its small portion (500 out of over 6000 verses) and provide only a small fraction of the overall body of detailed rules of the law of *Shari'ah*.

In contrast, *Sunnah* as narrated, apart from the question of authenticity (which is in a way akin to the question of the reliability of English case law reporting in medieval times),⁶²

⁵⁷ Jannāti, M. E., (1370 H.S.) at 405-406.

⁵⁸ In this respect see generally, Shahābi, M., (1369) vol. 1 at 61-64.

⁵⁹ Jannāti, M. E., (1370 H.S.) at 397, 408. See also, Sadr, S. M. B., (1994) at 200.

⁶⁰ See Sadr, S. M. B., (1994) at 200; Ma'rafat, M. H., (1994) at 69 and 106.

⁶¹ See e.g., Mutahhari, M., (1361 H.S.) at 12; Jannāti, M. E., (1370 H.S.) at 3.

⁶² As regards the forged *rewāyāt* see, Jannāti, M. E., (1370 H.S.) at 146 and *seq.*

are considered too important for the jurist. Its significance for *Shi'ah* law is undeniable. The vacuum left by the few general principles, or scanty and dispersed rules, of Quran on any given legal topic is mostly covered by tradition.⁶³ However, traditions, although they are many in quantity, can only meet a portion of the modern needs. Masses of new events (*hawādeth wāqeah*) with which society of the time of the Prophet and Imāms was never concerned arose later and must be answered. Today Muslim communities encounter a huge volume of modern situations in their various relationships. Fairly, it is hard to accept that tradition will be an adequate source to meet them.

As regards *Ijmā'*, it is fair to say that this source has very little contribution to the detailed rules of law. There are a few cases in which the jurists have relied solely on this source. If it is relied on in some occasions it is in fact as a supplementary source rather than a separate one. *Ijmā'* even in its broad sense, apart from the theoretical objections made as to its authenticity, could play its role in the early stages of the development of Islamic law when the community was fairly small, eminent jurists of the era were few, and the views of all jurists concerned could be obtained. Thereafter its role diminished and it may be said that it soon died out as an active source of the law for the practical impossibility of obtaining it. Accordingly, the only place left for *Ijmā'* as a source of law is the convergence of the jurists of the earlier era obtained directly (which is called *Ijmā' muhassal*) or those consensuses cited by the jurists, that is *Ijmā' manqūl*, although a number of jurists have cast doubt as to the authenticity of the quoted consensuses.⁶⁴

Although *a'ql* is in theory recognised by *Shi'ah* jurists and it could have been an important tool for developing this system, in practice little use can be found in jurisprudence to infer the law of *Shari'ah*. It is relied on primarily to support the textual authority (*nass*) available on the point or to interpret the text of the written authorities. Although it is also relied on to find out the *ratio* (*e'llaht* or *manāt*) of an existing rule in order to extend to the similar situations or to infer a religious precept where there is no textual authority, it is subject to a rigid restriction which is hardly obtainable in practice.⁶⁵ This is because few cases can be found where a jurist is able to find out the binding *maslah*, *mafsadah* or the *ratio* of an existing rule with full certainty. In any legal case, some doubt will necessarily exist and consequently, this source, as almost all jurists suggest in the present time, should not be reliable.

⁶³ See Jannāti, M. E., (1370 H.S.) at 119-120. For detailed examples of the role of *Sunnah* see, *ibid.*, at 120-121.

⁶⁴ See e.g., Khurāsāni, M. K., (1364 H.Q.) vol. 2 at 70 and *seq.*

⁶⁵ Very few examples can be found in *Shi'ah* jurisprudence where the jurists have relied on the rule of *tanqih al-manāt*. See e.g., Mara'shi, S. M. H., (1994) at 86.

Custom and the traditions of the learned (*banā'āt al- u'qalā*, pl. of *banā' al- u'qalā*), as already seen, have little contribution to the development of the law in view of *Shi'ah* jurists. Almost all jurists have seen custom and community practice as a tool for understanding the meaning of the written authorities and identifying the object of prescribed rules. They are not used as separate sources for the law. Resistance on the basis that any community practice should be effectively linked to the period of the Prophet and Imāms renders this supplementary source useless, at least at the present time which is so far from that period.

As a general conclusion, it can be said that the significant practical sources in the present *Shi'ah* jurisprudence are the Quranic normative rules and those contained in *rewāyāt*, a mass of scattered texts contain various general and specific rules. But, as any one can easily realise, the legal rules which are prescribed under Quranic verses or those which are contained in the *rewāyāt* are (apart from the question of forged *rewāyāt*) very limited. They are not able to meet the thousands and thousands of legal issues with which modern societies are concerned. Certain 'practical principles' (*usūl -e- a'maliyah*) such as *isteshāb* (presumption of the continuance of the *status quo ante* until the contrary is proved and *barāah* (acquittal), are, by nature, procedural presumptions rather substantive law. They are not able to meet a mass of modern needs which require substantive law.

4.0. *Shi'ah* Law and Modern Needs

Shi'ah jurists were and are still confidently claiming that *Shi'ah* jurisprudence is able to provide a modern legal system and to tackle any modern needs which arise in any aspect of human life. The establishment of the Islamic Republic of Iran was the first experience for *Shi'ah* jurists at a large scale to show the capability of *Shi'ah* jurisprudence to respond to various modern needs. But after nearly two decades little development can be found in practice, masses of legal issues are still left unanswered in *Shi'ah* jurisprudence and the university societies are still awaiting for their solutions. The jurists who are teaching and researching in Islamic Schools (*Huzah -e- E'lmiyeh*), show little willingness to examine these modern issues in their academic courses and are still emphasising hypothetical rather than concrete cases, classical issues which are mostly residual of the early societies and the era of slavery. No comprehensive work has been made to answer this significant question: "Is the present method of *ijtehād* (discovering the law of *Shari'ah*) able to meet the modern needs and make this system compatible with the changing circumstances of the human legal life? And if so, how would it be made?" This is the reason why the Islamic Government of Iran in the course of making the needed laws was forced in practice to resort to a practical device, under

under which in any case where the Islamic Parliament should be unable to meet the expectations of the Guardian Council⁶⁶ (notwithstanding that six members of its twelve members are *Shi'ah* well-qualified jurists) the case should be referred to the "Expediency Council".⁶⁷ Under the doctrine of "Expediency of Islamic State", in any case in which the proper religious *hukm* (precept) cannot be inferred from the primary sources, the Islamic State has the power to pass the necessary resolutions in order to secure the interests of the Islamic State. However, this is a practical method in order to tackle State problems rather than the traditional method of inferring the law of *Shari'ah*, which holds that Islamic laws are not made, but are discovered through the process of inference (*istinbāt*) from Islamic sources as described above.

The significant question is therefore how this system can adapt itself to changing circumstances and provide a proper system of law. After establishment of the Islamic Government in Iran this question has extensively attracted the attention of Muslim scholars and entirely different views have been offered. However, some of these suggestions are theological in nature and beyond this study. It will also not discuss the doctrine of "powers of Islamic Governor" (*ikhṭeyārāt hākem*) which is presently applied by the Iranian Islamic Government.⁶⁸ What follows is an attempt to present a method by which any jurist is able to infer the law of *Shari'ah* in respect of any new legal issue.⁶⁹

4.1. New Reading of the Traditional Sources

As was seen above, the jurists commonly hold that *banā'āt al- u'qalā* can be relied on as a source of law only where they were formed at the time of the Prophet or Imāms and approved by them. However, approval is defined in a very narrow sense, that is, if a particular public practice is formed within the Muslim community and acted upon at the time of the Prophet or an Imām. In such a situation, the infallible leader (Prophet or Imām) had a duty to lead the

⁶⁶ Under the Constitution of the Islamic Republic of Iran, the Parliament cannot enact laws contrary to the *usūl* and *ahkām* of the official religion of Iran. The question whether a particular legislation passed by the Parliament accords with the official religion is left to the discretion of the "Guardian Council" which consists of twelve members six of which are *Shi'ah* jurists who are to be appointed by the leader. See the principles 72, 96 and 110, as amended in 1988.

⁶⁷ See the Islamic Constitution of Iran as revised in 1988, Principle 112.

⁶⁸ Under this doctrine, in any case where a proper legal rule is required to secure the "interests of the Islamic State" and safeguard the interests of the Muslim community, the Islamic State is given the power to prescribe the proper regulations. These regulations will be religiously binding if the *hākem* (ruler) is a qualified person holding the requirements prescribed under this doctrine. The resolutions passed by the Islamic State do not need to conform with the traditional sources. It will suffice if the Islamic Governor sees those regulations as necessary for safeguarding the Islamic State and Muslim community. See in this respect, *Daftar Hamkāri Huzah wa Dāneshgāh*, (1368 H.S.) at 338 and *seq.* in which this doctrine is fully examined in view of different *Shi'ah* and *Sunni* scholars. See also generally, *Sachedine, A. A.*, (1988).

⁶⁹ Various devices are also offered by *Sunni* scholars to modernise the Islamic legal system in accordance with the *Sunni* jurisprudence. See in this respect, *Zaki Yamany, A.*, (1979) 205; *Khadduri, M.*, (1979) 213; *Fazlur R.*, (1979) 219.

Muslim community to the right conduct. If he did not reject that common practice, as contrary to the law of *Shari'ah*, his silence was an indication of his consent.

When relying on the community practice, a distinction should be made between *ibādāt* (devotional rites) and *mua'āmalāt* (social conduct). Where a particular practice emerged in respect of a purely religious rule regulating the relationship of man and God it may be argued that it should be reliable only where it is proved that it was formed at the time of the Prophet or Imām and was approved by them. However, such a rigid requirement is not necessary where a common practice is concerned with regulating the legal relations of individuals and social institutions. It would be sufficient if it is proved that a particular practice becomes common within the community as a whole or a particular community (as the case may be a general custom or a particular one) as long as it does not conflict any settled Islamic rules.

The suggestion can be justified on the basis of the following reasons. First, it is in line with the prophetic rewāyat which says: "Whoever establishes a worthy tradition he would be rewarded for any person who acts on it".⁷⁰ It can also be justified on the basis of the Quranic verse which provides "ufū bel u'qūd" (You are required to respect your covenant)⁷¹ and the Prophetic rewāyat which provides "*al- mu'menūn e'nda shurūtehem*" (All Muslims should respect their covenants).⁷² The terms "u'qūd" and "shurūt" (covenants) are general and cover any covenant, whether legal covenant such as contract, or social one. *Banā'āt al- u'qalā* formed within Muslim community are in fact social covenants which are gradually formed among them because they felt their existence necessary for their life.

Second, it can be justified on the basis of implied approval (*taqrir*) of *ma'sūm* (infallible leader) through a new reading of the implied approval. It is suggested that *taqrir* signifies the approval of any actual or *potential* practice within the Muslim community. This is based on the well-settled belief between *Shi'ah* scholars that the Prophet and *Shi'ah* Imāms had divine knowledge and could anticipate that their followers after their period would gradually tend to some practice because of their modern needs and it was their duty to give the Muslim community a guideline to avoid from the formation of and following those common practice which would arise in the future if they did not agree with them. Since they did not reject expressly reliance on practices formed later, despite their anticipation that they may take place, they therefore implicitly recognised those practices formed after their period.

⁷⁰ See, Nūri Tabarasi, M. H., vol. 12, bāb 15 at 230, hadith no. 13962, and, at 231 hadith no. 13965; Majlesi, M. B., vol. 71 at 204 bāb 14 hadith 41, vol. 74 at 166 bāb 7 hadith 2, vol. 97 at 7 bāb 1 hadith 7 and at 23 bāb 2 hadith 15.

⁷¹ See: The Holy Quran, chapter 5 (Māe'dah), verse 1: "O ye who believe, perform all covenants".

⁷² In a famous statement the Prophet of Islam said: "All Muslims are obliged to perform their contractual obligations". See Āmeli, H., vol. 15, bāb 20 at 30, hadith 4.

Accordingly, it can be said that any *rational norm* which is fully adopted and acted on by the Muslim community, because they are *u'qalā* is deemed to have impliedly been approved by the Prophet and Imāms.⁷³

Banā al- u'qalā can also be regarded as a source of the law of *Shari'ah* in accordance with the theory of *hujjiat -e- zānn -e- mutlaq* (a fully satisfying legal proof of general preponderance) in accordance with the theory of *insidād -e- bāb -e- e'lm* (closure of the door to certain legal knowledge). To explain, at the present time it is conventionally held that the mere *zānn* (conjecture), even a strong one, at a point of law is not valid unless it is specifically validated by some certain authorities. In this case, those doubtful authorities are called "*zānn khass*" (specific conjecture, as opposed to "general conjecture"). In inferring the law of *Shari'ah*, the jurist must either rely on an authority which certainly leads him to the religious precept or on those non-certain authorities whose authenticity is certified by a certain authority. In any case where there is no *qate'i* (certain) authority or authentic *zānni* authority (which are called "*dalil ijthadi*") the jurist is required to rely on some practical authorities (*usūl al- amaliyah*, which are called "*dalil faqāhati*"), that is, *barā'a'h*, *ihtheyād*, *takhyir* and *isteshāb*.⁷⁴

It is to be noted that these jurists do not deny that if the existing authorities, as already described, are not sufficient to meet the needs the jurist would be able to rely on other conjectural authorities. But in actual fact almost all jurists currently assume that there are sufficient certain and authentic *zānni* authorities to lead the jurist to the law of *Shari'ah* in any new situation and in the few circumstances where the jurist is not able to infer the relevant religious precept by referring to those authorities he would be able to resolve the problem by relying on a proper practical principle (*asl-e-a'mali*). However, this view can only be justified where it is proved that there are sufficient authentic authorities to meet new situations. It is

⁷³ See in this respect, Fayz, A., (1994) at 183-185. Such a construction has been accepted and applied in some cases. For example see, Hāeri, S. M. K., (1994) at 104 (in which he cites from the late Ayatullāh Kumpāni). The late Kumpāni holds that in any case where it is proved that a particular practice is accepted by a community it should be deemed as approved by the Islamic-law maker (see *ibid.*). Likewise, the Late Imām Khumayni has referred to this broad interpretation of *u'rf* (custom) under the question of *Ijtehād* and *Taqlid* (imitation of the qualified jurist) (see, Khumayni, S. R. M., *Resālah al- Ijtehād wa al- Taqlid*, at 120-130, particular, at 125, as cited in: Fayz, A., (1994) at 184. The late Imām Khumayni has also relied on such a broad construction in the law of contracts. For example, in the case of the right to claim *arsh* and the right to terminate the contract on the basis of *imtenā'* (repudiation) he has based both rights on this principle. (See in this respect, Khumayni, R. M., vol. 5, at 127, 128, 134 and 372). Likewise, a number of *qawāed feqhiyah* (general principles) and principal rules (*qawāed usūli*) are formulated by relying on this source, although as a supplement to the other formal sources. The late Shahid Sadr says that it is not required that a particular rational norm should have been actually employed by the Muslims community at the period of Ma'sūm. It would be sufficient if it is proved that that particular norm was realisable then by the learned (*u'qalā*). The implied approval is in fact concerned with the criterion of that norm rather than the extent to which it is actually applied at that time (see, Sadr, S. M. B., (1994) at 210-211).

⁷⁴ See generally, Ansāri, M., (1991) vol. 1 at 1 and *seq.*; Khurāsāni, M. K., (1364 H.Q.) vol. 2 at 55 and *seq.*

submitted that such authorities are not at hand. It was pointed out before that the Quranic verses and the tradition are insufficient to meet the mass of new questions which arose after the period of the *Imāmah*.⁷⁵ The inadequacy of the consensus was also examined. Accordingly, the only way is to rely on the *ẓann* where there are no authentic authorities from the Quran and tradition in order to infer the law of *Shari'ah*. The authenticity of such *ẓanni* authorities can be justified by the theory of *hujjiat -e- ẓann -e- mutlaq*. A clear instance of such a non-authentic *ẓann* is *banā al- u'qalā*.⁷⁶

One may, however, argue that the practical principles (*usūl al- amaliyah*) such as *barāat* will operate before these conjectural (*ẓanni*) authorities come to operate. It is arguable, since the subject of the practical principles is doubt (*shakk*) to the religious precept (*hukm-e-shar'ei*), while it is assumed that for the reason of lack of adequate authentic conjectural authorities *e'lm-e-ejmāli* (literally, general or unspecified knowledge) still remains.⁷⁷

Having proved that *banā al- u'qalā* can be relied on as a source of Islamic law, the question arises how to identify such a common practice. For this purpose, some concrete guidelines should be provided to lead the jurist who has to rely on this source. It seems that the best and useful solution is to study modern legal systems and international and regional conventions. Any legal rule which has practically been experienced within a legal system and its advantages and disadvantages examined by the courts and academic writers can be taken

⁷⁵ It seems that this is perhaps the reason why some jurists in some occasions have tried to offer a new reading of the traditional sources. Two historical events can be presented as evidence. First, at the early century of formation and development of *Shi'ah* jurisprudence some eminent jurists suggested that any unanimous convergence of the views of all reputable jurists of a particular era on a given point of law should be treated as a binding rule. Second, a number of distinguished jurists such as Muhaqqeq Qumi -the writer of the leading text book "Qawānin", have tried to justify any conjectural authority as a source of law. This is in fact a step toward recognition of the inadequacy of the existing authentic *rewāyāt* to meet modern needs.

⁷⁶ The theory of "closure of the door to certain legal knowledge" as a valid proof (*dalil*) is based on a number of premises. The first is that, in any case relating to the individuals and community, the Islamic-law maker has a real precept (*hukm-e-wāqei*). The second, and by far the most significant, is that due to the absence of an infallible *Imām* in any case it is impossible to infer the real precept concerned through a certain authority. The third is that due to the existence of *e'lm-e-ejmāli* (literally, general, or, unspecified knowledge) the mere absence of certain authority on the relevant precept will not excuse a Muslim from the real religious verdict (*hukm-e-wāqei share'i*). The fourth, is that it is unreasonable to prefer doubtful authorities where there are *ẓanni* authorities. Where these premises are proved a jurist would be able to resolve the problem by relying on *ẓanni* authorities, such as conjectural rational analysis and *banā al- u'qalā*. No jurist questions these premises. The only thing which is denied by most jurists is the inadequacy of the special *ẓanni* authorities, while, as shown in the text, the existing special authorities are not able to tackle all the needed issues. Accordingly, to that extent *ẓann* should be reliable in accordance with the theory of "*Insedād*", which is called "*Insedād Saghir*" (minor closure). However, some *Shi'ah* scholars have recently suggested that the door of certain knowledge to the religious law is entirely closed since no certain authority exist to validate the *Sunnah* which is frequently transmitted by *kabar -e- wāhed* (single transmission). This is called '*Insedād kabir*'. On this view, the only way to infer the religious precepts is to rely on *ẓann*. See, Fayz, A., (1994) at 180 and *seq.*

⁷⁷ Moreover, one of the main authorities for authenticity of the practical principles is *banā al- u'qalā*. This shows that the learned themselves do not attach to these principles an unqualified role. They will rely on such principles when there is no strong *ẓann*.

into account as indication of *banā al- u'qalā*. The jurist would be able to look at the history of formation and development of these rules and their practical merits and demerits to make sure that they are clear indication of *banā al- u'qalā* and then compare them to the settled religious principles. If no contrary rule, whether express or implied can be found, those rules can be accepted as legal rules in the jurisprudence.⁷⁸

4.2. New Reading of the Rational Analysis

A further technique which can be utilised to enable this system to adapt itself to changing circumstances is to present a new reading of the rational analysis of the existing rules. It is commonly held that *Shi'ah* law prohibited the method of applying a straight analogy for the extension of an existing particular rule to a similar instance (*qiyās*), which is adopted by some *Sunni* schools.⁷⁹ Directly, no existing rule on a 'particular' instance can be extended to another 'particular' instance, no matter how similar the two cases may appear to be. However, the *Shi'ah* school has recognised a composite analytico-syllogistical process known as *tanqih al-manāt* (or *-malāk*) to circumvent the prohibition of applying *qiyās*. The method is motivated by some preconception of perfect law. By the process of *tanqih al- mamāt* the basic reason or the core of the rules will first be analytically stripped of the surrounding particularities, and then the generality of the rule so obtained will be applied to the case at hand in the guise of syllogism (*qiyās*, in a logical sense).⁸⁰ *Tanqih al- manāt* in the sense described above, has been, however, made subject to a rigid qualification. By the process of *tanqih al- mamāt* the jurist must certainly discover the criterion of the existing rule. Any doubt as to its real criterion would render the syllogism unreliable.

It seems that such a qualification cannot be acceptable in all cases. It is suggested that a distinction should be made between pure religious laws (*ibādāt*) and legal rules (*mua'malāt*).⁸¹ As regards the first, which regulate the relationship of man and God, it can be said that religious rules requiring man to do or refrain from doing a particular action may be based on a criterion which cannot be identified by human intellect. But such a statement cannot be true as

⁷⁸ Some *Shi'ah* scholars have recently suggested that a jurist who is going to infer the law of *Shari'ah* by the process of *ijtehad* should not confine himself to those normative Quranic verses and tradition. In extracting the law of *shari'ah* careful attention, they suggest, should also be paid to the fundamental principle of "justice" along with other religious objectives for which the religion was sent. See in this respect, Hakimi, M. R., (1994) 107. Accordingly, the objectives of the religion as a whole would be taken into account in order to assess the merit and demerit of a particular legal rule formed in a legal system.

⁷⁹ Mutahhari, M., (1361 H.S.) at 17; Jannāti, M. E., (1370 H.S.) at 294 and *seq.* For a detailed discussion of *qiyās* (analogy) and certain supplemental principles, such as, *istehsān* -seeking the best, or, juristic preference-, see Jannāti, M. E., (1370 H.S.) at 309 and *seq.*; Muslehuddin, M., at 135 and *seq.*; Fyzee, Asaf A. A., (1974) at 21-22.

⁸⁰ See also, Owsia, P., (1994) at 74.

⁸¹ See also, Gurgy, A., (1994) at 96.

regards those legal rules which are prescribed to regulate the legal relations of human beings. Those rules are commonly based on a realisable criterion. Accordingly, it would fairly be possible to realise the real criterion of the existing rules and to extend the rules thus obtained to the new instances. The mere fact that man cannot realise with certainty the real criterion and that in any case there is some possibility that other factors might have been relevant in regulating the existing rule, should not affect the argument. If to that extent the capability of human intellect is doubtful, no where it will be reliable and as a result no jurist can infer the law by the process of *ijteḥād*, since in any case there would be some contrary possibility.⁸²

5.0. Summary and Conclusions of Sources of *Shi'ah* Law

From the above discussion it was made plain that the Quranic rules and tradition cannot be the adequate sources to meet the new situation. Owing to the impracticability of obtaining it, the consensus of the jurists, unless formed in the initial formative phase of *Shi'ah* law, has little contribution to the development of the law. Accordingly, the best, and most practical, way to adapt this system to new situations is to rely on rational analysis and well-settled legal practice among human societies. Various arguments were rendered to prove the latter as a valid source for the inference of the legal rules. Likewise, it was seen that rational analysis of existing rules would be an important technique for adaptation of this system to modern needs. There is no reason to justify that the technique of *tanqih al-mamāt* should certainly lead the jurist to the real criterion of the existing rules.

However, in order to make a balance between some of the polarised needs and demands of societies - stability and change, security and flexibility, certainty and adaptability - some concrete guidelines are required. For this purpose, it was suggested that the settled rules in modern legal systems and international and regional conventions can be useful solutions for this system in order to identify the common practice of the learned (*banā al-u'qalā*).

6.0. Methodology

The present work is intended to present a general picture of the buyer's remedies for seller's non-conforming delivery under *Shi'ah* law by way of comparing it with its two counterparts, English law and the Convention. A comparative study, in principle, can be done in two different forms; it may be made on a large or on a smaller scale. In the first, the spirit and style of different legal systems, the methods of thought and procedures they use, are

⁸² In *Shi'ah* jurisprudence there can be found some cases in which some eminent jurists have relied on this technique in a broad sense. As an example see a number of instances cited in: Ma'rafat, M. H., (1994) at 90-91.

examined.⁸³ Whereas, in the second a comparative study is carried out by emphasising the special legal institutions or the rules used to resolve particular actual problems.⁸⁴ For instance, when can a contracting party withhold performance of his contractual obligations and terminate the contract? Is an aggrieved party entitled to apply to the judicial authorities to coerce the defaulting party to perform what he promised under contract? Is the seller to be given a general right to cure his defective performance? What damages can an injured party recover for other party's breach of contract?

In the present study most emphasis is placed on the second method. Although such a study may be carried out by way of a mixed study raising a problem and analysing any particular solution prescribed in a relevant legal system, it seems that the best way for the present study is that the author first shows the attitude of the developed systems, case by case, and then examines the issue under the undeveloped system and at the end uses these materials as a basis for a comparative assessment. This would help the researcher first to show the vacuums in an undeveloped system and then to consider how the existing gaps can be filled by interpretation of the existing law and giving new suggestions.

For this purpose, in the case of English law, the study will focus on the law regulating the buyer's remedies in light of the Sale of Goods Act 1979 (as amended in 1994 and 1995) as interpreted and applied in relevant judicial precedents and general principles of contract law, as a primary source, and the commentaries of academic writers in the field of the sale of goods law, as a secondary tool. In performing the English part of the study much emphasis is placed on the well-established law applicable to the issues in question without getting into much detail, though reference is made to different approaches taken by English commentators in respect of a particular issue where there is no settled law.

Similarly, in respect of the Convention, primary emphasis is placed on the rules prescribed by the Convention with respect to the issues under consideration by way of interpretation of the text of the Convention. However, the history of legislation of any particular provision is not disregarded. Great efforts are made to interpret the text of the Convention in light of its legislative history to read the intention of the Convention drafters. An effort has also been made to refer to the courts' and arbitrators' attitudes towards the Convention provisions which are susceptible to different constructions. However, in the absence of sufficient available judicial decisions in respect of the Convention text in England, an attempt is made to access cases decided by the courts of member States and arbitral tribunals through the Internet (UNCITRAL and Pace University School of Law Home Pages).

⁸³ See in this respect, Zweigert, K.; Kötz, H., (1987) vol. 1 at 4.

⁸⁴ *Ibid.*, at 5.

Although due to unavailability of the full text of the courts' decisions in the Internet in English, these decided cases do not present a clear picture of the deciding courts' views in respect of the concept and purpose of the relevant provisions of the Convention, the case notes which are published by the Journal of Law and Commerce and those are available on the Internet are a significant means of accessing the attitude of courts.

A somewhat more complex method is used in the Islamic part of the work. This is because of the nature of this traditional and undeveloped legal system. In order to access what is law under this system, great efforts are made. Initially an attempt is made to answer the relevant questions in accordance with the existing law, that is, *Shi'ah* jurists' judgements. In the absence of express statements of law, it is attempted to answer the question by interpreting the judgements of the jurists in similar situations and analysing the original authorities upon which the jurists have based their judgements in those cases. When the legal vacuums could not be filled by the foregoing methods, the author has tried to suggest the appropriate law by way of interpretation of the well-accepted general principles.

The emphasis is not confined to the jurists who have officially published their authoritative opinions. Efforts have been made to access the views of the current jurists who have not officially published their opinions. For this purpose, the writer had a chance to discuss with some of them in respect of particular legal issues, and in particular, with respect to those modern issues which have not been yet addressed by the jurists in published authorities.

A significant difficulty of such a study is that most jurisprudential arguments have been made with respect to very traditional as well as hypothetical cases or questions rather than concrete ones. Likewise, the jurists have not gathered and classified the law governing the remedies for breach of contract, but they are scattered rules discussed in different places. One of the difficult tasks of the author was, therefore, to identify these rules and the relevant reasoning from different places.

The other major difficulty which naturally arises from such a study is the language barrier. In the absence of a comprehensive work on *Shi'ah* law in English, the author was forced to use materials which are originally in the Arabic and Persian languages. Thus, the major problem of a research of the present nature was to convert the texts and arguments from the original context. The problem becomes more serious where some expressions or legal institutions have no equivalent in the second language. To tackle this problem, the writer was forced to get help from persons who are educated in Islamic and English law. An attempt has also been made to clarify most of the legal expressions by explanation.

This study will not examine secular Iranian law. Although the history of Iranian law is close to that of *Shi'ah* law, they are to be distinguished.⁸⁵ The core of this research is the law of *Shi'ah* as reflected in *Shi'ah* jurisprudence in the form of jurisprudential judgements (*fatāwā*) by the eminent *Shi'ah fuqahā* (jurists). However, in order to present a practical example of the influence of *Shi'ah* jurists' judgements on Iranian civil law reference is made to the Iranian Civil Code (hereinafter ICC as amended in 1991) in footnote.

The last point which deserves to be noted is the method of transliteration of the Arabic and Persian texts and expressions into English. Various phonetic rules are suggested and applied by academic authors and organizations. But there is no official method to be followed. For this purpose, a method suggested by an English journal published in Tehran by Ahl al-Bayt World Assembly, "The Message of Thaqalayn" vol. 3, Nos. 1 & 2 (1996), with slight modification is used throughout this work.

⁸⁵ For more information as to the history of Iranian law and its relation with *Shi'ah* law see, Owsia, P., (1994) at 25 and *seq.*

CHAPTER TWO

BUYERS' REMEDIES

UNDER

ENGLISH LAW

Introduction

In English law, at a broad level a buyer who is injured by the seller's non-conforming performance may be entitled to resort to the following remedies separately or in combination; to withhold performance of his obligation, terminate the contract, require the defaulting seller to perform what he has undertaken under the contract or claim damages for the losses he sustained by the reason of the seller's breach of contract.

Section One

Withholding Performance and Termination

1.0. Introduction

1.1. Sketch of Discussion

One of the crucial questions is to identify the circumstances in which a buyer may be entitled to refuse to perform his contractual obligations and to put an end to the contract where the seller has failed to perform his obligations in accordance with the contract terms. Sometimes, the refusal to perform will be merely a part of, or a step towards, putting an end to the contract, but a failure to perform may also have the less drastic effect of entitling the buyer simply to withhold performance of his reciprocal obligations at least for so long as the seller's failure continues, irrespective of whether or not he is entitled to bring the contract to an end. However, the question of termination seems somewhat complicated in English law since, for reasons which will be made clear below, English sale of goods law has not clearly distinguished between these two courses of action. The present section will try first to examine the question whether in English sale of goods law the buyer has two separate rights: the right to withhold performance of his obligations, and the right to terminate the contract. Then, it will discuss the circumstances in which the buyer may be entitled to resort to either or both of these two remedies.

Termination of contract raises some further questions. First, how should it be exercised? When will it be effective? The latter in turn raises the question when will the buyer lose his right to terminate? Second, what effects will termination have on the contract, rights and duties of the parties? However, before considering the provisions regulating these two remedies it is necessary to examine a preliminary issue which has an important role in understanding the main issue under English law.

1.2. Classification of Contractual Terms

In English law, the question whether a party has a right to withhold performance of his obligation and to terminate the contract for the other party's non-conforming performance is analysed in the context of classification of contract terms as either "conditions", breach of which enables the innocent party to refuse to accept the non-conforming performance and terminate the contract, "innominate terms", breach of which entitles him to do so only when it results in serious consequences which will deprive him of substantially the whole benefit which it was the intention of the contracting parties that he should obtain from the contract, or "warranties" breach of which enables him only to claim damages for losses arising out of the breach.

Unlike "conditions"¹ and "warranties"², "intermediate terms" are not expressly recognised by the English Sale of Goods Act and as a result no statutory definition is available. They are the invention of case law, thus one must look at the case law for definition. This category of contract terms has firstly been expressly addressed in the leading case of *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*³ However, it was not a sale of goods case and it had not directly addressed the special problems of sale cases. For that reason for a period of time there was some doubt on the question whether the modern approach could be applied to the sale of goods cases. One view⁴ argued that as s. 11 (3) of the Sale of Goods Act created a statutory dichotomy which divided all terms in contracts for the sale of goods into conditions and warranties, the existence of any further category of contractual terms was impliedly excluded. But this view was rejected by the Court of Appeal in the case of *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)*.⁵ In that case, the Court of Appeal held that the *HongKong Fir* doctrine was a common law rule which was not inconsistent with the Sale of Goods Act and which was therefore not affected by it.⁶

¹ See s. 11 of the Sale of Goods Act 1979. In spite of the fact that the term 'condition' has a significant role within the remedial provisions of the English Sale of Goods Act, the Act has failed to define it. The term has different usages. See in this respect, *Wickman Machine Tools Sales Ltd v. Schuler A.G.* [1972] 1 W.L.R. 840 at 850, and, [1974] A.C. 235 at 250; Stoljar, S. J., (1953) at 488; Reynolds, F. M. B., (1963) at 534-535; Guest, A.G. *et al* (1997) Para. 10-024; Treitel, G. H., (1995) at 58, 677-678.

² Unlike 'condition', the Act has expressly defined 'warranty', in s. 61 (1). See also the statement of Lord Abinger in a case decided before the passing of the Act, *Chanter v. Hopkins* [1838] 4 M. & W. 399 at 404. Like "condition", the term 'warranty' has different usages. See in this respect, Carter, J. W., (1991) Para. 416.).

³ [1962] 2 Q.B. 26. As to the history of development of the doctrine of serious breach as a ground for rejection and termination see, Bridge, M., (1983) 868; Carter, J.W. and Hodgekiss, C., (1977) 31.

⁴ See e.g., at the first instance of *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1974] 2 Lloyd's Rep. 216, per Moccata J. See also, Reynolds, F. M. B., (1963) at 540; Montrose, J. L., (1964) at 75; Sutton, K.C.T., (1967) at 152-3.

⁵ [1976] 1 Q.B. 44. In *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 at 718 Lord Scarman said that the statutory classification of terms in the Sale of Goods Act as conditions or warranties "is not to be treated as an indication that the law knows no terms other than conditions and warranties".

⁶ S. 62 (2) of the Sale of Goods Act.

Following this decision, the courts applied this threefold division of contract terms to the sale of goods cases.⁷

The emergence of the new category of "intermediate" terms appears likely to have reduced the number of occasions when a term will be classified as a "warranty" in its Sale of Goods Act sense, so that it has been said that since the decision of Court of Appeal in the *HongKong Fir* case few cases can be found in which the courts have construed a contract term as a warranty.⁸

As regards conditions, although their continued separate existence has been acknowledged by the courts,⁹ the courts before the decision of the House of Lords in the case of *Bunge Corp v. Tradax Export*¹⁰ showed a great tendency to regard contract terms as intermediate rather than as conditions.¹¹ And even in *Reardon Smith Line v. Yngvar Hansen-Tangen*, Lord Wilberforce suggested that a number of the old cases are "excessively technical" and ought to be re-examined by the House of Lords.¹² The above statements show clearly that the courts during that period proved more tendency in favour of the *HongKong Fir* doctrine.

It seems that this was probably the result of applying strict test of Diplock LJ in *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*¹³ However, in *Bunge Corp v. Tradax Export S. A.*¹⁴ Megaw L.J. in the Court of Appeal observed that he did not think that the statement of Diplock L.J. in *HongKong Fir* case was intended to be a "literal, definitive and comprehensive statement of the requirements of a condition". The House of Lords, approving the judgment of Megaw LJ, held that the "wait and see" method, or, the "gravity of the breach" approach, is not the way to identify a condition in a contract. This is done by construing the contract in the light of surrounding circumstances.¹⁵ By this criterion,

⁷ In this regard, reference can be made to the statement of Browne L.J. in *Bunge Corp. v. Tradax Export S.A.* [1980] 1 Lloyd's Rep. 294 at 309). See also, Reynolds, F. M. B, (1976) 17; Weir, T., (1976) 33.

⁸ Carter, J.W., (1981) at 221. For the reason of failure of the courts to recognise a term as a warranty since the *HongKong Fir* case, the editors of *Benjamin's Sale of Goods* raise the question whether the notion of such a term is a necessary one (see Guest, A. G. *et al* (1997) Para. 10-33).

⁹ For instance, in *Wickman Machine Tool Sales v. Schuler A.G.* [1974] A.C. 235, all members of the House of Lords recognised that conditions in the technical sense still formed a valid part of legal reasoning.

¹⁰ [1981] 1 W.L.R. 711.

¹¹ See e.g., *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44, (the statement of Roskill LJ at 70-71).

¹² [1976] 1 W.L.R. 989 at 998.

¹³ [1962] 2 Q.B. 26 at 69-70.

¹⁴ [1980] 1 Lloyd's Rep. 294 at 305

¹⁵ [1981] 1 W.L.R. 711 at 716 and 719. Perhaps it was for this reason that in *Photo Production v. Securicor Transport* [1980] A.C. 827, Lord Diplock in order to base discharge on the parties' intention, somewhat modified his earlier description of conditions in *HongKong Fir* case by describing them as arising where "the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular obligation ..., irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed", (*ibid.*, at 849).

the House of Lords did open indeed a path to treat some kinds of contractual terms more easily as condition.

Under the present law, a term of a contract will generally be regarded as a condition if it has previously been recognised as such by statute¹⁶, precedent¹⁷, or it appears that it was the intention of the parties that a particular term is to be a condition.¹⁸ However, the mere fact that the parties labelled a particular stipulation as a "condition" does not necessarily mean that it is used in its strict sense. The court will usually be disinclined to treat a term as a condition if the result of such a construction would be unreasonable.¹⁹

The important issue is, therefore, whether a previously unclassified terms is to be classified as a 'condition' or as an 'intermediate' term. This issue is a difficult one influenced by two competing policies: fairness and certainty. The first policy favours the classification of terms as intermediate illustrated by the *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*²⁰, whereas, the second policy, emphasising the requirement of commercial certainty and predictability, favours the classification of terms as conditions.²¹ Both policies have been supported by judicial decisions.²² As a matter of policy, English courts are, as will be seen later, more inclined to treat as conditions time stipulations in commercial contracts than other contract terms.²³ However, the court may be reluctant to conclude that a term has been treated as a condition by the parties where that might result in termination for a relatively minor breach.

¹⁶ As far as the sale of goods cases are concerned, see ss. 12-15 of the Sale of Goods Act 1979, as amended by the Sale and Supply of Goods Act 1994.

¹⁷ See e.g. *Bowes v. Shand* (1877) 2 App. Cas. 455. The important point is that *Bowes* establishes that in an f.o.b. contract the date of shipment term is a condition.

¹⁸ See the statement of Blackburn L.J. in *Bettini v. Gye* (1876) 1 Q.B.D. 183 at 188. See also *Wickman Machine Tools Sales Ltd. v. Schuler A. G.* [1974] A.C. 235; *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 at 923, 937, 944.

¹⁹ See e.g., the statement of Lord Denning M.R. in *Wickman Machine Tool Sales Ltd. v. Schuler A. G.* [1972] 1 W.L.R. 840 at 851. The view was also confirmed by Lord Reid at the House of Lord [1974] A.C. 235 at 251. See also *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44 at 71.

²⁰ See e.g., *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44; *Tradax Internacional S.A. v. Goldschmidt S.A.* [1977] 2 Lloyd's Rep. 604) and by a number of later decisions cited in: Treitel, G. H., (1995) at 713 no. 95.

²¹ See e.g., *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711; *Gill & Duffus S.A. v. Societe Pour L'Exportation des Sucres S.A.* [1986] 1 Lloyd's Rep. 322. See also the cases cited in Treitel, G. H., (1995) at 714 no. 3.

²² See the authorities cited in fns. 20 and 21.

²³ But in other types of contract terms the court are somewhat reluctant to treat a contract term as a condition. For instance, in *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 at 715, Wilberforce L.J. maintained "It remains true, as Roskill LJ has pointed out in *Cehave N.V. v. Bremer Handelsgesellschaft m. b. H. (The Hansa Nord)* [1976] 1 Q.B. 44, that the courts should not be too ready to interpret contractual clauses as conditions".

2.0. Rejection and Termination

As indicated before, in English sale of goods law the buyer's right to refuse to accept the seller's non-conforming delivery and to terminate the contract is analysed in the context of classifying contract terms into "conditions", "warranties" and "intermediate terms". By the express language of the Sale of Goods Act 1979 the buyer neither is entitled to terminate the contract nor even has a right to reject the non-conforming goods where the lack of conformity is caused by breach of "warranty".²⁴ The same is true where breach of an "intermediate term" does not result in serious consequences. Accordingly, breach of warranty and that of intermediate term in the above prescribed form does not cause much difficulty in respect of the issue in question. The controversial issue is the case where the seller's non-conforming delivery results in breach of "condition" or an "intermediate term" which causes serious results.

Where the seller's non-conforming delivery is caused by breach of condition it is commonly said that the buyer is entitled to *reject it and treat the contract as repudiated*. However, the position of these two rights and their relationship is not quite clear. In the absence of a clear statement of law the following significant questions arise:

- (i) Does the term 'right to reject' refer to a right separate from the right to treat the contract as repudiated?
- (ii) If so, does it mean that the latter can be exercised whenever the first is available?

The answer to the latter question throws light on the significant question whether or not the seller after the buyer's lawful rejection has a right to "cure" his non-conforming delivery.

Since most arguments arise from the language of the Sale of Goods Act and case law which do not apply to breach of an innominate term, the following discussion will first answer these questions where the seller has committed breach of a condition. After that, it will examine the question when the buyer will be entitled to reject the seller's non-conforming delivery and terminate the contract if the seller has broken an innominate term. Finally, it will examine some special cases which arise in respect of the question under consideration.

2.1. Breach of Condition

2.1.1. Rejection and Termination, One Remedy or Two?

In spite of the fact that the Sale of Goods Act talks of the right to reject the goods *and* to treat the contract as repudiated for breach of condition (s. 11 (4)), which signifies the existence of

²⁴ See ss. 11 (3) 61 (1).

two possibly distinct rights, the phrase has not been clearly interpreted in English sale of goods law. In this connection the language of the section, as will be seen below, is unclear. Nowhere else does the Act define these two concepts in precise words. It also fails to state the effect of their exercise on the rights and duties of the parties. Neither the Sale and Supply of Goods Act 1994 nor the Law Commission's Reports which preceded it²⁵ make any mention of the buyer's right to terminate the contract. The Law Commission has never taken into consideration the nature of the buyer's right to reject and its relationship with the right to treat the contract as repudiated in making their proposals. Nor has the question been clearly worked out in the case law. Academic writers, as will be seen below, are of different opinions. Accordingly, the first question is whether breach of condition gives the buyer a right separate from his right to treat the contract as repudiated and terminate it. The question will be examined in the light of Sale of Goods Act, case law and academic writings.

Sale of Goods Act. Although the Act has made plain that the buyer has the right neither to reject the goods nor to treat the contract as repudiated for breach of a "warranty"²⁶, when dealing with the remedies available for breach of a "condition", it merely says that "... breach ... may give rise to a right to treat the contract as repudiated"²⁷ without mentioning the existence of a right to reject. There are similar statements in the sections dealing with the possibility of the buyer's right to "waive the condition", or his election to "treat the breach of condition as a breach of warranty".²⁸

On the other hand, ss. 15A and 30 of the Sale of Goods Act, when dealing with the remedies for breach of implied conditions (ss. 13-15) and remedies for delivery of wrong quantity, simply talk of the buyer's entitlement to reject, without referring to the right to treat the contract as repudiated at all. Even s. 53 (1) in the same situation in which s. 11 (2) mentions the right to treat the contract as repudiated, mentions the right to reject. Likewise, the Act recites the circumstances where the buyer loses the right of rejection, but it does not state the precise meaning of rejection, but only, when it provides that the buyer is under no obligation to return the rejected goods to the seller, refers to the right to refuse to accept delivery of non-conforming goods.²⁹ The only provision which contains both the buyer's

²⁵ Law Commission, (1983); Law Commission, (1987).

²⁶ Ss 11 (3) and 61 (1).

²⁷ S. 11 (3). It does not mention the aggrieved party's right of "termination" or any of the other alternatives similar to it, although it refers to a contract of sale as being "rescinded" by the seller on account of the buyer's breach (s. 48). It only refers to the right of an innocent party to treat the contract as repudiated (ss. 11 and 31), without saying what that signifies in practical terms.

²⁸ S. 11 (2).

²⁹ S. 36. See in this respect, Bridge, M., (1988) at 278-279.

alleged rights, i.e., to reject the goods and treat the contract as repudiated, is s. 11 (4). This sub-section provides:

“..., where the contract is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for *rejecting the goods and treating the contract as repudiated* unless there is an express or implied term to that effect”. (italic added)³⁰

It might be argued that this sub-section by using the conjunction “and” intends to give the aggrieved party two separate rights for breach of condition. However, this interpretation is arguable. “And” is conjunctive, so that one reading of this would be that the two rights are actually one: i.e.: the buyer who rejects is automatically treating the contract as repudiated³¹. Alternatively, “and” could be read disjunctively as indicating that there are two rights which may be exercised separately. Thus, “and” is ambiguous.

Case Law. Similarly, the question has not been clearly answered by case law. On the one hand, there are several judicial dicta which use one instead of another.³² A general review of these cases reveals the fact that case law does not clearly show that breach of condition gives the innocent buyer two separate rights: rejection of non-conforming goods and termination of the contract. Even assuming that they regard them conceptually as two distinct rights, it is hard to find a clear statement elucidating the question whether the buyer can reject the goods without having to terminate the contract. In contrast, there can be found some cases in which the buyer is given the right to reject the defective goods without being required to terminate the contract.³³

Academic Writers. The unclear status of the sale of goods legislation and failure of case law to clarify the language used in the Act has caused academic writers to take up two opposing approaches. On the first approach, the remedy of rejection is equated with termination or, it is

³⁰ These two alleged rights can also be inferred from the provision which state the remedial consequences of breach of warranty (ss. 11 (3) 61 (1)).

³¹ In other words, it uses the word “rejection” as a component of a single right because of the fact that in the case of non-conforming delivery this right is frequently exercised by actual rejection of the non-conforming goods.

³² See e.g., *Bentsen v. Taylor, Sons & Co* [1893] 2 Q.B. 274 at 281; *Arcos, Ltd. v. E.A. Ronaasen & Son* [1933] A.C. 470, per Lord Atkin at 480; *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q. B. 44, per Ormerod LJ at 83 and 84 (in which he described the term “rejection of goods” equivalent to the phrases “treat the contract as repudiated”, “terminate the contract” and “rescind”); *Kwei Tek Chao v. British Traders and Shippers Ltd* [1954] 2 Q.B. 459 at 480 (where Devlin J treats ‘rejection’ as tantamount to ‘rescission’ (in the sense of termination); Lord Roskill in *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 at 724, 725. Again, there are numerous judicial dicta, in non-sale of goods cases, which express the law that breach of condition automatically entitles the innocent party to terminate the contract, without exploring the concept of “rejection” and “termination”. See for instance, Lord Denning M R in the case of *Wickman Machine Tools Sales Ltd. v. Schuler A.G* [1972] 1 W.L.R. 840 at 850 (see also Lord Reid’s statement in the House of Lords, [1974] A.C. at 251); Lord Diplock in *Photo Production v. Securicor Ltd.* [1980] A.C. 827 at 849.

³³ See for instance, the old case of *Reuter, Hufeland, & Co. v. Sala & Co.* [1879] 4 C.P.D. 239.

a component of a single right. Apparently, according to this construction, by the buyer's rejection of the non-conforming goods the contract would automatically be terminated. The buyer will not have an option to reject the goods without being required to terminate the contract.³⁴ The opposite approach is that the right of rejection is distinct from the right of termination, although the advocates of the second approach, as will be seen later, differ in permitting the victim of breach to terminate the contract.³⁵ The latter approach is based on the fact that the term "condition" in the sense accepted in the Act is used to describe an important term whose full performance is a condition precedent to the buyer's duty to accept the goods the seller delivers in performing the contract.³⁶ On this interpretation, the seller's delivery of the goods in accordance with the terms of the contract (s. 27 of the Act) is the pre-condition of the buyer's duty to accept and pay in exchange for them. The buyer is deemed liable to the seller for non-acceptance provided that the seller's delivery has been in accordance with the terms of the contract, express or implied, including the implied conditions. Thus he is required to accept (not to reject) such a delivery. Accordingly, as long as the seller's delivery is not in conformity with the terms of the contract the buyer is not under any duty to accept it. Under this approach, the right to terminate the contract is a separate right which must be justified on another ground.

2.1.2. Relationship Between the Two Remedies

Assuming that a buyer who is aggrieved by the seller's breach of condition may have two rights -to reject the non-conforming goods and to treat the contract as repudiated and terminate it-, a further question is to determine the relationship between these two remedies. Is a buyer who is given a right to refuse to accept the non-conforming goods entitled to terminate the contract immediately after he has rejected the goods?

The Sale of Goods Act fails to determine the relationship between rejection and termination. It only states that breach of condition "may give rise to a right to treat the contract as repudiated" (s. 11 (3)). It does not precisely determine the time when a breach of condition would occur, whether it will be when the seller's non-conforming delivery takes

³⁴ See e.g., Treitel, G. H., (1991) at 690; Carter, J. W., (1991) Paras. 102, 628, in particular, 940; Carter, J. W., (1991 A), at 102-103; Carter, J. W., (1993) at 95 and 110; Guest, A.G. *et al* (1994) vol. 2, Para. 41-040.

³⁵ Beale, H., (1980) at 20-21 and 80, 91; Davies, I., (1992) at 161; Furmston, M., (1995) at 158, 159; Goode, R. M., (1995) at 362-363; Atiyah, P. S. & Adams, J., (1995) at 449 and 456 fn. 30; Bradgate and White (1995) at 53; Treitel, G. H., (1995) at 704 fn. 17 then p. 670; Bridge, M., (1997) at 162, 163; Guest, A. G. *et al*, (1997) Para. 12-031.

³⁶ See in this regard, Bradgate and White (1995) at 61-62. The idea which underlies the use of the word "condition" in this context is that the term is, or assumed to be, so vital, to the operation of the contract that its fulfilment by one party is a condition precedent to the other party's liability to perform his own part (see *Wallis, Son & Wells v. Pratt & Haynes* [1910] 2 K.B. 1003, the statement of Per Fletcher Moulton L.J. at 1012; see also *State Trading Corp. of India Ltd. v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277 at 282.

place or when the time for performance has expired, provided that it is of the essence of the contract. Similarly, case law has not made the issue quite clear. On the one hand, there are numerous judicial dicta which say that breach of condition automatically entitles the innocent party to reject the non-conforming goods and treat the contract as repudiated and terminate the contract, without distinguishing clearly between cases of curable and incurable breach, and, between cases in which the time for performance expired and those allowing the breaching seller to remedy his breach within the contract time. Reference can be made to the general statement made by Lord Roskill in *Bunge Corpn. v. Tradax Export S.A.* In this case he observed that where an obligation is held to be condition any breach of which "will entitle the innocent party to rescind" the contract.³⁷ Reference can also be made to the f.o.b. case of *Compagnie Commerciale Sucres Et Denrees v. C. Czarnikow Ltd. (The Naxos)*. In this case Butler Sloss L.J. remarked:

"But if this is a condition, any breach, however trivial, would entitle the party aggrieved to bring the contract to an end."³⁸

On the other hand, there are some other cases in which the buyer's termination was not regarded as lawful termination and it was held that the seller was entitled to make a second tender. The latter cases are, however, disputable and they will be examined in detail when discussing the seller's right to cure. Equally, some authors have questioned the authority of the former statements by that many of them are *obiter*, or have been rendered in situations in which the breach was incurable because of its nature or the time for performance had expired.³⁹

Because of the unclear status of the issue in sale of goods law, the English commentators are of two different approaches. Some writers took the view that any non-compliance with a condition by the seller would place him in breach of condition and give the buyer a right to reject the non-conforming goods and treat the contract as repudiated and terminate the contract immediately.⁴⁰ Unlike the language of s. 11 (3) which provides that the

³⁷ [1981] 1 W.L.R. 711 at 724, 725; see also Lord Scarman's judgement at 717.

³⁸ [1989] 2 Lloyd's Rep. 462 at 478. See also non-sale of goods cases such as, Lord Denning M R in *Wickman Machine Tools Sales v. Schuler A.G.*, [1972] 1 W.L.R. 840 at 850; Lord Reid in the same case before the House of Lords, [1974] A.C. 235, at 251; Lord Diplock in *Photo Production v. Securicor Ltd.* [1980] A.C. 827 at 849.

³⁹ See in this respect, Bradgate and White (1995) at 69 (fn. 47). See e.g., the statements observed in respect of the promissory representations regarding the existence of certain facts in the subject-matter of the contract, such as *Behn v. Burness* [1863] 3 B.& S. 751 (statement that the ship "now in the port of Amsterdam"; *Bensten v. Tatlor* [1893] 2 Q.B. 274 (statement that ship "now sailed or about to sail"; *Maredelanto Compania Naviera SA v. Bergbau-Handel G m b H (The Mihalis Angelos)* [1971] 1 Q.B. 164 (statement that a ship is "expected ready to load" clause in a voyage charter.

⁴⁰ See e.g., Atiyah, P. S. & Adams, J., (1995) at 449 and 456 fn. 30; Bradgate and White (1995) at 76; Bridge, M., (1997) at 162, 163. See also, Carter, J.W., (1991) Paras. 308, 407, 501 and 569, in particular Para. 572; Guest, A. G. *et al*, (1994) vol. 2 Para. 41-040. In justifying this approach see, Treitel, G. H., (1991) at 692-

innocent party, say buyer, *may* treat the seller's breach of condition as repudiation of the contract, the proponents of this approach argue that not much significance should be attached to the particular word "*may*" where the contract is non-severable.⁴¹ On this approach, it is argued that it is assumed by the law that non-compliance with a condition does always amount to a repudiation of the contract. That is to say, because of the actual or presumed importance of 'condition' delivery of goods which do not comply with it does always lead to such a consequence. As a result, the buyer has an option to accept the seller's repudiation and terminate the contract immediately, or, to reject the defective delivery and give the seller an opportunity to perform his obligations in compliance with 'condition'.⁴²

In contrast, some others argue that the mere delivery of goods which do not comply with a condition will not place the seller in breach of condition, so there is no reason to justify the buyer's termination. The seller will only be in breach if defective performance remains incurred at the time when performance is due. There is no breach because the duty of the seller is to tender a correct performance by the contract date.⁴³ On this view, the buyer's immediate remedy for seller's non-conforming delivery is simply to refuse to accept it. The buyer would be entitled to terminate the contract on account of seller's defective delivery only where:

(a) the time for performance of the contract has expired, so that it is too late for the seller to make a fresh tender and the time for delivery is of the essence or has been made so as the result of notice or where a reasonable (or frustrating) time has passed after the contract delivery date; or

(b) the seller's conduct amounts to a repudiation of the contract, e.g., by insisting on his original non-conforming delivery, refusing to re-tender, making a delivery so defective or so near the expiry of the date which is of the essence of the contract. According to this view it is not non-compliance with a term classified as a condition which gives an innocent buyer a right

693, Treitel, G. H., (1988) Paras. 198, 267; Treitel, G. H., (1990) at 186; *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44, the statement of Ormerod LJ at 84.

⁴¹ See e.g., Guest, A. G., *et al*, (1997) Para. 10-28; Bradgate and White (1995) at 69).

⁴² See in this respect, Bradgate and White, (1995) at 75. On this view, where the buyer rejects the goods and requests cure but the seller fails to comply, the buyer will be entitled to terminate the contract and claimed damages assessed as at the date of termination (see, *ibid.*).

⁴³ Goode, R., M., (1995) at 274-276, 293-294, 362-367; Beale, H., (1980) at 91. The difficulty which arises from this approach is that if it is assumed that before the time for performance is expired the seller's non-conforming delivery would not result in breach of a condition how it is that the buyer can reject for 'breach of condition'. Where does the right of rejection come from? The proponents of the view do not deal with this issue adequately. It might be argued that the right to reject is to be justified on the breach of an implied term. That is, the seller has undertaken to deliver goods in conformity with 'conditions' within the contract period, but is impliedly obliged to make just one delivery. Where he has made non-conforming delivery he will be guilty of breach of this implied term which entitles the buyer to reject them (the point to which Professor Goode refers in a footnote of his leading text book without any explanation, *ibid.*, at 362). But if breach of this implied term justifies rejection, the implied term must be a condition. If so, why can the buyer not terminate for its breach.

to terminate the contract but his right is to be justified by the seller's particular conduct resulting in repudiation of the contract, or, by the impossibility of performance resulting from expiry of the time for performance.

2.1.3. Seller's Right to Cure

Further question is whether the seller should be given a right to cure his defective performance, and if so, to what extent such a right is defensible in English sale of goods law. Sale of Goods Act provides no express provision regulating the issue. Case law has also failed to make clear the issue. Academic writers are currently of different opinions. In this respect, while a number of authors are doubtful⁴⁴, some others took the view that the seller after the buyer's lawful rejection of non-conforming goods has a general right to cure.⁴⁵ Professor Goode is one of the authors who confidently observes that where the buyer lawfully rejects the non-conforming goods the seller has a general right to cure, provided that it is not too late for him to do so. In justifying the view, he argues that not only is it confirmed in a number of cases⁴⁶ but also it is in accord with legal principle and commercial practice. The consequence of this approach is that where the seller makes a non-conforming delivery and the buyer refuses to accept it, the seller, in the case of a contract for unascertained goods, can cure by tendering replacement goods. Where the contract is for specific goods the seller could not, without the buyer's consent, tender substitute goods, since the contract itself identifies and thereby restricts the goods to those named therein.⁴⁷ Thus he can only cure by repairing the goods to make them conform to the contract. Although Professor Goode does not say so expressly, it appears that he regards this right as being available even in cases where the seller's breach consists of a breach of the statutory implied conditions.⁴⁸ On this view, the

⁴⁴ See e.g., Guest, A. G., *et al*, (1997) Para. 12-031; Ahdar, R. J., (1990) 364; Guest, A. G., *et al*, (1994) vol. 2 Para. 41-045; Law Commission, (1983) Para. 2.38.

⁴⁵ See e.g., Goode, R. M., (1995) at 363-367; Beale, H., (1980) at 91; Sealy, L.S. & Hooley, R. J. A., (1994) at 427. See also, Lord Devlin, (1966) 192; Beale; Bishop, and Furnston, (1995) at 482, 504 and 510; Davies, I., (1992) at 161; Apps, A., (1994) 525; Treitel, G. H., (1995) at 704 fn. 17 and then 670 fn. 13.

⁴⁶ In this respect, Professor Goode and his advocates have relied on a number of cases such as, *Tetley v. Shand* (1871) 25 L.T. 658; *Borrowman Phillips & Co. v. Free & Hollis* (1878) 4 Q.B.D. 500; *Ashmore & Sone v. C.S. Cox & Co* [1899] 1 Q.B. 436; *Longbotton v. Bass Walker* [1922] W.N. 245; *E. E. & Brian Smith* (1928), *LD. v. Wheatshaf Mills. LD.* [1939] 2 K.B. 302; *McDougall v Aeromarine of Emsworth* [1958] 3 All E.R. 431; *Agricultores Federados Argentinos v. Ampro S.A* [1965] 2 Lloyd's Rep. 157; *Gertride Import Gesellschaft mb H v Itoh & Co. (America) Inc.* [1979] 1 Lloyd's Rep. 592; *Bremer Handelsgesellschaft m. b.H. v. J. H. Rayner & Co. Ltd.* [1979] 2 Lloyd's Rep. 216; *S.I.A.T. Didal Ferro v. Tradax Overseas S.A* [1980] 1 Lloyd's Rep. 53; *Empresa Exportadora de Azucar v. Industria Azucareva Nacional S.A. (The Playa Larga)* [1983] 2 Lloyd's Rep. 171; *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corpn of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391 at 399.

⁴⁷ The same argument may arise where the seller of unascertained goods has unconditionally appropriated goods to the contract. In such a situation, it can be argued that the act of appropriating goods to the contract with the buyer's consent may result in a description on them so that the seller cannot unilaterally recall and substitute them. See also, Bridge, M., (1997) at 199.

⁴⁸ Goode, R. M., (1995) at 274-277, 294,, 362-367. See also, Beale, H., (1980) at 90-93.

buyer can reject a re-tender if, but only if, time for performance is of the essence or, though not originally of the essence, has been made so as the result of notice procedure, or more than a reasonable period of time has elapsed since the contract date delivery.⁴⁹

Some others⁵⁰, in contrast, have disagreed with this view and suggested that delivery of goods which do not comply with a condition would be breach of contract and always entitle the innocent buyer to reject the non-conforming goods, and, in the case of non-severable contract it does, in itself, amount to a repudiation of the contract by the seller entitling the buyer to accept it and terminate the contract. This would be regardless of whether the buyer could, or could not, terminate for the failure of the seller to deliver within the contract time. On this view, the seller is not entitled to cure the breach, but if the buyer chooses to reject without terminating, the seller will be entitled to attempt to cure his breach by a fresh delivery.⁵¹

As regards the cases cited to support the existence of a right to cure for seller, the advocates of the second view have argued that these cases cannot be authorities to establish a general right to cure.⁵² A number of these cases, they argue, can be explained as cases where the sellers had not effectively appropriated goods to the contract. On their view, the case most often cited as authority on the issue, *Borrowman Phillips & Co. v. Free & Hollis*⁵³, does not prove the existence of a general right to cure. This case, they suggest, can only be an authority where the seller has not committed himself as to the appropriation. In such a case, where the goods offered do not correspond with the contract he has an option to withdraw his tender and make a fresh offer.⁵⁴ It does not apply to a case where the seller has made a binding appropriation or has actually delivered goods in performance of his delivery obligation and it turns on that they are not in conformity with the contract.⁵⁵ On this interpretation, a number of cases cited in support of the existence of the right to cure for the seller become doubtful, since the authority cited in these cases is *Borrowman*.⁵⁶ The proponents of the second

⁴⁹ Goode, M. R., (1995) at 365 and then 279. See also Beale, H., (1980) at 91; Beale H.G.; Bishop, W.D. and Furmston, M.P., (1995) at 482, 503 and 510; Lord Devlin, (1966) at 203.

⁵⁰ Bradgate, R., (1995) at 247; Bradgate and White (1995) at 75; Atiyah, P. S. & Adams, J., (1995) at 455-456; Bridge, M., (1997) at 163, 198-201.

⁵¹ See Bradgate and White (1995) at 76.

⁵² See in this regard, Bradgate and White (1995) at 71-75; Bridge, (1997) at 199-201.

⁵³ [1878] 4 Q.B.D. 500.

⁵⁴ The editors of *Benjamin's Sale of Goods*, has cited this case as authority for this proposition (Guest, A. G., et al, (1997) Para. 19-021).

⁵⁵ See e.g., Bradgate, R., (1995) at 247; Bridge, (1997) at 199.

⁵⁶ Such as *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp'n of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391 at 399; *Empresa Exportadora de Azucar v. Industria Azucareva Nacional S.A. (The Playa Larga)* [1983] 2 Lloyd's Rep. 171 at 186; *E. E. & Brian Smith (1928), LD. v. Wheatsheaf Mills. LD* [1939] 2 K.B. 302 at 315; *Gertreide Import Gesellschaft mb H v Itoh & Co.* [1979] 1 Lloyd's Rep. 592 at 594

approach also argue that the cases of *Ashmore & Sone v. C.S. Cox & Co*⁵⁷, *Brian Smith v. Wheatsheaf Mills*⁵⁸ and *McDougall v Aeromarine of Emsworth*⁵⁹ can be explained on the same way as *Borrowman*. Cases such as *Agricultores Federados Argentinos v Ampro S.A*⁶⁰ have also been explained as those concerned with the buyer's right to make a replacement nominations of vessels under f.o.b. contracts. Such cases can only, they argue, support the right to cure for the seller by way of inference.⁶¹ Similarly, cases such as *Longbottom v. Bass Walker*⁶² have been explained as cases involving instalment deliveries in which different rules may be applicable.⁶³

On the second approach, a seller who has made a delivery which does not comply with a "condition" may, however, be entitled to cure his default under the following circumstances.⁶⁴ First is where the buyer rejects the non-conforming goods and allows the seller to make a new tender. He may be able to do so where the buyer has lost his right to terminate after rejection. In some cases, the seller may be able to do so under the principle of mitigation. Although the buyer is not required under the general law to accept the seller's offer to make conforming delivery after rejection, the principle of mitigation, as will be discussed when dealing with the restrictive role of the principle of mitigation on the right to claim damages, may require him to accept the seller's offer to cure in order to mitigate his loss.⁶⁵ Similarly, the seller of unascertained goods may be entitled to cure as long as his offer to

⁵⁷ [1899] 1 Q.B. 436.

⁵⁸ [1939] 2 Q.B. 302. The relevant statement cited in this case has also been explained as *obiter*, because the reasoning to which is referred is only one of two reasons for the decision (see Bradgate and White, (1995) at 73). The same has been said as to the comment in *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corpn of India (The Kanchejunga)* [1990] 1 Lloyd's Rep. 391 at 399, since the statement relied on was made in a case concerned with nomination of vessel under a charterparty contract.

⁵⁹ [1958] 3 All E.R. 431. The case of *Gertreide Import Gesellschaft mb H v Itoh & Co.* [1979] 1 Lloyd's Rep. 592 can also be explained in this way. *McDougall* has also been explained as a case concerned with a contract containing an express term giving the seller a right to make a further tender after the buyer's rejection. It was not based on the general provisions of the law (see Bradgate and White, (1995) at 74).

⁶⁰ [1965] 2 Lloyd's Rep. 157. See Bradgate and White, (1995) at 74. It seems that *Bremer Handelsgesellschaft m. b.H. v. J. H. Rayner & Co. Ltd.* [1979] 2 Lloyd's Rep. 216 at 229 could be explained in this way.

⁶¹ However, it can be said that nomination of a vessel is broadly equivalent to appropriation of goods to a contract. That is, as appropriation identifies some particular goods to the contract, nomination of a vessel identifies the vessel to be used in performance. As a result, such cases can be authorities for a limited right of cure; where no binding appropriation/nomination has been made.

⁶² [1922] W.N. 245. As Atkin LJ indicated in respect of the *Longbottom v. Bass Walker* at 246. In this way *Tetley v. Shand* (1871) 25 L.T. 658 can also be explained, since in that case the plaintiffs (brokers who actually sold the cargo in their names) undertook to buy gradually the 500 bales of cotton in a certain prices.

⁶³ See e.g., Bradgate, (1995) at 247. The other cases such as *S.I.A.T. di dal Ferro v. Tradax Overseas S.A* [1980] 1 Lloyd's Rep. 53 at 63 and *Empresa Exportadora de Azucar v. Industria Azucareva Nacional S.A. (The Playa Larga)* [1983] 2 Lloyd's Rep. 171 at 185 can be explained on the basis that no authority has been cited in favour of the view in the statements cited in these cases. Moreover, the comments are rendered in respect of seller's duty to present documents in a documentary sale. It is not thus clear whether it would be applied to the other type of contracts and in respect of the delivery of defective goods under documentary sale itself.

⁶⁴ See in this respect, Bradgate and White, (1995) at 75.

⁶⁵ For instance, in *Payzu Ltd. v. Saunders* [1919] 2 K.B. 581, Scrutton LJ said that "in commercial contracts it is generally reasonable to accept an offer from the party in default" (*ibid.*, at 589).

appropriate a particular cargo for the contract has not been unconditionally accepted by the buyer.⁶⁶ In this way one may explain the cases in which a seller was given a right to re-tender correct documents within the contract period when the buyer refused to accept them on the ground that they are not corresponding with the contract.⁶⁷

2.2. Breach of "Intermediate" Term

As indicated before, where breach of a term classified as an intermediate term does not result in serious consequences the only remedy available for it is to claim damages. Rejection and termination can be justified only when breach has attained a certain degree of seriousness. As explained in the introductory remarks of this chapter, this is a circumstance which was first recognised in *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*⁶⁸ and its application to sale contracts was confirmed by the Court of Appeal in the *Hansa Nord* case in 1976.⁶⁹

According to the doctrine of serious breach, the court's duty is, at the first stage, to decide whether or not the broken term, on its true construction, was a condition. If the term broken is held not to be a condition, the court then should look at the breach itself and examine whether it is sufficiently serious to justify termination of the contract on the common law principles.⁷⁰ If it does, the buyer will be entitled to reject the non-conforming goods and terminate the contract: if it does not there will be only a right to claim for damages.

2.2.1. Description of the Doctrine

Notwithstanding that justifying termination on account of the theory of serious breach is a well-accepted rule now, there is no generally accepted terminology to describe the breach satisfying the requirements of the doctrine. Various expressions are used to refer to this doctrine. For instance in the leading case of *HongKong Fir* itself, Upjohn L.J. described the breach satisfying the requirement of the doctrine as one which goes "so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other

⁶⁶ One may argue that the point can be supported by the language of s. 27 of the Sale of Goods Act. The section requires the seller to deliver "the goods". It is quite possible to say that such a language refers to "the specific goods" or, in a contract for unascertained goods, "the goods actually appropriated to the contract". As long as some particular goods are not effectively allocated to the contract the seller's duty is simply to identify some goods which conform to the contract terms. On this reading, the section would fit with a right of cure up to the stage of appropriation to identify the contract goods.

⁶⁷ Such as *S.I.A.T.di dal Ferro v. Tradax Overseas S.A* [1980] 1 Lloyd's Rep. 53 at 63 and *Empresa Exportadora de Azucar v. Industria Azucareva Nacional S.A. (The Playa Larga)* [1983] 2 Lloyd's Rep. 171 at 185. See also, Guest, A. G., *et al*, (1997) Para. 19-062.

⁶⁸ [1962] 2 Q.B. 26.

⁶⁹ [1976] 1 Q.B. 44 at 60, 73 and 84.

⁷⁰ See e.g., *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44, at 60, 73, 84; *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 at 717.

words where the whole contract is frustrated".⁷¹ Diplock L.J., on the other hand, described it as a breach which results in an event which deprives an innocent party "of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing" the contract.⁷² In subsequent application or affirmation of the doctrine, the courts have described the breach giving rise to a right of termination under this doctrine in various terms.⁷³ It has sometimes been described as a breach which "goes to the root" of the contract⁷⁴, or as being "fundamental"⁷⁵, or which "destroys the consideration which he gave"⁷⁶.

However, what is certain is that these are not really different tests but are different ways of saying the same thing. Thus a breach which "goes to the root of the contract" is "fundamental" (going to the root); a breach which deprives a party of the whole benefit destroys the consideration he gave (by depriving him of the consideration he was to receive) and, from the innocent party's point of view, frustrates the commercial purpose by affecting the substance of the contract.

2.2.2. Operation of the Doctrine

Before the *HongKong Fir* doctrine comes into operation it must be proved that the broken term is a term which does not fall into the category of condition or warranty. If so, although every breach of such a term may give rise to a right to claim damages, the right to reject and terminate will arise only where it is proved that the breach attains a certain degree of seriousness. The difficult step for the operation of the doctrine is to establish that the breach is sufficiently serious. Three factors have been considered by the courts for this purpose the nature of the breach, its foreseeable consequences,⁷⁷ and the nature of event resulting from the breach.⁷⁸

⁷¹ [1962] 2 Q.B. 26 at 64.

⁷² *Ibid.*, at 66. See also, *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44, per Roskill L.J. at 73.

⁷³ See generally, Guest, A. G., (1984) at 480; Treitel, G. H., (1988) Para. 260; Carter, J.W., (1991) Paras. 620, 647.

⁷⁴ See e.g., *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 at 368; *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44 at 60, 73, 84.

⁷⁵ See e.g., Lord Diplock in *Photo Productions* [1980] A.C. 827 at 849; *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 391.

⁷⁶ See e.g., *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44, per Roskill LJ at 73.

⁷⁷ Upjohn LJ in *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 64.

⁷⁸ *Ibid.*, per Diplock LJ at 66, 72. See also *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711, per Lord Scarman at 717. Diplock's criteria has been criticised by Lord Devlin (see, Lord Devlin, (1966) at 197). In contrast see, Carter, J. W., (1991) Para. 625.

(A) Actual and Foreseeable Consequences

In order to establish that the breach is sufficiently serious as to justify the buyer's termination, the injured buyer may rely not only on the actual events caused by the breach but also on the foreseeable consequences of the breach. He may also be entitled to rely on the doctrine when the addition of foreseeable consequences to the actual ones satisfies the requirement of the doctrine, even if neither, when considered alone, would be sufficient. However, since termination of the contract may have prevented the foreseeable consequences from actually occurring, the buyer in such a situation may need to rely on the consequences which would have occurred but for termination.

No clear authority can be found to explain what actual or foreseeable effects of breach can be relied to show that the breach is sufficiently serious. However, some authors have suggested that a distinction should be made between actual and foreseeable consequences.⁷⁹ When the actual consequences of the breach are relied on what is required is that the injured buyer has to prove that those consequences are caused by the seller's breach even though they were not foreseeable *at the time of breach*. Beyond causation, there is no further requirement in this respect. But in the case of foreseeable ones, he cannot invoke the foreseeable consequences unless those are foreseeable *at the time of termination*. The same author continues to suggest that the fact that an injured buyer had foreseen that breach would be sufficiently serious cannot be conclusive. The effects of breach should be foreseeable by a reasonable person. The injured party's view may be relevant to what a reasonable person in his position would have foreseen.⁸⁰

However, this suggestion does not explain whether those consequences should be foreseeable by the seller in breach. And if so, at what time should they be foreseeable? Can the buyer rely on those consequences which were not reasonably foreseeable by the seller when the contract was made? As will be seen in the third section, the buyer can only recover damages for those results which were foreseeable by the seller at time of the contract. Hence, one may argue that how can a buyer terminate the contract on account of the results for which he cannot claim damages?

Degree of Foreseeability. It is also not clear whether it is sufficient for the buyer to prove that it was reasonably foreseeable that the seller's breach would have caused consequences which are sufficiently serious, or whether it is necessary to prove that those are the *likely* or

⁷⁹ See Carter, J. W., (1991) Para. 652.

⁸⁰ Carter, J. W., (1991) Para. 653.

the most likely consequence of the seller's breach. This issue raises the question of degree of foreseeability of the consequences of breach.⁸¹

The question has not expressly been addressed by the courts. However, Professor Carter suggests that applying a very strict test and requiring substantially deprivation from the contract to be *the most likely* consequences of the breach is more doubtful.⁸² As regards the other test, i.e., being the *likely* consequences of the breach, Carter also argues that the position is not quite clear. In *HongKong Fir*, although the Court of Appeal did not expressly refer to the issue, when considering whether the delay which was likely to occur as a consequence of the shipowner's default, their Lordships observed that the delay would not have been sufficiently serious since the vessel's engine crew had been replaced. It might be therefore argued, Carter says, that a foreseeable consequence of the shipowner's breach was serious delay, but this was not *a likely* consequence of the breach because in all likelihood the replacement engine crew would be competent.⁸³

In contrast, Lord Devlin has suggested that physical injury should be distinguished from economic loss.⁸⁴ Where physical injury is a foreseeable consequence of the seller's breach this should give rise to a right to terminate the contract notwithstanding that the chances of physical injury are fairly remote. On the other hand, where, as in the *HongKong Fir* case, the foreseeable consequences of the default are economic loss it is appropriate to apply a stricter criterion, that is, the injured buyer has to prove that those consequences would be *likely* to occur as a result of seller's default.⁸⁵

(B) Degree of Seriousness

As indicated above, the remedy of termination on the basis of the *HongKong Fir* doctrine is only available if the breach attains a certain degree of seriousness. The most significant stage in applying the doctrine is, therefore, to determine what degree of seriousness the breach must attain so that the doctrine could operate and give rise to a right to terminate the contract.

⁸¹ The same question, as will be seen in damages section, arises in the case of recoverable loss. As to that issue, it is disputed whether to recover damages for loss resulting from the breach of contract, it is sufficient that the loss in question foreseeable or it must attain a degree more than the mere foreseeability.

⁸² Carter, J. W., (1991) Para. 653.

⁸³ Ibid.

⁸⁴ Lord Devlin, (1966) at 198. It is worth noting that the question of degree of foreseeability of recoverable loss is, as will be seen in detail in damages section, a controversial issue. At that place, in some English cases, it has been suggested that in order to ascertain the degree of requisite foreseeability of recoverable loss there must be a distinction between the personal injury and economic loss (see, *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*, [1978] Q.B. 791, the statement of Lord Denning MR. However, the view has not been welcomed by the other members of the Court of Appeal.).

⁸⁵ Professor Carter favours this approach (see, Carter, J. W., (1991) Para. 653). In the absence of clear provision, Professor Carter suggests that one way of avoiding this problem is to allow the buyer to refuse to accept the goods in situations where a serious consequence is a foreseeable event and only to permit termination if serious consequences are likely to occur as a result of the breach (ibid.).

Whether the breach of an intermediate term is sufficiently serious to give rise to a right to terminate the contract is a complex question. Thus, the innocent buyer who is seeking to rely on the doctrine so as to justify his termination has a difficult task to satisfy the court that the seller's breach has attained, or will be likely to attain, the sufficient degree of seriousness.

In order to determine whether the breach of an intermediate term is sufficiently serious some criterion is required. When dealing with the expressions used to describe the doctrine, we saw that the courts have referred to the requisite criterion by using various phrases such as, breach resulting in a "substantial deprivation" of the party not in breach from the whole benefit of the contract or in such a result which "frustrates his purpose in making the contract" and a breach going to "the root of the contract".

However, these phrases are not particularly helpful in analysing the law or in predicting the course of the courts' decisions. Description of the test by some vague phrases do not give a useful guideline to the judge to assess whether the breach resulted in serious consequences. It is also very difficult for the injured buyer or his legal adviser to predict at what degree the breach will be regarded as sufficiently serious and will satisfy the court to treat the buyer's termination as a justified termination. This is perhaps the main reason why the doctrine has been the subject of strong criticisms that it places the innocent party into an uncertain position and promotes inefficiency by rewarding the incompetent promisor.⁸⁶

It seems that these various expressions, as pointed out above, are all metaphors which mean much the same. What they indicate is that a breach of an intermediate term must be particularly serious before an aggrieved party is entitled to terminate the contract in accordance with the *HongKong Fir* doctrine. However, for the particular nature of the test of such a kind the judges are indeed seeking to retain a degree of discretionary control over the issue. The question what degree of breach will be regarded as sufficiently serious to justify termination is therefore left to the court to decide on the basis of the circumstances of each particular case.

Seriousness as a Question of Fact. Accordingly, although the question whether an injured buyer was entitled to terminate the contract on account of the seller's breach of an intermediate term is a question of law, the question whether a particular breach is sufficiently serious to justify termination of the contract is a matter of fact which is to be decided on the basis of circumstances of each case. Thus it is not an issue that can be determined in advance by fixed rules. When applying the general requirement of "sufficiently serious breach", the courts classify a failure in performance with an eye to the nature of the breach and its actual

⁸⁶ See e.g., Weir, T., (1976) 33; Beale, H., (1980) at 98; Carter, J. W., (1991) Paras. 625, 626.

and foreseeable consequences, considering all the circumstances surrounding the contract, the subject-matter, the position of the party in breach and other relevant factors.

Relevant Factors. In order to determine whether the breach committed by the seller attains a "sufficient degree of seriousness" to give rise to the right of termination, regard can obviously be had to any factor shown to have relevance to the circumstances of the case. However, case law shows that there are certain factors which are more likely to be relevant. These include factors⁸⁷ such as loss or detriment suffered or likely to be suffered by the buyer as a result of the seller's breach, loss of benefits which were expected from the performance of the contract,⁸⁸ the adequacy of damages,⁸⁹ any offer to remedy,⁹⁰ and motives for termination⁹¹.

In this regard, they also look at the express, implied terms of the contract and relevant customs in order to determine what the buyer was legitimately entitled to obtain from the contract. A particular expectation of the aggrieved buyer would be taken into account if it is indicated by the contract. The court would then compare the consequences caused by the breach with the contractual expectation of the injured buyer and decide whether the breach has deprived (or will deprive) him substantially of that contract entitlement. In this connection, the courts are usually influenced by the parties' conflict of interests in terminating the contract. For this reason they consider, on the one hand, whether termination is necessary to protect the

⁸⁷ See generally, Carter, J. W., (1991) Paras. 655 and *seq.*; Treitel, G. H., (1988) Para. 264; Treitel, G. H. (1995) at 686 and *seq.*; Brownsword, R., (1992) at 92 and *seq.*

⁸⁸ *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 66. As an example, see *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44; *Tradax Internacional S.A. v. Goldschmidt S.A.* [1977] 2 Lloyd's Rep. 604 at 612.

⁸⁹ See e.g., Buckley L.J. in *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 (a distributorship case) which is cited with approval by Lords Wilberforce and Frazer in *Federal Commerce & Navigation v. Molena Alpha Inc. (The Nanfri)* [1978] 3 W.L.R. 757 at 779 and 783. However, where damages are regarded as an inadequate remedy termination will likely be permitted (*Bremer Handelsgesellschaft m. b.H. v. Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109 at 113).

⁹⁰ According to some authors, this factor should have been given an important relevance to the fact whether the consequences of the breach are sufficiently serious (see Treitel, G. H (1967) at 155).

⁹¹ It is worth noting that although English law does not overtly recognise an explicit general duty of "good faith" affecting the formation, performance or breach of contracts (see particularly Bingham LJ in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433 at 439), there is no doubt that English judges would take account of the behaviour of the parties when reaching decisions. Thus, if a court thinks that a buyer is acting in bad faith in trying to get out of a contract on the grounds of an alleged breach, for instance by trying to get out of the contract to avoid a fall in market prices the court will try to prevent the buyer escaping the contract. Thus, it may find that there is no breach, or that the breach is only of an intermediate term, not a condition, and is not sufficiently serious to allow the buyer to reject and terminate. This can be seen in *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)*. In that case the original buyers who had sought to reject defective goods later re-acquired them for almost the same purpose from another source for about a third of the original contract price it was quite obvious that the court had grave suspicions about the buyer, and consequently refused to regard the sellers' breach of the term requiring that "goods be shipped in good condition" as sufficiently serious to justify their rejection. In that case Roskill L.J. observed that "Contracts are made to be performed and not to be avoided according to the whims of market fluctuation" ([1976] 1 Q.B. 44 at 71).

injured buyer and, on the other, the prejudice which termination will cause the defaulting seller. If, on balancing the above-mentioned factors, they conclude that the injured buyer should be allowed to terminate, they will classify the failure in performance as "substantial" in order to produce the desired result; and conversely.⁹²

2.3. Special Cases

Although the general rules described above are applicable to the cases discussed below, for the reasons which will be made clear it seems appropriate to address them separately to assess how these rule are applied to these cases.

2.3.1. Breach of Severable Contracts

English sale of goods law makes a distinction between severable and non-severable contracts.⁹³ Where the contract is construed as severable the seller's breach of condition or an intermediate term, even satisfying the requirement of seriousness, in respect of one or more instalment deliveries does not necessarily entitle the buyer to terminate the contract as a whole. In such a situation, the buyer may terminate the contract as a whole only where the seller's defective performance in respect of one or more instalments amounts to a repudiation of the whole contract. Accordingly, the crucial issue is to determine whether or not the seller's non-conforming delivery in respect of one or more instalments has amounted to a repudiation of the contract as a whole.

The seller under a severable contract will certainly be guilty of repudiation of the whole contract when his non-conforming delivery with respect to one or more instalments is associated with an express refusal to perform or refusal to perform except in a manner which is substantially different from that bargained for.⁹⁴ The difficult case is, however, where repudiation has to be inferred from the present or past defective performance of a seller who is not expressing his intention in this way. Is the buyer entitled in such circumstances to reject the non-conforming deliveries and treat the whole contract as repudiated or is he entitled only to reject that part in respect of which there is a breach, or is he confined to a claim for damages? The question is addressed by s. 31 (2) of the Sale of Goods Act but it does not answer this question: when does the seller's making defective deliveries in respect of one or

⁹² See e.g., *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 at 380. See also Treitel, G. H., (1995) at 686.

⁹³ Sale of Goods Act 1979 ss. 11 (4) and 31 (2). In view of terminology, the usual approach is to speak of severable and non-severable *contracts* rather than *obligations*. But it has been suggested (Goode, R. M., (1995) at 284 fn. 48.) that such a description is incorrect, since it is the obligation to deliver goods and to accept them and pay the price which is to be regarded severable or non-severable.

⁹⁴ See e.g., *Taylor v. Oakes, Roncoroni & Co.* [1922], 127 L. T. 267 (C.A.).

more instalments amount to a repudiation of the contract as a whole? It refers the case to the court to decide on the basis of "the terms of the contract and the circumstances of the case".⁹⁵

(A) Terms of the Contract

The first factor referred to in section 31 (2) of the Act is a consideration of the terms of the contract. Thus the court, in deciding whether the seller's making non-conforming delivery in respect of one or more instalments amounts to a repudiation of the entire contract, is to look first at the terms of the contract itself and determine whether or not non-compliance with those terms is such as to amount to a repudiation of the contract as a whole. The parties may contemplate particular provisions dealing with the circumstances under which one of the parties is entitled to terminate the contract for the other party's non-conforming deliveries. However, discussion of this issue is beyond the scope of the present research which deals with the position of general law of remedies for breach of contractual terms.

(B) Circumstances of the Case

The second factor referred to in s. 31 (2) is a consideration of the circumstances of the case. Under this provision, for a seller to be treated as repudiating the contract as a whole it is not necessary to prove that he has intimated to the buyer his intention no longer to be bound by the contract. He will be guilty of repudiation if his default goes to the root of the contract. In deciding whether the default has such an effect, the court must consider "first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability and improbability that such a breach will be repeated".⁹⁶ Relying on these criteria, in *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd*⁹⁷ the seller was held not repudiating the contract as a whole where under a contract to be performed by some 66 deliveries, one out of the first 19 was defective. On the other hand, in *Robert A. Munro & Co. Ltd. v. Meyer*⁹⁸ where the buyer agreed to buy from the seller 1,500 tons of meat and bone meal, to be delivered at the rate of 125 tons per month and after about half of the total contract quantity had been delivered by the seller the buyer realised that those were seriously

⁹⁵ Section 31 (2): "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, ..., it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

⁹⁶ Lord Heward in *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148 at 157.

⁹⁷ [1934] 1 K.B. 148 at 157. See also, *Regent OHG Aisenstadt und Barig v. Francesco of Jermyn Street Ltd.* [1981] 3 All ER 327.

⁹⁸ [1930] 2 K.B. 312.

defective and purported to treat the contract as repudiated, the court held that the buyer was entitled to do so.⁹⁹

On the basis of what has been said above, it can be said that whereas under a non-severable contract the Act, as most English writers suggest, seems to give an innocent buyer an option to treat the seller's breach of a condition as a repudiation of the contract, in the case of severable contract it does not recognise such a presumption. Accordingly, where the seller is, for example, late in tendering one instalment, or tenders an instalment which does not correspond with a condition, it will not normally constitute a repudiation of the contract as a whole but will do only if it is made in such circumstances as to lead a reasonable person to conclude either an intention to repudiate or an inability to perform the contract as a whole,¹⁰⁰ or, its effect is so serious as to go to the root of the contract.¹⁰¹ Individual terms qualifying the seller's delivery obligation will therefore not be conditions in the sense that the seller's failure to comply with them in tendering an instalment amounts to a repudiation of the whole contract. The seller's compliance with them is a condition precedent to the buyer's liability in respect of that particular instalment. Thus where time is of the essence the seller's late delivery as regards one instalment will only affect the innocent buyer's liability in respect of that particular instalment. The same is true where the seller tenders an instalment which is not in accordance with the other terms of the contract.

(C) Effects of Repudiatory Breach

Where the seller's non-conforming delivery in respect of some instalments amounts to a repudiation of the contract as a whole the buyer will be entitled to accept it and terminate the contract. If the seller's repudiatory breach is accepted by the buyer it would entitle him to reject the present defective tender and treat himself as discharged from liability in respect of all further performance. He can do so even where he has previously accepted some instalments. However, the question arises here whether the buyer is entitled to reject the prior instalments. The language of s. 31 (2) is not quite clear. But some academic authors suggest that the language of the section is concerned with the future performance, so that the buyer can refuse to perform outstanding obligations. In addition, the buyer's severable obligations to

⁹⁹ In that case, Wright J. observed: "Where the breach is substantial and so serious as the breach in this case and has continued so persistently, the buyer is entitled to say he has the right to treat the whole contract as repudiated" ([1930] 2 K.B. 312 at 331). The same principles have been clearly stated by Donaldson J with respect to an alleged repudiation by the buyer in a f.o.b. case of *Warinco A.G. v. Samor S.P.A.* [1977] 2 Lloyd's Rep. 582 at 588. Although the decision was reversed on appeal ([1979] 1 Lloyd's Rep. 450), the disagreement was purely with the application of the law to the facts, and no doubt was cast on Donaldson's statement of the relevant principles.

¹⁰⁰ See e.g., Donaldson J. *Warinco A. G. v. Samor S. P. A.* [1977] 2 Lloyd's Rep. 582 at 588.

¹⁰¹ See e.g., *Honck v. Muller* [1881] 7 Q.B.D. 92; Lord Blackburn in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* [1884] 9 App. Cas. 434 at 443-4.

accept previous conforming instalments have already been fulfilled and can be no longer undone.¹⁰² However, it has been suggested¹⁰³ that where the instalments already accepted constitute parts of an indivisible whole, e.g., individual volumes of a set of books, parts of a machine, or a suit of clothes, the buyer will be entitled to reject the previously accepted instalments. Of course, in such cases the contract is *ab initio* rescinded by returning the instalments already delivered and he will be entitled to recover the whole, or any part, of the price paid.¹⁰⁴

(D) Effects of Non-Repudiatory Breach

Where the lack of conformity of some instalments has not constituted a repudiation of the contract as a whole, the buyer is not allowed to terminate the contract as a whole.¹⁰⁵ Under such circumstances, the seller is entitled to require the buyer to accept and pay for each instalment tendered or which will be tendered in conformity to the contract. The buyer will not be entitled to refuse to accept and pay for an instalment because of a defect in or short or late delivery of an earlier instalment; nor is he allowed to insist on waiting to see whether the seller will make proper delivery of subsequent instalments before he accepts and pays for an instalment.¹⁰⁶

However, the Sale of Goods Act has not made clear what remedy the buyer will have where the lack of conformity in respect of some instalments has not amounted to a repudiatory breach. S. 31 (2) of the Act speaks only of “a severable breach giving rise to a claim for compensation”. It does not say whether the buyer may be entitled to reject the non-conforming instalments in circumstances where he is not able to terminate the contract as a whole. The language of s. 31 of the Act is not quite clear. It appears that the section assumes that where the seller's making non-conforming delivery as regards one or more instalments does not amount to a repudiation of the entire contract the buyer has only one option, i.e., to claim for damages. The sub-section, as Professor Atiyah suggests¹⁰⁷, does not seem to contemplate the possibility of permitting the buyer to reject that particular delivery while keeping the contract on foot. Under such a language it might be said that the Act treats compliance of an instalment with the terms of contract as a warranty breach of which under the Act may only give rise to a

¹⁰² See e.g., Atiyah, P. S. & Adams, J., (1995) at 455; Guest, A. G., *et al*, (1997) Para. 12-070. See also, Bradgate, R., (1995) at 257.

¹⁰³ Guest, A. G., *et al*, (1997) Para. 8-078.

¹⁰⁴ *Ibid*.

¹⁰⁵ The reason for that has been clearly stated by Brett L. J. in *Reuter, Hufeland & Co. v. Sala & Co.* [1879] 4 C.P.D. 239 at 256, which was cited with approval by Lord Farwell in *Jackson v. Rotax Motor & Cycle Co.* [1910] 2 K.B. 937 at 947.

¹⁰⁶ See Guest, A. G., *et al*, (1997) Para. 8-079 and the authorities cited in fns. 68, 69.

¹⁰⁷ Atiyah, P. S. & Adams, J., (1995) at 454.

right to claim damages. On the other hand, compliance of substantial parts of all instalments with the contract terms is a condition precedent for the buyer's duty to accept and pay for them. Despite the imprecision of s. 31 (2), some authors have suggested that "there is a considerable case law support for the buyer's right to reject non-conforming instalments, even if the buyer has lost the right to terminate the contract or has not yet acquired it".¹⁰⁸ In addition, s. 35A (2) of the Sale of Goods Act, which permits the buyer to accept the conforming instalments and reject the non-conforming ones, would support severable rejection rights.¹⁰⁹

Likewise, the Act provides no clear provisions regulating the circumstances where the buyer will be entitled to reject some instalments which do not conform with the contract terms. This question, therefore, arises under what circumstances the seller's breach of contractual obligations as regards one instalment may entitle the buyer to refuse to accept a non-conforming instalment. In the absence of a clear statement of law, some authors have suggested that the general principles applicable to non-severable contract should apply to each instalment.¹¹⁰ That is to say, for remedial purposes each instalment is to be regarded as the subject of a distinct contract, although within a main contract and the principles applied to a contract containing a single delivery obligation should be applied to such a subsidiary contract. As a result, the different approaches rendered in relation to breach of a condition under a non-severable contract arise in this connection. That is, where the broken term is classified as a warranty or an intermediate term whose breach has not resulted in serious consequences with respect to that particular instalment the buyer's remedy is only to claim for damages. Whereas, if the broken term is treated as a condition any breach by the seller in respect of a particular instalment will (subject to s. 15A) entitle the buyer to reject that particular part. After the buyer has lawfully rejected the non-conforming instalment, if one accepts that the seller has a general right to cure he is entitled to cure the default by delivering a substitute instalment in conformity with the contract, provided that he does so within the time limited for delivery of that instalment.¹¹¹ According to the other view previously analysed, the seller's defective delivery (assuming that it does not amount to a repudiation of the whole contract) entitles the buyer to reject it and give the defaulting seller the opportunity to make a fresh tender or immediately terminate that subsidiary contract. Under this approach, breach of a condition or an intermediate term satisfying the requirement of seriousness in respect of a

¹⁰⁸ Bridge, M., (1997) 40 at 185 and fn. 250 in which he cites a number of authorities for this view. See also Atiyah, P. S. & Adams, J., (1995) at 454; Guest, A. G., *et al*, (1997) Para. 8-080

¹⁰⁹ Bridge, M., (1997) 40 at 185.

¹¹⁰ Bridge, M., (1997) 40 at 185.

¹¹¹ Goode, R. M., (1995) at 365; Guest, A. G., *et al*, (1997) Para. 8-080

particular instalment would strike that subsidiary contract out of the main contract, which is *pro tanto* terminated.¹¹² This is true according to the former view where the time fixed for delivery of an instalment has expired and has been of the essence. Where the buyer has exercised his severable rejection right in this way the seller will not be entitled afterwards to claim to deliver nor the buyer will be entitled to have the instalment in respect of which the seller has made defective delivery. The sole remedy of the buyer will lie in damages.¹¹³

2.3.2. Breach of Time Stipulation

(A) Sketch of Discussion

Failure to perform a stipulation as to time for performance of an obligation does not differ intrinsically from any other failure to perform. As with the terms concerning the goods themselves, it is not breach of any stipulation as to time for performance, but only of some which may give rise to a right to terminate the contract. However, time provisions have a history and terminology of their own in English law; and for this reason, perhaps, are usually considered separately.¹¹⁴

(B) Classification and Terminology

Notwithstanding that the Sale of Goods Act contains a particular provision for stipulations about time of performance, it fails to make clear what consequences will follow if a time provision is broken. The only thing which it provides is that the court should decide whether or not the infringed stipulation was of the "essence of the contract"¹¹⁵. In this respect, s. 10 (2) provides that whether any stipulation as to time other than that of payment¹¹⁶ is or is not "of the essence of the contract" depends on the terms of the contract.¹¹⁷ The Act also fails to make clear the position of the case where a particular time provision is not fixed by the contract.

¹¹² See also Guest, A. G., *et al*, (1997) Para. 8-080; Bridge, M., (1988) at 263-265.

¹¹³ The view is cited in: Guest, A. G., *et al*, (1997) Para. 8-080. However, the editors of *Benjamin's Sale of Goods* themselves suggest that the seller should be entitled to cure the default by delivering a substitute instalment (*ibid.*)

¹¹⁴ There are also other reasons which may justify the separate consideration of time provisions in contract law. First, time stipulations attract a notice procedure under which time stipulation can be made essential even where the term was not originally of such character. Secondly, in commercial contracts, a court is more likely ready to treat a time stipulation as a condition than other contractual terms. See also, Carter, J.W., (1991) Para. 543; Treitel, G. H., (1995) at 739.

¹¹⁵ The Act, in dealing with the nature of time stipulations, makes no explicit reference to the doctrine of conditions and warranties which is so dominant elsewhere of the Act. It uses a different terminology to describe a time stipulation strict compliance with which is a condition precedent to the promisee's obligation.

¹¹⁶ With respect to stipulations as to time of payment, sub-section (1) provides that unless a different intention appears from the terms of the contract, such stipulations are not of the essence of a contract of sale.

¹¹⁷ In *Martindale v. Smith* [1841] 1 Q.B. 389 at 395, a case decided before the passing of the Sale of Goods Act, Lord Denman observed "In a sale of chattels time is not of the essence of the contract, unless it is made so by

Accordingly, as regards the time for performance of a particular obligation two general possibilities may arise: first, where the time for performance is fixed by the contract, and second, where no particular time provision is specified in the contract. In both cases this question may arise whether or not time for performance is of the essence of the contract.

(I) Time is of the Essence

The question whether a stipulation as to time is of the essence may be resolved first by the terms of the contract itself.¹¹⁸ A time stipulation will be regarded as the essence of contract where the parties have expressly provided that strict compliance is essential.¹¹⁹ In the absence of such an express provision, the question whether time is of the essence of the contract is one of construction, that is, it is the court's duty to determine whether the nature of the subject-matter of the contract or other surrounding circumstances indicate that the parties should have intended time to be essential.¹²⁰ The court may also reach the same result by another way, that is, whether even a brief postponement of the performance at the stipulated time would deprive the claimant of "substantially the whole benefit that it was intended that he should obtain from the contract".¹²¹

Notwithstanding that the Sale of Goods Act remits the question whether a time stipulation in a sale contract is of the essence to the discretion of the court to decide, on the basis of construction of the contract, English courts have made efforts to formulate some general principles governing the legal classification of stipulations as to time. In this way it has been said, on the one hand, that "in modern English law time is *prima facie* not of the essence of a contract"¹²²; and, on the other hand, that "broadly speaking time will be considered of the essence in 'mercantile' contracts".¹²³ Nevertheless, in the case of contract for the sale of goods, the courts have taken a more specific view as to the seller's delivery

express agreement". See also Lord Simon in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 at 941.

¹¹⁸ The Sale of Goods Act 1979 s. 10 (2).

¹¹⁹ See e. g., *Steedman v. Drinkle* [1916] A.C. 275 at 280. The time stipulation will have the effect of an express condition where the contract provides that, in the event of one party's any failure to perform within the stipulated time, the other is to be entitled to terminate (see e.g. *Maredelanto Compania Naviera SA v. Bergbau-Handel G m b H (The Mihalis Angelos)* [1971] 1 Q.B. 164), or, that the stipulation as to time is to be a condition.

¹²⁰ Lord Diplock in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 at 927. See also, Lord Hailsham of St. Marylebone, (1983) vol. 9 Para. 481.

¹²¹ Lord Diplock in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 at 928.

¹²² Lord Simon in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 at 940.

¹²³ Lord Wilberforce in *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 at 716. See also, Lord Hailsham of St. Marylebone, (1983) vol. 41, Para. 686; Carter, J.W., (1991) Para. 564.

obligation, and, in the words of McCardie J.,¹²⁴ "In ordinary commercial contracts for the sale of goods the rule is clearly that time is *prima facie* of the essence with respect to delivery".¹²⁵

It is commonly said that the question whether the time specified for performance of a particular obligation is essential is based on consideration of commercial convenience and certainty applicable in particular context, rather than on any general principle or presumption as to time being, or not being, of the essence.¹²⁶ For this reason, it is said that general statements such as those quoted in preceding paragraphs do not prove that this is a presumption or rule of law, but is apparently a presumption of fact about the intention of the parties in the paramount interests of commercial certainty¹²⁷, or in the language of Lord Lowry "treatment of time limits as conditions in mercantile contracts does not appear ... to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen ..."¹²⁸ On this basis, the mere fact that the contract can be labelled "mercantile" or "commercial" does not determine, in itself, the issue.¹²⁹ To find the commercial significance of the term, therefore, the court must look "at the contract in the light of surrounding circumstances, and then make up its mind about the intention of the parties, as gathered from the instrument itself".¹³⁰ Alternatively, if the exercise has already been gone through by arbitrators, their finding about the commercial significance of the term will be adopted by the court.¹³¹

By way of summary, in three cases a stipulation as to time for performance is commonly regarded as of the essence of the contracts.¹³² First, where the courts have held it to be so.¹³³ Secondly, when a term has to be performed by one party as a condition precedent to the ability of the other party to perform another term.¹³⁴ Thirdly, where the contract says so.

¹²⁴ *Hartley v. Hymans* [1920] 3 K.B. 475, at 484. See also by the same judge in *J. Aron & Co. v. Comptoir Wegimont* [1921] 3 K.B. 435 at 439-40; *James Finlay and Co. Ltd. v. N. V. Kwik Hoo Tong Handel Maatschappij* [1929] 1 K.B. 400, per Scrutton L.J. at 407.

¹²⁵ See also, Stoljar, S.J., (1955) at 532, and the authorities cited at fns. 25 and 26.

¹²⁶ For example in *Bunge Corp v. Tradax Export* Lord Roskill observed: "I would emphasise in this connection the need for certainty in this type of transaction ... Parties to commercial transactions should be entitled to know their rights at once and should not, when possible, be required to wait upon events before those rights can be determined" ([1981] 1 W.L.R. 711 at 725). See also, Guest, A. G., *et al*, (1994) vol. 1 Para. 21-012; Treitel, G. H., (1995) at 741. See also Bradgate (1995) at 38; Carter, J. W., (1991) Para. 564.

¹²⁷ See e.g., Perell, Paul M., (1990) at 426; Clarke, M., (1991) at 30.

¹²⁸ *Bunge Corp v. Tradax Export S. A.* [1981] 1 W. L. R. 711 at 719.

¹²⁹ See also, *ibid.*, at 729; *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904 at 924, 950.

¹³⁰ *Bentsen v. Taylor, Sons & Co.* [1893] 2 Q.B. 274, per Lord Bowen at 281.

¹³¹ See e. g. *Compagnie Commerciale Sucres Et Denrees v. C. Czarnikow Ltd. (The Naxos)* [1991] 1 Lloyd's Rep. 29.

¹³² See in this respect, Clarke, M., (1991) at 31.

¹³³ For instance, as Scrutton L.J. in *James Finlay and Co. Ltd. v. N. V. Kwik Hoo Tong Handel Maatschappij* [1929] 1 K.B. 400 at 407) observed "since the decision in *Bowes v. Shand* ((1877) 2 App. Cas. 455) it has been well settled that on a sale of goods a condition as to the time of shipment is vital and is of the essence of the contract."

¹³⁴ Lord Roskill in *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 at 729.

Beyond these, it is all a matter of substantial deprivation and the circumstances of the case which are to be relied on in this connection.

Breach of an Essential Time Stipulation. Where time is of the essence, it is well-accepted law that strict compliance with the time of performance is a condition of the contract, so that any breach by the seller will entitle the buyer to terminate the contract, no matter how trivial, or whether or not it causes any loss.¹³⁵ Time stipulation with such a characteristic, as the case of other essential contract terms, means that performance by the seller of his obligations *within* the time allowed is a condition precedent to the buyer's liability, which is not fulfilled if the obligations are performed *after* that date.¹³⁶ As a result, the buyer can refuse to accept late performance and since the condition can no longer be fulfilled, the aggrieved buyer is totally discharged from performing his primary obligations under the contract enabling him to elect to affirm the contract or to terminate it.

Time provisions are important to the argument that in the case of a non-conforming delivery the seller has a right to make a fresh tender. On this view, the seller must do so within the contract period if it is of the essence; making cure beyond that period would discharge the buyer from his primary obligations under the contract at that point and entitle him to terminate the contract. As a result, the seller is deprived of the right to cure, in the sense that the seller cannot insist that the buyer accepts a substitute performance at the moment when the time for performance has expired.

(II) Time is not of the Essence

Where the time is not of the essence, the seller's failure to perform by the specified date will not entitle the buyer to terminate the contract at that date¹³⁷, although he will be entitled to damages for delay beyond the specified date. The question arisen here is "how long does the seller have to perform his obligation before the buyer is entitled to terminate the contract on account of late performance? Does the seller have only a "reasonable time period" after the

¹³⁵ See e.g., *Bowes v. Shand* (1877) 2 App. Cas. 455. In this case the court held that the buyers were justified in the termination where the seller shipped the goods prior to a stipulated period, notwithstanding the buyers suffered no damages as a result of the breach.

¹³⁶ *Bunge Corp. v. Tradax Export S.A.* [1980] 1 Lloyd's Rep. 294 (A.C.); [1981] 1 W.L.R. 711 (H.L.).

¹³⁷ See e.g., *Raineri v. Miles* [1981] A.C. 1050. In such a case, the buyer has also an option to resort to the notice-giving procedure. Under this provision, the buyer will be able to give a notice containing a reasonable period of time requesting the seller to perform the contract within that time. By this way, he will be able to make the time for performance of the essence. As a result, the seller's failure to perform within the additional period of time the buyer will be entitled to terminate the contract. It is to be recalled that the notice procedure was originally developed by equity in contracts for the sale of land and is frequently utilised in this context. However, common law has also applied the procedure to the contracts for sale of goods (McCardie J., in *Hartley v. Haymans* [1920] 3 K.B. 475 at 495; cf. by Lord Denning in *Charles Rickards Ltd. v. Oppenheim* [1950] 1 K.B. 616 at 623, in which he described McCardie J's statement "as accurately stating the law in regard to the sale of goods".).

expiration of the specified date within which he was required to perform his obligation,¹³⁸ or can he do so until such a time as the delay goes to the root of the contract and frustrates the commercial purpose of the contract?¹³⁹

At first sight, the distinction between a "reasonable time" and a "frustrating time" period may seem semantic. However, there is a considerable difference between these two time periods: it is quite possible that the seller may perform his obligation within a time which is regarded as unreasonable, having regard to relevant factors, yet such an unreasonable delay may not frustrate the purpose of the contract.¹⁴⁰ In addition, these two periods involve different factors. "Reasonable time" is governed by what remains to be done by the seller in breach, how hard he has been pressed by the buyer previously, and other such factors, whereas "frustrating time" is determined by the effect on the innocent party: does the delay deprive him of substantially the whole benefit of the contract?¹⁴¹

It has been thought¹⁴² that *McDougall v. Aeromarine of Emsworth Ltd.*¹⁴³ could be the strongest authority for the former time period. Under a clause in a contract to build and supply¹⁴⁴ a yacht the suppliers undertook to use their "best endeavours" to complete the construction and fitting out by a certain date, but owing to the effect of delays and shortages such delivery date could not be guaranteed. Diplock, J., held that a clause in this form placed on the sellers a duty to deliver within a reasonable time of the specified date, and the obligation to deliver within a reasonable time after the certain period of date was a condition.¹⁴⁵ Thus, the seller had had a reasonable time within which to perform his obligation, because the buyer could terminate after a reasonable time had expired.

However, it could be argued that the case was not basically concerned with the issue in question. In that case, there was effectively no contractually delivery date; Diplock J. was therefore not concerned with the right to terminate but with the prior question, when the boat should have been delivered. He did not need to decide whether time was of the essence until he had decided what the delivery date was, which in this case he held that it was "within a reasonable time". At the second stage, Diplock J. held that this period was a condition, and

¹³⁸ Goode, R. M., (1995) at 365 and then p. 279. However, Professor Goode, when dealing with buyer's remedies for seller's breach, observes that the seller's delay may give rise to a right of termination if the delay is so great as to frustrate the commercial purpose of the contract (*ibid.*, at 391).

¹³⁹ Devlin J. in *Universal Cargo Carriers Corp. v. Citati* [1957] 2 Q.B. 401 at 426. See also Apps, A., (1994) at 535.

¹⁴⁰ *Universal Cargo Carriers Corp. v. Citati* [1957] 2 Q.B. 401 at 430, 432.

¹⁴¹ See also, Beale, Bishop & Furmston, (1995) at 505.

¹⁴² Apps, A., (1994) at 536, although he himself rejects such an inference, but on other grounds. See also Goode, R. M., (1995) at 279, fn. 26.

¹⁴³ [1958] 3 All E.R. 431.

¹⁴⁴ Although the contract was for a building a yacht, it was treated as a contract of sale.

¹⁴⁵ [1958] 3 All E.R. 431 at 438-439.

since the seller did not deliver within that period the buyer was entitled to terminate the contract.

Moreover, there are a number of authorities which support the view that the buyer can only terminate when the delay becomes so long as to frustrate the commercial purpose of the contract. For instance, in *Universal Cargo Carriers Corp. v. Citati*,¹⁴⁶ the charterer's obligation to complete loading within the lay times (the time permitted for loading) was held not to be of the essence of the contract, so that its breach did not entitle the owner to terminate, but gave rise to a claim for damages only. In this case, Devlin, J., held that the owners could terminate the contract only if the delay went to the root of the contract. What yardstick should be used to determine whether it went to the root of the contract, the arbitrator had held that the delay must have been for a reasonable time. Devlin J., however, rejected this criterion and held that the proper test in order to decide whether delay in fulfilling obligations under a contract amounts to a right of termination is that the given delay was so grave as to frustrate the commercial purpose of the contract.

On this authority, a "reasonable time" is something less than the period required for the delay to "frustrate the charterparty", and therefore did not amount to a delay long enough to justify termination.¹⁴⁷ It could only be accepted as the test where the period regarded as reasonable time was the same as the period necessary to frustrate.¹⁴⁸ Accordingly, in such cases the victim of breach can only terminate the contract if the seller's delay would deprive him of substantially the whole benefit of the contract. It is consistent with the *Hong Kong Fir* test; where the time has not been regarded as the essence of contract it would be an innominate term the breach of which amounts to a right of termination provided that the delay is so grave as to frustrate the commercial purpose of the contract.¹⁴⁹

(III) No Time is Specified

Where the contract is silent as to the time for performance, the court will imply a term that performance must be made within a reasonable time.¹⁵⁰ In such a case, the seller's failure to deliver the goods or cure the defect in them (assuming he has such a right) within a reasonable time will amount to a breach of contract, entitling the buyer to claim for damages. The question arises here whether such an implied time is a condition so that the seller's failure to perform his obligation within the period gives rise to a right of termination. In this respect, it

¹⁴⁶ [1957] 2 Q.B. 401.

¹⁴⁷ [1957] 2 Q.B. 401 at 434-435.

¹⁴⁸ *Ibid.*, at 403.

¹⁴⁹ See also, Guest, A. G., *et al.*, (1997) Para. 8-025.

¹⁵⁰ Sale of Goods Act 1979 ss. 29 (3) and 59. See e.g., *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 3 All E.R. 431; *Charles Rickards Ltd. v. Oppenheim* [1950] 1 K.B. 616 at 622. See also Carter, J.W., (1991) Para. 103.

has been submitted that where there is no time limit for delivery, the contract continues until its purpose is frustrated.¹⁵¹

The suggested view seems sound. This is because the rationale for the general rule that time is of the essence is the need for certainty, while where no time for performance has been fixed there is no certainty. Accordingly, where no time is specified in the contract, time is not normally of the essence in the first instance. In such cases, the buyer should, in the absence of special circumstances indicating otherwise, only be entitled to terminate the contract if the delay is such as to frustrate the commercial purpose of the contract. This is because although there may well be cases where special circumstances indicate that a failure to perform within a reasonable time is to be regarded as a breach of condition entitling the buyer to terminate,¹⁵² in the absence of such special circumstances it is difficult to accept that, where no time is specified under the contract, the parties would have intended that time would be of the essence.

2.3.3. Breach of Quantity Stipulation

A particular provision is set out by s. 30 of the Sale of Goods Act where the seller delivers the wrong quantity of goods. Under this section where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. The same right is given to the buyer where the seller delivers to the buyer a quantity of goods larger than he contracted to sell. In the latter case, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole.

However, the Act does not make clear whether delivery of wrong quantity is breach of a "condition" which, as already discussed, gives the buyer two separate rights to reject the goods and terminate the contract. Although the new sub-section (2A) inserted by the Sale and Supply of Goods Act 1994 has restricted the buyer's right to reject the whole of the goods delivered¹⁵³, it does not say whether he has a separate right to terminate the contract. Similarly, it does not make clear whether the buyer is entitled to refuse to perform his obligation as to the missing part and terminate the contract in respect of that part, as the Convention seems to suggest (Art. 51). As far as the first question is concerned, some authors have suggested that giving the buyer a right "to reject the whole of the goods delivered in the

¹⁵¹ Lord Devlin, (1966) at 208. See also, Guest, A. G., *et al*, (1997) Para. 8-034.

¹⁵² See, e.g., *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 3 All E.R. 431; *Thomas Borthwick (Glasgow) Ltd. v. Bunge & Co, Ltd.* [1969] 1 Lloyd's Rep. 17.

¹⁵³ Under this new provision, a buyer who does not deal as consumer will not be entitled to reject the goods where the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to reject.

circumstances dealt with by s. 30 means that in substance the seller in such cases is treated as though he commits a breach of condition by delivering the wrong quantity."¹⁵⁴

2.3.4. Breach of the Duty to Tender Shipping Documents

A further question is the application of the general rules explained above to the case where the seller has to perform his delivery obligations by tendering to the buyer (or his bank) some documents representing the purchased goods. In contracts of such type (such as c.i.f. and sometimes in f.o.b.) the seller is obliged to tender shipping documents, consisting essentially of a bill of lading, insurance policy and sale invoice¹⁵⁵ in accordance with the requirements stated in the contract of sale.

As a general rule, where the documents accord with the contract the buyer or his bank must accept and pay the price in accordance with the contract.¹⁵⁶ However, as in the case of the goods themselves, the seller may tender the shipping documents in a way which do not conform to the contract requirements. Where the tendered documents do not correspond with the contract it is the settled law that the buyer (and in the case of payment through documentary credit, his bank) is entitled to reject and refuse to pay for them.¹⁵⁷ The rule has been justified on the general principles already explained by that as in the case of the buyer's obligation to accept the goods delivered to him by the seller, his duty to accept the relevant documents is subject to the condition that the seller's delivery has been in conformity with the terms of the contract. Therefore, where the documents tendered are not in accordance with the requirements stated in the contract the buyer (or his bank) is entitled to refuse to accept them and to pay the price. For instance, in the case of *James Finlay and Co. Ltd. v. N. V. Kwik Hoo Tong Handel Maatschappij*¹⁵⁸ where goods were shipped out of time under a bill of lading incorrectly dated to show the timely shipment, the seller was regarded as guilty of breach of contract entitling the buyer to reject them.

In a documentary sale contract, in addition to the right to reject the non-conforming documents, the buyer is given a further right to reject the goods substituting the subject of the documents on arrival where he learns that goods do not conform to the contract. The existence

¹⁵⁴ Atiyah, P. S. & Adams, J., (1995) at 109. In contrast, see: Bradgate and White, (1995) at 75; Bridge, M., (1997) at 199 in which he says that the seller's duty to deliver right quantity is not expressed as contractual condition and as a result s. 11 (3) does not come into play.

¹⁵⁵ See e.g., *Manbre Saccharine Co. Ltd. v. Corn Products Co. Ltd.* [1919] 1 K.B. 198 at 202. He may be obliged to tender these documents together with any other documents required by the contract, e.g. a certificate of quality or origin. It should be noted that in a standard f.o.b. contract only the bill of lading is required.

¹⁵⁶ See e.g., *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382. See also, Sassoon, David, M., (1995) at 4; Bradgate, R., (1995) at 657.

¹⁵⁷ See in this respect, Guest, A. G., *et al*, (1997) Para. 19-126 and the authorities cited there.

¹⁵⁸ [1929] 1 K.B. 400 (AC)

of two rights of rejecting the documents and the goods is based on the fact that under a documentary sale contract, the seller's duty to deliver includes a duty to ship (or to appropriate to the contract goods already afloat, which the seller may have shipped himself or bought directly or indirectly from the shipper) goods, and a duty to tender proper shipping documents in accordance with the terms of the contract. In such cases the seller may fail to perform one or both of these duties; and the buyer may be entitled to reject in respect of any such failure.

The authority which clearly recognised two separate duties for a c.i.f. seller, i.e., the duty to ship conforming goods, and, to tender conforming documents, as well as two separate rights to reject non-conforming goods and documents is *Kwei Tek Chao v. British Traders & Shippers Ltd.*¹⁵⁹ In that case, Devlin J. was of the view that the right to reject non-conforming goods is distinct from the right to reject non-conforming documents; the former arises when the goods have been taken up and found after examination to be not in conformity with the contract and the latter on tender of the documents.¹⁶⁰ Accordingly, the documents may be rejected if they are defective on their face, for instance by being wrongly dated or by indicating that the goods were not in good order and condition. The goods may also be rejected, even though the documents are in order and have been taken up and paid for, if they themselves are defective, for example, by being of unsatisfactory quality, provided that the defect was not apparent on the face of the documents.

On this view, where the seller fails to tender the shipping documents in accordance with the requirements stated in the contract the buyer may be entitled to reject them even though the goods themselves are perfectly in accordance with the contract. Thus if the contract provides that the goods are to be shipped, and the bill of lading is to be dated, in January the buyer can reject the bill dated in February, even though the goods were actually shipped in January.¹⁶¹ Similarly, he can reject a bill of lading for a quantity of goods in excess of the contractual limits, even though the goods actually shipped are within these limits.¹⁶² He may also be entitled to reject the documents even though the defect on their face would not, of itself, have justified rejection of the goods.¹⁶³

¹⁵⁹ [1954] 2 Q.B. 459. Similarly, Lord Diplock in *Gill & Duffus S.A. v. Berger & Co. Inc* [1984] A.C. 382 at 395, has referred to the buyer's right to reject documents and to reject goods as "separate and successive rights". See generally, Sassoon, David M., (1995) at 281 and *seq.*

¹⁶⁰ However, some academic authors have suggested that the existence of two separate rights of rejection prescribed by Devlin J. in *British Traders & Shippers* case is subject to some qualifications. In practice there can be found some cases in which such a separation is undermined. See in this respect, Atiyah, P. S. & Adams, J., (1995) at 467-8; Bridge, M., (1997) at 191.

¹⁶¹ See e.g., *In re General Trading Co. & Van Stolk's Commissiehandel* [1910] 16 Com. Cas. 95.

¹⁶² See e.g., *Tamvaco v. Lucas (no. 1)* [1859] 1 E. & E 581. See in this connection: Guest, A. G., et al, (1997) Para. 19-126.

¹⁶³ As was the case in *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44, at 70.

Another consequence of the separation of documents and goods is that the right to reject the non-conforming goods is not necessarily impaired by the acceptance of the documents.¹⁶⁴ Thus where the buyer accepts the bill of lading and later it turns out that the goods constituting its subject are not in accordance with the contract conditions he will not be prevented from refusing to accept the goods on discharge from the ship on arrival, although he may lose his right to reject the bill of lading on the doctrine of 'waiver'.¹⁶⁵ Furthermore, if the documents reveal that the goods are not on conformity with the contract and the buyer nevertheless accepts the documents, he cannot then reject the goods themselves on the basis of that non-conformity but he can still reject the goods if a different defect, or non-conformity, not revealed by the documents, becomes apparent on delivery.¹⁶⁶ However, if the defect giving rise to both rights of rejection is a single breach, for example, the goods are shipped late and this fact appears from the documents, acceptance of the documents may well be treated as waiver¹⁶⁷ of the buyer's right to reject the documents as well as the goods constituting their subject, so that the buyer is bound to accept the goods on arrival.¹⁶⁸

From the above discussion it has been made clear that a buyer may be entitled to refuse to accept the documents tendered to him by the seller where they are not in conformity with the contract requirements. In other words, contractual terms requiring the seller to provide and tender documents conforming with the contract are "conditions" breach of which gives the buyer an immediate right to reject them. The buyer's right to terminate the contract on account of tender of non-conforming documents is subject to the seller's right to cure discussed above. As has been seen before, there are certain judicial authorities which clearly state that following the buyer's lawful rejection the seller under certain circumstances has a right to make a sound tender provided that he can do so within the contract time. Beyond that limited right to cure the buyer will be entitled to terminate the contract immediately without being required to wait for the goods to be landed.

¹⁶⁴ See e.g., *Kwei Tek Chao v. British Traders & Shippers Ltd*, [1954] 2 Q.B. 459 at 482.

¹⁶⁵ If, however, the buyer takes up the documents in ignorance of facts giving him the right to reject the documents or goods or both, he will not be taken to have waived his right to reject the documents or the goods (see e.g., *Suzuki & Co. v. Burgett & Newsman* [1922] 10 Ll. L.R. 223). Although he may, as will be seen below, lose his right to reject the goods under the doctrine of "acceptance" (s. 35 of the Sale of Goods Act).

¹⁶⁶ See e.g., *Bradgate, R.*, (1995) at 664.

¹⁶⁷ It is, of course, controversial whether such a case is strictly a matter of waiver, estoppel, or solely the effect of s. 35. The controversy is based on the fact where the buyer has not read the documents he cannot strictly speaking be said to have waived the right to reject, since waiver requires actual knowledge of the existence of the right to reject. See in this respect, *Atiyah, P. S. & Adams, J.*, (1995) at 468, fn. 79; *Bradgate, R.*, (1995) at 664.

¹⁶⁸ See e.g., *Panchaud Freres S.A. v. Etablissements General Grain Co.* [1970] 1 Lloyd's Rep. 53. For further cases see, *Atiyah, P. S. & Adams, J.*, (1995) at 468, fn. 79.

3.0. Mechanism of Termination

3.1. No Automatic Termination

As a general rule, under English law termination of contract for breach of contract is regarded as a matter of "election". That is, a discharging breach does not automatically bring the contract to an end,¹⁶⁹ but gives the aggrieved party an option either to terminate the contract or to continue performance,¹⁷⁰ if he wishes, and claim damages for losses suffered as a result of the breach.¹⁷¹ This principle is of general nature in the sense that it applies to all contracts including the contract of sale.¹⁷²

The principle has been justified on the basis of that the law should not allow the defaulting party to rely on his own default to obtain a benefit under the contract, to excuse his own failure of further performance, or in some other way to prejudice the injured party's legal position under the contract.¹⁷³ On the basis of this principle, it has been said that the defaulting party should not be allowed to rely on his breach so as to prevent the injured party from enforcing provisions in the contract¹⁷⁴, or the chance of claiming specific relief¹⁷⁵, since the contract may contain provisions highly favourable to the aggrieved party, and it would be unjust to allow the other party by breaching the contract to bring about an automatic termination and so to deprive the aggrieved party of the benefits of those provisions.

3.2. Election of Remedies

In English law when a buyer is given a right to terminate for breach of contract it is always at his option. Thus in terminating the contract he is not required to apply for a court's judgment even though he may sometimes need the court's decision to the effect that he was entitled to terminate the contract.¹⁷⁶ In the latter case the court simply declares whether termination was justified or not when the party in breach has disputed it. The contract would be effectively

¹⁶⁹ In contrast see, Thomson, J. M., (1978) 137 (in which he argues that the breach always bring the contract to an end automatically unless the victim affirms it).

¹⁷⁰ An election to continue the performance of the contract is often termed an "affirmation" of the contract (see e.g., *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corpn of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391 at 398).

¹⁷¹ See Cheshire, Fifoot and Furmston, (1996) at 556; Treitel, G. H., (1995) at 757 and authorities Treitel cited in fn. 9; Carter, J. W., (1991) Paras. 745, 1001.

¹⁷² As far as the sale of goods cases are concerned, the given feature of the right to terminate might be inferred from the language of s. 11 (3) of the Sale of Goods Act 1979 which provides that breach of condition "may give rise to a right to treat the contract as repudiated".

¹⁷³ *Alghussein Establishment v. Eton College* [1988] 1 W.L.R. 587. See also, Treitel, G. H., (1995) at 758.

¹⁷⁴ See e.g., *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361, where it was held that a repudiation or discharging breach by one of the parties to a contract does not of itself terminate the contract.

¹⁷⁵ *Ibid.*, at 375.

¹⁷⁶ Treitel, G. H., (1988) Paras. 243, 248.

terminated from the time when the buyer terminates it not from the time at which the court confirms termination. Accordingly, where a breach giving rise to a right to elect is committed by one of the contracting parties the other is faced with two alternative rights: either to terminate the contract or to affirm his obligation to perform. He must choose between these two alternative rights.¹⁷⁷ When he elects for one option he loses the other.

However, the questions remain: how must that option be exercised? Is the buyer who wishes to elect termination required to declare his intention of election to terminate the contract? Is the declaration of termination to be communicated to the defaulting party? When is the option of termination lost?

3.2.1. Election of Termination

The Sale of Goods Act does not lay down any procedure for the election to treat the contract as terminated. The Act, in respect of breach of condition, simply provides that it "may give rise to a right to treat the contract as repudiated". Nevertheless, since the Act does no more than codify the common law rules the process of termination is therefore governed in the absence of specific contractual terms by the common law rules on election of remedies.

3.2.1.1. Declaration of Termination

Generally, at common law, there is one clear requirement for exercising the option: there must be "unequivocal words or conduct" on the part of the non-defaulting party showing that he has elected to terminate or to affirm the contract.¹⁷⁸ The use of the term "unequivocal words or conduct" does not, however, mean that there must be an express words or conduct.¹⁷⁹ The requirement will be satisfied if, by words or actions, the non-defaulting party makes plain¹⁸⁰ that he intends to terminate the contract. Accordingly, the requirement does not necessarily depend upon the terms of one communication alone. It is necessary to consider the whole of the relevant communications and the buyer's conduct generally.¹⁸¹ The requirement may also be met by actions such as, rejection of the seller's defective performance, making of an alternative contract.¹⁸²

¹⁷⁷ See e.g., *Kwei Tek Chao v. British Traders and Shippers Ltd.* [1954] 2 Q.B. 459 at 477; Lord Goff in *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp'n of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391 at 397-398..

¹⁷⁸ See e.g. *Graanhandel T. Vink B.V. v. European Grain & Shipping Ltd.* [1989] 2 Lloyd's Rep. 531, at 533, in which Evans J. said: "if he does decide to reject the goods he must do so unequivocally and be prepared to take a stand."

¹⁷⁹ See e. g., *Vitol SA v Norelf Ltd., The Santa Clara*. [1994] 4 All E R 109 (anticipatory repudiation).

¹⁸⁰ See e.g., *Heyman v. Darwins, Ltd.* [1942] A.C. 356 at 361.

¹⁸¹ See e.g., *Graanhandel T. Vink B.V. v. European Grain & Shipping Ltd.* [1989] 2 Lloyd's Rep. 531 at 533. See also, *Tradax Export S.A. European Grain & Shipping Ltd.* [1983] 2 Lloyd's Rep. 100 esp. at 107.

¹⁸² See also, *M.S.C. Mediterranean Shipping Co. S.A. v. B.R.E-Metro Ltd.* [1985] 2 Lloyd's Rep. 239 at 240.

No particular form is required.¹⁸³ A written or oral statement is therefore sufficient. The buyer is also not required to use the particular term "termination". Accordingly, the use of any word or phrase which clearly shows that the buyer has declared the contract terminated would be sufficient.¹⁸⁴ Although the mere "silence and inactivity" on the part of the non-defaulting party has been said not to suffice,¹⁸⁵ it may be construed, in certain circumstances, as an affirmation of the contract depriving him of the right of termination.¹⁸⁶ In other words, if a buyer who has a right of option unnecessarily delays in taking his decision, he may not be entitled to resort to termination any more.¹⁸⁷

To put the requirement in a short phrase, a party who wishes to exercise his option to elect his remedies must declare his intention in a proper way by which a reasonable person is able to understand readily what he intends. Accordingly, there must be at least some notice by which the right to terminate is exercised, though it does not have to be in a particular form. The party giving notice need not as a general rule even specify in the notice the ground on which the contract is terminated.¹⁸⁸ If the ground stated in the notice does not in law justify termination, the notice may nevertheless be valid so long as a ground which does justify termination actually exists.¹⁸⁹ However, the question remains whether termination to be effective needs that the party in breach has received the notice of termination.

3.2.1.2. Communication of Termination to the Defaulting Party

The question has not been clearly answered. There can be found some authorities which suggest that communication is a general requirement of the election.¹⁹⁰ In contrast, there are many cases which do not insist on the requirement.¹⁹¹ The idea of necessity of communication of election to the party in breach is probably based on the view that the decision of termination is an "acceptance" of the defaulting party's "offer" to put an end to the contract.¹⁹²

¹⁸³ See e.g., *Lakshmit v. Faiz Sherani (P.C.)* [1974] A.C. 605 at 616.

¹⁸⁴ For instance, in the very recent case *Barber v. NWS Bank plc.* [1996] 1 All ER 906 at 909 (CA) the contract for sale of car has been treated as "terminated" when the solicitors sent a letter "rescinding" the contract. See also Carter who suggests various examples in: Carter, J. W., (1991) Para. 1016.

¹⁸⁵ See e.g., *State Trading Corp. of India v. M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277 at 286.

¹⁸⁶ See e.g., *Denmark Productions Ltd. v. Boscoble Productions Ltd.* [1969] 1 Q.B. 699 at 731-732. See, further, Dawson, F., (1981) at 90; Lord Hailsham of St. Marylebone, (1983) vol. 9, Para. 559; Thomson, J. M., (1978) at 142.

¹⁸⁷ See e.g., *Mardorf Peach & Co. v. Attica Sea Carriers Corp. of Liberia (The Laconia)* [1977] A. C. 850 at 871. See also, s. 35 (4) of the Sale of Goods Act.

¹⁸⁸ Carter, J. W., (1991) Para. 1016.

¹⁸⁹ See e.g., *Taylor v. Oakes, Roncoroni & Co.* [1922] 38 T.L.R. 349.

¹⁹⁰ *Car & Universal Finance Co. Ltd. v. Caldwell* [1965] 1 Q.B. 525 at 550. For further authorities see, Carter, J. W., (1991) Para. 1016

¹⁹¹ See e.g., *State Trading Corp. of India v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277 at 286 ("at least overtly evinced"). For further cases see, Carter, J. W., (1991) Para. 1016.

¹⁹² See e.g., *Heyman v. Darwins, Ltd.* [1942] A.C. 356 at 361; *Decro-Wall International S.A. v. Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361 at 375-6.

Accordingly, as in considering the rules of acceptance in the context of formation of the contract, the acceptance on the part of the offeree must be communicated to the offeror,¹⁹³ in the case of election of termination, acceptance must also be communicated to the party in breach.¹⁹⁴ On the other hand, it has been argued that election is “an effect which the law annexes to conduct which would be justifiable only if an election had been made one way or the other”.¹⁹⁵

3.2.2. Election of Affirmation

When the seller's non-conforming delivery constitutes a breach giving rise to the right to elect the injured buyer has also an alternative right to accept the non-conforming delivery, if he prefers, and claim for damages. The significant aspect of the rule is that under certain circumstances the law recognises a presumed affirmation on the part of the buyer who has an option to elect remedies for breach of contract. Where he elects or is deemed to have affirmed the contract he will lose his right to reject the non-conforming delivery and terminate the contract.¹⁹⁶ The rule can be justified on the principle that a person cannot take up inconsistent positions: once a choice has been made or deemed to have been made that party will usually be bound by that election.¹⁹⁷

Since affirmation usually precludes subsequent termination, a crucial issue is: at what point will the buyer be deemed to have affirmed the contract and as a result have lost his right to reject the non-conforming delivery and to terminate the contract? In general, a buyer may be deemed to have elected to affirm his duty to perform the contract when that intention can be attributed to him. In this connection, the Sale of Goods Act has provided certain rules regulating the circumstances under which the buyer may affirm or is deemed as have affirmed the contract and consequently has lost his right to reject the non-conforming delivery and to terminate the contract.¹⁹⁸

¹⁹³ See Generally, Lord Hailsham of St. Marylebone, (1983) vol. 9 Para. 254; Treitel, G. H. (1995) at 21; Cheshire, Fifoot & Furmston, (1996) at 48-49.

¹⁹⁴ Lord Hailsham of St. Marylebone, (1983) vol. 9 Para. 556; Cheshire, Fifoot & Furmston, (1996) at 556.

¹⁹⁵ *State Trading Corp. of India v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277 at 286. See also, Carter, J. W., (1991) Para. 1016

¹⁹⁶ Sale of Goods Act, s. 11 (4).

¹⁹⁷ The principle was clearly stated by Lord Atkin in *United Australia Ltd. v. Barclays Bank Ltd* [1941] A.C. 1 as follows: “If a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose” (ibid., at 30). It can also be said that the reason why the non-defaulting party loses his right of termination is that he cannot at the same time claim the benefits of performance and claim to be discharged from the obligation to perform the contract.

¹⁹⁸ Ss. 11 (2), (4) and 35. It is worth noting that common law has also developed certain doctrines in order to identify whether or not a party who has an option to affirm the contract or to terminate it has affirmed or is deemed to have affirmed the contract. There is no uniform terminology to describe these doctrines. Terms such as “election”, waiver, “affirmation” in the one hand, and “estoppel”, “promissory estoppel”, on the other, are used for this purpose. See e.g. Lord Goff in *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corpn*

3.2.2.1. Concept and Terminology

The circumstances under which an aggrieved buyer may affirm or is deemed as have affirmed the contract are comprised under the heading of "acceptance"¹⁹⁹. In this respect, section 11 (2), as a general principle, provides that a buyer may waive a condition that has to be fulfilled by the seller, electing instead to treat it as warranty. When this sub-section is read with the provisions under s. 35, and, sub-section 11 (4) which provides that the buyer may lose his right to reject the non-conforming delivery and to terminate the contract once he has accepted the seller's non-conforming delivery, acceptance can be explained as behaviour by the buyer that objectively demonstrates an election to seek his remedy only in damages.

3.2.2.2. Methods and Requirements of Acceptance

The Sale of Goods Act provides three general methods under which the buyer may lose his right to reject and terminate the contract. These methods of acceptances are recited in s. 35 as the buyer's (a) intimating to the seller that he has accepted the goods, (b) after the seller's delivery doing an act inconsistent with the seller's ownership and (c) retaining the goods beyond a reasonable time without giving the seller a notice of rejection.

(A) Intimation of Acceptance

The first method by which the buyer may be taken to have accepted the seller's delivery is his intimation to the seller that he has accepted the goods (s. 35 (1) (a)). However, any word or conduct made by the buyer will amount to an intimation of acceptance only when he has had a reasonable opportunity to examine them.²⁰⁰ This method of acceptance includes not only cases of express intimation, but also those where it may be inferred from the buyer's conduct, although such an intimation of acceptance must be clear.²⁰¹ For this reason, in *Varley v. Whipp*²⁰² the buyer's 'grumbling' letter requesting the seller to arrange a meeting with him in

of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391 at 397-398; *Kwei Tek Chao v. British Traders and Shippers Ltd.* [1954] 2 Q.B. 459 at 477. See also, Guest, A. G., et al, (1997) Paras. 12-034-12-038 and 19-129-19-131). However, since these doctrines have little relation to the present research, they are not examined here in separate, although they will be referred to if some of them come into application. See also, Bridge, M., (1997) at 169-170.

¹⁹⁹ It is worth noting that in the case of breach of condition, the Act (s. 11 (2).) uses the terms "election" and "waiver", while s. 11 (4) and 35 refers to the term "acceptance". It is also to be stressed that acceptance in this context is different from that is mentioned in s. 27 which provides correlative duties of the parties to a sale contract. See also Goode, R. M., (1995) at 367; Bridge, M., (1997) at 169.

²⁰⁰ S. 35 (2). Relying on this provision it can be said that a acceptance of a delivery note can only operate as an express acceptance if suitably worded as an acceptance and not merely an acknowledgement of delivery and the buyer was offered a reasonable opportunity to examine the goods before signing. See in this respect, Law Commission, (1983) Para. 2.53; Law Commission, (1987) Para. 5. 24; Atiyah, P. S. & Adams, J., (1995) at 461; Bradgate, R., (1995) at 251; Bridge, M., (1997) at 171.

²⁰¹ Law Commission, (1983) Para. 2.53.

²⁰² [1900] 1 Q.B. 513. See also Law Commission, (1983) Para. 2-53; Law Commission, (1987) Para. 2-45.

order to discuss the dispute and find a solution was held not to be an acceptance, though there was no express statement of intention to reject.

(B) Act Inconsistent with Seller's Ownership

The second statutory method by which the buyer may be taken to have accepted the seller's delivery is where after the seller has delivered the goods, he has done an act which is inconsistent with the seller's ownership²⁰³ (s. 35 (1) (b)). The buyer will only lose his right under this method where he has had a reasonable opportunity to examine the goods.²⁰⁴ Case law suggested that acts such as selling the goods or other dispositions of them may be treated as acts inconsistent with the seller's ownership. Similarly, consumption of the goods by the buyer or using them in a way which makes the physical return of the goods impossible could be placed into this category.²⁰⁵ However, the buyer is not to be taken to have accepted the non-conforming goods:

"merely because (a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or (b) the goods are delivered to another under a sub-sale or other disposition".²⁰⁶

But, as the language of this new provision shows, the above provision applies to cases where the buyer has repaired the goods under the arrangement with the seller; it does not apply to cases where the buyer has tried to repair the goods or to have them repaired without making any agreement or arrangement with the seller.

Dealing with Documents. Although the Sale of Goods Act 1979 has addressed the position of the case where the buyer has dealt with the goods delivered by the seller, it contains no provision dealing with dispositions of documents representing goods under documentary sales. The question which arises here is whether a buyer under a documentary sale contract can be taken to have accepted the seller's non-conforming delivery where he had made disposition of the documents, whether by way of pledge or sale, before their arrival.

It might at first be argued that since the goods have not actually been delivered to the buyer the case did not come under the heading of the phrase "acts inconsistent with the seller's

²⁰³ As to the concept of the term "an act inconsistent with the seller's ownership" used by the Act, see, *Kewi Tek Chao v. British traders and Shipping Ltd.* [1954] 2 Q.B. 459 at 487). See also, Goode, R. M., (1995) at 371. See also, Law Commission, (1983) Para. 2.55; Atiyah, P. S. & Adams, J., (1995) at 466-7; Guest, A. G., *et al*, (1997) Para. 12-046; Bridge, M., (1997) at 175.

²⁰⁴ S. 35 (2).

²⁰⁵ See also, Bradgate, R., (1995) at 251.

²⁰⁶ S. 35 (6). It is worth noting that this sub-section applies to all the three methods of acceptance. Accordingly, when the buyer asking the seller, for example, to repair he will not be deemed to have accepted under the method of lapse of a reasonable time. This will suspend the period of reasonable time. It will also not put the buyer in a position that he has accepted under the head of express intimation. See also, Bridge, M., (1997) at 170 and 171.

ownership". However, the answer seems arguable. It is true that the goods actually have not been delivered, but the documents representing the goods had, and this would often amount to delivery of goods. Moreover, the goods might be regarded as having been delivered by being entrusted to a carrier.²⁰⁷

The courts, facing with the problem, answered the question by way of recognising two separate rights of rejection of documents and goods and distinguishing between these two rights.²⁰⁸ Upon this, it is said that in the case of documentary sales any disposition of the documents is only a disposition of the conditional property which the buyer had received, and that a pledge or sale of the documents, does not amount to an act inconsistent with the seller's ownership within s. 35 of the 1979 Act. On this rule, a dealing with the documents might deprive him of his right to reject the documents, but could not deprive the buyer of the right to reject the goods.²⁰⁹

(C) Lapse of Reasonable Time

The third method by which a buyer may be taken to have accepted the seller's non-conforming delivery is retention of the goods for more than a reasonable time without intimating to the seller that he has rejected them (s. 35 (4)). In the absence of a contract time limit for rejection, the buyer will lose his right to reject after the lapse of a reasonable time. The rule has been justified on the grounds that there must come a time when the seller is entitled to regard the transaction as closed and assume that he is safe from a claim for a refund.²¹⁰

What is reasonable is a question of fact depending on the circumstances of any particular case.²¹¹ The court, in determining whether a reasonable time has elapsed will take into account different factors²¹² including the nature of the goods, conduct of the parties, the custom of the particular trade, market conditions, and whether the buyer has had a reasonable time to examine the goods²¹³

Unlike the two other methods, this method is not subject to the qualification that the buyer must have an opportunity to examine before he has been taken to have accepted the

²⁰⁷ See e.g., *Kwei Tek Chao v. British Traders and Shipping Ltd.* [1954] 2 Q.B. 459 at 486; approved in *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 395.

²⁰⁸ See e.g., *Kwei Tek Chao v British Traders & Shippers Ltd* [1954] 2 Q.B. 459. See also, Atiyah, P. S. & Adams, J., (1995) at 467.

²⁰⁹ However, in practice the buyer's dealing with the documents will affect his power to reject the goods unless the sub-buyer himself rejects. See also, Atiyah, P. S. & Adams, J., (1995) at 468.

²¹⁰ Bradgate, R., (1995) at 252.

²¹¹ S. 59 Sale of Goods Act 1979.

²¹² See also, Law Commission, (1983) Para. 2.57, Law Commission, (1987) Para. 5.19; Bradgate, R., (1995) at 253; Goode, R. M., (1995) at 376-377; Bridge, M. (1997) at 176-177. The Law Commission has commented that "Because every thing will turn on the question of reasonableness, there is no limit on the number of factors which the court is entitled to take into account when deciding what period of retention is reasonable (Law Commission, (1987) Para. 2. 48).

²¹³ Sale of Goods Act, s. 35 (5).

seller's non-conforming delivery. The Act simply provides that in assessing whether a reasonable time has elapsed the court has to taken into account whether the buyer has had a reasonable opportunity of examining the goods²¹⁴, but it does not absolutely prevent a finding that the buyer has accepted despite his not having had a reasonable opportunity to examine.²¹⁵

As a conclusion, under the first two methods, the buyer is not deemed to have accepted the goods until he has had a reasonable opportunity of examining them at the place contemplated for the examination of the goods for the purpose of ascertaining whether they are in conformity with the contract, or, in the case of a contract for sale by sample, of comparing the bulk with the sample unless the right of examination has been exercised, or waived in accordance with the general principles. However, under the third method the question whether he has had such an opportunity is material only in determining whether a reasonable time has elapsed. But in all three cases it is the opportunity of discovering the defect, rather than its actual discovery, which is the crucial factor, so that a buyer may be deemed as having "accepted" before discovering the truth.²¹⁶

Accordingly, the doctrine of acceptance comes into play even where the buyer has been unaware of his right to reject and the facts giving rise to the right.²¹⁷ Similarly, it is not necessary for the seller to know of the buyer's acts or to have detrimentally relied on, or altered his position in consequence of, the buyer's behaviour²¹⁸. But it would be sufficient if

²¹⁴ S. 35 (5).

²¹⁵ Taking into account the lack of a principle allowing an accepting buyer to revoke his acceptance, as it is provided in American Uniform Commercial Code (U.C.C. s. 2-608), the rule would be harsh for the buyer in respect of latent defects which may appear long time after delivery during the period in which he uses them. In addition, in a large scale-sale of commodities it is frequently impractical or at least expensive and wasteful for a buyer to inspect each item before he comes to use it. Thus, it is probable that a buyer is required to have a consignment which is substantially different from that bargained for on the basis of being have had a reasonable opportunity to examine the goods. The case has been examined by Law Commission and was decided ultimately in favour of finality of transaction (see Law Commission, (1983) Paras. 4.66-4.73, and, Law Commission, (1987) Paras. 5.6-5.5.14).

²¹⁶ See e.g., *Bernstein v. Pamson Motors (Golders Green) Ltd.* [1987] 2 All E.R. 220; Reynolds, F.M.B., (1988) 16.

²¹⁷ This is one of the points which distinguishes this doctrine from the common law doctrine of "waiver". Although there are some dicta which cast some doubt on the necessity of existence of the element that a non-defaulting party must have actual knowledge of the defect before he can be said to have waived his right to reject (see e.g., *Bremer Handelsgesellschaft m. b.H. v. C. Mackprang Jnr.* [1979] 1 Lloyd's Rep. 221 at 226, 230; *Avimex S.A. v. Dewulf & Cie* [1979] 2 Lloyd's Rep. 57 at 67; see also, Carter, J. W., (1991) Para. 1042), there are a number of authorities which demonstrate that the non-defaulting party's actual knowledge of the defect constitutes an essential element of the doctrine of waiver in the sense of election of remedies. This view has been affirmed by the Court of Appeal in *Peyman v. Lanjani* [1985] Ch. 457. See also *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1 at 30; *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corpn of India (The Kanchenjanga)* [1990] 1 Lloyd's Rep. 391 at 398; Bridge, M., (1997) at 266 and *seq.*; Treitel, G. H., (1995) at 728-729; Beale, H., (1980) at 118; Carter, J. W., (1991) Para. 1042; Carter, J. W., (1992) at 215.

²¹⁸ This is one of the elements which distinguishes this doctrine from the common law doctrine of "estoppel". The doctrine has two branches: "promisory estoppel" and "estoppel by conduct". See in this respect, Cheshire, Fifoot & Furmston, (1996) at 106-107 and 578-579; Carter, J. W., (1991) Para. 1045-1046; Atiyah, P. S. & Adams, J., (1995) at 102. Although in modern decisions, it is difficult to find an authority to make a clear distinction between waiver and estoppel, differences can be found between the conceptual bases of the

the buyer's behaviour objectively demonstrates that he wishes to elect his remedy only in damages.

3.2.2.3. Effects of Acceptance

By virtue of s. 11 (4) of the Sale of Goods Act, where a buyer has expressly, or is taken to have, accepted non-conforming goods or part of them he will lose his right to reject them and terminate the contract. However, this general rule is subject to the overriding provision of s. 35A, which gives the buyer a right of partial rejection. Under this provision, where the buyer who "has the right to reject the goods by reason of a breach on the part of the seller that affects some or all of them"²¹⁹ accepts some of them, he will not lose the right to reject the rest (s. 35A (1)). The restriction is, however, subject to the qualification that the goods unaffected by the breach were included in those goods he has accepted. On this provision, where all of the goods delivered by the seller are affected by the breach the buyer has an option either to choose to reject some or all of them, but in a case where the seller has delivered goods only part of which do not conform to the contract he may (1) reject all of the goods or (2) reject some or all of defective goods and keep those which conform to the contract.

Similarly, where the contract is severable the buyer will not be prevented from rejecting the goods delivered in one instalment simply because he has accepted a previous instalment. Therefore, the buyer can reject an individual defective instalment, either on general principle prescribed under s. 11 (4) or by virtue of the right of partial rejection provided in s. 35A. In addition, the right of partial rejection under s. 35A applies to each instalment of a severable contract and as a result the buyer will have the same options he has in respect of non-severable contract. That is, where the whole instalment is affected by the breach he has the option either to reject all or reject some and accept the remainder. In a case where only some of the goods in an individual instalment are defective, he may reject some or all of those affected by the breach and keep the remainder.

Accordingly, under the current provisions the question of acceptance will only arise in respect of the very goods accepted. Thus, in a non-severable contract, the buyer who has accepted the goods cannot reject them and the buyer who has accepted a part or an instalment of the goods cannot reject *that part or that instalment*. In short, the buyer will only lose his right to reject by accepting all the goods, or by accepting goods included in the same

two doctrines. See in this respect, Adams, J., (1972) 245; Carter, J. W., (1991) Para. 1090; Atiyah, P. S. & Adams, J., (1995) at 99.

²¹⁹ As the language of this provision shows, the buyer must first have the right to reject the whole goods for the partial defective performance. That is, the defective part must not be seen as isolated from the whole part, but it must be as such that allows the buyer to reject the whole goods. Accordingly, he will not be entitled to reject a portion of the goods and retain the remainder if his rejection would be unreasonable under s. 15A.

'commercial unit'²²⁰, or (in the case of severable contract), by accepting the non-conforming goods which he could otherwise have rejected.

4.0. Effects of Termination

Sale of goods legislation does not provide particular provisions regulating the effects which follow from termination of the contract. Accordingly, the question is to be answered in accordance with the general law of contract. In general, when election of termination for breach of contract validly takes place, it affects both the contract and relations of the parties from that time.

4.1. Effects on the Contract

One of the general questions which is often discussed in each legal system, in particular in civil law systems, is whether termination has retrospective or prospective effects on the contract. With respect to English law it is usually said that it is a general rule of the English law of contract that termination of the contract by the innocent party on the footing of the other party's breach operates prospectively and not retrospectively.²²¹ Retrospective effects are confined to the cases where the contract is *rescinded* on account of invalidating matters such as mistake and misrepresentation. For this reason, it is said that by termination of the contract on the basis of breach only future primary obligations are discharged, and that even the aggrieved party remains liable in damages for his own pre-termination breaches²²².

An illustration of such an effect of termination can be found in a severable contract in the meaning already discussed. Suppose, for example, that the seller breaches the contract in respect of one or more deliveries; in that case, the buyer may be entitled to terminate the contract in relation to the future deliveries without affecting deliveries already made. Thus, it is clear that termination in such a case does not affect the whole contract but only part of it.²²³

²²⁰ See s. 35 (7) of the Sale of Goods Act 1979 which provides "Where the contract is for the sale of goods making one or more commercial units, a buyer accepting any goods included in a unit is deemed to have accepted all the goods making the unit; ...".

²²¹ See generally, Cheshire, Fifoot and Furmston, (1996) at 558-559; Carter, J. W., (1991) Paras. 314, 1038-1040, 1206-1207, 1211-1212, 1215; McGarvie, R. E., (1964) 305; Albery, M., (1975) 337. See further *Heyman v. Darwins, Ltd.* [1942] A.C. 356 at 399; *Johnson v. Agnew* [1980] A.C. 367, in particular at 392-393. Cf. Coote, B., (1970) at 227; Dawson, F., (1976) 214; Coote, B., (1981) at 802.

²²² As it happened in *State Trading Corp. of India v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277 at 288. See also *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 390 (where Lord Diplock seems to assume that such a breach had indeed occurred on the part of the seller); Treitel, G. H., (1995) at 762-763.

²²³ As some academic writers have suggested (Atiyah, P. S. & Adams, J., (1995) at 455; Guest, A. G., *et al.*, (1997) Para. 12-070). But, as already indicated, this point is not clearly stated by the Act (see in this respect, 2.3.1.). See also, Treitel, G. H., (1988) Para. 283.

4.2. Effects on Rights and Obligations

Generally speaking, a valid termination of the contract releases not only the victim of breach but also the party in breach from their primary obligations to perform in the future.²²⁴ However, the defaulting party is not totally discharged from any liabilities, but may be liable to pay damages²²⁵ and that liability may relate both to breaches committed before termination and to losses suffered by the injured party as a result of the defaulting party's repudiation of future obligations.²²⁶

One explanation of the survival of the right to damages draws on a distinction between primary and secondary contractual obligations.²²⁷ The breach of a primary contractual obligation, that is, the failure to perform a duty expressly or impliedly created by the contract, gives rise to a secondary obligation to pay damages. This secondary obligation will arise by operation of law unless the contract itself deals with the matter.²²⁸

Section Two. Specific Performance

1.0. Introduction

The previous section was concerned with the circumstances in which an aggrieved buyer may be entitled to withhold the performance of his contractual obligation and terminate the contract. The present section will examine the circumstances in which he might be entitled to require the defaulting seller to perform specifically what he has undertaken under the contract.

It is a well-known fact that English law does not recognise specific performance as a right for a victim of breach and that English courts are very reluctant to decree specific

²²⁴ See e.g., Lord Diplock in *Moschi v. Lep Air Services Ltd.* [1973] A.C. 331 at 350; *Johnson v. Agnew* [1980] A.C. 367 at 392; *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827 at 849, 850; *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 390; *State Trading Corp. of India v. M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277 at 285.

²²⁵ See e.g., Lord Diplock in *Photo Production v. Securicor Transport Ltd.* [1980] A.C. 827 at 848-850 and in *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 390. See also, Thornely, J. W. A, (1967) 168; Treitel, G. H., (1995) at 762-764; Carter, J. W., (1988), 113 and 246; Opeskin, B. R., (1990) 293.

²²⁶ See e.g., Lord Diplock in *Photo Production v. Securicor Transport Ltd.* [1980] A.C. 827 at 849 ("anticipatory secondary obligation"); and, in *Gill and Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 390.

²²⁷ See e.g., *Photo Production v. Securicor Transport Ltd.* [1980] A.C. 827 at 848; *Afovos Shipping Co. v. Pagnan* [1983] 1 W.L.R. 195 at 203; Corbin, A. L., (1917) at 745.

²²⁸ Lord Porter in *Heyman v. Darwins Ltd.* [1942] A.C. 356 at 399; *Johnson v. Agnew* [1980] A.C. 367, at 396; *Photo Production v. Securicor Transport Ltd.* [1980] A.C. 827 at 850 (survival of choice of forum clause); *Gill & Duffus S.A. v. Berger & Co. Inc.* [1984] A.C. 382 at 390. See also Beale, H., (1980) at 105-106; Cheshire, Fifoot & Furmston, (1996) at 559-560; See Carter, J. W., (1991) Para. 1208; Shea, A. M., (1979) 623, in particular, at 635, 642 ff.

performance of contracts for the sale of goods.²²⁹ The reluctance of English courts to recognise such a right has a long history and the present study is not a proper place to examine the reasons for such a reluctance. For the present purpose it suffices to say that, historically, English law gives priority to compensation by way of awarding damages. No considerable significance has been given to the idea of compensating an injured buyer by ordering the defaulting seller to carry out what he promised.²³⁰ However, despite the reluctance of the common law courts to accept the remedy of specific performance, courts of equity have gradually recognised specific performance as a remedy.²³¹ It originated in the realisation that there are many cases in which the remedy available at common law is not adequate.²³² This remedy, as will be seen below, is a form of relief that is left to the discretion of the court rather than the victim of breach. This equitable remedy's main application was in land disputes,²³³ but the English courts have extended the remedy to sale of goods cases and subsequently took statutory form and it is now regulated by s. 52 of the Sale of Goods Act 1979.²³⁴

2.0. Requirements for Resorting to the Remedy

Under s. 52, an order requiring the seller to deliver the goods will only be made if the following requirements are fulfilled. First is the goods must be delivered are "specific" or "ascertained". Secondly, the court must "think fit" the grant of an order for specific performance.

²²⁹ Treitel, G. H., (1966) 211. It should be mentioned that where the subject of obligation is to pay a liquidated money such as price under a sale contract, such a reluctance does not apply. Here it is not a discretionary remedy. Where the beneficiary party applies for the decree the court will issue the decree ordering the refusing party to pay the agreed sum. See for example s. 49 of the Sale of Goods Act 1979 in respect of the seller's right to take an action for price. See also, Ogus, A., in: Harris, D., and Tallon, D., (1989) 243 at 251.

²³⁰ See in this respect, Cheshire, Fifoot and Furmston, (1996) at 607 (in which the authors explain that "this was probably because common law courts' judgments were enforced by distraint on the defendant's goods which ultimately produced a money sum). This reference, however, does not explain the reason why the common law courts' judgments were only introduced in the form of sum of money. This has its origin in the process of development of contractual claims in English law.

²³¹ Harris, D., (1988) at 132; Zweigert, K.; Kotz, H., (1987) vol. 2 at 169. It is to be noted that during the nineteenth century there was legislation which enabled the common law courts to order specific performance and the Court of Chancery to award damages (see e.g., Mercantile Law Amendment Act 1856; Chancery Amendment Act 1858), and eventually since the Judicature Acts 1873-75 all remedies available for equity courts are applicable in all divisions of the High Court. See in this respect, Cheshire, Fifoot and Furmston, (1996) at 607

²³² Cheshire Fifoot & Furmston, (1996) at 644; Guest, A. G., (1984) at 516; Ogus, A., in; Ogus, A., in: Harris, D., and Tallon, D., (1989) at 249.

²³³ See in this respect, Bishop, W., (1985) at 305; Harris, D., (1988) at 134; Furmston, M., (1995) at 158.

²³⁴ Section 52 (1): "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

2.1. Where Goods are “Specific” or “Ascertained”

The first requirement which appears from this section for resorting to this remedy is that the subject of sale must be “specific”, or, “ascertained” goods. This requirement raises some questions: what is meant by the term ‘specific goods’? What is the position of ‘goods to be produced’? In other words, does the requirement that the goods must be ‘specific’ mean that at the time of conclusion of the contract they must exist and the seller possesses them?

2.1.1. Specific Goods

“Specific goods” are defined by s. 61 (1) of the Act as being goods “identified and agreed upon at the time the contract is made”. That is, at the time of making the contract the parties agreed to designate the subject-matter of the contract as particular goods to be delivered by the seller in performance of his obligation; their individuality is established, so that there is no room for further selection or substitution.²³⁵

As far as the present discussion is concerned, the most practical question arises here is whether non-existent goods such as “future goods”, “goods to be manufactured or acquired by the seller after the conclusion of the contract” can be placed into the category of ‘specific goods’ for the purpose of application of s. 52. In this connection, some authors have shown that no clear answer can be found in case law.²³⁶ For instance, in a case decided before the Sale of Goods Act was passed²³⁷, the court held that a contract to sell 200 tons of potatoes from a particular crop to be grown by the seller was to be a sale of “specific” goods for the purpose of treating the contract as frustrated under the rule in *Taylor v. Caldwell*²³⁸. Similarly, in *Varley v. Whipp*²³⁹ the court considered a reaping machine to be specific goods, when the contract was for the sale of a specific second-hand self-binder reaping machine which at the time of making the contract, the seller did not possess and had still to acquire.

²³⁵ See, Guest, A. G., et al, (1997) Para. 1-113.

²³⁶ *Ibid.*, Para. 1-114. In *Howell v. Coupland* [1876] 1 Q.B.D. 258 (the case was concerned with the question of frustration of contract), it was stated that the authorities on such a matter are confused. see also, Treitel, G. H., (1966) at 218.

²³⁷ *Howell v. Coupland* [1876] 1 Q.B.D. 258. In this case Mellish L.J. at 262 called the potatoes “specific things”. However, Treitel criticised that they were not “specific goods” within the definition given in s. 61 (1) of the Sale of Goods Act 1979 (“identified and agreed upon at the time a contract of sale is made”) (Treitel, G. H., (1995) at 831 fn. 66).

²³⁸ [1863] 3 B. & S. 826.

²³⁹ [1900] 1 Q. B. 513. The case was in fact concerned with a claim on the part of the buyer that the contract was a sale by description and as a result of lack of conformity of the article sold with the seller’s statements the buyer had a right to reject. The seller argued that s. 13 of the Sale of Goods Act applies only to the case of a sale of unascertained goods (see p. 515). However, the court, rejecting the seller’s argument, held that although the most usual application of s. 13 was no doubt to the case of unascertained goods, it must also be applied to cases such as the case in question where there was no identification otherwise than by description (at 516).

Nevertheless, in *In re Wait*²⁴⁰, it was said that the plain language of the Act leaves no room for giving such a so wide meaning to the term "specific goods", so far as the application of the Act is concerned.

Academic writers have also taken up different opinions. For instance, Professor Treitel suggested²⁴¹ that there is no linguistic difficulty or logical reason in identifying and agreeing on such goods as specific goods. Accordingly, where a contract is made to buy a certain quantity of cars to be come from the seller's factory the subject-matter of the contract seems to be identified and agreed upon, even if it does not yet exist, at the time the contract is made. In contrast, some others have said that "it is probably safe to say that future goods can never be specific goods within the meaning of the Act."²⁴² But in response to the latter view it has been said that although there is reason enough for acceptance of this view in the context of passing of property,²⁴³ there is nothing which requires one to read into the definition of "specific goods" a condition that they should presently exist.²⁴⁴

As far as the language of the Sale of Goods Act is concerned, one may argue that there is, generally, no logical reason for the non-application of s. 52 of the Act to non-existent goods. For, on the one hand, the definition of specific goods in s. 61 is not conditional on the goods existing when the contract is made. Again, non-existent goods are not excluded by the provision of s. 61 (1) of the Act. On the other, the goods may be described definitely, particularly and specifically although they are non-existent. It can therefore be suggested that future goods can be the subject of specific performance, so long as, they are identified and agreed upon by the parties, and they can be considered as a specific goods when they are sufficiently identified. Accordingly, the main basis for considering the goods as specific, is the agreement of the contracting parties in respect of the goods, specifying them in a way which leads to no misleading, ambiguity or vagueness about their nature, quality or quantity, no matter whether they presently exist or not, or whether they have been produced or will be produced in the future.

However, it would be better to make a distinction between two different types of future goods: those which are non-existent and those which exist but are not yet owned by the seller. In addition, non-existent goods can be further sub-divided into crops (etc.) to be grown and products to be manufactured. One may argue that the treatment of these different items should

²⁴⁰ [1927] 1 Ch. 606.

²⁴¹ Treitel, G. H., (1966) at 218.

²⁴² Atiyah, P. S. & Adams, J., (1995) at 50.

²⁴³ For, in order of application of s. 18 rule 1 of the Act, the goods must be in a deliverable state at the time of the contract, while a contract to sell future goods as such can never be "unconditional" (see Guest, A. G., *et al.*, (1997) Para. 1-113.

²⁴⁴ *Ibid.*

differ: for instance, where the seller contracts to sell a particular item which he has not yet bought - as in *Varley v. Whipp* - then the goods clearly are specific. The position is different where the contract is to sell something not yet in existence. However, it is easier to regard a particular item to be manufactured as "specific" than items to be grown - as in *Howell v Coupland* etc. - unless the contract is something like to deliver "the first 1000 tonnes harvested from a particular field".

2.1.2. Ascertained Goods

Unlike the term 'specific goods', the expression "ascertained goods" is not defined by the Act. However, case law has made efforts to define the term. For instance, in *In re Wait*²⁴⁵, Atkin L.J. observed that in the present context,

"'Ascertained' probably means identified in accordance with the agreement after the time a contract of sale is made".²⁴⁶

According to the above definition, the term means goods originally unascertained which are identified in accordance with the parties' subsequent agreement after the contract of sale is made. However, in *Thames Sack and Bag Co. Ltd. v. Knowles & Co. Ltd* it was said that

"ascertained" in s. 52 "means that the individuality of the goods must in some way be found out, and when it is, then the goods have been ascertained".²⁴⁷

Similarly, in *Wait & James v. Midland Bank*,²⁴⁸ it was stated that "ascertainment" might take place by any method which is satisfactory to the parties concerned. Moreover, a part of the goods purchased from a bulk which is specified, may become ascertained by process of exhaustion, which, was said to be "the only effective way of ascertaining the goods which are in bulk".²⁴⁹

Examination of the above-mentioned cases shows that the term "ascertained" refers to some process subsequent to the contract by which goods are sufficiently²⁵⁰ identified or

²⁴⁵ [1927] 1 Ch. 606 at 630.

²⁴⁶ See also, Guest, A. G., *et al*, (1997) Para. 1-116.

²⁴⁷ [1918] 119 L.T. 287 at 290. It is worth noting that there is a difference between the view of Atkin L.J. in *In re Wait* and that of Sankey J. in *Thames Sack and Bag* in that the first view requires identification "in accordance with the agreement" after the conclusion of the contract, while on the second view any process of identification will be sufficient for this purpose, even if the agreement contained no provisions to that end, and even if the process of identification was not in accordance with such provisions on the matter as the agreement did contain.

²⁴⁸ [1926] 31 Com. Cas. 172 at 179.

²⁴⁹ *Wait & James v. Midland Bank* [1926] 31 Com. Cas. 172 at 178-179. The same rules are applied to the case of passing of property by the new s. 18 rule 5 (3) inserted by the Sale of Goods Act (Amendment) 1995.

²⁵⁰ For instance in *Thames Sack and Bag Co. Ltd. v. Knowles & Co. Ltd.* which was concerned with the sale of ten bales of Hessian bags, and the invoice sent by the seller after the making of the contract referred to ten out of a particular parcel of 45 bags, the judge held that this was insufficient ascertainment of the goods for the

otherwise earmarked by the seller as goods he intends to use in performance of the contract.²⁵¹ However, there will be no ascertainment of part of a larger bulk of goods until the part has been actually or by way of exhaustion earmarked and segregated from the bulk.²⁵²

2.1.3. Specific Performance and Unascertained Goods

On its face s 52 appears to apply only where the goods to be delivered are of specific or being sufficiently ascertained after the contract is made and therefore does not apply to an important category of contracts, those for sale of unascertained goods still to be ascertained. Accordingly, the buyer will not benefit from the provision under s. 52 where the seller has failed to perform his delivery obligations where the goods which should be delivered to the buyer under the contract are not sufficiently ascertained.²⁵³

Yet, the question is not so clear as it seems in its apparent face. On the one hand, it might be argued that where the language of s. 52 is combined with the belief that the Sale of Goods Act is designed to provide a comprehensive code, one may conclude that the remedy will not arise where there is a contract for the sale of unascertained goods not yet ascertained.²⁵⁴ On the other hand, there is a possibility to say that s. 52 may be applied to the case of unascertained goods. This is because first, the language of the section itself does not seem to exclude expressly its application to such cases. Secondly, the idea that the Sale of Goods Act is a comprehensive code is arguable.²⁵⁵ Accordingly, the answer depends on whether or not the Act presents an exclusive code of remedies available.

The question was particularly addressed in *In re Wait*.²⁵⁶ In that case, Atkin L.J. took the view that where a matter is dealt with by the Act, the treatment was intended to be exhaustive.²⁵⁷ Unlike the firm view of Atkin L.J. that s. 52 codifies the buyer's rights, in *Sky*

purposes of s. 52 ([1918] 119 L.T. 287). Accordingly, an inappropriate part of a larger, ascertained bulk cannot be "ascertained" for the purposes of section 52.

²⁵¹ For instance, where the subject of sale is growing crops or natural products, it is possible that ascertainment takes place at the same time when they are appropriated for the purpose of passing the property (see Bridge, M., (1997) at 532-533).

²⁵² Ontario Law Reform Commission, (1979) vol. 2 at 438.

²⁵³ It seems that there is no significant difference between the contracts for goods which are wholly unascertained and the contracts for unascertained goods from a designated source. In the latter case which is called quasi-specific goods (Goode, R. M., (1995) at 252; Bridge, M., (1988) at 41) the goods remain in principle unascertained since it cannot be said of any particular part of a large bulk whether it has been identified and agreed upon at the time of contract (see Bridge, M., *ibid.*). A slight difference, however, may appear where the particular bulk is used by the seller and reduced to or less than the contract quantity the remaining goods will be taken as appropriated to the contract (as in *Wait & James v. Midland Bank* [1926] 31 Com. Cas. 172 at 178-179; see also, the new section 18 rule 5 inserted by the Sale of Goods (Amendment) Act 1995).

²⁵⁴ See in this respect, Bridge, M., (1988) at 532.

²⁵⁵ See in this respect, Bridge, M., (1988) at 532.

²⁵⁶ [1927] 1 Ch. 606.

²⁵⁷ *Ibid.*, at 630.

*Petroleum Ltd. v. VIP Petroleum Ltd*²⁵⁸ some doubt was thrown on the traditional idea.²⁵⁹ In that case, the judge did, in fact, grant specific performance of a contract for unascertained goods.

Although the decision in *Sky Petroleum* may be welcomed as commercially realistic, it is hard to reconcile with the language of s. 52 (1) of the Act and with both earlier and subsequent authorities.²⁶⁰ Moreover, neither s. 52 nor *In re Wait* were referred to in the judgment. Accordingly, it is difficult to say that in the case of unascertained goods not yet ascertained the buyer can apply for specific performance. In addition, assuming that the jurisdiction to award specific performance exists where the subject of sale is unascertained goods, it is likely to be exercised only rarely, for by definition, unascertained goods will rarely be unique. As a result, the court would hold that damages will be an adequate remedy.

Moreover, the case may be, as Goulding J. himself pointed out in his judgment, justified on the special facts of the case. In a case of the nature of *Sky Petroleum* no question of specific performance would normally arise because the filling station could go and buy petrol on the market and be compensated adequately by damages, but at the time of the case, because of the Arab oil embargo and the related events of 1973, there was little prospect of the plaintiffs being able to procure alternative supplies from another source so that alternative supplies were not available to the buyers. Moreover, as some authors pointed out²⁶¹, in the particular case a substantial part of the buyers' loss would not have been recoverable in damages because of the remoteness rule. In addition to the above-mentioned factors, in that case damages would clearly not be an adequate remedy because, as Professor Atiyah pointed out²⁶², "there was a real danger that the plaintiffs would be forced out of business if the defendants broke their contract in the very peculiar circumstances then holding".²⁶³ In the circumstances of that case, specific performance was a uniquely desirable and effective remedy. It was in fact such peculiar circumstances which induced the judge to depart from the general rule.

²⁵⁸ [1974] 1 All E. R. 954.

²⁵⁹ Atkin L.J.'s view has also been objected on the ground that he offered no explanation why the parliament should have wished to reduce the ambit of the remedy of specific performance, and the history of the section does not support the thesis. (Ontario Law Reform Commission, (1979) vol. 2 at 438-439).

²⁶⁰ Such as *In re Wait* [1927] 1 Ch. 606; *Societe des Industries Metallurgiques S.A. v. Bronx Engineering Co. Ltd* [1975] 1 Lloyd's Rep. 465 at 468, 470.

²⁶¹ See Macdonald, E., (1987) at 251. See also: Berryman, J., (1985) at 319.

²⁶² Atiyah, P. S. & Adams, J., (1995) at 508.

²⁶³ See also, Ontario Law reform Commission, (1979) vol. 2 at 438.

2.2. When the Court Thinks Fit

The important feature of specific performance in English law is that it is not granted as a matter of right to the aggrieved party seeking remedy, but it is an equitable jurisdiction whose exercise is left to the court's discretion.²⁶⁴ This is confirmed by the Sale of Goods Act 1979 which does not require the court to give effect the buyer's application for specific performance but gives the court a broad power to give an order for specific performance "if it thinks fit".

However, it is to be stressed that this does not mean that the decision is left to the uncontrolled fancy of any individual judge. A court may refuse to give effect the buyer's application for specific performance, if to grant it in the particular circumstances of the case will defeat the ends of justice.²⁶⁵ For instance, Lord Parker, explaining the rule, observed:

"Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable so to do."²⁶⁶

3.0. Grounds for Refusing to Order Specific Performance

Exercise of the court's discretion to award specific performance is guided by certain principles. For instance, the court will generally not order specific performance of a contract which involves personal services²⁶⁷ or which requires constant supervision by the court.²⁶⁸ However, as far as sale of goods cases are concerned the adequacy of damages rule is the main restriction on the remedy of specific performance.²⁶⁹

²⁶⁴ See e.g., in an appeal to the House of Lords of a Scottish case *Stewart v. Kennedy* [1890], 15 App. Cas. 75 at 102, Lord Watson observed: "I do not think that upon this matter any assistance can be derived from English decisions, because the laws of two countries regard the right to specific performance from different standpoints. In England the only legal right arising from a breach of contract is a claim for damages; specific performance is not matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. ..." See also, Cheshire Fifoot & Furmston, (1996) at 644; Ogus, A. in: Harris, D. and Tallon D., (1989) at 250; Priest A. J. (1984) 927.

²⁶⁵ See e.g., *Shell UK Ltd. v. Lostock Garages Ltd.* [1976] 1 W.L.R. 1187 at 1202. See also, Cheshire Fifoot & Furmston, (1996) at 645; Guest, A. G., (1984) at 518; Treitel, G. H., (1988) Para. 64; Priest A. J., (1984) at 927.

²⁶⁶ See also, *Stickney v. Keeble* [1915] A.C. 386 at 419.

²⁶⁷ The restriction has been justified on the grounds of policy: that it would be improper to make one man serve or employ another against his will (see Guest, A. G., (1984) at 519).

²⁶⁸ See e. g., *Ryan v Mutual Tontine Westminster Chamber Association* [1893] 1 Ch. 116, where the court refused to order specific performance of a contract to provide pottering services for a flat. See generally, Burrows, A. S., (1984) 102; Treitel, G. H., (1995) at 930; Harris, D., (1988) at 138, 139; Ogus, A., in: Harris, D., Tallon, D., (1989) at 250 Zweigert, K.; Kotz, H., (1987) vol. 2 at 171-172.

²⁶⁹ This rule plays a substantial role in the case of specific performance under general law of contract (see in this respect, Ogus, A., in: Harris, D., Tallon, D., (1989) at 243 at 254), although the rule has been described as "a severe limitation in sales of other things than lands" (Dawson, F., (1959) at 532).

Under this rule, where complete justice can be achieved by damages, the plaintiff will be left to his remedy at law.²⁷⁰ In other words, the court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice.²⁷¹

There is no clear rule by which the court can always examine the adequacy of damages test. Generally, where damages fail to afford a complete remedy to the aggrieved party,²⁷² or the amount of damages is impossible to be assessed,²⁷³ they are considered an inadequate remedy, and, consequently, specific performance is granted. The court will refuse to grant specific performance when the plaintiff is able to obtain the equivalent to what he has contracted for by damages.²⁷⁴

A clear instance can be found in *Behnke v. Bede Shipping Co. Ltd.*²⁷⁵ In this case, specific performance was granted because the subject-matter of the sale was a unique thing, i. e., a ship. However, it is not accurate to say that the buyer of a ship will always be able to resort to the provision of s. 52. In *CN Marine Inc. v. Stena Line (The Stena Nautica (no. 2))*,²⁷⁶ it was held that as a matter of law, an order for specific performance could be made in respect of a vessel but it, in no way, follows that there should be an order for specific performance in respect of every contract for the sale of a ship.

The court's reluctance to grant specific performance is illustrated by the case of *Societe Des Industries Metallurgiques S.A. v. Bronx Engineering Co. Ltd.*²⁷⁷ In this case, the defendants had wrongfully repudiated a contract to deliver goods manufactured by them to the plaintiffs. Although the subject of sale was over 220 tons in weight and cost around £270, 000, the evidence showed that it would take the plaintiffs between nine to twelve months to obtain similar goods from an alternative source. Even this serious delay failed to persuade the Court of Appeal that the case was a proper one for grant of specific performance, for the

²⁷⁰ See e. g., *Beswick v. Beswick* [1968] A.C. 58 at 90-91 (Lord Pearce), 102 (Lord Upjohn).

²⁷¹ *Tito v. Waddell (No. 2)*, [1977] Ch. 106, Per Megarry V.-C. at 322. In the old case of *Flint v. Brandon* [1803] 8 Ves. Jun. 159, the Master of Rolls [Sir Wm. Grant] explained the position as follows: "This court does not profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for courts of equity to interfere ... In the present case complete justice can be done at law."

²⁷² See e.g., *Wilson v. Northampton & Banbury Junction Railway Co.* [1874] 9 Ch. App. 279 at 284 (Per Lord Selborne)

²⁷³ See e.g., *Hart v. Herwig* [1873] 8 Ch. App. 860.

²⁷⁴ The rule is clearly stated by Lord Redesdale in *Harnett v Yielding* as follows: "Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled: that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the court in a variety of cases, has refused to interfere, where from the nature of the case, the damages must necessarily be commensurate to the injury sustained" ([1805] 2 Sch. & Lef. 549 at 553.).

²⁷⁵ [1927] 1 K. B. 649. In that case, Wright J. said: "... I think a ship is a specific chattel within the Act" (*ibid.*, at 661). See also, *Hart v. Herwig* [1873] 8 Ch. App. Cas. 860 at 864 (W.M. James, L.J.) and 866 (Mellish, L.J.).

²⁷⁶ [1982] 2 Lloyd's Rep. 336 (Lord Justice May) at 348, and, Parker J., *ibid.*, at 343

²⁷⁷ [1975] 1 Lloyd's Rep. 465.

goods were of a type obtainable on the market in the ordinary course of business²⁷⁸ and the additional loss suffered by the plaintiffs as the result of the delay would be covered by an increased award of damages.

Damages may be inadequate, even when the buyer can buy goods similar to those in the contract, if the fluctuation of the price is so great, that the party who is obliged to accept damages cannot be sure of being put in as good a position as he would have been if the contract were specifically performed and the goods supplied.²⁷⁹ Furthermore, where the goods or items are unique, specific performance may be granted. Thus, "the more unusual the subject-matter of the contract, the more difficult it becomes to assess the plaintiff's loss",²⁸⁰ and "damages can be readily assessed but not so easily collected".²⁸¹ Nor can damages be described as an adequate remedy when the defendant is unable to pay for them, because of his insolvency.²⁸² Under these circumstances specific performance is justified and will be decreed.²⁸³

Whether damages are adequate remedy is a question of fact in each case which is to be decided according to the circumstances of any particular case. Accordingly, "[I]t is unsafe to rely on decisions reached on other contracts and in other circumstances".²⁸⁴ It seems that the exercising of the inherent discretionary power by the court, varies from one court to another, and there are no reliable criteria to justify or predict the conduct of the court in ordering specific performance or granting damages in a case where there are specific or ascertained goods, such as a ship or a machinery or some articles which are not easily obtainable.²⁸⁵

However, it is to be emphasised that it does not follow that specific performance will necessarily be granted because damages are not an adequate compensation. Above all, the onus is upon the plaintiff to justify the claim that damages would not achieve justice and that he "the plaintiff" should not be compelled to accept them.²⁸⁶ The plaintiff may fail to prove that the goods are unique, and consequently will not obtain specific performance, but damages. The court will generally enquire in any case into all the circumstances, in particular any hardship which would be imposed on one party or the other by giving or refusing specific performance. This reflects a combination of two policies; the general feeling that specific

²⁷⁸ [1975] 1 Lloyd's Rep. 465, Lord Edmund Davies at 468, 469.

²⁷⁹ *Adderley v. Dixon* (1824) 1 C. & S. 607 at 610-612; *Evans Marshall & Co. Ltd. v. Bertola S. A.* [1973] 1 W. L. R. 349 at 380.

²⁸⁰ Sharpe, R. J. (1983) at 280.

²⁸¹ *Ibid.*, at 282.

²⁸² *Ibid.*

²⁸³ See e.g., *Dyster v. Randall & Sons* [1926] 1 Ch. 932. See also, Sharpe R. J., (1983) at 283 and the authorities cited there.

²⁸⁴ Spry, I. C. F., (1990) at 62.

²⁸⁵ As example, see the cases concerned with sale of ships which already discussed.

²⁸⁶ *CN Marine Inc. v. Stena Line (The Stena Nautica) (No. 2)* [1982] 2 Lloyd's Rep. 336 at 348.

performance is usually not necessary in the case of goods and the general equitable principle that specific performance is not be granted mechanically and that all the circumstances are to be considered.²⁸⁷

4.0. Right to Demand Cure

We have been so far concerned with the question of specific performance under English law in general. It has been made clear that this legal system gives little chance to an aggrieved buyer to resort to the remedy of specific performance. And it has also been seen that even within the discretionary power given to the courts to grant specific performance under certain circumstances, in exercising the power, the English courts are very reluctant to use this power in favour of the plaintiff.

The position of the right to request the seller to cure the non-conformity is not much better than that of specific performance in general. In fact, failure to recognise a general right to cure for an aggrieved buyer can be justified on the grounds that English law gives priority to the compensation by damages.

As a general rule, the English Sale of Goods Act does not recognise a general right for the buyer to demand the cure. Case law lacks any legal statement indicating the recognition of such a right. Academic writers have shown little tendency to accept such a right. Accordingly, it can be said with certainty that under English law an aggrieved buyer has no general right to demand that the seller cure his defective performance. Any offer from the buyer to the seller for cure can be rejected by the seller unless the case places into the category discussed above, though if the seller accepts his offer he must perform his duty.²⁸⁸ However, as indicated when dealing with the seller's right to cure, according to one interpretation, where the buyer lawfully rejects the seller's non-conforming delivery without terminating the contract the Sale of Goods Act enables the buyer to permit the seller to cure his defective delivery and, to that extent, to request cure.²⁸⁹

Buyer's Right to Demand Cure and S. 52 of the 1979 Act. As the law stands presently, in English law, where the seller has made defective delivery the buyer is primarily entitled to reject the non-conforming delivery and terminate the contract and/or claim for damages, as some authors suggest, or to reject it and wait for seller's cure and/or claim for

²⁸⁷ Furmston, M., (1995) at 168.

²⁸⁸ However, the European Parliament and Council Directive on the Sale of Consumer Goods and associated Guarantees 1996 proposed that the consumer buyer should be given a right to "ask the seller either to repair the goods free of charge within a reasonable period, or to replace the goods, when this is possible, ... (Art. 3 (4)).

²⁸⁹ See e.g., Bradgate, R., & White, F., (1995) at 77.

damages, as others suggest. However, the question arises whether an injured buyer who has lawfully rejected the non-conforming goods is entitled to require the seller to cure his defective performance on account of s. 52 of the Act. As far as the language of the section is concerned, there is no linguistic difficulty in recognising a limited right for an aggrieved buyer to demand that the seller cure within the scope of the section.²⁹⁰ The reason is that a demand to cure the non-conformity, whether by delivery of substitute goods or repair the defects, is in fact, a particular form of requiring to perform the contractual obligations specifically. In other words, the buyer demands the seller to perform his duty to deliver goods conforming with the contract terms (s. 27 of the 1979 Act). Accordingly, for this purpose, an injured buyer may be entitled to apply the court for a decree ordering the seller to tender conforming goods or to repair the defective goods provided that the requirements of s. 52 are met. That is, the purchased goods are of commercially unique kind, such as ship, machinery that could not readily be obtainable elsewhere, or the seller is the sole manufacturer so that the buyer cannot obtain them in the market or damages do not afford an adequate remedy to him. Under such circumstances, the court may exercise its discretionary power to order the seller to cure non-conforming goods.

However, as far as the right to demand cure by repair is concerned, the buyer will have little chance to persuade the court to give effect to his application, since cure by repair will normally involve personal services and require constant supervision by the court in which circumstances the English courts, as pointed out above, are reluctant to order the party to perform his obligations specifically.²⁹¹ Moreover, in the case of sale of unascertained goods, it is quite possible to say that the buyer is not basically entitled to demand the seller for delivery of replacement. For, after rejection of non-conforming goods the substitute goods are not ascertained. Accordingly, the case will be outside the scope of s. 52.

Section Three. Monetary Relief

1. 0. Introduction

A further remedy available in English law for an aggrieved buyer is to claim damages for losses he has sustained as a consequence of the seller's breach of contract. The main purpose

²⁹⁰ Since the section provides: "If any action for breach of contract to deliver ..." which includes the seller's breach of his duty to deliver goods corresponding with the contract terms (s. 27 of the Act).

²⁹¹ In particular, in the case of international sale of goods under which the buyer's place of business takes place in another country. In such a case, it would be hard for the court to supervise the performance of the court's order by the seller in a foreign country.

of this remedy is to compensate the buyer by putting him, so far as money can do so, into the same financial position in which he would have been, had the contract been performed.²⁹²

Unlike the Convention and *Shi'ah* law which provide a further financial remedy enabling the buyer to reduce the contract price where the seller has delivered non-conforming goods, English law has not recognised such a remedy. The closest English law counterpart could be the 'set-off' rule provided in s. 53 (1) (a) of the Sale of Goods Act 1979 which permits the buyer to "set up against the seller the breach of warranty in diminution or extinction of the price". Under this provision, as will be seen later, an injured buyer is authorised to deduct all or any part of his damages from the purchase price still due.

Nevertheless, reduction of price, as reflected in the Convention and some other legal systems, is a remedy separate from that of damages, and should not be confused with the right to set-off.²⁹³ In common law systems the set-off rule is not regarded as a separate remedy but it is, in fact, a particular means of exercising the right to damages. Accordingly, the appropriate place for consideration of the rule, it seems, is where the right to claim for damages is examined. For the said reason this section will not include a separate part under the heading of the remedy of reduction in price.

2.0. Claim for Damages

2.1. General Principles

In English law, it is a well-established law that a breach of contract, no matter what form it takes, always entitles the innocent party to maintain an action for damages. An action for damages can succeed even though the victim has suffered no actual loss by reason of the other party's violation, although in that event, the damages recoverable will be purely nominal. The effect of such an award may simply recognise the fact that a breach of contract has occurred.²⁹⁴

²⁹² See e.g., Per Parke B. in *Robinson v. Harman* (1848), 1 Ex. 850 at 855; *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London* [1912] A. C. 673, per Viscount Haldane L C at 688-689.

²⁹³ The nature of the "set off" rule is not quite clear in English law. For instance, in *Stewart Gill Ltd. v Horatio Myer & Co. Ltd.* [1992] 1 Q.B. 600 where the Court of Appeal considered a "no set-off" clause in a contract it appears from Lord Donaldson's judgement that he was not quite sure about the nature of set-off whether it is a remedy or a matter of procedure. The nature of the right is also controversial between academic writers. For further discussion of the nature of set off in academic works see, Goode, R. M., (1988) at 148 and *seq* Derham, S. R., (1996). Professor Goode himself, relying on some decided cases, prefers the procedural character of the remedy (*ibid.*, at 151-152).

²⁹⁴ The term "nominal damages" has been explained by Earl of Halsbury L.C. in: *Owners of Steamship "Mediana" v. Owners, Master & Crew of Lightship "Comet" (The Mediana)* [1900] A.C. 113 at 116. See also, Treitel, G. H., (1995) at 838; Schmitthoff, C. M., (1966) at 174 and *seq*; Guest, A. G., (1984) at 491.

This general rule has been recognised in the case of breach of a contract for sale of goods by the Sale of Goods Act 1979. In this respect, the Act, instead of providing a general rule, confers on an injured buyer a right to claim damages under three separate sections.²⁹⁵ Relying on these provisions, it can be said that a buyer who has suffered by reason of the seller's breach of contract has a general right, subject to the restricting principles which will be examined later, to claim damages for any loss he has sustained, including loss of profit, personal injury, damaged property and indemnity he has sustained as a result of the third party's claim.

2.2. Grounds for Claim for Damages

The principle described above is applied where one of the contracting parties is guilty of a breach of a valid contract. An injured buyer can claim damages for loss caused by any kind of default, whether be it non-delivery, late delivery or defective delivery, all of which may amount to a breach of contract. Although delivery of goods beyond the contract time is in fact a form of non-conforming delivery, English lawyers, for reason which will be made clear later, tend to treat the case of late delivery as distinct from the case where the seller delivers goods which do not conform with contract terms.²⁹⁶

Thus, the seller's total failure to deliver, or delivery beyond the contract time (where the contract fixes a specific time or a period of time) or beyond a reasonable time (where the contract does not specify specific time), or, to deliver in a way which does not comply with a contract term (whether classified as 'warranty', 'condition' or 'intermediate term') would be regarded as a breach of contract entitling the buyer to claim damages for losses resulting from it.

It is not possible in a work of the present nature to list specifically all the possible losses a buyer may suffer as a consequence of seller's failure to deliver goods in accordance with the contract terms. They would vary from case to case in accordance with the various circumstances which may surround any particular case. What follows is an attempt to

²⁹⁵ In the case of the seller's failure to deliver, section 51 provides: "(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery." Similarly, in the case of non-conforming delivery section 53 (1) reads as follows: "Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may ... (b) maintain an action against the seller for damages for breach of warranty." Section 54 of the Act completes the statutory provisions by providing: "Nothing in this Act affects the right of the buyer ... to recover ... special damages in any case where by law ... special damages may be recoverable ..."

²⁹⁶ See generally, Greig, D.W., (1974) at 289.

generalise various pecuniary losses which may result from the seller's failure to deliver goods according to the contract terms.

As far as the question of recoverable loss is concerned, whether the alleged loss resulted from non-delivery, late delivery or non-conforming delivery, according to the statutory provisions quoted above, an injured buyer may generally be entitled to recover damages for two general category of losses: normal (or general) loss (ss. 52 and 53) and special loss (s. 54). The distinction between these two types of loss and the different circumstances under which they could be recoverable will be made clear when the rules of remoteness of damage are considered.

2.3. Principles Restricting the Recovery of Damages

An injured party is not able to recover damages for all losses he may suffer consequent upon the other party's breach. The protection which is afforded to an injured party by the English general law of contract will rarely represent his actual loss; rather it will reflect what the law considers it just for him to recover. For this reason, an injured party will succeed in recovering damages for a particular head of losses where certain requirements are met. Generally, a buyer who wishes to claim damages for a particular head of loss must prove that his alleged loss was caused by the seller's breach of contract and was not too remote. He must also take reasonable steps to minimise his loss.

2.3.1. Causal Connection

The starting point for recovery of damages is that the injured party must show that the loss incurred has a real connection with the other party's breach of contract. The principle is occasionally referred to in English law as that of 'causation'.²⁹⁷ Under this principle, recovery of damages requires a sufficient connection between the breach and the loss for which the injured buyer claims damages. The rule can be clearly inferred from section 51 (2) of the Act which provides as follows:

"The measure of damages is the estimated loss ... *resulting, ..., from the seller's breach of contract.*" (italic added)²⁹⁸

²⁹⁷ See e.g., Donaldson M.R. in *Sotiros Shipping Inc. v. Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep. 605 at 608; Guest, A. G., *et al.*, (1997) Para. 16-046; Goode, R. M., (1995) at 124; Beale, H., (1980) at 178; Treitel, G. H., (1995) at 679-881; Fridman, G. H. L., (1986) at 661-662; Opeskin B. R., (1990) at 315.

²⁹⁸ The same point was pointed out in the statement of B. Alderson in *Hadley v Baxendale* (1854) 9 Exch. 341 at 354.

Under this doctrine the loss must be causally connected to the breach, so that if it would have occurred in any event it is not recoverable. Equally, if the loss resulted from some intervening act of the plaintiff or a third party which the defendant could not reasonably have foreseen as the consequence of the breach, the chain of causation will be broken and the loss will be regarded as too remote. In such a situation, the effect of the breach was in fact exhausted and replaced by the intervening act as the 'proximate cause'.

It follows that the buyer will not be entitled to claim damages where he has incurred loss, but not by the reason of the fact that the contract was breached by the seller. This is the position where a buyer of goods has made a bad bargain or where the market value of the goods drops between the time the contract was made and time of breach, and the seller then delivers non-conforming goods which are worth no less than those contracted for would be worth. In such a case, no substantial damages can be recovered by the buyer on account of non-conformity of the goods; though if the buyer is able to reject the goods (for example, on the ground of some defect in the documents under a c.i.f. contract, or the goods themselves) he will in effect escape from the loss resulting from the fact he made a bad bargain either by refusing to pay the price or by rejecting the goods and recover the payment already made.²⁹⁹

2.3.2. Remoteness of Damage

Causation is a matter of fact. Granted that a particular head of loss has in fact sufficient connection to the breach, English law provides that the defendant will be liable for those losses which were contemplated by him at the time of the contract.³⁰⁰

The legal concept of the test was first formulated in English law by the Court of Exchequer in the leading case of *Hadley v. Baxendale*³⁰¹ and subsequently has been expressly

²⁹⁹ See e.g., *Taylor & Sons, Ltd. v. Bank of Athens (Pinnock v. Same)* [1922] 27 Com. Cas. 142. See also, Treitel, G. H., (1995) at 844 and 857; Guest, A. G., *et al.*, (1997) Paras. 19-166 and *seq.*

³⁰⁰ See e.g., *Victoria Laundry (Windsor) v. Newman Industries Ltd* [1949] 2 KB 528 at 539, As a matter of terminology, some disputes have arisen as to the phrase describing the principle. The principle is sometimes described that of "foreseeability". Curiously, however, neither in the leading case of *Hadley v. Baxendale* (1854) 9 Ex. 341), upon which the principle is commonly based, did the court in fact refer to the term "foreseeability" nor does the Sale of Goods Act explicitly state the rule in terms of "foreseeability". The Act refers to "loss directly and naturally resulting in the ordinary course of events" from the breach and in *Hadley* the court referred to losses which were "in the contemplation of the parties" (*ibid.*, at 354). See also *Koufos v. C. Czarnikow Ltd. (The Heron II)* [1969] 1 A.C. 350 at 384-385). In analysing the rule, the term 'foreseeability' was used in *Victoria Laundry (Windsor) v. Newman Industries Ltd* ([1949] 2 K.B. 528 at 539; and in subsequent cases the judges have described the doctrine by using the language of foreseeability. But in the *Koufos v. Czarnikow Ltd. (The Heron II)* ([1969] 1 A.C. 350), the House of Lords deprecated the use of that word which they thought it more appropriate to the law of tort and suggested to recur to the original words as declared in *Hadley v. Baxendale*, i.e., to the term "contemplation" instead of "foreseeability" (*ibid.*, at 384-385). The divergence in phraseology, as will be explained below, did in fact derive from the different views raised with respect to the degree of probability which is necessary for a particular head of loss to be recoverable by the party injured through the breach of contract.

³⁰¹ (1854) 9 Exch. 341. In that case, Alderson B., in describing the remoteness rule, maintained: "... the damages which the other party ought to receive in respect of such breach of contract should be such as may

recognised by the Sale of Goods Act in the provisions regulating the measurement of damages. For instance, s. 51 of the Act provides:

“The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.” (underline added)

The same principle is provided by ss. 50 (2) and 53 (2) when dealing with the case of non-acceptance and breach of warranty, respectively.³⁰²

The rule has been clearly illustrated in the leading case of *Victoria Laundry (Windsor) v. Newman Industries Ltd.*³⁰³. In that case, the defendants, an engineering company, agreed to manufacture and supply a large boiler to the plaintiffs. But the boiler was damaged while it was being dismantled for transport to the buyers, and it was delivered to them late. In that case, the defendants were aware of the fact that the plaintiffs ran a laundry and that they intended to put the boiler into immediate use in their business. However, they did not know that the plaintiffs intended to use the boiler to expand their business and fulfil some highly profitable government dyeing contracts. Under such circumstances, the plaintiffs claimed for loss of profit on the dyeing contracts. At first instance, Streatfeild J allowed the plaintiffs a sum for damages under certain minor heads but refused to award damages for loss of profits. The Court of Appeal, however, held that the defendants were not liable for the loss of profits they would have made from the special contracts, but were liable for the amount of profit the plaintiffs would have made using the boiler for the ordinary laundering. In the view of this Court, since the defendants had not been told about the dyeing contracts they should not have been held liable for the losses resulting from such special circumstances, but must have been held liable for the ordinary use of the boiler because it must have been obvious that in all probabilities the buyers wanted the boiler for immediate use in their laundering business. In the language of Asquith LJ, “everyone, as a reasonable person, is taken to know the ‘ordinary course of things’ and consequently what loss is liable to result from the breach of that ordinary course.”³⁰⁴

2.3.2.1. Single Rule or Two Separate Rules

The rule in *Hadley v Baxendale* is often discussed as being two rules or one rule in two parts, an approach reflected in the Sale of Goods Act (ss. 50 (2), 51 (2) and 53 (2) and s. 54.

fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the *probable* result of the breach of it.” (Ibid., at 354, *Italic added*).

³⁰² The forgoing provisions are indeed intended to codify the common law provisions declared in *Hadley v Baxendale* and other early cases such as, *Robinson v. Harman* (1848), 1 Exch. 850 at 855 (Per Parke B.).

³⁰³ [1949] 2 K. B. 528.

³⁰⁴ [1949] 2 K. B. 528 at 539.

(A) First limb

It is commonly said that the first limb of the *Hadley* rule is concerned with those losses which may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, so that *any* plaintiff would be likely to suffer the loss in question. These damages are referred to as “ordinary”, “general” and sometimes, “normal” damages.³⁰⁵

The computation of normal loss, as will be seen later in detail, depends on whether the breach takes the form of total non-delivery, defective or delayed delivery. The latter in turn depends upon the manner in which the injured buyer exercises his options; for if he elects to reject a non-conforming delivery, the case becomes one of non-delivery. Thus, in the event of non-delivery of goods, for example, the normal loss for which an aggrieved buyer can recover damages is the difference between the value of the goods on which they have agreed at the time of the contract (in this case, contract price) and their value as in fact delivered (nothing). The same criterion is true in the case of late and defective delivery.³⁰⁶

(B) Second limb

In contrast, the second branch of the rule is said to be concerned with those losses resulting not as the natural consequence of breach but from some special or extraordinary circumstances. In s. 54, the Sale of Goods Act describes damages recoverable for such losses as ‘special damages’. A plaintiff could recover damages for these losses only if the special circumstances had been communicated to the party in breach at the time the contract was concluded.³⁰⁷

Because of the variety of loss recoverable under this branch of the rule, it is not possible to provide an exhaustive list of special losses an aggrieved buyer may suffer as a consequence of the seller's breach. It would vary according to various special circumstances that may be known to the seller at the time of the contract. Generally, damages may be recoverable for this type of loss provided that the rules of remoteness are satisfied. As an example, where a seller agrees to sell to a buyer goods for which there is not a ready market and fails to deliver them, and as a result the buyer is forced to hire other goods during the period of time he is seeking for a replacement and then has to pay a higher price for the substitute goods, the excess of that price over the contract price is the normal loss and the hire

³⁰⁵ See in this respect, Ontario Law Reform Commission, (1979) vol. 2 at 492.

³⁰⁶ Of course, in the case of defective delivery, the normal loss may include damage to the buyer's property and personal injury.

³⁰⁷ See *Hadley v. Baxendale* (1854) 9 Ex. 341, the statement of per Alderson at 354; *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)* [1949] A.C. 196, per Lord Wright at 221.

charges may be recoverable in addition as special loss.³⁰⁸ The special loss may also arise where the goods were bought for resale in the form of claiming compensation for damage to good will and loss of future business from his customer.³⁰⁹

2.3.2.2. Necessity of Distinction

The distinction is clearly drawn by Baron Alderson in *Hadley v Baxendale*³¹⁰, and Asquith LJ in the *Victoria Laundry*³¹¹. However, in some cases the distinction has been questioned. For instance, in the case of *The Heron II*, Lord Reid observed:

“I do not think that it was intended that there were to be two rules or that two different standards or tests to be applied.”³¹²

It has also been argued that dividing the rule into two parts is not necessary; “contemplated damages” could apply both to damages which are contemplated because they “naturally arise” and to damages contemplated because some special information was possessed by the parties. Ignoring the separate “branches” also saves an analyst from having to decide which part is applied in a case where the answer is not certain.³¹³

However, it has been argued³¹⁴ that the consequence of dividing the recoverable losses and the relevant rules into two parts appears in that losses which are the ordinary and natural consequences of the breach eliminate any question over the need for proving awareness of these possible consequences. Such direct losses, if proximately caused by the breach, do not need to be proved to have been foreseeable by the party in breach when the contract was made. But if the losses in question are of the type contemplated, only in light of special information which the buyer or some other sources give the seller, the court must decide if the information was adequate to satisfy the criterion of contemplation at the time of the contract.

³⁰⁸ It can be said that if the seller knows that the purchased goods will only be used for use, as opposed to resale, then the hire charges are recoverable under the first limb.

³⁰⁹ It is worth noting that loss of goodwill does not necessarily fall into the second limb. It depends on the nature of the goods and the facts of the case.

³¹⁰ (1854) 9 Exch. 341 at 354-355.

³¹¹ [1949] 2 K. B. 528 at 539. See also Cotton L.J. in *Hydraulic Engineering Co. Ltd. v. McHaffie Goslett & Co.* (1878) 4 Q.B.D. 670 at 677; Wright W. M., (1980) at 493-494; Street, H., (1962) at 18-22.

³¹² [1969] 1 A.C. 350 at 385. In that case it was also referred to the difficulty which arises from the idea of regarding the *Hadley* rule as two separate rules by that “there is sometimes difference of opinions as to which is the part (i.e., branches of the *Hadley* rule) which governs a particular case and it may be that both parts govern it” (ibid., at 416). See also Adams, A., (1979) at 147 (stating that the two “limbs” of *Hadley* tend to be seen today as merely parts of a single rule); James, P. S., (1950) at 39 (arguing that both parts of the *Hadley* rule “are only alternative ways of stating the same proposition”); Smith, F. E., (1900) at 277 (reaching the same conclusion that “*Hadley v Baxendale* then lays down one positive rule, and one only”); Cheshire, Fifoot and Furmston, (1996) at 616 (arguing that “The two branches of *Hadley v Baxendale* do not represent two separate rules, and it may sometimes be difficult to identify which is applicable”); Bridge, M., (1997) at 543.

³¹³ The argument is cited in: Murphey A.G., (1989) at 434.

³¹⁴ See e. g., Wright W. M., (1980) at 494; Murphey A.G., (1989) at 434.

In such a situation, the court must first, of course, decide that the facts of the case present which of these two situations.

2.3.2.3. Degree of Foreseeability of Loss³¹⁵

As the above discussion showed, under English law, a buyer can only claim damages for losses which were in the contemplation of the contracting parties when the contract was made. However, it is not quite clear how far the loss must be contemplated by the party in breach in the light of information he possesses before the injured party becomes entitled to recover damages for it.

In the leading case of *Hadley v Baxendale*, the court held that the requirements of remoteness would be satisfied where the consequences of the default have been reasonably within the parties' contemplation at the time of making the contract³¹⁶ "as the probable result of the breach". The test has been fully explored by Asquith L.J. in *Victoria Laundry v. Newman Industries*.³¹⁷ In that case, in analysing the rules of remoteness under the *Hadley v Baxendale* case, he attempted to describe how much a particular head of loss must be foreseeable so as to satisfy the requirements of remoteness rules. In describing the criterion, he observed that to make a particular loss recoverable, the plaintiff does not need to prove that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach *must necessarily* result in that loss. But it is enough if he could foresee that it was "liable to result".³¹⁸

After near twenty years, the question was reopened by the House of Lords in *Koufos v. C. Czarnikow Ltd (The Heron II)*.³¹⁹ In that case, the House of Lords held that in an action for breach of contract, the mere fact that a loss is foreseeable is insufficient. In *Victoria*

³¹⁵ See generally, Waddams, (1983), Paras. 1137-1142; Swinton, K., in: Reiter, B. J., and Swan, J., (1980) 61-91.

³¹⁶ It is to be noted that in a case following *Hadley v Baxendale*, an English court suggested that the time rule be changed to allow for notice after the contract was made (see *Gee v. Lancashire and Yorkshire Railway Co.* (1860) 6 H. & N. 211). In that case Baron Bramwell observed that the *Hadley* rule might be further qualified: "[t]hat in the course of the performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say: 'If, after that notice, you persist in the breaking the contract I shall claim the damages which will result from the breach'" (ibid. at 217). This suggestion, however, was rejected in later decisions, and some academic writers regarded it as "heresy" (see Adams, J., (1979) at 148).

³¹⁷ [1949] 2 K.B. 528.

³¹⁸ [1949] 2 K.B. 528 at 540. Earlier cases had similarly offered various phrases to describe the meaning of "probable". For instance, in *R. & H. Hall Ltd. and W. H. Pim (Junior) & Co. Ltd.* [1928] 33 Com. Cas. 324 at 329-330, Lord Dunedin stated: "I do not think that 'probability' ... means that the chances are all in favour of the event happening. To make a thing probable, it is enough, in my view, that there is an even chance of it happening." See also ibid., at 336 in which Lord Phillimore referred to "those damages which ... are ... recognised by the parties as those which in the particular case *may* result from a breach... There may be cases where the word to be used might 'will,' but there are also cases and more common cases where the word to use is 'may'."

³¹⁹ [1969] 1 A.C. 350.

Laundry, Asquith LJ had said that the party injured by the breach of contract was entitled to recover “such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.”³²⁰ However, in *The Heron II*, Lord Reid did not agree with that statement and said that a great many “extremely unlikely results are reasonably foreseeable”.³²¹ He also expressed his unhappiness with the reference by Asquith L.J. to the foreseeability test and thought that this reference was calculated to confuse the measure of recovery in tort claims with that sounding in contract. He then continued to say that there must be a distinction between the degree of foreseeability of damages claims in tort and that of in contract.³²² The other law Lords agreed, although using different terminologies, that the remoteness tests are not necessarily the same in contract and tort.³²³ Accordingly, on the House of Lords’ view, for a loss to be recoverable in the case of breach of contract, it must be more probable than is required in tort.

Having strongly rejected the reasonable foresight criterion in contract cases, their Lordships then made great efforts to explain what they thought was the correct interpretation of the *Hadley* rule. But they were not agreed on the expression that accurately conveys this higher degree of likelihood, although Lord Reid at least was willing to settle for something less than a 50% probability. In this respect, a considerable number of alternative expressions were considered, many being cited without express approval or disapproval.³²⁴

Although the House of Lords have made great efforts to present a more clear criterion upon which the recoverable damages are to be determined, these deliberations made, in fact, the question more difficult than easier.³²⁵ However, what is certain is that according to their Lordships, the rule of remoteness in contract is different from and stricter than that in tort and when the word ‘foreseeability’ is used in contract, it refers to this higher degree of probability.

³²⁰ [1949] 2 K.B. 528 at 539.

³²¹ [1969] 1 A.C. 350 at 389. In that case, Lord Reid also observed: “The court (in *Hadley v. Baxendale*) did not intend that every type of damages which was reasonably foreseeable by the parties when the contract was made should be either considered as arising naturally, i.e., in the usual course of things, or be supposed to have been in the contemplation of the parties” (ibid., at 385).

³²² In justifying the distinction, see, ibid., at 385-6). See also, Lord Upjohn’s judgment at 422.

³²³ See ibid., at 411 (Lord Hodson), at 413 (Lord Pearce), and, at 422 and 425 (Lord Upjohn). But Lord Morris did not specifically discuss this question. See also, Whincup, M., (1992) 433; Davies, P.J., (1982) at 25

³²⁴ The headnote of the Law Reports is summarised so: ...since prices in a commodity market were liable to fluctuate, shipowners should reasonably contemplate that (per Lord Reid) it was not unlikely ...; (per Lord Morris of Borth-y-Gest) the result was liable to be or at least the result was not unlikely to be ...; (per Lord Hodson) the result was liable to be ...; (per Lord Pearce and Lord Upjohn) there was serious possibility or real danger ... that, if their ships delayed the voyage, the value of marketable goods on board their ships would decline... (ibid., at 351).

³²⁵ Moreover, the value of these deliberations is greatly diminished by the considerable degree of apparent verbal inconsistency between them. The usefulness of this exercise was in any event strongly questioned by Lord Morris, who stated that such phrases “... are useful and helpful indications of the application of the rule in *Hadley v Baxendale*. But they neither add to the rule nor do they modify it ([1969] 1 A.C. 350 at 399). See in this respect, Pickering, M. (1968) at 209.

In other words, the mere foreseeability, even reasonable foreseeability, is not sufficient. The loss must be substantially foreseeable.³²⁶

The relationship of the tests of foreseeability in contract and tort was further considered by the Court of Appeal in *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*³²⁷ At the first instance, in respect of the question whether or not the actual loss (death of a considerable numbers of pigs) suffered by the plaintiffs could be recovered by them, the court held that, although it was reasonably foreseeable that the breach might cause the pigs to become ill, the defendant was not liable for the damage caused because at the time of contract neither the farmer nor the suppliers would reasonably have contemplated as a serious possibility that feeding mouldy pignuts to the pigs would cause this particular disease and the death of the pigs. However, the Court of Appeal, reversing the decision, held that the damage in question was of the same kind as that which was seen foreseeable by the first court, and so was recoverable. As regards the distinction between tort and the contract cases, all the members of the Court thought "it absurd that the test for remoteness of damage should, in principle, differ according to the legal classification of the cause of action".³²⁸

Although in that case the three members of the Court of Appeal were unanimous in regarding the loss in question as not too remote, they took different views in the reasoning. On the one hand, Lord Denning MR draw a distinction between breach of contract causing physical injury or damage to the property and breach of contract causing loss of profit or other economic loss. In his Lordship's view, the principle of remoteness in contract that the loss in question must have been within the reasonable contemplation of the parties at the time of the contract as a "serious possibility"³²⁹ should be restricted to the latter cases.³³⁰ Whereas, where the plaintiff's claim is concerned with personal injury or damage to the property the principle of remoteness in tort, which in his words is "... the defaulting party is liable for any loss or expense which he ought reasonably to have *foreseen* at the time of the breach *as a possible consequence*, even if it was only a *slight possibility*"³³¹, should be applied. Accordingly, the defaulting party is liable for any loss or expense which he ought reasonably

³²⁶ However, the distinction has been criticised by some academic writers (see e.g., Whincup, M., (1992) at 433). It is worth noting that in some earlier cases one can find some statement which describe the probability of occurrence of loss in such phrases. For instance, in the old case of *Hammond & Co. v. Bussey* (1887) 20 Q.B.D. 79 at 93 Lord Esher, M.R. described the parties' reasonable contemplation "highly probable result of breach".

³²⁷ [1978] 1 Q.B. 791.

³²⁸ *Ibid.*, at 806. In the words of Lord Denning (at 802) and Scarman LJ (at 807), the difference between 'reasonably foreseeable' (the test in the tort) and 'reasonably contemplated' (the test in the contract) was 'semantic, not substantial'. For instance, Lord Denning in this case observed: "I find it difficult ... to draw a distinction between what a man 'contemplates' and what he 'foresees'".

³²⁹ As it prescribed by the House of Lords in *The Heron II*.

³³⁰ [1978] 1 Q.B. 791 at 802.

³³¹ *Ibid.*, at 803.

to have foreseen at the time of the breach as a possible consequence, even if it was only a slight possibility. In that case, although there was not a serious possibility or a real danger, a slight possibility would, in his Lordship's view be sufficient to make the defaulting party liable. Whereas, loss of profit on future sales or future opportunities of gain would not be recoverable for the mere fact that the given loss was reasonably foreseeable by the party in breach. Recoverability of such losses requires more than that is necessary for physical injury.

However, this view was not welcomed³³² by the two other members of the Court and Scarman L.J., with whose reasoning Orr L.J. agreed, observed that the suggested distinction was an unnecessary and unjustified complication and the cases did not support this distinction. Differences in assessment of damages in relation to economic losses and physical injuries, in their view, merely illustrated the overall test of remoteness and did not in their opinion constitute a separate rule within it.³³³ In their Lordships' view, the loss in question was recoverable even according to the rule under *The Heron II*, for what has to be contemplated as a serious possibility, is not the specific injury in question but if the type of a loss could be reasonably contemplated as a serious possibility it would be sufficient to make that particular loss recoverable.³³⁴ In the case in question, as illness in the pigs could reasonably have been contemplated as a serious possibility, it was irrelevant that the specific injury in question could not. In so holding, they relied on the principle that a distinction must be drawn between the type of loss involved and the extent of the injury in question. On this basis, the two members of the Court treated that particular disease as differing from general illness not in type but in extent only.

The House of Lords has not yet had an opportunity of hearing a comparable case which would enable it to express its opinion about this case. However, some academic writers have commented that neither approach is free from difficulties. In their view, Lord Denning's approach not only has no explicit support in the authorities, but the distinction between economic and physical loss in contract cases is itself difficult to apply. The two other members' view also places a heavy burden on the distinction between type and extent of loss.³³⁵ In addition, one may argue that the majority's construction has not resolved the problem. The question does still remain whether or not in a case such as *Victoria Laundry* an

³³² The view has also been criticised by academic writers. See e.g., Hadjihambis D. H., (1978) at 485-6.

³³³ 1978] 1 Q.B. 791 at 806. In this regard see also, Cheshire, Fifoot and Furmston, (1996) at 616; Guest, A. G., (1984) at 499-500; Beale, Bishop and Furmston, (1995) at 567-568; Ontario Law Reform Commission, (1979) vol. 2, at 492-493; Cooke, R., (1978) at 295-296; William Bishop, (1983) at 254 and *seq.*

³³⁴ 1978] 1 Q.B. 791 at 813. The same point was confirmed before by Megarry J. in *Wroth v. Tyler* [1974] 1 Ch. 30 at 61. For more authorities on the point see, Guest, A.G., *et al.*, (1997), Para. 16-040, particularly, fns. 20, 21.

³³⁵ Cheshire, Fifoot and Furmston, (1996) at 616.

injured party is entitled to claim damages for those losses the Court of Appeal regarded them as remote. In that case, what is certain is that the type of loss (loss of profits) was foreseeable but the court held that some lost profits were not recoverable.

2.3.3. Mitigation Principle

Not all foreseeable losses are recoverable. Recoverability of damages for a particular head of loss is also subject to another restricting rule.³³⁶ The rule, in the language of common law, is called “the duty to mitigate the loss”. Under this rule, once the plaintiff buyer becomes aware of the seller’s breach of contract he must take reasonable steps to minimise his loss. If he fails to do so, he will recover no damages in respect of losses which he could have avoided. The given doctrine is clearly stated by Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London*³³⁷

Such measures will typically be making a substitute transaction. Of course, other measures may be appropriate to lessen the prospective loss from the breach of contract. For instance, measures taken to minimise potential loss would be for the buyer to hire substitute goods or to remedy hidden defects of the goods delivered to him by the seller, or, in a contract involving carriage of goods in which the seller is unable to hand them over in due time to the carrier, for the buyer to take them over at the seller’s place of business or even to accept an offer of alternative performance from the defendant, as is appropriate.³³⁸ It is this principle which explains why, when the contract takes place within a competitive market setting, the plaintiff normally obtains the difference between the contract price and the market price at the

³³⁶ The point which deserves to be noted here is that the doctrine of mitigation arises in relation to the computation of damages. However, in this stage, mitigation is substantially an aspect of remoteness, since it is within the contemplation of the parties that the plaintiff will take reasonable steps to mitigate his loss. For this reason, the principle is discussed under the heading of general principles restricting the recoverable loss rather than under the heading of measurement of damages. See also, Cheshire, Fifoot and Furmston, (1996) at 630. For a detail discussion of the different legal grounds on which the rule may be justified, see: Bridge, M., (1989) at 400 and *seq.*, and, Bridge, M., (1997) at 547-548.

³³⁷ [1912] A. C. 673. In describing the principle, he observed: “The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps” (*ibid.*, at 689).

³³⁸ The question whether the buyer is under the duty to mitigate his damages by accepting the seller’s offer is not entirely clear. In *The Solholt (Sotiros Shipping Inc. v. Sameiet Solholt (The Solholt))* [1983] 1 Lloyd’s Rep. 605) it was held that the buyer was not entitled to the difference between the contract and the market prices, when he refused to accept the seller’s offer. But, in *Heaven & Kesterton v. Etablissements Francois Albiac* ([1956] 2 Lloyd’s Rep. 316 Devlin J., distinguishing between breaches as to quality and other breaches, observed that in the latter cases the court must take that fact into consideration in arriving at what is the proper sum of damages to award to the buyer. Whereas, in the first case there is no room for the court to take into consideration of that sort (*ibid.*, at 321, see also, Schmitthoff, C. M., (1961) at 366). For criticism on these cases see, Bridge, M., (1989) 416-418. However, in the case of anticipatory repudiation, it is commonly said that the rule does not require the buyer to accept the seller’s repudiation when it is first made (*White & Carter (Councils) Ltd. v. McGregor* [1962] AC 413). See in this respect, Cheshire, Fifoot and Furmston, (1996) at 631-633.).

date of breach; he is expected to secure a substitute. Mitigation, then performs an important economic function of encouraging efficiency in the allocation of resources.³³⁹ Under the so-called 'duty to mitigate' the plaintiff in fact has a twofold duty. He must refrain from unreasonable acts which would increase his loss; and he must take such positive steps to reduce his loss as are reasonable in the circumstances.

The principle is well illustrated by the case of *Payzu v Sanders*³⁴⁰, where the defendant had agreed to sell to the plaintiffs a quantity of silk, payment to be made a month after delivery. The buyers failed to pay the first instalment within the agreed time, owing to a number of mishaps, but gave an order for the second instalment of the goods. The seller (defendant) who had wrongly thought that the buyers were in financial difficulties, in breach of contract, refused to make further deliveries except for cash. The buyers refused to accept the seller's offer and treated this as being a repudiation and elected to terminate the contract. This they were certainly entitled to do, but they then sued the seller for damages on the basis that the market price of silk had risen and that they could claim the difference between the contract price and the market price at the date of the buyers' acceptance of the seller's repudiation. The Court of Appeal, rejecting the buyers' argument, held that although the seller's refusal to continue credit terms was a breach of contract and that he was liable in damages, by refusing to accept the seller's offer to supply the goods on payment of cash, the buyers had in fact failed to take a reasonable measure in order to mitigate his damages.

However, the mitigation rule will generally not require the plaintiff to go to the market under any circumstances. What a plaintiff has to do under this rule is what a reasonable man in his position would do. Of course, what is reasonable in the circumstances is a question of fact³⁴¹; in spite of that, the case law from which the doctrine is derived gives some guidance in ascertaining whether or not the buyer has acted in a reasonable manner. Accordingly, it is considered that he is not bound to take any step which a reasonable man would not ordinarily take in the course of his business;³⁴² nor is he bound to hunt the globe to minimise the loss suffered by him.³⁴³ Nor does the duty to mitigate go so far as to oblige him to engage in a complicated and difficult litigation with third parties, even though its outcome might have

³³⁹ See also, Ogus, A., in: Donald Harris, Denis Tallon, (1989) at 249; Beale, H., (1980) at 187 and *seq.*; Treitel, G. H., (1995) at 881 and *seq.*; Guest, A. G., (1984) at 510-511; Cheshire, Fifoot and Furmston, (1996) at 628 and *seq.* Goetz and Scott, (1983) 967.

³⁴⁰ [1919] 2 KB 581.

³⁴¹ See e.g., *Payzu v. Saunders* [1919] 2 KB 581 at 589; *Carlos Federspiel & Co., S.A. v. Charles Twigg & Co. Ltd.* [1957] 1 Lloyd's Rep. 240 at 256.

³⁴² For instance, Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London* [1912] A. C. 673 at 689 observed: "This ... principle does not impose on the plaintiff an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business."

³⁴³ *Lesters Leather & Skin Co. Ltd. v. Home & Overseas Brokers Ltd.* [1948] 64 T. L. R. 569 at 25.

been to reduce the loss.³⁴⁴ Nor need he take any step which is contrary to business ethics and which would tend to lower or ruin his commercial reputation.³⁴⁵ Nor is he under an obligation to destroy his own property to reduce the damages payable by the defaulting seller. Furthermore, the buyer may not have the financial means to mitigate his loss; in such a case, he is not obliged, for the purpose of reducing damages, to do that which he cannot afford to do.³⁴⁶

Provided, however, that the aggrieved buyer acts reasonably in an effort to minimise the loss he may recover the full amount of his loss even if it later transpires that the price he paid is higher than the market value at the due delivery date, so that he has, in effect, increased his loss.³⁴⁷ Conversely, where the buyer has actually minimised any part of his loss he cannot claim recovery for that part, even where he has done more than reasonable by way of mitigation.³⁴⁸ The reason for that is plain, that is, the purpose of damages, as was indicated, is to compensate the buyer for loss he has suffered by placing him in as good a position as if the contract had duly been performed, but not in a better position.

2.3.4. Relevance of Fault

In English law it does not matter for the purpose of damages for breach of sale contract whether the breach was deliberate or accidental. In some cases where non-performance is caused by supervening impossibility the contract may be frustrated, in which case there will be no breach. Subject to that possibility, however, liability for breach of contract is therefore strict, in the sense that the aggrieved buyer does not have to show that the breach was committed deliberately or negligently.³⁴⁹ The reason is clear; the award of damages for breach of contract is to compensate the party who is injured as a result of the other party's breach.

2.4. Measure of Damages

So far we have been concerned with the principle of compensation and the kind of loss for which an injured buyer may be entitled to claim damages. Where a particular head of loss satisfies the preceding rules the next significant question is how to measure the recoverable

³⁴⁴ *Pilkington v. Wood* [1953] 1 Ch. 770 at 777.

³⁴⁵ *James Finlay and Co. Ltd. v. N. V. Kwik Hoo Tong Handel Maatschappij* [1929] 1 K.B. 400, at 410.

³⁴⁶ See e.g., *Dodd Properties (Kent) Ltd. v. Canterbury City Council* [1980] 1 All E.R. 928, per Megaw LJ at 935. See further, Mark, M., (1981) at 248; Schmitthoff, C. M., (1966) at 187; Schmitthoff, C. M., (1961) at 364; MacIntosh J. G., Frydenlund D. C., (1987) at 119; Bridge, M., (1989) at 400.

³⁴⁷ See e.g., *Melachrino v. Nicholl & Knight* [1920] 1 K.B. 693 at 697; *Lloyds & Scottish Finance Ltd. v. Modern Cars & Caravans (Kingstons) Ltd.* [1966] 1 Q.B. 764 at 782. See also Schmitthoff, C. M., (1966) at 186; Guest, A.G., *et al.*, (1997) Para. 16-052.

³⁴⁸ See also, Guest, A.G., *et al.*, (1997) Para. 16-050.

³⁴⁹ *Fridman, G. H. L.*, (1986) at 642.

damages in terms of money. The question of computation of recoverable damages must be distinguished from that of recoverability of damages.³⁵⁰ The former arises where it is proved that a particular loss is recoverable. After establishing the fact that the loss is of a kind which in principle is recoverable the question arises upon what criterion the amount of damages must be quantified.

As explained above, an injured buyer is given a general right to recover damages for losses he has suffered as a result of the seller's breach, in whatever form it occurs. As far as the measure of special damages are concerned, there seems not a great deal of difference between the different types of breach. But in relation to normal damages, different types of breach lead to different practical results and their consequences in monetary terms would *prima facie* be differently evaluated. It is perhaps for this reason that English lawyers examine these forms of breach separately. Following this method, the various formulae upon which the buyer's damages are measured will be discussed under the following headings. However, it is appropriate to deal first with the situations covered by statutory rules - non-delivery and defective delivery - and then with the situation not covered - late delivery, where analogy can be found.

2.4.1. Non-Delivery

The action for non-delivery arises where goods are not delivered at all but also when goods which are not in conformity with the contract are tendered and lawfully rejected by the buyer. In both cases, a buyer who has suffered loss can claim damages for non-delivery.³⁵¹ In the case of non-delivery the basic measure is the difference in value rule. The rule is regulated by s. 51 (2) of the Act as follows:

“The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.” (underline added)

For the measure of the difference in value, the Sale of Goods Act distinguishes between the two cases: where there is a market and where there is no available market for the goods purchased under the contract.

³⁵⁰ Farwell L.J. in *Chaplin v. Hicks* (1911) 2 K.B. 786 at 797. See also, Cheshire, Fifoot and Furmston, (1996) at 607-608; Wilson, J.F. and Slade, C.J., (1952) at 458-459.

³⁵¹ The Act does not make clear how the buyer's damages are to be measured where the seller has made short delivery. However, in *Sealace Shipping Co. Ltd. v. Oceanvoice (The "Alec M")* [1991] 1 Lloyd's Rep. 120, it was held that the appropriate measure for the case of short delivery was damages for non-delivery. It seems that in the case of short delivery the buyer may resort either to the provision under s. 30 (1) and accept that part actually delivered and reduce the price by that of the missing part or recover that part of the price if he has already paid; or to regard the seller's failure to deliver part of the goods as a case of non-delivery and claim damages in accordance with s. 51. The first option will be in his favour where the market price has fallen, whereas the latter can be advised when the market price of the contract goods has risen. He may also be entitled to claim damages for consequential losses provided the rules of remoteness are satisfied.

2.4.1.1. Where There is an Available Market

Where there is a market for the purchased goods, the difference in value is *prima facie* to be assessed by reference to the market price. The case is expressly addressed by the Sale of Goods Act 1979 in s. 51 (3) as follows:

“Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current³⁵² price of the goods ...”³⁵³

Application of the market rule raises a significant question: Does the buyer's actual substitute purchase or actual sub-sale affect the application of the rule?

(A) Market Price Rule and Substitute Purchase

Application of this *prima facie* rule does not depend upon whether or not the injured buyer has gone into the market and purchased substitute goods. So the actual sub-purchase should not, in principle, be taken into account in preference of the market price rule, though it may be evidence of the market price.³⁵⁴ In spite of that, such a sub-purchase may affect the application of the rule in some cases. In this case, a distinction has been drawn between two events. If the buyer immediately proceeds to purchase substitute goods at a price higher than the market price, he can only recover the difference between the contract and the market price.³⁵⁵ This obviously means that the *prima facie* rule applies here. But if the sub-contract is made immediately after the seller's failure to deliver at a price less than the market price, it is not clear whether the seller can take advantage of this to reduce damages he would otherwise to pay. Although there is no authority directly on this point, the editors of *Benjamin's Sale of Goods* suggest that the *prima facie* rule in s. 51 (3) should apply to this situation. The suggestion has been justified on the grounds that “it cannot be said that the buyer's opportunity to buy at the bargain price arose only because of the seller's breach: even if the seller had fulfilled his obligation by delivering the promised goods, the buyer could also have bought the other goods at the lower price.”³⁵⁶ Moreover, the contract to buy substitute goods at such a price is an extraneous event to which the seller has no connection and is thus *res inter alios acta*.³⁵⁷ But if the buyer, instead of purchasing the substitute goods immediately after the seller's failure to deliver does not proceed to make a sub-contract, the market price

³⁵² As is seen, the Act uses two terms “market” or “current” price. It seems that there is no difference between the two terms, the latter is used simply as an explanation of the former.

³⁵³ The sub-section assumes that the buyer has not paid the price in advance to the seller: if he has, the damages must also cover the price.

³⁵⁴ McGregor, H., (1997) Para. 829.

³⁵⁵ Guest, A. G., et al, (1994) vol. 2, Para. 41-291.

³⁵⁶ Guest, A. G., et al, (1997) at Para. 17-018.

³⁵⁷ Goode, R. M., (1995) at 395.

rule would be applied even if he has made the sub-contract at a price less than the market one.³⁵⁸

(B) Market Price Rule and Sub-Sale

It is also said that the effect of the application of the *prima facie* rule is that sub-contracts are to be regarded as 'accidental' to the issue of damages and as being "circumstances peculiar to the plaintiff which cannot affect his claim one way or the other."³⁵⁹ The rule will be applied apart from the fact that damages recoverable thereunder might exceed, or fall short of, the actual profits which the aggrieved party would have made had the principal and sub-contracts been carried out. The rule was clearly expressed in *Rodocanachi v. Milburn*³⁶⁰, concerned with an action against carriers for non-delivery of cargo when the ship sank because of its master's negligence.³⁶¹ The House of Lords in *Williams Bros v. Ed. T. Agius Ltd.*³⁶², applying the rule in *Rodocanachi v. Milburn* to the sale of goods, held that the true measure of damages which the buyers could recover was the difference between the contract price and the market price and not the difference between the contract price and the resale price. In that case, Lord Dunedin observed that in a question of the measure of damages there must be a distinction between non-delivery and delayed delivery and the rule under *Wertheim v. Chicoutimi Pulp Co.*³⁶³, decided by the Privy Council, should be applied to the latter.³⁶⁴

2.4.1.2. Where There is no Available Market

The market price rule has been applied by the English courts whenever possible, even where it produced hardship in individual cases.³⁶⁵ Nevertheless, it is a *prima facie* rule and it will not apply if there is no market.³⁶⁶ In such circumstances, recourse must be made to the general rule prescribed by s. 51. (2). For this purpose, the court must determine the amount of

³⁵⁸ See *Campbell Mostyn (Provisions) Ltd. v. Barnett Trading Co.* [1954] 1 Lloyd's Rep. 65. This is because the buyer is accepting the risk of market fluctuations. See also, Guest, A. G., *et al.*, (1994) vol. 2, Para. 41-291.

³⁵⁹ Per Scrutton L.J. in *Slater v. Hoyle & Smith* [1920] 2 K.B. 11 at 23. For more cases see, Guest, A. G., *et al.*, (1994) vol. 2, Para. 41-295, fn. 48; Guest, A. G., *et al.*, (1997) Para. 17-027 and authorities its editors cited in fn. 4. It is to be stressed that the question whether the re-sale price is relevant or not arises where the sub-sale is actually made and it is relied on by the defendant to reduce a claim for loss of value which was not alleged to be too remote. It is quite different from the sub-sales relied on by the plaintiff to increase the damages by reference to the lost of profits which he may suffer when he had lost an opportunity to sell the goods on favourable terms. The former is a question of mitigation, while the latter falls into the question of remoteness. Lost resale profits could be recovered by claiming under s. 54 or the second limb of *Hadley v Baxendale* rule.

³⁶⁰ (1886) 18 Q.B.D. 67 at 77

³⁶¹ In that case, Lord Esher laid down the law as follows: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods." (*ibid.*, at 77).

³⁶² [1914] A.C. 510.

³⁶³ [1911] A.C. 301.

³⁶⁴ *Ibid.*, at 522.

³⁶⁵ See e.g., *Thol v. Henderson* (1881) 8 Q.B.D. 457 (sub-contract by buyer disregarded). See also, Mark, M., (1981) at 232; Bridge, M., (1997) at 561.

³⁶⁶ Devlin J. in *Kwei Tek Chao v. British Traders and Shippers*, [1954] 2 Q.B. 459 at 489.

recoverable damages by the way of ascertaining, by way of estimation, the value of the purchased goods according to various factors may be appropriate in any case. In this connection, the court will look at the case to see whether the buyer bought the goods for the purpose of resale or to use them in his business as an income-producing asset. Each case turns on its particular circumstances, and is usually complicated by the question of special damages could be recovered under s. 54 of the Act or the second limb of *Hadley v Baxendale* rule.³⁶⁷ Where the court is satisfied that any peculiar circumstance was or ought reasonably to have been within the seller's contemplation where the contract was made it would rely on it to ascertain the value of the goods. For instance, where the buyer ordered goods to be specially manufactured for himself, the buyer's damages will be *prima facie* the difference between the contract price and their value³⁶⁸ at the time they had to be delivered. In this respect, the buyer may be entitled to recover damages for the additional cost of buying reasonable alternative goods, or of adapting or modifying alternative goods for his purpose.³⁶⁹ Similarly, where the seller was aware of the buyer's intention to buy the goods for the purpose of resale to a sub-buyer, the re-sale price may be evidence of their value, provided that the resale price is not unusually high.³⁷⁰

In the absence of an available market for the purchased goods he is also required to mitigate his loss. For this purpose, he must take reasonable steps to find a new source to provide him with substitute goods and if he acts reasonably the price at which he bought them will be the basis for assessing his damages under the general principle of s. 51 (2). In this respect the buyer may be entitled to recover as damages the reasonable cost he has incurred for procuring goods which are the nearest available equivalent in quality and price to the goods he has purchased under the contract. In procuring the nearest equivalent, the buyer may be forced to purchase goods of superior quality and so higher in price than the contract goods. However, he will be entitled to recover the extra costs incurred provided that he has acted reasonably.³⁷¹

³⁶⁷ *Hydraulic Engineering Co. Ltd. v. McHaffie* (1878), 4 Q.B.D. 670 (special damages); *Grebert-Borgnis v. J. & W. Nugent* (1885) 15 Q.B.D. 85. (goods made to order). See also, mark, M., (1981) at 234)

³⁶⁸ It has been argued that the 'value' of goods for which no substitute are available may, in appropriate circumstances, include an element of subjective or idiosyncratic value (Guest, A. G., *et al*, (1997) Para. 17-020, no. 56)).

³⁶⁹ See also, Atiyah, P. S. & Adams, J., (1995) at 488.

³⁷⁰ See e.g., Devlin J. in *Kwei Tek Chao v. British Traders and Shippers*, [1954] 2 Q.B. 459 at 489. See also, Guest, A. G., *et al*, (1997) Para. 17-020 and *seq*; Atiyah, P. S. & Adams, J., (1995) at 487-488.

³⁷¹ *Hinde v. Liddell* (1875) L.R. 10 Q.B. 265 at 268, 270; *Blackburn Bobbin Co. Ltd. v. T. W. Allen & Sons, Ltd.* [1918] 1 K.B. 540 at 554. See also, Guest, A. G., *et al*, (1997) Para. 16-071, and 17-022; Guest, A. G., *et al*, (1994) vol. 2, Para. 41-292 and *seq*; Bradgate, R., (1995) at 263.

Similarly, the rule can be displaced where it would be inappropriate.³⁷² For instance, where the buyer has bought to sell to his sub-buyer the very same goods he purchased from the seller as specific goods,³⁷³ or he has fixed the same delivery date in the contract of resale as in the original contract,³⁷⁴ the market price rule will not apply, for when the seller fails to deliver in such situations the buyer is not able, despite the presence of an available market, to avoid loss under the resale contract. The buyer can, however, recover damages for that loss only where such special circumstances were reasonably contemplated by the seller at the time of original contract.³⁷⁵

2.4.2. Non-Conforming Delivery

As in the case of non-delivery, the basic measure in the case of non-conforming delivery is the difference in value. The rule is prescribed by s. 53 (2) as follows:

“The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty” (emphasis added),

The rule is a general applicable to all cases unless there is an available market for the goods in question. Where there is a market the damages must be measured by reference to the market price of the sound and defective goods as provided by s. 53 (3).

2.4.2.1. Where There is an Available Market

Where there is an available market for conforming goods, the market price must be taken as the warranted value. In this respect, s. 53 (3) lays down:

“In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.”³⁷⁶

³⁷² See e.g., Per Upjohn J. in *Thompson (W. L.) v. Robinson (Gunmakers) Ltd.* [1955] 1 Ch. 177 at 188; Lord Wilberforce in *Johnson v. Agnew*, [1980] A. C. 367 at 401. See also the authorities cited in: Schmitthoff, C. M., (1966) at 181 no 61.

³⁷³ *Williams Bros v. Ed. T. Agius Ltd.* [1914] A.C. 510 at 523; *The Arpad* [1934] P. 189 at 204.

³⁷⁴ *Kwei Tek Chao v. British Traders and Shippers*, [1954] 2 Q.B. 459 at 489-490.

³⁷⁵ Guest, A. G., *et al*, (1994) vol. 2, Para. 41-295. Cases such as *R & H Hall Ltd and W H Pim (Junior) & Co. Ltd* [1928] 33 Com. Cas. 324, might be explained by this way. In that case, the House of Lords saw the market rule as an inappropriate one and held that the buyer's damages should be quantified by reference to the re-sale price formula. However, there is the possibility to argue that it was concened with the recovery of damages under the second limb of the *Hadley v. Baxendale* rule. For this reason, in describing the likelihood of the foreseeability of the buyer's sub-sale, different criterion were used by the law Lords (see the headnote of the case, [1928] 33 Com. Cas. 324 at 325). See also, Devlin J. in *Kwei Tek Chao v. British Traders* [1954] 2 Q.B. 459 at 489-490; Guest, A. G., *et al*, (1997) Para. 17-031; Atiyah, P. S. & Adams, J., (1995) at 485-486; Bradgate, R., (1995) at 262-263.

³⁷⁶ Although the Act in this section does not use the language of market, case law has used it (see e.g., *Slater v Hoyle and Bence Graphics* explained in the text).

When the market rule is applicable, the contract price has no relevance, though it may be regarded as an evidence of the market price where there is little other evidence.³⁷⁷ This is because the buyer's complaint is not that he will have to buy a substitute from another source, but it is about how much more the goods would have been worth if they would have been delivered on the due delivery date in proper condition.

Re-Sale Price or Market Price? The question which arises here is whether the buyer's damages for breach of warranty are to be measured by reference to the re-sale price or the market price. The law as it stands now is not quite clear. Two differently decided cases are available on the question. In the one hand, in *Slater v. Hoyle & Smith Ltd.*³⁷⁸, the Court of Appeal favoured the market rule.³⁷⁹ On the other hand, the same court in the very recent case of *Bence Graphics International Ltd. v. Fasson UK Ltd.*³⁸⁰ has disregarded the market rule and favoured the re-sale price rule. The case was concerned with a contract to supply vinyl film to make identification decals for bulk containers. It was a term of the contract that the film would survive in good legible condition for at least five years. The defendants supplied the film for the plaintiffs who printed words or numbers on them and cut them to size so that they could be applied to the containers and subsequently most of them were used by them to make decals for Sea Containers Ltd. However, after the passage of some period it transpired that the film manufacturers used insufficient ultra-violet stabiliser so that the film tended to degrade and some decals became illegible. As a result, the customers of Sea Containers expressed their extensive complaints about the poor labelling of their containers, although they had not sued the plaintiffs for supplying defective items.³⁸¹ The plaintiffs sued the suppliers to recover damages for breach of contract. In that case, the primary question was how the damages for delivery of defective product were to be measured. At first instance, Morland J., applying the *prima facie* rule prescribed in s. 53 (3) of the Sale of Goods Act, held that the suppliers' liability should be ascertained by reference to the difference between the value of the goods at the time of delivery and the value they would have had if they had fulfilled the

³⁷⁷ See e.g., *Minster Trust Ltd. v. Traps Tractors Ltd.* [1954] 3 All E.R. 136. See also, Mark, M., (1981) at 243; McGregor, H., (1997) Paras. 876-877.

³⁷⁸ [1920] 2 K.B. 11.

³⁷⁹ In that case, Scrutton L.J., treating the market price rule as general applicable to all cases, said: "..., sub-contracts do not come into account, ... The difference between the two market prices should be the measure of damages. If the buyer delivers under the sub-contract the damaged goods and has to pay damages, these damages will not be the measure of damages. ... The result seems the same if they are less; it is *res inter alios acta*: 'circumstances peculiar to the plaintiff,' which cannot affect his claim one way or the other." (ibid., at 22-23).

³⁸⁰ [1997] 1 All E.R. 979.

³⁸¹ See Otton LJ, [1997] 1 All E.R. 979 at 982).

contract term.³⁸² However, the Court of Appeal, by a majority (Thorpe LJ dissenting), reversed this judgment and held the defendants liable for damages to be measured on the basis of the plaintiffs' liability to the subsequent or ultimate users of the plaintiffs' product incorporating the defective vinyl supplied by the defendants. The Court of Appeal held that section 53 (3) laid down a *prima facie* rule, from which the court might depart in appropriate circumstances. On the facts of the case, Otton LJ, justifying the departure from the *prima facie* rule, observed that *Slater v. Hoyle* could be distinguished narrowly³⁸³ from the present case, since in that case the sub-sale was of substantially the same goods, whereas in the instant case the goods had been substantially processed or converted by the buyer and it was certainly within the contemplation of the seller at the time of making the contract that the goods sold would have been used for the Sea Containers. In his Lordship's view, once the goods had been converted in a manner which was contemplated by the parties, *Slater* should not be applied and damages must be measured by reference to the sub-sale. Auld LJ, concurring with Otton LJ in non-application of *Slater* case in the instant case, did not agree with him that *Slater* could be distinguished from the instant case. In his Lordship's view, the time had come for *Slater* to be reconsidered at least in the context of claims by a buyer for damages on account of breach of warranty where he had successfully sold on the subject matter of the contract in its original or modified form without being sued by his sub-buyers.³⁸⁴ He then criticised the reasoning of *Slater's* case on a number of grounds.³⁸⁵

2.4.2.2. Where There is no Available Market

As pointed out earlier, the market rule is a *prima facie* rule and will not come into play where there is no market. In such cases, the value must be ascertained by other means, such as the contract price,³⁸⁶ resale price,³⁸⁷ the cost of putting the goods into their warranted state³⁸⁸, the cost of buying substitute goods,³⁸⁹ or even by reference to the price offered for the goods by a sub-purchaser before the defect was discovered (where the value of warranted goods is the case)³⁹⁰ and with knowledge of their defective conditions.³⁹¹

³⁸² The judge regarded the whole films supplied by the defendants as worthless and as result held them liable to pay £564,328. 54 damages with interest.

³⁸³ [1997] 1 All E.R. 979 at 988.

³⁸⁴ *Ibid.*, at 992.

³⁸⁵ *Ibid.*, at 994. However, this case itself has been criticised by Treitel, G. H., (1997) 189.

³⁸⁶ Where there is no evidence as to the market value of the goods which comply with the contractual description and quality, as it happened in *Dingle v. Hare* (1859) 29 L.J.C.P. 143.

³⁸⁷ As suggested in *Clare v. Maynard* (1837) 6 AD. & E. 519.

³⁸⁸ *Minster Trust Ltd. v. Traps Tractors Ltd.* [1954] 3 All E.R. 136 at 156.

³⁸⁹ See *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London* [1912] A. C. 673. In this case the House of Lords accepted that the cost of substitute machines (turbines) could be awarded, but held that in assessing the damages any extra profit to the buyer resulting from the replacement of the defective machines should be taken into account.

³⁹⁰ As suggested in *Clare v. Maynard* (1837) 6 A. & E. 519.

2.4.2.3. Damages and the Defence of Set-off

In the case of non-conforming delivery, s. 53 of the Sale of Goods Act gives the buyer two options either to claim damages as described above or to withhold a part or all of the contract price as a self-help remedy. The case will arise where the buyer has not paid the price in advance. In such a case, under sub-section (1) (a), a buyer who elects to accept, or, is required to accept the non-conforming goods is entitled to “set up against the seller the breach of warranty in diminution or extinction of the price.” Accordingly, a buyer who is tendered non-conforming goods may exercise a measure of self-help, by simply withholding part or all of the price where the seller sues him for the price. His claim for damages may completely extinguish his liability to pay, even it is too late to reject.³⁹² Sub-section (4) of s. 53 also provides: “The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.”³⁹³

The sub-section talks of ‘further damage’. But it is not clear whether the term refers to fresh damage the buyer may suffer as a result of non-conforming goods, for example, by reason of latent defect, or if, it refers to damage which was not taken into account in the first action when assessing the extent of the reduction of price, as *Mondel v. Steel*³⁹⁴ suggests. Another possible meaning has been suggested that it may refer to a sum ‘over and above’ the price at least in cases where the breach of warranty had been set up in ‘extinction’ of the price. That is, if the buyer’s damages exceed the price, he may claim the excess in separate proceedings or by means of a counterclaim in the seller’s action for the price.³⁹⁵

It should be recalled that the buyer is not deprived of his claim for damages where the buyer has paid the full price or the seller has recovered the full price by an action against him. Thus, the buyer can subsequently bring a separate action against the seller for damages resulting from breach of warranty.³⁹⁶ The rule has been justified on the ground that this is because the existence or extent of defect may not become apparent to the buyer until after the buyer has paid the price to the seller.³⁹⁷

³⁹¹ See also, Mark, M., (1981) at 243-244; Bradgate, R., (1995) at 266; Goode, R. M., (1995) at 406; A. G., *et al.*, (1997) Para. 17-049.

³⁹² See e.g., *Mondel v. Steel* (1841) 8 M. & W. 858.

³⁹³ See e.g., *ibid.*, at 871-872. In that case, the buyer also claimed for further damages for costs he incurred in respect of repairing the defective ship. However, the court refused to hold the manufacturer liable for the further damages.

³⁹⁴ (1841) 8 M. & W. 858.

³⁹⁵ Guest, A. G., *et al.*, (1997) Para. 17-047; Guest, A. G., *et al.*, (1994) vol. 2, Para. 41-303; Mark, M., (1981) at 244; Bradgate, R., (1995) at 265.

³⁹⁶ See the building contract case: *Davis v. Hedges* (1871) L.R. 6 Q. B. 687 at 690.

³⁹⁷ Guest, A. G., *et al.*, (1997) Para. 17-047.

2.4.3. Late Delivery

The Sale of Goods Act does not provide an express provision dealing with the measure of damages for late delivery. Case law has not clearly examined how the buyer's damages should be measured where the seller delayed in making delivery. In spite of lack of express authority on the point, English writers, referring to some cases decided in other areas, suggest that the buyer's damages should be measured by reference to the difference in the market prices prevailing at the agreed and actual dates of delivery.³⁹⁸ However, depending on whether the contract goods were bought for resale or use in an income-producing asset, the measure of damages for delay in delivery will vary in practice.

2.4.3.1. Goods Purchased for Resale

Where the goods are purchased for resale the natural loss resulting from delay must be quantified by comparing the market price or value of the goods at the due delivery date with the market price or their value at the actual delivery date. Where there is an available market for goods of the contract description at the due delivery date, the normal measure of damages is the difference between the market price at the due delivery date and the date of actual delivery. Where there is no available market, the recoverable amount will be the difference between the value of the goods at the contract delivery date and their value at the date of actual delivery: that is, the amount by which the value has fallen and which the buyer has lost by delay in his reselling.³⁹⁹ In the latter case, the value of the goods at the time fixed for delivery and at the actual date of delivery is to be determined by whatever test is the most appropriate in the light of the evidence available.⁴⁰⁰ In this respect, the court may rely on the contract price, the price at which a third party has agreed to buy the goods from the buyer.

2.4.3.2. Goods Purchased for the Buyer's Business

Where the goods are purchased for the purpose of use in the buyer's business, the appropriate measure might be some other criterion since the buyer does not complain that he has been tendered an asset whose realisable value was diminished by reason of delay. His claim is for deprivation of the use of the goods during the period of delay whereby he has sustained costs of hiring substitute goods for that period and/or additional costs he may have incurred as a

³⁹⁸ *Borries v. Hutchinson* (1865) 18 C. B. (N.S.) 445 at 465 with approval by *Elbinger Actien-Gesellschaft v. Armstrong* (1874) L.R. 9 Q.B. 473 at 477, which was in turn approved by Lord Pearce (*obiter*) in *The Heron II* [1969] 1 AC 350 at 417-418. The same formula is confirmed by Lord Dunedin in *Williams Bros v. Ed. T. Agius Ltd.* ([1914] A.C. 510 at 522. See also McGregor, H., (1997) Para. 854; Atiyah, P. S. & Adams, J., (1995) at 490; Greig, D. W., (1974) at 289; Bridge, M., (1997) at 570.

³⁹⁹ See Goode, R. M., (1995) at 402; Guest, A. G., *et al.*, (1997) Para. 17-037; Bradgate, R., (1995) at 264; Treitel, G. H., (1995) at 856; Sealy, L.S. & Hooley, R. J. A., (1994) at 437.

⁴⁰⁰ See, e.g., *Fletcher v Tayleur* (1855) 17 C.B. 21. See also, Goode, R. M., (1995) at 402; Guest, A. G., *et al.*, (1997) Para. 17-037.

consequence of having to make do without the goods for the period of delay. In such situations, apart from pure inconvenience, the buyer, in fact, seeks to be reimbursed for loss of income-profit and for any expenditure he has incurred in taking reasonable steps to mitigate such loss during the period after the goods should have been delivered until the actual date of delivery.⁴⁰¹

If the asset is of an income-producing kind- e.g. because it is a production machine or because it is utilised in the provision of income-producing services or is an asset that the buyer acquired for the purpose of letting on hire - the normal measure of damages is the loss of profit that the seller could reasonably have contemplated as flowing from the breach⁴⁰². Where the goods were bought to be used for a specially lucrative purpose the buyer will only be able to claim a sum equal to the profit he would have obtained using them for their normal purpose, unless his special purpose was reasonably foreseeable by the seller when the contract was made. The latter point was clearly illustrated in *Victoria Laundry v. Newman Industries* which was early mentioned.⁴⁰³

2.4.3.3. Relevance of Actual Resale in Measuring Damages

The question arises here, as in two other cases, whether actual resale by the buyer should be disregarded or it must be taken into account in fixing the damages. Two differently decided cases are available on the issue. In *Wertheim v. Chicoutimi Pulp Co.*⁴⁰⁴, the Privy Council held that where the buyer has managed to resell the purchased goods at a price more than the market price at the actual delivery date the court must take into account such actual resale in fixing the amount of damages the seller is liable to pay. On the other hand, in *Slater v. Hoyle & Smith Ltd.*⁴⁰⁵, a case of non-conforming delivery, the Court of Appeal confirmed that the below-market price realised by the buyer on resale should be ignored in assessing the recoverable damages.⁴⁰⁶ Scrutton L.J., addressing the *Wertheim v. Chicoutimi* case, said:

⁴⁰¹ See the earlier authorities in respect of delay in delivery of ships or vessels such as, *In re Trent & Humber Co. Ex parte Cambrian Steam Packet Co.* (1868) L.R. 4 Ch. App. 112 (contract to repair the plaintiff's vessel).

⁴⁰² However, where there is an available market for the goods, the buyer is required under the rules of mitigation to avoid loss of profit by immediately purchasing or hiring substitute goods.

⁴⁰³ See in this respect, Goode, R. M., (1995) at 402-403; Guest, A. G., *et al*, (1997) Para. 17-039; Schmitthoff, C. M., (1966) at 189 and *seq.*

⁴⁰⁴ [1911] A.C. 301.

⁴⁰⁵ [1920] 2 K.B. 11.

⁴⁰⁶ In that case, Scrutton L.J. said that sub-contracts were *res inter alios acta*; they were "circumstances peculiar to the plaintiff," which cannot affect his claim one way or the other. If the buyer is lucky, for reasons with which the seller has nothing to do, to get his goods through on the sub-contract without a claim against him, this on principle cannot affect his claim against the seller any more than the fact that he had to pay very large damages on his sub-contract would affect his original seller." (*ibid.*, at 23). *Cf.* the statement of Lord Dunedin in *Williams Bros v. Ed. T. Agius Ltd.* ([1914] A.C. 510), where he observed that in a question of the measure of damages there must be a distinction between non-delivery and delayed delivery and the rule under *Wertheim v. Chicoutimi* should be applied to the latter (*ibid.*, at 522.).

“This is a decision of Privy Council, and although not technically binding on us, is of course entitled to the greatest respect” but said that it was “difficult to see how this fits in with the principles ...”, and concluded that “... all the English decisions show that a plaintiff cannot measure the real value of what he has lost by reference to a contract peculiar to himself, for which the defendant is not responsible, and that his loss therefore is not measured by that price.”⁴⁰⁷ Moreover, the buyer was not under any duty to perform his delivery obligation vis-à-vis the sub-buyer by delivering the contract goods, but he could purchase other goods and use them for the sub-contract. As a result, he would have been left with the original goods on his hands so that their market price at actual delivery would have been the relevant figure in assessing the damages.

In contrast, as explained in the case of breach of warranty, the Court of Appeal has departed from *Slater v Hoyle* case in *Bence Graphics*. In that case, two members of the Court have agreed that under some circumstances the market price rule should be replaced by re-sale price. However, the case was concerned with breach of warranty and two members of the Court have based their judgments on different reasoning. Otton LJ said that *Slater v. Hoyle* could be distinguished narrowly⁴⁰⁸ from *Bence Graphics*, while Auld LJ, criticising the rule under *Slater*⁴⁰⁹, did not agree with his reasoning and suggested that *Slater* should be reconsidered at least where the buyer has claimed for damages on account of breach of warranty and he had successfully sold on the purchased goods in their original or modified form without being sued by his sub-buyers.⁴¹⁰

English commentators have taken different views. While some authors have accepted that the law stated in *Wertheim* was a good law and should be followed where the seller has delayed in delivering the goods⁴¹¹, the others have agreed with the *Slater* case and commented that the *Wertheim* case is hard to fit with general principles.⁴¹²

⁴⁰⁷ Ibid., at 23 and 24.

⁴⁰⁸ [1997] 1 All E.R. 979 at 988.

⁴⁰⁹ Ibid., at 994.

⁴¹⁰ Ibid., at 992.

⁴¹¹ For instance, see Waddams, S. M., (1983) Paras. 200-202 (particularly, Para. 201), distinguishing late delivery from the two other cases, argues the considerations applicable to the cases of non-delivery and defective delivery are not easily applicable to the case of late delivery; Burrows, A.S., (1994), at 146.

⁴¹² See e.g., Treitel, G. H., (1995) at 857; Beale, Bishop and Furmston, (1995) at 581 (with doubt); Guest, A. G., et al., (1997) Paras. 17-038 and 17-053 (with doubt); Goode, R. M., (1995) at 402; McGregor, H., (1997) Paras 342, 857;), Guest, A. G., et al., (1994) vol. 2 at Para., 41-300; Ogus A. I., (1973) at 345; Street, H., (1962) at 185; Greig, D. W., (1974) at 289-291 (the author, although criticises the reasoning upon which the decision was based, acknowledges that the decision itself is consistent with the international trade, see 290-291); Bridge, M., (1997) at 584-5, in which the author has seen the case as a decision “is probably right” (see also, Bridge, M., (1988) at 786). In respect of *Wertheim*, Professor Bridge also observes that “if the buyers were locked into the head contract in their dealings with the sub-buyers”, the sub-sale price should be taken into account (Bridge, M., (1997) at 583, and, Bridge, M., (1988) at 784). In comparison with the new decided case, *Bence Graphics*, Treitel has preferred the reasoning of *Slater* (Treitel, G. H., (1997) at 195).

2.4.5. Time of Assessment

The time by reference to which damages are assessed gives rise to no difficulty where the method of assessment is the actual substitute contract; for in that case assessment is in principle the difference between the purchase price and the contract price. The problem as to the time of assessment does, however, arise where damages are to be quantified by reference to the market price. In English law, the starting principle is that damages are to be assessed by reference to the market price at the time of breach.⁴¹³ So far as contracts for the sale of goods are concerned, the principle is stated in the Sale of Goods Act 1979 where the buyer has claimed damages for non-delivery. In this regard, section 51 (3) provides:

“Where there is an available market ... the measure of damages is *prima facie* to be ascertained ... at the time or times⁴¹⁴ when they ought to have been delivered, or (if no time was fixed) at the time of the refusal to deliver.”⁴¹⁵

However, this is a general rule applicable to the case of late delivery as well as defective delivery. Thus, where the seller has delayed in his delivery the buyer's damages are to be assessed by reference to the market value of the goods from the date when he should have delivered the purchased goods in accordance with the contract. The same is true where the seller has delivered non-conforming goods. His liability is measured by reference to the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty (s. 53 (3)).

The rule that the buyer's damages should be assessed by reference to the market price at the time of delivery is only a '*prima facie*' rule from which the court may depart in appropriate circumstances. For instance, it will not apply when, for some reason, it is not reasonable for the injured party to make a substitute contract at that time.⁴¹⁶ Likewise, where the defect in the goods is not discovered at the time of delivery the time when the value of the goods in their defective state is to be assessed may be postponed until the time when the buyer can reasonably be expected to discover the defect.⁴¹⁷ It may also be postponed where the buyer

⁴¹³ See generally, Waddams, S.M., (1981) 445; Mann, F.A., (1969) 516.

⁴¹⁴ As in the case of delivery of instalments within several successive times.

⁴¹⁵ As in the case of contract to deliver goods on demand or as required by the buyer. However, the concluding part of s. 51 (3) of the Act dealing with the situation where no time was fixed for delivery, is said to be inapplicable to cases of anticipatory breach (see *Millett v. Van Heek & Co.* [1921] 2 K.B. 369 at 376-377 (Atkin L.J.)). Thus should the seller repudiate the contract before the date for delivery arrives, damages are to be measured by reference to the market price at the time when the goods must be delivered not that prevailing at the date of repudiation. However, although the buyer, as already pointed out, is not bound to accept the seller's repudiation when it is first made (*White & Carter (Councils) Ltd. v. McGregor* [1962] AC 413), if he accepts the repudiation he is under the duty to mitigate his loss. See also, Guest, A. G., *et al.*, (1997), Paras. 16-075 - 16-076, 17-013 - 17-015.

⁴¹⁶ *Johnson v. Agnew* [1980] A. C. 367. See in this connection, Guest, A. G., *et al.*, (1994) vol. 2, Para. 41-290.

⁴¹⁷ *Naughton v. O'Callaghan* [1990] 3 All E.R. 191. This is the case where a c.i.f. buyer paid against the documents and later discovered that the goods were defective, and reject them. In such a situation, it has been

has resold the goods to a sub-buyer before examining them because they were packaged. In such a case, the date of examining would be the date for assessing the buyer's damages for defective goods, provided that the seller knew that the buyer intended to resell the goods at another place.⁴¹⁸

It is to be noted that although s. 51 of the Act speaks of the time of delivery of goods, the courts have interpreted the statutory wording in a broader sense to cover the cases of documentary sales under which the seller's duty to deliver the goods is performed by tendering the documents representing the goods.⁴¹⁹ Accordingly, in a c.i.f. contract, the time in which the goods ought to have been delivered is *prima facie* the time when the documents should have been tendered⁴²⁰ and not the time when the goods themselves should have arrived at the destination and this is the time from which the buyer ought to have bought on the market.⁴²¹

An illustration of the rule can be found in *Sharpe & v. Nosawa* itself. The case was concerned with a contract under which the sellers agreed to sell two parcels of Japanese peas c.i.f. London at £10 15s. per ton. One parcel to be shipped in May and the other in June, 1914. The whole of the first parcel was shipped, and part of the second was shipped at the proper time. A dispute arose and the sellers refused to ship the rest of the second parcel; but the buyers did not accept the repudiation. No time for tender of documents was specified under the contract. But if shipment had been made by the end of June, the documents representing the goods would have reached the buyer on 21st July, and the goods themselves would have arrived by the end of August. During the period the market price had risen and reached £12 per ton in London at the end of July and £17 10s. at the end of August. The question was whether the damages were to be measured by the market price in July, when the documents would have arrived in the ordinary course, on a June shipment of goods, or the price in August when the goods would have arrived, on the assumption that the voyage took

suggested that damages would no doubt be measured by reference to the date of rejection rather than the date of tender of documents (Guest, A. G., *et al*, (1997) Para. 19-161).

⁴¹⁸ See e.g., *Van Den Hurk v. R. Martens & Co. Ltd.* [1920] 1 K.B. 850 (packaged goods which the seller knew that the buyer intended to re-sell and which it was not practical to examine before they were despatched to the sub-buyer abroad).

⁴¹⁹ For instance, in *C. Sharpe & Co. Ltd. v. Nosawa* [1917] 2 K.B. 814, Atkin J. observed: "... the time or times when the goods ought to have been delivered, within the meaning of s. 51 of the Sale of Goods Act 1893, it seems to me that the words of that section mean the time or times when they ought to be delivered according to the mode of delivery contemplated by the contract. If the contract provides for delivery of the goods by delivery of the shipping documents, or by handing over to the buyer the key to the warehouse, the date for that event is the time 'when they ought to have been delivered' (ibid., at 821).

⁴²⁰ This is because their tender is a constructive delivery of the goods giving the buyer the power to deal with them.

⁴²¹ See also, *Garnac Co. v. HMF. Faure & Fairclough* [1966] 1 Q.B. 650 at 675.

about two months. In that case, Atkin J. held that the buyers' damages were to be assessed with reference to the London market price at the end of July.⁴²²

There is No Fixed Time for Delivery. Where the contract does not fix a particular time for delivery of the goods, the *prima facie* rule for the assessment of damages is based on the market price "at the time of refusal to deliver". However, the question which arises here is whether a contract for delivery of the goods within a reasonable time is a contract with a fixed time for delivery. In one case,⁴²³ it was held that such a contract is not a contract with a fixed time for delivery.⁴²⁴ The editor of *Benjamin's Sale of Goods*, however, suggests that "where delivery is to be made within a reasonable time of the making of the contract or from some other fixed point of time, the relevant market price should not necessarily be that prevailing at the date of the seller's refusal to deliver ... but at the time, perhaps later than the refusal, when it would have been reasonable for the seller to deliver."⁴²⁵ This is because from the latter time the seller will be in breach of the contract.

The principle is based on the view that any loss resulting from market movements after the time of breach is not caused by the breach but by the injured party's failure to mitigate by making a substitute contract. Since, however, the mitigation rule only requires the injured party to act reasonably, it follows that the principle of assessment by reference to the time of breach allows him some latitude. Thus where a seller failed to deliver and an exact substitute could not be obtained at the time of that failure, it was said that the buyer ought to have "a reasonable time to consider their position"⁴²⁶-amounting to about ten days- and the damages were assessed by reference to market prices at the end of the ten days.⁴²⁷

2.4.6. Relevant Place

Further question which arises from the application of the market price rule is to ascertain the place at which the market price to be referred to. The Act does not make any express provision as to the place at which the market price is to be measured. In some cases, various possible markets may be relevant for this purpose. For instance, in a c.i.f. contract, different

⁴²² *Ibid.*, at 821. In contrast, in a classic f.o.b. contract, damages for on-delivery may be assessed with reference to the time at which the seller should have put the goods corresponding with the contract conditions on board a ship which has to be nominated or designated by the buyer (Guest, A. G., *et al.*, (1997) Para. 20-099), for under such a contract, this is the time at which the seller will perform his delivery obligation (*ibid.*, Paras. 20-011 and *seq.*).

⁴²³ *Millett v. Van Heek & Co.* [1920] 3 K.B. 535.

⁴²⁴ But the Court of Appeal in the same case expressly reserved the court's decision on this point ([1921] 2 K.B. 369).

⁴²⁵ Guest, A. G., *et al.*, (1997) Para. 17-009. See also, Guest, A. G., *et al.*, (1994) vol. 2, Para. 41-288.

⁴²⁶ *C. Sharpe & Co. Ltd. v. Nosawa & Co.* [1917] 2 K.B. 814 at 821.

⁴²⁷ *Wroth v. Tyler* [1974] 1 Ch. 30. See also, Treitel, G. H., (1988) Para. 104.

at which the documents should be tendered, or at the place of the seller's failure to deliver or to appropriate goods may become relevant.⁴²⁸ It is not infrequent that there is an available market for the purchased goods in more than one of these places but with different prices. The question arises according to what place damages ought to be assessed? No clear authority can be found on the point. Some authors have suggested that the relevant place is generally the place at which the goods were to be delivered under the contract, since this is usually the market on which the buyer will buy.⁴²⁹ Nevertheless, it has been held that 'where' to the knowledge of both buyer and seller, goods are bought c.i.f. and f.o.b. for shipment to a particular market, the relevant values to be taken into consideration are the values of the goods upon that market on arrival there.⁴³⁰ This clearly means that the market price in c.i.f. and f.o.b. contracts is that which prevails in the place of destination of goods.

Conclusion

In light of this study it was seen that in English law primacy is given to damages as a remedy. An injured buyer is given a general right to claim damages for any loss he suffered as a result of the seller's breach of contract. Damages are awarded to compensate the injured buyer. The compensatory nature of damages has a number of consequences. First, the buyer is not entitled to claim damages unless he has suffered loss. Second, damages are not awarded to prevent the seller profiting from a breach of contract; its primary purpose is to put the injured buyer, so far as money can do so, into the same financial position in which he would have been, had the contract been performed properly. Third, fault is irrelevant: if the seller is in breach and the breach causes loss the seller is liable whether the breach was deliberate or accidental.

This could be linked to the absence of a separate right of price reduction in English law. Price reduction, as will be seen in the next chapters, is not compensatory, but primarily restitutionary in nature and is designed to prevent the seller from unjust enrichment. It is possible to say that problems such as those the English Court of Appeal had in *Bence Graphics International Ltd. v. Fasson UK Ltd.*⁴³¹ is due to the absence of price reduction as a separate remedy. In that case, the plaintiffs had claimed damages for losses they had not in

⁴²⁸ Guest, A. G., et al, (1997) Para. 19-164.

⁴²⁹ Atiyah, P. S. & Adams, J., (1995) at 484 (relying on *Attorney-General of Rep of Ghana v. Texaco Overseas Tankships Ltd. (The Texaco Melbourne)* [1993] 1 Lloyd's Rep, 471). On this view, where there is no market at the place of delivery, recourse should be had to the nearest market in which the goods are bought and sold (see *Attorney-General Rep of Ghana v. Teaco Overseas Tank Ships Ltd. (The Texaco Melbourne)* [1993] 1 Lloyd's Rep, 471; see also, Bridge, M., (1994) at 157. The same rule is accepted by the Convention (Art. 76 (2)).

⁴³⁰ See e.g., *Aryeh v. Lawrence Kostoris & Son Ltd.* [1967] 1 Lloyd's rep. 63, per Diplock L.J. at 71 and 73-4.

⁴³¹ [1997] 1 All E.R. 979.

fact suffered.⁴³² Accordingly, holding the defendants liable of that damages would have given the plaintiffs a windfall. On the other hand, holding the suppliers non-liable would have enriched them by allowing to receive money without giving a proper consideration. The court in fact resolved the problem by measuring the recoverable damages on the ground of the resale price formula. But one may argue that in such situations the doctrine of price reduction would work effectively.

It was also seen that English law gives little significance to specific performance. In this system specific performance is rarely awarded as a remedy. For this reason, it is less likely that an order is granted where the buyer has demanded that the seller cure his non-conforming performance by replacement or repair.

It has also been made clear that although English law seems to permit termination relatively easily by recognising the "theory of condition" and pre-classifying certain contract terms as "conditions", it has restricted the right to terminate the contract for breach, by developing the "theory of serious breach" and the 1994 Sale of Goods Act reforms. It seems that by having two different tests the law is seeking to achieve a balance between two competing policies: certainty and fairness. However, the law is doubly uncertain here because outside the area of legally classified terms (such as those in the implied terms of the Sale of Goods Act 1979) is very difficult to know which approach the court will adopt.

It was also shown that there are certain areas in which the law is not clear. First is that although the classification of the contract terms is justified on the grounds of the needs for commercial certainty, there is a surprising degree of uncertainty in relation to the relationship between rejection and termination and the existence and otherwise of a right to cure. Similarly, the law is not clear in respect of the time and degree of foreseeability of consequences required to justify termination under the theory of serious breach. The same is true as to the relationship of the tests of foreseeability in contract and tort, the effects of resales on the buyer's right to claim damages and the place at which the market price is to be measured.

⁴³² The plaintiffs had claimed the amount of the whole price as damages, while in fact they had not sustained such losses, since they had used a considerable number of the vinyl supplied by the defendants in their manufacturing process and had apparently lasted for part of the stipulated five-year period. Moreover, although the plaintiffs were, for the defect in the material, clearly in breach of their contracts with their customers and extensive complaints were subsequently made from the users of the containers, in fact only one minor claim had been made even up to the time when the case was considered by the Court of Appeal against the plaintiffs, who settled it by the supply of new decals at their own expense and in turn received agreed damages from the defendants (see *Bence Graphics International Ltd. v. Fasson UK Ltd.* [1997] 1 All E.R. 979, per Otton LJ at 982). See also, *ibid.*, per Auld LJ at 991 where he said "... it should not be set aside in that way so as to produce a result where the claimant will clearly recover more than his true loss."

CHAPTER THREE

BUYERS' REMEDIES

UNDER

THE CONVENTION

Introduction

Having considered the remedies available for the aggrieved buyer under English law, it is now time to examine the position of the Convention. Generally, under the Convention, two series of remedies are elaborated, one of them governing all the species of non-performance by the seller, the other governing all the non-performances of the buyer. As far as the buyer is concerned, Art. 45 opens the section on remedies for breach of contract by the seller by listing the remedies available to the buyer. Under this provision, the buyer may resort to the following remedies where the seller has failed to perform his obligations under the contract and the Convention:

- (i) claim for damages (Art. 45 (b)) as provided in Arts. 74-77;
- (ii) require the seller to perform his obligations (Art. 46 (1));
- (iii) require delivery of substitute goods by the seller (Art. 46 (2));
- (iv) require the seller to remedy the lack of conformity by repair (Art. 46 (3));
- (v) declare the contract avoided (Arts. 49 (1) (a) (b) and 51 (2));
- (vi) reduce the contract price (Art. 50);
- (vii) refuse to take delivery (Art. 52).

However, closer observation reveals that the list is far from being exhaustive. Further remedies are expressed in Arts. 71-73. Likewise, some commentators have suggested that a through reading of the remedial provisions of the Convention shows that the buyer is also given a general right to 'refuse to take delivery' where the seller fails to perform his delivery obligations in accordance with the contract and the Convention.¹ This remedy, as will be seen later is controversial.

These remedies are subject to an important provision. Under this provision, the buyer will lose the right to rely on non-conformity of the goods if he does not notify the seller of the lack of conformity within a reasonable time after he has, or ought to have discovered it (Art. 39 (1))²; and in any event within two years of actual delivery (unless this period is extended by the contract) (Art. 39 (2))³ unless the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer (Art. 40).⁴

¹ Maskow in: Bianca, C. M.; Bonell, M. J., (1987) at 390 and *seq.*; Enderlein, F.; Maskow, D., (1992) at 229 and *seq.*

² Art. 39 (1): "The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

³ Art. 39 (2): "In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were

As in English law, a general look at the remedial provisions of the Convention shows that they can be placed into three general categories: those which enable the buyer aggrieved by the seller's breach to withhold performance of his contractual obligations and bring the contract to an end, those which enable him to require the defaulting seller to fulfil the contract and those which provide for him some monetary relief. The following sections will examine in detail the provisions which provide the above remedies for the buyer where the seller has made a non-conforming delivery.

Section One

Withholding Performance and Termination

1.0. Introduction

The Convention contains some provisions which can be said to allow the buyer to withhold performance of his contractual obligations. However, as indicated in the English law chapter,⁵ there must be theoretically a distinction between the remedy under which he is simply given a right to withhold performance as long as the seller has not fulfilled his contractual obligations and the remedy under which he is entitled to terminate the contract. There can be found some provisions in the Convention under which the buyer is only given a right to withhold performance of his obligations without being entitled to terminate the contract. Termination in such cases will be justified where certain requirements are satisfied. The first part of this section determines where an injured buyer is entitled simply to refuse to perform his obligations and the second part ascertains where he is entitled to terminate the contract if the seller fails to perform his delivery obligations in accordance with the contract and the Convention.

2.0. Part One. Withholding Performance

2.1. Concept and Importance

Withholding performance under the Convention, as in English law, means that the buyer is entitled to refuse to perform his obligation without being required or even being entitled to terminate the contract. Obviously, if the requisites for the latter remedy are met and the buyer,

actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee." See also Art. 43 and then *cf.* Art. 44.

⁴ See also Art. 43 (2) where the seller has delivered goods contrary to Arts. 41 and 42.

⁵ See Chapter Two, Section One, 1.1.

before fulfilling his obligations has declared the contract avoided in accordance with Arts. 49, 51, 72 or 73 of the Convention, he is no longer obliged to perform his obligations (Art. 81 (1)). But such requisites may not be met or the buyer may not wish to declare the contract terminated, but rather demand goods fully conforming with the contract.

In the provisions regulating the buyer's remedies for seller's breach, although the Convention gives specific rights to withhold performance in certain cases, it does not make a general statement that the buyer is entitled to withhold performance of his obligations.⁶ The question is, therefore, whether the buyer has a *general right to withhold performance* of his obligations under the contract where the seller has performed his delivery obligations in a way which does not correspond with the contract or the Convention.

In this respect, some commentators, as pointed out above, have tried to infer from the Convention provisions that the buyer should be given a general right to *refuse to take delivery*. But it seems that they have failed to distinguish between the buyer's right to refuse to recognise goods the seller delivers as the contract goods and his right to refuse to take delivery and consequently they have relied on the provisions which concern the former rather than the latter. It is probably for the reason that the Convention has not expressly imposed on the buyer a duty to accept what the seller delivers as the contract goods. It is, however, proposed to examine these two possible rights separately. Although in practice both may often arise at the same time, in some cases the right to refuse to accept arises where the buyer has already performed his duty to take over the goods as defined in Art. 60.

From the buyer's point of view, the existence of the right to refuse to recognise the goods offered as the contract goods seems important, since the buyer will thus be entitled to resort to the remedies provided under Art. 46 (2) or (3). But what significance follows from the right to refuse to take delivery? It seems that the existence of the right to refuse to take delivery would also be significant for the buyer, not only in respect of the link between delivery and payment (Art. 58 (1) (2)), but also in regard to the passing of the risk (at least where the case falls into the scope of Art. 69). That is to say, as long as the seller does not deliver the goods in accordance with the contract and the Convention the buyer can refuse to take delivery and thereby return the risk to the seller. The seller would face delay, and in order to avoid the undesirable consequences of delay, he would strengthen his efforts to perform. Since taking delivery and payment of the price generally are linked, the buyer would have the

⁶ As a matter of terminology, the Convention, in different places, speaks of the right of "suspension" - in the case of prospective non-performance (Art. 71 (1)) -, the right to "refuse" - in the case of early or excess quantity delivery - (Art. 52) and the right to "reject" (Art. 86 (1)) -, but in this study the right is described by "withholding performance". All of these expressions are in fact particular instances of the application of a general right to withhold performance.

further advantages of paying later and not for non-conforming goods, for the seller who wants to obtain payment must take action against the buyer.

More importantly, the right will be significant where the seller fails to fulfil his obligations with respect to the place of delivery (Art. 31)⁷, or to specify the goods by notice (Art. 32 (1))⁸. The significance of the right is for the reason that the remedy prescribed under Art. 46 (2), (3) does not apply here, since it only relates to the seller's obligation to deliver conforming goods under Art. 35 and probably Arts. 41 and 42. In such cases, if the buyer has such a right he can refuse to take delivery and subsequently require performance according to Art. 46 (1), and fix an additional period of time in accordance with Art. 47 (1).⁹

The remedy will also be significant for the buyer where the seller partially or fully fails to perform his obligations relating to the quantity, quality and other description required by the contract (Art. 35) or fails to fulfil his duty under Arts. 41 and 42, that is where the goods delivered are not free of the rights or claims of third parties. In such cases the right to refuse to take delivery would be useful for the buyer where he wishes to require the seller to repair the non-conformity under Art. 46 (3). In such situations the buyer can, if he is entitled, by turning the risk of the goods to the seller persuade him to cure the non-conformity as quickly as possible. Accordingly, in the case of the seller's failure to deliver goods in accordance with Arts. 35, 41 and 42 the buyer is not required to take delivery of them in order to have them cured later but he can refuse to take delivery until cure is made.

Having considered the concept and importance of the remedy, the following discussion will try first to answer the question whether the Convention has recognised a general right to withhold performance and then to ascertain how the given right will work in different types of failure by the seller to perform his obligations.

2. 2. Withholding Performance as a General Right

A close examination of the Convention provisions will clearly show that the Convention has recognised the right to withhold performance for an aggrieved buyer on some occasions.

⁷ Art. 31: "If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists: (a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer; (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place; (c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."

⁸ Art. 32 (1): "If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods."

⁹ See also, Maskow in: Bianca, C. M.; Bonell, M. J., (1987) at 390, 391.

However, in some cases the Convention has expressly applied the rule and in others it has impliedly recognised it.

2.2.1. Prospective Non-Performance

The Convention has expressly applied the right to withhold performance in Art. 71 (1) under the heading of the right to 'suspend the performance of obligations'.¹⁰ Under this provision whenever it is apparent that a party, say the seller, will not be able to deliver goods or documents, the buyer is given a right to suspend the required steps leading to payment, such as the establishment of a letter of credit (Art. 54). However, the provision comes into operation only where it becomes apparent that the seller is about to commit non-performance of a substantial part of his obligations;¹¹ it does not concern where the seller has performed his delivery obligations in a way which do not correspond with the contract requirements.

For the provision to be applied certain requirements are to be satisfied. First, the inability to perform must be 'apparent' after the conclusion of the contract. If it was already apparent at the time of making the contract that one party would not be able to perform, the other party is not entitled to suspend his obligations. Second, the appearance of prospective failure to perform must be caused by either a serious deficiency in the ability to perform, or in the creditworthiness, or by conduct in preparing to perform or actually performing the contract (Art. 71 (1) (a) and (b)). Third, the expected failure must relate to a 'substantial part' of the obligations of the party who is about to commit the breach. There is, thus, no right to suspend where the prospective breach only relates to a minor part of the obligations.

2.2.2. Actual Non-Performance

The right to withhold performance is also impliedly recognised by Art. 58 (1)¹² of the Convention. Under this provision, where the contract is silent as to the time of payment the buyer is under the duty to pay only *when* the seller places the goods or the documents controlling their disposition at the disposal of the buyer. Hence, where the seller has failed to place the goods or documents at the buyer's disposal the latter is entitled to *refuse to pay* as long as the seller's failure continues.

¹⁰ Art. 71 (1): "A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract."

¹¹ See e.g., the statement of Bulgaria in: Official Records, (1981) at 375 para. 57; Secretariat Commentary, (1979) at 52-53; Bennett in: Bianca-Bonell, (1987) at 518; Honnold, (1990) at 484. See generally, Strub, M. G., (1989) 475.

¹² Art. 58 (1) provides: "... the buyer ... must pay it (the price) when the seller places either the goods or documents controlling their disposition at the buyer's disposal"

Similarly, it seems that the Convention has also accepted the right to withhold performance where the seller has delivered non-conforming goods. In that event, the buyer is impliedly given a right to *refuse to recognise* the seller's non-conforming delivery as a conforming delivery. The buyer's entitlement to refuse to accept the seller's non-conforming delivery can be inferred when it is proved that under the Convention the buyer is under a further duty to *accept* what the seller delivers in performance of the contract. The Convention provides no clear provision for this purpose. It simply provides: "The buyer must pay the price for the goods and *take delivery* of them as required by the contract and the Convention" (Art. 53).

What is certain is that recognising the goods delivered as conforming to the contract is not the same as taking delivery or even taking over the goods as prescribed by Art. 53. The duty to take delivery is defined by Art. 60. Under this Art. the buyer's duty to take delivery consists of two elements: The first element is that he must do "all the acts which could reasonably be expected of him in order to enable the seller to make delivery." For example, if the contract requires him to arrange for the carriage of the goods (as is often the case under the terms of f o b contract), he is bound to make the necessary contracts of carriage in order to enable the seller to deliver (hand the goods over to the first carrier for transmission to the buyer (Art. 31 (a)). The second element of the buyer's duty to take delivery is to take over the goods. It is the case where the seller is bound under the contract to make delivery by placing the goods at the buyer's disposal at a particular place or at the seller's place of business (Art. 31 (b) and (c). In such cases the buyer will be regarded as having taken delivery where he has physically removed the goods from that place.¹³

As is seen, taking delivery, as defined under Art. 60, is not inconsistent with the case where the buyer has done all the acts which enabled the seller to make the delivery but he is nonetheless required to accept the goods in the sense that he is not allowed to reject them. This is where the buyer after receiving the goods when examining them (Art. 38) has realised that they are in conformity with the contract and the Convention. Accordingly, taking delivery does not include what is called here the duty to accept the goods. Under this interpretation, the buyer is under two separate duties: to take delivery of the goods and to accept (not reject) them if they are in conformity with the contract.

This duty is clearly inferable from the provisions of Arts. 46 (2) and 49 (1) (a). The first provision gives the buyer *a right to require the seller to tender replacement* goods and the second entitles him to avoid the contract provided that the seller's breach amount to a fundamental breach. Similarly, Art. 46 (3) enables the buyer to demand that the seller repair

¹³ See Secretariat Commentary, (1979) at 47.

the lack of conformity where it is reasonable having regard to all the circumstances. Beyond these circumstances, the buyer is not entitled to resort to these remedies but he has to accept them as the contract goods, otherwise he will be in breach of the contract. Accordingly, the buyer is under the duty to accept the seller's delivery where the lack of conformity does not fall into the foregoing circumstances.

Assuming that the buyer is under a reciprocal duty to accept the seller's delivery, where it accords with the contract and the Convention, he will be entitled to refuse to accept where it does not conform to the contract terms and the Convention.¹⁴ This right not only corresponds with commercial practice¹⁵, but can clearly be inferred from the provisions allowing the buyer to require the seller to tender substitute goods or to make them repaired (Art. 46 (2) and (3)). These provisions, by allowing the buyer to require the seller to make a fresh tender or cure the non-conformity by way of repair (as the case may be) where the seller has delivered goods which do not conform with the contract and this Convention, presuppose that the buyer is entitled to refuse to accept them as the contract goods. Accordingly, it is quite possible for the buyer to retain his right under Art. 46 (2), (3) after having taken delivery or taken the goods over. This is the reason why Art. 86 (1) speaks of the buyer's right to reject after he has received the goods from the seller.

2.2.3. Early or Excessive Delivery

A further application of the right to withhold performance can be found under Art. 52.¹⁶ Under this provision, where the seller has made an early delivery the buyer is entitled to refuse to take delivery of such a delivery (Art. 52 (1)). He is also given a right to refuse to take delivery of the excess quantity where the seller has delivered greater than the contract quantity (Art. 52 (2)).

Buyer's Right to Refuse to Take Delivery as a General Remedy. Although the refusal to take delivery under this Art. is mentioned in the catalogue of the buyer's remedies in Art. 45, it can only be exercised in reference to the special case of early or excess quantity delivery under Art. 52. No clear provision is provided by the Convention to determine whether the buyer is entitled to refuse to take delivery of the goods delivered to him by the seller where they do not

¹⁴ See also, Enderlein; F.; Maskow, D., (1992) at 229.

¹⁵ In the event of a tender of non-conforming goods or documents, the buyer may very well want to keep the contract alive, even be entitled to terminate the contract, but at the same time not be interested in accepting the actually tendered goods or documents.

¹⁶ Art. 52 provides: "(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery. (2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity...".

accord with the contract terms and the Convention, such as the cases where the seller has failed to perform his duty under Arts. 31, 32 (1), 35, 41 and 42.

Some commentators, as already pointed out, have suggested¹⁷ that such a right, to some extent, can be inferred from the interpretation of the relevant provisions of the Convention. In justifying the view, they argue that this rule can be inferred not only from the express granting of that right under Art. 52 for cases of early delivery and delivery of excess quantity, but also from the fact that Art. 86 (1) presupposes the existence of *a right to reject*.¹⁸ The advocates of the existence of this general remedy have also resorted to the link between payment and delivery (Art. 58 (1), (2)) and the right of the buyer to examine the goods under Art. 58 (3)¹⁹, and to Arts. 46 (1)²⁰ and 47 (1)²¹ by saying that they are at least consistent with the assumption of the buyer's right to refuse the taking delivery under certain conditions.²²

However, it seems that although the view can be supported under the Convention, the provisions referred to above do not help to establish such a rule. This is because, first, although the first paragraph of Art. 52 can be relied on for this purpose, it is only applied to the case of early delivery. The second paragraph is entirely irrelevant. It simply provides that the buyer can refuse to accept the seller's offer of an *extra quantity* where he has delivered a quantity of goods greater than that provided for in the contract. It does not say that the buyer is entitled to refuse to take delivery of *the whole goods* the seller has delivered as contract goods. Secondly, Art. 86 presupposes that the buyer who has received the goods which do not correspond with the contract requirements is entitled to reject them. Such a statement, as indicated previously, is consistent with the principle that he can refuse to *accept* them as contract goods not that he is entitled to refuse to take delivery which this Art. presupposes has taken place in advance. This is the reason why these two Arts. used different terminologies.

Nevertheless, it can be said that the Convention has impliedly recognised a right to refuse to take delivery for an aggrieved buyer under certain circumstances. This rule is inferable from taking into consideration the question in the light of the principles of the Convention upon which it is based. Under these principles it might be concluded that the buyer is not obliged to take delivery where the seller's delivery is not in conformity with the contract and the convention. For it is one of the principles of the Convention that the seller has to

¹⁷ Enderlein; F.; Maskow, D., (1992) at 229 and *seq.*; Maskow in: Bianca-Bonell, (1987) at 389 and *seq.*

¹⁸ Art. 86 (1) provides "If the buyer has received the goods and intends to exercise any right under the contract or this Convention *to reject* them (*italic supplied*),..."

¹⁹ Art. 58 (3) provides "The buyer is not bound to pay the price until he has had an opportunity to examine the goods, ..."

²⁰ Art. 46 (1): "The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement."

²¹ Art. 47 (1): "The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations."

²² Enderlein; F.; Maskow, D., (1992) at 229; Maskow in: Bianca-Bonell, (1987) at 390, 391.

deliver in full conformity with his obligations and the buyer is only required to take delivery of such a performance. This principle can be inferred through the examination of the relationship between the main duties of the parties under the Convention. The essential duties of both the seller and the buyer; i.e., delivery, taking delivery of the goods and payment of the price, are provided by Arts. 30 and 53 of the Convention. Although the relationship between the buyer's duty to take delivery and the seller's obligation to deliver goods is not expressly defined by the Convention, it seems that these two duties are interdependent. Some commentators have argued that such a relationship can be inferred from Art. 58 (1) and (2) by saying that this Art. qualifies the buyer's duty to pay the price to the condition that the seller's delivery is to be in accordance with the contract and the Convention.²³ However, it seems that Art. 58 is provided only to state that the seller's duty to deliver and the buyer's duty to pay the price are concurrent obligations and they are to be performed at the same time when the contract is silent as to the time of payment. It is not intended to define the main duties of the parties. The main obligations of the parties are defined by Arts. 30 and 53. Although these two Arts. do not expressly refer to each other, it is suggested that they must be read in connection with each other. Thus, the seller is obliged to deliver the goods provided that the buyer is ready and willing to pay the price for the goods and take delivery of them "*as required by the contract and this Convention*", and the buyer is bound to pay and take delivery provided that the seller is being ready and willing to deliver the goods "*as required by the contract and this Convention*". Accordingly, the buyer's duty under Art. 53, i.e., taking delivery and pay in exchange for the seller's delivery, is conditioned by the qualification that the seller's delivery conforms with the terms of the contract and this Convention. In accordance with this interpretation the buyer's duty to take delivery and pay the price under Art. 53 may be re-phrased as follows:

"It is the buyer's duty to take delivery of goods delivered to him by the seller provided they are delivered in accordance with the terms of the contract and this Convention".

On this interpretation, where the seller has delivered goods in a way which do not conform with the contract terms and the Convention the buyer is not in principle bound to take delivery of them. In more clear words, as long as the seller has not fulfilled his duty to deliver in accordance with the contract and the Convention the buyer's duty to take delivery has not indeed arisen. He is, therefore, under no obligation to perform his duty to take delivery under Art. 53.

²³ Ibid.

2.3. Withholding Performance for Partial Delivery and Partial Non-Conforming Delivery

Although Art. 52 (2) entitles the buyer to refuse to take delivery of the excess quantity, it does not make clear whether the buyer has the right to refuse to take delivery where the seller delivers less than the contract quantity. It could be argued that according to the principles already dealt with the buyer can refuse to perform his obligations on account of the seller's partial non-delivery. The view can also be supported by the fact that short delivery gives the buyer the right to terminate the contract in its entirety in certain circumstances (Art. 51 (2) which includes the right to refuse to perform his obligations insofar as this has not taken place. The same logic justifies the buyer's right to refuse to perform until complete delivery in conformity with the contract is offered.

A further question is "Does the buyer have the option to refuse to perform in respect of the missing part or non-conforming part where the seller has delivered goods some part of which conform with the contract?" Art. 51 (1) seems to enable the buyer to treat the missing and the non-conforming part (as the case may be) as the subject of separate contracts for the purpose of remedy and resort to his remedies under Arts. 46-50. But those provisions do not include such an option. Can the buyer treat the missing or non-conforming part as the subject of a separate contract for the purpose of the right to refuse to perform for the proportion of the missing or the non-conforming part? Since he is entitled to terminate the contract with respect to the missing or the non-conforming part if the requirements of fundamental breach or *Nachfrist* notice procedure are satisfied, it can be said, by analogy, that he is entitled to refuse to perform the contract to the proportion of the missing part. The view can also be supported by Art. 58 (1) which provides that the buyer is not bound to pay only when the seller places the goods at the buyer's disposal in accordance with the contract. By analogy, the same rule is applicable where only part of the goods is in conformity with the contract. The same rule would be applicable to an instalment where the seller has delivered a defective instalment, since Arts. 51 and 73 are in fact concerned with a similar case, i.e., where the contract is severable.²⁴

2.4. Grounds for the Right

In the absence of an express statement by the Convention in describing the right its legal basis must be identified by interpreting the provisions of the Convention and taking into account the general principles upon which it is based. As pointed out above, the Convention, when

²⁴ For further discussion, see 3.2.3.1., and the accompanying footnotes.

supplying the provision regulating the timing of the performance, has at least referred implicitly to the interdependence of the seller's obligation to deliver and the buyer's duty to pay. In that case, Art. 58 (1) provides that the buyer, unless otherwise agreed, "must pay the price *when* the seller places either the goods or the documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention". It seems that this sub-paragraph intends to state that the seller's obligation to deliver the goods and hand over the documents controlling their disposition and the buyer's duty to pay the price are tied together so that failure of one party to perform his duty would entitle the other to rely on the rule. A close examination of Arts. 46, 52, 58 and 71 of the Convention leads one to the conclusion that the Convention has based the right to withhold performance on the theory of "reciprocal obligations". It is under this rule that the obligations are to be exchanged for each other's performance at the same time, and refusal of one party justifies the other party's refusal to perform as long as the defaulting party continues his refusal.

The question which arises here is what degree of lack of conformity enables the buyer to refuse to perform his duty to accept and take delivery of the goods? No clear provision can be found under the Convention for this purpose. It can be said, however, that since the buyer by refusing to accept and take delivery of the non-conforming performance simply refuses to perform his counter-obligation, his option to do so need not be based on a showing of "fundamental breach". He is only required to demonstrate that the seller's delivery is not in accordance with the contract and the Convention. This is because the right of refusal is based on the theory of reciprocity of the parties' obligation rather than the theory of fundamental breach.²⁵ However, in granting the right to refuse one cannot be generous. Accordingly, the substance and the limits of the right to refuse to accept and take delivery have to be determined in detail according to the system of the buyer's remedies under the Convention. The proposition would not, therefore, be acceptable that the goods should be in conformity of the contract in every aspect, otherwise there shall seemingly be a right of refusal.²⁶ Such a broad proposition seems to undermine the system of remedies prescribed by the Convention. In one case, the Convention has referred to the criterion upon which the buyer may withhold performance (Art. 71 (1)). In that case, it provides that the buyer will be entitled to do so

²⁵ The view can be supported by Arts. 71 (1) and 72 (1). Under these Arts. the Convention has differentiated between the right to suspend and that of avoidance. A buyer will be entitled to resort to the remedy under Art. 71 (1) if the seller's prospective non-performance relates to a 'substantial part of his obligation', whereas for avoidance it must be 'fundamental' (Art. 72 (1)). The legislative history of these provisions shows that it must be, at least in theory, assumed that such a differentiation is possible. This is because the Egyptian proposal to make the right to suspend conditional on a prospective 'fundamental breach', was rejected by the delegations (see, Official Records, (1981) at 129 para. 10, 419-422 and 431-433. See also, Schlechtriem, (1986) at 93 and 95-96; Bennett in: Bianca-Bonell, (1987) at 521; Strub, M. G., (1989) at 494; Kritzer, Albert H., (1989) at 457.

²⁶ Tercier, cited in Enderlein; F.; Maskow, D., (1992) at 230.

where the seller's non-performance relates to a 'substantial part of his obligations'. However, it is not clear what lack of conformity will enable the buyer to refuse to accept the goods and take delivery of the non-conforming goods. It seems that the buyer is certainly not entitled to refuse to accept the goods for minor non-conformity. This right may be available for him where the seller's failure to perform his obligations in accordance with the contract terms and the Convention has attained a certain degree of seriousness.²⁷ Close consideration of Arts. 46 (2), (3) and 71 (1) of the Convention supports this restriction. Moreover, it accords with the principles of good faith (Art. 7 (1))²⁸ and mitigation (Art. 77).²⁹

2.5. Right to Refuse for Tender of Non-Conforming Documents

Although the Convention has referred to the seller's duty to deliver goods and documents in accordance with the contract terms (Arts. 30 and 34), it does not deal properly with the issue. It is therefore not quite clear whether the buyer has two separate rights to refuse to accept non-conforming documents and goods, and if so, what relation is there between these two rights? It appears that the question must be examined according to the same principles as elaborated for goods.

According to the principles explained above, it seems that where the seller fails to tender the shipping documents the buyer is entitled to refuse to pay the price, since where the contract does not specify otherwise, the buyer is under the duty to pay the price only "when the seller places the ... documents controlling their disposition at the buyer's disposal" (Art. 58 (1)). In other words, the seller's duty to hand over the documents controlling the disposition of the goods at the buyer's disposal and the buyer's duty to pay the price are to be fulfilled at the same time. However, it seems that the rule prescribed under Art. 58 (1) would not be applicable to all shipping documents, since the Convention qualifies the non-defaulting buyer's right to withhold performance of his obligation to pay the price to the qualification that the documents should be those "*controlling* their disposition". Accordingly, the seller's failure to tender documents which lack this qualification is to be placed within the category of defective delivery rather than non-delivery.

Where the seller tenders documents which do not correspond with the contract requirements the buyer is not required to take delivery³⁰ and pay the price in exchange for such

²⁷ See also, Enderlein; F.; Maskow, D., (1992) at 201 and 230; Maskow in: Bianca-Bonell, (1987) at 392.

²⁸ Art. 7 (1) provides: "In the interpretation of this Convention, regard is to be had to its international character and to the need to prompt uniformity in its application and the observance of good faith in international trade."

²⁹ See also, Maskow in: Bianca-Bonell, (1992) at 392.

³⁰ It is worth noting that the Convention fails to mention any statement that the buyer is bound to take over the documents tendered to him by the seller. Nevertheless, this failure can be justified by the fact that in the case of documentary sales, insofar as documents are concerned, any document which is necessary for taking

documents, since, as the last phrase of Art. 30 and Art. 58 (1) provides, the seller must tender documents which are *in conformity with the contract*, otherwise the buyer is not obliged to accept and pay for them. Furthermore, it seems that the right to refuse to take over the documents could be inferred from the obligation of the seller under Art. 34.³¹ Under this Art. the seller is obliged to hand over the documents at the time and place and *in the form required by the contract*.³² In addition, rejection of non-conforming documents is a well-accepted customary law which is to be given effect under Art. 9.³³ Accordingly, where documents tendered by the seller do not show the respective conditions in respect of the goods and documents the buyer would be entitled, under some circumstances, to refuse to accept them.³⁴

Rejection of Goods and Documents. From the preceding discussions it has been made clear that the Convention allows the buyer to reject defective documents. However, it contains no clear provision to regulate the case where the subject of the documents is defective. Is the buyer have a further right to reject the non-conforming goods when they are landed?

It seems that since the seller's duties to deliver the goods and the relevant documents are two separate obligations (Arts. 30-34) breach of each would give rise to a separate right to refuse to accept. Accordingly, the buyer should be given the right to refuse to accept the goods when they arrive. He should also be entitled to reject documents which do not comply with the contract even though the goods themselves are perfectly in accordance with the contract.³⁵

On the above interpretation, the question arises whether the right of rejection of non-conforming goods is impaired by the acceptance of the documents. What is certain is that where the given defect is reflected on the documents, the buyer's acceptance may be treated as a waiver of his right to reject for the defect in the goods. But where the buyer accepts the documents, for example a bill of lading, which turns out to have been falsely dated, it would not, it seems, prevent him refusing to take delivery of the goods on discharge from the ship. Although, the question is not expressly addressed by the Convention, it can be argued that

delivery of the goods, e.g. documents of title, the obligation to take delivery of the goods regularly comprises an obligation to take those documents.

³¹ Art. 34; "If the seller is not bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. ..."

³² See also, Enderlein, F.; Maskow, D., (1992) at 231.

³³ Art. 9: "1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. 2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

³⁴ It is worth noting that where the parties make payment through the system of letters of credits banks, of course, have very strict requirements in regard to the adequacy of documents where letter of credit are issued. That is, they will refuse to pay against documents which do not strictly comply with the requirements of the contract. See in this connection: Uniform Customs and Practices for Documentary Credits (1993 Version), Art. 13.

³⁵ See in this respect, Guest A.G. et al, (1997) para. 19-126, no. 91.

under the Convention the buyer would lose the right to rely on the lack of conformity of the goods only "if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time *after he discovered it or ought to have discovered it*" (Art. 39 (1)).³⁶ Therefore, he can rely on an unspecified defect if at the time of acceptance he had neither knowledge nor means of knowledge of it. He can also rely on the non-conformity of the goods, even if at the time of acceptance of the documents with a minor defect he had neither knowledge nor means of knowledge of another defect in respect of the goods.

3.0. Part Two. Termination of Contract

3.1. Introduction

In the preceding part it was seen that the Convention has given the buyer a right to withhold performance of his obligations as long as the seller has not fulfilled his delivery obligations in accordance with the contract and the Convention. This remedy, as already indicated, is distinguishable from the remedy of termination in terms both of the ground on which it is available and its effects. Withholding performance is based on the theory of "reciprocity of obligations" and will be justified where the lack of conformity is not minor, while termination³⁷ is primarily based on the doctrine of 'fundamental breach'. Termination, as will be seen below, will bring the contract to an end, while withholding performance will not affect the legal existence of the contract.

The following discussion first examines the circumstances in which the buyer will be entitled to terminate the contract for the seller's non-conforming delivery and then addresses the mechanism of exercising the right and the circumstances in which the buyer may lose his right to terminate. Finally, it has a short look at the effects termination may have on the rights and liabilities of the parties.

3.2. Grounds for Termination

General Review. As a general rule, the Convention grants an aggrieved buyer the right to declare the contract terminated provided that the failure by the seller to perform any of his obligations amounts to a "fundamental breach of contract" as defined in Art. 25. However, the

³⁶ See also Art. 43 (1).

³⁷ The term employed by the Convention to describe the concept of bringing the performance of the contract to an end is "avoidance". As to the history of using the term in the context of international conventions on contracts for the sale of goods see, Official Records, (1966), vol. 2 at 236 No. 3); UNCITRAL, Yearbook, vol. IV (1973), at 41 para. 36; Honnold, (1989) at 118, para. 38). The Convention also uses the term "termination" for describing the given concept when the parties to the contract bring the contract to an end by mutual consent (Art. 29). As to the history of using this term see, Honnold, *ibid.*, at 304 para. 141, 379); Official Records, (1981) at 7, 27-28, 76, 181, and 157).

buyer may also be entitled to terminate the contract without being required to rely on the doctrine of "fundamental breach". This possibility arises where the buyer resorts to the provision authorising him to request the seller to perform within a specified additional period of time of reasonable length (commonly referred to in the literature as the *Nachfrist* notice) (Art. 47). Failure to comply with this request may, as will be seen, be regarded as another ground upon which the buyer's termination may be justified (Art. 49 (1) (b)).

3.2.1. Fundamental Breach

3.2.1.1. Significance and Concept of the Test

"Fundamental breach" is one of the pillars of the Convention because various sanctions available to the buyer and seller as well as certain aspects of the passing of risk depend on this concept.³⁸ Above all, the concept of fundamental breach is a key to the system of termination under the Convention. The Convention in several places bases the buyer's right of termination on the *fundamental breach* test.³⁹ Accordingly, the main question is: what is *fundamental breach*? Art. 25 of the Convention defines it in the following terms:

"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 not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."⁴⁰

In international sale contracts it is a "fresh legal concept, born from compromise"⁴¹ and open to different interpretations.⁴² It should be, therefore, interpreted in its own context by taking into account the legislative history of its development.

³⁸ Arts. 46 (2), 49 (1) (a), 51 (2), 64 (1) (a), 70, 72 (1), and 73 (1) and (2).

³⁹ See e.g., Art. 49 (1) (a), Art. 51 (1) -avoidance for partial non-conforming delivery-, Art. 72 (1) -avoidance for anticipatory breach- and Art. 73 for breach of a contract for delivery of goods by instalments.

⁴⁰ Effort to define the fundamental breach test has undergone substantial changes over the years during the development of the international sale law. These changes can be found in the following documents: The 1939 and 1951 Rome Drafts, the 1956 and 1963 Working Committee Drafts, the Text Presented by the Drafting Committee to the 1964 Hague Conference, the 1964 Hague Uniform Law (ULIS) Text, the 1975 Text of the UNCITRAL Working Committee, the 1977 Vienna UNCITRAL Text, and finally the Text of the 1980 Convention. For more information as to the history of the test see, Official Records, (1966) vol. 2 at 50 (Art. 55 (3) of the 1939 of the Rome Draft), 108, 124, 125, 138, 169, 183, 214, 378; Official Records, (1966) vol. 1 at 35-36, 337; Graveson-Cohn-Graveson, (1968) at 55; Eorsi G., (1983) at 338-339; Will in Bianca-Bonell, (1987) at 206; Honnold, (1989) at 64-65, 88-90, 219, 220, 244, 324; Official Records, (1981) at. 157, 206, 295-303, 425.

⁴¹ Will in Bianca-Bonell, (1987) at 205. It has been said that the concept of "fundamental breach", in the Convention sense, is an "unfamiliar concept in many parts of the world" (Will, in Bianca-Bonell, *ibid.*). For instance, Mr Guevara (delegation of Philippines) at the Vienna session of UNCITRAL in opposing the last phrase of Art. [25] said: the term "fundamental breach" was not very familiar to him but he took it that it meant a serious breach (as cited in: Michida, S., (1979) at 285).

⁴² For instance, Peter Schlechtriem suggests that it approximates to the German test of whether the injured party can be said to have no further interest in the performance of the contract (Schlechtriem, P., (1986) at 59, while Nicholas likens it to the *HongKong fir* test which is examined in the previous chapter (see Nicholas, B., (1989) at 218).

3.2.1.2. Elements Constituting the Test

Art. 25 of the Convention sets up two major criteria for defining "fundamental breach". First, the breach must result in a *detriment* to the innocent party; second, it must *substantially* deprive the innocent party of what he is entitled to expect under the contract. The last phrase of the Art. also provides for the party in breach an avenue to escape from the drastic effects of his breach, if he can prove that he did not foresee (or could not have foreseen) the consequences of his breach. Meditation over the key words of definition employed in Art. 25: "detriment", "substantial" and "foreseeability", gives rise to some constructive questions: what is *detriment*? what detriment is *substantial*? and when is the *foreseeability* test applied?

(A) Detriment

The first foundation for a breach being fundamental is that it must cause the non-breaching party detriment. The Convention itself does not contain any definition of the term "detriment". Nor does it give any example of detriment that rises to the level of a fundamental breach. Confronted with such a "newcomer"⁴³ word in the field of international sale, commentators have taken diverging views in its interpretation.⁴⁴

In the absence of precise definition, it seems that the term must be interpreted in light of the Convention's legislative history as well as its intended purpose. The legislative history of Art. 25 shows that the test developed out of the debate over the weaknesses of the 1964 Uniform Law on the International Sale of Goods (herein after, ULIS)'s criterion for defining the "fundamental breach" doctrine. The Draftsmen in avoiding the difficulty of subjectivity of ULIS test accepted the "detriment" criterion so as to present an objective test for determining the fundamentality of the breach.⁴⁵ But the history of the word "detriment" is short. It was

⁴³ Will in Bianca-Bonell, (1987) at 210. For instance, Van Der Velden says: "detriment is hardly of a term of art. It is rarely used in (international) legal terminology. Is detriment damage or loss, or damage and loss? Is consequential damage/loss included, or has detriment to be interpreted in a specific way..." (see Van Der Velden in: Voskuil C.C.A. and Wade J.A., (1983) at 64-65).

⁴⁴ For instance, Van Der Velden suggests: "a paraphrase of detriment, acceptable for international use could be one given by the *Corpus Iuris Secundum*, namely, '... the detriment need not be real and need not involve actual loss, nor does it necessarily refer to material disadvantage to the party suffering it, but means a legal detriment as distinguished from a detriment in fact and has been defined as giving up something which one had the right to keep, or doing something which one had the right not to do'." (Van Der Velden in: Voskuil C.C.A. and Wade J.A., (1983) at 64-65. Interpretation of this term in this way is arguable. Such an interpretation seems to relate to an entirely different context, i.e., the doctrine of consideration, whereas detriment in the Convention sense is designed to describe the circumstances in which the remedy of termination or demanding substitute goods are available. It is perhaps for this reason, Professor Will describes the test in an entirely different way (see Will, in Bianca-Bonell, (1987) at 211-212). See also Schlechtriem, P., (1986) at 60.

⁴⁵ See in this respect, UNCITRAL, Yearbook, VI (1975) at 53; Honnold, (1989) at 244. The legislative history of fundamental breach test as defined by Art. 10 of ULIS shows that it was subject to serious criticisms by the delegations to the Hague Conference itself (see e.g., observation of the Austrian Federal Government, the Government of the Netherlands, the UK Government (Official Records, (1966) vol. 2 at 108, 138 and 169) respectively; in the course of debate: delegations from Austria, Israel, UK; against: delegations of France, Ireland, who definitely believed the subjective notion appropriate (see Official Records, (1966) vol. 1, 35-36). See also (Official Records, (1966) vol. 2 at 124-125, academic writers (see e.g., Graveson-Cohn-Graveson,

proposed in the sixth session of the UNCITRAL Working Group in 1975 and was retained in the 1978 Draft proposal.⁴⁶ The nature and concept of the term has not been examined, neither during the UNCITRAL Working Group's sessions nor in the 1980 Diplomatic Conference.⁴⁷ The only thing said with respect to the term "detriment" was that the Working Group report was quoted as having the advantage of stressing that the term *detriment* "had to be interpreted in a broader sense and set against the objective test of the contents of the contract itself".⁴⁸

However, an unofficial commentary by the UNCITRAL's Secretariat on Art. 23 of 1978 Draft Convention may provide some guidance as to its meaning and application. The drafters' commentary stated that "[t]he determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party."⁴⁹ From this comment, it is possible to conclude that the drafters intended the word "detriment" to be synonymous with "injury" and "harm", and it can also be exemplified by monetary harm and interference with the other activities.⁵⁰

The term can be further clarified by considering its purpose. The purpose is simply to allow the injured party to terminate the contract, demand substitute goods or to prevent the risk of loss from passing to the buyer.⁵¹ These purposes, as will be seen later, clearly require a broad sense which is beyond the realm of compensation for damages.⁵² Accordingly, keeping in mind both its history and purpose, the term has to be interpreted in a broad sense and any narrow construction must be excluded.

(B) Substantial Deprivation

The second major requirement for a breach to be regarded as fundamental is that the detriment caused by the breach must have some degree of seriousness so that it substantially deprives the victim of breach of what he is entitled to expect under the contract. Unlike the nature of detriment which was not much at issue neither by UNCITRAL Working Group nor in the Diplomatic Conference, the degree of its effects was and still is controversial. In this

(1968) at 55) and the UNCITRAL Working Group (see Honnold, (1989) at 64-65, 88-90, 220, 244). The drafting party considered the revised text of ULIS Art. 10 unsatisfactory since it relied on an impractical test that requires the breaching party to anticipate whether the non-breaching party would have entered into the contract had he foreseen the breach and its effects.

⁴⁶ See UNCITRAL, Yearbook, VI (1975) at 53, VIII (1977) at 31; The Official Records, (1981) at 7; Honnold, (1989) at 244, 324, 384.

⁴⁷ But see Official Records, (1981) at 329-330.

⁴⁸ Official Records, (1981) at 330 para. 33.

⁴⁹ Secretariat Commentary, (1979) at 26 para. 3.

⁵⁰ See also Will in Bianca-Bonell, (1987) 1 at 211; Babiak, A., (1992) at 119-120.

⁵¹ See Arts. 49 (1) (a), 64 (1) (a), 51 (2), 72 (1), 73 (2), 46 (2) and 70.

⁵² See also Will in Bianca-Bonell, (1987) at 211. The Brazilian delegate, in contrast, observed that Art. [25] was related to Art. [74], see Official Records, (1981) at 296.

connection the first question is that: what criteria should be applied to determine whether the detriment sustained by the victim of breach has resulted in fundamental breach?

The legislative history of the provision shows that it was controversial. Examination of the legislative history of Art. 25 shows that it was first suggested that to ascertain whether breach was fundamental, it should have been proved that detriment caused by the breach was substantial and the Committee welcomed that proposal and inserted it into the definition of fundamental breach.⁵³ In the Diplomatic Conference, however, the debate on the words "substantial detriment to the other party" was extensive.⁵⁴ Some delegations labelled it something between "vague", "subjective" and "objective and flexible".⁵⁵ The main objection on the "substantial" criterion was that "substantial" as an adjective caused as much uncertainty as "fundamental" itself, and, therefore, required an objective yardstick. Various proposals were offered for this purpose. Eventually, in order to reconcile the different proposals, it was decided that for a breach to be fundamental, it must result in such detriment as substantially to deprive the victim of breach of *what he is entitled to expect under the contract*.⁵⁶

However, in relying on the phrase "the buyer was entitled to expect" one should be careful. It does not mean that the only criterion for this purpose is the buyer's expectations from the contract, as the language of Art. 25 seems to suggest. His expectations are qualified by the last phrase "what he is *entitled to expect under the contract*". It seems that this limitation introduces an important qualification and ensures that it is not solely the buyer's expectations which are relevant. The buyer is clearly entitled to expect to receive the performance promised by the seller, but since this depends on the seller's contractual undertaking it is defined as much by the seller's expectations as by the buyer's. Thus, suppose that the buyer is deprived of the opportunity to obtain a particular benefit he expected to receive from the seller's performance but of which he has not informed the seller. Can it be said that the buyer is "entitled" to expect that benefit *under the contract*? Moreover, as will be seen in detail, the test of the buyer's expectations is further limited by the qualification, which

⁵³ In 1971 at the second session a proposal was presented by the Mexican delegation. It contained a single objective criterion: "whether the breach *substantially* alters the scope or contents of the rights of the other party." On the basis of this proposal, the proposed revision of Art. 10 was drafted as follows: "For the purpose of the present law, a breach of contract shall be regarded as fundamental wherever such breach substantially [to a significant extent] impairs the value of the performance required by the contract and the present Law." (see, Honnold, (1989) at 219-220) This was further developed at the sixth session in 1975 when the definition was revised by introduction of the word "detriment" and the requirement that the party in breach should have had reason to foresee this consequence (see, Honnold, *ibid.*, at 244.). This survived the seventh session of the Working Group in 1976 (see, Honnold, *ibid.*, at 324). Consequently, the proposed Art. 10 of the Working Group was drafted as follows: "A breach committed by one of the parties to the contract is fundamental if it results in *substantial detriment* to the other party and the party in breach foresaw or had reason to foresee such a result" (Honnold, *ibid.*, at 324) (*italic supplied*).

⁵⁴ Official Records, (1981) at 98-99, 295-303, 329-330 and 425-426, then 206.

⁵⁵ Official Records, (1981) at 296-297, 299-300 329-330.

⁵⁶ Official Records, (1981) at 425, para. 13.

takes account of what the seller could reasonably foresee. This makes clear that if the buyer is deprived of a benefit which the seller could not foresee and could not reasonably be expected to foresee, the breach is not fundamental. Accordingly, the degree of the requisite substantiality of deprivation caused by detriment must be ascertained within the framework of the amount of detriment incurred by the buyer in respect of those *expectations required under the contract*. The "legitimate expectation interest" test of Art. 25 as described above is, therefore, the only criterion in determining whether or not deprivation is substantial.

The question which arises here is whether the only source for the buyer's expectation interests is the terms of the contract, as the language of Art. 25 shows where it says "he is entitled to expect under the contract"- which in principle refers to all the terms of the contract whether express or implied-. Does it mean that any other circumstances of the case are not to be taken into account? The question came into view at the Vienna Conference when the German delegation proposed to amend the draft article 23 on fundamental breach so that the determination of whether or not a detriment was substantial would have been determined by the express or implied contract terms themselves.⁵⁷ His amendment was criticised by a number of representatives as too narrow. A substantial number of delegations suggested that the court had to examine the terms of the contract as well as the surrounding facts⁵⁸ It was on this general understanding that the text accepted by the Conference referred to the phrase "what he is entitled to expect *under the contract*".

On this interpretation, the extent to which a party suffers an injury to its expectations will, therefore, be found not only in the language of the contract but in the circumstances surrounding the contractual relationship of the parties.⁵⁹ However, it does not mean that the assessment of the existence of substantial detriment will depend on the circumstances of any individual cases even those circumstances take place after the time of making the contract. If some particular circumstances are significant for a contracting party he should bring them into the other party's attention at the time of contract. Accordingly, it is fair to say that the Convention has not left the determination of the degree of a given detriment and drawing the line between substantial and insubstantial deprivation to the judge's sole and sovereign appreciation but requires him to decide in the framework of the contract and the circumstances existed *at the time it was made*.

⁵⁷ Official Records, (1981) at 99, Para. 3.

⁵⁸ See, Official Records, (1981) at 301, Paras. 74, 75, and, at 300 Para. 70. It was the reason why the German representative responded that "he had not intended to restrict [by his proposal] the definition of substantial detriment or to exclude the circumstances of the case" (Official Records, (1981) at 300 Para. 68; at 301 Para. 78, and, at 329 Para. 23).

⁵⁹ See also Babiak, A., (1992) at 120; Will in Bianca-Bonell, (1987) at 213; Schlechtriem, P., (1986) at 59-60. In contrast, see Van Der Velden in: Voskuil C.C.A. and Wade J.A., (1983) at 64.

After all above, the main question still remains; at what point deprivation resulting from detriment would reach the threshold of substantial deprivation? The Convention has failed to introduce any concrete factors to guide the judges to decide whether the detriment sustained has attained the sufficient degree of substantial deprivation.⁶⁰ The Convention seems to have left the question of determining the sufficient substantial deprivation of the buyer from his contractual expectations to the arbitrators to decide in the light of the circumstances surrounding any particular case.⁶¹ In any case, the court should decide the case by taking into account the value of the goods, the purpose for which the buyer has purchased the goods, and the degree of actual and prospective detriment caused by the breach and other interference caused by the breach into his activities.⁶²

(C) Foreseeability

The foreseeability test in the final conditional clause of Art. 25 constitutes a further qualification. Although the sustained detriment which resulted in substantial deprivation *prima facie* makes breach fundamental, a breach will not be fundamental if the seller can rely on the last sentence of Art. 25. The legislative history of Art. 25 reveals that the burden of proving foreseeability of loss was originally on the party in breach. The 1976 Draft Convention put the onus on the aggrieved party both to show that the breach of contract resulted in a substantial detriment to him and that the party in breach foresaw or had reason to foresee such

⁶⁰ To know what the Convention commentators suggest in this respect, see e.g., Schlechtriem, P., (1986) at 59-60, see also p. 77).

⁶¹ In a considerable number of the Convention cases the courts and arbitral tribunals have addressed the doctrine of 'fundamental breach'. For instance, in a case decided by an Italian court, it was held that the delay by the seller in delivering the goods, together with the fact that two months after the conclusion of the contract the seller had delivered only one third of the goods sold, amounted to a fundamental breach of the contract according to Art. 49 (1) (a) (see, Italy 24 November 1989 Pretura circondariale di Parma (Foliopack Ag v. Daniplast S.p.A), (CLOUT, abstract no. 90). Likewise, in a case decided by the German Court of Appeal (see, Oberlandesgericht Frankfurt A. M.; 5 U 164/90 (17 September 1991), (CLOUT, Case No. 2:), an Italian seller had agreed to manufacture and deliver a number of shoes with a particular trademark, to be used as a basis for further orders. The manufacturer was allowed to use the trademark only with special permission from the buyer. At a trade fair, the manufacturer displayed some shoes produced according to the buyer's specifications and did not remove them upon the buyer's demand. In that case, the German Civil Court of Appeal held that the manufacturer's breach of the ancillary duty of preserving exclusivity constituted a fundamental breach of the contract under Art. 25 of the Convention, since it *endangered the purpose of the contract to such a degree that*, as was foreseeable to the manufacturer, the buyer had *no more interest in the contract* (see in this regard, the Editorial remarks by Albert H. Kritzer attached to the abstract case; Behr, V., (1993) at 271-275). For further cases, see, Diederichsen, E., (1995) at 177-181 (a comment on a German court decision: 17 September 1991 Oberlandesgericht Frankfurt); Karollus, M., (1995) at 51-94. In the latter reference, the author has gathered a number of cases decided by the German courts, including those referred to Art. 25. But, no detailed analysis, as far as the English abstract shows, can be found in them.

⁶² It seems that the problems of defining 'substantial deprivation' are unavoidable and that it is neither practical nor useful to try to solve them in the abstract. The problem the commentators face here is very similar to that faced by judges and commentators in defining when under English law a breach will be sufficiently serious to justify termination under the *HongKong Fir* test, or in deciding how foreseeable loss has to be recoverable as damages. In all these cases any attempt at "definition" is likely to result in replacement of one analogy or metaphor with another. See the problems the House of Lords had in *Koufos v. Czarndikow Ltd. (The Heron II)* [1969] 1 AC 350.

a result.⁶³ The Philippines' delegate to UNCITRAL subsequently objected that this formulation was unfair to the injured party and that the burden should not rest on him to show that the breaching party ought to have foreseen the result of his conduct. In the light of this objection, the wording of the definition was amended at the 1977 session of UNCITRAL so as to require the defaulting party to show that he could not reasonably have foreseen the consequences of his breach.⁶⁴ At the Vienna Diplomatic Conference the Egyptian delegation sought to amend the Draft Art. 23 on fundamental breach by including express language indicating a shift in the burden of proof.⁶⁵ The drafters refused to include the language which would raise questions of civil procedure. However, there was a consensus that this burden should be on the party in breach because of the logical difficulty of requiring the non-breaching party to prove what the party in breach actually foresaw or a reasonable man in its position could have foreseen.⁶⁶

The concept of foreseeability developed out of Art. 10 of ULIS which completely based fundamental breach on the foreseeability of events. Art. 25 of the present Convention, however, adds an objective test into the determination of whether a breach is fundamental by asking two questions: (1) did the party in breach foresee that the breach of contract would result in a substantial deprivation of the non-breaching party; and (2) would a "reasonable person of the same kind in the same circumstances" have foreseen such a result. These two questions will require the court to view the contract from the subjective perspective of the party-in-breach, as well as from the objective perspective of a reasonable merchant of the same kind in the circumstances of the party in breach. These subjective and objective elements are cumulative, not alternative. The outcome is that a breach would be regarded as non-fundamental only where courts or tribunals are satisfied that both elements are proved.⁶⁷

The first requirement for negating the claim for breach under Art. 25 is whether or not the party in breach actually foresaw the harm caused by the given breach. Whether the

⁶³ Honnold, (1989) at 244.

⁶⁴ Honnold, (1989) at 324; Michida, S., (1979) at 285.

⁶⁵ Their amendment read as follows: "A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach proves that he did not foresee such a result and that a reasonable person of the same kind in the same circumstances would not have foreseen it", (Official records, (1981) at 99, 295).

⁶⁶ See for instance, Official records, (1981) at 296, para. 13, 297, paras. 21 and 26.

⁶⁷ It is to be noted that the 1976 UNCITRAL Working Group's Draft Convention contained the conjunction "or" instead of "and"(Honnold, (1989) at 244, No. 45). At the Vienna Working Group session in 1977, as a result of the American delegation's proposal the word "or" was replaced by "and" (Summary Record, as referred to by Michida, S., (1979) 285). The word "and" survived an attempt to switch back to "or" at the Vienna Conference (Official Records, (1981) at 296 para. 13 and 298 para. 41). The purpose of replacement was that just as the subjective test alone is not enough, the objective test alone would not suffice either, for it may well happen that an overly astute merchant in fact knew and foresaw more than his peers would have known and foreseen. In such a case the real person should not be allowed to hide behind the reasonable person of the same kind in the same circumstances. See also, Will in: Bianca-Bonell,(1987) at 220.

detriment caused by the breach was actually foreseeable by the seller depends on his knowledge of the facts surrounding the contract. In this respect, as some commentators suggested⁶⁸, factors such as the seller's experience, level of sophistication, and organisational abilities should be considered in showing whether or not the harm in question was foreseeable. In the light of such factors the court may be satisfied that the seller was able to anticipate and recognise problems in the transaction. However, this requirement is a purely subjective one which focuses solely on the personal position of the breaching party. Certainly, any party who has committed a breach of contract resulting in serious consequences will hardly accept that he foresaw those consequences, but will most likely insist that unfortunately he did not foresee, as the article describes it, "such result".⁶⁹ The mere allegation, however, does not suffice but, as explained above, the party in breach must prove his allegation.

In this connection, Art. 25 provides a further requirement. This is an objective one requiring the party in breach to show that a reasonable person of the same kind in his circumstances would not have foreseen that the given default would have caused the injuries in question to the innocent buyer. Since parties to international sales contracts are presumed to be merchants, a "reasonable person" can be construed as a reasonable merchant. A reasonable merchant would, therefore, include "all merchants that satisfy the standards of their trade and that are not intellectually or professionally substandard".⁷⁰ The features that may characterise reasonable merchants include: (1) the merchant's degree of skill and professional qualifications (for example specialised licenses); (2) the merchant's professional associations or affiliations which may set competency standards; (3) the length of the merchant's business experience; and (4) the geographic region in which the merchant does business.

The phrase "of the same kind" is the first element of precision intended to mitigate the effects of subjectivity of the first criterion of foreseeability. The meaning of the phrase has to be apparently inferred from the purpose of the clause. It is, as Professor Will⁷¹ suggested, provided to tailor a reasonable person to the likeness of the party in breach. The hypothetical merchant ought to be engaged in the same line of trade, doing the same function or operations as the party in breach. Not only must business practices be taken into account, but the whole socio-economic background as well, including average professional standards.⁷²

Further element is also provided by Art. 25 for the purpose of precision. Under this requirement, the court must take into account the reasonable merchant "in the same

⁶⁸ Babiak, A., (1992) at 122. See also Will in: Bianca-Bonell, (1987) at 217.

⁶⁹ See also Will in: Bianca-Bonell, (1987) at 217.

⁷⁰ See also, Will in: Bianca-Bonell, (1987) at 219; Babiak, A., (1992) at 122.

⁷¹ Will in: Bianca-Bonell, (1987) at 219.

⁷² See Official Records, (1981) at 261 Para. 30; Will in: Bianca-Bonell, (1987) at 218-219.

circumstances", in which the party in breach was. By this requirement, the court should take into account "conditions on world and regional markets, legislation, politics and climate, ..., in short: [the] whole range of facts and events at the relevant time."⁷³

As was seen, a party alleged to be in breach thus has a difficult burden, but if he can show that he did not foresee the drastic effects of his default, and can prove that a reasonable merchant facing the same market conditions would not have foreseen such results, then the party claiming breach will not be able to rely on the seller's breach for termination.

Time for Foreseeability. The other issue that arises out of the definition of Art. 25 is at what time the foresight of the party in breach is to be judged? Is the relevant time when the contract was concluded or when the breach was committed, or does it depend on the circumstances of each case? Unlike Art. 10 of ULIS which was quite clear that the time point should have been "the time of the conclusion of the contract", the language of Art. 25 does not expressly answer the question. This ambiguity has generated a substantial literature.⁷⁴

It seems that like the other issues it would be more helpful to analyse the present issue in the light of legislative history of the provision. In the UNCITRAL Working Group's sessions and at the 1980 Vienna Conference some delegates proposed that this element be amended to restrict consideration to those circumstances that the party in breach could have foreseen when the contract was made. In UNCITRAL's final [1977] review of the "sales" provisions, one delegate proposed to limit the time for foreseeability to the time of "the conclusion of the contract." Under another view it was thought that "it would be fairer to refer to the time at which the breach was committed." The decision was recorded as follows: "The Commission, after deliberation, did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach".⁷⁵ Finally, the UNCITRAL Draft Convention after some discussion preferred not to specify that point, thus leading the Secretariat's Commentary to note that "in case of dispute, that decision must be made by the tribunal."⁷⁶

As has been seen, the general understanding of the issue prior to the Vienna Diplomatic Conference was that the relevant time for foreseeability was left open. At the 1980 Diplomatic

⁷³ Will in: Bianca-Bonell, (1987) at 219, as under Art. 8 para. (3) of the Convention which provides: "due consideration is to be given to all relevant circumstances of the case".

⁷⁴ See e.g., Ziegel, in: Nina M., Galston; Hans Smit, (1984) at 9-20, (arguing that "it would surely be anomalous if a buyer were able to avoid the contract for breach by the seller if the grounds justifying avoidance were regarded as too remote for the recovery of damages under Art. 74"); Honnold, (1991) at 257-258 (in contrast, on the basis of the legislative history of the provision, he concludes that information received after formation but prior to performance can be relevant and could fall within the scope of Art. 25); Will in: Bianca-Bonell, (1987) at 220-221; Schelchtriem, P., (1986) at 60; Feltham, J. D., (1981) at 353; Speidel, R. E., (1983) at 444; Flechtner, H. M., (1988) at 76-79; DTT's Consultative Document, (1989) at 29-30.

⁷⁵ Honnold, (1989) at 324.

⁷⁶ Official Records, (1981) at 26.

Conference, the issue again came into focus and there were various attempts to specify the point in time at which the foreseeability standard is to be applied. One proposal would have limited Art. 25 to foreseeability "at the time when the contract was concluded." The right to damages under Art. 74 is so limited. Had the proposal to similarly limit Art. 25 been approved, it would clearly have eliminated the possible anomaly of a right to avoid a contract even where there is no right to damages. However, this proposal was not approved nor did the delegates approve a related proposal which would have required foreseeability to be related to "the reasons for the conclusion of the contract, or any information disclosed at any time before or at the conclusion of the contract". The Official records indicate that the latter proposal was withdrawn following the statement that "information provided after the conclusion of a contract could modify the situation as regards both substantial detriment and foresight."⁷⁷ Although the other delegates were not unanimous, a substantial number favoured leaving the question at large to be decided by the adjudicating body, taking into account the circumstances surrounding the case in question.

As the preceding analysis shows, the *travaux préparatoires* offer no help to the court. Accordingly, one may argue that the question was deliberately left unanswered because the working groups could not agree on the answer. They therefore left the question to the courts.⁷⁸ There is, therefore, no reason to impose an interpretation on Art. 25's foreseeability requirement that ignores post-formation developments. However, on this approach, one has to be in conformity to Honnold's view that information received by the seller later than the breach should not have attached to it any value.⁷⁹

Nevertheless, there is the possibility of arguing in support of the first approach. As explained when dealing with the concept of the injured party's expectations under the contract, whether or not the injured party was entitled to expect to have a particular benefit should be ascertained within the contract terms and other circumstances which came into the attention of the party in breach at the time of making the contract. The same analysis seems to be applicable to the measurement of foreseeability of the consequences of the breach. It can even go further and argue that the language of Art. 25 is in line with this approach, since it defines the consequences relevant to the determination of fundamental breach in terms of what a party "is entitled to expect under the contract" and the second sentence of the Art. refers to the foreseeability of "such result" by the party in breach. Accordingly, as contractual expectations

⁷⁷ See Official Records, (1981) at 99 and 302.

⁷⁸ On this reading, there is, of course, no guarantee of consistency in interpretations.

⁷⁹ Honnold, (1991) at 257-258

are formed at the time of contracting, foreseeability of substantial deprivation of those expectations by the reason of breach should also be measured at that time.⁸⁰

3.2.2. Nachfrist

As already pointed out, termination of contract is primarily to be justified on the basis of the doctrine of "fundamental breach". This criterion is to be applied even where the seller fails to perform his obligations within the contract time. Under this requirement termination can be a thorny problem, for in any case the buyer must be sure that the breach is fundamental. This will not always be a proper solution for him. Once the seller is, for instance, late in performing, the buyer may rightly be doubtful whether the seller's delay amounts to a fundamental breach. One way to circumvent this problem is by use of the German law solution of *Nachfrist* according to which, where one party is in default the other party may give him a reasonable time within which he should perform his obligations. If at the end of this additional period of time, the defaulting party has not performed the innocent party can terminate the contract.⁸¹ In the case of buyer's remedies, Art. 47 (1) adopted a version of this concept. The provision authorises the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations. The wording of the provision appears to cover the whole range of obligations arising under the contract and the Convention, such as delivery of all or part of the goods, the remedy of any lack of conformity by repair of the goods or by delivery of substitute goods or performance of any other act which would constitute performance of the seller's obligations. However, Art. 49 (1) (b) only refers to the case where the seller has failed to deliver the goods. Accordingly, the question is whether the buyer's right to terminate the contract on the basis of *Nachfrist* notice arises only where the seller has failed to deliver on the date set for delivery in the contract or if it also comes into operation in respect of failure to perform other obligations.

Although ULIS started with the idea that the buyer could avoid a contract only for a fundamental breach (Art. 43)⁸², it also allowed the buyer to demand that the seller cure the defect within a reasonable time and, if the seller did not, the buyer could declare the contract

⁸⁰ See also, Schlechtriem, P., (1986) at 60. Speidel articulates, but does not necessarily endorse, a similar argument. Speidel, R. E., (1983) at 441, 444.

⁸¹ See Art. 326 (1) of The German Civil Code. It provides: "If, in the case of a mutual contract, one party is in default in performing, the other party may give him a reasonable period within which to perform his part with declaration that he will refuse to accept the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance, or to withdraw from the contract, if the performance has not been made in due time; the claim for performance is barred. If the performance is only partly made before the expiration of the period, the provision of Art. 325 (1) sent. 2 applies *mutatis mutandis*."

⁸² ULIS Art. 43: "The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract..." See also, Arts. 27 (2) 31 (2).

avoided (Art. 44 (2))⁸³. The UNCITRAL Working Group's early drafts were also broad and covered any failure of the seller to perform his any non-fulfilled obligations within the additional period of time.⁸⁴ However, in 1973 at the fourth session several representatives advanced proposals to restrict the notice-avoidance procedure to cases where the seller has not delivered goods. UNCITRAL accepted those proposals on the ground that the procedure could be abused to convert a minor breach into a fundamental breach by using the *Nachfrist* system provided under Art. [47 (1)] and avoid the contract where the seller did not perform his obligations within the additional time.⁸⁵ The restricting provision survived in Art. 45 (1) (b) of the UNCITRAL's 1978 Draft Convention.⁸⁶ At the Vienna Conference, the question of extension of the buyer's right to avoid the contract on the ground of *Nachfrist* notice was again proposed by some delegations.⁸⁷ The debate over the issue centred on whether a distinction should be drawn between non-delivery and non-conformity. Some delegations proposed that since the aggrieved buyer by virtue of draft Art. 43 (1) was empowered to fix an additional period of time for the seller to perform any of his obligations it was appropriate to widen the sphere of application of draft Art. 45 (1) (b) to give the buyer necessary remedies when the seller disregarded his fundamental obligations arising from the additional period of time.⁸⁸ But as a result of the opposition of the State delegations, the Diplomatic Conference rejected the proposals to broaden the scope of notice-avoidance to include non-conformity and in order to avoid any possible misunderstanding, it added the phrase "in case of non-delivery" at the beginning of the notice-avoidance provision in Art. 49 (1) (b).⁸⁹ Based on this amendment, it can be concluded that the buyer's right to avoid the contract on the ground of *Nachfrist* notice is restricted to non-delivery cases. Accordingly, the buyer will not be entitled to resort to the *Nachfrist*-notice rule to terminate the contract if the seller has failed to perform his duty to deliver substitute goods or other obligations under the contract and the Convention within the additional time.⁹⁰

⁸³ ULIS Art. 44 (2): "The buyer may however fix an additional period of time of reasonable length for the further delivery or the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Art. 46 or, provided that he does so promptly, declare the contract avoided."

⁸⁴ Honnold, (1989) at 98-99, 109-111, 130-132, 136, 147.

⁸⁵ Honnold, (1989) at 147-148.

⁸⁶ Honnold, (1989) at 148, 155, 201, 247, 339 and 387.

⁸⁷ Official Records, (1981) at 79, 116-117.

⁸⁸ Official Records, (1981) at 354, paras. 67 and 68, 356, para. 87.

⁸⁹ Official Records, (1981) at 354-56, then 211 para. 12.

⁹⁰ In contrast, see, Karollus, M., (1995) 51-94 where the author (relying on a Convention case decided by a German court in 1994, see, Germany 10 February 1994 Oberlandesgericht Düsseldorf [6 U 119/93], CLOUT abstract no. 82) suggests that since the substitute delivery is regarded as a delivery under Arts. 31-33, Art. 49 (1) (b) is to be applied where the buyer has demanded delivery of substitute goods under Art. 46 (2). As the language and the history of Art. 47 makes clear, by virtue of this provision the Convention grants the buyer a general right to request the seller to perform his obligations during the period of time fixed by him. Yet, it is,

The buyer will be entitled to terminate the contract on the *Nachfrist*-notice procedure where he satisfies the court that he has fixed an additional period of time of reasonable length⁹¹ and demanded that the seller deliver the goods within that period (Art. 47 (1)).⁹² He also has to prove that the seller has not delivered the goods or had declared that he would not have delivered them within the period so fixed (Art. 49 (1) (b)).

No clear provision, however, can be found in the Convention to be relied in ascertainment of this vague term. Professor Will suggests that it must be ascertained on the particular circumstances of each case. He also suggests that among the various elements to be taken into consideration are "the nature, extent and consequences of the delay, the seller's possibilities of and time needed for delivery, and the buyer's special interest in speedy performance."⁹³

(A) Perfect Conforming Delivery or Substantially Conforming

Where the seller has delivered the goods subsequent to the buyer's request the latter will not be allowed to refuse to accept them and terminate the contract. The question which arises here is whether only a perfect tender would deprive the buyer of the right to rely on *Nachfrist* avoidance or a delivery which is substantially in conformity with the contract. Suppose, for example, that the seller is late in delivering the goods and the buyer sends a *Nachfrist* notice requiring complete delivery and within a reasonable period fixed by the buyer's notice the seller delivers all but a small portion of the goods or delivers all, but all or part of them do not conform to the contract terms, can the buyer avoid the contract? Art. 49(1)(b) permits the buyer to avoid if the seller fails "to deliver the goods" within the period fixed by a *Nachfrist*

as was pointed out at the Vienna Conference (Official Records, (1981) at 211, para. 13 and 354, para. 68), strange that the Convention protects the buyer only in the case of non-delivery but without giving him any remedy against the seller's failure to comply with the buyer's request under Art. 47 (1). It is not in fact obvious what purpose Art. 47 (1) serves in giving a broad right to the buyer to fix an additional period of time for the seller to perform his obligations other than delivery of goods. The only advantage seems that the *Nachfrist* procedure may provide for the buyer is to give him time to consider what course of action to adopt in relation to the seller's breach and to encourage him to perform. See also, DTT's Consultative Document, (1989) at 37; Nicholas, B., (1989) at. 225; Ziegler in: Nina, M.; Galston and Hans Smit, (1984) at 9.03 at 9.17.

⁹¹ Although whether or not a particular period of time is reasonable depends on the facts of the case, in a case decided by a German court it was held that the additional delivery period of two weeks was too short. According to the court, the period of seven weeks between announcement and actual declaration of avoidance was reasonable (see Germany 24 May 1995 Oberlandesgericht Celle (CLOUT, abstract no. 136).

⁹² The question whether the fixing of an additional time period must be done in such a way as to make it clear to the party in breach that the additional period sets a fixed and final limit on the date for performance or whether no such unequivocal warning is necessary is controversial. Will and Knapp (see Bianca-Bonell, (1987) at 345 and 461 respectively) and Honnold (see Honnold, J., (1991) at 370) support the former view and Enderlein & Maskow (see Enderlein F., & Maskow, D., (1992) at 238) support the latter view. However, in a Convention case decided by ICC the arbitral opinion appears to support the latter view (see ICC Arbitration Case No. 7585 of 1992, the case was concerned with the seller's right to avoid the contract on *Nachfrist* notice.). See also the Editorial remarks by Albert H. Kritzer attached to the abstract case.

⁹³ Will in: Bianca-Bonell, (1987) at 345.

notice - a standard that could be construed to apply even though such failure does not amount to a fundamental breach.

It might be argued that the position is apparently covered by Art. 51 (2)⁹⁴. Under this Art. a buyer who has received goods a part of which is not in conformity with the contract or is missing can avoid the contract in its entirety "only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of contract." Thus a buyer who has received delivery of less than the required amount or non-conforming goods cannot avoid the contract as a whole by using the *Nachfrist* procedure. Termination can be justified in such a case where the lack of conformity amounts to a fundamental breach. The question can also be answered by the proper construction of the general principles on which the Convention is based (Art. 7 (2)).⁹⁵ One of those principles is that avoidance of the contract is effective only where the other side has committed a fundamental breach. Art. 7(1)⁹⁶, furthermore, requires that the Convention is to be interpreted "to promote ... observance of good faith in international trade." The *Nachfrist* provisions of the Convention can and should, therefore, be interpreted in a manner that does not undermine the fundamental breach standard for avoidance accepted as a general criterion by the Convention. In the light of these considerations, Art. 49 (1) (b) should be construed to permit avoidance only where the seller fails to deliver within the additional time fixed by the buyer in accordance with Art. 47 (1) a substantial part of the goods or the delivered goods are substantially contrary to the contract.⁹⁷

(B) Nachfrist Notice and Non-Conforming Documents

The other question which arises is whether the *Nachfrist*-notice avoidance can be extended to the case of non-tender of documents. There is no express provision in the Convention for such an extension, but Art. 49 (1) (b) expressly refers to the case of non-delivery of *goods*. However, some commentators have suggested that "[B]y analogy, the provision also applies to the failure to transfer documents of title".⁹⁸ This can be justified on the ground of the fact that

⁹⁴ Art. 51 (2): "The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract."

⁹⁵ Art. 7 (2): "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

⁹⁶ Art. 7 (1): "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

⁹⁷ See also Flechtner, H. M., (1988) at 71-73 in which he raises the question as to the buyer's failure to pay in full within the additional period of time. At the Vienna Diplomatic Conference, both the Netherlands and Canada delegations proposed amendments that would have allowed a buyer to avoid if the seller failed to perform any obligation within the extended period of time. However, the Canadian proposal would have permitted avoidance only where the seller's failure consisted of non-delivery or failure to fulfil another 'material obligation' (see, Official Records, (1981) 116, 354-356). Although the proposal was consisted of two separate questions: the question of the materiality of the seller's delayed performance and that of extension of the *Nachfrist* notice to breaches other than late performance, the first issue was confused with the second and consequently the whole proposal was defeated.

⁹⁸ Schlechtriem, P., (1986) at 78.

in an international sale of goods the parties normally bargain for documents. Without the documents of title the buyer cannot access or resell the goods bargained for. Accordingly, the same logic which justifies the provision in the case of non-delivery of goods exists in the case of failure to transfer the documents of title.⁹⁹

3.2.3. Breach of Severable Contract

In the preceding discussions it became clear that the buyer may be entitled to terminate the contract either on the basis of the doctrine of "fundamental breach" or the *Nachfrist* rule. Application of these rules has been examined in respect of the case where the buyer wishes to terminate a non-severable contract as a whole for the reason of the seller's non-conforming delivery and late delivery. The Convention, in addition to that, provides some provisions under which the buyer may be able to terminate the contract in respect of some part of the subject-matter of the contract and keep the contract alive with respect to the other part (Arts. 51 (1) and 73 (1)). In the following, the application of the doctrine of fundamental breach as well as *Nachfrist* rule is assessed in respect of such cases.

3.2.3.1. Fundamental Breach and Severable Contracts

Where the seller makes a delivery which includes some non-conforming goods or of less than the required quantity of goods, Art. 51 (1)¹⁰⁰ entitles the buyer to exercise his remedies under Arts. 46-50, including Art. 49 which gives him the right to avoid the contract. Although the Convention does not expressly make a distinction between cases where the contract is or is not severable, it seems that by recognising partial avoidance Art. 51 (1) presupposes that it should be the case where performance of the seller could be divided into conforming and non-conforming parts. Where the non-conforming part is severable the reference means that both the conditions and the effects of Arts. 46-50 can be applied to that part.¹⁰¹ It follows that the buyer can treat the missing or non-conforming part as the subject of a separate contract that is severable for remedy purposes, and consequently terminate the contract in respect of that part, provided that the seller's failure constitutes a *fundamental breach* with respect to that part. In such situations the buyer can avoid the contract "in its entirety" only if the seller's default "amounts to a *fundamental breach of contract* (italic added)" as a whole (Art. 52 (2)).

⁹⁹ See also, Guest A.G. et al, (1997) Para. 19-123, no. 62.

¹⁰⁰ Art. 51 (1): "If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform."

¹⁰¹ See in this respect, Will in: Bianca-Bonell, (1987) at 378. In contrast, see DTT's Consultative Document, (1989) at 42; Ziegel, J., & Samson, C., (1981) Art. 51 where the authors argue that the article does not make such a distinction. However, they do not answer the question: how can the breach in respect of a particular part be determined fundamental if it is non-severable.

Similar provision is provided where the seller has committed a breach of contract in respect of one or more instalments under an instalment contract. Art. 73 (1)¹⁰² permits the buyer to avoid the contract "with respect to [an] instalment" if the seller's failure to perform any of his obligations "constitutes a *fundamental breach of contract* (italic added) with respect to that instalment".¹⁰³ He is also empowered to avoid the contract in respect of future instalments if the seller's default in relation to any instalment gives the buyer "good grounds to conclude that a *fundamental breach of contract* (italic added) will occur with respect to future instalments" (Art. 73 (2))¹⁰⁴. Likewise, Art. 73 (3) grants the buyer who declares the contract avoided in respect of defective instalments an opportunity, at the same time, to declare the contract terminated "in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract".

3.2.3.2. Nachfrist Notice and Severable Contracts

As the language of Art. 49 (1) (b) shows, the rule comes into operation where the seller fails to *deliver* goods. This phrase raises the question whether the *Nachfrist* procedure can be applied to the case of partial delivery and instalment contracts or is confined to situations where the seller has not delivered any part of the goods within the contract period. Art. 51 (1) entitles the buyer to exercise his remedies in Arts. 46-50, including the *Nachfrist* procedure, if the seller makes a delivery that contains less than the required quantity. In such a case it therefore allows the buyer to fix an additional period of time for performance. Where the seller does not deliver, or informs the buyer that he will not deliver, the missing part within the time fixed in a *Nachfrist* notice the buyer has a right to avoid the contract with respect to that part.

However, Art. 73 (1) does not, by its terms, permit the buyer to use the *Nachfrist* procedure to create grounds for avoidance with respect to an instalment if the seller is late in delivering the instalment. According to Professor Honnold "an analogy to Art. 51 (1) suggests that a *Nachfrist* notice should be effective with respect to overdue performance".¹⁰⁵ It seems

¹⁰² Art. 73 (1): "In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment."

¹⁰³ If Art. 51 (1) is provided to cover severable contracts one may argue that what is the role of Art. 73 (1). The legislative history of the provision shows that the point was noted by the 1977 Commission. The Commission then argued that the provision was necessary to enable the seller to avoid the contract equivalent to the provision in what is now Art. 51, which permits the buyer to do so (see, UNCITRAL, Yearbook, vol. VIII, (1977) at 55, paras. 422-425. Under this construction, the language of Art. 51 is broad. It is not directed to contracts which provide for delivery of goods in separate lots. It applies to any contract its subject-matter is commercially severable.

¹⁰⁴ Art. 73 (2): "If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time."

¹⁰⁵ Honnold, (1991) at 501 No. 3.

that there is no clear reason to treat the analogous non-delivery situations covered by Arts. 51 (1) and 73 (1) differently; a buyer who is awaiting a late instalment delivery should be able to use the *Nachfrist* procedure to establish grounds for avoiding with respect to the instalment.

Similarly, Art. 73 (2) does not mention avoidance of the contract for future delivery on the ground of the *Nachfrist* notice. Professor Honnold, however, argues that *Nachfrist* avoidance is "intrinsically inapplicable" to the situation addressed in Art. 73 (2), i.e., avoidance as to future performance.¹⁰⁶ It seems that the basis of his argument is that the *Nachfrist* avoidance rule is designed to justify the buyer's avoidance where the seller fails to perform within a reasonable time beyond the contractual time for performance (Arts. 47, 49 (1) (b)). It is not designed to deal with avoidance as to performance not yet due.

3.3. Buyer's Right to Terminate and the Seller's Right to Cure

The Convention, for the purpose of minimising the hardship and economic waste involved in termination of the contract for international sales, provides appropriate rules permitting the defaulting seller to "cure" a defect in his performance by way of replacing or repairing defective documents and goods. For this purpose, Art. 34 enables the seller who handed over documents before the contract date to cure any lack of conformity in the documents before the time for performance is expired.¹⁰⁷ The same power is given to him by Art. 37 when he has delivered goods which do not conform to the contract.¹⁰⁸ The right to cure is also extended by Art. 48 to the case where the contract time for performance has expired.¹⁰⁹ The general language of Arts. 34 and 37 raises a significant question: Is the seller entitled to cure any lack of conformity even in case where it constitutes a fundamental breach of contract? The particular language of Art. 48 raises also the question: Does the buyer's right to avoid have priority over the seller's right to cure under Art. 48?

The Convention provides no clear provision to ascertain the relationship of the buyer's right to avoid the contract on account of fundamental breach with the seller's right to cure

¹⁰⁶ Honnold, (1991) at 501, and, fn. 3, see also at 401.

¹⁰⁷ Art. 34: "If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention."

¹⁰⁸ Art. 37: "If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention."

¹⁰⁹ Art. 48 (1): "Subject to Art. 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention."

under Arts. 34 and 37; it does not determine when the seller's right to cure would stop the buyer's right to terminate under Art. 49 (1) (a). It simply says that the seller may, up to the contract date, cure any lack of conformity (by repair or replacement) or deficiency in the goods delivered under certain circumstances provided by Arts. 34 and 37. To solve this conflict, one way is to say that where the seller is ready and able to offer reasonable cure the breach is not effectively fundamental. Professor Honnold is one of the commentators who support this construction.¹¹⁰ In contrast, Professor Will suggests that the same object can be achieved by determining the fundamentality of breach on the basis of the mere lack of conformity (without having regard to cure), but the existing right to avoid is merely suspended when a rightful offer to cure arrives.¹¹¹

However, it seems that the legislative history of Art. 48 tends to support Honnold's view.¹¹² But it is suggested that it does not mean that the mere possibility of remedying the defect by the seller should change the character of an actual fundamental breach, otherwise the right of avoidance conferred on the buyer by Art. 49 (1) (a) would be limited to very exceptional cases. In addition, it would certainly increase the uncertainty. A commercial seller is expected to act in a reasonable manner. It would not be fair to keep the buyer waiting for the seller to be able and willing to cure.

¹¹⁰ Honnold, relying on the legislative history of Art. 25 concludes that "the question of whether a breach was 'fundamental' for the purpose of avoidance must be answered in light of the effect of a rightful offer to cure or price adjustment, for otherwise [the] seller's exercise of this right would be futile." (see Honnold, 1991) at 258-259. See also, Ziegel in: Nina, M.; Galston and Hans Smit, (1984) at 9-23. The Secretariat's Commentary on Art. 45 (1) (a) also notes: "In some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate time" (Secretariat Commentary, (1979) at 41 para. 6).

¹¹¹ Will in: Bianca-Bonell, (1987) at 357-358. The same difficulty arises in respect of the buyer's right to demand that the seller deliver substitute goods under Art. 46 (2). Will the seller's offer to repair the lack of conformity exclude the buyer's right to require substitute goods if the lack of conformity is fundamental? Professor Will argues that to confine the buyer's right to require substitute goods under Art. 46 (2) to the case where the seller was not able and willing to offer to repair may make little sense, since it would be restricted to the few situations where repair is impossible. Such a rigid construction of Art. 46 (2), was certainly not in the mind of the drafters, who had originally dedicated all of Art. 46 to the right to require substitute goods (ibid., at 357). See also, Secretariat's Commentary, (1979) at 38-39; Official Records, (1981) at 332-333.

¹¹² In this regard, the Drafting Committee, during its consideration of Art. [48] in Tenth Session (1977) considered a proposal under which Art. [25] was to be changed as follows: "A breach committed by one of the parties to the contract is fundamental if, under all the circumstances, *including a reasonable offer to cure*, it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result (emphasis added)." In support of this proposal the US delegate explained that the proposed addition to the definition of fundamental breach was meant to protect the defaulting party against technical avoidance of the contract where there had been an offer to cure under Art. [48]. However, the majority did not support the US proposal, arguing that the change was unnecessary because the problem was fully covered by the specific provision dealing with the seller's right to cure and if there was no offer to cure, the situation was governed by Art. [25] (see UNCITRAL, Yearbook, VIII (1977), 31-32; Honnold, (1989) at 324, paras. 93-95. See also, Michida, S., (1979) at 287-289 in which he explained in more detail the history of that proposals). As is seen, the general understanding of the members of the Committee was that the problem was covered by a specific provision. However, they did not doubt the fact that in determining whether or not the breach was fundamental, the seller's rightful offer to cure should be regarded as a decisive factor

Art. 48 by its language raises a further question: Does the buyer's right to avoid the contract have priority over the seller's right to cure after the contract date? This Art. by expressly reserving Art. 49, appears to underline the priority of the buyer's remedy of termination over the seller's right to cure. Is this appearance true? Things are not as simple as that. The interplay between termination and cure was a highly controversial issue throughout the UNCITRAL Working Group's sessions and the Vienna Conference and is still among the commentators on the Convention.¹¹³

It seems that a precise answer to the question requires one to examine the issue in light of the legislative history of the provision. Initially, the UNCITRAL Working Group, in examining the provision which is now Art. 48, took into consideration the relationship of the seller's right to cure with the buyer's right to terminate the contract and the reduction of price. Several proposals were considered. The central issue in discussion of those proposals was whether the buyer may preclude the seller from curing any failure to perform his obligations where the cure can be effected without such delay as would amount to a fundamental breach and without causing the buyer unreasonable inconvenience or unreasonable expense. This issue was discussed in the context of a defect in the goods which, in the absence of repair, was so serious as to constitute a fundamental breach but where the delay in remedying that defect would not constitute a fundamental breach and would not even cause the buyer unreasonable inconvenience or unreasonable expense. Different views were rendered by the members of the Committee. However, there was considerable opposition in the Committee to the idea that the buyer's right to declare the contract avoided could be affected by an offer to cure the defect after the time for performance. The seller was in breach and a possibility to cure was a privilege which depended upon the consent of the buyer who had the right to declare the contract avoided. There was, on the other hand, substantial support for the proposition that the buyer's right to declare a reduction in the price was subject to the seller's right to cure provided that the seller bore all expenses of such cure. As a result, the Committee accepted the majority's view and reworded para. 1 of the draft Art. 30, which was renumbered as Art. 44(1) of the Draft Convention 1978, as follows: "[U]nless the buyer has declared the contract

¹¹³ For instance, Professor Honnold, emphasising the replacement of UNCITRAL's Draft Art. 44 -i.e., "Unless the buyer has declared the contract avoided ..." by the present words of Art. 48 -i.e., "Subject to Art. 49...", argues that the change in words leaves little doubt that the seller's right to cure prevails over the buyer's right to avoid. To find otherwise, he observes, would make meaningless the seller's right to cure (see, Honnold, (1991) at 375-376, particularly, footnote no. 6 at 376, see also, p. 259). In contrast, Professor Ziegel argues that the offer to cure must be made before the injured party exercises the right to avoid the contract (Nina, M.; Galston and Hans Smit, (1984) at 9-23). See also, Enderlein in: Sarcevic P.-Volken P., (1986) at 193; Schlechtriem, P., (1986) at 77). Professor Will, on the other hand, believes that one cannot answer with certainty the question whether avoidance or cure will prevail, since the language of para. 1 of Art. 48 is no clearer than that of 1978 Draft (Bianca-Bonell, (1987) at 349-351).

avoided in accordance with Art. 31, the seller may, ..., remedy...".¹¹⁴ The Secretariat's Commentary on Art. 44 of the 1978 Draft in line with this general understanding notes that "the seller would have the right to remedy the non-conformity in the goods by repairing or replacing them, unless the buyer terminated the seller's right by declaring the contract avoided".¹¹⁵

The issue again became the subject of considerable debate at the Vienna Conference. This provision, which explicitly gave the priority to buyer's right to avoid the contract over the seller's right to cure, was opposed by some delegates at the Conference who sought to delete these limiting words.¹¹⁶ Three alternative proposals were considered by State delegations.¹¹⁷ Because of the strong opposition by some delegations the proposals which sought to delete the limiting phrase were rejected¹¹⁸ and the Conference finally adopted the second alternative as Art. 48(1) which opens with the words "subject to Art. 49, the seller may ... remedy...".

As seen, the legislative history of the provision clearly shows that the majority of delegations at the Conference were opposed to the approach which sought to give absolute priority to the seller's right to cure over the buyer's right to avoid the contract under Art. 49 (1) (a). The opening words of Art. 48 were adopted upon this general understanding.¹¹⁹ Accordingly, where the fundamental breach test is satisfied the buyer would be entitled to terminate the contract. The buyer is not required to accept the seller's offer to cure and give him an opportunity to cure the defect under Art. 48. This is because the language of para. 1 of Art. 48 subjects the exercise of the right of cure to the buyer's right to avoid the contract under Art. 49. In addition, there is no provision under the Convention to require the buyer to give the seller in breach an opportunity to cure before exercising his right of avoidance. Moreover, para. 2 of Art. 48 implicitly permits the buyer to reject the seller's request to remedy the defect

¹¹⁴ UNCITRAL, Yearbook, VIII (1977) at 44-45; Honnold, (1991) at 337-338; Official Records, (1981) at 40.

¹¹⁵ Official Records, (1981) at 40 para. 3.

¹¹⁶ Official Records, (1981) at 78-79, 114-116, 341-344 and 351-353.

¹¹⁷ Official Records, (1981) at 115.

¹¹⁸ Official Records, (1981) at 341-344, paras. 44, 45, 48, 51, 55, 56, and 66-68.

¹¹⁹ In a case decided by ICC arbitration in 1994, the Tribunal confirmed the point. In that case a buyer from Austria sued a seller from China. The contract involved 80,000 scaffold fittings delivered to buyer's customer in England. The Tribunal found that there was a lack of conformity of an important part of the goods giving rise to the right to avoid the contract. In justifying the buyer's avoidance, the Tribunal stated: "The lack of conformity of an important part of the goods supplied amounts to a breach of the contract which, under Art. 25, is fundamental since the buyer is deprived of substantially what he was entitled to expect under the contract." The Tribunal also stated: "According to Arts. 49(1) (a) and 51 (2) of the Convention [the buyer] may declare the contract avoided." The seller, in contrast, argued that subject to Art. 49, Art. 48(1) permits a seller to cure, if he can do so without unreasonable delay, unreasonable inconvenience to the buyer or uncertainty of reimbursement of expenses incurred by the buyer. However, on the facts of the case (declaration of avoidance pursuant to Art. 49 (1) (a)), the Tribunal held that "[the seller] is not entitled to supply substitute items after the delivery date specified in the contract without the consent of [buyer]." See in this respect, ICC Arbitration Case No. 7531 of 1994. See also, the Editorial remarks by Albert H. Kritzer attached to the abstract of the case.

within a reasonable time.¹²⁰ Under this provision, the buyer is deprived of the right to resort to remedies which are inconsistent with the seller's performance only when he accepts the seller's request. There is no express provision in the Convention to deprive the buyer of his right of avoidance in accordance with Art. 49 (1) (a) for the seller's mere offer to cure his default after the contract date. The only thing provided by the Convention is the last phrase of Art. 50 under which the buyer who rejects the seller's offer to cure under Art. 48 is deprived of his right to claim price reduction.

However, the above construction would raise the question what purpose Art. 48 (1) serves for the seller. Is it true, as Honnold observes, that giving priority to the buyer's right to avoid the contract would frustrate the seller's right to cure under Art. 48?¹²¹ The answer to the question needs to take into account the relationship between the two provisions under Arts. 48 and 49. Under Art. 48 (1) the seller is empowered to cure at his own expense "any failure to perform his obligations". Therefore, this is a general provision, contrary to Honnold who believes that it is a specific one¹²², which covers fundamental and non-fundamental breaches. On the other hand, by virtue of Art. 49 (1) the buyer is given an option to avoid the contract where the seller's failure amounts to a fundamental breach, whether the seller offers to cure or not. On this interpretation, giving priority to the buyer's right to avoid does not make the seller's right to cure futile, since the seller can exercise his right under Art. 48 (1) where his breach does not amount to fundamental breach for the purpose of precluding the buyer from exercising his right to reduce the price under Art. 50.¹²³ The buyer would be able to exercise his right under Art. 49 (1) where the seller does not show his ability and willingness to cure the breach, since the buyer should not be deprived of his right for the mere possibility of curing the breach by the seller. This is because the buyer, as indicated before, is not under any duty under the Convention to discover the possibility of cure by the seller and to give him an opportunity to cure.

The controversial case is where the buyer has not declared the contract terminated and the seller, after becoming aware of the defect, informs the buyer of his readiness to cure.¹²⁴ Which of these two rights has priority? The language of Arts. 48 (1), 49 (2) (b) (iii)¹²⁵ and 50 as well as the legislative history of the provision demonstrate that in such a situation the buyer

¹²⁰ See also Art. 49 (2) (b) (iii).

¹²¹ Honnold, (1991) at 376.

¹²² Honnold, (1991) at 376 and the accompanying fn. 6.

¹²³ Art. 50 provides where the buyer refuses to accept the seller's offer to cure in accordance with Arts. 34, 37 and 48 he may not reduce the price.

¹²⁴ However, this would be the case where the buyer is not deemed to have lost his right to avoid the contract because of lapse of a reasonable time (Art. 49 (2) (b) (i)).

¹²⁵ This provision provides that the buyer will not lose his right to avoid the contract if he has declared that he will not accept performance made under Art. 48 (2).

is entitled to disregard the seller's offer to cure and terminate the contract on account of seller's fundamental breach. However, Art. 48 gives the seller the right to make clarify the position by asking the buyer to make known whether he will accept late performance within a period specified by the seller in accordance with Art. 48 (2), (3), (4). Where the buyer does not expressly declare his contrary view the seller would be entitled to cure (Art. 48 (2)). In the meantime the buyer may not resort to any remedy inconsistent with the seller's performance.

Likewise, one may say that the seller's right to cure under Art. 48 would also arise where he has made a partial non-conforming delivery. In that case, where the lack of conformity does not constitute a fundamental breach of the whole contract the seller may be entitled to cure even though breach in respect of the non-conforming part is fundamental. In that case, it can be argued that the seller's right to cure has priority over the buyer's right to avoid the contract in respect of the non-conforming part (Arts. 51 (1) and 73 (1)), since Art. 48 only refers to Art. 49 which is only concerned with the avoidance of the whole contract.

3.4. Mechanism of Termination

3.4.1. No Automatic Termination

Under ULIS two types of avoidance of the contract were provided for. The first was *ipso facto* avoidance, that is, the right to continue performance under the contract would come to an end without needing a declaration by the victim of breach¹²⁶, and the second was avoidance by declaration or notice from the innocent party to the breaching party. *Ipsa facto* avoidance was eliminated from the remedial system of the present Convention on the ground that it led to uncertainty as regards the rights and obligations of the parties, e.g., in the case of late delivery, the seller needs to know when he must reship or resell the goods or take other actions to prevent their wastage or spoilage.¹²⁷ Under the present Convention, where the seller's breach amounts to a fundamental breach or the seller disregards the additional period of time fixed by the buyer in accordance with Art. 47 (1), the buyer has an immediate right to declare the contract avoided, but he is not bound to make use of this remedy. He can, if he wishes, resort to other remedies.¹²⁸ However, it is to be noted that this does not necessarily apply where the

¹²⁶ See e.g., Arts. 25, 26 (1) and (2), 30 (1) and (2) of ULIS.

¹²⁷ See generally the study of the secretary-general, A/CN.9/W.G.2/W.P.9, reprinted in UNCITRAL, Yearbook, III (1972) at 41-54; A/CN. 9/35, reprinted in UNCITRAL, Yearbook, I (1971) at 176-188, paras. 94 ff., and annex 2, reprinted in UNCITRAL, Yearbook, I (1971) at 188-198, paras. 70 ff.; A/CN. 9/62, annex 2, reprinted in UNCITRAL, Yearbook, III (1972) at 83-90 paras. 28 ff.; Secretariat's Commentary, (1979) at 41; Berman H.J.; Kaufmann C., (1978) at 268; Goldenhielm, B., (1966) at 35; Honnold, (1965) at 384; Honnold, (1979) at 228; Treitel, G. H., (1988) paras. 250, 281; Treitel, G. H., (1976) paras. 154, 178.

¹²⁸ Arts. 49 (1), 72 (1) and 73 (1) -may declare the contract avoided. As the word "may" shows, under the Convention the remedy of avoidance is always at the option of the aggrieved party. For justification of this rule, see, A/CN. 9/35, reprinted in UNCITRAL, Yearbook, vol. 1 (1971) pp. 176-188, para. 96; A/CN. 9/62, annex 2, reprinted in UNCITRAL, Yearbook, vol. 3 (1972) at 83-90 para. 30.).

failure in performance is due to a supervening event for which neither party is contractually responsible. Such an event may lead to automatic discharge, but this differs from termination for contractual default, most obviously in that it excludes all claims for damages.

Under the Convention, termination of the contract is always at the option of the aggrieved buyer. He is under no duty to give the defaulting seller prior notice of the proposed avoidance or give him an opportunity to provide an assurance of performance.¹²⁹ He is also not required for this purpose to resort to a court's judgment¹³⁰, and the court is not allowed to give a period of grace to the defaulting seller (Arts. 45 (3) and 49). It is in his hand to exercise if he wishes unless he has lost his right under the Convention.

3.4.2. Electing to Terminate the Contract

Termination under the Convention in all cases can be effected by a simple declaration of the buyer to the seller.¹³¹ If the injured buyer does not declare the contract avoided the contract continues in force. Under the Convention the avoiding buyer must declare affirmatively that he avoids the contract and must transmit advice of his decision to the seller by an appropriate means of communication (Arts. 26, 27). There must be a positive act on the part of the buyer to declare his intention to terminate. This principle is of a general nature applicable to all cases of avoidance under the Convention whether it affects the whole contract or only part of it, and irrespective of whether it is based on an actual or anticipatory breach.

Form of Declaration. An entire Art. of the Convention, Art. 26¹³², is dedicated to the declaration of avoidance, requiring that it be made by a notice. The Convention does not, however, require that the notice of termination must be in a particular form or by a specific means of transmission. It may, therefore, be written or oral, and may be transmitted by any means whatsoever.¹³³

Unlike in the case of acceptance of an offer where the Convention puts the risk of loss etc. on the person sending the acceptance (i.e., offeree), Art. 27 lays down the opposite principle (i.e., the dispatch principle) as governing any notice, request or other

¹²⁹ The rule is subject to an exception. In the case of avoidance for the "anticipatory fundamental breach" Art. 72 (2) requires the party intending to declare the contract avoided "to give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance" provided the time for performance allows.

¹³⁰ This point has been expressly referred to by ICC arbitration in the Convention case of ICC Arbitration Case No. 7585 of 1992. The full text of the decision is cited in: UNILEX, E. 1992-32.

¹³¹ See in this respect the opening word of Art. 49 which provides: "The buyer may *declare* the contract avoided: ..."

¹³² Art. 26: "A declaration of avoidance of the contract is effective only if made by notice to the other party."

¹³³ This was the clear position of the draftsmen where all suggestions opposing this principle were expressly rejected (such as the suggestion that notice must be made in writing (A/CN. 9/125, add. 1, comment of USSR on Art. 10 reprinted in: UNCITRAL, Yearbook, VIII, (1977) at 130) or, alternatively, be immediately followed by written notice (A/32/17, annex 1, para. 102, reprinted in: UNCITRAL, Yearbook, VIII, (1977) at 32).

communication, unless otherwise expressly provided in the Convention¹³⁴. The risk therefore is *prima facie* on the person to whom the communication is addressed. Accordingly, what the buyer is required to do is to declare his intention to avoid the contract by an appropriate means. It is assumed, however, that failure to comply with the method of transmission does not mean the nullity of the notice; it simply means that a party who gives it in an inappropriate means would run the risk of its transmission if, for instance, it fails to arrive in time.¹³⁵ The notice has to make clear to the seller that the contract is avoided. Although the degree of clarity required in the notice is not clearly ascertained,¹³⁶ in a Convention case,¹³⁷ a German court provided guidance with respect to the type of declaration that must be made in order for the contracts to be avoided in accordance with the Convention's provisions. First, the court by implication recognised the use of telex or fax as a proper means to declare avoidance. Second, and more significantly, the Court concluded that a party declaring a contract avoided need not use exact language, such as, "I hereby declare our contract avoided." Rather, the Court acknowledged a more pragmatic form for declaration of avoidance, that is, that the communication must contain language which clearly operates to put the party in breach on notice that the party not in breach will no longer fulfil. In that case, the buyer had informed the seller that the shoes remaining to be made would be made by another Italian company and that their joint venture under the contract for sale of shoes had ended. This notice was regarded by the court as sufficient for an effective declaration of avoidance.¹³⁸ Likewise, in another case, a German court stated that the buyer's refusal to take delivery would suffice.¹³⁹ This would be the case where termination is based on the late delivery, since refusal to accept has a clear meaning. However, the meaning would not be clear where the buyer rejects defective goods, for rejection could be understood as a demand for replacement goods under Art. 46 (2).

3.4.3. Election of Affirmation

The Convention provides a number of circumstances in which the buyer may be treated as having affirmed the contract and as a result have lost his right of termination. These

¹³⁴ Such as the seller's request or notice to cure beyond the contract time under Art. 48 (1) which is to be received by the buyer (see Art. 48 (4)).

¹³⁵ See also, Graveson-Cohn-Graveson, (1968) at 60 where it is said that a communication made in an unusual manner would appear to be satisfactory if it reached the addressee in due course and was not promptly (Art. 11 of ULIS) rejected by him.

¹³⁶ See, Karollus, M., (1995) 51-94.

¹³⁷ See, Germany 17 September 1991 Oberlandesgericht Frankfurt (CLOUT abstract no. 2).

¹³⁸ See in this respect, Babiak, A., (1992) at 126; the editorial remarks by Albert H. Kritzer attached to the abstract case.

¹³⁹ see, Germany 24 April 1990 Amtsgericht Oldenburg (CLOUT, abstract no. 7). See also, Karollus, M., (1995) at 51-94.

circumstances can be divided into three general categories: (a) failure to notify the seller of the lack of conformity in accordance with Art. 39; (b) lapse of a reasonable time without giving notice to the seller of his avoidance (Art. 49 (2))¹⁴⁰; and (c) restitution of the goods becoming impossible (Art. 82)).

Under the first rule, the buyer may lose his right to reject the non-conforming delivery and terminate the contract if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered or ought to have discovered it (Art. 39 (1)).¹⁴¹ Similarly, in the case of latent defects he may lose his right under this rule if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to him, unless this time-limit is inconsistent with a contractual period of guarantee (Art. 39 (2)).

Under the second rule, the buyer may lose his right where the time limit expires. In the case of late delivery, the time runs from the buyer's becoming aware that delivery has been made (Art. 49 (2) (a)). In the case of any other breach it runs either from the moment when the buyer knew or ought to have known of the breach (Art. 49 (2) (b) (i)); or, where he has given a notice under Art. 47 (1) requiring the seller to perform within a reasonable period of time,

¹⁴⁰ Art. 49 (2): "However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of Art. 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of Art. 48, or after the buyer has declared that he will not accept performance."

¹⁴¹ It is to be noted that in a number of Convention cases the courts have applied this rule in a severe sense. For instance, in a case decided by an Austrian court (Austria 29 March 1994 Landgericht (i.e., District Court) Feldkirch), it was held that two months after delivery of the goods was a reasonable period of time within which the buyer should have discovered the lack of conformity of the goods. The decision of the district court was affirmed in: Austria 1 July 1994 Oberlandesgericht Innsbruck: Dansk Blumsterexport A/s v. Frick Blumenhandel, CLOUT abstract no. 107). The same position has been taken by the German courts. For instance, in a case heard by a Stuttgart court, a German buyer of Italian shoes claimed that it had examined several samples, but that the defects could not have been discovered before the buyer's clients brought them to the buyer's attention. The shoes were delivered on May 25, 1988 and the buyer gave notice of lack of conformity of June 10, 1988. The court held that the buyer was in contravention of the "reasonable time" requirement of Art. 39 (1), reasoning that the buyer had a duty to examine the goods minutely and scrupulously. The court noted in this context that the buyer previously had identified flaws in a prior shipment, and that it therefore had been on notice of problems. The court thus held that notice to be tardy when it was given sixteen days after delivery (see, Germany 31 August 1989 Landgericht Stuttgart (CLOUT abstract no. 4)). Likewise, in the case of OLG Düsseldorf 8 January 1993, the German court held that seven days constituted an unreasonably long time period. In another case before a German court, notice of lack of conformity was deemed unreasonable where it was given two months after the delivery of the purchased goods, and where the court found that the claimed defect in packaging could have been discovered immediately (Germany 20 April 1994 Oberlandesgericht Frankfurt (CLOUT, abstract no. 84). In other cases before German courts, notice of lack of conformity was held not to have been given within a reasonable time period when it was given more than two months after the delivery of shirts of the wrong size (see Germany 10 February 1994 Oberlandesgericht Düsseldorf [6 U 32/93] (CLOUT, abstract no. 81), and in other cases it is measured about one month (see e.g., Germany 8 March 1995 Bundesgerichtshof (CLOUT, abstract no. 123; Germany 21 August 1995 Oberlandesgericht Stuttgart). See in this respect, Curran, V. G., (1995) at 175-199. These instances show that the period of reasonable time would vary according to the nature of lack of conformity and goods.

from the expiration of that period, or from the seller's declaration that he will not perform his obligations within that period (Art. 49 (2) (b) (ii)).

A further general rule is that the buyer may lose his right of termination if he cannot restore the goods in substantially the condition in which he received them (Art. 82 (1)). Thus, he may lose his right if he has consumed, altered or resold the goods to a third party provided that he has done so after he discovered or ought to have discovered the lack of conformity (Art. 82 (2)). One may argue that acts such as sale, pledge or any other disposition of documents by the buyer may be placed in this category, since dealings with the documents controlling the goods will usually place them out of the buyer's control. This may be the case where he transferred the documents representing the goods or pledged them to the bank for credit. In both cases, he will hardly be able to reject the goods unless the sub-buyer himself rejects, or in the case of pledge, the pledgee approves rejection of the goods. Accordingly, unless the sub-buyer rejects or the buyer pays off the bank to obtain release of the documents, he will not be able to enforce his right to reject because of the impossibility of returning the goods to the seller.

However, he will retain his right where the impossibility of restoration was not caused by his acts or omission (Art. 82 (2) (a)). Similarly, he will not lose his right by this method where it was due to examination of the goods in accordance with Art. 38 (Art. 82 (2) (b)); or was because of reselling the goods in the normal course of business, consuming or transferring them in the course of normal use before he discovered or ought to have discovered the lack of conformity (Art. 82 (2) (c)).¹⁴²

3.5. Effects of Termination

As in English law, under the Convention, termination affects the legal life of the contract and the contractual relationship of the parties. In the following, the effects of termination on both the contract, rights and duties of the parties will be referred to in brief.

3.5.1. Effects on the Contract

As regards the question whether termination has retrospective or prospective effects on the contract, it is hard to say that the Convention adopted any single approach.¹⁴³ This is because it provides, on the one hand, that avoidance releases both parties from the obligations they

¹⁴² Giving the buyer who resells, transforms or consumes the goods the right to avoid the contract raises the question whether it has any legal justification. See in this respect, Tallon in: Bianca-Bonell, (1987) at 609; Honnold, J., (1991) at 568.

¹⁴³ For different views see Enderlein; F.; Maskow, D., (1992) at 341-342; .Schlechtriem, p., (1986) at 107; Tallon in: Bianca-Bonell, (1987) at 604.

have undertaken under the contract without affecting any rights to claim damages caused by breach. It also emphasises that avoidance does not affect any provision of the contract concerning dispute-settlement mechanism (arbitration and forum or re-negotiation clauses)¹⁴⁴ or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract, such as liquidated damages and penalty clauses or clauses restricting or excluding liability (Art. 81)¹⁴⁵. On the other hand, the Convention requires both parties to return all benefits of possession (profits and advantages of use). If the seller is required to return the price, he must also pay interest from the date on which the price was paid. Similarly, in contrast to the seller who is bound to pay interest on the refundable price, the buyer is only required to account to the seller for all benefits which he has actually derived from using the goods or part of them (Art. 84 (1))¹⁴⁶. In addition, it imposes on the parties reciprocal duties of restoration (Art. 82). An obvious example of adoption of the retrospective effect of termination by the Convention can be found when an instalment contract is entirely terminated after delivery of some defective instalments. Under this provision all instalments are to be returned even though some of them are perfect. These instances reveal that, although the Convention does not pose the problem in abstract terms of retrospectivity, its wording implies retrospective effects of avoidance. Accordingly, it can be said that the Convention has adopted a quasi-rescission and not a real one, that a contract becomes void *ex tunc*, as in the context of defects of consent.

3.5.2. Effects on the Duties and Rights

Under the Convention termination releases both parties from their primary contractual obligations: The seller is not required to perform his delivery obligation and the buyer is under no duty to pay the price (if he has not paid in advance) and accept the seller's performance.¹⁴⁷

¹⁴⁴ The 1976 UNCITRAL Arbitration Rules (General Assembly Resolution 31/98) in Art. 21 (2) protects this basic function by providing that an arbitration clause, although included in the contract, "shall be treated as an agreement independent of the other terms of the contract"; the arbitrators "have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part". See also, the draft "Principles of International Commercial Contracts" proposed by International Institute for the Unification of Private Law (UNIDROIT) in 1994 (Art. 7.3.5.); The Principles of European Contract Law (Version 1996), Art. 9.305.

¹⁴⁵ Art. 81 (1): "Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract. (2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."

¹⁴⁶ Assuming that the buyer was able to benefit from the non-conforming goods, as the case may be in the latent defect which affects the capability of the item some time after taking over and putting it in use. Art. 84 (1) provides so: "If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid."

¹⁴⁷ If the contract is partially avoided, the parties are released from their obligations only as to that part of the contract which has been avoided.

However, the injured buyer retains his claim for damages caused by the seller's breach before the avoidance (Art. 82 (1)). After the contract is validly terminated both parties have a right to claim restitution from the other party of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently (Art. 81 (2)).¹⁴⁸

Section Two. Specific Performance

1.0. Introduction

The third remedy provided for an aggrieved buyer by the Convention is the right to require the seller to perform his obligations in accordance with the terms of the contract and the Convention. As far as the buyer's remedies are concerned, the right is, in principle, recognised by the Convention under Art. 46, by virtue of which the buyer is given an option to "require performance by the seller of [his] obligations ..." The remedy may be exercised in one of the three following forms. As long as the seller has not delivered the goods or the relevant documents, the buyer is given a right to demand that the seller deliver the goods or documents (Art. 46 (1)). Where delivery has already been made, but the goods delivered do not conform with the contract requirements sub-paras. (2) and (3) of Art. 46 provide for the buyer two further variants of specific performance, allowing him to: demand that the seller in breach supply substitute goods or repair the non-conforming goods.

2.0. Specific Performance

By virtue of Art. 46 (1) of the Convention, "The buyer may¹⁴⁹ require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirements." The language of the provision seems broad in scope. It may be invoked in a wide variety of circumstances. It does not make any distinction between different sorts of

¹⁴⁸ It is interesting to note that a proposal for the purpose of applying such a right to the case of the buyer's right to require the seller to deliver substitute goods was made by the Norwegian delegation at the Vienna Diplomatic Conference but it was rejected (Official Records, (1981) at 387 para. 68. See also Schlechtriem, P., (1986) at 107). Accordingly, the buyer has no lien on the non-conforming goods and is not entitled to refuse to return them to the seller for the purpose of requiring the seller to tender substitute goods.

¹⁴⁹ The language of Art. 46 (1) which provides "the buyer *may* require" may be somewhat misleading. Although the provisions governing the remedy of specific performance are phrased in terms of the "rights" of the parties (as the language of Art. 45 (1) suggests), they, as Secretariat's commentary clearly indicated, anticipate that, if one of the contracting parties does not perform, a court *will* order such performance upon the other party's request and will enforce that order by the means available to it under its procedural law. Accordingly, where an injured buyer applies the court for a decree ordering the seller to perform his obligations specifically on account of Art. 46 the court lacks the discretion to refuse to issue such an order unless the case falls within Art. 28. See Secretariat Commentary, (1979) at 27, Art. 26 (now Art. 28), para. 4, and, Art. 42 (now Art. 46), at 38, para. 8). See also: Kastely, A. H., (1988) at 614 n. 40; Walt, S., (1991) at 214 n. 9.

breaches. The buyer can, therefore, require the seller to perform all "his obligations" under the contract and the Convention. The most common example is when the seller fails to procure or produce the goods or to deliver them at the right place (Art. 31) or date (Art. 33) provided by the contract.¹⁵⁰ It may also be resorted to where part of the purchased goods are missing, or, the seller refuses to hand over the documents and do all other acts necessary to fulfil the contract as originally agreed.¹⁵¹

3.0. Right to Demand Cure

As indicated above, the right of the buyer to demand that the seller cure the non-conforming delivery may be exercised in the form of requiring him to tender substitute goods or to repair the defect in the goods. It is to be noted that although the language of Art. 46 (2) and (3) shows that the remedies provided under these two sub-paragraphs are separate remedies, they are not to be regarded as alternatives but can both be resorted to in the same case. Thus, it is possible for a buyer to request both substitute goods and the repair of goods depending on the circumstances. For instance, the seller may only be able to supply a portion of replacement goods but be in a position to repair the remainder of the defective goods.¹⁵²

3.1. Demand Substitute Goods

Art. 46 (2) of the Convention gives the buyer a right to request the seller to deliver replacement goods where the latter has delivered non-conforming goods. However, since it could be expected that the cost of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods, the Convention adopts the approach that a buyer will be entitled to resort to require the seller to deliver replacement goods only where the non-conformity is serious enough to constitute a 'fundamental breach'. Accordingly, relatively trivial defects do not justify a claim for substitute delivery, though in appropriate cases they

¹⁵⁰ It is worth noting that in the latter case, it may sometimes be difficult to decide whether the buyer, by demanding late performance, does demand that the seller perform under Art. 46 (1) or whether he does offer voluntarily to modify the contract pursuant to Art. 29 (1). If his demand is interpreted as a demand for performance he can claim damage for any loss he may have suffered as a result of the late delivery, while if his statement is interpreted as a modification of the delivery date he could receive no damages for late delivery. The question was posed by Secretariat's Commentary (see, Secretariat Commentary, (1979) [Art. 46] at 38, Para. 5), but it was not further pursued at the Vienna Conference. It is a matter of construction of the buyer's declaration which is to be made under Art. 8. However, it has been suggested that in the case of doubt the declaration should be interpreted as requiring performance under Art. 46 (Will in: Bianca and Bonell, (1987) at 340).

¹⁵¹ See also, Enderlein, F.& Maskow, D., (1992) at 178; Will In: Bianca and Bonell, (1987) at 335-336; Kastely, A. H., (1988) at 613; Shen, Jianming, S.J.D., (1996) at 261.

¹⁵² See also, Babiak, A., (1992) at 130.

may entitle the buyer to require the seller to remedy the lack of conformity by repair (Art. 46 (3)).¹⁵³

The question which arises here is whether the buyer of specific goods can require the seller to deliver substitute goods on the basis of para. (2) of Art. 46. Although the question was expressly addressed by ULIS, which provided that the buyer could only require the seller to deliver substitute goods where the sale related to unascertained goods¹⁵⁴, the present Convention does not expressly state that the remedy should only be applied to unascertained goods. Nevertheless, it seems that the same rule should be applied here since under a contract for specific goods the seller has not undertaken any duty other than to deliver the particular goods. Requiring him to deliver substitute goods would be contrary to the mutual agreement of the contracting parties.¹⁵⁵ However, it should be stressed that in the case of sale of unascertained goods, the buyer is not required to request delivery of substitute goods; he can keep the defective goods and resort to the remedy of requiring the seller to repair the lack of conformity.¹⁵⁶

The buyer may also be entitled to require delivery of substitute goods where the seller's delivery only partially fails to conform with the contract. Art. 51, addressing the question, provides: "If only part of the delivered goods is in conformity with the contract, Arts. 46 to 50 apply in respect of the part ... which does not conform." Thus, by virtue of Arts. 46 (2) and 51 (1) the buyer may accept the conforming parts and require the seller to deliver substitute conforming goods for the defective units, provided that the lack of conformity constitutes a fundamental breach of the contract with respect to the part affected.

3.2. Demand Repair

The remedy seems slightly stronger than that which is provided under Art. 46 (2).¹⁵⁷ The latter, as already seen, will be available only when the non-conformity constitutes a fundamental breach of contract, while the former will be available "unless this is unreasonable having

¹⁵³ The provision has been criticised by some academic writers (Horacia A. Grigera Naon, in: Horn R.; Schmitthoff, C. M., (1982) at 114.).

¹⁵⁴ Art. 42 (1) of ULIS: "The buyer may require the seller to perform the contract: ... (c) if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible."

¹⁵⁵ In practice, sellers prefer to accept the buyers' demand in order to avoid further damages for late delivery.

¹⁵⁶ See also, Will in: Bianca and Bonell, (1987) at 336.

¹⁵⁷ The 1978 draft version of Art. 46 (then 42) did not contain this remedy. It was incorporated into the Convention by an amendment introduced by a joint proposal at the Vienna Diplomatic Conference (see Official Records, (1981) at 112-113). Of course, the remedy was proposed during the preparation of the Draft Convention by UNCITRAL but the committee did not accept it (see, UNCITRAL, Yearbook, VIII (1977) at 43 paras. 243-260; Honnold, (1989) at 336. During debate on the amendment, some delegates noted that the right to repair was necessary to protect the buyer where delivered goods were defective but the defects did not constitute a fundamental breach (Official Records, (1981) at 335-336).

regard to all the circumstances" (Art. 46 (3)). According to the wide language of the provision the buyer will have a general right to require the seller to cure any form of lack of conformity by way of repair except in cases where it is unreasonable, having regard to all the circumstances.

The flexible language of the provision is designed to encourage a reasonable and flexible approach to cases where the buyer can readily make repair, particularly when the seller's facilities for repair are in a distant country. Accordingly, a buyer will not be entitled to require the seller to make good minor defects which can readily be repaired by him.

The reasonableness of the request to repair does not depend on the nature of breach, but, as some commentators have suggested¹⁵⁸, on the character of the goods delivered, technical difficulties and all the other circumstances. It would, for instance, be so regarded if repair is impossible, whether because of the nature of the goods, such as agricultural products, or because of technical difficulties. A claim for repair may also be unreasonable if the costs involved are disproportionate to the price of the goods or if the seller is a dealer who does not have the means for repair, or if the buyer himself can repair the goods at least cost.¹⁵⁹

However, the Convention does not expressly provide that the right to ask for supply of substitute goods should be subject to some requirements such as, economic facility or even practical possibility. Accordingly, the question which arises here is: is the right to be subject to some qualification, and, if so, what degree of "difficulty" or "impossibility" should be sufficient to free the seller of his obligation to deliver substitute goods?¹⁶⁰ It seems that the remedy under Art. 46 (2) is to be restricted to the same qualification to which the remedy of repair under paragraph (3) of the article is made. There is no clear argument to distinguish these two remedies which are in fact both particular forms of the general right to specific performance.

The point which deserves to be noted here is that unlike ULIS which entitled the buyer to require the seller to repair provided that the seller was also manufacturer of the goods,¹⁶¹ under the present Convention such a right exists, no matter whether the seller is in a position to repair the goods by his own means or by utilising the facilities of the market. If he is not in

¹⁵⁸ Will in: Bianca and Bonell, (1987) at 338; Enderlein, Fritz, in: Sarcevic, Petra; Volken, Paul, (1986) at 192; Enderlein, F. and Maskow, D., (1992) at 181.

¹⁵⁹ See also, Schlechtriem, P., (1986) at 76; Will In: Bianca and Bonell, (1987) at 339; Enderlein, F. and Maskow, D., (1992) at 180.

¹⁶⁰ See also: Rolf Herber, in: Herber, Bobbs Herry, (1980) at 118-119.

¹⁶¹ Art. 42 of ULIS made a difference between producer and manufacturer, on the one hand, and distributor and dealer, on the other. Art. 42 (1): "The buyer may require the seller to perform the contract: (a) if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in position to remedy the defects; (b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof; (c) if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible."

a position to do so at all, this could indeed amount to unreasonableness. However, it should be mentioned that the mere fact that repair is not possible, does not automatically turn the defect into a fundamental breach of contract. But the buyer is left only with the right to claim a reduction of price and/or compensation for damages.¹⁶²

4.0. Restrictions on the remedy

Despite the broad language of Art. 46, the buyer's remedies under this Art. are subject to a number of substantial restrictions. These restrictions differ according to whether the case involves a claim under the first paragraph of Art. 46 or the second or third.¹⁶³

4.1. Resorting to an Inconsistent Remedy

The first restriction is expressed by Art. 46 (1). By virtue of this sub-paragraph, the buyer will be entitled to apply for specific performance only when he has not "resorted to a remedy which is inconsistent with this requirement". Despite the express language of this provision, it is not quite clear which remedies are incompatible with the remedy of requiring performance. The buyer's exercise of his right to declare the contract avoided would certainly be an "inconsistent" remedy for this purpose.¹⁶⁴ This inconsistency will become plain when we look at what Art. 81 provides. Under this Art., avoidance "releases both parties from their obligations under [the contract] subject to any damages that may be due." The same is true in the case where the buyer has claimed price reduction in the case of non-conforming delivery pursuant to Art. 50,¹⁶⁵ since it would re-establish equivalence.¹⁶⁶

The question whether a claim for damages would be an inconsistent remedy, depriving the buyer of the right to require performance gives rise to some doubt. What is certain is that, under the Convention, the buyer is not deprived of his right to claim damages by exercising his right to claim performance (Art. 45 (2)); but is the converse necessarily true? The Convention does not make the position clear. It has, therefore, been suggested that a distinction must be drawn between the case of a claim for damages for late delivery and that of non-delivery.¹⁶⁷ Where the buyer has claimed damages for delay in delivery he would not be pursuing a

¹⁶² See also, Enderlein F.; Maskow D., (1992) at 181.

¹⁶³ See generally, Flechtner, H. M., (1988) at 59-60; Timothy, D., Hughes, in: Hancock, William, (1990) at 101-60 and *seq.*; Fitzgerald, J., (1977) at 291-313 Shen, Jianming, S.J.D., (1996) at 274-277.

¹⁶⁴ Professor Honnold says that the rule of inconsistency under Art. 46 (1) is based on the likelihood of reliance of the seller on the buyer's declaration by stopping production, reselling the goods, or cancelling the reservation of shipping space (Honnold, (1991) at 362).

¹⁶⁵ See, Secretariat Commentary, (1979) [Art. 46] at 38. See also Rolf Herber, in: Herber, Bobbs Herry, (1980) at 117; Enderlein, Fritz, in: Sarcevic, P.-Volken, P., (1986) at. 189; Schlechtriem, P., (1986) at. 76; Alejandro M. Garro, (1989) at 459 footnote 69; Ndulo, Muna, (1991) 21; Walt, S., (1991) at 214.

¹⁶⁶ Will in: Bianca and Bonell, (1987) at 336; Enderlein, F.; Maskow, D., (1992) at 178.

¹⁶⁷ Rolf Herber, in: Herber, Bobbs Herry, (1980) at 117; Walt, S., (1991) at 214, no. 11.

remedy 'inconsistent' with that of requiring performance¹⁶⁸, while a claim for damages for non-delivery would be inconsistent with requiring performance, since such a claim for damages can only be brought 'If the contract is avoided'.¹⁶⁹

Although the requirement is expressly provided under Sub-para. (1) of Art. 46, it seems that the buyer's right to resort to the remedies under sub-paras. (2) and (3) of this Art. should also be subject to the same requirement; the buyer will not be entitled to require the seller to deliver replacement goods or repair defects in the goods where he has already resorted to an inconsistent remedy.

4.2. Forum Approach Rule

A further restriction is provided under Art. 28. Pursuant to this Art., "a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention." The provision which is designed to compromise the divergent common law and civil law perceptions of the role of specific performance in sales contracts of movables, empowers the state members' courts to follow their traditional position. Three different situations may arise in this connection. The first is where the court is under a mandatory duty to order specific performance under domestic law. In this case, the court is bound to accept the buyer's application for specific performance where the required conditions under the Convention are met. The second is an extreme situation where the national law disallows the court to order specific performance. In this case, the court is not bound to disregard its domestic law and to give effect to the buyer's application even though the requisite requirements provided by the Convention are met. But, it has discretion to decide the case either on the basis of the Convention or domestic law.¹⁷⁰ The third case is where the court under the national law has a discretion as to whether or not to accept the buyer's application. The question is whether the court would still be free to continue its discretion under national law or it becomes bound to decide the case on the Convention provisions. The answer depends upon how the word "would" in Art. 28 is interpreted. Does the phrase under Art. 28 "unless the court *would do so* under its own law ..." include the case where the court *could* accept the buyer's application under the national law? It seems that the legislative history of Art. 28 suggests that in the latter case the court would be able to disregard the Convention provision. This is because the UNCITRAL Draft

¹⁶⁸ This view is supported by Art. 47 (2) sent. 2 which provides "However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance".

¹⁶⁹ Art. 76 (1), applicable to breach by seller; cf. Art. 75. See Treitel, (1988) para. 43. See also: Enderlein, F.; Maskow, D., (1992) at 178; Booyen, Hercules, (1991-1992) at 82.

¹⁷⁰ See also, Honnold, J., (1991) at 273.

Art. 28 used the word “could” instead of “would”. Under that version, the court was certainly bound to give effect to the buyer’s application even it has discretion under its domestic law in the similar cases. However, at the Vienna Diplomatic Conference, some common law delegates opposed to this wording and as a result, the word replaced by “would”.¹⁷¹

It is to be noted that Art. 28 only permits the court to deviate from the rules of the Convention where the buyer may “require performance of any obligation of the other party”; it does not affect the Convention’s restrictions on specific performance.¹⁷² For this reason the buyer cannot, relying on the law of *forum*, seek to require a seller to deliver substitute goods even though the lack of conformity is not a fundamental breach as required by Art. 46 (2), or seek for repair of the goods even though, pursuant to Art. 46 (3), under “all the circumstances” requiring the seller to repair is “unreasonable”. Art. 28 applies only when the buyer is entitled to performance in accordance with the provisions of this Convention.¹⁷³

The Forum Approach Rule and the Remedy of Repair. As the language of Art. 28 shows, the Art. only refers to the term “specific performance”. The question arises here is whether the restrictive aspect of the provision covers the remedies of requiring the seller to deliver substitute goods and repair defects. The answer depends on the meaning of “specific performance” under Art. 28. The secretariat’s Commentary makes it clear that it does include an order requiring the seller to deliver goods pursuant to Art. 46 (2).¹⁷⁴ Does it include, in addition, an order requiring the seller to remedy the defects by repair under Art. 46 (3)?

The drafting history of the Art. does not help. During the preparation of the Convention the question whether an order for repair should be covered by Art. 28 was not addressed. The Secretariat’s Commentary also lacks any guideline in this respect, since the remedy was not included in the 1978 Draft Convention recommended by UNCITRAL. It is therefore difficult to determine whether the restriction under Art. 28 applies to an order requiring the seller to repair defective goods under Art. 46 (3).

Considering the purpose of Art. 28, one may, however, reach the conclusion that the objections to an order requiring a seller to deliver contract goods or substitute goods should apply as well to an order requiring the seller to make repairs, since in all of these cases, the court is indeed requiring the seller to perform one of his obligations.¹⁷⁵ Nevertheless, treating an order to require the seller to make repair as an order for specific performance would result

¹⁷¹ Official Records, (1981) at 76, 100, 304-5. See also, Shen, Jianming, S.J.D., (1996) at 271-3.

¹⁷² See also, Honnold, (1991) at 274.

¹⁷³ See also, Honnold, (1991) at 365-366.

¹⁷⁴ Art. 46 (1) and (2). The Commentary on Art. 42 (now 46) expressly refers to Art. 26 (now 28). See Secretariat Commentary, (1979) at 27, para. 3.

¹⁷⁵ See also, Kastely, A. H., (1988) at 635. See also: Sutton, K. C., (1977) at 57.

in an unreasonable consequence. Accepting the view that the right under Art. 46 (3) is enforceable subject to the court's discretion under Art. 28 would severely restrict this remedy, since many legal systems are not familiar with it in their domestic law.¹⁷⁶ The legislative history of the provision shows that the remedy was adopted as an alternative to the remedy of requiring the seller to deliver substitute goods where the delivery of them clearly would be wasteful.¹⁷⁷ If an order to repair is treated as an order to perform which is subject to the discretionary power of the courts under Art. 28, this alternative remedy may rarely be invoked because most courts could disregard it as a remedy inconsistent with their national law. Such an interpretation would substantially restrict the effect of this remedy which seems to be far from what the drafters had intended in incorporation of it into Art. 46.

It is difficult to find a solution for this problem. Both the language and purpose of Art. 28 support the approach that an order to make repair is to be subject to the restrictive provision under Art. 28. Accordingly, the courts have the power to treat an application for repair as they do one for the other forms of specific performance.¹⁷⁸

4.3. Time Limit Restriction

The Convention provides a further requirement which is applicable to the remedies prescribed under Art. 46 (2) and (3). Under this requirement the buyer must request supply of substitute goods or repair from the seller in conjunction with notice he has to give under Art. 39 so as to inform the seller of the lack of conformity (Art. 46 (2) and (3)).¹⁷⁹ If the buyer does not request cure at the very moment of giving notice, he has to do so within a reasonable time after he has given notice to the seller that the goods delivered do not correspond to the contract. Failure to request the remedy either in conjunction with the notice given under Art. 39 or within a reasonable time thereafter would deprive him of the right to require the seller to deliver substitute goods or repair the defects. On this provision, in the case of latent defects the buyer may be entitled to demand that the seller cure the lack of conformity up to two years from the date in which the goods are actually handed over to him.

¹⁷⁶ When an amendment to Art. 46 for the purpose of incorporating the remedy into the article was proposed several delegations commented that the right to repair was unknown in their domestic laws (Official Records, (1981) at 335-336).

¹⁷⁷ Official Records, (1981) at 335-336.

¹⁷⁸ However, Kastely suggests that in order to promote international harmony a court should exercise its discretion under Art. 28 to order specific performance, sometimes in the form of an order to repair, even if it would not do so in a dispute involving a domestic contract (Kastely, A. H., (1988) at 636).

¹⁷⁹ See also, Knapp in: Bianca and Bonell, (1987) at 566.

4.4. Whether Goods Must be Ascertained?

The question arises here whether the goods must be identified before the buyer of unascertained goods can resort to the remedy of specific performance. As far as Art. 46 is concerned, it does not expressly provide that the goods are to be identified to the contract before the buyer can resort to the remedy. Nor can such a requirement be inferred from Art. 46. Accordingly, in the case of sale of unascertained goods, identification of the goods to the contract should not be regarded as a pre-requisite to a claim for the remedy of requiring performance.¹⁸⁰

On this interpretation, if a contract, for example, requires the seller to arrange for shipment, the seller would be in breach of contract if he fails to do so¹⁸¹ and as a result the goods are not marked or otherwise identified. The seller's failure to arrange for shipment is presumably a breach of one of his obligations under the contract and Art. 46 (1) may thereby entitle the buyer to apply for an order requiring the seller to arrange for carriage of the contract goods.

4.5. Whether the Purchased Goods Should be Unavailable in the Market?

A further possible restriction is that the buyer seeking to resort to the remedy is required to show that he cannot reasonably procure the purchased goods from another source. The Convention does not expressly provide this requirement. However, a close interpretation of the relevant provisions of the Convention, particularly, taking into consideration the drafting history clearly supports the conclusion that resorting to the remedy does not require the buyer to demonstrate that he is not able to obtain equivalent goods from another source before he can resort to the remedy.

Art. 25 of ULIS precluded the buyer from requiring performance by the seller "if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates."¹⁸² An UNCITRAL Special Working Group proposed a

¹⁸⁰ See also, Walt, S., (1991) at 214.

¹⁸¹ See Art. 32 (2): "if the seller is bound to arrange for carriage of the goods, he must make such contacts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstance and according to the usual terms for such transportation."

¹⁸² Art. 25 of ULIS: "The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be ipso facto avoided as from the time when such purchase should be effected." See also Art. 42 which provides: "(1) The buyer may require the seller to perform the contract: (c) if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible."

version of what is now Art. 46 which retained the language of Art. 25 of the ULIS.¹⁸³ However, the UNCITRAL Committee rejected this version of the Art.. In justifying its rejection, the Committee noted that “the proposal, if accepted, would unjustifiably restrict the rights of the buyer to require performance of the contract”.¹⁸⁴ Again, in response to the 1978 Draft Convention, the United States delegate proposed a new paragraph for what is now Art. 46, by which the buyer could not resort to the remedy where he “can purchase substitute goods without substantial additional expense or inconvenience”.¹⁸⁵ The proposal was repeated by the same delegate at the 1980 Vienna Diplomatic Conference¹⁸⁶, but it was also rejected by the majority.¹⁸⁷ Likewise, the legislative history of Art. 77 of the Convention shows that the United States delegate made efforts to amend Art. 77 to minimise any claim against the party in breach if the injured party failed to mitigate damages. The language of the proposal was broad and would have applied to any form of relief,¹⁸⁸ but that proposal was also defeated.¹⁸⁹ Relying on the foregoing arguments, as some commentators concluded¹⁹⁰, it can be said that Art. 46 does not require the unavailability of substitute purchase as a pre-requisite for ordering specific performance.

4.6. Rule of Mitigation

As explained above, the remedy of requiring performance is not excluded merely because the buyer could, acting reasonably, have found a substitute source. However, is there any way to say that the deficiency arising from the lack of a particular provision restricting the buyer's right to specific performance to the case of lack of equivalent goods could be compensated by the principle of mitigation of damages provided by Art. 77. By virtue of this Art., an injured buyer is required to take reasonable steps to mitigate his losses caused by the seller's default.

¹⁸³ See “Report of the Committee of the Whole I Relating to the draft Convention on the International Sale of Goods”, reprinted in UNCITRAL. Yearbook, VIII, (1977) at 42, para. 239 (Annex I).

¹⁸⁴ *Ibid.*, para. 240.

¹⁸⁵ Pre-Conference Proposals on the 1978 Draft, art. 42, reprinted in, Official Records, (1981) at 78, 111; Honnold, (1989) at 399 para. 3.

¹⁸⁶ Honnold, (1989) at 551 para. 47.

¹⁸⁷ Honnold, (1989) at 551 paras. 71-72.

¹⁸⁸ Honnold, (1989) at 617, para. 55.

¹⁸⁹ Honnold, (1989) 619, para. 78. It is interesting to note that prior to the Diplomatic Conference, a similar proposal was made to restrict the seller's right under Art. 62 if the buyer had not taken delivery of the goods and the seller could resell them without unreasonable or substantial additional expense or inconvenience (see, *ibid.*, 400). But this proposal was apparently withdrawn.

¹⁹⁰ Walt, S., (1991) at 215-216; Shen, Jianming, S.J.D., (1996) at 263-265. However, some observers appear to be of the view that the omission of the ULIS qualification from the present Convention is not fatal and that the seller may still be entitled to rely on trade usage under Art. 9 (1) of the Convention to resist a claim for specific performance (see e.g., Rolf Herber, in: Herber, Bobbs Herry, (1980) at 116). According to this view, if the seller can prove the existence of such a usage he may be in a stronger position than he would be under ULIS since it will not be necessary for him to show that it was also reasonably possible for the buyer to procure the goods elsewhere. However, it is difficult to conceive of a usage that would lead to such an anomalous result. See in this respect, Ziegel, Jacob S. in: Nina M. Galston and Hans Smit, (1984) at 9-3.

This presumably includes the purchase of substitute goods by the buyer. Assuming that the Art. applies to Art. 46, then it would effectively restrict the buyer's right under Art. 46 whenever substitute goods are reasonably available. In other words, Art. 77 would mean that the buyer must mitigate loss through the choice of remedy.

However, the language of the Convention on this point is not clear and the commentators differ. Some of them suggest that the duty to mitigate would be important to prevent injustice and waste resulting from the exercise of specific performance.¹⁹¹ In contrast, others, relying on the drafting history of Art. 77,¹⁹² conclude that an aggrieved buyer's failure to mitigate his loss is irrelevant when he applies for an order requiring performance in a jurisdiction where domestic law authorises this broad approach to "requiring performance" under the Convention.¹⁹³

Nevertheless, it seems that the language of Art. 77, the structure of the Convention and its drafting history do not support the idea that the mitigation principle is a restriction on the right to specific performance under the Convention. First, the second sentence of Art. 77 continues that if the party relying on the breach "fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated". As can be seen, the provision is hardly expressed as a bar to requiring performance. It simply specifies the consequences for failure to mitigate one's loss: The party in breach may only claim a reduction in *damages*.¹⁹⁴ Under this wording, the duty to mitigate only applies when the injured party claims damages, not when that party resorts to the right to require performance.¹⁹⁵ Secondly, Art. 77 is placed within a section of the Convention which contains the rules governing the entitlement to claim "damages". Art. 45, which specifies the remedies available to a buyer, distinguishes between the rights established in Arts. 46 to 52 and damages as provided in Arts. 74 to 77. A similar distinction is made by Art. 61 in respect of the seller's remedies for the buyer's breach. The structure of these remedial provisions constitutes a significant distinction between the right to require performance and a claim for

¹⁹¹ See e. g., Honnold, (1991) at 518-520. Honnold, emphasising the restriction of the seller's right to recover the price on reasonable attempt to resell, argues that the mitigation rule is *lex specialis* in relation to the general rule requiring performance (ibid., at 521). See also: Sutton, K. C., (1977) at 57; Lookofsky, Joseph M., (1989) at 256). See also generally, Thomas S. Ulen, (1984) at 390-393.

¹⁹² Official Records, (1981) at 396-398; 429-430. Bearing in mind that two significant restrictive provisions of ULIS (Arts. 25 and 61 (2)), which provided that "the buyer shall not be entitled to require performance ..., if it is ... reasonably possible for the buyer to purchase goods to replace those to which the contract relates ..." have been dropped. See also: Gabriel, H., (1994) at 87.

¹⁹³ See e.g., Schlechtriem, P., (1986) at 99. See also: Knapp in: Bianca and Bonell, (1987) at 564-567; Farnsworth, A., (1979) at 249-251 (concluding that Art. 77 does not apply to an action for specific performance); Ziegel in: Nina, M.; Galston and Hans Smit, (1984) at 9-41 to 9-42; Kritzer, Albert H., (1989) at 220, 473 and 495-496. For more views see, Enderlein, F. and Maskow, D., (1992) at 308-309.

¹⁹⁴ See also, Feltham, J. D., (1981) at 355.

¹⁹⁵ See also, Kastely, A. H., (1988) at 622; Treitel, G. H., (1988) 145 para. 72; Kritzer, Albert H., (1989) at 473.

damages, including the duty to mitigate in Art. 77.¹⁹⁶ Finally, the drafting history of Art. 77 clearly shows that it does not concern the right to specific performance under Arts. 46 and 62.¹⁹⁷ As indicated above¹⁹⁸, at the Vienna Conference, several amendments were proposed in order to impose a duty to mitigate under Arts. 46 and 62 but all of them were defeated. For instance, the United States delegate proposed to amend Art. 46 so as to restrict the buyer's right to specific performance if he could "purchase substitute goods without substantial [unreasonable¹⁹⁹] additional expense or inconvenience."²⁰⁰ The proposal was rejected by the delegates,²⁰¹ following a long debate in which several representatives stated that the amendment would result in depriving the injured party of his contractual right to performance and would cause great uncertainty in international contracts.²⁰² After the rejection of the first amendment proposed by the US delegate, he tried to propose another which provided that a failure to mitigate would allow the party in breach not only to reduce any damages claim but also to claim "a corresponding modification or adjustment of any other remedy."²⁰³ This proposal was also decisively rejected by a large majority of the delegates as it restricted the right to performance by imposing a duty to mitigate.²⁰⁴ Accordingly, Art. 77, as some commentators suggest²⁰⁵, should not be extended to Art. 46 so as to restrict the buyer's right under Art. 46.²⁰⁶

¹⁹⁶ See also, Kastely, A. H., (1988) at 622; Walt, S., (1991) at 215-216.

¹⁹⁷ See in this regard, Farnsworth, A., (1979) at 250. At the Vienna Conference the Irish delegation argued that the first sentence of Art. [77] establishes a general duty to mitigate applicable to any remedy and that the second sentence is just one of several possible consequences of a failure to mitigate. In response to this interpretation, the United States' delegation observed that although he hoped such an interpretation would be made, he doubted that the provision would be read in that way (Official Records, (1981) at 396-397, paras. 61, 62). The Secretariat's Commentary does also explicitly state that Art. [77] does not affect the seller's claim for payment of the price under Art. [62] and the buyer's claim a reduction in the price pursuant to Art. [50] (Secretariat Commentary, (1979) at 61 para. 3).

¹⁹⁸ Section Two, 4.5.

¹⁹⁹ As the US delegate amended his proposal during the debates (Official Records, (1981) at 330, para. 47).

²⁰⁰ Official Records, (1981) at 111, para. 3 (ii). A similar amendment was proposed to limit the seller's right to specific performance under Art. 62 (ibid., at 79).

²⁰¹ Official Records, (1981) at 113 para. 6.

²⁰² Official Records, (1981) at 330-332, in particular, paras. 58-59, 61, 66

²⁰³ Official Records, (1981) at 133.

²⁰⁴ Official Records, (1981) at 133 para. 5 and at 398 para. 78. See also, ibid., at 396 paras. 64, 65, 67, 68 and 73.

²⁰⁵ See also: Kastely, A. H., (1988) at 622 and *seq.*

²⁰⁶ Further restriction can be found under Art. 82 (1). Under this Arts. if the buyer is not able to make restitution of the goods in essentially the condition in which he received them he will lose the right to require substitute goods. Similarly, the rule on the requirement of the observance of "good faith" in interpretation of the Convention's provisions may come into play as a restriction on the remedy of requiring performance. Art. 7 (1) (see in this respect, Kastely, A. H., (1988) at 620-1).

Section Three. Monetary Relief

1.0. Sketch of Discussion

Under the Convention a buyer who has suffered loss as a result of the seller's breach is given two forms of monetary relief: a right to claim damages for any loss resulting from the seller's breach and a particular right to reduce the contract price where he has been tendered goods which do not conform to the contract terms. The following section will examine first the buyer's right to claim damages for the losses he may suffer as a consequence of the seller's non-conforming delivery and then the right to claim price reduction. The first part will try to answer the questions (1) whether an injured buyer is granted a general right to claim damages for any loss he may suffer through the seller's breach of contract and then (2): "under what circumstances may he be entitled to recover damages?" Finally, the formulae by reference to which the damages are to be measured will be discussed. The second part will examine the remedy of price reduction as well as its relationship to the right to claim damages.

2.0. Part One. The Claim For Damages

2.1. General Principle

The buyer's right to claim damages is recognised under Art. 45 (1) (b).²⁰⁷ Under this provision, an injured buyer is granted a general right to claim damages whenever the seller fails to perform "any of his obligations under the contract or this Convention". According to the broad language of the provision, the buyer has a right to claim damages for any sort of breach, no matter what form it may take.

As in English law, the purpose of awarding damages under the Convention is to compensate the party who is injured as a result of the other party's breach by putting him, as far as money can do it, into the same financial position in which he would have been, had the contract been performed.²⁰⁸

As Art. 45 (2) provides, the right to claim damages can be exercised with any of the other remedies provided for by the Convention. Accordingly, a buyer may be entitled to

²⁰⁷ Art. 45 (1): "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: ... (b) claim damages as provided in Arts. 74-77." It is this Art., not Art. 74 as the language of Art. 78 seems to suggest, which grants the buyer a general right to claim damages. Art. 74 sets-forth a general rule for the calculation of damages for loss suffered as a consequence of a breach of contract and the substantive requirements for exercise of the right to claim damages but does not expressly provide that damages are to be awarded where the seller has broken one of his obligations under the contract and the Convention. See also, Secretariat Commentary, (1979) at 37, Honnold, (1991) at 356; Will in: Bianca and Bonell, (1987) at 330, and Knapp in: Bianca and Bonell, (1987) at 540; Enderlein, F. and Maskow, D., (1992) at 300.

²⁰⁸ Secretariat Commentary, (1979) at 59 para. 3.

recover damages in accordance with Art. 74 if he resorts to price reduction under Art. 50, seeks substitute goods under Art. 46 (2), or demands repair of defective goods under Art. 46 (3).

2.2. Grounds for Claiming Damages

The general principle explained above comes into operation when the seller has broken one of his obligations under the contract or the Convention. The Convention, unlike the English Sale of Goods Act, does not provide different damages provisions for breach of warranty or failure to deliver, but rather applies a general provision to all damages for breach of contract. The second significant element of the principle of damages is that the buyer must have suffered some loss from the seller's breach. Accordingly, where a buyer suffers no loss through the seller's breach there will be no damages.²⁰⁹

Similarly, according to Art. 74, damages "... consist of a sum equal to the loss, including loss of profit, ...". As the language of this provision shows, the rule is intended to provide a general rule that any loss, whether it results directly and naturally from the breach or results from it under special circumstances, is recoverable, provided that the requirements prescribed under the second sentence of Art. 74 and Art. 77 are satisfied.²¹⁰ However, it is worth noting that according to Art. 5 of the Convention, claims for damages in the case of death or personal injuries caused by the defective goods, irrespective of whether or not the buyer himself or a third party is involved, are excluded from the Convention.²¹¹ Exclusion of such losses can also be inferred from the language of Art. 74 which appears to be concerned with a commercial measure of damages.²¹² Thus, an international buyer should look to national law for recovery for death or personal injuries.

It seems that one should distinguish between the case in which a buyer makes a claim on the basis of injuries he has personally suffered as a result of using the purchased defective products and that in which he has paid damages for personal injuries which a sub-buyer has

²⁰⁹ The point can be clearly inferred from the language of Art. 74 which lays down: "Damages for breach of contract by one party consist of a sum *equal to the loss*, including the loss of profit suffered by the other party as a consequence of the breach." According to this provision, damages should not be awarded where the victim of breach has suffered no loss and also they will not be awarded as such where they exceed the loss resulted from the breach. Under this interpretation, it can be said that under the Convention no nominal damages are recognised, as they are awarded in English law

²¹⁰ It is worth noting that of the different types of loss the buyer may suffer from the seller's breach, Art. 74 only makes express reference to "loss of profit". It was perhaps due to the fact that in some legal systems the concept of loss standing alone does not include the loss of profit. See in this respect, UNCITRAL, Yearbook, VII (1976), at 134 para. 2. See also Secretariat Commentary, (1979) at 59 para. 3; Knapp in: Bianca and Bonell, (1987) at 543; Vilus, in: Sarcevic, P.-Volken, P., (1986) at. 247); Graham, C., (1993) at 55.

²¹¹ Art. 5: "This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person." See generally, Lookofsky, Joseph M., (1989) at 284 and *seq.*

²¹² See also, Sutton, J., (1989) at 744.

suffered as a consequence of consumption of the defective goods. The first case is expressly excluded from the scope of the Convention by Art. 5, but the position of the second case is not quite clear. One may argue that the general language of Arts. 75 and 76 which enable the injured party to claim further damages in accordance with Art. 74 allows the buyer to be indemnified against such a subsidiary claim. A broad interpretation of Art. 5 may support such an inference, for it provides: "The Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person", while the buyer's claim is not based directly on the personal injury, but on the liability he has incurred to a sub-buyer by the reason of defective goods delivered by the seller. However, it seems that the express language of Art. 5 which excludes the seller's liability for death and personal injury caused by the goods to *any person*, would reject such a broad interpretation.²¹³

The point which deserves to be noted here is that, since the Convention does not expressly exclude damages or injury to property, they would be governed by the Convention.²¹⁴ But some commentators have raised the question whether such losses are recoverable under the Convention in those countries under whose national laws claims for such damages are placed into the tort category.²¹⁵ It might be argued that such a claim does not arise from the contract of sale to be covered by the Convention provisions, while "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer *arising from such a contract* (Art. 4).²¹⁶ It seems that such a narrow interpretation of Art. 4, as some commentators pointed out²¹⁷, is arguable. The mere fact that such claims are presented in the form of the claims in tort does not take them out of the Convention if the Convention would otherwise apply.

²¹³ However, in a Convention case decided by a German court (Germany 2 July 1993 Oberlandesgericht Düsseldorf (CLOUT, abstract no. 49), it was held that the obligation to the third party was to satisfy an injury claim that stemmed from defects in the goods sold. The court ruled that indemnification of such an obligation is an allowable element of damages under the Convention. Although the court so held, it did not refer to the rule under Art. 5. The Convention commentators, however, have criticised the decision. See, the Editorial remarks of Albert Kritzer and Peter Schlechtriem attached to the abstract of the case. See also, Karollus, M., (1995) at 51-94. It is to be noted that where the buyer is forced to pay his sub-buyer damages for loss he has sustained as a consequence of lack of conformity he would be entitled to sue the seller. It is the point to which a German court referred in a Convention case (Germany 21 May 1996 Oberlandesgericht Köln (CLOUT abstract no. 168). In this case, the appellate court held that a German buyer of a used car could claim damages under Arts. 35 (1), 45 and 74 of the Convention. The court argued that the buyer's damages caused by its liability to its customer could be claimed under Art. 74 of the Convention because such damages are foreseeable if goods are sold to a dealer who intends to resell them.

²¹⁴ Schlechtriem, P., (1986) at 97. See also, Schlechtriem, (1988) 467, particularly, at 471 and *seq.*

²¹⁵ See e.g., Murphey A. G., (1989) at 454.

²¹⁶ Art. 4: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."

²¹⁷ Khoo, in: Bianca and Bonell, (1987) at 49-50.

2.3. Principles Restricting Recoverable Losses

Under the Convention the recoverable damages are subject to certain restrictive rules which are briefly examined under the following headings.

2.3.1. Causal Connection

One of the crucial principles restricting the recoverability of damages for any particular head of loss is that that loss must have a causal link with the breach. This principle is impliedly recognised by Art. 74 where it provides that damages will be awarded for losses suffered by one of the contracting parties "*as a consequence of the breach*". According to this principle damages will only be awarded for a particular loss where he can show that it resulted from the fact that the contract has not been performed properly.

However, some commentators raised the question whether the party in breach is liable only for the loss caused to the injured party by a direct causality or whether his liability extends to losses by indirect causality.²¹⁸ It seems that although the Convention does not expressly address the issue, it can be inferred from the second sentence of Art. 74 that the party in breach should be held liable even for loss indirectly caused to the other party provided that this loss was or ought reasonably to have been foreseeable by the parties where the contract was made.²¹⁹

2.3.2. Foreseeability of Loss

The recovery of damages as laid down by the Convention is also subject to another significant restrictive principle, under which the buyer can recover damages only for losses which were foreseeable by the seller.²²⁰ In the language of Art. 74, the amount of the injured buyer's damages "may not exceed the loss" the seller "foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of facts and matters which he then knew or ought to have known ...".

Under this rule the loss for which an injured party claims damages must be that which the defendant actually foresaw or ought to have foreseen.²²¹ The same division is also applied

²¹⁸ Knapp in: Bianca and Bonell, (1987) at 540. Such a distinction is made in French Civil Code (Art. 1151). See in this respect, Treitel, G. H., (1988) para. 140.

²¹⁹ See also, Ziegel J., & Graham, W. C., (1982) at 48; Knapp in: Bianca and Bonell, (1987) at 540; Enderlein, F. and Maskow, D., (1992) at 298. In contrast, under the French Civil Code, in addition to foreseeability, the loss must be also an "immediate and direct consequence" of the non-performance of the contract (Art. 1151). See also, Treitel, G. H., (1988) para. 140.

²²⁰ There was, however, a proposal to delete the foreseeability from the Convention text on the ground that it was a limitation on the right of full damages, but the Working Group did not retain that proposal (see UNCITRAL, Yearbook, VI (1975) at 62 para. 114; see also the suggestion of ICC in UNCITRAL, Yearbook, VIII (1977) at 142, para. 56).

²²¹ Accordingly, it is not sufficient that the party in breach could foresee the losses to be caused by his breach of contract when he commits breach of the contract. The party in breach rather should have been able to foresee

to the sources of facts and matters in light of which the party in breach foresaw or ought to have foreseen the loss resulted from his breach. That is, the facts and matters must either actually be known²²² and/or at least must be such (like seasonal market fluctuations, difficulties in transport caused by bad weather etc.²²³) that the defaulting party ought to have known them at the time of the conclusion of the contract.

In theory, the distinction between actual and presumed knowledge may be important where the seller, for example, may possess actual knowledge of some facts which might lead to actual foreseeability, at a time when he ought not to have known those facts or foreseen the results of his breach. A further difference appears between these two types of knowledge in that in the case of imputed knowledge the party in breach is assumed to know the consequences of his breach at the time of the contract, while in the case of actual knowledge the injured party must prove that the defendant was in the position in which he did foresee or ought to have foreseen the consequences of his breach in light of the knowledge of facts and matters were available to him at the time of the conclusion of the contract. What was actually foreseeable or reasonably foreseeable will therefore depend on the actual knowledge of the party in breach and what reasonable merchants in the defaulting party's position would have known.²²⁴

2.3.2.1. Degree of Foreseeability

There is no doubt that under the Convention, a particular head of loss will be recoverable only when it was foreseeable by the party in breach at the time of making the contract. However, the question which arises here is whether the Convention's test is wider than that reflected in the English case of *Hadley v. Baxendale* as reinterpreted in the *Victoria Laundry (Windsor) v. Newman Industries Ltd.*²²⁵ and *The Heron II.*²²⁶ Art. 74, in presenting the criterion upon which

losses at the time of making the contract (*cf.* also Arts. 35 (2) (b) and 42 (1) (a)). *Cf.* the foreseeability test in the case of fundamental breach discussed in the first section of this chapter. In contrast, under ULIS such division was disregarded. According to that Convention, a defaulting party is liable for losses "which should have been foreseen by the party in breach ..." (Arts. 82 and 86).

²²² They may be known from the specific purpose of the goods which the buyer has made known to the seller. For this reason, should the buyer consider the seller's breach as such which would cause him exceptionally heavy losses he has to make this known to the seller, the result is that the latter becomes liable for these losses. In his commentary of Art. 82 of ULIS, Professor Tunc had pointed out to the point long time ago (see Tunc, A., (1964) at 386).

²²³ It is significant to note that the facts or matters leading to foreseeability need not be given by the buyer himself; indeed, they may be derived from any other source whatsoever, e.g., an economic magazine predicting the rise of market price.

²²⁴ For instance, in a Convention case decided by a German court (Germany 14 May 1993 Landgericht Aachen (CLOUT, abstract no. 47), it was held that the buyer's liability to third parties was foreseeable when the goods were not timely delivered. Similarly, in another case (Germany 17 September 1993 Oberlandesgericht Koblenz), the court held that the buyer could foresee that non-payment would force the seller to obtain credit (see, Karollus, M., (1995) at 51-94).

²²⁵ [1949] 2 K. B. 528.

²²⁶ [1969] 1 AC 350 (H.L.)

the recoverable loss should be determined, provides that the injured party can recover damages for losses which the party in breach "foresaw or ought to have foreseen ..., in the light of facts and matters of which he then knew or ought to have known, *as a possible consequence* of the breach of contract." There is no provision to explain the term "possible". Various phrases are used by the Convention commentators to describe this test and the divergence which exists between the two tests. Sutton, for instance, in a comment on an earlier draft of the Convention asserted that "the common law criterion, that is the loss must be one which was "not unlikely" or was "liable" to result, may indicate a difference from Art [74] where the loss which must be foreseen need be no more than a possible consequence of the breach."²²⁷ Professor Farnsworth, in contrast, attaches less significance to this phrase. In this respect, he observes: "Although the use in Art. [74] of 'possible consequence' may seem at first to cast a wider net than the Restatement's 'probable result', the preceding clause ("in the light of facts ...") cuts this back at least to the scope of the Code language."²²⁸

However, it is suggested that when interpreting the Convention text, one should be careful to avoid approaching it from its traditional background in national law. The Convention test must be seen in its own context. The drafters of the Convention have apparently intended to provide an easy formula in order to protect an injured party who suffered as a consequence of the other party's breach. Requiring him to prove that the incurred loss was foreseeable by the breaching party as more than a possibility would place him in a difficult position, for in many cases he may not be able to satisfy the court that the loss in question attained the given degree of probability. Accordingly, it would be sufficient if he can show that the party in breach did actually foresee, or, ought to have foreseen the loss in

²²⁷ Sutton, , K. C., (1977) at 102. See also, Murphey A. G., (1989) at 439-440 (in which he says: "the language of the Convention ostensibly widens the area of liability imposed upon a breaching party", see also, *ibid.*, at 474); Darkey, (1995) at 145 (describing the Convention foreseeability standard as "less stringent, which increases the liability of the breaching party"); Ferrari, F., (1993) at 1268; Nicholas, B., (1989) at 230 (in which he says that the Convention rule is "a weaker requirement than that which results from recent English decisions"); Ziegel, Jacob S. (1991) at 14 (in which he says: "It may be safely assumed that this test (that is, 'substantially foreseeable' as reflected in *The Heron II*) is substantially more demanding than the Convention prescription that the breaching party must have foreseen the damages 'as a possible consequence of the breach of contract'. Many consequences are possible though not probable or likely."); Ziegel, Jacob S. , in: Ziegel, J., & Graham, (1982) at 48; Ziegel, J.& Samson, C., (1981) Art. 74. He also described the term 'possible' as a very broad word (see, Ziegel, Jacob S., in: Nina M. Galston and Hans Smit, (1984) at 9-38).

²²⁸ Farnsworth, A., (1979) at 253. In a Convention case decided by an American court (United States 6 December 1995 U.S. Cir. Ct. (*Delchi Carrier, S.p.A. v. Rotorex Corp.*), (CLOUT, abstract no. 138), the U.S. Circuit Court of Appeals (2d. Cir.) the Circuit Court observed that the right to collect damages is "subject ... to the familiar limitation that the breaching party must have foreseen the loss as *a probable consequence*". The case was an appeal from the decision of a New York district court, i.e., United States 9 September 1994 U.S. Dist. Ct. (*Delchi Carrier S.p.A. v. Rotorex Corp.*), CLOUT, abstract no. 85). The court's interpretation, however, has been criticised by the Convention commentators who said that the court have been much influenced by the national law rather than the Convention text and its legislative history and that several Convention commentators' interpretation were not taken into account. See in this respect, Darkey, J. M., (1995) at 145-147; Schneider, Eric C., (1995) at 630, 666; Cook, V. S., (1997) at 257-263. See also, the Editorial remarks by Albert H. Kritzer attached to the case.

light of knowledge he actually had or ought to have had at the time of contract *as a possible result* of his default.²²⁹

2.3.2.2. Quantum or Type of Loss?

A further question arises whether, under the Convention's test as adopted in Art. 74, it is necessary that the party in breach foresaw or ought to have foreseen the exact amount of the loss, or whether it is sufficient that he could have foreseen the type of loss suffered by the injured party as a "possible" consequence of the breach of contract. It might be argued that the buyer need show only foreseeability of circumstances which embrace the head or type of loss in question, and need not demonstrate foreseeability of the quantum of loss under that head or type.²³⁰

But this interpretation is questionable. It has been suggested²³¹ that reading the second sentence of Art. 74 with the first sentence may lead one to conclude that under this provision damages for breach of contract must consist of a sum equal to the loss and this sum should not exceed the loss which was foreseeable by the party in breach. This wording makes it clear that it is the amount of the loss suffered by the other party as a consequence of the breach which is to be foreseen by the party in breach.

2.3.3. Mitigation Principle

A further restriction on the full recovery of damages arises from the injured party's duty to take reasonable measures to mitigate the loss (Art. 77).²³² The doctrine of mitigation as provided in the Convention is derived from common law systems and it is substantially in line with English law. Accordingly, there is no need to reiterate what has been stated in respect of English law. It suffices to say that a buyer who wants to claim damages for the seller's default is under a duty to minimise the losses resulting from the seller's breach. To comply with this duty, the buyer must take all measures reasonable in the circumstances,²³³ and at the same time

²²⁹ It is interesting to note that the draft "Principles of International Commercial Contracts" proposed by International Institute for the Unification of Private Law (UNIDROIT) in 1994 suggests that the results of failure should be "likely to result" (see, Art. 7.4.4.). See also, Art. 9:503 of The Principles of European Contract Law (Version 1996).

²³⁰ As in the English case of *Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.* [1978] Q.B. 791 at 804.

²³¹ See Knapp in: Bianca and Bonell, (1987) at 541.

²³² Art. 77: "A party who relies on the breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."

²³³ He may for example be bound to accept the defaulting party's offer if it is lower than the market price. The question arose in a Convention case decided by ICC arbitration (see, ICC Arbitration Case No. 6281 of 26 August 1989 (CLOUT, abstract no. 102). In that case the seller contested the buyer's substitute purchase and asserted that he had offered the steel at a lower price and in addition, his steel was of a better quality. The Tribunal did not reject the relevance of the reasonable offer on the part of the seller in principle, but it stated that the seller's offer was not at a lower price taking into consideration the fact that buyer's substitute price

he is not bound to do more than is reasonable.²³⁴ Failure to take such reasonable measures would entitle the party in breach to claim a reduction in the damages. The amount of reduction is, in the language of Art. 77, equal to that "by which the loss should have been mitigated".²³⁵

Where the buyer, in fulfilling his duty to mitigate, has actually minimised any part of his loss he will not be able to claim recovery for that part. Although there is no provision to that effect in the Convention, this is a corollary of the doctrine. Moreover, such a rule is in line with the principle of compensation of the actual loss the victim of breach has sustained as a consequence of the breach. On the other hand, it may well be that the buyer is allowed to recover any reasonable expenses incurred by him as a result of fulfilling his duty to mitigate. This rule, as discussed in the second chapter, has been suggested in English law.²³⁶ In this legal system, it is also suggested that such expenses are recoverable even if the buyer's attempt has led to greater loss. The reason for that is, as said, to protect the plaintiff who attempts to mitigate his loss.²³⁷ Whether this approach is to be followed in the Convention is doubtful, however. This is due to the fact that the purpose of the doctrine is to reduce the loss and not to augment it. In addition, it can be said that where the buyer's attempts to minimise lead to converse result, namely to greater loss, it may then be sound to conclude that he has not acted, at least in some cases, in a reasonable manner.

2.3.4. Relevance of Fault

The question of the relevance of "fault" on the entitlement of the injured party to claim damages is a controversial question in domestic law. Some legal systems, as Professor Honnold pointed out²³⁸, "that have espoused this doctrine have seen the principle become eroded and unclear. Other legal systems reject the 'negligence' principle." In preparing uniform rules for international sales law, the drafters of the Convention saw necessary to make a clear choice among these different approaches. That choice is expressed by the clear language of Art. 45 (1) (b) which states: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) ..., (b) claim damages as provided in

came with a reduced freight charge. See also, the Editorial remarks Albert H. Kritzer attached to the abstract of the case.

²³⁴ See also, Secretariat Commentary, (1979) at 61 para. 4; Knapp in: Bianca and Bonell, (1987) at 560; Enderlein, F. and Maskow, D., (1992) at 308.

²³⁵ In the case of buyer's failure to mitigate, his damages will be measured as follows: (a) first, full damages are to be determined in accordance with Art. 74, or as the case may be, according to Arts. 75 or 76; (b) then the amount by which the loss should have been mitigated is determined, and (c) the latter is deducted from the former. See also, Knapp in: Bianca and Bonell, (1987) at 562.

²³⁶ See, Chapter Two, Section Three, 2.3.3.

²³⁷ See Knapp in: Bianca and Bonell, (1987) at 561; Enderlein, F. and Maskow, D., (1992) at 308.

²³⁸ Honnold, (1991) at 357.

Arts. 74-77",²³⁹ unless the case falls into scope of Arts. 79 or 80. By this language the Convention rejects the view that one who fails to perform his contract is not responsible in damages unless he has been negligent.²⁴⁰ He will be liable for loss resulting from his non-performance unless he can prove that "the failure was due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" (Art. 79 (1)), or the non-performance was caused by the buyer's act or omission (Art. 80).

To sum up, provided that the buyer can show that he has suffered a loss which resulted from the seller's breach, and was foreseeable²⁴¹ by the seller, and that he has satisfied the requirement of mitigation, he will be entitled to recover damages. Damages are awarded no matter what degree of seriousness the seller's breach attains, whether it is fundamental or non-fundamental.²⁴² It is also irrelevant whether the seller has committed the breach with fault or negligently, in good faith or bad faith.

2.4. Measure of Damages

Having examined the general principles governing the recoverable losses, it is appropriate to consider the formulae by reference to which the recoverable damages are to be measured. In this connection, the Convention sets forth a general formula applicable to all cases and some particular formulae which come into operation under certain circumstances where the contract has been avoided.

2.4.1. General Formula

For the purpose of quantification of recoverable damages Art. 74 provides the basic and general rule applicable to every loss suffered as a consequence of the breach. On the basis of this formula, the recoverable damages must be "a sum equal to the loss" plus lost profit, "suffered ... as a consequence of the breach". However, this general criterion is implemented by Arts. 75 and 76 which provide the means of calculating damages in certain defined cases

²³⁹ Secretariat's Commentary, (1979) at 37 para. 4; Rabel, E., (1953) at 180-188. See also, Treitel, G. H., (1988) at 7 and *seq.*, 340 and *seq.*; Enderlein, F., and Maskow D, (1992) at 176, 301; Will in Bianca and Bonell, (1987) at, 331 *seq.*; Kritzer, Albert H., (1989) at 340; Clement Ng' Ong' Ola, (1995) at 245.

²⁴⁰ See generally, Lookofsky, Joseph M., (1983) particularly, at 129 and *seq.*; Enderlein, F. and Maskow, D., (1992) at 301.

²⁴¹ Some commentators have argued that the plaintiff is not required to prove that the defendant did actually foresee or ought to have foreseen the loss in question. Rather, it will be sufficient for him to prove, as in the case whether the breach is fundamental, the breach of contract, the loss and the causal connection between them. It is in fact up to the party in breach to object that the loss could not be foreseen by him (See Enderlein, F. and Maskow, D., (1992) at 302).

²⁴² Will in: Bianca and Bonell, (1987) at 331; Enderlein, F. and Maskow, D., (1992) at 298; Clement Ng' Ong' Ola, (1995) at 245.

when the contract has been avoided. Art. 74 provides the general rule for the measurement of damages whenever and to the extent that Arts. 75 and 76 are not applicable, irrespective of whether or not the contract has been avoided.²⁴³ Similarly, where the buyer's loss exceeds the amount recoverable under Arts. 75 or 76, then he may be entitled to recover further damages according to the general rule provided under Art. 74 (Arts. 75 and 76 (1)).

Accordingly, where the contract has not been avoided, damages are to be measured in accordance with the general rule prescribed by Art. 74. That is, where the seller delivers and the buyer retains non-conforming goods, the loss suffered by the buyer might be measured in different ways. If the goods delivered had a recognised value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods he actually received and that of goods he would have had had the seller performed his duty to deliver as stipulated in the contract.²⁴⁴ The same criterion is suggested to be applied where the buyer claims damages for late delivery. In such situations, the contract price is irrelevant in the calculation of damages, since the object of this formula is to restore the buyer to the economic position he would have had if the contract had been performed properly. However, the buyer may also be entitled to claim additional damages he has incurred as a result of the breach, provided that the requirement of foreseeability discussed before is satisfied.²⁴⁵

No particular provision is provided to specify the time and the place at which the loss to the injured party should be measured under the general rule prescribed by Art. 74. This issue is likely to arise in international contracts, in particular those involving goods whose price fluctuates significantly. However, in a footnote to Art. 70 of the 1978 Draft Convention, the UNCITRAL Secretariat has suggested that presumably it should be at the place the seller delivered the goods and at an appropriate time, such as the moment the goods were delivered, the moment the buyer learned of the lack of conformity of the goods or the moment that it became clear that the non-conformity would not be remedied by the seller under Arts. 37, 46, 47 and 48.²⁴⁶ In order to avoid the potential ambiguity of this aspect of Art. 74, the contracting parties are better advised to include a clause in the contract that specifies time and place by reference to which damages are to be measured.²⁴⁷

²⁴³ See Secretariat Commentary, (1979) at 59 paras. 1, 2. See also, Knapp in: Bianca and Bonell, (1987) at 539; Ziegel, in: Nina, M.; Galston and Hans Smit, (1984) at 9-39-40; Sutton, J., (1989) at 742 and 745. For example when the goods to be delivered under the contract consist of a unique product manufactured under special order by the buyer, the general formula will apply even though the contract has been avoided. See also, Babiak, A., (1992) at 140.

²⁴⁴ See also, Babiak, A., (1992) at 139, no. 188.

²⁴⁵ See also, Knapp in: Bianca and Bonell, (1987) at 546-547.

²⁴⁶ Secretariat Commentary, (1979) at 59, para. 7. See also, Knapp in: Bianca and Bonell, (1987) at 547-548; Gabriel, H., (1994) at 231; Sutton, J., (1989) at 743. See Sutton, K. C., (1977) at 102, in which he suggests that the loss is to be assessed at the time of avoidance where the contract comes to an end as a result of the breach.

²⁴⁷ See also, Sutton, J., (1989) at 743.

2.4.2. Special Formulae

These formulae come into operation where the contract has been actually avoided; the mere fact that the contract is avoidable does not suffice. Where the contract has been lawfully avoided by the injured party damages are to be calculated by reference to the particular formulae prescribed by Arts. 75 and 76, i.e., the sub-transaction or current price formula as the case may be.

2.4.2.1. Sub-Contract Price Formula

In the case of avoidance of the contract by the injured party Art. 75 of the Convention gives priority to the sub-purchase price formula.²⁴⁸ Application of this formula is subject to certain requirements. First, there must be an actual substitute transaction by the buyer. The possibility of making a substitute transaction will not justify the application of the provision²⁴⁹, although if the injured buyer fails to avail himself of such an opportunity, it could be considered as a failure to take reasonable measures to mitigate the loss, as required by Art. 77.²⁵⁰ It is also assumed that the formula does not apply if the buyer has purchased only part of the equivalent goods in replacement not all of them.

Secondly, the substitute purchase must be made in a reasonable manner. What is reasonable is always a question of fact dependent on the circumstances and may thus vary from case to case.²⁵¹ However, as a general guideline, for the substitute transaction to have been made in a reasonable manner within the context of Art. 75, it must have been made in such a manner as is likely to cause a substitute transaction to have made at the lowest price reasonably possible.²⁵² Therefore, the substitute transaction need not be on identical terms in respect of such matters as quantity, credit or time of delivery as long as it was in fact made in substitution for the transaction avoided.²⁵³ However, if the substitute transaction was made in a different place from the original transaction or on different terms, the amount of damages must be adjusted to recognise any increase in cost (such as increased transport cost) less any expenses save as a consequence of the breach.²⁵⁴ Moreover, the Convention requires that the substitute transaction must be made within a reasonable time after the contract has been

²⁴⁸ Art. 75: "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 ..., [he] may recover the difference between the contract price and the price in the substitute transaction ..."

²⁴⁹ See also Enderlein, F. and Maskow, D., (1992) at 303, in which he suggests that mere offer should not be considered neither in this regard nor as to the reasonableness of the substitute transaction.

²⁵⁰ See also, Knapp in: Bianca and Bonell, (1987) at 551; Enderlein, F. and Maskow, D., (1992) at 303.

²⁵¹ Sutton suggests that the term "reasonable manner" may be described as acting as a prudent man of business would act in the circumstances of the case (Sutton, K. C., (1977) at 103.).

²⁵² Vilus, in: Sarcevic, P.-Volken, P., (1986) at 248.

²⁵³ Secretariat Commentary, (1979) at 60 para. 4. See also, See also, Sutton, K. C., (1977) at 103; Knapp in: Bianca and Bonell, (1987) at 550; Sutton, J., (1989) at 745.

²⁵⁴ Secretariat Commentary, (1979) at 60 para. 3.

avoided. Thus, the reasonableness of the period of time for the substitute transaction will not start until the buyer has in fact declared the contract avoided. Accordingly, an avoiding buyer may not shift to the seller the risk of a rise in price which may occur subsequent to avoidance by delay in making substitute transaction.²⁵⁵

In the event of failure of one of the foregoing requirements, damages would be measured as though no substitute transaction has taken place and as a result they are to be assessed by reference to the provision prescribed under Art. 76, and, if applicable, to the general rule provided under Art. 74.²⁵⁶

The Convention provides no further restriction upon the injured party;²⁵⁷ thus the substitute transaction may be made privately or by auction, and the sub-contract price may be equal to, or in certain circumstances, even more or less than, the current price. Although the buyer is under no duty to notify the seller of his intention to purchase substitute goods²⁵⁸, his conduct is restricted by the requirement of reasonableness.

It is to be noted that the Convention does not expressly require the buyer to make a substitute transaction. It follows that he has the choice to make a substitute transaction or rely on the current price formula.²⁵⁹ However, his option is subject to his duty to mitigate the loss, in particular, when the market price increasingly rises. In such a case, substitute purchase is obviously one mode of mitigating the loss.

According to this provision, where the buyer has made a substitute transaction his damages are basically equal to the difference between the contract price and the price he has actually paid for the purchase of substitute goods. However, the language of Art. 75 is

²⁵⁵ Secretariat Commentary, (1979) at 60 para. 5. See also, Knapp in: Bianca and Bonell, (1987) at 550; Sutton, J., (1989) at 745. The rule that the sub-transaction must occur "within a reasonable time after avoidance" is in fact in line with the performance of the injured party's duty to mitigate the loss. By providing the formula, the Convention intends to prevent an avoiding party shifting to the party in breach the loss resulting from a subsequent change in the market. The same criteria are applicable to a claim for damages based on Art. 76. In that case, as will be seen, it is necessary that the "current price" must be ascertained as of the "time of avoidance" or in some circumstances at the time of "taking over" the goods. Thus, claims based on Arts. 75 or 76 seldom raise "mitigation" problems under art. 77. See also See Enderlein, F. and Maskow, D., (1992) at 303, 305; Vilus, Sarcevic, P.-Volken, P., (1986) at 250.

²⁵⁶ Secretariat Commentary, (1979) at 60 para. 6; Honnold, (1991) at 512; Vilus, Sarcevic, P.-Volken, P., (1986) at 248; Knapp in: Bianca and Bonell, (1987) at 547-548; Gabriel, H., (1994) at 233-234.

²⁵⁷ Although Art. 75 does not specifically require that the substitute transaction be made in good faith, the general mandate in Art. 7 (1) requiring the Convention to be interpreted in a manner that "promotes" the observance of good faith in international trade" would enable the judge to disregard the substitute transaction made in bad faith (see also, Flechtner, H. M., (1988) at 98).

²⁵⁸ This point has been expressly confirmed by I.C.C. arbitration in a case between a buyer from Egypt and a seller from Yugoslavia in 1989. In that case, although the tribunal found the Convention inapplicable at that time (because the Convention was not then in effect in any country.), it made an *obiter* reference to the Convention and interpreted the provisions relating to damages. In this case, the seller contended that buyer's substitute purchase "cannot be interpreted as a purchase in replacement, since [seller] was not informed in advance of [buyer's] specific purchasing intention. However, the Tribunal dismissed this contention and held that the buyer's notice to seller of his intent to cover is not a prerequisite to a claim for the difference between the option price and the cover price. See in this regard, ICC Arbitration Case No. 6281 of 26 August 1989 (CLOUT, abstract no. 102).

²⁵⁹ See also, Enderlein, F. and Maskow, D., (1992) at 306.

somewhat vague; it refers to the buyer who "may" recover that difference, and the key question is whether the application of this formula is mandatory or permissive. In other words, can an aggrieved buyer who has made an actual substitute transaction subsequent to avoidance of the original contract measure his damages by reference to the current price formula? The legislative history of the provision shows that the draftsmen's intention was that the injured party who had in fact arranged a substitute contract of the nature described above should not be allowed to claim damages under the current price formula where the formula would provide for a higher measure of damages.²⁶⁰

The rule has been described as "harsh"²⁶¹ in that it allows the party in breach to benefit from a good bargain made by the injured party. However, it has been justified on the basis that the rule was adopted in the interest of certainty and to prevent abuse.²⁶² Moreover, the rule is in line with the philosophy upon which awarding damages is justified to put the aggrieved party into the same, but not a better, financial position as if the other party had performed the contract. Therefore, whenever this purpose can be achieved by the substitute contract price formula, which is presumed to have met its requirements, there is no reason to justify the reference to the current price formula.²⁶³ However, the injured party is given a right to claim damages for any additional loss he may have suffered as a consequence of the other party's breach, provided the requirements of Art. 74 are satisfied.

The question arises here whether the injured buyer can recover the difference between the contract and substitute contract price even though it exceeds the current price. The language of Art. 75 does apparently entitle him to do so.²⁶⁴ However, where the difference is considerable it may be possible to assume that the injured buyer has not acted in a reasonable manner, nor has he met his duty to mitigate the loss. As a result, he is entitled to recover as damages the difference between the contract price and the current (but not the substitute contract) price.²⁶⁵ This is so unless there are circumstances justifying the substitute contract

²⁶⁰ UNCITRAL, Yearbook, VIII (1977) at 59 para. 472. See also, Treitel, G. H., (1988) para. 102; Ndulo, M., (1991) at 23.

²⁶¹ Nicholas, B., (1989) at 231.

²⁶² Honnold, (1991) para. 414.

²⁶³ It has also been argued that to allow the injured party who has made a substitute transaction to resort to the current price formula because it is more favourable to him, would encourage him to act dishonestly and to violate the principle of good faith. Moreover, he has in fact acted in accordance with his duty to mitigate the loss under Art. 77 (Enderlein, F. and Maskow, D., (1992) at 305). See also, Flechtner, H. M., (1988) at 101; Ziegel, in: Nina, M.; Galston and Hans Smit, (1984) at 9-39/40.

²⁶⁴ Enderlein, F. and Maskow, D., (1992) at 305.

²⁶⁵ For this reason, although in the case of existence of a substitute transaction, the injured party is not generally required to prove the 'current price' for the goods, prices that were available on the market may be relevant if a dispute arises as to whether the substitute transaction was effected "in a reasonable manner" (Honnold, (1991) at 508). However, in the case of dispute it is the seller who has to prove that the substitute contract was not effected in a reasonable manner.

for a price more than the current price; for example, if the market price rose while the buyer was in negotiations with the original seller for amicable settlement of their dispute.

2.4.2.2. Current Price Formula

Where the formula prescribed under Art. 75 fails to come into operation the case may fall within the provision under Art. 76 (1).²⁶⁶ This alternative means does not come into operation unless (1) when the contract is actually avoided, the injured party has not made an actual substitute transaction described under Art. 75 and (2) there is a current price for the purchased goods. The formula also applies where a substitute transaction is made in an unreasonable manner, or not made within a reasonable time after avoidance, or the formula is entirely inapplicable. The latter is the position where it is impossible to determine with certainty whether a substitute contract has been made or which contract was made in replacement of the avoided contract. For instance, where the buyer is consistently in the market for goods of the type in question, it may be difficult or impossible to determine which of many contracts of purchase was made in replacement of the one avoided.²⁶⁷

(A) Relevant Place

International contracts for sale of goods are made between traders who are in different countries. The goods may be situated in a different place. The question arises as to the current price of what place reference is to be made for the purpose of assessment of damages? The Convention provides that the place of the current price is that in which delivery "should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods"(Art. 76 (2)).

Accordingly, the starting point in determining the relevant place is to ascertain the place at which the seller is discharged of his duty to deliver. No major difficulty will arise where the contract determines, whether expressly or impliedly, the place at which the goods must be delivered. Problems may arise where, for instance, the contract provides that delivery is to be made in more than one place; the question which arises here is whether all these places should be considered for determining the current price, or if the court is likely to concentrate only on one place according to some relevant factors, e.g., the quantity of the goods to be delivered in that place.

²⁶⁶ Art. 76 (1): "If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase ... under Art. 75, recover the difference between the price fixed by the contract and the current price ..."

²⁶⁷ Secretariat Commentary, (1979) at 60-61 para. 2. See also, Knapp in: Bianca and Bonell, (1987) at 554; Enderlein, F. and Maskow, D., (1992) at 306; Sutton, J., (1989) at 746; Nicholas, B., (1989) at 231.

If strictly followed, the former approach necessarily leads to adopting several 'current prices' for quantifying damages in relation to one bargain. In addition to that, this method would complicate the matter. Its application may not be possible in a given case if, for example, the subject-matter of the goods constitutes, by its very nature, parts of an integrated whole such a large machine.²⁶⁸ Similarly, the adoption of the other approach raises the question: what factors are to be considered when applying the current price prevailing in only one place?²⁶⁹

As the language of Art. 76 (2) provides, the formula only refers to the place of delivery of the *goods*. Such a formula may give rise to the difficulty of ascertaining the relevant place of market in a documentary sale contract. For instance, in a c.i.f. contract it is not clear whether the buyer's damages are to be assessed by reference to the market of the place of 'handing over the goods over to the carrier' (Art. 31 (a)), or to the place of 'tender of shipping documents' (Art. 34), or to the place of 'physical delivery of the goods to the buyer'. No particular view has been suggested by the commentators on the Convention. It is suggested that the place of handing over of documents should be decisive, since this is the place at which a c.i.f. seller is discharged from his duty to deliver under such a contract. However, there is a possibility to argue that the place of the buyer's destination might be significant, since this is usually the market in which the buyer will buy the replacement goods.²⁷⁰

(B) Substitute Place

Where no current price is available in the place at which the seller's duty to deliver should be fulfilled Art. 76 (2) refers the deciding court to another place which serves as a reasonable substitute. Obviously, this expression empowers the court to play a main role in determining which place may be regarded as a reasonable substitute; and in doing so, trade usage may be given considerable regard. But since the buyer would normally be required to transport the substitute goods from that market, the court should make 'due allowance for differences in the cost of transporting the goods' (Art. 76 (2)) from that place to their place of delivery as provided under the contract. It should be noted that in such circumstances damages would be assessed by reference to the current price at a place different from the place at which the goods should have been delivered, provided that this current price can serve as reasonable

²⁶⁸ This may be the case where the seller is an international manufacturer who makes different part of a large machine by its different branches in different places. In such a case, different parts, depending on the type of the contract may be delivered in different places.

²⁶⁹ For further criticism on the rule, see Sutton, J., (1989) at 746-747.

²⁷⁰ This view is suggested by some authors in English law. See e.g., Atiyah & Adams, (1995).at 484; Guest A.G. et al, (1997) paras. 19-164 and 20-102. See in this respect, the English Chapter, Section Three, 2.4.6.

substitute to the non-existing current price at the place of delivery.²⁷¹ The question whether or not the price at a particular substitute place is reasonable cannot easily be answered; it must be determined in each case from the point of view of an average merchant, in light of the justifiable interests of both parties.²⁷²

2.5. Time of Assessment

When damages are assessed on the sub-transaction price formula no difficulty arises as to the time point because it is fixed by the date of the substitute transaction. General damages, in such cases will be the difference between the two contract prices. However, the question becomes more relevant where damages are to be measured by reference to the current price. In such situations, because the current price may vary from time to time, a primary question is what is the relevant time for specifying the current price or the substitute current price, if one is to be used in calculation of damages under Art. 76.

The question of determining a point of time at which the injured party's damages are to be assessed was one the draftsmen of the Convention had encountered. Art. 84 of ULIS provided that the current price is to be determined at the date at which the contract becomes avoided whether by operation of the law (*ipso facto*) or by the aggrieved party's declaration, as the case may be. The potential result of this provision is that, an injured party who has the right to avoid the contract, may not avoid the contract unless and until the market price changes in his favour. So, if the current price formula is to be applied, this would certainly increase his damages but at the other's expense. Owing to the potential for harsh results created by a provision of ULIS,²⁷³ the draftsmen's main intention was to prepare a text which could eliminate the possibility of such speculation by the aggrieved party. Many suggestions to achieve this were laid before the Working Group of UNCITRAL²⁷⁴ and consequently Art. 72 of the UNCITRAL's Draft Convention stated that the relevant time for determining the amount of the current price should be the time at which the injured party "first had the right to

²⁷¹ See also, Knapp in: Bianca and Bonell, (1987) at 557-558. If the difference in transportation costs is excessively high, the question may be asked whether the price at the other place is a "reasonable substitute" (Sutton, K. C., (1977) at 104).

²⁷² Knapp in: Bianca and Bonell, (1987) at 557. However, some commentators have described the provision as "a vague and uncertain test" and inappropriate formula for the businessmen whose suppliers or buyers are great distances away from them. In addition, the expression "making due allowance" is, according to them, one which is open to varying interpretations (see, Sutton, K. C., (1977) at 104).

²⁷³ Art. 84 of ULIS (1): "In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided. (2) In calculating the amount of damages under paragraph 1 of this Art., the current price to be taken into account shall be that prevailing in the market in which the transaction took place or, if there is no such current price or its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

²⁷⁴ See e.g., UNCITRAL, Yearbook V (1974) at 44-45 paras. 170-177; IV (1975) at 62, para. 116; VIII (1977) at 59-60, paras. 485-488.

declare the contract avoided” - in other words, the time when the contract became avoidable. At the Vienna Conference several delegations objected to the proposed formula.²⁷⁵ The Conference felt that the proposed wording was not clear enough and was too elastic, so that in practice it might be very difficult to determine when the contract could first have been avoided by the injured party. Such a determination would have been particularly difficult in an anticipatory breach of contract.²⁷⁶

Following these objections, several amendments to the Draft wording were proposed.²⁷⁷ As a result of a lengthy discussion, the Vienna Conference ultimately adopted the ‘time of avoidance formula’ as prescribed in Art 76 (1).²⁷⁸ The provision under this Art. provides a two-fold formula. First is that the current price is to be determined at the time of avoiding the contract.²⁷⁹ To this extent, therefore, the present text does not achieve the drafters’ intention and one may say that the door is still open to speculation. Moreover, it may well be that the scope within which the speculation operates under the present Convention is larger than that under its predecessor. This is due to the fact that the *ipso facto* avoidance in the latter, which limits the possibility of speculation, is excluded from the Convention. The second comes into operation where the party claiming damages has avoided the contract after taking over the goods. In such a situation, the current price is to be determined by reference to the time of such taking over rather than the time of avoidance (Art. 76 (1) sentence. 2).²⁸⁰

The formula provided in the last part of Art. 76 (1) seems to be vague, and in practice, it may lead to some difficulties. For instance, it is not quite clear what is the meaning of the expression “taking over” the goods?²⁸¹ The Convention does not contain any provision determining the meaning of the term. One may, therefore, argue that this problem is to be solved according to the domestic law applicable to the contract. It is granted, however, that

²⁷⁵ See Official Records, (1981) at 132, 222-223, 394-396 and 415.

²⁷⁶ See also, Knapp in: Bianca and Bonell, (1987) at 556.

²⁷⁷ Suggested solutions were to make the relevant time for determining the current price the time where the contract is avoided, or that of delivery, or the time of delivery or alternatively the time of avoidance, whichever of the two came first (Official Records, (1981) at 80-81, 132-133).

²⁷⁸ Art. 76 (1): “If the contract is avoided and there is a current price for the goods, the party claiming damages may, ..., recover the difference between the price fixed by the contract and the current price *at the time of avoidance* ..., however, the party claiming damages has avoided the contract after taking over the goods, the current price *at the time of such taking over* shall be applied instead of current price at the time of avoidance.” (Art. 76 (1). (Italic supplied)

²⁷⁹ Which is exactly the same which was adopted in ULIS.

²⁸⁰ However, the alternative criterion should not apply when an aggrieved buyer rejects the goods immediately after the inspection permitted by Art. 38.

²⁸¹ As it is not clear whether the formula applies to the seller or it is confined to the buyer. See, in this respect, Treitel, G. H., (1988) at 120. According to the legislative history of the provision (Official Records, (1981) at 222-223), the object of this provision was to prevent the buyer from speculating at the expense of the seller by holding the non-conforming goods and then avoiding the contract after the market has risen (see also Knapp in: Bianca and Bonell, (1987) at 556; Kritzer, Albert H., (1989) at 491). This risk has, however, been described as slight in view of the fact that the buyer loses his right to declare the contract avoided within a reasonable time after he knew or ought to have known of the breach (Art. 49 (2)). Treitel, G. H., (1988) at 119; Nicholas, B., (1989) at 232; Schlechtriem, P., (1986) at 98; Ndulo, M., (1991) 23.

'delivery' by the seller is different from 'taking over' by the buyer. Sometimes, they take place at the same time; this is so whenever the seller delivers the goods directly to the buyer who takes them. In other situations, the time of delivery may differ from that of taking over the goods; this may occur, for example, when delivery is effected by handing the goods over to the carrier for transmitting them to the buyer (Art. 31). In such an event, the buyer's duty of taking the goods may only be fulfilled by removing them from the carrier.

Likewise, Art. 76(1) raises another problem. If, for example, the buyer has avoided the contract after he has taken only part of the goods and not all of them. The key question is: which time is relevant for determining the current price? Is it the time of avoidance or the time of such taking over? Once again, it is suggested that the court in such a case may be thrown back to the general rule as prescribed under Art. 74.

The alternative formula will, nonetheless, not be an effective one where it is likely to cause prejudice to the buyer. This is the position where he could not reasonably have been expected to discover the defect at the time of taking over, because the goods, for instance, were in sealed packages, which would not normally be opened before use. In such a case, the proper solution, as suggested by some commentators²⁸², is to assess damages by reference to the time of avoidance. The same is true where, after taking over the goods and discovering the defect, the buyer calls on the seller to cure the defect (Art. 46) and the seller fails to do so.²⁸³

Further difficulty may arise from this provision in respect of documentary sales. However, with a broad interpretation of the phrase "taking over" in Art. 76 (2), it can be said that in such a case damages are to be measured from the time of taking over the documents, since the term does not only refer to the physical possession of the goods but includes also control over them.²⁸⁴

3.0. Part Two. Price Reduction

3.1. Introduction

The other type of financial remedy available under the Convention to a buyer injured by the seller's non-conforming delivery is the right to reduce the contract price. It enables the buyer unilaterally to adapt the contract to the delivery actually made, if he is in principle willing to keep the defective goods. Of course, the buyer's calculation may later be questioned by the

²⁸² Treitel, G. H., (1988) at 119; Nicholas, B., (1989) at 232; Ndulo, M., (1991) at 23. See also, Kritzer, Albert H., (1989) at 491. Schlechtriem describes the case as "difficult to understand" (Schlechtriem, P., (1986) at 98).

²⁸³ Treitel, G. H., (1988) at 119-120.

²⁸⁴ See also, Babiak, A., (1992) at 140.

seller. In such a case, to determine the amount of reduction in price the court will refer the case to an expert.

A series of questions must be considered in relation to this remedy. First, what is its legal nature? Second, how is the amount of the reduction to be assessed? Third, is this remedy subject to any restrictive provisions? Finally, what relation is between this remedy and damages?

3.2. Nature and Origin of the Remedy

The Convention's remedial provisions do not always, as Bergsten and Miller pointed out²⁸⁵, reflect merchants' practice but sometimes reflect the efforts of lawyers from different legal systems to reconcile their views on the appropriate action to be taken by the contracting parties and by a tribunal in the event of breach of contract by one of contracting parties. Although the reconciliation has apparently resulted in a series of provisions which are in general harmony with one another, it presents certain provisions which are unfamiliar to lawyers of some legal systems.²⁸⁶ Accordingly, it is quite possible that such provisions are confused with other similar provisions applied within the domestic law context. Among such provisions is Art. 50 which entitles the buyer to reduce the price under certain circumstances. Since the remedy of price reduction is similar to that of damages in that both give some relief to the injured buyer measured in money, it is quite possible to confuse one with the other. The drafting history of the provision shows that such confusion was made by participants from some legal systems, in particular those from common law systems who saw the provision as a type of set-off rule as provided in common law jurisdictions.²⁸⁷ During preparation of the draft Convention by the UNCITRAL Working Group, some common law commentators recommended that the Art. relating to the remedy of price reduction be redrafted "so as to provide that a buyer may deduct all or any part of the damages resulting from breach from any part of the price due under the contract."²⁸⁸ Accordingly, in order to avoid such confusion and to clarify the field of application of the remedy of price reduction it seems necessary to explain the nature of the remedy to determine how the provision entered into the Convention remedial provisions.

²⁸⁵ Bergsten & Miller, (1979) at 255.

²⁸⁶ *Ibid.*

²⁸⁷ See UNCITRAL Yearbook., III (1972) at 89 paras. 109-113; IV (1973), at 56-57 paras. 146-152 and at 71 paras. 118-126. See also: Enderlein, F. and Maskow, D., (1992) at 196; Schlechtriem, P., (1986) at 79. Confusion of the remedy with that of damages was also made during the preparatory work for ULIS. Common lawyers experienced great difficulty in understanding the nature of the remedy of price reduction and its relationship with the that of damages (see, Bergsten & Miller, (1979) at 266-270; Will in: Bianca and Bonell, (1987) at 369).

²⁸⁸ Sutton, K. C., (1977) at 100.

The drafting history shows that the remedy was incorporated as a separate remedy at the insistence of civil law participants. Under civil law systems, price reduction is a separate remedy from damages.²⁸⁹ It arises only where the seller has delivered goods which do not correspond to the contract quality but the buyer decides to keep them.²⁹⁰

The idea of price reduction emerged from the idea of restricting the right to claim damages to cases where the party in breach was at fault or guilty of fraud. Under Roman law an injured buyer was entitled to claim damages only where he could prove that the seller was at fault or guilty of a degree of fraud, whereas delivery of non-conforming goods was not considered fault or fraud.²⁹¹ On the other hand, it was thought unfair to require the buyer to pay the full price for defective goods. To prevent unjust enrichment, Roman law developed the action for the reduction of the price (*actio quanti minoris*²⁹²), which was adopted later by the civil law systems.²⁹³

3.3. Price Reduction under the Convention

Although the Convention included price reduction as a separate remedy, as will be seen, it may in some respects be more expansive in effect than price reduction in many civil law jurisdictions.²⁹⁴ Art. 50 of the Convention provides:

²⁸⁹ See e.g., The German Civil Code, Arts. 462 and 472; The French Civil Code, Art. 1644. Art. 462 of the German Civil Code provides: "On account of a defect for which the seller is responsible under the provisions of Arts. 459, 460, the purchaser may demand annulment of the sale (termination), or reduction of the purchase price (reduction)."

²⁹⁰ See e.g., The German Civil Code, Art. 462, and, The French Civil Code, Art. 1644 (both Codes placed the provision under the heading of "Warranty Against Defects in the Goods). On the influence of civil law tradition some representatives declared that the remedy under the Convention must also be applied only to the case of defective delivery (see Report on Fourth Session reprinted in: UNCITRAL, Yearbook, IV (1973) at 71 para. 120).

²⁹¹ See Treitel, G. H., (1988) paras. 90, 100. A degree of this severe rule is reflected in the French Civil Code where it provides: "A debtor is judged liable, the case arising, to the payment of damages, either by reason of the inexecution of the obligation or by reason of delay in the execution, at all times when he does not prove that the inexcursion came from an outside cause which cannot be imputed to him, and further that there was no bad faith on his part" (Art. 1147). This traditional basis for recognition of the special price-reduction mechanism was removed by the Convention's adoption a unitary contractual approach. As already seen, the buyer is given a general right to claim damages for seller's breach without he has to prove any degree of fault or fraud on the part of the seller.

²⁹² This action in turn originated from an order of Roman Governors (*Ediles Curules*) seeking to protect the parties who bought slaves and cattle in the City markets against the defects which were easily concealed. In this respect, see Bergsten & Miller, (1979) at 256 and the references cited in footnote 5; Abd al-Razzaq Ahmad al-Sanhori, (1952), vol. 4, at 711; Winship, P., (1982) at 1233; Treitel, G. H., (1988) para. 90; Nicholas, B., (1989) at 225. See generally, Zimmermann, R., (1996) at 318 and *seq.*

²⁹³ See also, Szakats, A., (1966) at 762-763; Bergsten & Miller, (1979) at 257; Ziontz, Martin L., (1988) at 171; Gonzalez, Olga, (1984) at 91; Will in: Bianca and Bonell, (1987) at 368; Zwart, Sara. G., (1988) at 121; Treitel, G. H., (1988) paras. 90, 100; Honnold, (1991) at 395. See also: Report on Fourth Session, UNCITRAL Yearbook, IV (1973) at 71 para. 121.

²⁹⁴ Under French law, for example, there is a "need for judicial action to reduce the price of goods". This is "in contrast to Art. 50 of the Convention, which permits the buyer himself to reduce the price in the event of non-conforming goods" (Kritzer, Albert H., (1989) at 20, 344). See also: Claude D. Rohwer and Jack J. Coe, in: Campbell, D., and, Rohwer, C., (1984) at. 285.

"If the goods do not conform with the contract and whether or not the price has already been paid the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time..."

According to the language of this provision, price reduction may be made either where the seller has delivered but "the goods do not conform with the contract" in quantity²⁹⁵, quality and description or are not contained or packaged in the manner required by the contract (Art. 35 (1)). The provision seems also to be applied where the seller has rendered a partial non-conforming delivery, particularly where partial non-conformity does not justify partial avoidance.²⁹⁶

Application of Art. 50 raises the question: can it be extended to other types of breaches such as delay, delivery at the wrong place, defects in documents and the like? At the Vienna Diplomatic Conference, the question was raised in particular as to cases where the seller has delivered goods which are not free from third-party rights or claims. Some delegations put forward a proposal whereby the provision under Art. 50 would have extended to the case of defects in title. The proposal attracted conflicting views, and consequently was withdrawn. As a result, no decision was reached as to whether the price may be reduced for defects in title or third-party claims based on industrial or other intellectual property rights.²⁹⁷

Different views are expressed by commentators on the Convention. For instance, Professor Schlechtriem argues that "the general similarity of the prejudice caused by these defects with that caused by other defects justifies the availability of price reduction in these cases as well".²⁹⁸ In contrast, Professor Honnold concludes that the price-reduction formula of

²⁹⁵ However, some commentators have doubted that the remedy under Art. 50 comes into operation where the goods fail to meet the quantity obligations of the contract (see e.g., Flechtner, H. M., (1995) at 170 and *seq.*). Other commentators such as Honnold (Honnold, (1991) at 397) and Will (Will in: Bianca and Bonell, (1987) at 373 and *seq.*) failed to answer whether the remedy is available where the seller delivers the wrong quantity of goods. Nevertheless, some other commentators on the basis of the text of Art. 50 declared that failure of quantity constitutes "non-conformity" and as a result reduction of price is available where the goods are insufficient in quantity (see e.g., Bergsten & Miller, (1979) at 258). In a Convention case (*United States 6 April 1994 U.S. Dist. Ct. (S.V. Braun, Inc. v. Alitalia Linee Aeree Italiane, S.p.A.*, decided by an American court, the court, however, showed its tendency to apply Art. 50 to such a case, although because of facts of the case the court was satisfied that the seller had stipulated that "full delivery had in fact been made". See also, Flechtner, H. M., (1995) 170).

²⁹⁶ See also Art. 51 (1) which applies all remedies provided under Arts. 46-50 to the case of partial non-conforming delivery.

²⁹⁷ Official Records, (1981) at 360-361 (discussion on defects in title). The Norwegian sponsor maintained that he withdrew his proposal "on the understanding that it would be up to the courts to decide whether and to what extent" the price reduction provision would apply to third-party claims. However, this was a statement from an individual delegation. No significant weight should be given to such a statement as long as there is no evidence on the fact that the Conference agreed to such an "understanding". See in this respect, Honnold, (1991) at 141-142 and 397.

²⁹⁸ Schlechtriem, P., (1986) at 79. However, he acknowledges that Art. 50 formula is not a proper one to tackle the question but it certainly would have required thorough deliberations. However, due to lack of sufficient time the Conference failed to address the point. See also: Will, in: Bianca and Bonell, (1987) at 375 (Will argues lack of time led to the decision not to amend the present text of Art. 50 but to leave the solution for the courts (*ibid.*)); Enderlein, F. and Maskow, D., (1992) at 195.

Art. 50 is a special rule and should not be extended outside its stated sphere, i.e., claims of non-conformity.²⁹⁹

The better view seems to be that the remedy should be limited to cases where the seller has delivered goods which do not conform with the requirements of Art. 35 (1). This view can be supported by the language of the Art. which states that the remedy is available when the "goods do not conform with the contract."³⁰⁰ Using the words "goods do not conform with the contract" means that breach of duties such as that to deliver at the place and time provided for delivery of goods and documents (Arts. 31-34) and other obligations imposed by contract (Art. 30) are excluded from Art. 50. This construction can also be supported by the heading approved by the Vienna Diplomatic Conference for Section II (Arts. 35-44), that is, "Conformity of the goods *and* third party claims". By adoption of this heading the Convention, in fact, has distinguished between two types of breaches: breach of duty to deliver conforming goods (subject of Art. 35) and breach of duty to deliver goods free from a third-party rights or claims (subject of Arts. 41, 42). Moreover, as far as the third-party rights or claims are concerned, different notice requirements are established for claims of "lack of conformity of the goods" (Arts. 39, 40) and claims that the goods are subject to a "right or claim of a third party" (Art. 43).³⁰¹

This interpretation may be weakened by Art. 44.³⁰² By referring expressly to Art. 50 it seems to indicate that a buyer who fails to give notice of the existence of third-party rights or claims, but has a reasonable excuse, may nevertheless claim a price reduction. It is, as some commentators indicated³⁰³, hard to accept that a buyer should have the right to resort to the price-reduction remedy only if he fails to give notice, but not if he gives notice in time.

However, it seems that Art. 44 should be taken into account with caution. It was not included in the 1978 Draft Convention. It is, in fact, a compromise developed late at the Vienna Diplomatic Conference to meet objections to the notice requirements of Art. 39 (1) (conformity of goods).³⁰⁴ It is true that the Art. includes references to the notice requirements of Art. 43 (1), and adds that these requirements do not affect the buyer's rights to various remedies available under the Convention, including Art. 50. But the point which weakens the reading that Art. 44 is intended to expand the scope of application of price reduction is that

²⁹⁹ Honnold, (1991) at 397.

³⁰⁰ Likewise, according to the language of the second sentence of Art. 50 which only refers to Arts. 37 and 48 but not to Art. 34, it seems that the remedy does not apply to non-conforming documents.

³⁰¹ See also, Honnold, (1991) at 397.

³⁰² Art. 44: "Notwithstanding the provisions of paragraph (1) of Art. 39 and paragraph (1) of Art. 43, the buyer may reduce the price in accordance with Art. 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice."

³⁰³ Enderlein, F. and Maskow, D., (1992) at 195-196. See also, Will, in: Bianca and Bonell, (1987) at 375-376.

³⁰⁴ Official Records, (1981) at 108, 159 and 208. See also, Honnold, (1991) at 338-340.

the legislative history of the provision shows no indication that Art. 44 was understood to amend Art. 50. Indeed, the debate that led to the delegations' refusal to accept the proposal which recommended the extension of price reduction to the case of third-party rights or claims, did recognise that it is difficult to apply the remedy under Art. 50 outside claims for non-conformity.³⁰⁵ Accordingly, it is quite possible to say that Art. 44 was only intended to meet the concerns of developing countries about the severity of Arts. 39 (1) and 43 which deprive the buyer of his remedies and not to amend the scope of Art. 50 and extend it beyond its stated scope. The Art. therefore should be read as saying: "Notwithstanding ... the buyer may reduce the price or claim damages *as appropriate*...". That is, the buyer, who, having a reasonable excuse, fails to give the required notice may be entitled to reduce the price and/or claim damages for the lack of conformity or for the existence of the third party rights or claims, as appropriate.

The last point which deserves to be pointed out here is that, as sub-paragraph (2) of Art. 45 provides, exercise of any remedy provided in Arts. 46 to 52 (note the inclusion of Art. 50) does not bar a claim for damages under Art. 74. On this basis, the right of price reduction does not preclude the buyer from claiming damages for any consequential losses he has sustained. Accordingly, the buyer could claim both price reduction and consequential damages for -e.g., delays in production because of defects in the goods. Art. 45 should not however be construed to permit double recovery based on the reduced value of the goods.³⁰⁶

3.4. Assessment of the Ratio of Reduced Price

According to Art. 50, price reduction involves a proportional reduction of the price of goods according to the ratio of the value of conforming goods to that of the goods actually delivered. In calculating that reduction the value of conforming goods is not just treated as equal to the price under the contract, which may well be below or above it. Accordingly, in order to measure the amount of reduction it is first necessary to determine the value which the actual goods delivered have at the time of delivery and then to ascertain what value the goods would have had if they had been delivered properly. The actual value may be determined from the market price, if any, of the defective item, or from other relevant factors including the cost of repairing or remedying the defect. When the two different values of the goods are ascertained the contract price should be reduced on the basis of the ratio of difference between these two values, not the real difference.

³⁰⁵ Official Records, (1981) at 360 paras. 69-76; Honnold, (1991) at 397.

³⁰⁶ Honnold, (1991) at 395. See also: DTT's Consultative Document, (1989) at 38-39; Nicholas, B., (1989) at 225-226; Gonzalez, Olga, (1984) at 92-93.

3.4.1. Time of Assessment

One contentious aspect of the remedy of price reduction is the date at which the actual value of the conforming and non-conforming goods should be assessed. One alternative is the time when the defect was or ought to have been discovered. Another is the date of the action. A third contends that the Roman law history of *actio quanti minoris* logically points to the date of the conclusion of the contract.³⁰⁷

According to the Convention, the decisive time for calculation of the price difference between conforming and non-conforming goods is the time of delivery of the goods rather than that of conclusion of the contract³⁰⁸ or of examination by the buyer of the goods delivered. The position presents a change from the 1978 UNCITRAL Draft Convention which had suggested measuring the requisite proportion by reference to the "time of the conclusion of the contract". As a result of proposals by some delegations the contract formation criterion was changed to the delivery date criterion.³⁰⁹ The criterion was apparently chosen partly because account is better taken of fluctuations in market value between the conclusion of the contract and the date of delivery, since the non-conforming goods might not have existed at the time of the contract,³¹⁰ and partly because, at least as far as the common law participants were concerned, the value at the time of delivery would be a more adequate substitute for damages.³¹¹

The significance of the time point at which the proportion is measured will appear where the value of non-conforming goods rises or falls disproportionately to that of conforming goods from the time of formation of contract. This significance can be illustrated by the following example. Suppose that at the time of formation of the contract the value of conforming goods was £300, 000 and of non-conforming goods was £200, 000, but at the time of delivery the value of conforming goods has risen to £600, 000, whilst that of non-conforming goods actually delivered increased only by one-half, so that at the time of delivery they had a market value of £300, 000. If the price reduction proportion is assessed at the time of the contract, the contract price would be reduced by one-third, or £100, 000. If, on the other hand, the time of delivery is chosen, the price will be reduced by one-half, or £150, 000.

³⁰⁷ See also, Clement Ng' Ong' Ola, (1995) at 241.

³⁰⁸ As was laid down in Art. 46 of ULIS. See also Art. 472 (1) of the German Civil Code.

³⁰⁹ See Official Records, (1981) at 357-36,1 particularly, at 357 para. 23.

³¹⁰ The current value at the time of delivery is easier to establish, whereas the current value at the time of formation of the contract (except for stock market goods) always tends to be somewhat hypothetical (see Enderlein, F. and Maskow, D., (1992) at 1978).

³¹¹ Official Records, (1981) at 357-358, in particular, paras. 23, 25, 26 and 27. See also Will, in: Bianca and Bonell, (1987) at 369-370 and 371; Gonzalez, Olga, (1984) at 94. For instance, the US delegation indicated that it could support either of the draft proposals, but it suggested that the proposed text would be more consistent and easier to explain to US lawyers familiar with UCC provisions calculating damages as of the time of delivery (Official Records, (1981) at 358 para. 26). This is one of the aspects which shows that price reduction under the Convention is partly not an exact analogue of the civil law equivalent.

If the time of the contract is used to assess the proportion, there may be times when, due to price fluctuations, the remedy of price reduction would actually be more advantageous than normal damages. For example, if the price of conforming goods was £400, 000 and of non-conforming goods was £200, 000, but at the time of delivery the first price increases to £500, 000 and the second rises to £400, 000, damages would only be £100, 000, while the amount of price reduction will be £200 000. However, if the time of delivery, rather than the time of contract formation, is used, the price reduction will be £80, 000. Thus, by choosing the time of delivery to measure the proportion of conforming and non-conforming value, the Convention limits the circumstances under which the price reduction remedy might be used.³¹²

3.4.2. Place for Assessment

Another issue raised at the Vienna Conference but on which no decision was taken is which market should serve as a basis for determining the comparable value.³¹³ What is certain is that there is no question that the value of both conforming and non-conforming goods must be assessed with reference to the same time and place of delivery; otherwise the comparison would be meaningless. The main question is whether the value of the delivered goods must be compared with the value goods would have at the place of destination or supply of goods.

In the absence of a clear provision in this respect, some commentators have suggested that "according to the sense and purpose of the price-reduction provision, the place of the seller's performance would determine the comparable market price. In a sale involving carriage, the destination would provide the appropriate basis of comparison".³¹⁴ In contrast, it has been said that: "in view of the close relationship between date and place of delivery, the place of delivery should be decisive. It is not excluded, however, that buyers may consider the place of destination."³¹⁵ Some other commentators have suggested a three-step solution: the place of destination, then the place of delivery and finally the place of business of either the buyer or the seller, depending on where a market price can best be assessed.³¹⁶

It seems that the Convention has left the question to be decided by the court according to the special circumstances of any particular case. However, according to the sense and

³¹² See Gonzalez, Olga, (1984) at 94. See also: Schlechtriem, P., (1986) at 79; Enderlein, F. and Maskow, D., (1992) at 198.

³¹³ Official Records, (1981) at 358-359 para. 42 and *seq.*

³¹⁴ Schlechtriem, P., (1986) at 79 footnote 311. Some commentators on the early draft of the Convention have suggested that the value of the goods must be contrasted with the value of the goods actually supplied at the seller's place of business (Sutton, K. C., (1977) at 100).

³¹⁵ Enderlein, Fritz, in: Sarcevic, P.-Volken, P., (1986) at. 197. See also: Enderlein, F. and Maskow, D., (1992) at 197.

³¹⁶ Will in: Bianca and Bonell, (1987) at 375.

purpose of the price-reduction remedy, the place where the seller has to perform his delivery obligation is of particular significance.

3.5. Restrictions on the Remedy

As was made clear, the remedy of price reduction is a separate remedy which can be utilised by the buyer in certain circumstances. In view of the Convention, the remedy is effectuated by the unilateral declaration of the buyer. Thus, no court action or even seller's agreement is required, unless the seller disagrees with the buyer as to the existence of a non-conformity or to the monetary consequences of that non-conformity.³¹⁷

Such a declaration is not subject to the various defences applicable to a claim for damages. Accordingly, the buyer may be entitled to reduce the price even if the seller is excused from paying damages for the lack of conformity under Art. 79. Again, the remedy "is not affected by the limitation to which a claim for damages is subjected under [Art. 74] i.e., that he has to prove that he has suffered loss as a consequence of the seller's breach and that the amount of damages may not exceed the loss which the seller in breach foresaw or ought to have foreseen at the time of the contract."³¹⁸ A further advantage of this remedy can be found in the fact that unlike Arts. 46 (specific performance) and 49 (avoidance), Art. 50 does not contain the element "within a reasonable time".³¹⁹ Likewise, the Secretariat Commentary suggested that "[T]he sanction provided by [Art. 77] ... does not affect ... a reduction in price by the buyer pursuant to [Art. 50]."³²⁰ The suggestion may be justified on the basis that, first, it is consistent with the literal language of the second sentence of Art. 77 which refers only to the injured party's duty to take reasonable measures to mitigate *damages* for breach of contract, and, secondly it is in line with the legislative history of Art. 77. At the Vienna Conference, as discussed in the first part of this section, some delegates proposed a suggestion to extend the scope of Art. [77] to make it applicable to a wider range of remedies, but it was defeated.³²¹

³¹⁷ Bergsten & Miller, (1979) at 263-264; Gonzalez, Olga, (1984) at 92; Winship, P., (1982) at 1233; Will in: Bianca and Bonell, (1987) at 372; Ndulo, M., (1991) at 24. Enderlein, F. and Maskow, D., (1992) at 196. However, it is surely always more appropriate that the parties agree on the amount of the reduction.

³¹⁸ Secretariat Commentary, (1979) at 42 para. 5; Kritzer, Albert H., (1989) at 375 and 376. See also, Bergsten & Miller, (1979) at 265-266.

³¹⁹ See also, Will in: Bianca and Bonell, (1987) at 372; Kritzer, Albert H., (1989) at 344, 496. In the absence of time-limit guideline under the Convention, Will suggests: the domestic laws on limitation period determine if the seller is left in uncertainty for an excessive period of time (*ibid.*).

³²⁰ Secretariat Commentary, (1979) at 61 para. 3. See also, Knapp in Bianca and Bonell, (1987) at 564-566; Kritzer, Albert H., (1989) at 496. In contrast, Professor Honnold argues that Art. 77 should be read into a wide range of remedies (Honnold, (1991) at 520-522).

³²¹ Official Records, (1981) at 396-398. See also, Farnsworth, A., (1979) at 250; Ziegel in: Nina, M.; Galston and Hans Smit, (1984) at 9-42.

Furthermore, to be effective price-reduction needs no special form of notice. In order to invoke the reduction, the buyer need only dispatch notice thereof.³²² Another point to be noted in this regard is that the Convention does not restrict the remedy to the case of specific goods, but applies it also to all goods, whether identified to the contract or not.³²³

Nevertheless, the remedy is subject to some significant restrictions some of which are provided by the second sentence of Art. 50 itself.³²⁴ This provision subjects the exercise of this remedy to two major limitations: actual remedy of the lack of conformity by the seller and his offer to cure under Arts. 37 or 48. Where the seller has cured according to Art. 37 this should be quite natural. And also if he remedies the defect in accordance with Art. 48 there will be no need for a price reduction because equivalence will be re-established and consequently the buyer will get what he is entitled to receive under the contract. What is of significance here is that the buyer will lose his right to price reduction when he refuses to have the defect cured by the seller. However, in practice, buyers would justify their refusal on the grounds of unreasonable inconvenience (Art. 48). Accordingly, it is the court's duty to decide whether or not the seller's offer was unreasonable. It is to be noted that the legislative history of Arts. 48 and 50 shows that the drafters of these provisions have intended to restrict the right to price reduction to the actual cure or the seller's reasonable offer to cure after he is notified of the lack of conformity. Certainly, they did not intend to bar the buyer of his right to reduce the price for the mere possibility of cure even though the seller has not shown any readiness and willingness to remedy the defects in accordance with the requirements of Arts. 37 and 48.³²⁵

The remedy is also subject to another important restrictive rule, that under which the buyer is required to notify the seller of any lack of conformity within a reasonable time after he discovered or ought to have discovered it (Art. 39 (1)). For instance, in a Convention case decided by a German court it was held that the buyer lost the right to rely on non-conformity of goods and to reduce the price proportionally, since it gave notice of the non-conformity only when the goods arrived in Germany, i.e. seven days after the buyer had the opportunity to examine them at the place of delivery in Turkey.³²⁶

³²² The declaration by the buyer is governed by Art. 27, i.e., it will be effective, even if it does not reach the seller.

³²³ See also, Gonzalez, Olga, (1984) at 95.

³²⁴ Art. 50: "... However, if the seller remedies any failure to perform his obligations in accordance with Art. 37 or Art. 48 or if the buyer refuses to accept performance by the seller in accordance with those Arts., the buyer may not reduce the price."

³²⁵ See in this respect, UNCITRAL, Yearbook, VIII (1977) at 44 paras. 271-277, and 46 paras. 299-301; Honnold, (1989) at 337 and 339.

³²⁶ See Germany 8 January 1993 Oberlandesgericht Düsseldorf (CLOUT, abstract no. 48).

3.6. Price Reduction and Damages

As pointed out above, the remedy of price reduction is distinct from that of damages which is regulated by Arts. 74-77. They are two separate remedies which can be exercised separately or cumulatively. Nevertheless, commentators on the Convention have given various examples to illustrate that this remedy in practice has a narrow scope, since on most occasions when the buyer is entitled to claim damages under Arts. 45 and 74, the difference between damages and a reduction in price under Art. 50 will generally not be significant; a buyer claiming damages is in effect claiming a reduction of the price.³²⁷ They note that "the price reduction formula applies only where the buyer accepts and retains non-conforming goods, and plays an important role only when the seller is not liable for the non-conformity."³²⁸ However, the utility of the remedy should not be underestimated. Although both remedies give the injured buyer monetary relief, various reasons justify distinction between these two remedies.

First, as to their function they are totally distinct. Damages are awarded in order to compensate the injured buyer's losses, while price reduction tends to prevent the seller from receiving a windfall. By application of the reduction, the seller will get proportionately less than the price he would have received had he delivered conforming goods, and, the buyer will pay proportionately less for keeping the non-conforming goods.³²⁹

Second, it is a non-judicial remedy in the sense that it may be resorted to unilaterally without a prior judicial adjudication. However, if the seller considers that it has been resorted to wrongfully,³³⁰ he may go to court to challenge the price reduction or the quantum of it. The non-judicial character of the remedy of price reduction would seem to be the main difference between it and damages. A buyer may only claim damages and unless and until a court or arbitral tribunal or the seller has accepted this claim, the damages remain unliquidated. However, a claim to reduce the price is liquidated by the buyer's unilateral quantification of it, subject always to challenge in the courts.³³¹

³²⁷ See also: Ziontz M. L., (1980) at 172. Long years ago the current utility of the remedy based on the Roman law traditional rule, i.e., *actio quanti minori*, was doubted by some lawyers (see Rable, E., (1953) at 191.

³²⁸ Honnold, (1991) at 393.

³²⁹ Will in: Bianca and Bonell, (1987) at 372.

³³⁰ For example, the seller may satisfy the court or tribunal that the price reduction was not basically justified because it jeopardised his right to cure the defects.

³³¹ However, this advantage will be questioned when the buyer has pre-paid. In such a case price reduction is not a self-help remedy, but will need to be enforced with judicial assistance. The case becomes more significant where, as it may often be the case in international sales, the price is paid by documentary credit. In that case the buyer cannot reduce the price, since the seller has a separate entitlement to be paid the contract price under the credit. The buyer may still be able to recover part of the price on the grounds of price reduction but it will no longer be a unilateral action. This is in fact one of the limitations which in practice makes this remedy of little use in the context of international sale of goods.

The third divergence is that damages are to be measured as of the time of delivery, while reduction in price is measured as of the time of conclusion of the contract.³³²

Fourth, the right to reduce the price, as indicated above, is not affected by the limitations to which a claim for damages is subjected under Arts. 74 and 77.³³³

Fifth, the seller may be exempted from liability for damages pursuant to Art. 79, if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences, whereas the remedy of reduction in price is not subject to such a defence.³³⁴ Accordingly, from the standpoint of the buyer who is willing to accept the goods even though they do not conform to the contract, Art. 50 is a better route to follow when the seller is excused from damages because Art. 79 ousts the application of Art. 74, but not Art. 50.

The final difference between price reduction and damages is the formula used to quantify them. The quantification of the amount of monetary relief under price reduction is made by reference to the ratio between the value of the goods as contracted for and the value of the goods as delivered, while damages are measured by reference to the real difference between the value of the goods contracted for and those delivered at the delivery date. Accordingly, the buyer's recovery under Art. 50 can be different from his recovery in an action for damages under Art. 74. It may sometimes turn out to be less, equal or even more.³³⁵ The following examples will illustrate these different results.

(A) First Example

Suppose the seller contracted to sell a certain quantity of first grade wheat worth \$300,000 to a buyer in Iran and that delivery was to be 30 September, "Ex Ship" from United States to a port in the buyer's country. The seller dispatched goods conforming with the contract requirements. Owing to problems, the ship was delayed at the Suez canal for a month, and the wheat deteriorated so that on arrival it was of lower grade than the wheat contracted for. At the time of delivery, wheat of the quantity and quality contracted for was valued at the contract price, while the non-conforming wheat sold for one-half the contract price, or \$150,000. The buyer decided to keep the non-conforming wheat and to reduce the price under

³³² See in this respect, Bergsten & Miller, (1979) at 259; Ziontz, M. L., (1980) at 171.

³³³ Secretariat Commentary, (1979) at 42 para. 5.

³³⁴ *Ibid.* The distinction can be justified on that the reduction of price, irrespective of the seller's responsibility, serves to re-establish equivalence between performance and counter-performance (Enderlein, F. and Maskow, D., (1992) at 196). In any case where the buyer is in doubt as to the availability of damages, it has been suggested that he can seek relief under both Art. 50 and Art. 74 and take the best relief he can ultimately establish (Kritzer, Albert H., (1989) at 21).

³³⁵ See also: Will In: Bianca and Bonell, (1987) at 373; Kritzer, Albert H., (1989) at 376.

Art. 50 of the Convention. Under Art. 50, the buyer could reduce the price of the contract by one-half, which would be the ratio of the value of the wheat actually delivered to that of conforming wheat at the time of delivery. Under this situation, there will be no difference between price reduction and damages, if the buyer is able to claim damages, (though it is in the interest of the buyer to resort to price reduction rather than to claim for damages). However, different results occur when the price level changes.

(B) Second Example

Assuming that the facts are the same as in the first example, expect that, due to a shortage of wheat, the price of wheat rises in the market so that, at the time of delivery, the value of conforming goods is \$600, 000 and the value of the goods actually delivered is \$300,000. Under these facts, the buyer relying on Art. 50 can refuse to pay more than one-half of the agreed price, i.e., \$150, 000 (or can reclaim \$150, 000 if the price has been paid in advance). Therefore, the price he must pay for the delivered wheat is \$150, 000, even though it is now worth \$300, 000 on the market.³³⁶ On the other hand, damages would be \$300,000. In this case, as pointed out above, it is the interest of the buyer to declare first price reduction and then sue the seller for remaining loss (\$150,000), if he could claim damages in a price increase situation.

(C) Third Example

Assuming similar facts but that the market value falls between contract and delivery so that the market value of conforming grade of wheat at the time of delivery is worth \$150, 000, and that of the wheat actually delivered is \$75, 000. In this situation, the reduced price will be \$150, 000, whereas an award of damages will yield \$75, 000. However, if the non-conformity amounts to a fundamental breach the buyer will usually be advised to avoid the contract and recover the price.

(D) Fourth Example

If the contract price was \$300,000 but at the date of delivery the market value of conforming goods at the time of delivery has fallen to \$225, 000 and the actual value of the goods is \$166,375, the buyer will pay \$221, 831, a saving of \$78, 169, whereas damages will yield only \$58, 625. Accordingly, in such a situation, price reduction is the only effective remedy for the injured buyer.

³³⁶ Paying only \$150, 000 for wheat is worth \$300, 000, might seem to give the buyer a windfall. However, this advantage to him reflects a portion of the protection that performance would have provided. If the ship had not been interned, the buyer would have received wheat that had increased in value to \$600, 000 but would have paid \$300, 000 (see Honnold, (1991) at 393).

It is, therefore, up to the buyer to decide which is more advantageous for him: price reduction, or damages, or a combination of the two.³³⁷ Where the buyer has paid the price in advance and the amount of the price reduction is less than, or, equal to that of the damages which he may claim, price reduction will not offer any advantage over a claim for damages. However, where the amount is more than of damages, the buyer will certainly choose reduction in price.

Where the amount of reduction is less than that of damages and the buyer has not yet paid the price, it is in the buyer's interest to resort first to price reduction and then sue for the remaining damages. If the amount of the price reduction is equal to or greater than the damages which the buyer would ordinarily be able to claim, it is in the interests of the buyer to reduce the price and not claim any damages. In such a case, he buyer gets an extra monetary remedy without having to sue for damages.³³⁸

Conclusion

The preceding examination has shown that the Convention gives great significance to specific performance; an aggrieved buyer is given a general right to require the seller to perform specifically what he is required to do. However, damages are also treated as an important remedy available for any default. This remedy can be exercised in separate as well as with any of the other remedies provided for by the Convention. In addition to this, the Convention affords an aggrieved buyer a further right to reduce the contract price where the seller has made a non-conforming delivery. It is not a compensatory remedy, it is primarily a restitutionary remedy based on the principle of "unjust enrichment". It may be granted without the buyer is required to prove that he has suffered loss as a consequence of the seller's non-conforming delivery.

The preceding discussion has also shown that the Convention considerably restricts termination of the contract, by basing it on the doctrine of "fundamental breach". This may cause great uncertainty, particularly in the case of delay in performance. However, the Convention does not leave the buyer in a sea of uncertainty. By recognising the *Nachfrist* - notice procedure, it allows the buyer to treat a delay in delivery as a ground to terminate the contract if it is not cured within a reasonable time fixed in the notice in accordance with Art. 47. Dealing with termination in this way shows that the Convention in principle favours flexibility and fairness over certainty.

³³⁷ Secretariat Commentary, (1979) at 43 para. 13; Nicholas, B., (1989) at 226; Knapp in: Bianca and Bonell, (1987) at 563-564, Example C.

³³⁸ See also, Will in: Bianca and Bonell, (1987) at 373; Babiak, A., (1992) at 131. See also: Enderlein, F. and Maskow, D., (1992) at 196.

It was also seen that, unlike English law, the Convention has sharply distinguished between the right to withhold performance from the right to terminate the contract and has given the seller in default a general right to cure his default, either before or after the date for performance has expired.

Nevertheless, there are a number of areas of uncertainty in respect of the buyer's right to reject the non-conforming delivery and to terminate the contract under the doctrine of fundamental breach or *Nachfrist*-notice procedure. There is further uncertainty in regard to the relationship between the seller's right to cure and the buyer's right to avoid the contract. In addition to that, there are some areas of uncertainty in relation to the remedies of specific performance and claim for damages. This is perhaps the result of the compromises made during drafting.

CHAPTER FOUR

BUYERS' REMEDIES

UNDER

SHI'AH LAW

Sketch of Discussion

In the two previous chapters, the law governing the buyer's remedies for the seller's non-conforming delivery has extensively been examined under two modern legal systems in order to identify the issues and the way these systems deal with in this connection. It is now time to deal with the remedies available to the aggrieved buyer under *Shi'ah* law. As indicated in the first chapter and, as will be shown in detail below, *Shi'ah* law, as reflected in the present *Shi'ah* jurisprudence, lacks a developed law of remedies. *Shi'ah* jurists have concentrated on very simple, and mostly, hypothetical instances rather than modern and concrete cases and consequently a number of important questions which arise in this connection are left unanswered. Likewise, the way by which the jurists have examined the law governing remedies is not a proper way. They have not examined the remedies available for an injured party in any one place and thus they are not easily accessible. The rules relating to remedies are dispersed in various places such as, (a) where the promisor fails to perform *shurūt* (stipulations within the contract)¹, (b) where the seller fails to deliver *mabi'* (subject of sale) or the buyer refuses to pay *thaman* (price)², and, (c) when dealing with *kheyārāt* (options to terminate the contract)³. More importantly, damages which almost all legal systems have recognised as a remedy for breach of contract are not addressed by the jurists at all.

This chapter intends (1) to present a general picture of various rules governing the buyer's remedies for the seller's non-conforming delivery by gathering, classifying and interpreting the rules scattered within the above-mentioned discussions, (2) to identify gaps in the law in respect of the issue under consideration, and, (3) finally to show how the gaps could be filled by employment of the suggested methodology.

Generally, as in the two other systems, the remedial provisions of this system can be divided into three general categories: (i) those which allow the buyer to withhold performance of his contractual obligations and to bring the contract to an end; (ii) those giving him a right to require the seller to perform his obligations in accordance with the contract, and; (iii) those which entitle him to claim monetary relief.

¹ See e.g., Ansāri, M., (1375 H.Q.) at 283 and *seq.*; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 126 and *seq.*; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 366 and *seq.*; Tabrizi, J., (1412 H. Q.) at 429 and *seq.*

² See e.g., Najafi, M. H., (1981) vol. 23 at 145; Ansāri, M. (1375 H.Q.) at 312.

³ See e.g., Najafi, M. H., (1981) vol. 23 at 3 and *seq.*; Ansāri, M., (1375 H.Q.) at 216 and *seq.*; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 26 and *seq.*

Section One

Withholding Performance and Termination

1.0. General Introduction

A general look at what *Shi'ah* jurists have addressed when dealing with the seller's duty to deliver *mabi'* shows that it is a well-accepted rule that the buyer under certain circumstances is entitled to withhold payment of the price as long as the seller's refusal continues. The expression *haqq-e-habs* is used in the jurists' terminology to refer to this concept.⁴ The jurists have also accepted the view that in some cases the buyer may be entitled to *reject* the seller's non-conforming delivery⁵ and in some other cases he is free to *reject* it and *bring the contract to an end*.⁶ The expression *haqq-e-radd* refers to the first right⁷ and the term *haqq-e-faskh* is used to describe the second right. However, they have not examined withholding performance as a general remedy separate from termination. They have also not examined the relationship between this remedy and *haqq-e-faskh* (right of termination). More importantly, the right of cure by the seller is unknown in *Shi'ah* jurisprudence. Nor have they addressed the case where the seller has broken his obligations to hand over the documents in accordance with the requirements of documentary sale contracts.

The following section aims to show where the buyer may be entitled to resort to one or both of these two remedies, how the consequences of the seller's failure to fulfil his duties to tender documents could be analysed under *Shi'ah* law and how one can reconcile the seller's right to cure with the general principles of *Shi'ah* contract law.

2.0. Part One. Withholding Performance

2.1. Introduction

As indicated above, *Shi'ah* jurists have in some instances recognised that the buyer who is aggrieved by the seller's breach is entitled to withhold performance. However, the position of the right to withhold performance as a general right is not quite clear. For instance, in the case of the seller's failure to deliver *mabi'* the jurists speak of *haqq-e-habs*, whereas in the case of

⁴ See e.g., Ansāri, M. (1375 H.Q.) at 312; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 592; Khumayni, S. R. M., vol. 5 at 371-372. The only jurist who disagreed with this well-settled view is Muhagheq Ardebili, in *Sharh al-Ershād*, (as cited in: Najafi, M. H., (1981) vol. 23, at 146. For criticism on this view see, Shahidi, M. F., (1375 H.Q.) at 617.

⁵ See e.g., Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 70; Irvāni, A., (1379 H.Q.) vol. 2 at 50; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 60; Tabrizi, J., (1412 H. Q.) vol. 4 at 419.

⁶ See e.g., Ansāri, M. (1375 H.Q.) at 283; Khumayni, S. R. M., (1363 H.S.) vol. 5 at 209; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 38-39.

⁷ Tabrizi, J., (1412 H. Q.) vol. 4 at 419.

seller's non-conforming delivery they talk of *haqq-e-radd*. Apart from using different terminologies, they have not answered the question whether the latter is a particular form of a general right to withhold performance, or something else. And if it is not so, on what ground should it be based?

It seems that the availability of this remedy, as a general rule, should be analysed on the division of contracts into *u'qūd mua'wwad̄* (synallagmatic contracts) and *u'qūd qayr-mua'wwad̄* or *tabarrū'i* (*nudum pactum*) on the one hand, and classification of contractual obligations into *eltezām-e-asli* (literally, principal obligation) and *eltezām-e-fare'i* (literally, collateral or subordinate obligation), on the other hand. For, as will be seen later in detail, *Shi'ah* jurists have justified the remedy of refusal to perform on the ground of the theory of *mutuality* of obligations on the one hand, and have said that such mutuality only exists between principal obligations rather than between them and subordinate ones, on the other hand.

Accordingly, before entering into examination of the circumstances where this remedy may be available, it seems necessary to consider two preliminary issues: classification of contracts and of contractual obligations. The topics have ramifications that go beyond the scope of the study, but there will be an attempt, so far as intelligibility allows, to limit the discussion to what exploration of this remedy requires.

2.1.1. Classification of Contracts

One of the significant classifications of contracts is the distinction between *mua'wwad̄* and *tabarrue'i* contracts. Under the first type both parties to the contract undertake an obligation. The contract of sale is a typical *mua'wwad̄* contract in *Shi'ah* jurisprudence so that almost all rules applicable to such contracts are examined under this heading. In contrast, under the second category only one of the parties undertakes an obligation to do or forbear to do something.⁸ *U'qūd mua'wwad̄* themselves are divided into two divisions. Under the first division, the contract is only bilateral, in the sense that each party undertakes an obligation⁹, whereas under the second, the contract is not only bilateral but has the characteristic that each

⁸ As an example of the second category reference can be made to the contract of donation. See e.g., Isfahāni, S. A., and Gulpāyḡāni, S. M. R., (1977) vol. 2 127

⁹ Such as *hebeh-e-mua'wwad̄* (bilateral donation) (see, e.g., I.C.C. Art. 801). In this type of the contract two obligations are not exchanged with each other, but they are two independent obligations. However, if the donee fails to perform his contractual obligation the donor is entitled to require him to fulfil his duty otherwise he can terminate the contract on the ground of the option of *kheyār-e-takhalluf an al-shart* (unfulfilled condition). See e.g., Ansāri, M. (1375 H.Q.) at 80; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 3, at 14. Isfahāni, S. A., and Gulpāyḡāni, S. M. R., (1977), vol. 2 at 129 (question no. 11); Khumayni, S. R. M., vol. 2 at 52 (question no. 11).

party undertakes an obligation vis-à-vis the other party because the latter has undertaken an obligation in his favour.¹⁰ It follows that each party's duty is tied to the other's.¹¹

As far as the remedy of withholding performance is concerned, the latter is the most significant category. The synallagmatic nature of such contracts is said to be 'generic' and 'functional'. The first concept refers to the creation of contract (in the sense that it will fail to come into existence if either of the two promised performances is impossible)¹² and the second to its performance, i.e., failure by one party to perform his part of the promised exchange will justify the other party's refusal to perform.

2.1.2. Classification of Contractual Obligations

The parties' obligations under a reciprocal contract are classified into two general categories: *eltezām-e-asli* (principal obligation) and *eltezām-e-far'ei* (collateral or subordinate obligation).¹³

2.1.2.1. *Eltezām-e-Asli* (Principal Obligation)

The term is used to describe those obligations which constitute the heart of the contract and play a central role for making the contract. As an example, in a sale contract the basic aim of the seller and buyer is to exchange the goods against the price. On this basis, the seller's duty to deliver goods and the buyer's duty to pay the price are regarded as "principal" obligations.

Referring to this concept, the jurists have concentrated only on the seller's duty to deliver the subject of sale and the buyer's duty to pay the price; they have failed to answer the question whether the buyer is under a further principal duty to accept (not reject) the goods the seller delivers in performance of the contract. It seems that this is a crucial question, a clear answer to which will clarify the position of the buyer's right to reject the non-conforming delivery (i.e., *haqq-e-radd*) under this legal system. As will be explained later, the buyer's duty to accept the seller's delivery should be regarded as a principal obligation which is undertaken in exchange for the seller's duty to deliver *in accordance with the contract terms*. Accordingly, these two obligations should also be regarded as principal obligations under a sale contract.

¹⁰ For this reason the jurists define the contract of sale "Disposition of *res (a'yn)* in return for a known consideration", (see e.g., Ansāri, M. (1375 H.Q.) at 79; I.C.C. Art. 338.).

¹¹ All expressions such as: (*Mu'āwadeh*), (*mubādalah*), (*mu'ā'maleh*), and (*e'wadeyn*), in the jurisprudential text books, indeed, are used to indicate such a nature of the reciprocal contracts.

¹² See e.g., Najafī, M. H., (1981) vol. 22 at 390; Ansāri, M. (1375 H.Q.) at 185; Najafī, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 378; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 1 at 201-2. See also, Imāmi, S. H., (1363 H.S.) at 219-220; Kātūziān, N., (1992) vol. 1 at 30, 36 and 140-142; Kātūziān, N. (1990) vol. 4 at 83-86. For this reason Art. 348 of I.C.C. states: "The sale of something which is not within the seller's power to deliver is null and void."

¹³ See e. g., Tabrizi, J., (1412 H. Q.) vol. 4 at 375.

2.1.2.2. *Eltezām-e-Fare'i* (Subordinate Obligation)

The theory of "subordinate obligation" and its relation to the principal ones, in particular, the effects of void subordinate obligations is one of the most complicated and controversial areas of *Shi'ah* contract law. A full consideration of the issue is beyond the scope of the present research and requires a separate work. However, as far as the remedy of withholding performance is concerned, some significant aspects of the theory will be examined.

"Subordinate" obligations refer to those obligations which are technically collateral to the principal obligations. In the language of the jurists, they are those contractual obligations which are not exchanged with the principal obligations, but whose main role is to restrict or determine the scope of the principal obligations. For instance, Shaykh Murtaḍā Ansāri, a leading *Shi'ah* jurist, observes:

"*Shart* (subordinate obligation) is only for the purpose of conditioning a principal obligation. It is not exchanged with a part of the consideration. The exchange is only made between two considerations (goods and price). Condition (in his words, *qayd*) is not regarded as property (*māl*) to be exchanged with other property, although the value of consideration may be changed for it."¹⁴

"Subordinate" obligations are often described by the term *shart*, pl. *shurūt* (stipulation within the contract).¹⁵ As with the term "condition in English law which is used in different meanings, the term *shart* in *Shi'ah* law is used in different senses.¹⁶ As far as the present study is concerned, the most important meaning of the term is that which is used to describe an *eltezām* (covenant or agreement) within another *eltezām* (a main covenant).¹⁷ *Shart* in this sense is divided into three types: (1) *shart-e-sefat*; (2) *shart-e-fe'l*; and (3) *shart-e-natijah*.¹⁸

¹⁴ See Ansāri, M. (1375 H.Q.) at 285, see also at 286 in which he says in clear words: "An undertaking, when is classified as *shart* is not exchanged with the consideration". See also, Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 138; and 142 and *seq.*; Gharavi Isfahāni, M. H., (1408 H.Q.) vol. 2 at 159; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7, at 376; Khumayni, S. R. M., vol. 5 at 226, 238; Tabrizi, J., (1412 H. Q.) vol. 4 at 444, 450. See in contrast, Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 130

¹⁵ It seems that the reason of calling such an obligation as '*shart*' (literally, condition) is that it is, in fact, undertaken as a subsidiary obligation (as opposed to the principal one), and the enforceability of the principal obligation is qualified by performance of such an obligation.

¹⁶ See generally, Imāmi, S. H., (1363 H.S.) vol. 1 at 268; Kātūziān, (1989) vol. 3 at 122.

¹⁷ The term is sometimes used in the sense of an "event" when the jurists describe a conditional contract or an obligation. In this sense, the term "*shart*" is used to refer to an event on which the existence of a principal obligation or the occurrence of the whole contract depends (see in this respect, Ansāri, M. (1375 H.Q.) at 99; Shahrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 134 and *seq.*; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 143 and *seq.* See also, Kātūziān, (1989) vol. 3 at 124-5.

¹⁸ See generally, Ansāri, M. (1375 H.Q.) at 283; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7, at 359-360; Kātūziān, N., (1989) vol. 3, at 154. Since *shart-e-natijeh* has no relevance to the present study, it is not examined here. It is only used to refer to terms under which a particular juristic act occurs when the main contract is validly concluded (see e.g., I.C.C., Art. 234 (2)). The main emphasis of this part of the study is on the consequences of breach of the two other categories.

(A) *Shart-e-Sefat*

The expression is used to refer to any term indicating characteristics which define the subject-matter of contract, such as terms indicating the quality¹⁹, quantity and other characteristics.²⁰ The expression "*shart-e-sefat*" is, however, only used in the case of sale of specific goods. In the case of sale of unascertained goods, it is said that use of the term is technically inaccurate.²¹ The reason is that where the contract is for unascertained goods a promise about quality etc. defines the seller's duty to deliver rather than the goods, since the goods to be used in performance of the contract are not yet identified by the contract terms. The seller's statement of quality etc. must be a promise relating to his future conduct - I will deliver goods of a certain quality - not a promise of existing fact.²² Accordingly, such a duty is in fact to be placed into the category of *shart-e-fe'l* rather than *shart-e-sefat*.²³

(B) *Shart-e-Fe'l*

This expression is used to describe terms indicating a promise to do or refrain to do something.²⁴ Unlike *shart-e-sefat* which is commonly used to refer to all descriptions made in defining the subject-matter of the contract, *shart-e-fe'l* is used to refer to an obligation undertaken by one of the contracting parties within a contract to perform or refrain from doing a particular act. Any *shart* requiring the promisor to do a positive act in favour of a contracting party or even a third party is placed into this category. Accordingly, a seller's obligation to ship the goods within the contract time, or to notify the buyer of the consignment where the goods are not clearly identified to the contract, or a c.i.f. seller's obligation to arrange a contract with a carrier for transportation of goods to the buyer's destination or his

¹⁹ It should be noted that technically, the jurists use a particular term, that is, *wasf-e-salāmat* (literally, health) or *wasf-e-sehhat* (literally, correctness) to describe the 'quality' of the subject of sale.

²⁰ See generally, Ansāri, M. (1375 H.Q.) at 283; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7, at 359-360; I.C.C., Art. 234 (1). In comparison, the terms "*shart-e-sefat*" and "*sehhat*" in Shi'ah law may be likened to those terms referred to in ss. 13-15 of the English Sale of Goods Act 1979.

²¹ A general examination of what the jurists have stated when discussing *shurūt*, *kheyār-e-rū'ayat* (the option of inspection) and *kheyār-e-takhalluf an al-shart* (the option of unfulfilled condition) will make clear the point (see e.g., Ansāri, M. (1375 H.Q.) at 283, 285 and 249). In Iranian law, see Imāmi, S. H., (1363 H.S.) vol. 1 at 282 who suggested that the term "*shart-e-sefat*" used by Art. 234 of the Iranian Civil Code is to be restricted to the case of contract for sale of specific goods. In contrast see, Kātūziān, N., (1989) vol. 3 at 149.

²² The view can also be supported by the statements of some jurists who, raising the theory of *shart* within the grounds of termination (options), describe *shart-e-sefat* as the terms indicating the characteristics of specific goods. See e.g., Ansāri, M. (1375 H.Q.) at 283; Bujnūrdi, M. H., (1389 H.Q.) vol. 3 at 259.

²³ It seems that this is perhaps the reason why almost all the jurists hold that in the case of sale of unascertained goods the mere lack of conformity does not entitle the buyer to terminate the contract, but only to require the seller to deliver goods conforming with the contract terms, since the seller is able to select some other consignment which conform to the required conditions. Whereas, in the case of specific goods since the seller cannot be required to deliver conforming goods, the buyer is given an immediate right to terminate the contract.

²⁴ See generally, Ansāri, M. (1375 H.Q.) at 283; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7, at 359; I.C.C., Art. 234 (3).

duty to make a contract with an insurance company to insure the goods in transit as well as his obligation to transfer the relevant shipping documents are to be placed into this category.

2.2. Buyer's Right to Withhold Performance

As pointed out above, although in the case of the seller's failure to deliver goods the jurists have expressly recognised that the aggrieved buyer has a right to refuse to perform his payment obligation, they have failed to answer the question whether he has a general right to withhold performance of his obligations where the seller has failed to perform his delivery obligations in accordance with the contract terms. Whether the buyer has or has not a general right to withhold performance without being required, (and in some cases without being entitled) to terminate the contract seems to be analysed on the legal bases upon which the jurists have justified the buyer's right to refuse to pay. Examination of them will help as to understand whether or not the logic behind the right is of general application.

2.2.1. Theoretical bases of the Right

Although the jurists have not examined the legal base of *haqq-e-habs* in detail, they have occasionally referred to the legal ground upon which this right is to be based. In this respect, some jurists have observed that the right is to be justified on the ground of the theory of *shart-e-ḍemni* (implied stipulation). That is to say, at the time of making the contract, as each party expressly undertakes an obligation to do something in exchange for the other's undertaking, each of them also impliedly promises to perform his obligation simultaneously in exchange for the other party's performance. For instance, the late Shaykh Ansāri says:

“Some jurists have expressly said that there is no dissenting view between *Shi'ah* jurists as to '*haqq-e-habs*' for a party where the other has refused to perform. This is perhaps because the contract of sale is based on the 'concurrent performance'. That is, two performances must be made in exchange of each other. Accordingly, either party *has undertaken* to perform his obligation at the same time when the other performs and he is allowed to refuse when the other refuses.”²⁵

In contrast, some statements can be found which show that some jurists are inclined to justify the right on the theory of *mutuality* of obligations; the right of refusal is justified by the very nature of a *a'qd-e- mua'wwad*. For instance, Shaykh Muhammad Hassan Najafi (Sāheb Jawāher), in justifying the view that the performance of counter-obligations must be made at

²⁵ See Ansāri, M. (1375 H.Q.) at 312). See also, Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2, at 198-199 (in which the late Kumpāni explains this theory in very detail); Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 188; Khumayni, S. R. M., vol. 5 at 371.

the same time, observes that it is because of the reciprocal nature of transaction.²⁶ Similarly, the prominent *Shi'ah* jurist, the late Mirzā Habibullāh Rashti, explains this doctrine in clearer words:

"One of the well-accepted principles between *Shi'ah* jurists, as they stated in the contract of sale as a typical synallagmatic contract, is that the *nature* of reciprocal contract *requires* that two performances must be made concurrently".²⁷

As was seen, the first approach is based on a presumed mutual agreement on the part of the contract makers. It seems, however, that it is hard to prove that in any case it is impliedly agreed that the parties will perform at the same time. Although the parties at the time of concluding the contract are thinking of an entire performance of the obligations which they have undertaken, it adds nothing to the common concept of the reciprocal contract. To gain and benefit from the other party's performance is, indeed, the motive of each party in making the contract. But, that does not mean that the parties have in fact mutually agreed to perform their obligations concurrently in exchange for each other.²⁸ Thus, it seems that the best way to justify the right is to analyse it on the basis of the nature and definition of a synallagmatic contract. As explained earlier, *a'qd-e- mua'wwad* consists not merely of two separate obligations, but contains the exchange of two reciprocal promises at the stage both of formation and of performance of the contract. In both stages, the parties' counter-obligations are correlated together.

(A) Consequences of Correlation of Obligations

The correlation of the parties' obligations under a synallagmatic contract has a number of consequences, the most significant being that these obligations are exchanged with each other, both at the stage of formation of contract and at the stage of performance. Failure of one of them at the stage of formation may result in the nullity of the contract and at the stage of performance, any failure on the part of one contracting parties will entitle the other to withhold performance of his part.²⁹

²⁶ Najafi, M. H., (1981) vol. 23, at 144 ("Apparently, since the contract is a synallagmatic contract it is necessary that the performance must be made concurrently. As the ownership of the considerations is transferred so.")

²⁷ See Rashti., M. H., *al- Ijarah*, at 111. See also, *Āle Bahr al- U'lūm*, S. M., (1396 H.G.) vol. 1 at 157; Imāmi, S. H., (1363 H.S.) vol. 1 at 458; Sanhūry, A., vol. 1 at 730-1.

²⁸ See also, Khurasāni, M. K., (1406 H.Q.) at 275 where this jurist, in a short comment on Ansāri's statement quoted above, said that the contract does not contain such an implied undertaking.

²⁹ Although *Shi'ah* jurists expressly justify the remedy of withholding performance on the theory of *mutuality* of obligations, they have not expressly referred to the principle of correlation of reciprocal obligations under a synallagmatic contract. Nonetheless they have adopted the logical consequences of the principle in different places. See generally, Ansāri, M. (1375 H.Q.) at 185; Najafi, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 378; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 1 at 201-2; Imāmi, S. H., (1363 H.S.) at 219-220; Kātūziān, N., (1990) vol. 4 at 83-6 and 109-112; Kātūziān, N., (1992) vol. 1 at 36). It is to be recalled that I.C.C. does not indicate any express statement as to this principle. However, a close consideration of the legal grounds of Arts. 377 and 1085 (concerning the right of refusal) and Arts. 238 and 239 (regarding the innocent party's

(B) Correlation of Obligations and Subordinate Obligations

However, as already stated, the common view is that the correlation only exists between the principal obligations. The subordinate obligations are only for the purpose of defining the principal obligations. They only influence the parties in making the contract and from the point of view of their mutual intention they are less important, even though they may in fact be more significant. They are not exchanged with the principal, or part of, principal obligations. For this reason, it is said that where the parties to a contract of donation make a stipulation within the contract that the donee is to do some thing in favour of the donor it will not change the nature of the contract of donation into a reciprocal contract. This is because the mutual intention of the parties is that the subject-matter of the "condition" is not exchanged with that of the donation contract, even though it costs much more than the subject-matter of the contract of donation.³⁰

2.2.2. When Can the Buyer Withhold?

Having examined the concept of the remedy and its legal bases in general, it is now time to answer the question: when is the buyer entitled to withhold performance of his obligation on account of the seller's breach? As seen above, where the seller wholly fails to deliver, the buyer may refuse to pay the price as long as the seller's refusal continues. However, the position is not quite clear when the seller performs his delivery obligations in a way which does not conform with the contract conditions. The following discussion will try to ascertain in what circumstances the buyer may be entitled to withhold performance of his obligations on account of the seller's non-conforming delivery.

2.2.2.1. Non-Conforming Delivery

As already indicated, *Shi'ah* jurists simply say that if the seller delivers non-conforming goods the buyer is entitled to reject them, but they do not explain why, or what degree of non-conformity will entitle him to do so. The question may become more serious taking into account the fact that the jurists have only recognised the right of refusal (*haqq-e-habs*) where a reciprocal obligation is broken, whereas, non-conformity is always caused by breach of a

right to require the refusing party to perform his contractual obligations) as well as Art. 387 (relating to the automatic termination of the contract in the case of the impossibility of performing one of the reciprocal obligations) reveals that this Code has impliedly adopted the principle of correlation of obligations under a synallagmatic contract. See in this regard: Imāmi, S. H., (1363 H.S.) vol. 1 at 225-226.

³⁰ On this basis, it is said that where the *shart* is null it does not, except in some exceptional cases, make the main contract void (see Ansāri, M. (1375 H.Q.) at 287 and *seq.*, Khumayni, S. R. M. (1362 H.S.) vol. 5 at 243; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 389 and *seq.*; Tabrizi, J., (1412 H. Q.) vol. 4 at 455), while in the case of nullity or impossibility of the performance of one of the principal obligations the contract would be void (see Ansāri, M. (1375 H.Q.) at 185; Najafi, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 378-379).

contract term (*shart*) which is commonly regarded as a subordinate obligation. In the absence of a clear jurisprudential statement it is therefore necessary to examine the case on the basis of general principles prescribed above.

A close examination of the jurists' judgements in respect of the buyer's right to reject the non-conforming delivery, on the one hand, and the principle of correlation of reciprocal obligations, on the other hand, demonstrates that the buyer has a general right to withhold performance of his obligation under certain circumstances where the goods delivered do not conform with the contract requirements. However, the crucial task is to determine whether or not the seller's duty to deliver the goods in accordance with the contract terms is a reciprocal duty and if it is so, with what duty of the buyer it is exchanged?

2.2.2.2. Non-Conforming Delivery and the Theory of Eltezāmāt-e-Mua'wwad

As explained above, a common understanding among *Shi'ah* jurists is that all obligations arising from *shurūt* within a sale contract (as a typical synallagmatic contract in *Shi'ah* jurisprudence) are subordinate obligations rather than reciprocal duties, although undertaking such obligations may result in a considerable increase of the amount of the other party's obligations. Therefore, there would be no bilateral correlation between those obligations and the principal obligations the contract itself requires. As a result, failure to perform them will not in principle give the aggrieved promisee *haqq-e-habs*.³¹ For example, the seller's obligation under a *shart* indicating the required quality, quantity, time performance and other specifications of the goods sold is not regarded as a principal obligation or part of such an obligation which is exchanged with the buyer's duty to pay the price or some part of it but simply defines the seller's duty to deliver.³² On this construction, it is said that the seller's failure to deliver goods in accordance with the contract terms does not entitle the buyer to *haqq-e-habs*.³³ Nevertheless, almost all of them accept the view that where the seller delivers goods contrary to the contract description or quality the buyer is entitled to *haqq-e-radd* (reject the goods). But they do not explain the nature of the right to reject the seller's non-conforming delivery and the reason why the buyer is entitled to such a right.

The crucial point is, therefore, to determine the legal ground upon which the buyer's right to reject is based. Analysing this right shows that it is not a separate remedy but is in fact a form of the general right to withhold performance, justified on the basis of the theory of

³¹ See e.g., Ansāri, M. (1375 H.Q.) at 285 and 286; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 137-138 and 142-144; Khumayni, S. R. M., vol. 5, at 225-6 and 238-43; Yazdi, S. M. K., (1378 H.Q) vol. 2, at 129-31; Kātūziān, N. (1990) 9 vol. 4 at 84; Kātūziān, N. (1989) vol. 3 at 141.

³² This rule is stated in *Shi'ah* jurisprudence: "*laysa leshshart-e-qhestun men al thaman*" (No part of the consideration is exchanged with *shart*). See in this respect, Ansāri, M., (1375 H.Q.) at 286.

³³ See e.g., Kātūziān, N., (1989) vol. 3 at 90-91.

correlation between two reciprocal obligations, that is, the *seller's duty to deliver goods in accordance with the contract terms and the buyer's duty to accept such a delivery*. The common view, concentrating on the buyer's duty to pay the price in exchange for the seller's duty to deliver goods, fails to take into account the buyer's duty to accept what the seller renders in performance of his delivery obligation. It is true that the seller's obligations under *shurūt* are not exchanged with a part of the buyer's reciprocal duty to pay the price. However, the position is not so clear in respect of the buyer's *duty to accept* what the seller tenders in performance of his delivery obligation. A close analysis of the nature and definition of the sale contract as a synallagmatic contract demonstrates that both the seller and buyer are under two reciprocal obligations against each other.

To explain, although *Shia'h* jurists have not expressly examined the buyer's duty to accept the seller's delivery, it seems that a validly concluded sale contract imposes such an obligation on the buyer.³⁴ The buyer's obligation to accept can be proved by the following. First, in the context of a contract for sale of unascertained goods, where the seller's tender does not conform to the contract terms the buyer is given a right to reject it and request a further tender, whereas if the seller's tender conforms to the contract terms the buyer is not entitled to reject.³⁵ Acceptance of the fact that in some cases the buyer is not entitled to reject the seller's tender shows that he has a duty to accept it. Second, where the buyer rejects the seller's conforming tender the seller is entitled to apply to the court to require him to accept them.³⁶ It can also be proved by the principle of *ufū bel u'qūd*.³⁷ The buyer's refusal to accept the seller's delivery would be a contravention of the contract and against the above principle.

However, the question is for what duty of the seller is this duty exchanged? It seems that such an obligation is undertaken in exchange for the seller's obligation to perform his delivery obligation *in accordance with the contract terms*. Put in other words, a sale contract imposes on each party two reciprocal obligations vis-à-vis the other. The seller is required to deliver the goods and to ensure that the delivery is in accordance with the contract terms and the buyer is also obliged to accept them and pay in exchange for such a performance. These two obligations on the both sides are to be performed at the same time. Thus, as long as the

³⁴ The duty to accept has been expressly addressed in the case of payment of the price and other monetary debts. See e.g., Ansāri, M. (1375 H.Q.) at 306. However, the late Sayyid Yazdi recognises the duty to accept in a general form (see Yazdi, S. M. K., (1378 H.Q.) vol. 2, at 178-179. See also, Tabrizi, J., (1412 H. Q.) at 554. In Iranian Civil Code the buyer's duty to accept can be inferred from Art. 273.

³⁵ See e. g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 364; Gulpāyghāni, S. M. R. M., (1371 H.S.) at 359 questions 2122, 2123; Khumayni, S. R. M., (1369 H.S.) at 371, questions 2114, 2115.

³⁶ See Kātūziān, (1992) vol. 1 at 167.

³⁷ The principle has also been relied on by the late Sayyid Yazdi for this purpose (see Yazdi, S. M. K., (1378 H.Q.) vol. 2, at 179) where he says "the requirement of performance (*wafā bel a'qd*) means delivery (*dafa'*) and acceptance (*qabūl*)".

seller has not delivered goods corresponding with the contract requirements the buyer cannot be required to perform his acceptance obligation.

2.2.2.3. What Degree of Non-Conformity Gives Rise to the Right?

Assuming that the buyer has a general right to refuse to accept the seller's non-conforming delivery, a further question is: under what circumstances is the buyer entitled to refuse to accept it? Can he reject for any non-conformity or only where the non-conformity attains a certain degree of seriousness? No clear statement can be found in *Shi'ah* jurisprudence in this connection. The only thing which may afford some help for this purpose is the jurists' discussions about the concept of *a'yb* (defect) which gives rise to the 'option of defect' (*kheyār-e-a'yb*) including the right to reject and terminate the contract. In that case, after great efforts to produce a precise definition for the term "*a'yb*" giving rise to the 'option of defect', they eventually adopted the view that the case must be referred to the court to decide according to the relevant custom (*u'rf*).³⁸ However, as their discussion shows in that case, the given criterion has only been applied to ascertain whether the goods delivered are defective or not. It has not been extended to the case of other lack of conformity. In addition, they have examined it under the heading of "the option of defect" under which the buyer is given the right to reject the defective goods and terminate the contract. They have not distinguished between the right to reject and that of termination. Apparently, the same defect which gives rise to the right of rejection entitles the buyer to terminate the contract. Third, since the option of defect, as will be seen later, is only applied to the case of specific goods, the position of unascertained goods is not clear. As will be seen in detail in the second part, in the case of unascertained goods the buyer is only given a right to refuse to accept the non-conforming tender. But, it has not been made clear for what non-conformity the buyer should be given a right to reject.³⁹

One may argue that the general theories explained as to the case of non-delivery should be applied to the case of non-conforming delivery, since, as described above, rejection is a form of the remedy of withholding performance. Adoption of each of the two above-mentioned theories would result in different consequences. If it is accepted that withholding performance is to be justified on the basis of the theory of *shart-e-dēmnī* (implied stipulation) any lack of conformity will entitle the buyer to reject. In contrast, if the second approach is adopted it

³⁸ See for this purpose, Ansāri, M. (1375 H.Q.) at 265 and *seq.*, in particular, p. 267 in which the late Ansāri refers eventually definition of the term to the custom of traders. The same criterion has been adopted by other jurists. See e.g., Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 237 and *seq.*, particularly, p. 247; Khumayni, S. R. M., vol. 5 at 118 and *seq.*; Tabrizi, J., (1412 H. Q.) at 349.

³⁹ However, under I.C.C. whether or not the buyer is entitled to refuse to accept the seller's non-conforming performance is left to the court to decide according to the relevant custom (see Art. 279).

cannot be said that the nature of the reciprocal contract requires that any party should have the right to refuse to accept the other's performance for any lack of conformity. However, assuming that custom, as the jurists suggest in the case of defective delivery, is a general criterion applicable to all cases may afford some criterion. On this approach, it is suggested that the buyer should not be given a right to reject for minor non-conformity but only where the lack of conformity attains such a degree of seriousness that it is not customarily ignored. This suggestion not only favours safeguarding the contractual relationships against minor non-conformity but also can be justified on the basis of the general principle of *ufū bel u'qūd* under which the buyer is obliged to accept the seller's delivery. This principle should be disregarded only when the lack of conformity between the contract goods and what actually delivered attains some degree of seriousness, since it is in such circumstances the principle of *lā ḍarar*⁴⁰ comes into operation and allows the buyer to treat himself as discharged from his duty to accept. Whereas, when the non-conformity is minor it is doubted whether the buyer is required to continue his performance. In such a situation the principle of *isteshāb* comes into operation in favour of the principle of *ufū bel u'qūd*. Accordingly, it is suggested that in any case the court should look at the effects of the non-conformity to ascertain whether they are such that rejection would be customarily unreasonable for the buyer. If so, the buyer will not be able to justify his rejection.

If this suggestion is accepted the buyer's right to reject the seller's non-conforming delivery should be distinguished from his right to treat himself as discharged from the contract and terminate it. Termination, as will be seen later, is an exception to the principle of *ufū bel u'qūd* and will be justified by taking into account various factors, such as the actual and foreseeable *ḍarars*, the seller's ability and willingness to cure and the practicality of requiring the seller to perform his obligations.

2.2.3. Delivery of Partial non-Conforming Goods or Wrong Quantity

The preceding discussions were concerned with the buyer's right of refusal where the seller delivers the right quantity of goods none of which conforms to the contract. The present discussion deals with the cases where the seller (a) delivers the whole contract quantity but only part conforms to the contract or (b) delivers the wrong quantity. In this case the following questions arise:

⁴⁰ This principle is based on the statement of the Prophet of Islam who said "*lā ḍarar wa lā ḍerār fi al-Islam* (No detrimental decree is provided in Islam.)". The concept of the statement, as will be seen when dealing with the legal grounds for claim of damages (see Section Three, 2.2.3.), is controversial between the jurists. However, according to most of the commentators on the principle, the principle comes into operation in order to negate a harmful religious rule.

- (i) whether the buyer is entitled to refuse to accept the seller's non-conforming delivery;
- (ii) assuming that the buyer is entitled to reject, whether the buyer can accept the conforming and reject the defective part, or accept the lesser quantity and refuse to pay for the non-delivered part;
- (iii) whether the buyer is entitled to terminate the contract in respect of the non-conforming part or missing part.

In the following, the two first questions are examined under two separate headings: partial non-conforming delivery and wrong quantity delivery. The third question will be discussed in the second part of this section when dealing with partial termination.

2.2.3.1. Partial Non-Conforming Delivery

The jurists have not addressed directly the question whether the buyer has the right to withhold performance of his obligations where the seller has delivered a partially non-conforming delivery. What they have discussed is whether the seller's partially *defective* delivery would result in the right to terminate a contract for sale of *specific goods*. However, in that case no jurist has disputed the buyer's right to reject and terminate the contract as a whole. Any dispute is concerned with the buyer's right to terminate the contract as to the part affected.⁴¹ A number of them suggested that the buyer can only accept or reject all, and may not accept the conforming and reject the non-conforming part.⁴² In contrast, others suggested that the buyer is entitled to reject non-conforming goods and retain the rest.⁴³ However, as their discussions show, the subject of discussion is only the case where the seller of *specific goods* has delivered goods some of which do not conform to the contract *quality*. They have not addressed the case where the seller of *unascertained* goods has tendered goods part of which conform to the contract conditions, or where the seller of specific goods has delivered goods part of which does not conform with the contract terms *other than the quality one*.

A general look at their discussions as to the issue shows that the subject of discussion has not been clarified. There is some confusion between several entirely different issues. Accordingly, in order to answer the questions it is necessary to determine the reason why they have taken different opinions. What is certain is that where the contract is for sale of a non-

⁴¹ See e.g., Ansāri, M. (1375 H.Q.) at 258; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 81; Khumayni, S. R. M., vol. 5, at 56; Tabrizi, J., (1412 H. Q.) at 298-299.

⁴² Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 629-630, and 660; Bahrāni, Y., vol. 19 at 90; Ansāri, M. (1375 H.Q.) at 258-259; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 81; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 627 (in which he claims that he could not identify a jurist who disagreed with this view) and 629-630; Khumayni, S. R. M., vol. 5 at 56. The same view is accepted in Art. 431 of the I. C. C.

⁴³ See e.g., Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 108; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 146 and *seq.*; Tabrizi, J., (1412 H. Q.) at 299-300.

severable item any breach of contract conditions in respect of any part of it will be treated as a breach of the whole contract giving rise to a right to reject it. In such a case, almost all the jurists have no doubt that the buyer should not be given the right to accept the conforming and reject the non-conforming part.⁴⁴ Conversely, where the contract is for sale of several identified things each of which is exchanged for a certain portion of the contract price it has not been questioned that the buyer is entitled to do so.⁴⁵ In fact in such cases there are a series of certain separate contracts each of which has a separate subject-matter. The main debate of the jurists is in fact concerned with the case where the seller is required to deliver a severable consignment such as 1000 cars against a fixed total price without specifying that a certain part of the consideration is exchanged with some part of the subject of sale. In such a case, where the seller has delivered a consignment part of which does not conform with the contract conditions the question arises whether the buyer is entitled to keep the conforming and reject the non-conforming part or must either reject or accept all? This is the case where some of the jurists favoured the partial rejection and others disagreed with it.⁴⁶

It seems that the different views are in fact due to whether or not the mere severability of the subject-matter of contract makes the contract itself severable. The question what contracts are severable has not been clearly examined by *Shi'ah* jurists. As it appears from their discussions as to the buyer's right to terminate the contract in respect of the defective part, the mere severability of the subject of sale does not suffice for a contract to be severable.⁴⁷ Shaykh Ansāri gives a general criterion for this purpose. He says:

“Where more than one consideration is mentioned within the contract the contract would be regarded severable.”⁴⁸

However, others have questioned this criterion. According to them, a contract would be regarded as severable where both parties' performances are severable.⁴⁹

It seems that what is required to make a contract severable is that it can be severed in terms of performance so that there is severability of performance on one side and consideration for each partial performance on the other, thus creating a contract within a contract and making delivery of each severable part a separate, self-contained part of the delivery obligation.⁵⁰

⁴⁴ See e.g., Najafi, M. H., (1981) vol. 23 at 248; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 625; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 145; Tabrizi, J., (1412 H. Q.) at 299.

⁴⁵ See e.g., Ansāri, M. (1375 H.Q.) at 258; Khumayni, S. R. M., vol. 5 at 56.

⁴⁶ See generally, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 146-147.

⁴⁷ Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 641; Khumayni, S. R. M., vol. 5 at 57.

⁴⁸ Ansāri, M. (1375 H.Q.) at 258.

⁴⁹ See e.g., Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 81; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 640-641.

⁵⁰ See also, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 147.

On the basis of the above criterion, where a contract is construed as severable any breach as to a severable part will in fact amount to a breach of the subsidiary contract relating to that particular part, and consequently, the buyer will only be entitled to reject the subject of this subsidiary contract. Whereas, if the contract is construed as non-severable the buyer has no partial-rejection right, he is only entitled to reject all or accept all. Accordingly, it is the court's duty to decide according to the circumstances of any case and the terms of the contract itself whether there are several subsidiary contracts within a main contract or only a single contract.

The point which deserves to be noted here is that the jurists have not addressed the question under what circumstances the seller's breach of contractual obligations as regards a severable part may entitle the buyer to refuse to accept it. It seems that the general principles applicable to non-severable contracts should apply to each severable part. That is to say, for remedial purposes each severable part is to be regarded as the subject of a distinct contract, although within a main contract and the principles applied to a contract containing a single delivery obligation apply to such a subsidiary contract.

2.2.3.2. Delivery of the Wrong Quantity

The question whether or not the seller's wrong quantity delivery can give the buyer the right to refuse to accept has not been separately addressed by the jurists. What they have discussed is whether breach of a quantity term would result in the right to terminate a contract for sale of specific item.⁵¹ However, in that case no jurist has disputed the buyer's right to reject and terminate the contract as a whole. Any dispute is concerned with the buyer's right to terminate the contract as to the missing part.⁵²

Nevertheless, it is not clear whether the buyer can reject for any shortfall or excess. There is no rule such as the English *de minimis* rule or the test of "unreasonableness" provided by s. 30 (2A) of the English Sale of Goods Act 1979 for commercial contracts. Accordingly, it might be thought that in *Shi'ah* law the buyer may reject for a minor non-conformity with the quantity stipulation.⁵³

2.2.4. Seller's Failure as Regards the Shipping Documents

In the context of international sale transactions, the seller's duty to arrange the proper shipping documents and transfer them to the buyer is of great importance. As in the case of goods the

⁵¹ See generally, Ansāri, M. (1375 H.Q.) at 286-7; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 142-44; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 162-3; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 129-131, and 133-135; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 383-9. See also I.C.C., Art. 384. Imāmi, S. H., (1363 H.S.) vol. 1 at 437-39; Kātūziān, N., (1992) vol. 1 at 120- 126; Kātūziān, N., (1989) vol. 3, at 210-215.

⁵² In this respect, see, 3.2.6.2.

⁵³ For a new suggestion see, Chapter Five, 1.1.3. (Delivery of Wrong Quantity).

seller may fail to render the relevant documents to the buyer on due time or the handing over may be contrary to the contract conditions. As indicated above, no *Shi'ah* jurist has addressed the question. It is therefore important to answer the question: how can such an issue be analysed within the principles prescribed above? The issue raises a number of questions:

- (a) is the buyer entitled to refuse to pay the price where the seller fails to hand over the proper shipping document on due time?;
- (b) is he entitled to refuse to accept non-conforming documents and suspend payment of the price?;
- (c) can he terminate the contract for the seller's failure to tender the shipping documents in accordance with the contract requirements?;
- (d) assuming that the buyer has the right to reject non-conforming documents, has he a further right to reject the defective goods?; and
- (e) assuming that he has both the right to reject documents and goods, how are these two rights exercised?

Some of these questions will be considered later. In this part, the right of refusal will be discussed.

2.2.4.1. Non-Delivery

In *Shi'ah* law, the seller's duty to prepare and hand over proper shipping documents seems to be analysed on the basis of the doctrine of *shart-e-fe'l*, i.e., a stipulation requiring the promisor to perform a particular act in favour of the promisee. In this way, the first question which arises is whether the seller's duty concerning the shipping documents is a subordinate obligation or a principal one.

A close analysis of the parties' common intention in respect of the arrangement and delivery of shipping documents demonstrates that this duty is a reciprocal obligation which is fully correlated to the buyer's payment obligation. Furthermore, common sense and custom governing documentary sales confirms that the seller's duty to prepare and hand over the required documents is of such a character. The parties to a documentary sale contract, in fact, deal with documents. The seller receives the price by placing at the disposal of the buyer the shipping documents with which the buyer can sell or pledge the goods while they are in transit. Therefore, in the parties' view tender of the documents under such contracts is no less important than the delivery of the goods themselves in an ordinary sale contract.

The other question posed here is whether if the seller fails to hand over some of the relevant documents, the buyer can refuse to take delivery and suspend payment of the price. It is suggested that the buyer should be given such a right, since the customary understanding of

a documentary sale is that the buyer only pays for the full set of documents. The rule seems more clear where payment must be made by documentary credit under which the bank will refuse to pay the seller if the whole documents are not tendered as required by the contract.⁵⁴

2.2.4.2. Non-Conforming Delivery

The crucial question is concerned with the situation in which the seller hands over documents which do not conform to the contract, as for instance, where the seller under a c.i.f. contract hands over a bill of lading which does not provide existence of a valid contract of carriage from the port of loading to the port of destination, or is not clean, or does not show that the goods are loaded at the time and place required by the contract of sale, and so on. Is the buyer, in such a situation, entitled to reject the non-conforming documents and refuse to pay the price?

It seems that in such a situation the buyer should be given a right to refuse to accept the non-conforming documents. The legal justification for this view is that in a documentary sale transaction the seller is under a general obligation to prepare particular documents and hand them over to the buyer in accordance with the contract terms. The buyer is obliged to accept and pay in exchange for such a performance. As long as the seller does not tender such a performance the buyer is not under any duty to accept and pay for them.

2.2.4.3. Two Rights of Rejection

From the above, it appears that the buyer under a documentary sale contract should be given the right to reject documents for defects on their face, whether it relates to the goods or documents themselves. The question then arises whether the buyer can reject the goods on arrival for defects in the goods having accepted documents representing them. It seems that where the defect is one which was not apparent on the face of documents he should be entitled to reject because his acceptance of the documents was on the basis of the belief that the goods would be in accordance with the contract. However, where the defect was apparent on the face of documents he would be taken to have accepted the non-conforming goods on the doctrine of *isqāt* (waiver) which is discussed in the second part of this section when dealing with the circumstances under which the buyer may lose his rights to reject and terminate the contract.

⁵⁴ See in this respect, Uniform Customs and Practices for Documentary Credits -UCP- (1993 Version), Article 13 which reflects customary law of this area.

3.0. Part Two. Termination of Contract

3.1. Introduction

Shi'ah jurists have based termination on a complex system of *kheyārāt* (options).⁵⁵ Under this heading they have extensively examined various cases in which an aggrieved party may be entitled to terminate the contract. These cases differ from one book to another.⁵⁶ Some have gathered the options under five⁵⁷ others under seven⁵⁸ and a third group have gone further and talked of fourteen separate options.⁵⁹ However, it seems that the difference is in codifying the headings of options rather than in granting the aggrieved party the right to terminate the contract in those circumstances.⁶⁰ In order to have a general picture of the various circumstances identified in the leading text books, all of them will be mentioned below:

- (i) *kheyār-e-majlis* (the option of the (contract) meeting-place)⁶¹;
- (ii) *kheyār-e-haywān* (the option of animal)⁶²;
- (iii) *kheyār-e-ta'khir* (the option of delayed payment of the consideration)⁶³;

⁵⁵ As a matter of terminology, in *Shi'ah* law the process of bringing the contract to an end on account of breach of contract is described by the term *faskh* and the right to do so is called *kheyār-e-faskh*. The term *faskh* is controversial. Generally, the term has been defined in two phrases. According to the first, *faskh* is to put an end to a valid contract (see in this respect, Karimi, S. J., and Āmuli, M. H. (1380 H.Q.) vol. 4 at 23). According to the other, the term means "rejection, and, restitution of subject-matter of the contract" (see e.g., Khurāsāni, M. K., (1406 H. Q.) at 266; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 45; Khumayni, S. R. M., vol. 5 at 258, 259, 270, 271, 327, 328). The main effect of this difference appears where the subject-matter of the contract deteriorates, is consumed or is transferred to a third party. It seems hard to accept the view that the concept of termination involves rejection and restoration of the subject-matter of the contract. Rejection can be an evidence on the intention to terminate the contract; but rejection and restoration of the subject-matter is in fact one of the consequences of a valid termination, or, alternatively, one could argue, a pre-requisite of a valid termination, but not termination itself. Accordingly, it can be said with certainty that the term *faskh* is used to describe, the bringing a valid contract into an end. In this sense, the term refers to the same concept as the English term "termination".

⁵⁶ See generally, Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 372; Bahrāni, Y., vol. 19, at 3; Ansāri, M. (1375 H.Q.) at 216.

⁵⁷ See e.g., Helli, A. N. J. (Muhaqqeq Helli), (1377 H.Q.) at 100.

⁵⁸ See e.g., Ansāri, M. (1375 H.Q.) at 216. Almost all jurists after him have also confined to the seven.

⁵⁹ See for instance, Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 372. However, Iranian Civil Code has listed those circumstances in ten numbers (see Art. 396).

⁶⁰ See e.g., Najafi, M. H., (1981) vol. 23, at 3; Ansāri, M., (1375 H.Q.) at 216; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 6 at 56.

⁶¹ This option is clearly defined by Art. 397 of I. C. C. For more information see, Āmeli, Z. (Shahid Thāni), vol. 1 at 177; Bahrāni, Y., vol. 19 at 4 and *seq.*; Ansāri, M. (1375 H.Q.) at 216.

⁶² Art. 398 of I. C. C. has defined this option. For a detailed discussion see, Māmāqāni, A., (1345 H. Q.) at 45 (who applies, contrary to most jurists, the option to the case of certain unascertained animals), Imāmi, S. H., (1363 H.S.) vol. 1 at 479). See generally, Āmeli, Z. (Shahid Thāni), vol. 1 at 178; Ansāri, M. (1375 H.Q.) at 224; Najafi, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 31;

⁶³ See for instance, Āmeli, Z. (Shahid Thāni), vol. 1 at 180; Ansāri, M. (1375 H.Q.) at 244-247; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 4 and 8-19; Tabrizi, J., (1412 H. Q.) at 234-245; I.C.C., Arts. 402, 407). This is only the seller who is entitled to terminate the contract where the buyer delays in payment of the price. It is often said that the buyer cannot do so where the seller delays to deliver the goods (see e.g., Najafi, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 94; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2, at 542; I. C. C., Art. 406. This particular option is based on the particular authorities (see in this respect, Bahrāni, Y., vol. 19, at 44; Ansāri, M. (1375 H.Q.) at 244-247; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2, at 543-544; Najafi, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 94; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 4-8).

- (iv) *kheyār-e-shart* (the option of condition)⁶⁴;
- (v) *kheyār-e-ghabn* (the option of lesion)⁶⁵;
- (vi) *kheyār-e-a'yb* (the option of defect);
- (vii) *kheyār-e- rū'yat* (the option of inspection);
- (viii) *kheyār-e-takhalluf an al- wasf* (the option of incorrect description);
- (ix) *kheyār-e-takhalluf an al- shart* (the option of unfulfilled condition);
- (x) *kheyār-e-tadlis* (the option of misrepresentation)⁶⁶;
- (xi) *kheyār -e-taba'ud'safqah* (the option of sales unfulfilled in part)⁶⁷;
- (xii) *kheyār-e-sherkat* (the option of partnership)⁶⁸;
- (xiii) *kheyār-e-teflis* (the option of insolvency)⁶⁹;
- (xiv) *kheyār-e-ta'dhdhur-e-taslim* (the option of impossibility of performance)⁷⁰; and
- (xv) *kheyār-e-emenā'* (the option of refusal).

Dealing with termination in this way caused a number of important questions to be left unanswered. First, it is not clear what is the relationship between the buyer's right to withhold performance and that of termination. More importantly, it has not been made clear what lack of conformity will entitle the buyer to terminate the contract. Third, notwithstanding that almost all jurists have accepted the view that where the seller of unascertained goods makes a non-conforming delivery the buyer has only a right to reject, they have not addressed the question whether the seller has a right to cure, and if so, under what circumstances he can exercise his right.

It seems that the best way to deal with the issue is first to identify the grounds upon which the above-mentioned options are justified and then to examine the options relevant to the issue in question on the basis of their proper rationale and finally to evaluate the relevant options in accordance with their proper grounds.

⁶⁴ See e. g., Āmeli, Z. (Shahid Thāni), vol. 1 at 179; Ansāri, M. (1375 H.Q.) at 228-229; I.C.C., Art. 399).

⁶⁵ See e.g., Ansāri, M. (1375 H.Q.) at 234; I.C.C. Art. 416; Kātūziān, N., (1990) vol. 5 at 217).

⁶⁶ See e. g., Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 644 and 645; Ansāri, M. (1375 H.Q.) at 398. See also, Kātūziān, N., (1990) vol. 5, at 326, 354; Owsia, P. (1992) at 297; I.C.C., Art. 438.

⁶⁷, see Bujnūrdi, M. H., (1389 H.Q) vol. 2, at. 137; Marāghei, M. F., (1274 H. Q.) at 194; and *seq.*

⁶⁸ See e. g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 386).

⁶⁹ See e.g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 389, and, 402; Najafi, M. H., (1981) vol. 25 at 295; Tabrizi, J., (1412 H. Q.) at 580). I.C.C. has no mention of this option but see Art. 380. See also, Imāmi, S. H., (1363 H.S.) vol. 1 at 527; Kātūziān, N., (1990) vol. 5 at 393; Kātūziān,, N., (1992) vol. 1 at 217). It is to be noted that the option is purely for the seller, the buyer cannot enjoy from it. In the case of the seller's insolvency, the buyer can rely on the option of impossibility of performance.

⁷⁰ See e. g., Shahid Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 386; Gulpāygāni, S. M. R., (1371 H. S.) at. 361 (question 2132); Khumayni, S. R. M., (1369 H. S.) at 373 (question 2124)). For the position of Iranian Civil Code see, Kātūziān, N., (1989) vol. 3 at 263; Kātūziān, N., (1990) vol. 5 at 395.

3.2. Grounds for Termination

3.2.1. General Principle

It is commonly said that the right of termination in *Shi'ah* law is an exception to the dictum “*asl-e-luzūm-e- a'qd*” (*pacta sunt servanda*) rather than a rule.⁷¹ An obvious consequence of this principle is that so long as the performance of a binding contract is possible the contracting parties are required to perform their contractual obligations. According to this principle, termination should be the last option given

to a party aggrieved by the other party's breach. The victim of breach should be given a right to terminate only when he is not able to require the defaulting party to perform his obligations in accordance with the contract. The important question is that, if the primary principle is that as far as performance of the contract is practicable it should be made, on what rationale is one party entitled to terminate the contract unilaterally?

3.2.2. Grounds for Kheyārāt

Although the jurists have not examined the issue in separate, a thorough consideration of the jurists' arguments in justifying the grant of the option to terminate reveals three general principles: *rewāyāt*, *shart-e-ḍemni* and *lā ḍarar*. However, few of the above-mentioned options are solely based on particular *rewāyāt*.⁷² Most of them are commonly justified on two general theories: that which bases the right of termination on *shart-e-ḍemni* (which can be described in general as “respect to the mutual will of the contracting parties”) and that which bases the right on the principle of *lā ḍarar* which will be examined later in detail⁷³. If in some cases it is seen that the jurists rely on some *rewāyāt*, it is to support the general principles rather than exclusive rationale.

A number of jurists have suggested that apart from those options which are based on particular *rewāyāt*, an option to terminate the contract should in principle be justified on the basis of the contents of the contract itself.⁷⁴ The view is based on the idea that the law should

⁷¹ See e.g., Bahrāni, Y., vol. 19 at 3; Ansāri, M. (1375 H.Q.) at 214-215; Khalkhāli, S. M. K., & Rashti, M. H., (1395 H. Q.) vol. 1 at 50 and *seq.*; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 8 and *seq.*; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 4 and *seq.*; Khumayni, S. R. M., vol. 4 at 13 and *seq.*; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 6, at 15 and *seq.*; Āmuli, M. T. and, Nāeini, M. H., (1413 H.Q.) vol. 2. at 10 and *seq.* Kātūziān, (1990) vol. 5 at 55. The principle is primarily based on a Quranic verse which orders all Muslim to respect their contracts, “*ufū bel u'qūd*” (Māedeh, Verse 5) and the saying of the Prophet, “*al- mu'menūn enda shurūtehem*” (all who believe Islam must respect their obligations (see, Āmeli, H., vol. 15, Bāb 20, Abvāb al- Muhūr, hadith 4). The principle is expressly recognised in Art. 219 of I. C. C.

⁷² Such as the option of *majlis*, the option of animal and that of delayed payment of the consideration as well as the options of inspection and defect, as some jurists suggest.

⁷³ See, Section Three, 2.2.3.

⁷⁴ The approach has been taken particularly in the case of the options of lesion and defect. See for instance, Āmeli, Z. (Shahid Thāni), vol. 1 at 193; Ansāri, M. (1375 H.Q.) at 253, 262; Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 128 (in which the late Sayyed Yazdi has applied the criterion to some other options); Gharavi

not interfere in this respect but must simply confirm what the contracting parties have agreed on. If the contract is to be performed because the parties have so wished, the exception to the principle must be justified on the same ground. Basing the option to terminate the contract on such a subjective criterion, the supporters of this view have attempted in any case to ascribe the right of termination to the will of the contracting parties themselves.

In contrast, a considerable number of distinguished jurists have suggested that the option to terminate can also be justified on the principle of *lā ḍarar*. Historically, the principle has occasionally been relied on by some jurists,⁷⁵ and presently it is supported by a number of eminent jurists in respect of several options mentioned above.⁷⁶ According to this approach, one does not always have to seek a mutual agreement in order to justify the grant of the right of termination, but instead, to determine the scope of the contracting parties' mutual agreement and its performance.

On this approach, where an undue detriment is caused by the buyer's duty to carry on his own part under the broken contract the principle of *lā ḍarar* comes into operation. Put in other way, the contract of sale is a binding (*lāzim* as opposed to *jāeiz*) contract.⁷⁷ The principle of *ufū bel u'qūd* (fulfil your contracts) in principle obliges both contracting parties to accomplish their contractual obligations. However, where for the reason of the seller's default *luzūm-e- a'qd* (literally, the decree of necessity to perform the contract) results in imposing an undue detriment on the innocent buyer he will be released from such a detrimental decree on account of the principle of *lā ḍarar*.

(A) Different Consequences of Three Principles

Notwithstanding that the jurists have occasionally referred to the grounds justifying grant of an option to terminate, they have not addressed the issue that different consequences may follow from applying one principle rather than the other. For instance, when a party is given the right to terminate the contract because a particular *rewāyat* so authorizes, the scope of the

Isfahāni, M. H., (1408 H. Q.) vol. 2, at 199; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2, at 57, 58; Karimi, S. J., and, Āmuli, M. H. (1380 H.Q.) vol. 4 at 9 and 10, 325-327; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 6 at 291, 292; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 299-300, 374; Khunsāri, S. A., (1364 H.S.) vol. 3 at 156; Tabrizi, J., (1412 H. Q.) at 165-166, 257, 277, 436. Among the Iranian lawyer see, Burūjerdi Abduh, M., (1329 H.S.) vol. 3 Para. 977 and *seq.*; Amiri Qāemmaqāmi, A., (1347 H.S.) vol. 1 at 78.

⁷⁵ See e.g., Tūsi, M. H. (Shaykh al- Tāefah), (1407 H. Q.) vol. 2 at 19); Helli, M. M. (Allāmah Helli), vol. 1 at 531.

⁷⁶ See e. g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1, at 377, 378; Tabātabāei, S. A., (1404 H.Q.) vol. 1 at 525; Āle Kāshef al- Qetā, M. H. (1359 H. Q.) vol. 1 at 63; Najafi, M. H., (1981) vol. 23 at 42, 95 and 97; Ansāri, M. (1375 H.Q.) at 198, 235, 244, 249; Khurāsāni, M. K., (1406 H. Q.) at 189; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 208; Bujnūrdi, M. H., (1389 H.Q) vol. 3, at 269, 270; Khumayni, S. R. M., vol. 4 at 268-270. Among the Iranian lawyers see, Imāmi, S. H., (1363 H.S.) vol. 1 at 499, 501, 502, 518, 526; Kātūziān, N., (1995) vol. 1 at 99 and *seq.*

⁷⁷ As to the definition of the terms "*lāzim* and *jāeiz* contracts see, I.C.C., Arts. 185, 186, respectively.

right should be ascertained in accordance with the express language of that authority. It cannot be extended to analogous cases. In contrast, if the option to terminate is to be based on the second principle any breach of a *shart-e-sefat* or *fe'l*, whether express or implied, will give rise to an immediate right to terminate the contract even though the consequences of the breach are slight or even cause no loss. For example, a delay of one day in delivery or a slight non-conformity of the seller's delivery with the contract description will entitle the buyer to terminate the contract on the option of the "unfulfilled condition" and that of "incorrect description", respectively. Such a drastic effect is justified simply on the basis that the contracting parties themselves have wanted it. Whereas, if it is accepted that an option to terminate the contract should be justified on the third principle the buyer should only be entitled to terminate the contract when performance of the breached contract becomes detrimental. It is only in such a case that the principle of *lā dārar* comes into operation and restricts the decree of *luzūm-e- a'qd* to the cases where the contract is not harmful at the time of election of the remedies.⁷⁸

(B) Preferred View

As pointed out above, *rewāyāt* have no significant role in justifying the option to terminate the contract. Few options can be found which are solely based on *rewāyāt*. Even in cases where certain *rewāyāt* are available⁷⁹, the jurists are inclined to see them as ancillary reason rather than the main reason. For this reason, in those cases they try to justify the relevant option on one of the two other principles.

Similarly, although it is possible to infer under certain circumstances a mutual intention on the part of the contracting parties that in the case of any breach by one of the parties the other has a right to terminate the contract, it is hard to say that in all cases such an agreement can be inferred. Although receiving the required characteristics in the subject-matter of the contract or the actual performance of promises by the seller has a significant role in inducing the buyer to make the contract, it is not such that it can be inferred that in any case they have impliedly agreed that if the buyer is deprived of the seller's actual performance he will have an option to terminate the contract, because the contracting parties normally contemplate performance of the contract rather than seeking ways to evade performance.⁸⁰

⁷⁸ Speaking in English law context, a parallel can be drawn here: the principle of *lā dārar* in this context seems to work rather like the *HongKong Fir* principle, while the theory of *shart-e-sefat* seems similar to the rule that allows termination for breach of condition. For more detail, see Chapter Five, 1.2.

⁷⁹ Such as the options of defect and inspection.

⁸⁰ The case becomes much more difficult in the case of the "option of defect". As will be seen later, it is commonly said that where the seller has delivered defective goods the buyer has an option either to reject the defective goods and terminate the contract or accept them and claim *arsh* on the option of defect. It is hard to prove that the parties have impliedly agreed on such a twofold right.

Furthermore, ascription of the option to terminate the contract to the mutual agreement means that any contract containing a *shart-e-sefat* or *fe'l* consists of an implied undertaking that any breach of the *shart* gives the innocent buyer a right to terminate the contract, while a thorough interpretation of the contract⁸¹ and the common understanding does not accept such a fictitious analysis. Moreover, adoption of the view would produce the unacceptable result that all the options must be regarded as applications of the "option of condition", whereas the supporters of the view themselves make a distinction between the option of condition and the other options.⁸²

The option to terminate is therefore to be justified primarily on the theory of interference of the law in order to protect the party who suffers from the other party's violation. According to the principle of *lā ḍarar*, as will be explained later in detail,⁸³ the law should not disregard the losses an innocent buyer may incur due to the seller's breach. Accordingly, the law, respecting the lawful expectations of the innocent buyer from the contractual obligation broken, should give him a proper means to protect himself against the seller's breach.

From what has been stated above, it can be said that no one ground can justify all the options provided under *Shi'ah* law, but the most important of the three grounds is the principle of *lā ḍarar*.

(C) Criterion for Application of the Principles

Application of the first principle does not cause much difficulty. In any case, it has to be proved that a particular *rewāyat* allows the aggrieved party to terminate the contract. When it is established, he will be entitled to terminate, whether the breach be minor or substantial. However, as pointed out above, few options are purely justified on the *rewāyāt*. Similarly, when termination is based on the second principle, the aggrieved party has an absolute right to terminate the contract. In that event, the main issue is to show that perfect performance was the condition of the non-breaching party's duty to perform and that it was impliedly agreed that any lack of conformity would entitle him to terminate the contract. It has to be done by construing the contract in the light of the terms of the contract and the surrounding circumstances.

⁸¹ See also, Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 133.

⁸² Almost all jurists have distinguished the "option of condition" from the other options, whereas if the options should be justified on the basis of an implied condition to terminate the contract there would be one option, "the option of condition". See e.g., Ansāri, M., (1375 H. Q.) at 228 and *seq.* and other jurisprudential books discussing the "options".

⁸³ See, Section Three, 2.2.3.

However, application of the third principle may cause some difficulty. The jurists, when referring to the principle, simply say that if performance of the broken contract becomes detrimental for the innocent buyer the principle comes into operation and discharges him from performing the contract. But they do not explain what degree of detriment will be sufficient for the principle of *lā ḍarar* to come into operation. It is hard to find a general statement in *Shi'ah* jurisprudence to determine a general criterion. Accordingly, the main question here is whether the case is to be decided on the basis of personal factors so as to determine that a particular breach renders the contract harmful for the buyer, or on objective criteria. The only thing which can be found is the criterion provided in the context of the option of lesion (*kheyār-e-ghabn*) which applies where a buyer has paid an excessively high price for goods, and it has been suggested that the principle of *lā ḍarar* comes into operation where the price paid by the buyer was so excessive that a reasonable man would not have overlooked it if he knew of it. That is, where the difference between the contract price and the market value of the goods is so slight that a reasonable man would have ignored it when he learned of it, it will not be regarded as a ground for giving a right to terminate the contract.⁸⁴ It may therefore be argued that *lā ḍarar* comes into operation when the detriment caused by the seller's non-conforming delivery is so serious that a reasonable man would not have disregarded it when he learned of the detriment caused by the breach.⁸⁵

As is seen, the given criterion refers the case to the court to decide whether or not a particular failure on the part of the seller *results in such a detriment (ḍarar) that a reasonable man would not overlook it*. There is, nevertheless, little guidance to help the court to exercise the discretion and attempts must be made to formulate more specific guidance as to the degree of detriment which is required to give an injured party a right to terminate the contract. However, it has to be noted that in such a context it should avoid providing a single rule for all cases. It would suffice to determine some general factors giving general guideline and give the trial judge a power to decide in any case according to the relevant circumstances. It is suggested, therefore, that the court should take into account factors such as, the nature of the breach, the amount of the loss resulting from the breach, any unreasonable inconvenience or unreasonable expense caused by the breach, the seller's readiness and ability to tender a conforming delivery or repair the lack of conformity.

⁸⁴ See in this connection, Helli, M. M. (Allāmeḥ Helli), vol. 1 at 322, Helli, A. N. J. (Muhaqqiq Helli), (1377 H.Q.) at 101; Fayz Kāshāni, M., (1401 H.Q.) vol. 3 at 73; Najafī, M. H., (1981) vol. 23 at 43; Ansāri, M. (1375 H.Q.) at 236; Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 67; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 415; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 40; Kātūziān, N., (1990) vol. 5, at 215-216. The same criterion is expressly confirmed by the revised Art. 417 of I.C.C.

⁸⁵ See also, Khumayni, S. R. M., vol. 5 at 122 in which the late Imām Khumayni says: "whatever custom and the learned (*u'qalā*) will not disregard it would be *a'yb* which gives rise to the right to terminate the contract".

A further point which is to be mentioned here is that the jurists have not made clear whether in deciding that the *ḍarars* resulting from the seller's breach would make the contract harmful the court should only take into account the actual loss resulting from the breach or it should also take into account those *ḍarars* anticipated probably to result from the breach. It seems that the court must take into account both those *ḍarars* actually resulting from the breach and those which are anticipated most probably to result from the breach, since the principle of *lā ḍarar* is general and comes into operation for the purpose of negating both actual and foreseeable *ḍarar*.

However, it is not clear how foreseeable must the actual, and probable, consequences of the breach be? Can he rely on any detriment caused by the breach, or only on those which were foreseeable by the seller? And if so, at what time and to what extent they have to be foreseeable. No jurisprudential statement can be found to answer the question.⁸⁶

3.2.3. Relevant *kheyārāt*

So far as commercial contracts are concerned, the two first options mentioned in 3. 1. are of no significance. The third option is a particular option based on particular *rewāyāt* and in the context of commercial contracts is of less value. Among the rest of the options mentioned above, only a few are relevant to the present research. The "option of condition" comes into operation by the contracting parties' express mutual agreement within the contract rather than by operation of law in the case of breach of contract. The "option of *tadlis*" only arises where one of the contracting parties is guilty of fraud which induces the victim to enter into the contract.⁸⁷ Similarly, although the "option of lesion" is significant in the context of a commercial contracts, it has no relevance to the present study. It applies when a buyer has paid an excessively high price for goods. Options such as the "option of insolvency" and the "option of impossibility" of the performance of contract arise in particular circumstances where the buyer becomes insolvent, or, after the conclusion of the contract one of the contracting parties becomes unable to perform his contractual obligations. The "option of unfulfilled sale in part" relates primarily to cases where the contract is dissolved or treated as void in respect of part of the subject-matter. Similarly, the "option of partnership", as some jurists pointed out,⁸⁸ is not a separate option but it is in fact a particular form of the option of defect or the option of unfulfilled sale in part. As regards the last option, it is to be noted that no jurist has addressed *emtenā'* as a ground for termination. The only jurist who addressed the

⁸⁶ For suggestion see, Chapter Five, 1.2.

⁸⁷ See e. g., I.C.C., Arts. 438-440.

⁸⁸ Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 386.

“option of *emtenā*”, as far as the present writer could identify, is the grand jurist, Ayatullāh Imām Khumayni.⁸⁹ However, he has not explained what he means by his short statement and how can it be justified; the only thing he mentions is that this option is “*u ‘qalāeiyon*” (that is, it is a common practice between the businessmen). Second, he restricted the option to the case where requiring the refusing party to perform is impractical. Third, he has raised it in the context of the seller’s refusal to deliver goods and the buyer’s refusal to pay; he did not state whether or not it can be applied to the case of non-conforming delivery. Accordingly, it is difficult to find a jurisprudential statement which has regarded the doctrine of *emtenā* (similar to the doctrine of repudiation in English common law) as a ground justifying the right to terminate the contract.

What follows will examine the rules relating to the “options” which may be resorted to by a buyer who is aggrieved by the seller's non-conforming delivery. For this purpose the options of “inspection”, “incorrect description”, “unfulfilled conditions” and “defect” are the most relevant options.

3.2.3.1. *Kheyār-e-Rū'yat*

Kheyār-e-rū'yat (the option of inspection) is occasionally associated with two other options: *kheyār-e-takhalluf an al- wasf* (the option of incorrect description) and *kheyār-e-takhalluf an al- shart* (the option of unfulfilled condition). The first question which arises here is whether this is a separate option, or a particular form of the others. The same question has also arisen as to the option of incorrect description and that of defect.

A general look at the jurists’ classification of the options shows that there are three views: (1) they are separate options each of which arises under particular circumstances; (2) they are the same and in fact the options of inspection, incorrect description and defect are particular instances of the option of “unfulfilled condition”; and (3) the first two are the same and they are to be restricted to the case of breach of *shart-e-sefat*, while the option of unfulfilled condition should be limited to the case of breach of *shart-e-fe'l* and the option of defect is to be restricted to the case of breach of *shart-e-salāmat*.

(A) *Option of Inspection as a Separate Option*

A number of *Shi'ah* jurists believe that the option of inspection is a particular option based on *Rewāyat* and *Ijmā'*, rather than on general principles on which the other options are generally justified, i.e., the principle of *lā ḍarar* or *shart-e-ḍemni*.⁹⁰ According to them, it must be

⁸⁹ See, Khumayni, S. R. M., vol. 5 at 372.

⁹⁰ These authorities are cited in: Āmeli, H., vol. 12 at 361, *rewāyat* 1 (Jamil Ibn Durrāj cites from Imām Sādeq), and, at 362 *rewāyat* 2 (Zayd al-Shahhām cites from Imām Sādeq).

distinguished from the option of incorrect description and the option of unfulfilled condition. The option of inspection, they argue, arises only where the buyer has previously examined a particular thing having certain specifications. At the time of making the contract the seller has not undertaken any obligation as to the existence or accuracy of those specifications by way of incorporating them into the contract as the terms of the contract, but the buyer has agreed to buy those particular goods simply on the basis of his personal belief that they are of those specifications he found by his pre-contract examination. Accordingly, there is no contractual obligation as to the accuracy of the buyer's belief in respect of the object sold which would give the buyer the option of incorrect description. His entitlement to terminate the contract in such a case is, according to them, for the existence of special authorities.⁹¹

The same interpretation has been suggested in respect of the 'option of defect'. A number of jurists maintain that this option is to be distinguished from the 'option of unfulfilled condition'. The option of defect is a particular option based on particular *rewāyāt*⁹² and it arises only where it is proved that the purchased goods are not in conformity with the presumed quality on which the buyer has relied when the contract was made⁹³.

(B) Option of Inspection is the Same as the Option of Incorrect Description

In contrast, some other jurists believe that the option of inspection is not a separate option but a particular form of the option of incorrect description (as it seems that some jurists tend to view it⁹⁴) or of the option of unfulfilled condition.⁹⁵ According to the latter view, these three options are the same except that the first two arise where an implied term is broken, while the third arises where an express term is broken.⁹⁶ According to such a broad interpretation, it has also been suggested that the "option of defect" should not be regarded as a separate option, but as a particular form of the "option of unfulfilled condition".⁹⁷

(B) Preferred Construction

⁹¹ See e.g., Najafi, M. H., (1981) vol. 23 at 92 and 94; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2, at 86; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 55-59, particularly, at 59; Khumayni, S. R. M., vol. 4 at 422-427; Tabrizi, J., (1412 H. Q.) vol. 4 at 256-259.

⁹² These *rewāyāt* are cited in: Āmeli, H., vol. 12 at 362 and *seq.*, Bāb 15, at 418, Bāb 6, hadith 1.

⁹³ See e.g., Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 623; Ansāri, M. (1375 H.Q.) at 253; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 96-99; Irvāni, A., (1379 H.Q) vol. 2 at 52; Tabrizi, J., (1412 H. Q.) vol. 4 at 277.

⁹⁴ See e.g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 377; Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 585; Narāqi, A., vol. 2 at 388 and 389; Khunsāri, S. A., (1364 H.S.) vol. 3 at 168. See also Art. 396 of I.C.C.; Kātūziān, N., (1990) vol. 5 at 182-184. See in contrast, Imāmi, S. H., (1363 H.S.) vol. 1 at 491.

⁹⁵ See e.g. Ansāri, M. (1375 H.Q.) at 248, see also p. 198; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 591 and 595; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 54 (citing from some jurists such a broad construction).

⁹⁶ Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 595 in which the late Mirzā Rashti expressly refers to this point. See also, Ansāri, M. (1375 H.Q.) at 198-199 and other sources cited there.

⁹⁷ See e. g., Najafi, M. H., (1981) vol. 23 at 235-236; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 66; Āle Kāshef al-Qetā, M. H. (1359 H. Q.) vol. 1 at 63 and *seq.*; Khumayni, S. R. M., vol. 5 at 6-7.

It seems that it would be better to treat the option of inspection and that of incorrect description as a single option; both arise where an implied term of the contract indicating the characteristics of the article sold is broken. Nevertheless, although technically it can be said that these two options arise where a contractual promise (*shart*) is broken, it would be better to examine them separately from the 'option of unfulfilled condition'. This is because first the latter option, as will be seen, is subject to some restrictions to which the other options are not. Second, a general examination of the jurisprudential discussions in this respect shows clearly that *Shi'ah* jurists commonly use the expression *kheyār-e-takhalluf an al-wasf* in the case of breach of *shart-e-sefat* and the expression *kheyār-e-takhallof an al-shart* when discussing the consequences of breach of *shart-e-fe'l*.⁹⁸

Similarly, it seems that "the option of defect" is technically the same as the options of incorrect description and unfulfilled condition; it arises where a contract term indicating the quality of the object sold is broken. It is hard to accept that the relevant *rewāyāt* give the buyer a right to terminate the contract for the defect in the goods on the mere fact that the buyer at the time of making the contract has relied on his personal belief that the article which is to be sold has a particular quality. The seller will be responsible for the presumed quality of the subject of sale where he was aware of the buyer's presumption. Assuming that the seller was aware of the buyer's reliance on the presumed quality of the sold article there would be in fact an implied undertaking breach of which gives rise to the option of defect.⁹⁹ Evidence in support of this construction is that if the contract contains an exemption clause as to the quality of the article there will not be the option of defect even though the buyer has relied on the presumed belief.¹⁰⁰ In addition, some of these *rewāyāt*¹⁰¹ expressly refer to the fact that the option of defect is for breach of a contract term rather than the mere belief of the buyer. Moreover, in a fully authentic (*sahih*) *rewāyat*, the option of defect has been applied to a case in which the seller had expressly undertaken an obligation that the article sold was sound.¹⁰² Accordingly, the option of defect arises only where the seller has undertaken, whether impliedly or expressly that the article to be sold has a particular quality.

However, there are three reasons which justify why some jurists treat the option of defect as a separate option. First, the option of defect arises only where a contract term

⁹⁸ It is perhaps the reason why some jurists described the option of unfulfilled condition as the "option of *Ishterat*" See e. g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 385; Narāqi, A., vol. 2 at 389; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 129).

⁹⁹ Tabrizi, J., (1412 H. Q.) vol. 4 at 277.

¹⁰⁰ See e. g., Tabrizi, J., (1412 H. Q.) vol. 4 at 277.

¹⁰¹ Āmeli, H., vol. 12 at 418, Bāb 6, hadith 1. There are also *rewāyāt* under which a buyer was given the option of defect notwithstanding that their language tends to apply to the case where the contract contained an express term (see e. g., Āmeli, H., vol. 12 at 362, Bāb 16, hadith 2).

¹⁰² See: Āmeli, H., vol. 12 at 418, bāb 6, hadith no. 1.

indicating the quality of the goods (*shart-e-sehhat*) is broken. Second, where the option arises the buyer also has an option to accept the defective goods and claim for price reduction (*arsh*), while in the case of breach of *shart-e-sefat* most jurists believe that he is not given such a twofold option.¹⁰³ Third, the option of defect, as will be seen later,¹⁰⁴ is lost, as most jurists suggest, merely by using or altering the goods delivered, while in the case of breach of *shart-e-sefat* such a restriction is not applied. The two latter features are, as they argue, based on particular authorities.¹⁰⁵

According to this construction, the following discussion will examine these options under the three separate headings: the option of incorrect description, the option of defect, and, the option of unfulfilled condition.

3.2.3.2. *Kheyār-e-Takhalluf an al- Wasf*

When discussing termination of the contract on the basis of the option of incorrect description, *Shi'ah* jurists make a sharp distinction between cases where the contract is for sale of specific goods (*mabi' mua'yyan*) and where it is for unascertained goods (*mabi' Kulli*).¹⁰⁶

(A) *Mabi' Mua'yyan*

In the case of a contract for sale of specific goods it is commonly said that if the seller's non-conforming delivery amounts to breach of *shart-e-sefat*, the buyer has an immediate right to reject the non-conforming goods and terminate the contract on the basis of the option of "incorrect description".¹⁰⁷

This is the view which is supported by almost all *Shi'ah* jurists. But they do not explain what lack of conformity will enable the buyer to reject and terminate the contract. They also do not distinguish between the right to reject and that of termination. Apparently, the same lack of conformity which gives rise to the first right would justify the second right. However, as already suggested,¹⁰⁸ the right to reject non-conforming delivery should be distinguished from the right to terminate the contract. Termination is an exception to the principle of *ufū bel*

¹⁰³ The case is, as will be seen later, controversial. Some of the jurists are of the view that the right to claim price reduction is a general right for breach of any contract stipulation (see e. g., Yazdi, S. M. K., (1378 H.Q) vol. 2 at 130, 134). The case will be examined later under a separate section is designed for the purpose.

¹⁰⁴ See Section One, 3. 3.3. 2., (A).

¹⁰⁵ Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 97; Tabrizi, J., (1412 H. Q.) vol. 4 at 281.

¹⁰⁶ For a detail discussion of the terms, 'specific' and 'unascertained goods' see, Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 11-12; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 23-24; Imāmi, S. H., (1363 H.S.) vol. 1 at 425. See also, I.C.C., Arts. 350, 351.

¹⁰⁷ Ansāri, M. (1375 H.Q.) at 249 and 283 in which he observes "Where it becomes clear that a term classified as *shart-e-sefat* is broken by the seller there is no way for the buyer unless to terminate the contract."; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 60. See also, Arts. 235 and 410 of I. C. C. Similarly, in a case decided by an Iranian Court, it was held that when Art. 410 applies, any lack of conformity will give rise to the right to terminate the contract, whether or not it results in any loss (the decision No. 569 - 1329/3/25 cited in: Iranian Civil Code, Art. 410, (Nikfar, M., (1372 H.S.).

¹⁰⁸ See this Section, 2.2.2.3.

u'qūd and should be justified where the actual and foreseeable losses resulting from the breach makes the contract harmful for the buyer. Termination is not the only means to protect the injured buyer. He can be protected by the seller's offer to cure. If the seller is ready and able to cure the non-conformity by way of repair within the contract time without causing the buyer unreasonable expense or unreasonable inconvenience he will be adequately compensated. Under such circumstances there is no reason to justify application of the principle of *lā ḍarar* allowing the buyer to terminate the contract.

(B) *Mabi' Kulli*

Where the contract is for the sale of unascertained goods it is a well-accepted view that a mere non-conforming delivery by the seller does not entitle the buyer to terminate the contract on basis of the option of incorrect description.¹⁰⁹ However, the jurists do not ascertain when the buyer will be entitled to terminate the contract. The only thing they suggest is that he is entitled to reject the non-conforming goods and request the seller to deliver goods conforming with the contract and if the seller refuses to make a fresh tender the buyer will be entitled to apply to the court for an order requiring the refusing seller to perform his obligations.¹¹⁰ Apparently, the buyer will not be entitled to terminate the contract under this view even in a case where the lack of conformity is substantial.

This view may result in uncertainty. Moreover, the buyer may not be able to obtain what he bargained for by way of requiring performance. Accordingly, it is suggested that he should be given a right to terminate the contract under certain circumstances. Certainly, he should not be entitled to terminate for minor lack of conformity. Where the seller is ready and able to deliver replacement goods which conform to the contract within the contract time without causing the buyer unreasonable expense or unreasonable inconvenience there will be no reason to justify the buyer's termination. However, this is not always the case. Sometimes the lack of conformity is substantial and the seller is not ready to deliver replacement goods. Is the buyer still to be required to perform the contract and sue the refusing seller? It is submitted that such a rule may sometimes be contrary to the principle of *lā ḍarar*. Accordingly, there must be some time when the buyer is entitled to terminate the contract. It is suggested that he should be given the right to terminate the contract when the seller's breach results in such detriment that make the performance of contract harmful for the buyer. However, whether the lack of conformity is or is not sufficiently serious should be determined in light of relevant factors including the seller's ability and willingness to cure. Where the suggested criterion is

¹⁰⁹ Ansāri, M. (1375 H.Q.) at 249; Khumayni, S. R. M., vol. 4 at 427; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 61. See also, I.C.C., Art. 415.

¹¹⁰ Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 60; Tabrizi, J., (1412 H. Q.) vol. 4 at 419.

met the principle of *lā ḍarar* comes into operation and ceases the decree of *luzūm-e-a'qd*, which orders the buyer to perform the contract, to operate.

3.2.3.3. *Kheyār-e-A'yb*

As in the case of the option of 'incorrect description', the jurists, when discussing termination of the contract on the basis of the 'option of defect', make a distinction between cases where the contract is for sale of specific goods (*mabi' mua'yyan*) and where it is for unascertained goods (*mabi' Kulli*).¹¹¹

(A) *Specific Goods*

Where the contract is for sale of specific goods almost all jurists hold that the seller's failure to deliver goods conforming with the contract quality will entitle the buyer to terminate the contract immediately. The only difference is that in the case of defective delivery (breach of *shart-e-salāmat*) the buyer has a twofold option: to reject the defective goods and terminate the contract or to accept them and claim for *arsh*, whereas according to most jurists such a twofold option is not available for the buyer where *shart-e-sefat* is broken.¹¹²

The same objections made to the previous option are applicable here. Accordingly, as was suggested in respect of the option of incorrect description, termination on the basis of this option should be subject to the same limitation applied to the former option. A further objection to this common view is that at the present time almost all jurists seem to treat *arsh*¹¹³ as a part of the option of defect. For this reason, they extend the same requirements applicable to the right to terminate the contract to the right to claim *arsh*. However, as will be discussed in detail,¹¹⁴ the right to claim *arsh* should be distinguished from the right to terminate the contract. It is a monetary relief which has its own requirements. Confusing this right with the remedy of termination may, as will be shown later¹¹⁵, result in an unreasonable effect.

(B) *Unascertained Goods*

In contrast, where the contract is for sale of unascertained goods, the buyer is only entitled to reject the non-conforming goods and request the seller to tender a conforming consignment.¹¹⁶ Some jurists, however, take a different view here. According to them, where the seller of unascertained goods has tendered goods which do not conform with the contract quality the

¹¹¹ The distinction is clearly inferable from Art. 437 of the I. C. C.

¹¹² See e.g., Ansāri, M. (1375 H.Q.) at 253; Khumayni, S. R. M., vol. 5 at 15; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 100; Tabrizi, J., (1412 H. Q.) vol. 4 at 278.

¹¹³ The term is used to refer to what is called under the Convention "price reduction". This remedy is examined in detail in: Section Three, Part Two.

¹¹⁴ Section Three, 3.3., and, 3.5.2.

¹¹⁵ See, *ibid.*

¹¹⁶ Yazdi, S. M. K., (1378 H.Q) vol. 2 at 70; Iravāni, A., (1379 H.Q) vol. 2 at 50; Tabrizi, J., (1412 H. Q.) vol. 4 at 419.

buyer, as in the case of specific goods, has an option to accept them and claim for *arsh* or to reject them and terminate the contract immediately. This view has been justified on the basis that where the seller appropriates a particular consignment to the contract, it becomes as the case of sale of specific goods where breach amounts to the option of defect.¹¹⁷ However, as in the case of the previous option, no jurist explains when the buyer will be entitled to terminate the contract for a defective tender. It is suggested that the same criterion applied to termination on the basis of the option of 'incorrect description' is applicable here.

3.2.3.4. *Kheyār-e-Takhalluf an al-Shart*

As already pointed out, this option arises where the seller fails to perform a term classified as *shart-e-fe'l*. Where such a term is broken *Shi'ah* jurists are of two opposing views. A number of great jurists are of the opinion that mere failure to perform such a term does not entitle the buyer to terminate the contract on the basis of the option of unfulfilled condition. He will be entitled to terminate the contract on the basis of this option where requiring the defaulting seller to perform is impractical.¹¹⁸ In contrast, others believe that mere failure to perform in accordance with the contract term enables the buyer to terminate the contract even in the case when he can require the seller to perform his obligations.¹¹⁹

The origin of these different views is the ground upon which the option of unfulfilled condition is to be justified.¹²⁰ On the first view, the option is justified on the principle of *lā ḍarar* so that this option comes into operation where the buyer cannot be adequately compensated by another remedy. Accordingly, as long as he can require the defaulting party to perform he will be compensated by the remedy of requiring performance. There is therefore no reason to justify an immediate termination of the contract. In contrast, according to a number

¹¹⁷ See the different sources cited in: Yazdi, S. M. K., (1378 H.Q) vol. 2 at 70. See also Khumayni, S. R. M., vol. 5 at 17; Imāmi, S. H., (1363 H.S.) vol. 1 at 504, in which they try to justify the view. This view has been rejected by most jurists. See in this respect, Yazdi, S. M. K., (1378 H.Q) vol. 2 at 70; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 97; Khumayni, S. R. M., vol. 5 at 15-18. Moreover, there is no reason to justify a distinction between cases of breach of *shart-e-sehhat* and of *shart-e-sefat*, the same logic which justifies the above-mentioned view in respect of the former would justify it as to the latter. In addition, this view would enable the buyer to terminate the contract for minor defects, which certainly is contrary to the principle of *lā ḍarar*.

¹¹⁸ Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 386; Āmeli, Z. (Shahid Thāni), vol. 1 at 191; Narāqi, A., (1408) at 44; Najafi, M. H., (1981) vol. 23 at 219; Ansāri, M. (1375 H.Q.) at 285 (in which he expressly observes that we cannot find any authority for the option to terminate the contract for the mere refusal notwithstanding that the innocent party is able to require the refusing party to perform his contractual obligations.); Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 134. Iranian Civil Code, following this view, restricts the right of termination for breach of *shart-e-fe'l* to the case of impossibility of requiring the refusing party to perform (Art. 239).

¹¹⁹ Helli, A. N. J. (Muhaggeq Helli), (1377 H.Q.) at 105; Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 386; Qumi, M. A. (Muhaggeq Qumi), (1371 H. S.) vol. 2 at 193 (question no. 119); Narāqi, A., vol. 2 at 389; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 129; Bujnūrdi, M. H., (1389 H.Q) vol. 3 at 268, 270; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 374; Khūei, S. A., vol. 2 at 43 (question 167); Khumayni, S. R. M., vol. 5 at 220; Tabrizi, J., (1412 H. Q.) at 436-437, 439.

¹²⁰ See in this respect, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 373.

of jurists, the option of unfulfilled condition is to be based on the theory of *shart-e-d̄emni*. That is, at the time of making the contract the contracting parties have impliedly agreed that where the *shart* is not performed the promisee is entitled to terminate the contract.

Applying these two approaches to the seller's failure to tender documents conforming to the contract requirements, one may suggest that on the first approach the buyer is only entitled to reject the non-conforming documents and request the seller to tender the conforming documents. He will be entitled to terminate the contract only when he cannot require the seller to perform his obligations in respect of tender of the required documents. But according to the second approach, the buyer has a right to refuse to accept them and terminate the contract immediately.

The question whether the option to terminate is to be based on the first or the second ground has already been examined, and it was suggested that the option is primarily to be justified on the principle of *lā d̄arar*.¹²¹ On this suggestion, the buyer should be given the right to terminate the contract for breach of *shart-e-fe'l* when he cannot be adequately protected in other ways. Accordingly, where the seller is ready and able to tender conforming documents the buyer should not be entitled to terminate the contract provided that the seller's re-tender does not cause the buyer undue detriment.

3.2.4. Seller's Right to Cure

As already indicated, no jurist has examined the question whether the seller has a general right to cure a defective performance. What they have said is that where the contract is for sale of specific goods any breach of *shart-e-sefat* or *shart-e-salāmat* will give the buyer an immediate right to reject the non-conforming goods and terminate the contract, whereas where the contract is for sale of unascertained goods the buyer has only a right to reject the non-conforming goods and demand delivery of conforming goods. In the absence of clear jurisprudential authorities on this issue, it is proposed to deal with the issue on the basis of the general principles described above. A distinction should again be made between the cases of specific and unascertained goods.

3.2.4.1. Sale of Specific Goods

One may ask if the option to terminate is to be justified on the principle of *lā d̄arar*, why should the seller not be given a right to cure, at least in cases where he is ready and able to do so? If the seller is ready and able to cure the non-conformity by, replacing or repairing the goods, is the contract still detrimental for the buyer? It may be said that it is logical that in

¹²¹ See this Section, 3. 2. 2.

such cases the buyer should not be given an immediate right to terminate unless the seller's cure cannot adequately redress the buyer, or causes him unreasonable inconvenience.

Whether the seller should be given a right to replace non-conforming goods seems difficult to reconcile with general principles. The point has been addressed by the late Shaykh Murtada Ansāri in respect of the option of inspection. Ansāri, in justifying why the seller should not be able to deprive the buyer of his right to terminate the contract by tendering replacement goods, observes:

"The option of inspection is not lost ... by delivery of replacement goods. For, the contract is made on a particular specific goods and delivery of replacement requires a fresh transaction."¹²²

The rule seems generally applicable to both the option of inspection and that of defect. In both cases, the seller should not be given a right to tender replacement. Replacement goods will not be regarded as a performance of the contract unless the buyer consents to it.

However, the position of the seller's right to cure by repair is not clear. There is no clear reason to justify why the seller should not be given such a right. It may be argued that the subject-matter of the contract was a particular article possessing specific characteristics. Any change to the article delivered will render it other than that for which the buyer has bargained. As a result, it needs the buyer's consent. Moreover, deprivation of the buyer of his right to terminate by giving the seller a right to cure by repair would be contrary to the principle of *isteshāb*. Where it proves that the goods delivered do not conform with the contract requirements the right to terminate comes into existence. In such a situation, the seller's offer to cure the non-conformity raises the question whether the buyer's right to terminate derived from the lack of conformity should be continued or to be stopped by the seller's ability to cure. In the event of doubt as to the continuity of a pre-existent decree (right to terminate) it is presumed that it is still on foot on the principle of "*isteshāb*".¹²³ In addition, the principle of *lā ḍarar* is provided in favour of an innocent party who suffers a detriment (*ḍarar*) from the other party's violation, and cannot be relied on by a defaulting seller against

¹²² Ansāri, M., (1375 H.Q.) at 252. Before him the view was pointed out by the late Sāhib Javāher in: Najafī, M. H., (1981) vol. 23 at 96 ("There is no doubt that the option of incorrect description is not lost by replacement as it is not lost by paying the difference between the non-conforming and conforming goods."). See also, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 77; Tabrizi, J., (1412 H. Q.) vol. 4 at 271; Khumayni, S. R. M., vol. 4 at 441; Kātūziān, N., (1990) vol. 5 at 202. The late Sāhib Javāher goes further and suggests that where the parties have agreed that in the case of non-conformity the seller is allowed to deliver replacement or pay the difference the contract would be void because of *qarar* (see, Najafī, M. H., (1981) vol. 23 at 96). Nevertheless, in the case of the "option of lesion", it has been suggested that where the seller is ready to reduce the price the buyer will not be entitled to terminate the contract on account of the option of lesion. See e. g., Helli, M. M. (Allāmah Helli) and Āmeli S. M. J. H., vol. 4 at 571; Tabātabāei, S. A., (1404 H.Q.) vol. 1 at 525; Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 39).

¹²³ See Qumi, M. A. (Muhafiq Qumi), (1371 H. S.) vol. 2 at 117 (question no. 84) in respect of the option of lesion.

the injured buyer. On this view, the seller may be entitled to repair only where the buyer has accepted the seller's offer and gives him an opportunity to cure the non-conformity.

It seems that none of the forgoing arguments is sufficient to reject the possibility of giving the seller a right to cure a lack of conformity by repair. The first argument applies to the case where it turns out that the statement of fact as to the object sold was false. In such a case, cure is in fact impossible. It does not apply to the case where the buyer has ordered the seller to manufacture and deliver a particular instrument according to his instructions.

Second, the principle of *isteshāb* cannot be relied on here, for in such a case not only the continuance of the option to terminate on account of *kheyār-e-takhalluf an al-wasf* or *kheyār-e-a'yb* becomes doubtful, but the very existence of the option becomes basically doubtful where the seller is able and willing to repair. To explain, as indicated when discussing the grounds of the options,¹²⁴ the option to terminate is justifiable when the contract becomes detrimental according to the actual and/or probable results of the default at the time of exercising the option, whereas, where the seller has actually repaired the lack of conformity, or is willing and able to do so the contract will not be harmful for the buyer when he wishes to exercise the option. Accordingly, in such cases the option lacks the logic justifying the option, since where the seller has cured the lack of conformity, or has offered to do so, the prospective harm justifying the right to terminate will become doubtful, while it is a well-settled rule that in such a case (in the terminology of the jurists, it is described as *al-shakk fi iqtedā' al-hukm* (doubt as to the legal ground of the degree as opposed to its continuance), the principle of *isteshāb* cannot operate.

Moreover, if it is accepted that the option of termination is granted to an injured buyer in order to protect him against the losses sustained by reason of the seller's breach, such a protection would effectively be achieved by curing the breach by way of repair. Accordingly, there is no reason to justify to disregard the principle of *ufū bel u'qūd* which obliges the buyer to be bound by the contract.

In addition, in a rewāyat cited from Imām Šādeq, the Imām was asked about a person who purchased a particular plot of land of a certain area. After measurement he realised that it did not conform with the contract in area. In that case, the Imām held that:

“The buyer was entitled either to reject it and take back his money or accept the land and take back that part of the price exchanged with the missing part. However, if the seller was able to cure the missing part by giving from other land (if he had any beside the sold land) the buyer was not entitled to terminate the contract.”¹²⁵

¹²⁴ See this Section, 3.2.2. (C).

¹²⁵ See Āmeli, H., vol. 12, bāb 14, hadith 1 at 361.

Although the case was concerned with the sale of land, the logic behind the rule is generally applicable to any similar situations. Moreover, the loss of the option to terminate was accepted by some distinguished jurists where the defect is removed automatically before the buyer learns of the fact, or after he learns of it but before he has exercised his right. In justifying this view, they argued that when the defect is actually removed there is no reason to justify termination.¹²⁶ It seems that the same logic which justifies the loss of the option will justify the view where the seller is ready and able to cure the defect by repair, since when the seller is able and willing to cure the defect by repair as prescribed above the breach would not be sufficiently serious to bring the principle of *lā ʿārar* into operation. Accordingly, the buyer should not be allowed to terminate the contract unless the seller is not willing and able to cure or his cure causes the buyer unreasonable inconvenience or unreasonable detriment.¹²⁷

It is also worth noting that the buyer's termination will be effective where he has exercised his option to terminate before the seller has informed him of his ability and readiness to cure, for the buyer is not under a duty to ask the seller whether he is able and ready to cure the lack of conformity. However, the question which arises is whether the buyer should be entitled to terminate the contract before the seller learns of the lack of conformity. The question becomes more difficult taking into account the fact that the jurists have not made clear whether the buyer is obliged to inform the seller of the lack of conformity and what will happen if the buyer fails to inform the seller. In the absence of an express jurisprudential authority it is suggested that if the buyer has known that the seller would be able and willing to repair the lack of conformity as described above he should not be given the right to terminate. The suggestion can be justified on the basis of that the logic of the foregoing case exists here.

3.2.4.2. Sale of Unascertained Goods

Where the contract is for the sale of unascertained goods giving a general right to cure seems consistent with general principles, since as already explained, in such cases where the seller's tender does not conform to the contract terms the buyer has only a right to reject the non-conforming delivery. He is not entitled to terminate the contract. On this approach, it is quite reasonable to suggest that the seller should be given a general right to cure his non-conforming

¹²⁶ Āmeli, Z. (Shahid Thāni), vol. 1 at 195; Ansāri, M., (1375 H.Q.) at 261; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 663-664. See also, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 171-175; Tabrizi, J., (1412 H. Q.) vol. 4 at 311-312. In addition in the case of the option of lesion, it has also been said that if the seller is ready and willing to pay the difference between the contract price and the market price the buyer has no option to terminate the contract (see e. g., Qumi, M. A. (Muhaqqiq Qumi), (1371 H. S.) vol. 2 at 117 (question no. 84). See also Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 571; see also at 57; Tabātabāei, S. A., (1404 H.Q.) vol. 1 at 525; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 39).

¹²⁷ This view is expressly recognised by I.C.C. in lease contract (Art. 478).

delivery within the contract time. However, his right to cure beyond the time limit depends on the nature of time provisions to be discussed below.

Similarly, it is suggested that the seller should not be given the right to cure in all circumstances. The right must be given according to the general criterion that it could be done without causing the buyer unreasonable expense or unreasonable inconvenience. The same suggestion seems to be applicable where the seller has tendered non-conforming documents. As long as the seller is able and willing to cure lack of conformity in the documents without causing the buyer unreasonable inconvenience or unreasonable expense he should be allowed to do so if the contract time allows him.

3. 2. 5. Special Cases

The preceding discussions were concerned with the buyer's right to terminate the contract where the seller has delivered the right quantity of goods, not all conforming to the contract. The present discussion examines the cases where the seller (a) delivers the whole contract quantity only part of which conforms to the contract terms, (b) delivers the wrong quantity, or (c) fails to deliver when the time for delivery has expired. Three questions will be examined:

- (i) whether the buyer is entitled to terminate the contract entirely or in respect of the non-conforming part for partial non-conforming delivery;
- (ii) whether the buyer is entitled to terminate the contract entirely or in respect of the missing part for partial delivery;
- (iii) whether the seller's mere failure to perform his delivery obligations within the contract time gives the buyer an immediate right to terminate the contract.

3.2.5.1. Partial Non-Conforming Delivery

As stated in the first part¹²⁸, the seller's partially non-conforming delivery raises a number of questions. (1) Can the buyer reject all the goods delivered to him because some of them do not conform with the contract? (2) Can he reject the non-conforming part and accept the conforming part? (3) Is he entitled to terminate the whole contract on the basis that some of the goods delivered do not correspond with the contract terms? (4) Is there any case in which an aggrieved buyer is entitled to terminate the contract in respect of non-conforming and keep it alive with respect to the conforming part? The first two questions have been discussed in the first part. The two other questions are now examined.

As explained in the first part,¹²⁹ the jurists have raised the issue in question where the seller of *specific goods* has delivered goods some of which are in conformity with the *contract*

¹²⁸ See, 2.2.3.1.

¹²⁹ Ibid.

quality. In that case, no jurist has disputed the buyer's right to reject all of the goods and terminate the contract as a whole.¹³⁰ Different views appeared in respect of the buyer's right to reject the non-conforming part and terminate the contract with respect to that part but keep the contract alive as to the conforming part.¹³¹ A number of the jurists held that the buyer is simply entitled to either accept all or reject all and terminate the contract,¹³² while the others support the view that in such a case the buyer should be given an option to reject the defective part and terminate the contract to that extent and keep the contract alive in respect of the conforming part.¹³³ However, a number of questions are unclear: (a) is the buyer entitled to partial termination where the seller of unascertained goods has tendered goods some of which do not conform to the contract? (b) under what circumstances should he be given to terminate the contract partially or as a whole? (c) is there any difference to be between termination of the contract as a whole and termination in respect of the part affected by the breach?

As was shown in the first part,¹³⁴ the different views are due to the lack of a clear distinction between the case of severable and non-severable contracts. Accordingly, it is suggested that where the contract is construed as severable, as described in the first part¹³⁵, there is no reason to prevent the buyer to accept the conforming and reject the non-conforming part, whether the contract is for sale of specific or unascertained goods. Any severable part will in fact constitute the subject of a subsidiary contract within the main contract. As a result, the rules governing breach of a *shart-e-sefat* and *shart-e-salāmat* under a non-severable contract apply to the severable part. That is, where the broken term is classified as a *shart-e-sefat* or *salāmat* with respect to the severable part the buyer is entitled to reject that part (subject to the limitation suggested in respect of non-severable contract) and request the seller to tender a conforming delivery. After the buyer has lawfully rejected the non-conforming part, if it is accepted that the seller should be given a general right to cure he is entitled to cure the default by delivering replacement in conformity with the contract, provided that he does so within the time limited for delivery, otherwise the buyer is entitled to terminate the contract in respect of the non-conforming part.

¹³⁰ See e. g., Ansāri, M. (1375 H.Q.) at 259; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 627; Khumayni, S. R. M., vol. 5 at 56 and 61.

¹³¹ Āmeli, Z. (Shahid Thāni), vol. 1 at 189 in which the late Shahid Thāni expressly refers to two opposing views.

¹³² Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 629-630, and 660; Bahrāni, Y., vol. 19 at 90; Ansāri, M. (1375 H.Q.) at 258-259; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 627 (in which he claims that he could not identify a jurist who disagreed with this view) and 629-630. See also, Ansāri, M. (1375 H.Q.) at 258; Khumayni, S. R. M., vol. 5 at 56. The same view is accepted in Art. 431 of the I. C. C.

¹³³ Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 108; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 81-82; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 146 and *seq.*; Tabrizi, J., (1412 H. Q.) at 299-300.

¹³⁴ See, 2.2.3.1.

¹³⁵ *Ibid.*

It is also suggested that a distinction should be made between partial termination and termination of the contract as a whole. Partial termination should be allowed where the requisite requirements, as described in respect of termination of a non-severable contract, are satisfied. But the buyer should not be given the right to terminate the contract as a whole merely because the seller has broken the contract in respect of one or more severable parts, even if the lack of conformity is serious. Termination of such contracts as a whole is to be permitted only where the seller's defective delivery in respect of one or more instalments is such that the buyer can reasonably conclude that the contract would be harmful for him, sine in such a situation the principle of *lā ḍarar* comes into operation.

3.2.5.2. Breach of Quantity Stipulations

As indicated in the first part¹³⁶, the jurists have not disputed the buyer's right to terminate the contract for breach of quantity term. Almost all jurists have agreed to give the buyer the right to terminate the contract where the seller delivers less than what he contracted to sell. The same right is given to the buyer where the seller delivers to the buyer a quantity of goods larger than he contracted to sell.¹³⁷ The difference is in giving the buyer the right to keep the contract alive in respect of the goods delivered and to terminate the contract as to the non-delivered part.¹³⁸

As the language of the late Shaykh Ansāri's statement¹³⁹ shows, the jurists' difference is concerned with the case of sale specific goods. The different views are, it seems, due to the nature of the contract term indicating the quantity of the object of sale. Some jurists believe that such a term does not differ from *shart-e-sefat*. It is incorporated into the contract simply so as to qualify the seller's delivery obligation.¹⁴⁰ In both situations no part of the consideration is exchanged for the *shart*, i.e., the contract price as a whole is exchanged with the purchased goods. Accordingly, the buyer is only entitled to accept the wrong items against the agreed price or reject them and terminate the contract. In contrast, others argue that these two situations must be distinguished. A stipulation indicating the contract quantity is not a mere descriptive *shart* but also constitutes a part of the subject of the seller's obligation so that it is

¹³⁶ See, 2.2.3.2.

¹³⁷ See e.g., Ansāri, M. (1375 H.Q.) at 287; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 387.

¹³⁸ For instance, the late Shaykh Ansāri says: "There is no dispute as to the buyer's right to terminate the contract for partial delivery. The different views arise as to the question whether or not the buyer should be given a right to keep the contract alive as to the part delivered and terminate in respect of the undelivered part" (Ansāri, M. (1375 H.Q.) at 286). As to the first view see e.g., Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., 4 at 734; Ansāri, M. (1375 H.Q.) at 286-7 (in which the late Ansāri cites a number of jurists who supported this view); Yazdi, S. M. K., (1378 H.Q) vol. 2 at 133-134; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 144; Tabrizi, J., (1412 H. Q.) at 450, and as to the second view see e.g., Khumayni, S. R. M., vol. 5 at 238; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 383-388, in particular, at 388.

¹³⁹ See, Ansāri, M. (1375 H.Q.) at 286.

¹⁴⁰ Art. 234 (1) of I.C.C. does also regard stipulation as to quantity of subject-matter of the contract as *shart-e-sefat*.

exchanged with part of the price. On this construction, where the purchased items delivered differ in quantity from that provided for in the contract the buyer can accept them and terminate the contract in respect of the non-existent part. However, the jurists have not addressed the case where the seller of unascertained goods has made wrong quantity delivery. They have not also made clear what degree of non-conformity will entitle the buyer to terminate the contract.

It is suggested that the buyer should be given the right to terminate the contract for partial delivery in both cases. Nevertheless, it is suggested to distinguish between termination of the contract in its entirety and termination of the contract as to the missing part. In the first case, the buyer should be given the right to terminate where the missing part is such that its absence makes the contract harmful for the buyer. But in the second case, he should only be entitled to terminate the contract as to the missing part where it is not so slight that it would be customarily unreasonable for him to do so. This should be assessed in light of the seller's ability and readiness to make a fresh tender or to deliver the contract quantity within the contract time. This suggestion is in line with the *rewāyat* cited from Imām Šādeq. In that case, it was held that if the seller was able to cure the missing part the buyer has no right to terminate the contract.¹⁴¹

3.2.5.3. Breach of Time Stipulations

Although the consequences of breach of *shart-e-zamān* (time stipulation) have not been addressed by *Shi'ah* jurists, some useful discussions can be found in *Shi'ah* jurisprudence when dealing with the question: "Where no specific time limit is provided under the contract both parties are required to perform their contractual obligations "*fūran*" (promptly)".¹⁴²

A number of questions must be addressed. (i) Is a stipulation as to the time for performance to be regarded as of the nature of *shart-e-sefat* or *shart-e-fe'l*? (ii) Under what circumstances is the buyer entitled to terminate the contract for breach of a time stipulation? (iii) What is the position when the contracting parties have not specified a time limit for performance of contractual obligation? These are the questions which have not precisely been examined by *Shi'ah* jurists.

¹⁴¹ See e.g., Āmeli, H., vol. 12, bāb 14, hadith 1 at 361. See also, 3.2.4.1.

¹⁴² See generally, Qumi, M. A. (Muhaqqeq Qumi), (1371 H. S.) vol. 2 at 144 and *seq.* (question no 101); Ansāri, M. (1375 H.Q.) at 303; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 174 and *seq.*; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 191; Shahidi, M. F., (1375 H.Q) at 600-601; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 546 and *seq.*; Khumayni, S. R. M., vol. 5 at 330 and *seq.*; Tabrizi, J., (1412 H. Q.) at 540;

(A) Nature of Time Stipulation

As already explained,¹⁴³ contractual terms are either of the nature of *shart-e-sefat* or of that of *shart-e-fe'l* or *shart-e-natijah*. Terms indicating a time limit for performance of contract obligations cannot be outside this threefold classification. There is no doubt that a time stipulation does not fall into the category of *shart-e-natijah*.¹⁴⁴ The main question is therefore whether *shart-e-zāman* is to be placed into the category of *shart-e-sefat* or that of *shart-e-fe'l*.

It seems that a stipulation containing a definite time or a period of time for performance cannot be described as *shart-e-sefat* because, the term *shart-e-sefat*, as explained earlier¹⁴⁵, refers to those terms which define the subject-matter of the contract,¹⁴⁶ whereas a time stipulation is incorporated into the contract so as to define the contracting parties' duty to perform. A sale contract simply obliges the seller to deliver the object sold and the buyer to pay the price. Although, as will be seen below, where no particular contractual time limit is provided by the parties under the contract, the nature (*itlāq*) of a reciprocal contract requires them to perform their obligations promptly,¹⁴⁷ by incorporation of time stipulation they are obliged to perform their duties within the specified time.¹⁴⁸

(B) Termination for Breach of Time Stipulation

Having placed time stipulations into the category of *shart-e-fe'l* the question arises whether breach of such a contract term will give rise to an immediate right to terminate the contract, or whether the injured party is entitled to the common remedy provided for breach of *shart-e-fe'l*, i.e., requiring the defaulting party to perform his obligation. As already pointed out¹⁴⁹, according to most *Shi'ah* jurists, breach of *shart-e-fe'l* gives an innocent party only a right to require the breaching party to perform rather than an immediate right to terminate the contract. Accordingly, breach of a time stipulation must, according to this principle, produce the same result. That is, the buyer will be entitled to terminate the contract only when it is not practical to require the defaulting seller to perform his obligation.¹⁵⁰ This view has been strongly criticized by other jurists.¹⁵¹ The main objection to this approach is that breach of

¹⁴³ Section One, 2.1.2.2.

¹⁴⁴ See *ibid.*, fn. 18.

¹⁴⁵ See *ibid.*, (A).

¹⁴⁶ See e.g., Ansāri, M., (1375 H. Q.) at 283.

¹⁴⁷ See e.g., Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 547-548.

¹⁴⁸ Some jurists have recently referred to such a nature of time stipulation. See for instance, Tabrizi, J., (1412 H. Q.) at 419.

¹⁴⁹ See, 3. 2. 3. 4.

¹⁵⁰ This approach has been supported by the great *Shi'ah* jurist the late Sāhib Javāher in: Najafi, M. H., (1981) vol. 23 at 99.

¹⁵¹ See e.g., Ansāri, M. (1375 H.Q.) at 303; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 191; Khumayni, S. R. M., vol. 5 at 334; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 548; Tabrizi, J., (1412 H. Q.) at 542.

has not committed any breach entitling the buyer to require the seller to perform. After the expiration of that time the defaulting seller can no longer perform his obligation under the time stipulation.¹⁵²

However, the latter groups do not explain when the buyer will be entitled to terminate the contract for breach of time stipulation; is he entitled to terminate for any late delivery? It seems that the buyer's right to terminate the contract for the seller's late delivery should in principle be based on the serious consequences of delay. As explained before¹⁵³, the main ground for giving a right to terminate the contract is the principle of *lā ḍarar*. Accordingly, it is difficult to say that any delay in performance of the contract will give rise to an immediate right of termination. He will have such a right only where late performance will cause him undue detriment. Nevertheless, in the context of commercial contracts it is fairly possible to infer from the circumstances of the case that the contracting parties have impliedly agreed that any delay by the seller will give rise to a right of termination even though it does not cause the buyer any loss.

(C) No time specified in the contract

Where no time provision is specified by the parties within the sale contract it is a well-accepted view in *Shi'ah* law that the contracting parties are required to perform their obligation "*fūran*" (promptly).¹⁵⁴ The term 'promptly' is not defined in *Shi'ah* jurisprudence. It is generally said that it must be understood according to the custom of any particular case. Thus, the period of time for performance may differ from case to case.¹⁵⁵

The question arises here whether or not the seller's failure to deliver promptly entitles the buyer to terminate the contract. There is no clear answer from the jurists in this connection. It seems that the question must be answered on the basis of the general principles explained above. One may argue that since the parties have left the question of time for performance open it may be inferred that the time for performance of the contract cannot be regarded as of the essence, since otherwise they would have expressly referred to it. Accordingly, termination should always be justified on the basis of the principle of *lā ḍarar*. However, the case may be different in the context of commercial contracts. In such contracts, performance within a reasonable time is of significance for the contracting parties. The parties may have relied on such a common understanding and have left the matter to the relevant

¹⁵² See e.g., Qumi, M. A. (Muhaqqeq Qumi), (1371 H. S.) vol. 2 at 144 (question no 101) and 192 (question no. 119).

¹⁵³ See, 3. 2. 2.

¹⁵⁴ See e. g., Ansāri, M. (1375 H.Q.) at 303; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 547; Khumayni, S. R. M., vol. 5 at 333; Tabrizi, J., (1412 H.Q.) at 540. See also, Kātūziān, N., (1992) vol. 1 at 173; Imāmi, S. H., (1363 H.S.) vol. 1 at 237.

¹⁵⁵ Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 547-548. See also, Kātūziān, N., (1992) vol. 1. at 173.

may have relied on such a common understanding and have left the matter to the relevant custom.¹⁵⁶ Accordingly, it may be said that delivery beyond a reasonable time will be breach of an implied undertaking that the seller will perform his delivery obligation within that time and if he fails to do so the buyer may be entitled to terminate the contract immediately.

The point which deserves to be noted is whether one could adopt a *Nachfrist* type procedure (as provided in the Convention) or making the time of *the essence of the contract* (as recognized in English law) in this system. No jurist has addressed the question whether the buyer is able to give the seller a reasonable period of time requiring him to perform his obligations within that time so that if the seller refuses to perform the buyer is entitled to terminate the contract. It seems that *Shi'ah* law could follow neither. In *Shi'ah* law, as explained when dealing with the grounds for *kheyārāt*¹⁵⁷, there are three well-accepted circumstances in which the buyer may be entitled to terminate the contract; a particular *rewāyat* which allows him to do so, *shart-e-ḍemni* (implied agreement) and the principle of *lā ḍarar*. No particular authority can be found to allow the buyer to give the seller additional time and terminate the contract if he fails to perform within that time. Accordingly, the only way to justify termination for late delivery is either the doctrine of *shart-e-ḍemni* or the principle of *lā ḍarar* as described when dealing with the grounds of the options.

3.3. Mechanism of Termination

3.3.1. No Automatic Termination

As in the two other systems, in *Shi'ah* law termination is a matter of election. Thus breach of contract does not automatically result in termination of the contract. This fact can easily be inferred from the definitions suggested by the jurists in respect of the concept of *kheyār*. Although in terms of terminology *Shi'ah* jurists have defined the term in different ways,¹⁵⁸ all of them agreed that *kheyār* simply gives a party a right to terminate the contract if he wishes. Accordingly, termination of the contract is always at the option of the party who is given such a right. As long as he has not lost his right he cannot be required to elect to terminate or affirm the contract.

¹⁵⁶ The fact to which Diplock J. (as he was then) referred in an English case of *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 1 W. L. R. 1126 at 1132.

¹⁵⁷ See, 3. 2. 2.

¹⁵⁸ Definitions such as, "kheyār is the option to terminate the contract", or, "kheyār is the option to affirm the contract or bring it to an end", or, "kheyār is the option to dissolve the contract or bring it to an end". See in this respect, Ansāri, M., (1375 H. Q.) at 214; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 4; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 5-6; Khumayni, S. R. M., vol. 4 at 5; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 6 at 5-6; Karimi, S. J., and, Āmuli, M. H. (1380 H.Q.) vol. 4 at 3 and *seq.*

3.3.2. Election of Termination

A number of questions need to be considered here: When is a termination effective? Is the terminating buyer required to exercise his right in a particular form? Should termination be communicated to the seller? Is it necessary to obtain a court order for termination to be effective?

3.3.2.1. Declaration

The right to terminate is exercised by a simple declaration of intention to terminate the contract. A mere inner intention to terminate does not suffice. It must be clearly announced in a proper way.¹⁵⁹ Accordingly, there must be a positive act on the part of the buyer to declare his intention to terminate but the declaration is not required to take any special form. Any statement or conduct by the buyer will suffice to effect termination provided that it clearly indicates that he has intended to terminate.¹⁶⁰ Accordingly, the contract will not be terminated merely because of the buyer's failure to declare it terminated.¹⁶¹ Thus the buyer's rejection of defective goods or his request of the seller to return the money he has paid for the goods may be evidence of the intention to exercise the option to terminate the contract, provided that it was sufficiently unequivocal to show his intention.

3.3.2.2. Communication

It is commonly said that in *Shi'ah* law termination will be effective even though the party in breach has no awareness of it.¹⁶² This rule is based on the legal nature of termination. In *Shi'ah* law, termination is placed into the category of *iqā'*, (unilateral juristic act), as opposed to *a'qd* (bilateral juristic act). The expression refers to any legal institution which is created by a unilateral legal intention of a party. Under the theory of *iqā'* a unilateral juristic act such as termination does not require the consent of any person to be effective but would be legally effective as soon as an intention to create such a legal concept has unequivocally been announced. Accordingly, what a buyer is required, under this construction, to do in exercising his right to terminate is simply to declare his intention to terminate by a proper means such as

¹⁵⁹ See e.g., Najafi, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 58).Khumayni, S. R. M., vol. 5 at 279-280; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 451 and *seq.*; Tabrizi, J., (1412 H. Q.) at 488. Among the Iranian lawyers see, Kātūziān, N., (1990) vol. 5 at 54. In contrast, see Ansāri, M. (1375 H.Q.) at 294 and various references the late Ansāri cites there; Imāmi, S. H., (1363 H.S.) vol. 1 at 184-185.

¹⁶⁰ See e. g., Najafi, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 37, 163-164; Khurāsāni, M. K., (1406 H. Q.) at 258; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 445. See also, Arts. 449 and 451 of I.C.C.

¹⁶¹ However, as will be seen below, where the buyer learns of the breach and his right to terminate the contract he has to exercise his right promptly, otherwise he will lose his right.

¹⁶² See e.g., Helli, A. M. (Fakhr al- Muhaqqeqin), vol. 1 at 484; Helli, M. M. (Allāmah Helli), vol. 1 at 522; Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 567, 659 (in this reference Āmeli, citing a considerable number of sources on this view, observed that this view is a well-accepted view among *Shi'ah* jurists); Bahrāni, Y. vol. 19 at 117; Karaki, A. (Muhaqqeq Thāni) vol. 2 at 269); Najafi, M. H., (1981) vol. 30 at 344.

a notice. It may, therefore, be written or oral, and, may be transmitted by any means whatsoever.

This view may result in an unreasonable effect. It may be the case when taking into account the fact that the jurists do not require the aggrieved buyer to notify the seller of the lack of conformity. In such a case, it is quite possible that the contract is terminated even before the seller learns of the buyer's alleged entitlement to terminate. Such a result may be harsh for him when he is faced with the return of defective goods without any readiness to take back them, since the costs and risks of re-disposal of the goods fall on the seller together with losses resulting from a decline in the market price, which under the contract would normally fall on the buyer. This is perhaps the reason why the late Imām Khumayni was forced to depart from this common view and tacitly accept that as long as termination is not properly communicated to the party in breach it will not be effective.¹⁶³

However, according to the suggestion made in this study, the buyer in practice will notify the seller of the lack of conformity. This is because his entitlement to terminate the contract should be assessed by taking into account the seller's ability and willingness to cure. Accordingly, the buyer will not be able to terminate the contract quickly to block the seller's right to cure.

3.3.2.3. Application for the Court's Judgment

Under *Shi'ah* law, the party who wishes to exercise his right to terminate the contract is not under any duty to apply for a court's decree.¹⁶⁴ However, he may be forced to resort to the court in order to enforce the effects of termination. The party in breach may not accept the terminating party's entitlement to terminate and, in contrast, may regard him as guilty of unlawful termination. In such a case, the buyer is required to satisfy the court that he was entitled to do so and that he has properly exercised his right. In deciding the case, the court in fact declares the buyer's lawful termination. Consequently, his termination would be effective from the time the buyer's declaration. Where he fails to satisfy the court he will himself be guilty of breach of contract and obliged to perform his obligations under the contract.

¹⁶³ See Khumayni, S. R. M., vol. 4 at 21.

¹⁶⁴ It seems that this is a well-settled view in *Shi'ah* jurisprudence. In this respect, the distinguished *Shi'ah* jurist, Allāmah Helli observes: "Termination to be effective does not depend on the court's decision." (see Helli, A. M. (Fakhr al- Muhaqqiqin vol. 1 at 484). See also, Helli, M. M. (Allāmah Helli), vol. 1 at 522; Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 567 and 659; Māmāqāni, A., (1345 H. Q.) at 196. There is no clear provision in I.C.C. which requires a buyer who seeks to exercise his right to terminate to resort to the court. But in a case by the court in 1337 [1954] it is held that a buyer who wishes to exercise his right to terminate the contract is not required to apply for a court's judgment (as cited in Kātūziān, N., (1990) vol. 5 at 71, fn. 1).

3.3.3. Election of Affirmation

As already pointed out, when a breach giving rise to the right to terminate is committed by the seller, the buyer does not have to terminate the contract but can waive his right to terminate and instead affirm the contract. He may expressly affirm the contract. Affirmation of contract by this way is called *isqāt-e-šarih* (express waiver).¹⁶⁵ There are also circumstances in which he may be deemed as to have affirmed the contract. Affirmation in this way is called *isqāt-e-ḍemni* (implied waiver).¹⁶⁶

Where the buyer expressly affirms or is regarded as having affirmed the contract he will lose his right to terminate the contract. The reason is clear. The option to terminate is given to the buyer to protect himself against the seller's breach. Where it becomes clear that he has declared, whether by express words or conduct or by operation of the law, that he has accepted the continuance of the contract he must be bound to the consequence of his action. In the terminology of *Shi'ah* jurisprudence, loss of the right to terminate is justified on the principle of *iqdām* (action against himself). Under this principle, any person who is given a right will lose his right where he himself, knowing of the right, acts to his detriment. The loss of the option can also be explained on the basis that the major ground of the options, as already explained¹⁶⁷, is the principle of *lā ḍarar*. This principle comes into operation in favour of the buyer where he has not consented to the detrimental contract. But if he himself declares his consent to the non-conforming delivery or the law presumes so the principle will not come into operation.¹⁶⁸

3.3.3.1. *Isqāt-e-Šarih*

Express waiver of the right to terminate the contract does not cause too much difficulty. The buyer may be regarded as having expressly abandoned his right where he expressly intimates to the seller that he will not reject the non-conforming goods. However, it should be emphasized that this does not mean that "express waiver" can only be made by words: it would be sufficient if he does some positive act by which he indicates that he intends to waive his right to terminate the contract.¹⁶⁹ For example, where in the case of a documentary sale, the buyer, knowing the non-conformity of the seller's delivery with the contract, accepts and pays for the documents, it can be said that he shows his intention to abandon his rights to reject the

¹⁶⁵ See generally, Ansāri, M. (1375 H.Q.) at 251, 253; Khumayni, S. R. M., vol. 5 at 19-23.

¹⁶⁶ See generally, Ansāri, M. (1375 H.Q.) at 251, 254-5; Khumayni, S. R. M., vol. 5 at 23 and *seq.*

¹⁶⁷ See, 3.2.2.

¹⁶⁸ See e. g., Ansāri, M. (1375 H.Q.) at 239 (with respect to the loss of the option of lesion).

¹⁶⁹ Yazdi, S. M. K., (1378 H.Q) vol. 2 at 71; Khumayni, S. R. M., vol. 5 at 19, 24-25. It is worth noting that where the relinquish is expressed by the words it is called "*isqāt quli*", while if it is expressed by the conducts it is called "*isqāt fe'li*".

non-conforming documents and non-conforming goods as far as defects apparent on the face of the documents are concerned. It may also be said that the buyer has expressly waived his right to terminate the contract for non-conformity of the goods delivered where he, actually knowing of the lack of conformity, takes the seller's delivery note and signs it.

It is worth noting that express *isqāt* is not confined to cases where the buyer learns of the non-conformity and his right to terminate the contract. He may also do so before he learns of the fact. This is the position where after the seller's delivery he intimates to the seller that he will not reject the goods even though they do not conform with the contract.¹⁷⁰ However, it is suggested that the buyer's intimation must be such that it clearly shows his intention to waive his prospective right to terminate.

On the basis of this construction, where the buyer learns that the seller's delivery does not conform with the contract terms the buyer may expressly ignore his right to terminate and accept the non-conforming delivery. In this regard, he may totally waive all rights resulting from the non-conformity or he may simply ignore his right of termination. It is therefore the court's duty to decide in any case whether the buyer has waived the breach or merely his right to reject the non-conforming delivery and terminate the contract.

3.3.3.2. *Isqāt-e-Āemni*

In some cases, notwithstanding that the buyer has not expressly waived his right to terminate, he may be deemed to have ignored his right and affirmed the contract. The fact that in some cases the buyer may be deemed to have affirmed the contract is not controversial. The major problem arises in determining which circumstances in effect constitute an implied affirmation, in the sense that the buyer is regarded to have affirmed the contract.

In *Shi'ah* jurisprudence, the circumstances in which the buyer may have been treated as having impliedly affirmed the contract are discussed under the headings of *tasarruf* (literally, any act as to the goods delivered) and *ta'khir* (delay) in exercising the right to terminate. As far as the buyer's right to reject the non-conforming goods and terminate the contract is concerned, the jurists have examined under the two headings various cases where a buyer may be deemed to have affirmed the contract. In some cases there is no doubt that the buyer will be regarded as having impliedly affirmed the contract, but others are controversial. However, no jurist has addressed the circumstances in which an international buyer may be taken to have

¹⁷⁰ Ansāri, M. (1375 H. Q.) at 251 (the option of inspection) and 253 (the option of defect); Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 72, 105. The buyer may also lose his right to terminate the contract for the seller's non-conforming delivery where he relinquishes from his right to reject non-conforming goods at the time of conclusion of the contract. See in this respect, Ansāri, M. (1375 H. Q.) at 251; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 60; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 595; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 74; Khumayni, S. R. M., vol. 4 at 435; Tabrizi, J., (1412 H. Q.) at 266; and Art. 448 of the I. C. C.

lost his right to reject non-conforming documents and goods. In the following, examining some significant cases in which a buyer may be deemed to have accepted the contract, an attempt will be made to show how loss of the right to reject non-conforming documents could be analyzed in this system.

(A) *Tasarruf*

(I) *Concept and Terminology*

The expression "*tasarruf*" refers to any act on the part of the buyer over the goods delivered by the seller. *Shi'ah* jurists suggest that the buyer may be taken to have consented to the non-conforming delivery by the method of *tasarruf* in three classes of case: use of the goods, dealing with them and altering them so that it is not possible to return them in the same condition they possessed at the time of delivery.¹⁷¹

The crucial question which arises here is whether any use of the goods delivered will be regarded as an implied affirmation of the contract or if the rule must be restricted to a particular use of them. Will any disposition of, or, dealing with the goods result in loss of the right to terminate the contract? Is there any difference between the case where the buyer knows of the non-conformity and his right to terminate, and the case in which he has no knowledge of the fact? And finally, is there any particular criterion to be relied on in ascertaining what acts should amount to an implied acceptance of the non-conforming delivery?

(II) *Iste'māl (Use) of Goods*

The term "*iste'māl*" is used to refer to any use which does not cause any change in the state of the delivered goods. Any ordinary use or that made in order to prepare them for the purposes for which they have been purchased will be placed into this category. It is commonly said that where the buyer has no knowledge of the non-conformity giving rise to the right to reject and terminate the contract he will not lose his option of termination by mere use of the goods.¹⁷² The reason is clear. Waiver of the right to terminate is a unilateral juristic act (*iqā'*). There will be an effective *iqā'* only where it is unequivocally declared by the party who has such an option. But it is hard to treat a party who does not know of his right to terminate the contract as having thus declared his intention to abandon his right to terminate¹⁷³, since the buyer may

¹⁷¹ See e. g., Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 256; Tabrizi, J., (1412 H. Q.) at 197.

¹⁷² In contrast, a number of jurists are of the view that in the case of the option of defect any use of the goods even before knowledge of the fact will amount to loss of the right to reject. See e. g., Muhaqqeq Tehrāni, M. R., (1414 H.Q.) vol. 23 at 268; Muqniyah, M. J., (1402 H. Q.) vol. 3 at 226.

¹⁷³ Kātūziān, N., (1990) vol. 5 at 131. The existence of the option after such acts can also be justified on the basis of the principle of *Isteshāb*. That is, as long as it does not prove that the buyer has declared his intention to relinquish his right to terminate the pre-existent option is presumed as still standing (see Ansāri, M. (1375 H.Q.) at 239).

have used the goods for different purposes. He may use them for his ordinary purposes or in order to ascertain whether or not the goods delivered conform with the contract or simply for the purpose of preserving them.¹⁷⁴ For this reason it is commonly said that the buyer's use of the goods delivered will be regarded as an implied waiver of the right to terminate if three requirements are met.¹⁷⁵ First, he has used the goods as an owner of the goods does. Second, his conduct has not been for the purpose of examination of the goods so as to ascertain whether or not they are in conformity with the contract conditions. And third, when he uses the goods he has known of the lack of conformity giving rise to an option to terminate on that basis. On this view, as long as the buyer has not actually¹⁷⁶ discovered such a non-conformity he will not be deemed to have affirmed the contract by mere use of the goods.¹⁷⁷

However, in applying the rule some jurists have distinguished between the option of incorrect description and the option of defect. In respect of the first option, it has been suggested that the buyer will lose his right to terminate only where his acts *customarily* indicate his intention to affirm the contract, while with respect to the option of defect *any* use will result in loss of the right.¹⁷⁸

It is suggested that in both cases the buyer should be deemed to have lost his right provided that his acts does clearly indicate his intention to affirm the contract, for, as will be seen below, not every act has this result.¹⁷⁹ For instance, repairing or attempting to repair, or asking the seller to repair them may be regarded as a deemed affirmation, whereas, the same acts will not result in such a result if the buyer is not aware of the lack of conformity giving rise to the right to terminate the contract. It is therefore suggested that the buyer should not be

¹⁷⁴ See e. g., Ansāri, M. (1375 H.Q.) at 226 ("It appears from the wordings of the most jurists that the right to terminate is not lost by the mere use because it is quiet possible that it was for examination or preservation for the seller."). Accordingly, it cannot be said that the buyer has acted in his detriment. The principle of *iqdām* comes into operation where the buyer notwithstanding that he knows that his action would result in his detriment makes such an action (Ansāri, M., *ibid.*, at 239).

¹⁷⁵ See in this respect, Najafī, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 164.

¹⁷⁶ A buyer may be taken to have waived his right to reject the non-conforming delivery where he has discovered the non-conformity. The question arises here is whether it is necessary that defect to be latent on a reasonable person or the criterion is the buyer himself. It is commonly said that the criterion is the buyer not a reasonable person. Accordingly, he will be entitled to terminate for the defect which can be discovered by a simple examination. Art. 424 of I. C. C. apparently accepts this criterion. This would be harsh for the seller if one takes into account that the jurists have not obliged the buyer to examine the goods. It is therefore suggested that the right of the buyer must be confined to cases where he has examined the goods but failed to discover the defect, for where the buyer who knows that the goods *may* be defective, failed to examine them he cannot be protected by the principle of *lā ḍarar*, since he has acted against himself (*qāedah-e-iqdām*).

¹⁷⁷ Ansāri, M. (1375 H.Q.) at 254-255; Tabrizi, J., (1412 H. Q.) vol. 4 at 283-284.

¹⁷⁸ Ansāri, M., (1375 H.Q.) at 254, in which he cites from a great number of jurists that any use amounts to the loss of the right. See also, Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 664 (in which the late Rashti says: "There is no doubt and nobody has disputed that use of the goods delivered after that the user has known of the defect in the goods would result in loss of the right to terminate."); Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 110-111 in which the late Ayatullāh Khūei quotes the view from a number of jurists such as Allāmah Helli.

¹⁷⁹ Ansāri, M. (1375 H.Q.) at 254-255; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 60, 71; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 108; Khumayni, S. R. M., vol. 5 at 29; Tabrizi, J., (1412 H. Q.) at 282-283.

taken as having affirmed the contract if a reasonable man in his position could not have discovered the lack of conformity.

(III) Mua'melah (Dealing) with Goods

In the context of commercial contracts, goods are often purchased for resale. It is quite possible that the buyer resells the goods delivered before he discovers the non-conformity. In particular, in an international sale of goods the buyer may sell the goods to a sub-buyer while they are in transit. He may also do so after he has learned of the non-conformity and his entitlement to reject the non-conforming goods. The crucial question is whether the mere resale of the purchased goods or any other disposition will be regarded as an act indicating his intention to consent to the contract?

It is commonly said that where the buyer is aware of the non-conformity his act in reselling the goods delivered, and other dispositions, do clearly indicate his intention to affirm the contract.¹⁸⁰ The buyer, by his conduct, shows his interest in keeping the contract alive, otherwise he would not have resold or disposed of them to a third party.

Nevertheless, the case becomes somewhat difficult where the buyer has sold or otherwise dealt with them before learning of the non-conformity. Although acts such as dealing with the goods normally indicate an intention to affirm the contract, it seems that a mere dealing with the goods cannot be regarded as a clear indication of the intention to affirm the contract. The buyer should be regarded as having affirmed the contract by such acts where he knew, or could have known, of the breach giving rise to the right. Otherwise, it is hard to say that the buyer has intended to affirm the contract by dealing with the goods, in particular where he resold them when they were in transit with no knowledge of the lack of conformity entitling him to terminate the contract, unless the circumstances of the case and the buyer's behavior show that he would have done so even if he had known of the fact.¹⁸¹

Assuming that the buyer's right to terminate the contract will be lost merely by selling them to a sub-buyer the question arises if, where the sub-buyer learns of the fact and rejects the non-conforming goods, the first buyer will be able to enforce his right to reject. Different answers have been suggested by the jurists.¹⁸² Some of them believe that after the sub-buyer's rejection the original buyer will be entitled to reject the non-conforming goods.¹⁸³ But others are of the view that after the buyer is deemed to have lost his right of termination by selling

¹⁸⁰ See Art. 450 of I. C. C.

¹⁸¹ See, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 73, 107. The same argument has been supported by Ayatullāh Khūei in the case of option of lesion (see, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 6 at 355). See also, Art. 450 of I.C.C.

¹⁸² Khumayni, S. R. M., vol. 5 at 29-30.

¹⁸³ See e.g., Tūsi, M. (Shaykh al- Tāefah), vol. 2 at 131; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 71-72.

the goods to a sub-buyer he will not be able to revive the right lost by his unilateral intention.¹⁸⁴

It seems that one must distinguish between the case in which the loss of the right is justified on the implied affirmation of the contract and that in which the buyer is deprived of his right because of the impossibility of physical return of the goods. If it is accepted that by the resale the buyer has declared his intention to affirm the contract he himself has acted to his detriment (the principle of *iqdām*) and there is no room to return to the previous position. However, if the loss of the right is based on the impossibility of restoration it is quite possible for him to enforce his right to terminate. In fact his right has not been lost but its exercise was prevented by an external factor. As soon as the prevention is removed he will be entitled to exercise his right.¹⁸⁵

(IV) Ta'dhdhur-e-Radd-e-Mabi' (Impossibility of Physical Return of Subject of Sale)

A further circumstances in which a buyer may lose his right to terminate the contract for the seller's non-conforming delivery is where the goods delivered cannot be returned to the seller in the same condition they were in at the time of delivery. The rule is applied whether the buyer knows of the right or not.¹⁸⁶ However, this is an exception to the general principle established above and it is based on a particular *rewāyat* from Imām Šādeq and only applies to the case where the seller of specific goods has delivered defective goods. In that case the Imām, when he was asked about the situation in which the purchaser found some defect in the cloth or cattle after purchase, held that

"If the cloth or cattle were in the same condition as they were in at the time of delivery he would have been entitled to reject them but if the cloth was cut or swung or painted he could have only claim price reduction for the defect."¹⁸⁷

Where the right to terminate is based on other options the general principle already established would apply. Thus the buyer will lose his right to terminate in such a circumstance if it becomes clear that he has declared his intention to affirm the contract. As long as such an intention cannot be inferred from the buyer's conduct and other circumstances the buyer will preserve his right to terminate the contract. On this principle, even where the goods have perished or been destroyed by factors beyond the control of the buyer the right to terminate

¹⁸⁴ See Ansāri, M. (1375 H.Q.) at 255; Tabrizi, J., (1412 H. Q.) at 286.

¹⁸⁵ See also, Kātūziān, N., (1990) vol. 5 at 299. See in contrast, Imāmi, S. H., (1363 H.S.) vol. 1 at 506, 507.

¹⁸⁶ See e. g., Ansāri, M. (1375 H.Q.) at 255; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 610; Khumayni, S. R. M., vol. 5 at 29; Tabrizi, J., (1412 H. Q.) at 284-285. See also Art. 429 of I. C. C.

¹⁸⁷ See Āmeli, H., vol. 12 Bāb 16, p. 363, Hadith 3. The view is also supported by another full authentic (correct) hadith cited from Imām Šādeq (A. S.) (ibid., at 362 hadith 2).

still remains.¹⁸⁸ However, after termination the buyer will be entitled to request the seller to refund the difference between the price of non-conforming and conforming goods.¹⁸⁹

(B) *Ta'khir (Delay) in Exercise of the Right*

The other circumstance in which a buyer may lose his right to terminate the contract is delay in exercising his right after he has learned of the non-conformity giving rise to the right to terminate the contract. This is based on the view that the option to terminate should be exercised *fūran* (promptly). However, the question is controversial amongst the jurists and different views have been offered with respect to any option.

As far as the options of incorrect description and defect are concerned, the jurists distinguish between these two opposite options. In the first case, most jurists suggest that the option must be exercised promptly. Any unjustified delay would result in loss of the right.¹⁹⁰ It is worth mentioning that on this view, "prompt" is a customary concept. Accordingly, it will differ from case to case, depending on the circumstances of the case and the state of the buyer. In general, the buyer will lose his right to terminate if he fails to exercise his right within such period of time as he is able to do so according to the relevant custom.¹⁹¹ In contrast, in the second case, most of them believe that mere delay in exercising the right will not result in the loss of the right, unless the delay is such as to indicate his intention to affirm the contract.¹⁹²

The different views are, it seems, based on the grounds on which the option to terminate is justified. According to the view which justifies the option to terminate on particular authorities, the option should not be lost by mere delay, for the authorities reflecting the option give an absolute right to the aggrieved party without restricting his right to a particular time or period of time. Accordingly, as long as the buyer's delay in exercising his right does not show his consent to the contract he will be entitled to enforce his right of termination. The same is true if they are based on the doctrine of *shart-e-ḍemni*. But if it is accepted that the options of inspection and defect are based on the principle of *lā ḍarar* the consequence will be different.

¹⁸⁸ In this respect, see Ansāri, M. (1375 H.Q.) at 302. In contrast see, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 73 (with respect to the option of inspection) 109 and 113 (in general).

¹⁸⁹ See e. g., Ansāri, M. (1375 H.Q.) at 255; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 108.

¹⁹⁰ See e.g., Narāqi, A., vol. 2 at 388; Bahrāni, Y., vol. 19 at 59; Fayz Kāshāni, M., (1401 H.Q.) vol. 3 at 72; Ansāri, M. (1375 H.Q.) at 250; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 593; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 72; Khumayni, S. R. M., vol. 4 at 433. See also Art. 415 of I. C. C. See in contrast, Tabrizi, J., (1412 H. Q.) at 263.

¹⁹¹ Najafi, M. H., (1981) vol. 23 at 95; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 72; Kātūziān, N., (1990) vol. 5 at 73.

¹⁹² See e.g., Āmeli, Z. (Shahid Thāni), vol. 1 at 196; Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 659 (and different sources cited there); Bahrāni, Y., vol. 29 at 104, 117. Shaykh Yūsef Bahrāni and Abdullāh Māmāqāni maintain that most of *Shi'ah* jurists have accepted this view (Māmāqāni, A., (1345 H. Q.) at 119). However, there are a considerable number of the jurists who are of the view that the option of defect is to be exercised promptly. See in this respect, Ansāri, M. (1375 H.Q.) at 254 and different references he cites there and p. 262. I. C. C. in Art. 435 follows the latter view.

Under this view, the principle comes into operation in favour of an aggrieved buyer to protect himself against losses imposed on him as a result of the seller's non-conforming delivery. According to this view, the principle gives the buyer a reasonable opportunity to decide and declare his intention. Any failure to do this while he is able to discharge himself from the detrimental contract will be at his risk.¹⁹³

It seems that the buyer's right to terminate the contract for seller's non-conforming delivery should be exercised promptly, since, as already explained¹⁹⁴, the main reason for giving the buyer a right to terminate is the principle of *lā ḍarar*. For this purpose, he should be given only an adequate opportunity which enables him to benefit from this legal protection within that period. In addition, where the buyer, knowing of his right and being able to exercise, does not exercise it he will be regarded as having acted to his detriment (the principle of *iqdām*). Moreover, giving an indefinite right to the buyer would be harsh for the seller if one takes into account the fact that under *Shi'ah* law the buyer is not under any duty to inform the seller of the lack of conformity of the goods delivered.

(C) Position of the Non-Conforming Documents

One of the most important purposes of a commercial buyer is to have access to the goods for resale. An international buyer may wish to resell the purchased goods before they arrive at his destination. This is easily possible when the contract is made in the form of documentary sale. Under such a contract the buyer possesses documents representing the nature, quality, quantity and other specifications of the purchased goods. The documents enable the buyer who wishes to resell or obtain credit required for his future commercial activities to deal with them without having to wait for actual delivery. The crucial question which arises here is whether merely dealing with the documents will result in the loss of the right to reject for undisclosed defects, whether they are related to the documents themselves or to the goods. The question has not been addressed by *Shi'ah* jurists at all. Accordingly, it should be answered on the basis of general principles.

As already explained¹⁹⁵, according to general principles of *Shi'ah* contract law, it would not seem any problem if one suggests that under a documentary sale contract the buyer may have two separate rights to reject: a right to reject non-conforming documents and a right to reject non-conforming goods. Where the seller tenders documents which do not conform with the contract the buyer is entitled to reject them and request conforming documents. However,

¹⁹³ See e.g., Ansāri, M. (1375 H.Q.) at 262; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 60.

¹⁹⁴ See, 3.2.2.

¹⁹⁵ See, 2.2.4.3.

if the buyer, knowing of the non-conformity accepts them he should be regarded as having accepted them and will lose his right to reject them on the principle of *iqdām*.

The question which arises here is whether waiver of the right to reject non-conforming documents would result in the loss of the right to reject the goods where they prove non-conforming on arrival. It is suggested that if the non-conformity of the goods with the contract was apparent on the face of the documents he should be deemed to have lost his right to reject the goods. For, to accept documents representing non-conforming goods is a clear instance of conduct which indicates an intention to waive the right to reject. In contrast, if the defect was not apparent on the documents mere acceptance of them should not result in loss of the right to reject the goods.

On the above interpretation, loss of the right to reject non-conforming documents does not necessarily result in loss of the right to reject the non-conforming goods. There may be cases in which the buyer loses, or is taken to have lost, his first right without losing his second right. The question is whether the buyer will lose his right to reject where he has dealt with the documents, by for instance, disposing the documents representing the goods to a third party.

As stated before, it is a well-accepted rule of *Shi'ah* law that the buyer will lose his right only when he has expressly declared his intention to waive his right or when his conduct and other circumstances of the case clearly show that he has such an intention. On this general principle, it is suggested that a buyer who deals with the shipping documents should not be taken to have intended to waive his right to reject unless he was actually, or should have been, aware of the fact and his entitlement to reject. Accordingly, where the buyer learns later of the fact that the documents possessed a wrong date of shipment he should be allowed to reject them. The same is true *a fortiori* as to the buyer's right to reject the goods where it proves that they do not conform with the contract conditions.

3.4. Effects of Termination

As in English law and the Convention, under *Shi'ah* law when election of termination for breach of contract validly takes place, it affects both the contract and relations of the parties from that time.

3.4.1. Effects on Contract

The question of from when termination affects the contract has not caused major discussion between the jurists. With a few exceptions¹⁹⁶, it is commonly said by the jurists that it is a

¹⁹⁶ Makki, M. (Shahid Awwal), vol. 2 at 79, (rule no. 173); Yazdi, S. M. K., (1988) vol. 2 at. 590 (question no. 5).

general rule of *Shi'ah* contract law that termination of the contract by an innocent party for the other party's breach operates from the time of termination rather than the time of contract.¹⁹⁷ However, it seems that it is not an entire picture of the law to say that termination has only prospective effects. Although some support can be found for the view that termination has prospective effect¹⁹⁸, there can be found certain indications of retrospective effects of termination when, for instance, it is said that the purpose of termination is, like the mutual termination (i. e., *iqālah*), to place each party in the position in which he was at the time of making the contract, provided that it does not affect the rights of the third parties.¹⁹⁹ Or the point that by termination both the subject-matter of transaction and the consideration for it are automatically restored to the party who was the owner before the contract was made.²⁰⁰ Such an effect seems to treat termination as retrospective rather than prospective. It can therefore be said that as far as such an effect is concerned, the contract is terminated *ab initio*.

3.4.2. Effects on Rights and Obligations

Generally, a valid termination of the contract releases not only the victim of breach but also the party in breach from their contractual obligations to perform in the future.²⁰¹ However, no jurist has examined the question what effects will termination have on the injured party's right to claim damages. This is a question which has to be examined in the third section of this chapter. For now it suffices to say that the defaulting seller is not totally discharged from any liability, but may be liable to pay damages according to general principles. This liability may relate both to breaches committed before termination and to losses suffered by the buyer as a result of the seller's refusal to perform his future obligations. The contract will survive termination and in awarding the buyer damages for the seller's breach, the court should assess the buyer's legitimate expectations by reference to the terms of the contract.

¹⁹⁷ For instance, Allāmah Helli says: "Termination dissolves the contract from the time when the aggrieved party exercises his right to terminate not from the time of making the contract, since when the contract is validly concluded it affects the relationship of the parties and its actual effects cannot be restored. The same is true as to termination." (Helli, M. M. (Allāmah Helli), vol. 1 at 531).

¹⁹⁸ Reference can be made to that when the contract is validly terminated future contractual obligations of the contracting parties are discharged. Although no jurist has expressly referred to this effect, this can be clearly inferred where the jurists say termination does simply dissolve the contract rather than annul it. For instance, the late Allāmah Helli says: "Termination dissolves the contract", (Helli, M. M. (Allāmah Helli), vol. 1 at 531).

¹⁹⁹ See also, Kātūziān, N., (1990) vol. 5 at 81.

²⁰⁰ See e.g., Ansāri, M. (1375 H.Q.) at 303; Khumayni, S. R. M., vol. 5 at 258, 329; Tabrizi, J., (1412 H. Q.) at 539. See also, I.C.C., Arts. 287, 288.

²⁰¹ It is to be noted that the jurists have not expressly referred to such a consequence for termination. However, it is easily inferable from the statements made in definition of termination. See e.g., Khurāsāni, M. K., (1406 H. Q.) at 266; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 45; Khumayni, S. R. M., vol. 5 at 258 and *seq.*; Karimi, S. J., and, Āmuli, M. H. (1380 H.Q.) vol. 4 at 23..

4.0. Summary and Conclusions

In light of what has been discussed in this section, it has been made clear that under *Shi'ah* law a buyer who is aggrieved by the seller's non-conforming performance has a distinct right to withhold performance in the case of non-delivery. Although the question is not clearly analysed by the jurists, it was suggested that the right to reject non-conforming goods should be seen as an instance of the general right to withhold performance on account of the theory of "mutuality" of obligations which exists between the seller's duty to deliver goods in accordance with the contract terms and the buyer's duty to accept (not reject) them. It is only on this interpretation that the buyer's right to reject the non-conforming goods can be justified.

Similarly, despite the jurists' failure to address the question, it has been demonstrated that the buyer may be entitled to reject documents under a documentary sale contract. It was also suggested that under such a contract the buyer should be given two separate rights: to reject non-conforming documents and non-conforming goods and in some cases he may be entitled to benefit from one after he has lost the other.

It has also been shown that the jurists have not expressly ascertained what degree of non-conformity will entitle the buyer to refuse to accept the seller's non-conforming delivery. It was, nevertheless, suggested that the buyer should be given such a right only when the lack of conformity attains a sufficient degree of seriousness. It was also suggested that the buyer's right to refuse to accept the seller's non-conforming delivery should be distinguished from his right to treat himself as discharged from the contract and terminate it. Termination is an exception to the principle of *ufū bel u'qūd* and should be justified on the principle of *lā ḍarar*, whereas rejection is a form of withholding performance which is based on the principle of *correlation of obligations*. In any case where the lack of conformity is not customarily ignored the buyer would be entitled to refuse to accept the seller's performance.

Likewise, it was seen that the buyer's right to reject the non-conforming and accept the conforming part where the seller has made a partially non-conforming delivery is not quite clear in *Shi'ah* jurisprudence. However, it was suggested that a distinction should be made between severable and non-severable contracts. In the first case, the buyer should be given a right to reject non-conforming and accept conforming part under certain circumstances, but in the second case he should be given a single right, either to reject all or to accept all. Similarly, it was seen that in the case of wrong quantity delivery the buyer is in principle given a right to refuse to accept.

It was also seen that *Shi'ah* jurists examine termination on the basis of a complex system of *kheyārāt* (options). It was shown that dealing with termination in this way causes a

number of important questions to be left unanswered. It was therefore suggested that the best way is first to analyze the grounds upon which the jurists have occasionally justified the grant of *kheyār* (the right to terminate) and then to examine the options relevant to the issue in question on the basis of their proper rationale and finally to evaluate the relevant options in accordance with their proper grounds. In this way, it was first shown that the jurists are not unanimous on the rationale on which the option to terminate should be based. Some suggest that it should be based on the mutual intention of the parties, while others suggest that it would be better to base it on the principle of *lā ḍarar*. However, it was suggested that the option to terminate is primarily to be based on the principle of *lā ḍarar*. Under this principle, not every non-conformity gives rise to the right to terminate. Non-conformity must attain a degree of seriousness which renders the contract harmful unless on a proper construction of the contract it is proved that the contracting parties have agreed that any non-conformity will give rise to a right of termination. For this purpose, the court should take into account various factors, such as the nature of the breach, the actual and foreseeable *ḍarars*, the seller's ability and willingness to cure and the practicality of requiring the seller to perform his obligations. Likewise, the results should be sufficiently serious as to bring the case within the principle of *lā ḍarar*, provided that they were actually, or could have been, foreseeable by the seller at the time of contract in the light of information available to him. On the basis of this construction, where the contract is treated as harmful for the buyer because of the seller's violation the principle of *lā ḍarar* comes into operation. By application of this principle the initial decree of *luzūm* (non-terminable) of the contract is removed and it will be replaced by a secondary decree of *jawāz* (terminable).

Similarly, it was shown that although the jurists have not expressly examined the seller's right to cure, it in principle accords with their arguments that the buyer has no right to terminate for mere non-conforming delivery. However, the position of the seller's right to cure where the contract is for sale of specific goods is not clear. It was suggested, however, that giving the seller a right to cure by way of repair under certain circumstances prescribed above is consistent with the rationale upon which the right to terminate is based.

It was also seen that the jurists have not properly examined termination of severable contracts and a number of important questions are here left unanswered. However, it was suggested where the contract is construed as non-severable, the rules described above should be applied. But if the contract is construed as severable a distinction between partial termination and termination of the contract as a whole should be made. Partial termination should be allowed where the required conditions of termination, as described above, are met in

respect of a severable part. But the buyer should be allowed to terminate such contracts as a whole only where the seller's non-conforming delivery in respect of one or more instalments is such that the buyer can reasonably conclude that the contract would be harmful for him.

It was also shown that the jurists have not made clear whether the buyer should be given a right of partial termination where the seller has only delivered part of the contract goods. Moreover, it is not clear what shortfall or excess will give rise to the right to terminate the contract in its entirety or in respect of the missing part. It was, however, suggested that the buyer's right should be subject to some restriction. Where he wishes to terminate the contract in its entirety the missing part should be such that its absence makes the contract harmful for the buyer. But where he wishes only to terminate the contract as to the missing part he can do so if the missing part is not so slight that it would be customarily unreasonable for him to do so. This should be assessed in light of the seller's ability and readiness to make a fresh tender or to deliver the contract quantity within the contract time.

We also saw that the position of the buyer's right to terminate where the seller has delivered the contract goods beyond the contract time for performance is not quite clear in the current *Shi'ah* law. However, it was suggested that the buyer's right to terminate the contract for the seller's late delivery should in principle be based on the serious consequences of delay (the principle of *lā ḍarar*), unless it is inferred from the circumstances of the case that the buyer's right to terminate for performance beyond a the fixed time was impliedly agreed upon at the time of the contract.. The same is true where the contract has not fixed a particular date or period of time for performance.

The proceeding discussions also made clear that the option to terminate is in the hand of the victim of breach. Termination would be effective where it is properly announced. No particular form of declaration and communication is required. It may be oral, written or any other form. However, it should be such as unequivocally to show the buyer's intention to terminate the contract. The buyer does not need to apply to the court for termination. The buyer is also not required to terminate the contract. He may accept the non-conforming performance and claim for damages and demand that the seller cure the lack of conformity as described in the following sections. Under certain circumstances, he may also be deemed as have affirmed the contract. This may be the case where he has used, consumed, altered or dealt with, the purchased goods or delayed to exercise his right promptly, provided that he was, or ought to have been, aware of the lack of conformity giving rise to the right to reject and terminate.

Section Two. Specific performance

1.0. Introduction

The third remedy available for the buyer under this legal system is to require the defaulting seller to perform his obligations in accordance with the contract. Notwithstanding that it is commonly said that the primary remedy in this legal system is to require the defaulting party to perform the contract,²⁰² *Shi'ah* jurists have failed to discuss this remedy in detail. Much emphasis has been placed instead on the circumstances where the contract can be terminated by one of the parties. In the absence of a precise and detailed discussion in respect of this remedy a number of principal questions arise. (i) Is requiring performance a general remedy applicable in all cases of failure to perform contractual obligations? (ii) What rationale justifies requiring performance as a remedy? (iii) Is the aggrieved buyer entitled to require the seller to make substitute delivery or repair the defects in the case of defective delivery? (iv) In this connection, is there any difference between sales of specific and unascertained goods? (v) And finally, is there any restriction on the exercise of the remedy of requiring performance? What follows is an attempt to clarify the position of *Shi'ah* law in respect of the remedy of specific performance, in general, and to determine the circumstances in which the buyer may be entitled to demand that the seller cure his defective performance.

2.0. Specific performance as a General Remedy

It is a well-settled view amongst *Shi'ah* jurists that the defaulting seller can be required to perform his obligations in accordance with the contract.²⁰³ The only difference between the jurists is that some hold that the seller's mere refusal to perform gives the buyer an option either to keep the contract alive and require him to perform his contractual obligations or to terminate the contract, whereas others suggest that his primary remedy in such circumstances is to require the seller specifically to perform and that he will be entitled to terminate the

²⁰² See generally, Narāqi, A., (1408) at 44; Najafi, M. H., (1981) vol. 23 at 145 and 210; Najafi, M. H., (1981) vol. 24 at 339; Ansāri, M. (1375 H.Q.) at 284-285 and 312; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 542; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 158-159 and 199; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 125 and *seq.*, in particular, 128; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 131 and *seq.*; Irvāni, A., (1379 H.Q) vol. 2 at 67; Bujnūrī, M. H., (1389 H.Q) vol. 3 at 268; Tūhīdī, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 366 and *seq.* and 592-593; Khumayni, S. R. M., vol. 5 at 220 and 372; Tabrizi, J., (1412 H. Q.) at 435 and *seq.*

²⁰³ See the references mentioned above. See also, Sayūri, J. M. (Fādel Meqdād), (1343 H.S.) vol. 1 at 71; Ardabili, A. (Muqaddas Ardabili), at 462; Bujnūrī, M. H., (1389 H.Q) vol. 3 at 367 (in which he observes: "No jurist has denied the necessity of fulfilling "*shart*" in terms of religious duty."). In Iranian Civil Code see: Arts. 237, 376 and 395.

contract for the seller's refusal where he cannot receive what he bargained for by the remedy of requiring performance.²⁰⁴

Similarly, a close consideration of the jurists' arguments in favour of the remedy shows that it has a wide scope and may be invoked in a wide variety of circumstances. Generally, a buyer may be entitled to invoke the remedy where the seller fails to procure, produce or deliver the purchased goods or part of them (*emtenā' an al-taslim*) or fails to perform an obligation to do a positive act such as delivery of goods at a particular port or on a date provided by the contract, or prepare and hand over the shipping documents, and, all other acts he may undertake to do or refrain to do under the contract (*emtenā' an al-wafā' bi al-shart-e-fe'l*).

The fundamental reason for this general rule is the Quranic verse "*ufū bel u'qūd*"²⁰⁵ which orders Muslims to fulfil their contracts and a number of *rewāyāt* from the Prophet of Islam Hazrat Muhammad²⁰⁶ and Imām Ali and other *Shi'ah* Imāms to the effect that contractual obligations must be respected unless performance amounts to violation of the Islamic code of conduct (i.e., it is a sin in Islam) or is otherwise against the law.²⁰⁷

Nevertheless, the question which remains unanswered is whether the Islamic court should be obliged to interfere in favour of an aggrieved buyer by ordering the defaulting seller to perform his own part of the contract? If so, to what extent should the court be required to accept the buyer's application for requiring performance?

3.0. Reasons Justifying the Court's Intervention

The question whether the court should be required to give effect to the buyer's application for specific performance and if so, upon what rationale such a rule can be justified, has not been clearly examined by the jurists. However, some statements can be found in jurisprudential text books which may help one to identify the reasons justifying the rule. Two opposing approaches can be identified. The first supports giving the court wide power to interfere in favour of the aggrieved party by requiring the defaulting party to perform his contractual

²⁰⁴ In this respect see, Section One, 3.2.3.4.

²⁰⁵ The Holy Quran, chapter 5 (Māe'dah), verse 1: "O ye who believe, perform all covenants".

²⁰⁶ In a famous statement the Prophet of Islam said: "All Muslims are obliged to perform their contractual obligations". See Āmeli, H., vol. 15, bāb 20 at 30, hadith 4. The statement has been applied by *Shi'ah* Imāms in various cases, see for instance, Āmeli, H., vol. 12, bāb 6, at 353, ahādith 1 and 2; vol. 16, bāb 4, at 102, hadith 3 and at 103 hadith 5.

²⁰⁷ The relevant *rewāyāt* are cited in: Āmeli, H., vol. 12, bāb 6, at 353, hadith 5; Āmeli, H., vol. 14, bāb 32, at 478, hadith 9; Āmeli, H., vol. 15, bāb 40, at 50, hadith 4. See generally, Ansāri, M. (1375 H.Q.) at 214-215; Khurāsāni, M. K., (1406 H. Q.) at 144-145; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 4 and *seq.*; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 3-4; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 4 and *seq.*; Irvāni, A., (1379 H.Q) vol. 2 at 2 and *seq.*; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 8 and *seq.*; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 6 at 15 and *seq.*; Khumayni, S. R. M., vol. 4 at 13 and *seq.*; Tabrizi, J., (1412 H. Q.) vol. 4 at 18 and *seq.*

obligations and the second favours an approach which minimises the court's power to intervene in contractual relationships of the contracting parties.

(a) First Approach

The first approach is justified on the basis of that as soon as a reciprocal contract is concluded the Islamic law-maker obliges the parties to fulfil their contractual obligations, if his conditions for validity of the contract are met.²⁰⁸ No party to a contract is allowed to evade his contract, otherwise he will be acting contrary to the Islamic law (*taklif share 'i*). Accordingly, they argue that the Muslim community should not allow violation of the sanctity of contract, and the Islamic judge must thus force the party in breach to perform.²⁰⁹ Although this argument has been raised in the case of breach of *shart-e-fe'l*, it is a general argument applicable to all cases in which a contracting party is under an obligation to do some act in favour of the other party under a binding contract.²¹⁰

(b) Second Approach

In spite of strong support for the first approach on the part of a considerable number of jurists,²¹¹ it has been criticised by some.²¹² According to them, private contracts are the source of personal rights. Breach of these contracts is a violation of personal rights of the party in whose favour the obligation is undertaken.²¹³ It does not involve any of the duties owed by a man to God. Accordingly, there is no reason to justify the court's intervention. An aggrieved party, according to this approach, is left to the remedy of termination. However, the remedy of requiring performance is available in circumstances where breach of contract amounts to violation of not only the personal rights of the promisee but also the rights of the community, or obligations owed to God.²¹⁴ If a breach of contractual obligations of such a nature is

²⁰⁸ This group of jurists, in justifying their view, invoke on the famous Quranic verse, i.e., "*Ufū bel u 'qūd*" and various rewāyāt cited from the Prophet of Islam and the Imāms of *Shi'ah* to which it has been referred in previous footnotes. See generally, Ansāri, M. (1375 H.Q.) at 283-284;

²⁰⁹ Under this argument, the judge's intervention is, in fact, justified on the ground of his duty to protect the Islamic instructions (i.e., *a'mre be al- ma'rūf wa nahy an al- munkar*). Although this argument is not expressly supported by the jurists, it has been raised by them as a possible argument in favour of this approach (see e.g., Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 126; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 156, 158; Irvāni, A., (1379 H.Q.) vol. 2 at 67).

²¹⁰ The general nature of the rule can be supported by the fact that the advocates of this view do not make any distinction between the breach of *shart-e-fe'l* and repudiation of the contract as a whole. See in this respect, Ansāri, M. (1375 H.Q.) at 283 and 285; Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 132.

²¹¹ Āmeli, Z. (Shahid Thāni), vol. 1 at, 191; Karaki, A. (Muhaqqeq Thāni), vol. 1 at 262; Narāqi, A., (1408) at 44; Najafī, M. H., (1981) vol. 23 at 219; Ansāri, M. (1375 H.Q.) at 285; Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 132.

²¹² See e.g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 385-386; Tabātabāei, S. A., (1404 H.Q.) vol. 1 at 536; Ansāri, M. (1375 H.Q.) at 284 (citing from a number of eminent jurists); Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 132).

²¹³ See e.g., the statement of Allāmeḥ Helli in: Helli, M. M. (Allāmah Helli), *Mabath al- Shurūt*, at 180 in which he expressly says if the undertaking party fails to perform the judge cannot force him to perform.

²¹⁴ See the statement of al- Saymuri in: *Ghāyat al- Marām*, as cited in: Ansāri, M. (1375 H.Q.) at 284. It is worth noting that according to this approach the mere refusal to perform a contractual obligation enables the

committed an Islamic judge would be obliged to prohibit any breach of such a contract because this type of breach is more than a simple violation of the rights of a contracting party.²¹⁵ Although this approach has been taken by some jurists in the case of breach of *shart-e-fe'l*, it is, as the late Nāeini, observed²¹⁶, a general argument applicable to all contractual obligations under private contracts.

(c) Suggested Approach

It is hard to accept the argument that the authorities such as the Quranic verse *ufū bel u'qūd* and the rewāyāt such as *al-Mu'menūn enda shurūtehem* are intended to impose on the parties to private contracts, in particular, to commercial contracts, a purely religious duty (*taklif share'i mahd*) to fulfil the contract, breach of which will amount to breach of a religious decree so that the party in breach will be regarded as guilty of violation of a duty owed by a man to God. Likewise, the second approach is unacceptable in its entirety, since termination is not always an adequate remedy. It is a not infrequent circumstance that the seller is a unique supplier, or is the only supplier able to procure and deliver the goods within the required time. The buyer sometimes requires the purchased goods for his business activities and is not able to procure them within the required time from another source. Accordingly, leaving the buyer to his remedy to terminate will sometimes cause him unreasonable harm.

It seems that the language of authorities such as the Quranic verse and rewāyāt already referred to is nothing but to confirm that contractual expectations must be respected if the contract is concluded according to the Islamic law-maker's requirements. By this recognition, the Islamic law-maker does in fact accept a validly concluded contract as a source of personal rights which entitles each party to demand that the other give effect to what he has undertaken.²¹⁷ It also follows that where one of the contracting parties has not received what he was entitled to obtain under the contract he should be compensated adequately. Accordingly, breach of contract will not always amount to violation of Islamic law in the strict sense that obliges the Islamic judge to interfere in order to protect the Islamic faith against violation. But since all contractual rights have been recognised by the Islamic law-maker, any breach of contract will result in violation of Islamic law in the sense of the necessity of respecting the contractual expectations. Hence, the court's interference is in order to protect a party who is aggrieved by the other party's violation.

buyer either to terminate the contract or to keep the contract alive and claim *arsh* for non-performance of the contractual obligation (see the statement of al-Saymury in *Ghāyat al-Marām*, as cited in: Ansāri, M. (1375 H.Q.) at 285; Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 131).

²¹⁵ See in this respect, Amin, S. H., (1984) at 29.

²¹⁶ Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 132.

²¹⁷ The late Irvāni, confirming such a reading of these authorities, observes that the language of them is simply to recognise the contracting parties' contractual rights (see, Irvāni, A., (1379 H.Q.) vol. 2 at 66 and 67).

On this interpretation, requiring performance will be one of the ways to compensate the aggrieved party but not the only way. It is left to the aggrieved party to elect his proper remedy. However, the buyer's option to elect between remedies is subject to the principle of *lā ḍarar*. Under this principle, as will be explained in detail in the next section²¹⁸, no detrimental religious rule is passed by the Islamic law-maker. Accordingly, if requiring performance will cause the party in breach loss greater than that inflicted on the victim of breach it will be a detrimental decree which is unenforceable under this principle. The Islamic order to respect contractual obligations does not mean that they must be performed under any circumstance but that contractual rights must be respected and a proper remedy should follow any breach. However, exercise of any particular remedy is subject to the restriction that it does not violate the cardinal principle of *lā ḍarar*.²¹⁹

One of the natural consequence of the suggested approach is that the aggrieved buyer's right to demand specific performance is not an absolute right but is subject to the rights and interests of the seller in breach. Accordingly, if insisting on specific performance is unreasonable in the sense that it inflicts a greater loss on the seller in breach than the loss suffered by the buyer for non-performance, the cardinal principle of *lā ḍarar* comes into operation in favour of the seller in breach and, consequently, the buyer is left to other remedies. Accordingly, it seems to the writer that the remedy of specific performance has, in general, no priority over the remedy of termination but it is one of the remedies available for an aggrieved party. It may be resorted to in any case in which it does not cause the breaching party an unreasonable loss or inconvenience.

(d) Different Consequences of Three Approaches

Although no jurist has addressed, adoption of any one of the above-mentioned approaches produces different consequences. According to the first approach, in any case in which the seller fails to fulfil one of his contractual obligations the court has to give effect to the buyer's application for specific performance. The court has no power to refuse to accept the buyer's application and request him to terminate the contract and accept damages in lieu. An order requiring the seller to supply and deliver the subject of sale will be granted, so long as the compulsion of the seller to perform is possible. No matter whether or not the costs exceed

²¹⁸ See: Section Three, 2.2.3.

²¹⁹ It is interesting to note that the same jurists who give priority to the remedy of requiring performance, relying on the principle of *lā ḍarar*, argue that as long as an aggrieved party is able to require the defaulting party to perform, he can be adequately compensated in this way. Consequently, there is no reason to justify his option to terminate the contract for non-performance (see e.g., Ansāri, M. (1375 H.Q.) at 285; Khurāsāni, M. K., (1406 H. Q.) at 246). The question is that if the principle of *lā ḍarar* can come into operation in favour of the injured party it will also operate in favour of the defaulting party, where requiring him to perform the contract would put him into a bad situation and impose on him unreasonable loss and inconvenience.

considerably the contract price, or the buyer is able easily to obtain the goods from another source. Under this view, the court, in fact, protects Islamic laws against the seller's violation and thus is not allowed to ignore the infringement of Islamic instructions merely because of the increase of expense of supply of the goods.

In contrast, according to the second approach, the court is not given any power to interfere. The buyer is left to his remedy of termination. The only case in which he can apply for the court's aid is where the property in the purchased goods has passed to him. In such a situation, he can apply to the court for an order requiring the refusing seller to deliver the goods. However, the court's intervention is not justified on the basis of the buyer's right to require specific performance, but it is justified on account of *ghasb*; the seller is obliged to deliver the property to its real owner.

According to the present writer's suggested view, the court is bound to interfere in favour of the personal rights of a buyer who is aggrieved by the seller's violation. However, its interference is subject to the principle of *lā ḍarar*. The court will give effect to the buyer's application for specific performance provided that it does not inflict on the seller loss greater than that the buyer may sustain for non-performance.

4.0 Right to Demand Cure

Although *Shi'ah* jurists have not discussed the question whether the buyer is entitled to demand that the seller cure his defective performance, close review of what they have stated in justifying the injured party's right to apply for an order requiring performance supports the idea that the buyer may be entitled to such a remedy, whether by way of repair or delivery of replacement goods, because both remedies are particular forms of specific performance. In all cases, the court indeed orders the party in breach to perform specifically what he has undertaken under the contract, that is, to deliver goods conforming with the contract terms.

On this construction, the buyer's right to demand cure in the case of sale of unascertained goods is clear. Almost all jurists suggest that where the seller of unascertained goods fails to deliver conforming goods the buyer has an option to reject them and request the seller to deliver goods conforming with the contract conditions.²²⁰ If the seller refuses to deliver conforming goods the buyer may be entitled to apply to the court for an order requiring the seller to deliver substitute goods. This is because where the buyer has lawfully rejected the non-conforming goods the case becomes one of non-performance in which the buyer may be entitled to require the seller to perform his contractual obligations. Alternatively, the buyer

²²⁰ See e.g., Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 60; Tabrizi, J., (1412 H. Q.) vol. 4 at 419.

should be given the right to accept the non-conforming delivery and require the seller to repair the defects if he wishes. However, the right to demand cure is subject to the general principle of *lā ḍarar*; it must not cause the seller unreasonable expense or unreasonable inconvenience, otherwise the buyer will be left to his right to terminate the contract and/or claim damages.

The buyer may also be entitled to request the seller to deliver substitute goods where the seller delivers the wrong quantity, or where some of the goods are not in accordance with the contract conditions. Accordingly, in a severable contract the buyer may be entitled to accept the conforming and reject the non-conforming part and request the seller to deliver instead of it conforming goods.

However, the position of the buyer's right to demand cure where the seller of specific goods fails to deliver conforming goods does not seem so clear. It might be argued that the buyer has no right to demand that the seller do so. Any request by the buyer in such cases can be rejected by the seller. The view can be explained on the basis that the subject of the seller's obligation is to deliver the specific goods which were supposed to possess particular characteristics. After the seller has delivered them to the buyer his obligation to deliver has been performed. No other contractual obligation under the contract remains to be fulfilled by the seller. The duty to remove the defect by repair or to take back the non-conforming and deliver substitute goods is an extra duty which cannot be inferred from the contract unless the parties have agreed expressly on such a right for the buyer. However, wherever the non-conformity causes the imposition of an undue detriment on the buyer he is entitled to reject them and terminate the contract, as described in the previous section.

This argument cannot be accepted in its entirety. It is true that in a contract for sale of specific goods the seller will not be under any duty to do a positive act in favour of the buyer when he has delivered the subject of sale to the buyer. However, in such a case, in particular, in the case where the seller has manufactured an item and sold it to the buyer according to his order, the seller gives a promise that he will produce and deliver goods conforming to the conditions on which they made their contract.²²¹ If it is proved that the goods do not correspond with the requirements provided under the contract the seller has in fact failed to perform his obligation to produce an item conforming to the contract requirements. Accordingly, he is required to perform his obligation under the principle of *ufū bel u'qūd* if he is able to repair the defects or put the item into operation by changing some part of it. However, the buyer cannot demand that the seller take back the defective goods and deliver

²²¹ See also, Yazdi, S. M. K., (1378 H.Q) vol. 2 at 120.

substitute goods, since the seller's duties were only concerned with the specific goods and he has not undertaken any obligation as to the delivery of replacement goods.

5.0. Requirements of the Remedy

If the first approach is adopted the buyer's entitlement to this remedy is subject to the practicality of requiring the defaulting seller to perform his obligations, whereas according to the suggested approach, the court will give effect to the buyer's application where it does not cause the seller an unreasonable expense or unreasonable inconvenience. Where the buyer, without any unreasonable expense or unreasonable inconvenience, could procure the goods from another source, repair them himself or have them repaired by others he should not be entitled to demand cure. It is to be stressed that under the suggested approach it is the seller in breach who has to satisfy the court that specific performance would place him in a difficult position and impose on him hardship not the buyer who is given a right to have *in specie* what the seller has promised under the contract.

It is also suggested that the distinction made by the Convention (Art. 46 (2) (3)) between the right to demand replacement goods and cure by repair is an appropriate rule. Thus, in the first case, he should be given such a right, as in the case of the right to terminate, only where the lack of conformity results in sufficiently serious consequences, having regard to the circumstances of the particular case, including the seller's offer to repair. The buyer should not be given a right to demand replacement goods for minor defects. This suggestion, not only is in line with the principle of *lā ḍarar*, but also would bring the remedy of demanding delivery of substitute goods close to that of termination. In practice, the former remedy would place the seller in more difficult situation in which termination will put him; the seller must take back the non-conforming goods and make a fresh tender. But in the second case, the buyer is entitled to demand repair of defects unless it is unreasonable having regard to all the circumstances.

6.0. Summary and Conclusions

This section showed that in spite of great emphasis by the jurists on the remedy of specific performance, the position of the remedy and its relation to other law remedies is not quite clear. Likewise, it is not clear whether, and in what circumstances, the buyer should be given the right to demand that the seller cure a non-conforming delivery by tendering conforming delivery or by way of repair.

However, it was shown that requiring the defaulting seller to perform his contractual obligations is a well-settled remedy amongst *Shi'ah* jurists. It was also shown that specific performance has a wide scope and may be invoked in a wide variety of circumstances. Likewise, it was seen that the buyer's right to demand cure where the contract is for sale of unascertained goods is consistent with general principles. The buyer in fact requires the seller to perform his contractual obligation. The buyer's right to demand cure where the contract is for sale of specific goods is not so clear. It was, however, suggested that the buyer should be given the right to demand that the seller cure the lack of conformity by way of repair.

It was also seen that apart from a few jurists who disagreed with giving the buyer a right to apply for specific performance, most of them hold that in any case in which the seller fails to fulfil one of his contractual obligations the buyer has a *right* to apply for specific performance and the court has a mandatory duty to give effect to his application. According to this common view the court has no power to refuse to accept the buyer's application and request him to terminate the contract and accept damages in lieu. Under this view, an order requiring the seller to supply and deliver the subject of sale should be granted unless the compulsion of the seller to perform is impossible. No matter whether or not the costs exceed considerably the contract price, or, whether or not the buyer is able easily to obtain the goods from another source. According to this view, the court, in fact, protects Islamic laws against the seller's violation and thus is not allowed to ignore the infringement of Islamic instructions merely because of the increase of expense of supply of the goods.

However, it was suggested that specific performance, contrary to few jurists who disagreed with it, should be regarded as a legal remedy in this legal system but not as an absolute remedy applicable in every circumstance, as most jurists seem to suggest. Requiring performance is provided in order to protect the injured party's contractual expectations against the other party's violation rather than to enforce purely religious duties. The Islamic order to respect contractual expectations does not mean that it must be met under any condition but that contractual rights must be respected and a proper remedy should follow any breach. However, exercise of any particular remedy is to be subject to the restriction that it does not violate the cardinal principle of *lā ḍarar*. On this basis, it was submitted that giving the buyer the right to obtain specific performance must be subject to the rights and interests of the seller in breach. Where insisting on specific performance is unreasonable in the sense that it inflicts a greater loss on the seller in breach than the loss suffered by the buyer for non-performance the court should have power to refuse to accept the buyer's application for specific performance and leave him to his remedy of terminating the contract and/or claiming for damages. Accordingly, where the buyer is readily able to purchase the goods from the

market the courts should not be required to accept the buyer's application for requiring performance if it will cause the seller unreasonable hardship and inconvenience.

On this interpretation, specific performance has, in general, no priority over the remedy of termination, as most jurists seem to suggest, but is one of the remedies available for a buyer who is aggrieved by the seller's violation. Accordingly, the court in any case should look at all the circumstances, in particular any hardship which would be caused to any party by giving or refusing specific performance for the purpose of implementation of justice. For this purpose, it is the seller in breach who has to satisfy the court that specific performance would place him in a difficult position and impose on him hardship not the buyer who is given a right to have *in specie* what the seller has promised under the contract.

On the same principle, it was suggested, the buyer's right to demand cure should be analysed, since a demand for cure is in fact a particular form of requiring the seller to perform specifically what he has undertaken under the contract. It should not be applied in a form which causes the seller unreasonable detriment, otherwise the buyer should be left to his right to terminate the contract and/or claim for damages.

Similarly, it was suggested that a distinction should be made between the right to demand replacement goods and cure by repair. In the first case, he should be given such a right only where the lack of conformity results in sufficiently serious consequences, having regard to the circumstances of any particular case including the seller's offer to cure by repair. But in the second case, it was suggested that the buyer should be entitled to demand repair of defects unless it is unreasonable having regard to all the circumstances.

Section Three. Monetary Relief

1.0. Sketch of Discussion

When the seller has delivered goods which do not conform with the contract terms *Shi'ah* jurists refer to three types of liability: *damān al- mu'āwadah*²²², *damān al- qimah*²²³ and *damān al- arsh*.²²⁴ The first refers to the contracting parties' liability under a reciprocal

²²² It is also called *damān al- musammā*, as opposed to *damān al- wāqe'i*. See, e.g., Ansāri, M., (1375 H.Q.) at 271; Khalkhāli, S. M. K. and Rashti, M. H., (1395 H. Q) vol. 1 at 125; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 167.

²²³ It is also called *damān al- wāqe'i*, that is, liability to pay the real value of the destroyed property (see in this respect, Ansāri, M. (1375 H.Q.) at 102; Yazdi, S. M. K., (1378 H.Q) vol. 1 at 93).

²²⁴ The late Shaykh Ansāri has made great attempts to distinguish between these three types of liabilities (see, Ansāri, M. (1375 H.Q.) at 271) and concluded that liability to pay *arsh* is a particular liability which is to be distinguished from the two others. See also, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 281-282; Khumayni, S. R. M., vol. 5 at 126-127.

contract, while the second refers to the liability to pay *gharāmat* or *khasārat*²²⁵ (literally, compensation or damages) for any loss inflicted to a person as a result of the other's unlawful action. The third arises, as some jurists suggest, where the seller has delivered goods which do not correspond with the contract terms or, as most jurists suggest, which do not conform with the contract quality. The seller is then under a duty to pay the proportional difference between the value of the goods as actually delivered and the value they would have had had they been delivered in accordance with the contract.

The first type of liability has no relevance to the question under consideration. This type of liability arises where the subject-matter of the contract, or a portion of it, is lost before risk passes to the buyer. In such a situation, it is a well-settled law that the contract comes automatically to an end, either as a whole or to the extent of the part lost, and the seller himself must bear the loss and restore the price to the buyer (if the buyer has already paid the price).²²⁶ The question which arises here is whether the seller should restore only the contract price or portion of it which is exchanged for the part lost (as the case may be) or whether his liability must be ascertained by reference to the real value of the subject-matter or part lost.²²⁷

The main concern of this section is, however, with the two latter types of liability, that is, liability to pay *gharāmat* and liability to pay *arsh*. The question of liability to pay damages, as will be explained below, has not been properly discussed when the seller has committed breach of contract, but it is addressed here in order to ascertain the legal nature of *arsh* liability. In that case, as will be fully explained in the second part of this section, most jurists have described *arsh* as a sort of remedy provided to compensate the losses which the buyer has suffered as a result of the seller's non-conforming delivery. Nevertheless, they have not made clear whether beside the right to claim *arsh*, the buyer has a right to claim damages for loss he may suffer as a consequence of the seller's breach.

In the absence of any sufficient discussion in this connection, some fundamental questions arise. Does an injured buyer have a general right to recover damages for *ḍarars* (losses) he has sustained as a consequence of the seller's breach? If so, for what sort of *ḍarars* can he recover damages? And finally, what formulae are to be used for the purpose of measuring the recoverable damages? Assuming that such a general right has been recognised

²²⁵ It is worth noting that the term "*khasārat*" in Islamic contract law terminology is used in two entirely converse meanings: "loss or damage" and "damages". The term in the first sense is used in Art. 221 and in the second sense is used in Art. 226 of I.C.C. See also, Imāmi, S. H., (1363 H.S.) vol. 1 at 239.

²²⁶ The rule comes into operation where certain requirements are met. See in this respect, ., Najafi, M. H., (1981) vol. 23 at 85; Najafi, M. H., (1981) vol. 23 at 83 and *seq.*; Shirāzi, N. M., (1410 H.Q.) vol. 2 at 353 and *seq.* and different references cited there; Kātūziān, N., (1992) vol. 1 at 188 and *seq.* The rule is expressly adopted in Art. 387 of the I. C. C.

²²⁷ In this case, it is commonly said that the seller is only liable to restore the contract price. See, Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 281. See also the references cited above.

in this system, in what cases can the buyer claim *arsh*? And finally, how is this remedy related to the right to claim damages? The first part of this section is designed to answer the first three questions and the second part will examine the buyer's right to claim *arsh* and its relation to the right to claim *gharāmat*.

2.0. Part One. Claim for *Gharāmat*

2.1. Introduction

It is hard to find any jurisprudential text book or other form of jurisprudential writings which have discussed the right to claim *gharāmat* on account of breach of contract in *Shi'ah* law.²²⁸ The jurists have concentrated on the remedies of withholding performance, requiring performance, reduction of price and -with a large volume of discussion- on the right to terminate the contract on the basis of the options (*kheyārāt*). The right to claim damages can only be traced where they are discussing general principles governing the liability for payment of *khasārat*²²⁹ or where dealing with tort liability such as, conversion (*ghasb*) of the others' property,²³⁰ dealing with cases in which one caused loss or damage to another's properties and personal injuries.²³¹ Even in those places, they have failed to address the injured party's right to claim damages for losses resulting from the other party's breach of contract. Such a failure

²²⁸ One can, of course, occasionally identify some very short statements from some jurists who indicate that an injured party may be entitled to claim damages where the other party has failed to perform his contractual obligations (see e.g., Khumayni, S. R. M., vol. 5 at 223). However, as appears from the context in which the issue is raised (i.e., breach of *shart-e-fe'l*), the victim of breach in such situation is given a right to sue the defaulting party for damages on account of the fact that the defaulting promisor is going to benefit from the other party's performance without fulfilling his own part of the contract not on the basis of principle of compensating an injured party. Moreover, they have not addressed awarding damages for breach of contract as a general rule and whether a party who has not received the contract performance is entitled to claim for loss of expectation created by the contract. What the first part of this section intends is to establish a general rule allowing an injured buyer to recover damages for any loss he has suffered as a consequence of the seller's violation. The most clear indication may also be found in a jurisprudential book written in a very recent year. In that book the learned jurist has addressed the principle of compensation in a very brief statement. This is made where the seller has delivered the purchased goods beyond the contract time and as a result the value for them has fallen in the market. In that case, this jurist held the seller liable for the difference between the time of due delivery and that of actual delivery on account of the principle of *lā ḍarar* (see Shirāzi, N. M., (1413 H.Q.) vol. 1 at 200 and *seq.*). However, he did not explain the principle of compensation as a general rule.

²²⁹ See e.g., Narāqi, A., (1408) at 15 and *seq.*, 108 and *seq.*; Bujnūrdi, M. H., (1389 H.Q.), vol. 2 at 4 and *seq.*, 17 and *seq.*, 84 and *seq.*; Shirāzi, N. M., (1410 H.Q.) vol. 2 at 193 and *seq.*, 213 and *seq.*, 231 and *seq.*, 249 and *seq.*, 283 and *seq.*

²³⁰ See e.g., Helli, A. N. J. (Muhaqqeq Helli), (1377 H.Q.) at 273 and *seq.*; Isfahāni, S. A., and Gulpāygāni, S. M. R. (1977) vol. 2 at 270 and *seq.*; Khumayni, S. R. M., vol. 2 at 152 and *seq.*

²³¹ See e.g., Helli, A. N. J. (Muhaqqeq Helli), (1377 H.Q.) at 381 and *seq.*; Najafi, M. H., (1981) vol. 44 at 1 and *seq.*; Khumayni, S. R. M., vol. 2 at 498 and *seq.* The question of liability to pay damages has also been addressed by the jurists when dealing with the consequences of void contracts (*u'qūd-e-fased*) under which one of contracting parties has sustained loss (see e.g., Ansāri, M. (1375 H.Q.) 105 and *seq.*, 146 and *seq.*), and dealing with the case of unauthorised sale (see e.g., Shahrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 183 and *seq.*, Shirāzi, N. M., (1413 H.Q.) vol. 1 at 180 and *seq.*, 392 and *seq.*).

raises the fundamental question whether or not an injured buyer has a right to recover damages on account of the seller's breach.²³²

For this purpose, the best way, it is suggested, is to look at the original authorities governing the question of liability to pay damages. Accordingly, discussion of the question of the injured party's right to claim damages for losses he may suffer as a consequence of the other party's breach of contract, in general, and the buyer's entitlement to do so on account of the seller's breach, in particular, must be examined on the basis of general principles on which the liability to pay damages is based. Assuming that he has such a right, it would be appropriate to consider under what circumstances such a right can be exercised. After that it will be considered how the recoverable damages are to be measured in this system.

2.2. General Principle

Shi'ah jurists have fully examined the question of liability to pay damages when discussing the general principles governing liability to pay damages in general and have also applied them in detail in tort cases. A general look at those discussions shows clearly that in their view it is an established law that where anyone's act or omission causes another loss the victim is given a right to sue the injuring person for the loss he has sustained.²³³ This rule has not been disputed by any jurist. If any doubt has been cast on the question it is concerned with the different types of loss for which, or the circumstances under which, an injured person can claim damages rather than the rule itself.

This rule, as will be seen later, is based on the Quranic verses as well as *rewāyāt*. Pursuant to these authorities, no one is allowed to impose unlawful harm on the other, whether it be by a positive act or by refraining from an act which is to be done, otherwise the wrongdoer must bear the consequences of his action or inaction. On the basis of these authorities, *Shi'ah* jurists have developed certain principles upon which a person who is injured by another is given a right to sue the latter for losses he incurred as a consequence of the injurious act or omission in question.

Generally, there are certain general principles upon which a person may be held liable to pay damages. However, not all of them are relevant to the issue under consideration. As far

²³² In contrast, the I.C.C., making a clear distinction, has allocated certain comprehensive provisions to the principle of compensation on account of breach of contract (see Arts. 221, 222 and 226-230 under the heading of "on Losses Caused by Non-Performance of Undertakings". Interestingly, after the victory of the Islamic Revolution, the Islamic Parliament of Iran, most of its member consisting of those educated in *Shi'ah* Islamic Schools, in revising the provisions of the Code only changed and revised a very few of its provisions, leaving the provisions regulating claim for damages on account of breach as they stood. Likewise, the Guardian Council of the Constitution six members of its twelve members are consist of *Shi'ah* jurists have confirmed them and found them corresponding to *Shi'ah* law

²³³ See the sources cited in fns. 216-218.

as the question of an injured buyer's right to claim damages is concerned, the following principles may seem relevant: the principle of *itlāf*, the principle of *tasbib* and the principle of *lā ḍarar*.²³⁴ The following discussion will briefly examine these principles in order to answer the question: "how can these principles be utilised to justify the buyer's right to claim damages for loss he may suffer as a consequence of the seller's breach of contract?"

2.2.1. Principle of *Itlāf*

One of the most important principles justifying a claim for damages is the principle of *itlāf* (literally, wastage).²³⁵ According to this rule, "anyone who destroys another person's *māl* (i.e., property) (without his permission) will be held liable for the property lost". The principle applies where property possessed by a person is damaged or destroyed by another.²³⁶

The given principle is not found in the text of the Quran or sayings of the Prophet of Islam and *Shi'ah* Imāms, but rather is derived from several Quranic verses²³⁷ as well as sayings of the Prophet and *Shi'ah* Imāms²³⁸ which reflect that concept. The principle comes into operation where a person's action is customarily regarded as a direct cause of destruction or damage to another's property.²³⁹

This principle has little relevance in the case of breach of contract. For example, where a seller has failed to deliver goods and the buyer is consequently forced to go into the market and procure equivalent goods at a price higher than the contract price it cannot be said that the seller has directly wasted the buyer's property. It is the buyer himself who has proceeded to

²³⁴ The other principles are: *qāedah-e-alal yad* (the principle of unauthorised possession of the others' property), *qāedah-e-ghurūr* (the principle of deception) and *qāedah-e-ta'addi wa tafrit* (the principle of encroachment or abuse, and, negligence). See generally, Narāqi, A., (1408) at 108 and *seq.*; Bujnūrī, M. H., (1389 H.Q), vol. 2 at 4 and *seq.*, 84 and *seq.*; Shirāzi, N. M., (1410 H.Q.) vol. 2 at 213 and *seq.*, 231 and *seq.*, 249 and *seq.*, 283 and *seq.*; Kātūziān, N., (1995) vol. 1 at 156 and *seq.*

²³⁵ The principle is explicitly recognised by I. C. C., Art. 328.

²³⁶ In *Shi'ah* law terminology, the principle is called "*man atlaf māl al-ghayr (men ghayr edhneh) fahuwa lahu ḍāmen*". See generally, Bujnūrī, M. H., (1389 H.Q) vol. 2 at 17; Shirāzi, N. M., (1410 H.Q.) vol. 2 at 193.

²³⁷ See e.g., "Anyone who transgresses against you, transgress ye likewise against him" (chapter 2, verse 194). The language of the verse is very broad and covers various cases. However, in the context of liability to pay damages it is commonly interpreted into: "If someone transgresses on another the latter should be paid back in the same coin and the transgressor is liable to the extent of the transgression". See also, Sūrah Nahl, verse, 126; Sūrah Shūra, verse 40.

²³⁸ In this connection, there are a considerable number of cases in which a wrongdoer was held liable for the harmful consequences of his action. See e.g., Āmeli, H., vol. 19, ketāb deyāt, abwāb mujebāt al- ḍamān, bāb 9, hadith 1, and bāb 10, hadith 1, and bāb 11, hadith 1, and bāb 13, ahādith 2, 3, and bāb 40, hadith 1; Āmeli, H., vol. 18, ketāb al-hudūd wa ta'zirāt, abwāb nekāh al-bahāem, bāb 1, hadith 4, and ketāb al-shehādāt, abwāb al-shehādāt, bāb 11, hadith 2; Āmeli, H., vol. 16, abwāb al-e'tq, bāb 18, ahādith 5 and 9; Āmeli, H., vol. 13, ketāb al- ejāreh, abwāb ahkām al- ejāreh, bāb, 29, hadith 1, abwāb ahkām al- rahn, bāb, 7, hadith 2, abwāb ahkām al- wasāyā, bāb, 37, hadith 1, abwāb ahkām al- ā'reyah, bāb 1, ahādith 2 and 9; Āmeli, H., vol. 6, ketāb al- zakāt, abwāb al- mustahaqqin lel zakāt, bāb 39, hadith 2. See generally, Bujnūrī, M. H., (1389 H.Q) vol. 2, at 17-19; Shirāzi, N. M., (1410 H.Q.) vol. 2, at 195- 202. None of these authorities state the principle in express term. But, from various occasions in which the Prophet or His Successors held liable a wrongdoer whose action caused damage to another the jurists have formulated this principle.

²³⁹ Āmeli, Z. (Shahid Thāni), vol. 2 at 250; Marāghei, M. F., (1274 H. Q.) at 291; Najafī, M. H., (1981) vol. 42 at 90 and *seq.*; Rashti, M. H., (1322 H.Q.) at 29-30; Kātūziān, N., (1995) vol. 1 at 148 and *seq.*

buy from another source. Accordingly, loss of property (that is, the increased price) is due to the buyer's decision to obtain the substitute goods not a direct consequence of the seller's non-performance. The same is true where the non-conforming goods delivered by the seller have caused the buyer loss. However, it is accurate to say that the seller's failure to deliver in accordance with the contract was customarily regarded as the cause of the increased price or incurred loss. If he had delivered goods conforming to the contract the buyer would certainly have not been forced to purchase the equivalent goods at the high price.

2.2.2. Principle of *Tasbib*

Because of the inapplicability of the principle of *itlāf* to the case of breach of contract, the principle of *tasbib* (literally, causation)²⁴⁰ seems to play a significant role.²⁴¹ The principle is, in fact, a particular form of the principle of *itlāf*. For this reason, it is often discussed by the jurists under the heading of *itlāf*²⁴² and is justified by reference to the same authorities upon which the principle of *itlāf* is made. The significant difference between these two principles is in the degree of connection between the incurred loss and the wrongdoer's action. Under the principle of *itlāf*, a person will be held liable if his action has directly destroyed, or damaged, another's property,²⁴³ while the principle of *tasbib* comes into operation where his action is customarily regarded as the cause of the loss sustained, even though other factors may be involved in the occurrence of the loss in question.²⁴⁴

The principle of *tasbib* is a general rule. It is provided to afford an aggrieved person a general right to claim compensation for losses he suffered as a consequence of the other's action.²⁴⁵ Thus, where the seller, for instance, fails to perform his contractual obligations he may be held liable for any loss which is customarily attributable to him. On this principle, the

²⁴⁰ The principle is expressly recognised by the I.C.C. in Art. 331. It is worth noting that although the expression "*tasbib*" is commonly translated into English term "causation" (see e.g., the English Translation of I.C.C., Art. 307), it differs from "causation" in English law. *Tasbib* is a principle when its requirements are satisfied a victim will be entitled to claim damages, whereas "causation" in English law, as seen in the second chapter, is one of the provisions which restricts the recoverable damages. In comparison, one may liken this principle to the principle of compensation for foreseeable loss in English law. Accordingly, the principle of causation under *Shi'ah* law includes both the necessity of compensation of loss sustained and the rules of remoteness in English law.

²⁴¹ In some cases, the principle has been expressly relied on by some distinguished jurists in order to make one of the contracting party liable for losses caused by his failure to perform the contract. See e.g., Najafi, M. H., (1981) vol. 27 at 322 and *seq.* (in the case of breach of contract of lease); Rashti, M. H., *al-Ijāreh*, at 332.

²⁴² In contrast, the I. C. C. has distinguished these two principles and allocated to each certain provisions. See, Arts. 328-330 under the heading of "*itlāf*" (direct injury) and Arts. 331-335 under the heading of "*tasbib*" (causation).

²⁴³ See e.g., Najafi, M. H., (1981) vol. 43 at 43, 95; Rashti, M. H., (1322 H. Q.) at 30; Shirāzi, N. M., (1410 H.Q.) vol. 2 at 205-207.

²⁴⁴ See e.g., Helli, A. N. J. (Muhaggeq Helli), (1377 H.Q.) at 273, 385; Āmeli, Z. (Shahid Thāni), vol. 2 at 245; Najafi, M. H., (1981) vol. 37 at 46, 54; Rashti, M. H., (1322 H. Q.) at 30; Shirāzi, N. M., (1410 H.Q.) vol. 2, at 205-207; Kātūziān, N., (1995) vol. 1 at 150 and *seq.* The jurists normally call the first "*itlāf bel mubāsherah*" (direct injury) and the second as "*itlāf bel tasbib*" (indirect injury).

²⁴⁵ See in this regard, Gurgy, A., (1365 H.S.) vol. 1 at 44.

buyer may be entitled to recover damages for any loss he has sustained as a consequence of the seller's action (i.e., breach), whether in the form of non-delivery, late delivery or defective delivery. The principle itself, it seems, is unquestionable. Where the buyer can satisfy the court that his loss is caused by the seller's breach he will certainly be entitled to recover damages for it. No jurist has questioned the principle in the above sense. The main controversy among them is about the term "*māl*" used in the subject of the principle which will be discussed later.

2.2.3. Principle of *Lā Ādarar*

This is one of the most significant as well as a very broad principle which is relied on in various places of *Shi'ah* jurisprudence.²⁴⁶ The principle is derived from a very leading statement attributed to the Prophet of Islam.²⁴⁷ However, the jurists, in formulating the principle, have also relied on various Quranic verses²⁴⁸ as well as the sayings of *Shi'ah* Imams.²⁴⁹ The mandate is given, nevertheless, to the saying of the Prophet, that is, "*lā ādarar wa lā ādarar fī al-Islam*" (literally, there is no loss and no harm in Islam).²⁵⁰ In fact, the other authorities narrated from *Shi'ah* Imāms have applied this rule in several cases.²⁵¹ For this reason, the emphasis will be placed on the saying of the Prophet which constitutes the words of the principle.

²⁴⁶ This principle is similar to "*sic utere tuo ut alienum non laedas*". For a detail discussion of the history of development of this in *Shi'ah* jurisprudence see, Hakim, S. M., (1373 H.S.)

²⁴⁷ The statement is so: "*lā ādarar wa lā ādarar fī al-Islam*". It is cited in various occasions and in different languages. See e.g., Āmeli, H., vol. 17, bāb 12, at 341, hadith 3. See also; Āmeli, H., vol. 12, bāb 17, at 364 ahādith 3, 4, 5 (in this reference the phrase "upon Muslim" instead of "fī al-Islam" is cited); Āmeli, H., vol. 17, bāb 5, at 319 hadith 1, and bāb 7, at 333 hadith 2 and bāb 12, at 341 ahādith 3, 4 (in this reference the phrase "upon Muslim" is cited) and 5; and bāb 1, at 376 hadith 10 (it is only in this reference the phrase "fī al-Islam" is cited).

²⁴⁸ Such as, "When ye divorce women and they fulfil the term of their (during the period of *Iddah*), either take them back on equitable terms or set them free on equitable terms; but do not take then to injure them ..." (chapter 2, verse 231); "Neither mother nor father is required to sustain harm in preservation of their child" (chapter 2 verse 234); "And let neither scribe nor witness suffer harm" (chapter 2, verse 284); "... after payment of legacies and debts (in the case of division of the assets of the deceased); so that no loss is caused" (chapter 4, verse 12); "Let the women live (during the period of *Iddah*) in the same style as ye live; do not harm them (in terms of maintenance expenses and accommodation) to abandon from their rights." (chapter 65, verse 2). See also, chapter 3, verse 12. See generally, Shirāzi, N. M., (1410 H.Q.) vol. 2 at 29-30.

²⁴⁹ There are a considerable number of rewāyāt narrated from *Shi'ah* Imāms in which the principle is applied, such as the statement of Imām Šādeq who said: "Whoever injures a Muslim he is liable for that loss" (Āmeli, H., vol. 13, bāb 6, at 339 hadith 4). See also, *ibid.* bāb 8 at 179 hadith 2, and, bāb 9 at 181 hadith 2. See generally, Narāqi, A., (1408) at 15-17 (in which he has mentioned 11 rewāyāt justifying the principle); Bujnūrī, M. H., (1389 H.Q) vol. 1 at 176-177; Shirāzi, N. M., (1410 H.Q.) vol. 1 at 31-45; Sistāni, S. A., (1414 H.Q.) at 11 and *seq.*

²⁵⁰ What is to be noted is that there is only one authority in which the phrase "in Islam" is added to the statement "*lā ādarar wa lā ādarar*". The other authorities contains either the phrase "upon Muslim" or without any additional words. However, it is common between the jurists that the statement is what cited in the text.

²⁵¹ See for instance, Āmeli, H., vol. 13, bāb 22 at 49 hadith 1; Āmeli, H., vol. 15 at 299, 331, 385, 402, 509, 515 and 516.

Because of the great importance of the statement, the case in which the Prophet made this pronouncement is briefly cited. The case was concerned with a Muslim who was the owner of a date tree in the dwelling house of another Muslim. The owner of the house took action against the owner of the date tree who was frequently exercising his right of passage in unsocial hours to go to his date garden through the dwelling house without prior announcement, which caused the owner of the house inconvenience. After the owner of the date tree had refused to accept all suggested solutions, the Prophet, ordering that the tree to be pulled down and given to its owner, held that *the owner of the date tree was a person whose action caused loss to the other and that in Islam no loss is permitted to be sustained.*²⁵²

Because of the importance of the judgement, the jurists have written numerous pamphlets and books in order to elucidate the terms used in the Prophet's judgement and the extent to which it could be applied. This is not, of course, a proper place to review all of them. What is discussed in the following is to show how the principle can be relied on to make the seller in breach liable for losses resulting from his breach. For this purpose, two issues are of significance. First, what is intended by the statement? Second, what is the meaning of *ḍarar* used in the judgment?

(A) Concept of the Principle

As the language of the Prophet's statement shows, the principle is provided to declare that "there is no loss and no harm in Islam". Since there is no doubt that there is loss in fact between Muslims and in Islam,²⁵³ *Shi'ah* jurists have made great attempts to identify the real intention of the Prophet in his statement. In this respect, various interpretations have been offered as to the concept of the principle so that some of the jurists have identified nine views.²⁵⁴ Among those interpretations, four of them are particularly significant. The first holds that the principle is designed only to rule that "no one is allowed to cause the other loss".²⁵⁵ The second observes that the principle is prescribed to say that "there is no uncompensated

²⁵² See the references cited in fn. 234. Although this statement was declared for settlement of a tortious dispute between two Muslims in respect of exercising the right of ownership of one whose act was causing loss to the other, the jurists, relying on application of this judgment in various cases by the *Shi'ah* Imāms, have regarded it as a general principle applicable to any situation whether public, private, contractual, tortious, or otherwise. For this reason, the principle of *lā ḍarar* in its broad form is incorporated in the Iranian Constitution of 1979 in terms of Principle 40 which provides: "No one is entitled to exercise his rights in a way which causes others loss, or is an encroachment of public interests." See also Principle 43 which provides: "The economy of the Islamic Republic of Iran shall be based on the following criteria: (1) ... (5) the prohibition of infliction of harm and loss upon others"

²⁵³ Qumi M. A. (Muhaqqeq Qumi), vol. 2 at 48.

²⁵⁴ See Mullā Āqā Darbandi in: *Khazāen*, (cited in: Bahrāmi, H., (1366 H.S.) at 293)

²⁵⁵ See e.g., Shari'ah al- Isfahāni, F. (Shaykh al- Shari'ah) at 25. The view was firstly raised by Al- Badakhshi, as it is cited in: Narāqi, A., (1408) at 18.

loss in Islam".²⁵⁶ The third view holds that the principle is simply provided to declare that "no harmful mandate (*hukm-e-ḍarari*) is prescribed in Islam".²⁵⁷ Finally, the fourth view believes "no decree is prescribed for an injurious subject (*mudū'-e-ḍarari*)".²⁵⁸

Among these views there are two fundamental views which constitute, in fact, the basis of other subordinate views.²⁵⁹ Because different results derive from adoption of each of these views, both of them are briefly examined in the following. Full discussion of them would require more space than is available here. What follows is a general review of these views as far as the present purpose is concerned without getting involved in detail in their various arguments presented in support of their views.

(I) *Lā Ḍarar as a Rule Denying Harmful Decree*

The view which is supported by a considerable number of leading jurists²⁶⁰ is that the only thing inferable from this principle is that Islamic law-maker does not prescribe any rules from which loss results. But the fact that the loss sustained must be compensated and in what form should the said compensation itself be, requires other reasoning which should be discussed in other place.²⁶¹

Interpreting the principle as being only for the purpose of negation of harmful decrees, raises the question: does the principle mean that no loss is recognised in Islamic law, whether it results from a prescribed rule or from the lack of a proper law, or is it only prescribed to negate positive decrees? The question arises where there is no specific authority holding the injuring person liable.²⁶² The issue is disputed between the jurists. Most of them argue that the principle is only for the purpose of negating a prescribed rule if its performance results in

²⁵⁶ Bashrāvi, A. (Fādel Tūni), (1309 H.Q.) at 194; Marāghei, M. F., (1274 H. Q.) at 94; Rashti, M. H., (1322 H. Q.) at 4.

²⁵⁷ Qumi M. A. (Muhaggeq Qumi), vol. 2 at 48; Narāqi, A., (1408) at 18; Ansāri, M. in: Ansāri, M., (1375 H.Q.) at 372; Khalkhāli, S. M. and Rashti, M. H., (1395 H. Q.,) vol. 1 at 156; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 37 and 180; Nāeini, M. H. in: Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 200; Bujnūrī, M. H., (1389 H.Q) vol. 1 at 182; Tūhīdī, M. A., and Khūei, S. A. (1368 H.S.) vol. 3 at 204; Shāhrūdī, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 153.

²⁵⁸ Khurāsāni, M. K., (1364 H.Q.) vol. 2 at 267 and *seq.*

²⁵⁹ For instance the first two views are the same in effect. If the principle is provided to prohibit to cause another loss it must be compensated where the loss occurs, since prohibition of causing loss does not confine to the stage of inflicting loss, but it covers leaving the loss uncompensated. The inherent result of such an extension is that the loss should be compensated. The fourth view also resembles the third. Both of them hold that the principle is simply provided to declare that no harmful decree is prescribed in Islam. However, the fourth view differs from the third in that according to the fourth view it is the harmful subject which is negated by the principle. That is, by negation of a harmful subject the relevant decree is negated. Whereas, on the third view, it is the harmful decree which is negated. However, some slight difference may appear between the third and fourth views. See in this respect, Marāghei, M. F., (1274 H. Q.) at 99; Bujnūrī, M. H., (1389 H.Q) vol. 1 at 181-182; Kātūziān, N., (1995) vol. 1 at 146.

²⁶⁰ See the references cited in fn. 244.

²⁶¹ For instance, in the case of lesion in a transaction, by virtue of the principle the contract will not be binding on the aggrieved party, but the fact that he has the "option of lesion" cannot be inferred from it. See Narāqi, A., (1408) at 19; Khurāsāni, M. K., (1406 H. Q.) at 99, 100.

²⁶² There are also other instances in which the reference is made to the principle for negating the loss resulted from the lack of positive rule. See generally, Sistāni, S. A., (1414 H.Q.) at 291 and *seq.*

harm.²⁶³ In contrast, others hold that it is a broad principle covering both cases.²⁶⁴ On the latter interpretation, the principle would be a significant principle holding the wrongdoer liable for any loss resulting from his action or inaction where there is no particular authority holding him liable for the loss sustained.

(II) *La ġarar as a Rule Requiring to Compensate the Incurred Loss*

The foregoing interpretation has not, however, been accepted by some eminent jurists. According to them, the sentence narrated from the Prophet, that is, *lā ġarar wa lā ġerār fi al-Islam*, was, in fact, intended to rule that “there is no uncompensated loss in Islam”. An inherent result of such an interpretation is that where any loss occurs it must be compensated. In justifying the express language of the statement which negates the existence of *ġarar* in fact, this view observes that when it is said that the loss sustained must be compensated it is accurate to say that there is no loss in the view of the Islamic law-maker.²⁶⁵

(III) Preferred Interpretation

Having seen briefly the various interpretations suggested in respect of the principle, it is essential to decide which is to be preferred. As a rule, it can be said that the principle is provided to declare that “no loss is recognised by *Shāre'* (the Islamic law-maker) in his legislative environment”. The principle, it seems, should not be restricted to a particular area. It can play a significant role either in respect of the performance of religious instructions in relation of man to God where his prescribed rule results in harm²⁶⁶ and in respect of the relationships between individuals where the conduct of one of them causes another loss.²⁶⁷

The view can be supported by the language of the general statement prescribed in the Prophet's judgment and by the special circumstances in which the judgement was issued. As the case is recorded in the original sources, it was held that there is no harm in Islam. Such a statement is consistent with the view that the Islamic law-maker does not recognise any harm within his legislative environment, whether the given harm results from performance of his prescribed rules or from another person's actions. It does not mean that there is no loss in fact,

²⁶³ Narāqi, A., (1408) at 20; Nāeini, M. H. in: Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 220 and *seq.*; Bujnūrdi, M. H., (1389 H.Q) vol. at 200; Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 153.

²⁶⁴ The given broad interpretation has been supported by Marāghei, M. F., (1274 H. Q.) at 95; Ansāri, M. in: Ansāri, M. (1375 H.Q.) at 373; Shirāzi, N. M., (1410 H.Q.) vol. 1 at 85 and *seq.*; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 169, 219 and 394; Sistāni, S. A., (1414 H.Q.) at 291 and *seq.* See also, Bahrāmi, H., (1366 H.S.) at 341 and *seq.*

²⁶⁵ See e.g., Marāghei, M. F., (1274 H. Q.) at 94.

²⁶⁶ As the late Narāqi, Ansāri, and Nāeini observed. See the references cited when explaining their view.

²⁶⁷ As it is suggested by Ayatullāh Nāsser Makārem Shirāzi in: Shirāzi, N. M., (1410 H.Q.) vol. 1 at 67 and *seq.* The broad interpretation has been addressed by the great *Shi'ah* jurist, Muhaqqeq Qumi, in: Qumi M. A. (Muhaqqeq Qumi), vol. 2 at 48, but he did not reach the conclusion that the principle orders that the loss must be compensated.

for the facts are due to their causes; they are not in the hand of the law-maker. What is to be done by the law maker is to pass or reverse the law, not to negate the external facts.

The inherent result of non-recognition of loss by the Islamic law-maker is that if some harm occurs, whether in the stage of performance of a particular rule prescribed by the Islamic law-maker or in relation of the individuals to each other, it must be removed by an appropriate means. Where the exercise of a religious instruction causes a person loss in the stage of performance of his religious duties he is to be given a power to disregard them from the very beginning.²⁶⁸ Whereas, if a person causes another loss by his conduct the inherent result of the non-recognition of loss in Islam is that it must be compensated²⁶⁹, since leaving the loss sustained outstanding between the injuring person and the victim without allowing the latter to claim damages would mean that the Islamic law-maker consents to the existence of loss.

Based on the above construction, it is fair to say that the principle is designed both to negate the binding force of the Islamic rules where they cause Muslims loss in the stage of performance and to oblige the injuring person to compensate the victim of injury who suffered loss from the former's harmful conduct (breach). Accordingly, this principle, as the principle of *tasbib*, becomes a general rule holding the party in breach liable to pay damages. If any dispute arises it is in fact concerned with the concept of *ḍarar* rather than the principle of compensation of *ḍarar* under this principle.

2.2.4. Scope of The Principles of *Tasbib* and *Lā Ḍarar*

No jurist has questioned the necessity of compensating actual incurred damage. What has been questioned by most of them is recovery of loss of profit. In describing the concept of loss of profit, most of *Shi'ah* jurists hold that it does not fall into the scope of the subject of the

²⁶⁸ On such understanding, apparently, the Prophet, in declaring the principle, applied the principle in the case where one of the Muslims was exercising his right of passage in bad faith. In that case, the Prophet judged that, although the defendant was in principle entitled to exercise his right of passage to see his date tree, his right was subject to his not causing loss (in that case, inconvenience) to the other Muslim. For this reason, when it was proved for the Prophet (after the defendant had rejected all the proposed ways of solutions rendered by the Prophet) that the defendant was exercising his right in a harmful way, he held that his right of passage is unrespectable and as a result ordered the plaintiff to pull down the date tree.

²⁶⁹ The cardinal divergence of this interpretation with the common view is that the latter restricts the principle to negation of positive decrees. That is, it does not say that the injuring person should compensate the injured party. Whereas, under the suggested view, the principle is general. It is provided for the purpose of compensation of damages and comes into operation either where the performance of a decree causes a person loss and where he is harmed for the lack of a rule holding the injuring person liable to pay damages. The advocates of the opposite view observe that inferring such a broad reading from the principle results in emergence of a new jurisprudence and in any case the loss must be compensated by the Islamic State (see e.g., Nāeini, M. H. in: Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 221. However, as the suggested view shows, the loss must be compensated by the person whose conduct caused the loss not the government. In addition, if the true language of an authority suggests such a broad interpretation one should not fear the emergence of a new jurisprudence. The history of development of *Shi'ah* jurisprudence has witnessed such surprising reading. What is important is to read the authorities as they purport. See also in this respect, Kātūziān, N., (1995) vol. 1 at 147.

principles of *tasbib* (i.e., *māl*) and that of *lā ḍarar* (i.e., *ḍarar*) so as to be recoverable on these two principles.²⁷⁰ The key point in relying on these two principles is, therefore, to determine the precise meaning of the terms "*māl*" and "*ḍarar*" used in their subject.²⁷¹

Concept of *Māl* and *Ḍarar*. In spite of lack of use of the term '*māl*' within the authorities justifying the principle of *tasbib*, the jurists have incorporated it into the subject of the principle. It has placed them in great difficulty in ascertaining what the term means. A strict view supported by most jurists holds that *māl* is any valuable *res* which physically exists but not what comes into the existence in future. Thus, a prospective profit is not regarded as *māl* but is simply a chance to gain, and consequently loss of it will not be loss of *māl*. The same view has been taken as to the term "*ḍarar*". In their view, *ḍarar* in the authorities declaring the principle of *lā ḍarar* was used to describe any loss or damage to the existing property or personal injuries. As a result, a person whose conduct causes loss of prospective profit cannot be held liable on the basis of the principles of *tasbib*²⁷² or *lā ḍarar*²⁷³.

According to this narrow interpretation, the buyer will be entitled to recover damages for any expense he has incurred in reliance of the seller's performance or as a consequence of the seller's breach provided that the requisite requirements which will be examined later are satisfied, since in such cases he has lost the property he actually possessed or has sustained

²⁷⁰ See e.g., Qumi, M. A., *Jāme' al-Shetāt* (stone edition at 140) as cited in: Kātūziān, N., (1995) vol. 1 at 220) in which he says according to most *Shi'ah* jurists loss of profit is not recoverable. See also, Rashti, M. H., (1322 H. Q.) at 21.

²⁷¹ Confronted by the restrictive interpretation of the principle of *lā ḍarar*, as well as the strict interpretation of *māl* and *ḍarar* by most jurists, some jurists have recently tried to justify the principle of compensation in respect of prospective loss on the basis of the principle of *taffit-e-manfa't* (literally, causing the prospective profit lost). That is, anything which common usage would regard as a profit whose loss requires compensation, has to be regarded in view of the Islamic law-maker as *ḍarar* for which the victim can recover damages. This view has been put forward by some eminent jurists when the writer was discussing the issue with them (i.e., Ayatullāh Sayyid Mussā Shubayri Zanjāni and Ayatullāh Sayyid Ali Muhaqqeq Dāmād) at the Holy City of Qum two years ago. It seems that this view adds nothing to the issue in question. It is principally based on the common-usage criterion. That is, the question whether loss of a particular head of prospective profit is *ḍarar* must be referred to the relevant usage. This is the question which can be covered by the principles of *tasbib* and *lā ḍarar*, since, as already pointed out in the text, no jurist disputed the principles. What is questioned is the concept of *māl* and *ḍarar*. By referring the case to custom, they conclude that loss of prospective profits is not customarily loss of *māl* or *ḍarar*. However, if it is proved that the common usage does regard loss of a particular prospective profit as loss of *māl* or *ḍarar* it will certainly be recoverable in accordance with the principles of *tasbib* and *lā ḍarar*. However, the view might be seen as a new trend to justify the principle of compensation in this legal system if it is accepted that the principle of compensation of *ḍarar* should be based on the *banā al-u'qalā* which is fully explained in the first chapter when dealing with the sources of *Shi'ah* law. In that event, an Islamic legal rule can be justified without needing to refer the case to any particular authority from Quran and *Sunnah*, but whatever the learned (*u'qalā*) have regarded as a binding rule between themselves the Islamic law-maker would ratify it as an Islamic rule as long as it does not contradict the general principles.

²⁷² See e.g., Helli, A. N. J. (Muhaqqeq Helli), (1377 H.Q.) at 274; Isfahāni, S. A., and Gulpāygāni, S. M. R., (1977) vol. 2 at 274, 278; Khumayni, S. R. M., vol. 2 at 158, 159 (questions 5, 6); Gurgy, A., (1984).

²⁷³ See e.g., Narāqi, A., (1408) at 17-18; Rashti, M. H., (1322 H. Q.) at 21; Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 204; Gurgy, A., (1984).

ḍarar. In contrast, loss of any profit which is expected to be received following the performance of the contract by using the purchased goods in the course of business or other financial activities is irrecoverable because it does not fall into the subject of these two principles. According to this group of jurists, even in the case where a person has unlawfully prevented an owner of a property from selling in a situation in which its market price is high he will not be liable if the market has dropped down later.²⁷⁴

Preferred Interpretation. The given views, as described above, turn on the concept of *ḍarar* and *māl*. Although this view is supported by most jurists, it is, however, notable that these jurists, as they indicate themselves in appropriate places,²⁷⁵ do not render it as a matter of law, rather, they simply observe as a matter of fact. There is no doubt if it is proved that the common usage would regard deprivation of some particular head of prospective profit as *ḍarar* or loss of *māl* they will certainly judge that it is recoverable under the principle of *lā ḍarar and tasbīb*.

A close consideration of what these jurists observe reveals the fact that their concern is with a person who is held liable for speculative profits whose non-materialisation can be due to different factors and unknown contingencies, the happening of any of which may render any estimate of them incorrect, and hence result in injustice. Whereas, these principles are designed to protect a person who has sustained loss *by the reason of other party's actions*. In other words, the main reason for this view is the uncertainty of future profits rather than the fact that prospective profits are of no economic value.²⁷⁶

Such a strict view is understandable in the case of non-commercial goods, where it is quite possible to say that the probability of using the purchased goods in a way which results in receiving profits is frequently a mere chance, but in the context of commercial goods, the case is entirely converse. In these cases, it is quite likely that the purchaser uses the goods in a way which will certainly result in obtaining some legitimate profits. Basically, businessmen

²⁷⁴ See e.g., Helli, A. N. J. (Muhāqeq Helli), (1377 H.Q.) at 274; Narūqi, A., (1408) at 18; Najafi, M. H., (1981) vol. 37 at 14; Isfahāni, S. A., and Gulpāygāni, S. M. R., (1977) vol. 2 at 278; Khumayni, S. R. M., vol. 2 at 158, 159. Even the late Sāheb Jawāher goes further and asserts that "there is no doubt that the preventing person has no duty to pay damages for the reduction of market price of the property whose owner is prevented to sell, for he has not caused him loss of any *māl* so as to be liable under the principles of *itlāf* or *tasbīb* (Najafi, M. H., (1981) vol. 37 at 15).

²⁷⁵ See e.g., Narāqi, A., (1408) at 17; Marāghei, M. F., (1274 H. Q.) at 197 in which they expressly refer their definitions to the *u'rf* (custom).

²⁷⁶ The point is clearly inferable from the wordings of the late Mir Fattāh when he says loss of those profits which exist potentially (i.e., those will be derived habitually) should be regarded as *ḍarar*, but deprivation of the profits which are susceptible to derive is not *ḍarar* but it is simply deprivation of benefiting. Nevertheless, in the latter case he did not deny liability of the preventing person, but he says "it is another subject" (see, Marāghei, M. F., (1274 H. Q.) at 95 and 96). Such a distinction shows that the difference is concerned with the degree of probability of occurrence of loss not with differentiation between *māl* and *manfa'at* (profit), for what potentially exists is not an existent thing, but it is what would habitually materialise in future.

bear the risk of business in order to obtain such profits. Common usage and traditional wisdom attaches considerable economic value to them and the credibility of a trader is frequently assessed by the degree of probability of receiving such profits. Accordingly, if any doubt arises it should be as to the recoverability of entirely speculative profits which may be subject to different contingencies rather than as to whether deprivation of future profits is to be regarded as loss of property. It is perhaps on such an understanding, that some distinguished jurists have taken the view that loss of prospective profit may be reckoned as loss of property by common usage where certain circumstances are met.²⁷⁷ This is the position where, according to them, the causes and pre-requisites of profit have been acquired. Under these jurists' view, if it is quite probable that the plaintiff would have received the prospective profit in the ordinary course of events he would certainly be one who has sustained *ḍarar* and loss of *māl* as a consequence of the defendant's action.²⁷⁸

On this basis, it is quite fair to say that deprivation of prospective profits under certain circumstances would commercially be *loss of property* and *ḍarar* which entitles the injured buyer to recover damages.²⁷⁹ Such damages will be assessed, as will be seen below in detail, not by reference to the whole gain which the plaintiff buyer hoped to make or the whole loss which he hoped to avoid, but by reference to the degree of probability of the chance's turning out in his favour. Such lost gain will be recoverable when the plaintiff can show that the gain would *most likely* have been made.²⁸⁰

2.3. Principles Restricting Recoverable Losses

Although the principles governing liability to pay damages have been examined in general and applied to tortious cases, jurists have failed to clarify the rules restricting the amount of recoverable losses. It is thus not quite clear under what circumstances an injured buyer may be

²⁷⁷ See e.g., Marāghehī, M. F., (1274 H. Q.) at 197-198; Nāeini, M. H. in: Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 199; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 187-188. There are also other eminent jurists who considered loss of prospective profit as loss in particular circumstances. See e.g., Tabātabāeī, S. A., (1404 H.Q.); Shahid Awwāl in *al-Qawāe'd wal-Fawāe'd* (as cited in: Bahrāmi, H., (1366 H.S.) at 240-241). Although the I. C. C. does not specifically refer to recoverability of loss of profit, the Civil Procedure Code does expressly refer to it (Art. 728). The fact that the provision has not been altered by the Iranian Islamic Parliament and the Guardian Council after the Islamic Revolution shows that according to the governing jurists, loss of prospective profits is *ḍarar* and must be compensated.

²⁷⁸ See e.g., Khalkhālī, S. M. K. and Rashtī, M. H., (1395 H. Q.) vol. 1 at 162 in which he expressly accepts the view that where the pre-requisites of profit is available that prospective profit will be regarded "*māl*".

²⁷⁹ This is a fact to which some legal systems have expressly referred. See e.g., Art. 728 of the Iranian Civil Procedure Code and Art. 352 of the German Civil Code. See also Art. 1149 of the French Civil Code; Art. 74 of the Convention examined in this study.

²⁸⁰ See e.g., Imāmi, S. H., (1363 H.S.) vol. 1 at 244-245, 407-411 (in which he distinguishes between the profits which are expected to be certainly derived had the seller performed properly the contract (*manāfe' muhaqqeq al-husūl*) and those are hoped to be derived (*manāfe' muhtamal al-husūl*). See also, Kātūziān, N., (1995) vol. 1 at 220.

entitled to recover damages.²⁸¹ Is he entitled to recover damages for any loss subsequent to the seller's breach? Can he claim damages for loss the seller did not foresee or could not have foreseen? Does an injured buyer have a right to claim damages for losses he could have avoided?

Because of the lack of clear jurisprudential statements, it seems necessary to look at the general principles upon which the principle of compensation is justified. As explained above, according to the two principles of *tasbib* and *lā ḍarar*, an injured buyer must be given a right to claim damages for any loss *resulting from the breach* so that he is placed in the same position as if the breach had not occurred. However, social events are fully interconnected so that it is hard to decide all the close and remote losses caused by non-performance of the contract. The main issue is thus to identify what sort of loss can be attributed to the seller in breach. Relying on the above principles the following rules may help to identify some general criteria which can play a restrictive role in this system.

2.3.1. Causal Connection

One of the rules which can play a significant restrictive role is that the buyer may only be entitled to claim damages for those losses which have a causal connection to the seller's breach. The mere fact that the loss sustained has some connection is not sufficient. Loss, as an actual event, may be connected to a number of factors. A defaulting seller will only be required to bear loss incurred where there exists such causal connection between the loss sustained and the breach of contract that it is customarily attributed to the seller in breach. This requirement can clearly be found in the statements of the jurists which are mentioned under the following heading.²⁸²

²⁸¹ The I.C.C. also does not specifically prescribe the requirements under which damages can be claimed. Art. 226 does simply provide: "In case of non-performance of undertakings by one of contracting parties, the other party cannot claim damages for losses sustained unless a specified period was provided for the performance of the undertaking and that period has expired. And if no period was fixed for the performance of the undertaking, the other party may claim damages only when he was authorised to fix the time of performance of the undertaking and can prove that he has demanded the performance of the undertaking." However, Art. 728 of the Iranian Civil Procedure Code does more clearly state the relevant requirements as follows: "..., the court will pass a judgment for recovery of damages only in cases where the plaintiff proves that loss has been inflicted upon him and this loss has arisen directly out of non-performance or delay in performance of obligations or failure to submit the judgment debt. ..." The provision, as indicated by Professor Kātūziān, is derived from Art. 1151 of the French Civil Code (Kātūziān, N., (1990) vol. 4 at 247). However, the enactments passed after the revolution, the Islamic Majlis (parliament) of Iran, instead of relying on the "direct loss criterion", has placed the emphasis on the test of "foreseeable" (see e.g., Arts. 347-349, 352-353 of the Iranian Islamic Penal Law, 1370 H.S./ 1991 (as amended 1375/1996) section Deyāt (Blood Money). It is worth noting that these two criteria are different, for, firstly, the first is objective and depends on the facts, while the second is subjective depends on the persons. Moreover, using these two criteria may result in different consequences, since not every foreseeable loss is direct. It is quite possible that an indirect loss is foreseeable by the party in breach when the contract is made.

²⁸² See e.g., the statement of the late Shahid Thāni in: Āmeli, Z. (Shahid Thāni), vol. 2 at 245; Helli, M. M. (Allāmah Helli) and Āmeli S. M. J. H., vol. 6 at 206; Bujnūrdi, M. H., (1389 H.Q) vol. 2, at 28, 29.

2.3.2. Foreseeability Test

In considering the principles governing the recoverable losses, *Shi'ah* jurists have not expressly recognised a rule similar to the "foreseeability" limit on damages. The question is therefore whether an injured buyer is entitled to recover damages for any loss resulting as a consequence of the seller's breach or can only recover damages for those losses which were foreseeable for the seller in breach. Assuming that the buyer can claim damages only for foreseeable loss, the following questions are also unanswered: To what extent must it be foreseeable? When must the loss be foreseeable?, and, by whom should it be foreseeable?

2.3.2.1. Foreseeable Losses

Although the jurists have not specifically referred to the test of foreseeability of recoverable losses, some statements can be found which indicate what is called in common law system as "foreseeable" loss. The jurists have addressed the point when defining the concept of "*tasbib*", the criterion upon which a person may be held liable. For instance, the late Shahid Thāni says:

"A person will be held liable provided that two requirements are satisfied: first, the loss- (in his word, wastage)- can be attributable to him, that is, if it had not been for his default the loss would not have occurred. Second, the sustained loss was that which is *habitually* (in his word, *a'datan*) is expected to result."²⁸³

The word "habitually" used in the statement of this jurist shows that in his view, the wrongdoer is liable for those losses which are frequently expected to result.

The writer of *Mefiāh al- Kerāmah*, that is, the late Sayyed Muhammad Jawād Āmeli, has gathered a number of statements which expressly show that the mere causal connection between the loss suffered and the unlawful action does not suffice. A wrongdoer will be held liable for losses which are *frequently* expected to result.²⁸⁴

The point is also explicitly addressed by the late *Sāheb Jawāher*. In his leading text book, this jurist observes that the wrongdoer would be liable for those losses of which he did personally know or could have known that they would result from his action.²⁸⁵ The criterion of foreseeability has been also addressed in more general form by the late *Mirzā Habibullāh Rashti*, in definition of the principle of *tasbib*. In defining causation, he maintains:

²⁸³ Āmeli, Z. (Shahid Thāni), vol. 2 at 245. See also, Bujnūrdi, M. H., (1389 H.Q) vol. 2, at 28, 29.

²⁸⁴ See Helli, M. M. (Allāmah Helli) and Āmeli S. M. J. H., vol. 6 at 206. For instance, he cites from the distinguish jurist, *Allāmah Helli*, in his leading text book, *Ghawāed al Ahkām*, that he said: "... The defaulting person would be liable where it is *expected* that his action causes such loss ..." (ibid.). Such a statement is also cited from *Muhaqqeq Karaki* in *Jāme' al- Maqāsed* (ibid.).

²⁸⁵ See Najafi, M. H., (1981) vol. 37 at 59 (the phrase is so: *La a'lema walā zanna al- ta'ddi*). The distinction between the actual and presumed knowledge is also expressly made in page 61 when he explains *Muhaqqeq Helli* and *Allāmah Helli's* views. In this regard, he says: "The word 'conjecture (*zann*)' in their statements is purported to refer to what occurs habitually, ... although the wrongdoer has not actually realised at the time of default."

"The cause of loss is whatever is regarded as a cause of loss in view of custom ... so long as it is not treated as a rare cause."²⁸⁶

That is, a defaulting person would be held liable for any loss resulted from his unlawful action provided that it is not regarded as a remote consequence of his action. A remote consequence, in view of this jurist, is that which is customarily attributed to other causes rather the defaulting person's act.

Bearing in mind the foregoing statements declared by a number of distinguished jurists, it can be said with certainty that the mere causal link between the loss sustained and the unlawful act does not suffice. The wrongdoer should be held liable only for those losses which were foreseeable.²⁸⁷

However, the above statements were all declared in the context of tortious liability. Thus, the question is whether such a limitation is applicable to the contractual liability. It seems that the answer is positive. There is no satisfactory reason to confine the given restrictions to the particular case of tort liability. The jurists have not distinguished between liability based on tort and that based on breach of contract. Consequently, what they have said in justifying liability for tort should in principle be applied to the liability for breach of contract.

One can go even further and say that the restriction should *a fortiori* be applied to contractual liability, since in contract cases the injured party has an opportunity to make known unusual risks to the party in breach. Thus, it is reasonable to say that the seller in breach should only be held liable for those losses he foresaw or could have foreseen. If the buyer, wishes to protect himself against a risk which to the seller would appear unusual, he can direct his attention to it before the contract or at least the breach is made.

Further arguments can also be made in favour of this view on the cardinal principle of *Qubh-e-e'qāb-e-belā bayān* (No punishment except in accordance with the law, similar to "*nulla poena sine lege*").²⁸⁸ Contract is the law of the parties to the contract. Where one of them is required to pay damages for loss which he neither foresaw nor could have foreseen he will in fact be punished contrary to the contractual law. The contractual law commands that the party in breach should be held liable for those losses he was aware or at least could have been aware of.

²⁸⁶ See Rashti, M. H., (1322 H. Q.) at 30. The same criterion is expressly accepted by Isfahāni, S. A., and Gulpāygāni, S. M. R., (1977) vol. 2 at 288 (question no. 61).

²⁸⁷ It is probably on this reason that the grand Ayatullāh Nāsser Makārem Shirāzi has suggested that where a person has prevented an owner to sell his property when the market price is high he would be liable if the market does fall down later provided that he knows or could have reasonably known that the owner has the intention to sell his property (see Shirāzi, N. M., (1413 H.Q.) vol. 1, at 200).

²⁸⁸ See also, Kātūziān, N., (1990) vol. 4 at 252. The principle is commonly called in the jurists' terminology, *asālat al-barāeh*. However, it is to be mentioned that despite the language of this rule, damages in Shi'ah law, as shown in the text according to the principles of *tasbib* and *lā darar* are compensatory.

In this respect, there must, of course, be a distinction between losses which result naturally from the breach of contract in the ordinary course of events and those which result from special circumstances.²⁸⁹ In the first case, the seller in breach should be held liable for those losses directly and naturally resulting from the breach. Such losses are generally foreseeable for any reasonable person who is in the same position. Thus, the seller in breach is not allowed to claim that he was not aware of the events. However, in the latter situation the case becomes different. The seller should not be held liable for losses resulting from unusual circumstances he has no knowledge of unless the buyer could show that the seller was able to foresee such results in light of the facts and matters available to him at the time of making the contract or committing breach. Accordingly, the seller should not be regarded as liable for loss of a particular resale contract, new project in using the purchased materials or stoppage in the buyer's factory for a few days delay in delivery, where the buyer did not specify his special circumstances and particular purposes for the purchase of goods.

2.3.2.2. Degree of Foreseeability

The question now arises to what extent must the loss be foreseeable? In the case of tort cases, the jurists have suggested different criteria. For instance, some jurists held a wrongdoer liable for that loss which is *habitually* expected to result from his wrongdoing.²⁹⁰ With a slight divergence, the criterion has been supported by the late Muhaqqeq Karaki in *Jāme' al-Maqāsed*.²⁹¹ In contrast, according to the late Mirzā Habibullāh Rashti, loss will be recoverable if it is customarily regarded as a *possible* consequence of the default.²⁹² The same view has been supported by the late Allāmah Helli in *Qawāed al-Ahkām*. In that book, he suggested that, for making a wrongdoer liable, it is sufficient if the loss in question is such it is *expected* to result from the default.²⁹³

It seems that the defendant should only be held liable when in the light of information actually given to him or which he could reasonably have obtained from the facts and circumstances which exist at the time of the contract he did actually foresee or could reasonably have foreseen it as a *most likely* result of his breach of contract. The reason is clear. The general principles, as described above, would only come into operation when the loss sustained is customarily attributed to the seller's non-performance. This is the reason why

²⁸⁹ The distinction has clearly been made by the late Najafi in his leading book, *Jawāher al-Kalām* (see, Najafi, M. H., (1981) vol. 37 at 61. See also, fn. 269.

²⁹⁰ Āmeli, Z. (Shahid Thāni), vol. 2 at 245.

²⁹¹ As cited in: Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 6 at 206. See also, Bujnūrdi, M. H., (1389 H.Q) vol. 2 at 28, 29.

²⁹² Rashti, M. H., (1322 H. Q.) at 30.

²⁹³ See, Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 6 at 206.

most jurists, as already quoted from some of them, restricted the liability of the injuring party to the case where it was expected that the loss was *frequently* result from the cause (*sabab*).

It is to be noted that there is no mention of the question whether the exact amount of the loss should be foreseeable or if it is sufficient if the occurrence of the type of loss is most likely to result. It is hard to accept the latter requirement in accordance with the general principles prescribed above. It is of course natural that the court should resort to estimation of loss sustained so as to determine the amount of foreseeable loss.

2.3.2.3. Time of Foreseeability

It is also not clear at what time loss must be foreseeable. The statements cited above show that the time point must be when the wrongdoing is committed. The question which arises here is whether the same time-criterion should be applied to the case of breach of contract. As pointed out earlier, the above statements were originally made in respect of tort liability in which the victim has no opportunity to make the wrongdoer aware of his circumstances, while in contract cases, the injured party has such an opportunity. Thus, it is suggested that the proper time for foreseeability of loss in contract cases should be the time when the contract was made. This is the reasonable time at which the buyer must make any particular unusual risk known to the seller, for in that time the extent of the duties and rights of contracting parties are determined. Requiring one of the contracting parties to bear the risk of any particular circumstance which was unknown for him at the time of the contract would break the cardinal principle of *transactional justice* (*adālat-e-mu'wadi*). Accordingly, a contracting party, say buyer, will not be entitled to claim damages for unusual loss unless he has directed the attention of the seller to that particular loss by making him know of his special circumstances when the contract was made.

2.3.2.3. Whose Foreseeability

As the above-cited statements show, the party whose foreseeability is crucial is the party in breach. For instance, the passage quoted from the late *Sāheb Jawāher* shows clearly that the criterion is that the loss must be foreseen or could have been foreseen by the *wrongdoer*.²⁹⁴ No great significance should be attached to the injured party's foreseeability. The knowledge of the injured buyer will be of legal value when he has made it known to the seller in breach at the time of making the contract.

²⁹⁴ See Najafi, M. H., (1981) vol. 37 at 59. See also p. 61 in which he expressly gives the significance to the wrongdoer's knowledge.

2.3.3. Mitigation Principle

Although *Shi'ah* jurists do not talk of the principle of "mitigation", taking into account the principles which constitute the grounds of liability to pay damages draws a significant guideline for this purpose. Under *Shi'ah* law, as seen above, a defaulting party will be responsible for those damages *caused by his actions* provided that they were foreseeable by him when the contract was made. Accordingly, in any case where damage is customarily attributable to the plaintiff rather than the party in breach it is the plaintiff who must bear the consequences of his conduct. For example, suppose seller A fails to deliver raw materials for use in buyer B's factory and B fails to purchase substitute materials that are available on the market with the result that B's production is interrupted. The shut-down was in fact a "consequence" of B's conduct rather than A's breach.

The rule can also be justified on the principle of *iqdām* (fault against himself)²⁹⁵. That is, a buyer who could have avoided loss but fails to take some reasonable measures to avoid it has in fact acted to his own detriment. In such cases, the principle of *lā ḍarar* does not come into operation, for the principle is provided for the favour of a party who is aggrieved by the unlawful actions of the other, while it is presumed that such losses are caused by the buyer's own action rather than the seller's breach.

2.3.4. Relevance of Fault

To hold a person liable for the harmful consequences of his conduct, *Shi'ah* jurists have not attached much significance to the doctrine of *taqsir* (literally, fault).²⁹⁶ If the doctrine is occasionally talked of, it is in order to decide whether the loss sustained is attributable to the defendant. For instance, in relation to the question whether a trustee (*amin*) is liable for the loss of, or damage to, the subject of the contract of trust (*a'qd -e-wadi'ah*), it is said that he will be held liable on the principle of *ta'ddi* (abuse)²⁹⁷ and *tafrit* (negligence)²⁹⁸, that is, when he has acted other than a reasonable man would have done in his position.²⁹⁹ The fact that, the trustee is not held liable for the sustained loss when he has acted reasonably does not mean

²⁹⁵ The principle can be defined in English as follows: "No liability arises in favour of an owner who has acted in detriment to his own property" See generally, Shahābi, Mahmūd, (1326 H.S.) at 103.

²⁹⁶ See Najafi, M. H., (1981) vol. 27 at 128-129.

²⁹⁷ The term is defined in I.C.C., Art. 951 as "*Ta'ddi* is transgression of what is permitted or is customary in relation to another person's property or right."

²⁹⁸ The term is defined in I.C.C., Art. 952 as "*Tafrit* means omission of an act that, by virtue of a contract or by custom, is necessary for the preservation of the property of another person."

²⁹⁹ See e.g., Helli, A. N. J. (Muhafiq Helli), (1377 H.Q.) at 120, 141 and 151; Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 1 at 414, 441 and 446; Najafi, M. H., (1981) vol. 27 at 128, 183 and 428. See also, Yazdi, S. M. K., (1988) vol. 2 at 146; Isfahāni, S. A., and Gulpāyghāni, S. M. R., (1977) vol. 1 at 492, 503, and vol. 2 at 112; Khumayni, S. R. M., vol. 1 at 594, 602

that the commission of *taqsir* is an essential element of liability, but is for the purpose of determining whether or not the trustee has performed his duties.

The issue has its origin in the nature of the duties imposed on the promisor. To explain, contractual duties are divided into two general categories: the obligation of result (*ta'hhud be natijah*) and the obligation of means (*ta'hhud be wasilah*).³⁰⁰ In both cases, what a plaintiff is required to do is to prove that the defendant has not performed his contractual duty. However, in the case of obligation of result it is achieved by showing that the seller, for instance, has not delivered goods in accordance with the contract, while in the case of obligation of means, he must prove that the defendant has not acted as a reasonable person would have done.³⁰¹

Bearing in mind the above point, the seller must actually deliver the purchased goods in accordance with the contract. Any form of non-performance will entitle the buyer to sue him for damages if he can show that the seller has not performed the contract and that the loss sustained was caused by that non-performance. The seller can only excuse himself from liability where he proves that non-performance was caused by factors which were beyond his control or by the conduct of the injured buyer himself. Thus, he will not be discharged from liability merely because he has done his best and has not committed any form of *ta'ddi* or *tafrit*.

2.4. Assessment of Damages

So far we have been concerned with the question whether or not *Shi'ah* law has recognised a general right to claim damages for breach of contract, and, assuming that there is such a rule in this legal system, for what losses can an injured buyer recover damages? Further questions are: according to what criteria should the court assess the damages recoverable? At what time and place are damages to be measured? How are damages to be quantified where there is no market price for the purchased goods and the buyer has not made a substitute transaction? And finally, is priority to be given to the market price or substitute-transaction price, where the buyer has made an actual substitute contract? No clear answer can be found in *Shi'ah* jurisprudence. The best way, it is suggested, is to look at what the jurists have relied on in the case of tortious liability where the question of quantification of recoverable loss, the criteria upon which damages are to be assessed, time and place on which the amount of damages are to be determined have been extensively examined. The following discussion will try first to

³⁰⁰ See e.g., Makki, M. (Shahid Awwal), and Āmeli, Z. (Shahid Thāni), (1309 H.Q.) vol. 2 at 352; Najafi, M. H., (1981) vol. 42 at 106; Āle Kāshef al-Qetā, M. H. (1359 H. Q.) vol. 3 at 148 and 149. See also, Kātūziān, N., (1990) vol. 4 at 175; Kātūziān, N., (1995) vol. 1 at 85.

³⁰¹ In comparison, the distinction here appears to be very similar to the one drawn in English law between an absolute obligation to do something - such as the seller's obligation under a sale of goods contract - and an obligation to use "best endeavours" to do something, or to take reasonable skill and care.

identify those rules developed in the context of tortious liability and then to show how they can be applied to contract cases.

2.4.1. Formulae for Assessment in Tort Cases

In several places, the jurists have discussed the question of quantification of damages which can provide some useful guidelines for the present purpose. For instance, in the case of the buyer's liability for the purchased goods when it proves that the transaction was in fact void, it is commonly said that the receiver (buyer) is obliged to return the property to its owner (seller) in the same condition as at the time of delivery. Where the return of it in its initial conditions is impractical he is required to pay the owner its equivalent if it is of *methli* (fungible) or to pay its value if it is of *qimi* (non-fungible).³⁰² The jurists have examined in detail various questions such as, the meaning of *methli* and *qimi*, time and place at which the value of goods must be determined. The same discussions can be found when dealing with the liability of a *ghāseb* (usurper) to pay damages in the case of *ghasb* (usurpation).³⁰³

2.4.1.1. Methli Property

Where a transaction is treated as void but the return of the goods, becomes, for any reason, impractical the buyer is required to pay the seller its equivalent. For this purpose, the buyer is required to give a replacement to the seller where the property in question was *methli*. Neither is the seller entitled to require the value of the item nor does the buyer have an option to pay the value instead of the replacement.³⁰⁴ The reason for giving priority to replacement over paying the value was said to be that the former can better place the injured party into the position in which he was before the wrongdoing was committed without forcing him to go to the market and purchase the equivalent item.³⁰⁵

³⁰² See generally, Ansāri, M. (1375 H.Q.) 105 and *seq.*, Najafī, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 116 and *seq.*; Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 183 and *seq.*, Shirāzi, N. M., (1413 H.Q.) vol. 1 at 180 and *seq.* The same rule is applied when discussing the liability of a person who has destroyed or damaged another person's property (see e.g., Shirāzi, N. M., (1413 H.Q.) vol. 2 at 242 and *seq.*). The rule is expressly accepted by I.C.C. in Art. 311. See also, Arts. 328 (in *itlāf*) and 331 (in *tasbib*).

³⁰³ See e.g., Isfahāni, S. A., and Gulpāygāni, S. M. R., (1977) vol. 2 at 277 and *seq.*; Khumayni, S. R. M., vol. 2 at 159 and *seq.*; Imāmi, S. H., (1363 H.S.) vol. 1 at 368 and *seq.*

³⁰⁴ See e.g., Najafī, M. H., (1981) vol. 37 at 85; Qumi, M. A., (1371 H.S.) vol. 2 at 301; Ansāri, M. (1375 H.Q.) at 105 and *seq.*; Najafī, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 135 and *seq.*, particularly, at 146; Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2 at 184; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 190 and *seq.*; Imāmi, S. H., (1363 H.S.) vol. 1 at 368 and *seq.* The same rule is expressly applied to the case usurpation (see e.g., Isfahāni, S. A., and Gulpāygāni, S. M. R., (1977) vol. 2 at 277; Khumayni, S. R. M., vol. 2 at 159).

³⁰⁵ See Āmeli, Z. (Shahid Thāni), vol. 2 at 247; Ansāri, M. (1375 H.Q.) at 106; Najafī, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 135; Kātūziān, N., (1995) vol. 1 at 532-533 and the references cited there.

Concept of Methli. The term "*methli*" has been defined in various forms by the jurists.³⁰⁶ A close look at those definitions would lead one to conclude that "a property will be regarded as *methli* when there are various similar instances so that it can be readily accessible in the market. Existence of some equivalent which is hard to be accessed will not cause the case to become of the *methli*."³⁰⁷ However, almost all of the jurists have acknowledged³⁰⁸ that whether a particular item is to be regarded of *methli* or *qimi* is to be referred to the relevant custom. Thus, in the event of dispute in any particular case the court should refer the case to the relevant established custom so as to decide whether the item in question is of *methli* or *qimi*. Where it proves that the item is of the first type, the defendant is obliged to provide the replacement for the plaintiff.

2.4.1.2. *Qimi* Property

In contrast, where the property in question is *qimi* the party at whose risk the property is destroyed, damaged or becomes altered is required to pay its real value. The same rule, it is suggested, should be applied to the case where the purchased item under an invalid contract is provided on the buyer's instructions and has no equivalent in the market. The same is also true where the purchased goods become unavailable, for whatever reason. In all of these cases, the wrongdoer's liability is to be measured by reference to the real value of the purchased goods. That is, the court must, in accordance with relevant factors such as, the agreed price, or price offered by a purchaser, determine the value of it as payable damages to the injured person.

2.4.2. Applicability of the Tort Formulae to Contract Cases

The jurists have not considered applying the above-explained criteria when losses are caused by breach of contract.³⁰⁹ However, a close consideration of the jurists' arguments in respect of assessment of damages in tort cases shows a general formula: the wrongdoer's liability should be ascertained according to whether lost property is *methli* (i.e., there is an available market for it) or *qimi* (no market is available for it). In the first case, the wrongdoer's liability should be determined by reference to the market price. For this reason, it is said that he has to pay the

³⁰⁶ See e.g., Helli, A. N. J. (Muhaqqeq Helli), (1377 H.Q.) at 274; Āmeli, Z. (Shahid Thāni), vol. 2 at 247; Najafi, M. H., (1981) vol. 37 at 89, 93; Qumi, M. A., (1371 H.S.) vol. 2 at 298-300; Ansāri, M. (1375 H.Q.) at 105; Khalkhāli, S. M. K. and Rashti, M. H., (1395 H. Q.) vol. 1 at 166; Khurāsāni, M. K., (1406 H. Q.) at 35; Yazdi, S. M. K., (1378 H.Q) vol. 1 at 96; Najafi, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 140; Āmuli, M. T., and, Nāeini, M. H., (1413 H.Q.) vol. 2 at 336-337; Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2, at 186; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 193.

³⁰⁷ Āmuli, M. T., and, Nāeini, M. H., (1413 H.Q.) vol. 2 vol. 2 at 338; Shirāzi, N. M., (1413 H.Q.) vol. 1 at 194-195). The same definition is adopted by I.C.C. Art. 950.

³⁰⁸ Qumi, M. A. (Muhaqqeq Qumi), (1371 H. S.) vol. 2 at 300; Najafi, M. H., (1981) vol. 37 at 93; Khalkhāli, S. M. K. and Rashti, M. H., (1395 H. Q.) vol. 1 at 165; Yazdi, S. M. K., (1378 H.Q) vol. 1 at 96; Āmuli, M. T., and, Nāeini, M. H., (1413 H.Q.) vol. 2 at 337; Shirāzi, N. M., (1413 H.Q.) vol. 1 at. 194; Kātūziān, N., (1995) vol. 2 at 66. See also, Art. 950 of I.C.C.

³⁰⁹ It is worth noting that the I.C.C. is also silent as to this issue.

equivalent. Neither is the victim entitled to require the value of the item nor does the wrongdoer have an option to pay the value instead of the replacement. In the second case, his liability is to be ascertained by reference to the value of the property lost. The logic behind this formula is, it seems, to place the victim in the same position as if the wrongdoer had not destroyed his property. It seems that there is no justification preventing the application of the given formulae to contract cases. Accordingly, it is suggested that assessment of damages for breach of contract under this system are to be made in accordance with the following formulae.

General Formula. The general formula should be the 'difference in value' rule. As far as contract cases are concerned, some trace of reliance on such a rule can be identified in *Shi'ah* jurisprudence. As will be seen when dealing with *arsh*,³¹⁰ almost all jurists have suggested that *arsh* should be assessed by reference to the difference between the value of sound and defective goods. Although this rule is originally applied to *arsh* liability, since most of the jurists have described *arsh* as a sort of *gharāmat* (damages) it indicates the basic rule in measurement of compensation in their view. Moreover, this is in line with the principles of *lā ḍarar* and *tasbīb*. According to these principles, the cardinal principle which must be constantly kept in focus is that the total damages awarded should not exceed the actual loss the buyer has suffered by reason of the seller's non-performance. According to this formula, the buyer's damages are to be measured by reference to the general principle, that is, an estimate of the sum which will place him in the same position as if the seller had performed the contract rightly. In those cases, the court has to decide the case in accordance with relevant factors such as the contract price, the price which a second purchaser paid or was prepared to pay for it.

Special Formulae. Where the contract goods have an available market it is not clear whether the prevailing rule should be the market price rule (as English law suggests) or if the sub-contract price should primarily be taken into account in measurement of damages for non-delivery (as the Convention suggests). Both methods may be supported in this system.³¹¹ However, it is suggested that the English rule is more compatible with general principles. Accordingly, wherever there is an available market for the purchased goods so that the buyer is readily able to purchase a substitute his damages are to be measured by reference to the market price. Sub-contracts should in principle be disregarded. The same rule, it is suggested,

³¹⁰ See, this section, 3.4.

³¹¹ One may argue that the Convention approach is more acceptable in this system. This is because it is in line with the philosophy upon which awarding damages is justified to put the aggrieved party into the same, but not a better, financial position as if the other party had performed the contract. Where this purpose can be achieved by the substitute contract price formula, no reason to justify reference to the current price formula.

should be applied to the buyer's sub-sales. The suggestion can be justified on the basis of the same policy the jurists have offered in tort cases where³¹² it is commonly said that the wrongdoer is first obliged to give back the owner his property. Where the return of it in its initial condition is impractical his primary duty is shifted into a secondary obligation to pay damages. The liability to pay damages are to be ascertained by reference to the market price if the property lost is *methli* (i.e., it has an available market), otherwise he has to pay the real value of the item lost. On the basis of this rule, it is suggested that what the seller has undertaken to deliver is a certain quantity of goods conforming to the contract terms. As long as the seller has not performed his obligation he remains obliged in favour of the buyer to deliver the purchased goods: the buyer is entitled to demand performance of that obligation and the seller is required to perform it. Where due to the seller's breach delivery of the agreed goods to the buyer is impractical, his duty to deliver goods corresponding with the agreed conditions is shifted into a secondary obligation to pay damages. In this way, where the contract goods have an available market the seller's liability should be ascertained on that ground. Neither should the buyer be entitled to claim the actual price (if he has for example purchased the replacement goods or resold the purchased goods in a price higher than the market price) nor should the seller in breach have an option to rely on it (if the buyer, for instance, purchased or resold in a price less than the market price). In addition, it can also be argued that if the buyer has actually paid more than the market price the increase was due to the buyer's failure to go to the market and purchase at a reasonable price and that where the buyer has paid less than the market price the saving was due to the buyer's act rather than the seller's breach. Thus, it is the buyer, not the seller, who has to bear the increased price in the first case and benefit from the lower price in the second case.

Relying on the above formula, it is suggested that where the case becomes one of non-delivery the buyer's normal damages are to be assessed by reference to the difference between the contract price and the price available in the relevant market for goods resembling the contract goods. Similarly, in the case of late delivery the buyer's damages are to be measured by reference to the difference between the value of the purchased goods at the time they should have been delivered and at the time of actual delivery. Equally, in the case of non-conforming delivery the buyer's damages are to be determined by reference to the difference between the value of the goods actually delivered and that of the goods which should have been tendered. In all of the above cases the buyer should also be given a right to claim further damages provided that the requirements already explained are satisfied.

³¹² See, this Section, 2.4.1.

2.4.3. Time of Assessment

Where the contract goods are *qimi* it seems that the court will not have much difficulty. The problem arises where they are classified as *methli* and the price for the goods varies between the time of the contract and the time of performance. According to the price at what time should the court assess the buyer's damages?

Again, the problem has only been addressed by the jurists in the tortious cases. A great variety of solutions have been presented;³¹³ ranging from assessment on the basis of the time of default to assessment on the basis of the time of enforcement of the court's order to pay damages.³¹⁴ All of these solutions have been suggested in situations where a person has illegally possessed another person's property and subsequently caused its destruction, damage or alteration. As far as the contract for sale of goods cases are concerned, it seems that most of these solutions are inapplicable.

Some Iranian lawyers have suggested that the general time is to be the time when the court decides the case, since it is only this time that the loss caused by the non-performance of the contract would be adequately compensated. Relying on any other time would, they argue, leave some undue loss uncompensated.³¹⁵ This suggestion seems unacceptable, for it would allow the buyer to recover damages for losses he could have avoided if he has acted as a reasonable man. Allowing the buyer to sit aside and await for the court's judgement would mean that he could recover damages for losses which are not caused by the seller's non-performance. It is, therefore, submitted that the general rule applicable to the case of breach of sale contract should be the time of breach, that is, the time when the seller fails to perform his duty to deliver goods conforming to the contract requirements, for this is the time when the seller's duty to perform his primary obligation is changes into a secondary duty to pay damages. On this rule, where the seller refuses to deliver the contract goods the buyer's damages are to be measured by reference to the difference between the market price of the purchased goods at the time when the buyer knows or ought to have known of the lack of

³¹³ These suggestions are cited in: Qumi, M. A. (Muhaqqeq Qumi), (1371 H. S.) vol. 2 at 294 and *seq.*; Narāqi, A., at 368; Marāghei, M. F., (1274 H. Q.) at 314 and *seq.*; Rashti, M. H., (1322 H. Q.) at 64; Yazdi, S. M. K., (1378 H.Q) vol. 1 at 99-100; Najafi, M., and, Nāeini, M. H., (1373 H.Q.) vol. 1 at 147 and *seq.*; Āmuli, M. T., and, Nāeini, M. H., (1413 H.Q.) vol. 2 at 357 and *seq.*; Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2, at 196 and *seq.*; Shirāzi, N. M., (1413 H.Q.) vol. 1, at 202 For criticism on these solutions see, Kātūziān, N., (1995) vol. 2 at 69-74.

³¹⁴ These solutions are: date of wrongdoing, date of destruction of *māl*, date of claim for damages; date of the court's Judgment, the most high price from the date of possession till the date of destruction, the most high price from the date of possession till the date of claim, the most high price from the date of possession till the date of payment. See in this respect, Yazdi, S. M. K., (1378 H.Q) vol. 1 at 99-100 in which he has identified about fifteen suggestions.

³¹⁵ Kātūziān, N., (1990) vol. 4 at 240-241. See also, Shirāzi, N. M., (1413 H.Q.) vol. 1, at 202. The late Muhaqqeq Qumi has suggested that in the first case *methli* the victim's damages are to be measured by reference to the time of payment (*yum al- adā'*) and in the case of *qimi* damages are to be assessed by reference to the time of destruction (Qumi, M. A. (Muhaqqeq Qumi), (1371 H. S.) vol. 2 at 34).

conformity. However, "the time of breach criterion" should be construed as a flexible one. It must be intended as a period of time within which the buyer could reasonably decide to go into a proper market. Likewise, where a defect in the goods appears some time after delivery it is suggested that the damages are to be ascertained by reference to the difference between the contract price and the value of the goods at the time when the buyer discovered or ought to have discovered the defect.

The same criterion is, it is suggested, to be applied where the seller has failed to deliver within the contract time. If the value of the purchased goods has fallen between the time of due delivery and the time of actual delivery the buyer's damages are to be measured by reference to the difference between the value of the goods when actually delivered and at the contractual delivery date.

2.4.4. Place of Assessment

The jurists have not examined in detail the question at what place it has to be decided that the destroyed, damaged or altered item is *methli* or *qimi*. It is therefore not clear according to the price at what place the wrongdoer is to pay the injured owner's damages. Various solutions have been offered.³¹⁶ According to one, the case should be decided by reference to the place of the unlawful action (*ghasb*), while another holds that it must be referred to the place of destruction (*talāf*). A further view observes that the case must be decided by reference to the place of payment of damages.³¹⁷

These suggested solutions have not been properly applied to contract cases. The question therefore arises whether they can be applied to the case in which different places may be relevant. For instance, in the case of a contract for an international sale of goods various places may seem relevant; the seller's country, the buyer's country, the place of goods and the place at which they are to be tendered. It is suggested that the question is to be answered by reference to the place at which the seller should have performed his delivery obligation. This is because this is the place in which the seller's duty to deliver goods is discharged.³¹⁸ The first step is, therefore, to ascertain whether the contract has provided a particular place for delivery. If there is such a provision it would prevail. In the absence of such a provision in the contract, the place of delivery should be where the contract was made, unless established custom provides otherwise.³¹⁹ Accordingly, in any case the court has first to ascertain the place

³¹⁶ See generally, Shirāzi, N. M., (1413 H.Q.) vol. 1, at 215 -216.

³¹⁷ Shāhrūdi, S. A. and, Khūei, S. A., (1409 H.Q.) vol. 2, at 206; Kātūziān, N., (1995) vol. 2 at 74-75. See also, Yazdi, S. M. K., (1378 H.Q) vol. 1 at 100 in which he refers to the place at which the victim sues the party in default for damages, place of wastage of the property and the option is to be in the hand of the victim.

³¹⁸ Qumi, M. A. (Muhaqqeq Qumi), (1371 H. S.) vol. 2 at 237 (question 151).

³¹⁹ Ibid., at 236 (question 151).

at which the seller could have been discharged had he performed his delivery obligations and then proceed to determine whether there is an available market at that place or not. The buyer's damages are to be measured by reference to the price of that market if it proves that the place of delivery has such a market. Hence, the amount of his liability must be assessed by reference to that place. However, where the place of delivery lacks an available market for the purchased goods it seems that the Convention solution can be a useful one, that is, "the price at such other place as serves a reasonable substitute" (Art. 76 (2)).³²⁰ In applying the substitute market due allowance for differences in the cost of transporting the goods to the buyer's place should be, however, taken into account when measuring the recoverable damages.

3.0. Part Two. Claim for *Arsh*

3.1. Introduction

As indicated in the introductory remarks of this section, in *Shi'ah* law under certain circumstances the buyer is given a right to claim another form of monetary relief. In the language of *Shi'ah* jurisprudence, this is called *arsh*. Although the right to claim damages for breach of contract has not been properly examined, the right to claim *arsh* is extensively examined by *Shi'ah* jurists, when dealing with the case where it proves that the article purchased was defective. In that case, they have examined its nature, scope, and the different formulae by reference to which it is to be assessed. The following discussion will try first to define the concept and nature of the term, and then to determine in what circumstances the buyer will be entitled to this remedy, and finally to ascertain how it is to be measured. At the end it will make an attempt to examine the relationship between this right and the right to claim damages as described in the previous part.

3. 2. Concept and Nature

In *Shi'ah* jurisprudence, the term "*arsh*" is used in a general sense to refer to any valuable *res* which is to be paid to the victim of breach or personal injury. For instance, Shaykh Murtaḍā Ansāri describes the word as follows:

"*Arsh*" is used between the jurists to refer to any valuable *res* which must be paid against any vice in an article sold, or, for any bodily injury as a result of an unlawful

³²⁰ The late Nāeini has expressly referred to the solution when discussing liability of a contracting party as to the wastage of the subject-matter of the contract when it proves that the contract was originally invalid (i.e., *maqbuḍ be a'qd fased*) (see Najafī, M., and, Nāeini, M. H., (1373 H.Q.) vol 1 at 140). See also, Shirāzi, N. M., (1413 H.Q.) vol. 1 at 204.

act, provided that there has not been ascertained a specific blood money (*deyah*) for that injury in the latter case.³²¹

On this definition, the word is used to describe the valuable *res* either in case of breach of contract and tort.³²² However, in the context of sale of goods, the term is used to refer to “the proportional difference between sound and defective goods which is to be paid by the seller to the buyer where it proves that the purchased goods were defective”.³²³

Generally, almost all jurists have adopted *arsh* as a remedy for the buyer where in the case of sale of specific goods it proves that the purchased goods were defective. However, they have questioned other aspects of this remedy, in particular, its legal nature, whether it can be claimed for any non-conforming delivery or only in the case of delivery of defective goods and, whether it is a separate remedy or an alternative to the right to terminate the contract.

3.2.1. Nature of the Remedy

Shi'ah jurists are of two different views as to the legal nature of *arsh*: according to the first, it is in fact a portion of the contract price which is specifically allocated to the *wasf-a-salāmat* of the object sold³²⁴; according to the second, it is a type of *gharāmat* the seller has to pay the buyer for the defective goods.³²⁵

It seems that the jurists' dispute as to the nature of this remedy is partly because of the rationale justifying the remedy and partly because of the different languages used in the *rewāyāt* prescribing the remedy. To explain, as indicated in respect of the first two remedies previously discussed, a number of jurists tend to justify them on the basis of the mutual intention of the contracting parties. In respect of this remedy some jurists also tend to justify it on the basis of the will of the contracting parties. In contrast, others try to base them on the cardinal principle of *lā ḍarar*; a party who is injured by the other's violation should be

³²¹ Ansāri, M. (1375 H.Q.) at 271. See also: Shahidi, M. F., (1375 H.Q.) at 544; Muqniyah, M. J., (1402 H. Q.) vol. 3, at 217.

³²² *Arsh* in the latter case is discussed under the heading of “*deyāt pl. deyah*” (blood money) and it is sometimes called “*hukūmah*”). See in this respect, Khumayni, S. R. M., vol. 2 at 498. It is worth noting that *deyah* is one of the financial penalties prescribed in *Shi'ah* criminal law. *Arsh* in the sense of financial penalty is prescribed in cases where determination of the financial penalty is left to the court. In contrast, *deyah* is a pre-ascertained financial penalty the court has no power in ascertaining its amount.

³²³ Muqniyah, M. J., (1402 H. Q.) vol. 3 at 217; Khumayni, S. R. M., vol. 5 at 126; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 269.

³²⁴ See generally, Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 631-632. See also, Ansāri, M. (1375 H.Q.) at 271, and, Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 85 (where he quotes this view from some jurists); Muqniyah, M. J., (1402 H. Q.) vol. 3 at 218; Muhaqqeq Tehrāni, M. R., (1414 H.Q.) vol. 24 at 4. See also, Art. 427 of I.C.C.

³²⁵ See generally, Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 632; Khurāsāni, M. K., (1406 H. Q.) at 231; Yazdi, S. M. K., (1378 H.Q.) vol. 2 at 67, 85; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 674; Najafi, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 137; Irvāni, A., (1379 H.Q.) vol. 2 at 52; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 270; Khumayni, S. R. M., vol. 5 at 8-9; Tabrizi, J., (1412 H. Q.) vol. 4 at 280. In Iranian Law see, Imāmi, S. H., (1363 H.S.) vol. 1 at 501-502; Kātūziān, N., (1990) vol. 5 at 307-308.

redressed by a proper means. This is the reason, it seems to the present writer, why the jurists have disputed the nature of the present remedy. The advocates of the first theory tries to justify *arsh* on the grounds that the parties to the contract have agreed that where it proves that the article sold lacks the agreed characteristic a portion of the consideration should be returned to the party who has not received the conforming article.³²⁶ In contrast, those jurists who support the latter theory try to justify the remedy on the grounds that where it proves that the article sold does not conform with the contract quality keeping the defective goods will be harmful and consequently the principle of *lā ḍarar* entitles him to claim *arsh* for the lack of conformity.³²⁷

A further cause for this dispute may be the use of different language in the *rewāyāt* entitling the buyer to claim *arsh*. A considerable number of *rewāyāt* are available in this respect.³²⁸ However, they are not cited in a consistent language. In some of them it was held that the buyer was entitled to claim a portion of the contract price³²⁹, in others to claim the real value of the defect (which resembles the right to claim damages)³³⁰, while others held simply that he was entitled to claim *arsh* without specifying its nature.³³¹

It seems that none of the above-described interpretations is acceptable in its entirety; *arsh* is neither the exact portion of the contract price nor the real value of the defect. It is, as will be explained in more detail, a proportional difference between the value of defective and sound goods. The policy behind the *rewāyāt* concerned is to protect the buyer against the seller who has benefited from the contract without having completely performed his own part of the contract, rather than the principle of *lā ḍarar*.³³² The rule is, in fact, based on the principle of *akl -e- māl bel bātel* (i. e., unjust enrichment).³³³ Accordingly, although one cannot agree with

³²⁶ This view was criticised by a substantial number of eminent jurists. See e.g., Yazdi, S. M. K., (1378 H.Q) vol. 2 vol. 2, at 67, 85, in which he observes that although the appearance of the *rewāyāt* is consistent with this view, for several reasons it must be rejected.

³²⁷ As will be seen below, the late Sayyed Yazdi, relying on this principle, suggests that in any non-conforming-delivery case an aggrieved buyer should be given an option to claim for *arsh*. He also goes further and suggests that the buyer may claim *arsh* where he is entitled to terminate the contract on the option of lesion (*kheiyar-a-ghabn*) (Yazdi, S. M. K., (1378 H.Q) vol. 2 at 130-131). In contrast, see: Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 104, in which he argues that the principle of *lā ḍarar* cannot be relied on in the case of non-conforming delivery at all so as to give the buyer a right to claim *arsh*.

³²⁸ See for this respect, Āmeli, H., vol. 18, at 29-32, 101-109. It is worth noting that almost all of these *rewāyāt* are concerned with the sale of slaves.

³²⁹ See e.g., *ibid.*, ahādith nos.: 23068, at 30; 23240, at 102; 23244, at 103.

³³⁰ See e.g., *ibid.*, ahādith nos.: 23242, at 103; 23245 and 23247, at 104; 23257, at 108.

³³¹ See e.g., *ibid.*, ahādith nos.: 23069, at 30; 23241, at 102; 23243, at 103; 23246, at 104.

³³² The fact to which the distinguished *Shi'ah* jurist, the late Ayatullāh Imām Khumayni has expressly pointed out in his authoritative text book "*Kitab al-Bay'a*", (see, Khumayni, S. R. M., vol. 5 at 127, 128 and 130). The reason is clear. If the principle justifying *arsh* is the principle of *lā ḍarar* the buyer should be entitled to claim the whole difference between the sound and defective goods under *arsh* not a proportional difference.

³³³ The doctrine of "unjust enrichment" or the doctrine under which a person shall not be allowed to profit or enrich himself inequitably at another's expense (*akl-e-māl bel bātel*), is based on the Quranic verse which says: "And do not eat up your property among yourselves for vanities ..." (Chapter 2, verse 188).

those jurists who describe *arsh* as a portion of the contract price which is to be refunded to the buyer, it cannot be said that *arsh* is the same as damages. It seems that those jurists who have attempted to describe it as *gharāmat*, have done so only for the purpose of avoiding treating it as a portion of the contract price. For this reason they have described it as *a type of gharāmat* not *gharāmat* itself. *Arsh*, as will be seen below, differs from damages in terms of its grounds and purposes. It is a particular form of protection provided for a buyer against a seller who is going to profit or enrich himself at the buyer's expense.

3. 2. 2. Scope of the Remedy

The second controversial aspect of this remedy in *Shi'ah* jurisprudence is to determine the circumstances in which it can be resorted to. While a substantial number of the jurists have treated the remedy as exceptional, few jurists have made great attempts to justify it as a general rule applicable to breach of any contractual term.

According to the first approach, the rule is that in a contract for sale of specific goods any lack of conformity gives an injured buyer a single option: either to reject the non-conforming goods and terminate the contract or to accept the non-conforming goods. However, because of a particular *rewāyāt* and *ijmā'* (consensus), they argue, the case of breach of *shart-e-salāmat* is excluded from the general rule. According to these authorities, the only case in which the buyer is given a right to claim *arsh* is where the seller of specific goods has delivered a defective article. On this approach, the remedy cannot be relied on where the contract is for sale of unascertained goods and where the seller of specific goods has delivered goods which do not conform with the contract quantity, description or which are subject to third-party rights or claims. It also does not apply to other types of breach such as delay, delivery at the wrong place, defects in documents and the like.³³⁴

In contrast, some jurists have suggested that there is no reason to restrict the right to claim *arsh* to breach of *shart-e-salāmat*. The remedy, according to this approach, can be relied on for breach of any contractual term, whether it be of the type of *shart-e-salāmat*, *shart-e-sefat* or *shart-e-fe'l*.³³⁵

³³⁴ Ansāri, M. (1375 H.Q.) at 271, 285; (the late Ansāri expressly describes the remedy as an exceptional one provided for by virtue of *rewāyāt* and consensus (see, *ibid.*, at 271); Khurāsāni, M. K., (1406 H. Q.) at 231; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 159-160; Najafī, M., and, Nāeini, M. H., (1358 H.Q.) vol. 2 at 137-138, 143; Irvāni, A., (1379 H.Q) vol. 2 at 67; Shahidi, M. F., (1375 H.Q) at 546; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 157, 269-271 and 375-376; Tabrizi, J., (1412 H. Q.) at 357, 443-444. It appears that the Iranian Civil Code restricts the right to claim *arsh* for breach of *shart-a-salamat* (see Arts. 422-437). See in this respect, Kātūziān, N., (1990) vol. 5 at 307.

³³⁵ See e.g., Yazdi, S. M. K., (1378 H.Q) vol. 2 at 69, 130-131 and other sources cited there; Khumayni, S. R. M., vol. 5 at 226-227 (in respect of the breach of *shart-e-fe'l*, where the buyer has lost his right to terminate the contract).

It seems that *arsh* is a general remedy which can be claimed in any case of non-conforming delivery where the seller benefits from his breach of a contractual term describing the contract goods at the expense of the buyer. There is no clear reason to restrict the remedy to the particular case of defective goods. The only arguments in favour of such a restriction are that there is an *ijmā'* on the view, or, that no *rewāyat* exists under which the remedy has been extended to a case where the seller has delivered goods which do not conform with other contractual terms.

It seems that none of the above arguments can justify such a restrictive approach. First, the alleged *ijmā'* has been broken throughout the history of development of *Shi'ah* jurisprudence by dissenting views on the part of some distinguished jurists.³³⁶ Secondly, it is quite possible that the advocates of the first approach have relied on the above interpretation of the *rewāyat*. There is no doubt that such an *ijmā'* has no legal value.³³⁷ The only thing which may remain is that most jurists throughout history have supported the restrictive approach. But, as explained in the first chapter³³⁸, it is a well-accepted rule that the mere fact that a view is popular between a number of scholars, does not make the view an authority. It is their own understanding, which has no authoritative force for others.

In addition, it is quite possible to go further and claim that the suggested approach seems consistent with the *rewāyat* authorising the injured buyer to terminate the contract or to claim *arsh* for defective delivery. It is hard to accept that these *rewāyat* are intended to give a particular religious decree for a special case. If the case is so, this question cannot be answered: why have the jurists extended them to other cases? For instance, almost all of these *rewāyat* are concerned with the sale of slaves, while the jurists have extended them to the sale of any commodity. In addition, these *rewāyat* are specifically related to the contract for sale, while the jurists have extended them to other reciprocal contracts, such as leases.³³⁹ Moreover, notwithstanding that these *rewāyat* are concerned with the buyer who has received defective goods, the jurists have applied them to the case in which the seller has received a defective article as a consideration.³⁴⁰ More importantly, notwithstanding that a considerable number of jurists have acknowledged that the *rewāyat* have subjected the right to claim *arsh* to the case of loss of the right to terminate, almost all the jurists have disregarded the appearance of these *rewāyat* and have judged that the buyer can claim *arsh* even where he is able to reject the

³³⁶ See e.g., the sources cited in: Ansāri, M. (1375 H.Q.) at 285.

³³⁷ Since, as explained in the first chapter, *ijmā'* can be relied on as a source of legal view where there is no primary source (i.e., Quran and *Sunnah*) on the point.

³³⁸ See, Chapter One, 2. 1. 2. 1.

³³⁹ See e.g., Yazdi, S. M. K., (1378 H.Q) vol. 2 at 71.

³⁴⁰ See e.g., Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 624; Ansāri, M. (1375 H.Q.) at 253; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 70; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 104; Khumayni, S. R. M., vol. 5 at 13-14; Khumayni, S. R. M., vol. 1 at 529.

defective goods and terminate the contract. These instances show clearly that the *rewāyāt* are not intended to provide a special decree, but that they are in fact applied to the common cases with which the contracting parties were mostly concerned at that time of the *rewāyāt*. Moreover, the policy behind the rule is of general application. It is applicable to any case in which a seller enriches himself at the expense of the buyer. The *rewāyāt* are in fact in line with the given policy. There is nothing in the concept of *a'yb* (defect) which restricts the *rewāyāt* to the particular case of defective goods. Accordingly, as far as the *rewāyāt* are concerned, they should not be regarded as preventing extension of this remedy to cases other than delivery of defective goods. On the above construction, it seems that in any case of non-conforming delivery the buyer should be given a right to claim *arsh* if the seller has benefited from his non-conforming delivery.

3. 3. *Arsh* as an Alternative or Separate Remedy

The other controversial aspects of the remedy in question is the relation between this remedy and that of termination. The jurists have discussed *arsh* when discussing the buyer's right to terminate the contract on the basis of *kheyār-e-a'yb*. In that case, they have regarded the right to claim *arsh* as a part of *kheyār-e-a'yb*. That is to say, where it proves that the object sold was defective the buyer has *kheyār-e-a'yb* in the sense that he is entitled to reject the defective article and terminate the contract or to accept it and claim *arsh*. In that context, they have considered the question whether the buyer can claim *arsh* even where he is entitled to terminate the contract or can resort to it only where he has lost his right to terminate. In this connection, as pointed out above, the language of *rewāyāt* authorising the buyer to claim *arsh* shows that this remedy is available only when the buyer has lost his right to terminate the contract. Relying on the face of these *rewāyāt*, some jurists have regarded *arsh* as a substitute for the right to terminate the contract so that, as long as the buyer is able to protect himself by rejecting the defective goods and recovering his money back, he cannot claim *arsh*. He will be allowed to claim *arsh* for defects in the purchased goods only when he has lost, for any reason, his right to terminate the contract. This view was supported by Shaykh Tūsi in the early centuries of codification of *Shi'ah* jurisprudence.³⁴¹ However, at the present time most jurists support the view that in the case of defective delivery the buyer has an option either to reject the goods and terminate the contract or to keep the defective goods and claim *arsh*.³⁴²

³⁴¹ Tūsi, M. H. (Shaykh Tūsi), vol. 2 at 131.

³⁴² See generally, Bahrāni, Y., vol. 19 at 63-64; Ansāri, M. (1375 H.Q.) at 253; Khumayni, S. R. M., vol. 5 at 8 and 226; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 102. For instance, the great *Shi'ah* jurist, the late Shaykh Ansāri observes that there cannot be found any authority within *rewāyāt* authorising the buyer to claim *arsh* where he is able to reject the defective goods and terminate the contract. But what the relevant *rewāyāt* say is that the buyer can claim *arsh* where he has lost his right to terminate the contract because of the

As it appears from the jurists' statements, they have not made a distinction between these two remedies; they justify both the remedy of termination and that of *arsh* on a single ground. That is, a buyer who has received non-conforming goods would in principle be entitled either to terminate the contract or to keep the contract alive and claim *arsh*. However, they have not addressed the question whether this remedy only arises where the contract can be terminated on the basis of the seller's defective delivery or it is a separate remedy which may arise even where a buyer may not be entitled to terminate the contract.

In the absence of a clear jurisprudential statement, it is suggested that the right to claim *arsh* should be distinguished from that of termination. In the context of commercial contracts, termination is a drastic remedy and should be restricted to the case where the buyer cannot be adequately compensated by the other means. The remedy of *arsh* is an effective remedy which can protect an injured buyer without jeopardising the existence of the contract. It is in line with the cardinal principle of *asālat al-luzūm* of the contract, while termination is an exception to this principle justified on the principle of *lā ḍarar*. Accordingly, it would be unreasonable to treat the two remedies alike or subject them to the same restrictions. Common wisdom commands that these two remedies must be distinguished. An injured buyer should be given a right to terminate the contract only when the seller's failure has resulted in sufficiently serious consequences, and *arsh*, in contrast, should be given to the buyer where the seller is going to benefit from his violation at the expense of the buyer. This suggestion, if accepted, would bring this legal system into line with commercial reality and business practice. Buyers do often prefer, particularly in a rising market, some form of monetary relief rather than getting involved in a time wasting and expensive process of termination of contract. Moreover, the fact that a buyer may lose his right to terminate the contract rather than the right to claim *arsh* under certain circumstances is, in fact, a step towards recognising the distinction between these two remedies and that termination for its drastic effects must be restricted as far as possible. But the right to claim *arsh* must be kept as long as the buyer has not expressly or impliedly waived his right.³⁴³ Similarly, it can be said that even the rewāyāt restricting the remedy to the case where the buyer has lost his right to terminate are in fact in line with the policy of distinguishing these two remedies.

use of the delivered goods (see Ansāri, M. (1375 H.Q.) at 253. The same statement has been made before him by the late Sāheb Hadāeq in: Bahrāni, Y., vol. 19 at 63-64. See also: Yazdi, S. M. K., (1378 H.Q) vol. 2 at 67; Khumayni, S. R. M., vol. 5 at 8-11; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 100 and 102; Tabrizi, J., (1412 H. Q.) at 278). See in contrast, See also, Tabrizi, J., (1412 H. Q.) at 279. I. C. C. has followed the former group of the jurists (Art. 422).

³⁴³ See in this respect below, 3.5., and the references cited in fn. 342.

3.4. Assessment of *Arsh*

One of the significant aspects of this remedy in *Shi'ah* jurisprudence is to determine the extent of the seller's liability to pay *arsh* for his defective delivery. The *rewāyāt* prescribing this remedy have used different language when introducing the criterion on which it should be quantified. They can be classified into three general categories. According to some, the buyer is given a right to claim the difference between the value of the goods in sound and defective condition when he realises that the item delivered is defective.³⁴⁴ In contrast, others give him a right simply to claim *arsh* for defects which exist in the article delivered, without making clear how the *arsh* should be assessed.³⁴⁵ Finally, others entitle him to claim the value of defect, but require it to be quantified by reference to the contract price.³⁴⁶

It seems that all the three categories of *rewāyāt* are in fact in the same line. All of them are intended to provide that a buyer who has received defective goods must be protected by giving him a right to claim *arsh*.³⁴⁷ This protection is to be made by, in effect, reducing the contract price in the same proportion as the defect reduces the actual value of the goods as delivered. In order to refer to this point, in some of these *rewāyāt* it was said that the buyer is entitled to claim a portion of the contract price. Whereas, if *arsh* is the real value of defect it may sometimes exceed the agreed price. Thus, the absolute nature (that is, *itlāq*) of the first category of *rewāyāt* should be disregarded in favour of the express language of the third category which describes *arsh* as a portion of the contract price.³⁴⁸

3.4.1. Time of Assessment

Shi'ah jurists have not made much discussion about the time point at which the value of the goods actually delivered and that of the goods as they should have been delivered under the contract must be assessed. However, there can be found some references in which they have suggested different criteria.³⁴⁹ The time of making the contract, the time of delivery and the

³⁴⁴ Āmeli, H., vol. 18, bāb 4, ahādith nos. 23242 and 23243, at 103.

³⁴⁵ Ibid., bāb 6, hadith no 23241, at 102, bāb 4, hadith no. 23246 at 103.

³⁴⁶ Āmeli, H., vol. 18, bāb 16, hadith no. 23068, at 30, bāb 4, ahādith nos. 23240, at 102 and 23244 at 103, and bāb 5, hadith no. 23249 at 105, and bāb 6, hadith no. 23257 at 108. For instance, the late Shaykh Ansāri cites from some jurists of the early centuries that they were apparently of the view that *arsh* is the difference between the defective and perfect goods (Ansāri, M. (1375 H.Q.) at 271).

³⁴⁷ See also, Khumayni, S. R. M., vol. 5 at 130.

³⁴⁸ See generally, Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4, at 632; Bahrāni, Y., vol. 19 at 64; Ansāri, M. (1375 H.Q.) at 271, 272; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 101; Khumayni, S. R. M., vol. 5 at 126-129 and 136; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 272-275, 285; Tabrizi, J., (1412 H. Q.) at 362-363. See also, Kātūziān, N., (1990) vol. 5, at 321. The same criterion is provided by I.C.C. Art. 427.

³⁴⁹ Some of jurists have gathered about six possibilities in this regard (Māmāqāni, A. (1345 H.Q.) at 136. For the lack of a well-settled criterion between *Shi'ah* jurists, I.C.C. is silent on the question. See in this respect, Kātūziān, N., (1990) vol. 5 at 313-316.

time of the buyer deciding to claim *arsh* are some of possibilities supported by some distinguished jurists.

The time of making the contract has been supported by a considerable number of eminent jurists,³⁵⁰ on the grounds that this is the time at which the value of the defective and perfect goods is assessed by the contracting parties. It is true, they argue, that the buyer will be entitled to claim *arsh* when he learns of the lack of conformity, but his right is based on the defect which was in the article sold at the time of the contract. According to this view, a change in the market price should not affect the liability of the seller to pay *arsh*. What he has to pay is the proportional difference between the value of the goods actually delivered and that of the conforming goods at the time when the contract was made.³⁵¹ This argument may be defensible in respect of sale of specific goods where the defect was hidden at the time of the contract. However, it cannot be applied to the case of unascertained goods or to that where the article sold was perfect at the time of contract but was damaged during the period of time when the risk of loss was on the seller.³⁵² For this reason, some jurists who supported *arsh* as a general remedy have tried to rectify the criterion so as to cover such situations. According to them, the value should be assessed on the basis of the time when the defect arises, provided that the goods are at the risk of the seller.³⁵³

It seems that the different views as to time for assessment of *arsh* are based on the jurists' different views on the legal nature of *arsh*. If it is in fact a portion of the price which has to be refunded to the buyer, it is quite reasonable to say that it should be assessed at the time of the making-contract criterion, for at that time the seller has received a portion of the price against nothing. But according to the view that it is a monetary relief which is to be paid to compensate the buyer for the losses he has suffered as a consequence of non-conformity, it has to be determined at the time at which the buyer elects *arsh*, for before the buyer's election the seller's duty is not quite clear; he is simply under the duty to do some positive act in the buyer's favour. It may be in the form of refunding the whole price if the buyer prefers termination, or, to pay *arsh* if he prefers to keep the non-conforming goods.³⁵⁴

³⁵⁰ See e.g., Āmeli, Z. (Shahid Thāni), vol. 1 at 196; Helli, M. M. (Allāmah Helli), and, Āmeli, S. M. J. H., vol. 4 at 632 (and different sources cited there); Najafi, M. H., (1981) vol. 23 at 289; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 103; Muhaqqeq Tehrāni, M. R. (1414 H. Q.) vol. 24 at 3-8. In the latter source it is said that there is no difference between the time of contract criterion and that of other criteria. However, as pointed out when discussing the remedy under the Convention, it is accurate where the value of non-conforming goods rises or falls proportionately to that of conforming goods from the time of formation of contract, otherwise the time point will be of significance.

³⁵¹ Yazdi, S. M. K., (1378 H.Q) vol. 2 at 103.

³⁵² Kātūziān, N., (1990) vol. 5 at 314.

³⁵³ Yazdi, S. M. K., (1378 H.Q) vol. 2 at 103. See also, Najafi, M. H., (1981) vol. 23 at 290.

³⁵⁴ Najafi, M. H., (1981) vol. 23 at 290. In Iranian law, see, Kātūziān, N., (1990) vol. 5 at 315.

Under the suggested construction, however, *arsh* is a proportional reduction of price which should be assessed by reference to the value of perfect and defective goods at the time of delivery. Under this view, both views are satisfied; the ratio of difference between the perfect and defective goods is determined and to that extent the buyer's entitlement to reduce the contract price is ascertained.

3.4.2. Place of Assessment

No jurist has addressed the question at what place the value of the conforming and non-conforming goods must be determined. Accordingly, it is not clear whether it must be assessed by reference to the market value at the seller's place of business or the buyer's destination, or even, where the seller knows at the time of contract that the buyer will dispatch the consignment directly to a second purchaser, on the basis of the market value at the second buyer's destination. In the absence of any jurisprudential statement, it is suggested to leave the case to the court to decide according to the circumstances of each case, although one may argue that the place at which the seller is discharged from his delivery obligation would be the place most consistent with the concept and purpose of this remedy.

3.5. Restrictions on the Remedy

Owing to lack of a clear distinction between the right to terminate the contract and the right to claim *arsh* in *Shi'ah* jurisprudence, this remedy seems to be subject to the same requirements as the right to terminate the contract for defective delivery. *Shi'ah* jurists, as seen above, analyse both remedies within a single concept, i.e., *kheyār-e-a'yb* (option of defect). On this construction, the buyer's right to claim *arsh* will be confined to the same circumstances as those in which he will be entitled to terminate the contract on the basis of the 'option of defect'. Accordingly, *arsh* may be available for the buyer only where the contract is for sale of specific goods and the seller has delivered goods which do not conform to the contract quality. Likewise, it may be resorted to for the same defect for which the contract can be terminated. Similarly, *arsh* may be lost in principle in the same circumstances in which the right to terminate the contract may be lost, although the jurists have tried to identify some cases in which the buyer may lose one rather than the other.³⁵⁵ Among the various circumstances in

³⁵⁵ See generally, Ansāri, M. (1375 H.Q.) at 253, 259; Khumayni, S. R. M., vol. 5 at 19 and *seq.*, 63; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 105 and *seq.*, 156. It is to be noted that the circumstances in which the buyer may lose only his right to terminate the contract on the option of defect were examined when dealing with loss of the right to terminate the contract, that is, express waiver and *tasarrūf*. But the circumstances in which the buyer may only lose his right to claim *arsh* have no relevance to the commercial contracts.

which the buyer may lose his option of defect including the right to claim *arsh* the following are the most relevant.³⁵⁶

3.5.1. Delay in Claiming *Arsh*

One of the circumstances in which the buyer may lose his right to claim *arsh* is delay to exercise his right promptly. The question is, however, controversial.³⁵⁷ The controversy is, as explained in the case of termination,³⁵⁸ due to the question whether the 'option of defect' should be exercised immediately after it proves that the goods delivered are defective, or will survive even after the buyer has deliberately failed to exercise it. Accordingly, as in the case of termination, if it is accepted that the option of defect is to be exercised promptly, any delay in claiming *arsh* will result in loss of the right. In contrast, if it is an indefinite option, the buyer will be entitled to resort to this remedy even after that time has expired.

3. 5. 2. Seller's Offer to Cure the Non-Conformity

No jurist has addressed the question in this form. What the jurists have raised here is whether the buyer will lose his right to claim *arsh* where the defect has been cured by itself.³⁵⁹ In that case, some jurists suggested that where at the time of claim *arsh* the defect concerned was removed the buyer will lose his right to claim *arsh*. The view has been justified on the grounds that the buyer is given a right to claim *arsh* for the loss resulted from the defect. Thus, where the defect is actually removed there is no reason to justify claim for *arsh*.³⁶⁰

At the present time almost all jurists analyse the remedy of price reduction (*arsh*) in this way. In this event, *arsh* cannot provide an efficient remedy for a buyer under commercial contracts. However, as was suggested before³⁶¹, the right to claim *arsh* should not be confined to the case where the buyer is given the right to terminate the contract. It is a general right based on the principle of *unjust enrichment*. In any case where a buyer has been delivered non-conforming goods he should be given a right to claim *arsh* if he wishes to keep the non-conforming goods, whether the contract is for sale of specific or unascertained goods.³⁶² The

³⁵⁶ See generally, Ansāri, M. (1375 H.Q.) at 260-262; Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 651 and *seq.*; Khumayni, S. R. M., vol. 5 at 66 and *seq.*; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 160 and *seq.*; Tabrizi, J., (1412 H. Q.) at 306 and *seq.*

³⁵⁷ Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 186; Tabrizi, J., (1412 H. Q.) at 317.

³⁵⁸ See, Section One, 3.3.3.2., (B).

³⁵⁹ This can be the case where the subject of sale is animal which was ill at the time of the contract but before the buyer has known of the fact or exercised his right the animal becomes sound.

³⁶⁰ See e.g., Ansāri, M. (1375 H.Q.) at 261 in which he cites different sources in this respect. See also, Khalkhāli, S. M. K., & Rashti, M. H., (1407 H. Q.) vol. 2 at 664; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 171-175. In contrast, see: Khumayni, S. R. M., vol. 5 at 76-79; Tabrizi, J., (1412 H. Q.) at 312.

³⁶¹ See above, 3. 3.

³⁶² The late Sayyed Yazdi, basing the view on the principle of *lā ḍarar*, has accepted the view where the buyer of unascertained goods has lost, for whatever reason, his right to reject the defective goods (see Yazdi, S. M. K., (1378 H.Q) vol. 2 at 70). The suggested view can be supported by the argument presented by some jurists

fact that the jurists have recognised certain circumstances in which a buyer may lose his right to terminate without being barred from his right to claim *arsh* demonstrates that it is an independent remedy which is subject to its own requirements, though some requirements may be applied to both. Accordingly, it should not be surprising if it is said that failure to exercise the right to terminate the contract promptly results in loss of the right to terminate but not of the right to *arsh*.³⁶³ However, the jurists who support the view which holds that the buyer does not have to exercise his right promptly do not suggest any time limit under which the buyer will lose his right. It is suggested that there must be some time limit after the buyer should not be entitled to claim *arsh*. It seems that the buyer should be required to use his right within a reasonable time. Allowing the buyer to claim *arsh* for an indefinite time would place the seller in a great uncertainty which is contrary to the principle of *lā ḍarar*.

Likewise, the buyer should not be entitled to claim *arsh* where the seller has actually cured his defective performance. It seems that there is no difference between the case of self-cure where the jurists have suggested that the right is automatically lost and the case in which the seller has cured at his expense. What is important is to protect the buyer against the seller who has benefited without perfectly performing his obligations under the contract. Where the seller has cured the lack of conformity at his own expense, *transactional justice* is re-stabilised. Thus, there is no reason to justify the right. It is suggested that the same rule should be applied where the seller has made a reasonable offer to cure. Accordingly, as long as the seller is ready and able to cure without causing the buyer unreasonable detriment the buyer should not be given the right to claim *arsh*.

3.6. *Arsh* and *Gharāmat*

As seen in the first part of this section, *Shi'ah* jurists have not examined the right to claim damages for breach of contract. It is, therefore, hard to explain the relation between the right to claim *arsh* and the right to claim damages in view of *Shi'ah* jurists. Failure to make a clear distinction between these two remedies caused some jurists, as already seen³⁶⁴, to confuse *arsh*

in order to apply the option of defect to the case of delivery of defective items under a sale of unascertained goods. According to them, where the seller of unascertained goods has delivered goods which do not conform with the contract quality the buyer has an option to accept them and claim *arsh* or to reject them and terminate the contract immediately, or, according to some others, to claim *arsh* where he has lost his right to reject the non-conforming goods. This is because, they argue, where the seller appropriates a particular consignment to the contract and the buyer consents to it, it becomes as the case of sale of specific goods breach of which gives rise to the option of defect (see the different sources cited in: Yazdi, S. M. K., (1378 H.Q) vol. 2, at 70; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 97. See also Khumayni, S. R. M., vol. 5 at 17; Imāmi, S. H., (1363 H.S.) vol. 1 at 504). However, they do not explain why this argument is not to be applied where the seller has tendered goods which do not correspond with the contract description.

³⁶³ See also, Muhaqqeq Tehrāni, M. R., (1414 H.Q.) vol. 24 at 8.

³⁶⁴ See above, 3.2.1.

with the right to claim damages. As fully explained above, most jurists have rejected the idea that *arsh* is a portion of the contract price which is to be paid by the seller to the buyer for the defect in the article sold. In their view, it is a particular type of *gharāmat* which an injured buyer can claim for loss he has suffered as a consequence of the seller's defective delivery. On this interpretation, great efforts have been made to distinguish this remedy from other financial liabilities.³⁶⁵

Nevertheless, in spite of most jurists who have described *arsh* as a remedy provided to compensate the losses which an injured buyer has suffered as a result of the seller's non-conforming delivery, it is suggested that the right to claim damages and the right to claim *arsh* are to be distinguished. Some significant differences can be identified which justify treating them as two separate remedies.

(a) A main divergence between these two remedies is the legal basis upon which they are justified; damages are awarded in order to compensate a party who has suffered undue loss as a consequence of the other party's non-performance of the contract; while *arsh* is awarded in order to prevent the enrichment of the seller at the expense of the buyer.

(b) The right to claim *arsh* is available for mere non-conforming delivery, whereas, the right to claim damages, as seen earlier, arises only where the requirement of causation and that of foreseeability are satisfied.

(c) The seller who has been sued by the buyer for damages may be exempted from liability if he can prove that the lack of conformity was out of his control, while *arsh* is not subject to any restriction of this type.

(d) *Arsh* is determined by the buyer's unilateral declaration, though the seller may later dispute the buyer's entitlement or its amount,³⁶⁶ while damages are to be quantified by the court.³⁶⁷

(e) Damages are calculated by reference to the difference between the value of conforming and non-conforming goods, whereas, *arsh* is a proportional difference between the value of the goods as actually delivered and the value of the goods as they were required to be under the contract.

(f) *Arsh* can only be claimed in the case of defective delivery under a sale of specific goods, as most jurists suggest, or for any form of lack of conformity, as the present writer, consistent

³⁶⁵ See e.g., Ansāri, M. (1375 H.Q.) at 271; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 281-282; Khumayni, S. R. M., vol. 5 at 126-127.

³⁶⁶ Where the parties dispute on the amount of *arsh* the court will refer the case to the experts to ascertain what the seller must pay the buyer as *arsh*. See in this respect, Ansāri, M., (1375 H.Q.) at 272-273; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 285 and *seq.*; Khumayni, S. R. M., vol. 5 at 136 and *seq.* Tabrizi, J., (1412 H. Q.) vol. 4 at 363 and *seq.*

³⁶⁷ However, as pointed out in the third chapter, this difference will be questioned when the buyer has pre-paid, particularly, the price is paid by documentary credit.

with some distinguished jurists, suggests, whereas damages may be claimed in any case in which a contracting party fails to perform the contract. Accordingly, damages have a wide application. It can also be resorted to for consequential losses.

4.0. Summary and Conclusions

In light of the above section it was seen that great uncertainty exist in the present *Shi'ah* law in respect of the buyer's right to claim damages. It is not clear whether the buyer has a right to claim damages for losses he has suffered as a consequence of the seller's breach. If so, for what losses can he recover damages and how are the recoverable damages to be measured? However, by examining the principles primarily developed in tort cases, i.e., the principles of *tasbib* and *lā ḍarar*, it was shown that these principles are general and applicable to both contract and tort cases. A close consideration of these principles also showed that in *Shi'ah* law the general rule is that any undue *ḍarar* (loss) must be compensated. Accordingly, an injured buyer has a general right to claim damages for any loss he has suffered as a consequence of the seller's action (breach of contract). The necessity of compensation for loss sustained is an obvious fact to which the wisdom (*a'qal*) commands. Religious mandate is only for the purpose of confirmation of such a decree.³⁶⁸ On this rule, no difference seems to exist between the case of "out of pocket" losses and the case where the plaintiff claims for loss of future gains. Thus, compensation involves not only assessment of gains prevented by the breach but also of losses ensuing which would not have occurred had the contract been performed. It was also suggested that no distinction should be made between the various forms which the violation may take. The buyer may be entitled to claim damages for non-delivery, late delivery or non-conforming delivery provided that the requisite requirements as prescribed above are satisfied.

Damages justified on these general principles should be regarded as compensatory and awarded to protect certain recognised interests of the plaintiff in order to place him, so far as money can do, in the same situation as if the injurious action has not occurred, whether the given act is a breach of contract or something else. Thus there must be some injury to the plaintiff's contractual interests before damages are awarded. This principle restricts the extent of recoverable damages in various ways. In the first place, unlike the remedy of *arsh* which is based on the unjust enrichment doctrine, an award of damages must be justified on the grounds of loss to the plaintiff and not of gains and benefits to the defendant. Gains which

³⁶⁸ See in this respect, Shirāzi, N. M., (1410 H.Q.) vol. 2 at 28; Imāmi, S. H., (1363 H.S.) vol. 1 at 394; Kātūziān, N., (1995) vol. 1 at 147. For this reason, it should not be confined to particular cases; it can be extended to any case in which an undue *ḍarar* is imposed to the individuals or society (Kātūziān, N., *ibid.*).

have accrued to the party in breach may be recoverable on the principle of *akl-e-māl bel bātel* (unjust enrichment), for example where the defaulting seller has made use of the aggrieved buyer's property and thus saved expense. Thus, profits to the party in breach are not recoverable merely because they have accrued as a result of the breach of contract. The second consequence of these principles is that an award of damages should be a sum equal to the loss the plaintiff has sustained: he cannot recover more than his loss. If a seller of goods defaults, the buyer may as a result save storage charges; any such savings must be brought into account on the buyer's claim for damages. The third consequence of these principles is that 'punitive' (or 'exemplary') damages will not be awarded for breach of contract.³⁶⁹ The fourth consequence is that a mere breach on the part of a contracting party does not entitle the other to claim damages; they will be awarded only when the victim of breach has suffered loss as a result of that breach.

It also becomes clear that under *Shi'ah* law, what an injured buyer is required to do so as to satisfy the court for an award of damages is simply to show first that he has suffered loss as a result of the seller's failure to perform his obligations in accordance with the contract. He is not required to show any kind of *ta'ddi* or *tafrit* on the part of the seller because according to the principles of *lā ḍarar* and *tasbib* any loss which can customarily be attributed to him he is liable for it. Accordingly, a buyer seeking damages for losses he sustained must show that the seller has failed to perform his contract and that the seller's failure was the close cause of the loss so that it was actually foreseeable by the seller or that a reasonable man in his circumstances could have foreseen it as a most likely result of the default when the contract was made. In the case of different causes, the seller in breach is liable for a loss if his default appreciably increased the objective possibility of loss of a kind that in fact occurred. He will not be liable if the default would ordinarily have been a matter of indifference with regard to what actually occurred and only became a condition of the occurrence of the loss as a result of unusual or intervening events. Accordingly, the buyer will not be entitled to recover damages for losses he could have avoided them by taking reasonable measures.

Whether a breach is a sufficient cause for the incurred loss is, it is suggested, to be determined by applying the objective standard on the basis of information available to the seller in breach at the time of contract. For this purpose, the court would attribute knowledge of all the circumstances which a reasonable person at the position of seller could have known, as well as any additional circumstances which he himself actually knew. Thus, under the

³⁶⁹ It is worth noting that the *Shi'ah* jurists have not made a clear distinction between "punitive" or "exemplary" and "compensatory" damages. Both cases are sometimes examined in one place and under a single heading, like the discussions made under the heading of *deyāt* and usurpation (*ghasb*).

“sufficient causation” test there is both an objective and a subjective element, which does not limit, but rather, expands damage.

Once the liability of the seller is established it is the court's task to evaluate and quantify the damages in terms of money. It was shown that *Shi'ah* jurists have not addressed the question how the injured party's damages are to be measured. However, according to the rules developed by the jurists in tort cases, it was suggested that normal damages are basically to be assessed by reference to the “difference in value” rule. In the absence of available market no particular rule exists here to be relied on. For this purpose, the court may take into account various factors such as the contract price, actual price, the price offered by a second buyer and other circumstances surrounding the case. The cardinal principle which must constantly be kept in focus is that the total damages awarded should not exceed the actual loss the buyer has suffered by reason of the seller's non-performance. However, where there is an available market for the purchased goods in the sense described above the buyer's damages are in principle to be measured by reference to the market price unless the seller has known of the buyer's intention to resell the same goods he purchased as specific goods. In such case, since the buyer is not able to deliver the second buyer by procuring substitute goods, it was suggested that his damages are to be measured by reference to the resale price. In the case of different current price, the price at the time of breach of contract is crucial provided that the buyer has known of it. The place for ascertaining the current price is the place of delivery.

Similarly, the second part of the third section has shown that unlike damages remedy, *arsh* has been extensively examined by the jurists. It was seen that except for a few jurists, almost all jurists have considered it as an exceptional remedy applicable to the case where the seller of specific goods has delivered goods which do not conform with the contract quality. Likewise, it was shown that this remedy has been seen as an alternative to the right to terminate. However, it was suggested that *arsh* should be regarded as a general remedy which can be claimed in any case where the seller benefits from his breach of a contractual term characterising the goods at the expense of the buyer. It was also suggested that the right to claim *arsh* should be distinguished from that of termination. An injured buyer should be given a right to terminate the contract only when the seller's failure has resulted in sufficiently serious consequences by taking into account the relevant factors; and *arsh*, in contrast, should be given to the buyer where the seller is going to benefit from his violation at the expense of the buyer.

CHAPTER FIVE

COMPARATIVE ASSESSMENT

Introduction

The primary purpose of this study, as indicated in the introduction of this work, is to present a general picture of the buyer's remedies for seller's non-conforming delivery under *Shi'ah* law which has no developed legal system. It was suggested that this could be achieved by examining the issue under developed legal systems. This would help the writer to identify gaps in the undeveloped system and also have the rules provided in developed systems as guidelines for dealing with the issue under the undeveloped system. For this purpose, the issue has been dealt with first under English law and the Convention and then under *Shi'ah* law in accordance with the methodology suggested in the first chapter. In the chapter on *Shi'ah* law, it was first attempted to identify the existing law. When no clear answer was found great attempts were made to answer the relevant questions by interpretation of the jurists' judgements (*fatāwā*) made in similar cases and the original authorities on which they relied. In the absence of jurisprudential statements, an attempt was made to show how far the rules suggested in English law and/or the Convention could be adapted to the well-accepted principles of this system.

In the following, an attempt will be made to review the English and the Convention approaches first to highlight gaps in the current *Shi'ah* jurisprudence and then to compare both with the *Shi'ah* law approach to assess this system as described in the fourth chapter. This would help to show how far the rules relating to buyer's remedies under the two systems examined here could be utilised to fill the gaps in the current *Shi'ah* law as well as points of similarity and difference between English law and the Convention on the one hand and *Shi'ah* law on the other hand. To facilitate the treatment, it will address the question by considering the remedies previously examined.

1.0. Withholding Performance and Termination

1.1. Withholding Performance as a Separate Remedy

Withholding performance can play a significant role in providing transactional justice. Under this remedy, a party who has not received what he bargained for can lawfully suspend performance of his own part of the contract without being sued by the other party who has failed to perform his reciprocal obligations in accordance with the contract. This is an effective remedy for an aggrieved party where he has not already performed his obligations. He can withhold performance without the court's assistance and thereby induce the defaulting party to perform his obligations as the contract provided. As shown in the second and third

chapters, both English law and the Convention have addressed the right to withhold performance and provided their own answers. *Shi'ah* law seems to be similar to its two counterparts on some occasions and to depart from them on others. In some areas its position seems clear but in others, due to the jurists' failure to examine the question, unclear.

1.1.1. Delivery of Non-Conforming Goods

As far as the seller's failure to deliver goods is concerned, as English law (s. 28 of the Sale of Goods Act) and the Convention (Art. 58), *Shi'ah* law, by accepting the doctrine of *haq-e-habs*, has recognised that the buyer has an option to withhold performance of his payment obligation as long as the seller fails to deliver the subject-matter of the contract. As shown, no substantial theoretical divergence exists between *Shi'ah* law and the two other systems. Both English law and the Convention base the right on the theory of *interdependence* of the delivery and payment obligations (s. 28 of the Sale of Goods Act 1979 and Arts. 58 and 71 of the Convention) and *Shi'ah* law bases the remedy on the theory of *shart-e-ḍamni*, as some jurists suggest, or *u'qūd mua'wwad*, as the others suggest, which is similar to the English and the Convention analysis. Accordingly, it can be said that under all three systems, the remedy is justified on the basis of the theory of dependency, whether it is by operation of law or will of the contracting parties, as the first approach in *Shi'ah* law suggests.

The difference appears where the seller has performed his delivery obligation in a way which does not conform with the contract terms. In English law although the Sale of Goods Act 1979 has referred to the buyer's right to reject the goods where the seller's non-conforming delivery has resulted in breach of a term classified as "condition" (s. 11 (4)), as explained earlier in detail,¹ it is not entirely clear whether this is a separate right or a component of a single right, i.e., the right to treat the contract as repudiated. Nevertheless, a substantial number of English authors suggest that rejection is distinct from the right to treat the contract as repudiated and that it is a particular form of the right to withhold performance.² In contrast, it was shown³ that although the Convention does not mention the buyer's right to withhold performance within the remedial provisions provided for the buyer (Arts. 45-52), close analysis of the Convention provisions demonstrates that the buyer has a separate right simply to withhold performance of his obligations. The two systems, however, differ in that in the Convention, unlike English sale of goods law which precisely provides that any breach of condition entitles the buyer to reject, it is not precisely determined what non-

¹ See Chapter Two, Section One, 2.1.1.

² See, *ibid.*, 2.1.2.

³ See, Chapter Three, Section One, 2.2.

conformity will give rise to the right to refuse to accept and take delivery of the goods. However, it was shown⁴ that the buyer is certainly not required to show that the lack of conformity has amounted to a 'fundamental breach' defined in Art. 25. Fundamentality of breach is only required for the purpose of termination and requiring delivery of substitute goods (Arts. 49 (1) (a), 51, 72, 73 and 46 (2)). Similarly, it was argued that the Convention does not certainly allow the buyer to refuse to accept the goods for any lack of conformity. Close consideration of Arts. 46 (2), (3) and 71 (1) suggests that the buyer is not entitled to reject the goods for minor lack of conformity. This result deduced from the relevant provisions of the Convention accords with the system of remedies provided by the Convention, the principles of good faith (Art. 7 (1)) and mitigation (Art. 77). It appears that the Convention has left the case to the arbitrators to decide in accordance with the particular circumstances of each case.

Despite this apparent sharp difference, it seems that as far as the buyer's right to reject is concerned, the difference between the two systems will not be substantial in some cases. This would be the case where the buyer has alleged that the seller's non-conforming delivery has resulted in breach of a term implied by ss. 13-15 of the English Sale of Goods Act. In that event, s. 15 A (1) of the Act, by recognising the rule that where breach of a term implied by ss. 13-15 is so slight that it would be unreasonable for the buyer to reject the goods the buyer who does not deal as a consumer will not be entitled to reject, gives in fact the court a discretionary power to decide whether rejection was or not was reasonable. Moreover, as already shown,⁵ English courts will usually be disinclined to treat a term placed outside the area of legally classified terms as a condition if the result of such a construction would be unreasonable.

In *Shi 'ah* law, as already shown⁶, the jurists, by recognising *haq-e-radd* (right to reject) have in principle accepted that the buyer has an option to withhold performance where the seller has delivered non-conforming goods. However, no proper guidelines are provided in this system to answer the question: under what circumstances should a buyer be given the right to reject a non-conforming delivery? Is he entitled to reject the goods for any lack of conformity (as English sale of goods law suggest where a "condition" is broken) or must there be some restriction on the right (as the Convention and s. 15A (1) of the English Sale of Goods Act suggest)? Each of the given approaches may be supported in this system. This is because, as

⁴ See, Chapter Three, Section One, 2.4.

⁵ See, Chapter Two, Section One, 1.2.

⁶ See, Chapter Four, Section One, 2.2.2.

explained in the fourth chapter⁷, *Shi'ah* jurists have based the right to withhold performance for non-delivery on two different criteria. By applying them to the case of non-conforming delivery, one may argue that if it is accepted that the right to reject should be based on *shart-e-d̄emni* (implied agreement) it was the mutual intention of the contracting parties that any lack of conformity should give rise to the right to reject. In contrast, if it is accepted that the right must, as suggested in this study⁸, be justified on the basis of nature of a *a'qd -e-mua'wwad̄* (the theory of mutuality) it is difficult to say that the nature of the reciprocal contract requires that any party should have the right to refuse to accept the other's performance for any lack of conformity. On this basis, it was suggested that the right to reject must be restricted to cases where the lack of conformity is not trivial.⁹

If one describes *Shi'ah* law according to the first doctrine, it would be more similar to English law than the Convention. In any case, rejection should be justified on the mutual intention of the contracting parties. The court should look at the terms of the contract and the other circumstances surrounding the case to decide whether a perfect tender was, or is assumed to have been, the pre-condition of the buyer's acceptance. Nevertheless, it will depart from English law in two aspects. The first is cases covered by s. 15A of the English Sale of Goods Act. The second is that, unlike English law, the jurists are reluctant to pre-classify a contract term as a condition. In contrast, if it is explained on the basis of the second doctrine *Shi'ah* law would seem very similar to the Convention approach; in both systems the court should look at the effects of the breach on the buyer's position to decide whether or not the buyer was entitled to refuse to accept the seller's delivery. However, it will be close to the English approach in cases covered by s. 15A of the Sale of Goods Act 1979, since in *Shi'ah* law, as in English law in respect of cases covered by s. 15A, the court should look at the effects of the breach and see whether or not in the circumstances of the case at hand rejection is or is not customarily unreasonable for the buyer.

1.1.2. Tender of Non-Conforming Documents

Particular problems may arise where the seller fails to perform his duty to procure and tender documents representing the goods in accordance with the requirements provided by the documentary sale contracts. Should the buyer be given the right to reject non-conforming documents? Assuming that the buyer has the right to reject non-conforming documents, should

⁷ See, Chapter Four, Section One, 2.2.1.

⁸ Ibid.

⁹ See how this suggestion is justified, *ibid.*, 2.2.2.3.

he be granted a further right to reject the defective goods? Assuming that he has both the right to reject documents and goods, how are these two rights exercised?

The Convention while referring to the seller's duty to deliver goods and documents in accordance with the contract terms (Arts. 30 and 34), has not properly answered these questions. Although one may, relying on Arts. 30, 34 and 58 (1) which provides that the seller must tender documents which are *in conformity with the contract*, argue that the buyer has an option to refuse to accept non-conforming documents¹⁰, the other questions are left unanswered. This is perhaps because the subject is already adequately covered in such well known and widely accepted terms as the International Chamber of Commerce's Incoterms and its Uniform Customs and Practice for Documentary Credits. In contrast, English common law has addressed the issue in detail. Under a typical documentary sale contract, i.e., c.i.f. terms, English courts have regarded the seller's duty to tender conforming documents as distinct from the duty to deliver conforming goods and thereby they have held that breach of any of these duties would allow some remedy.¹¹ By classifying the seller's duty to tender conforming documents under documentary sale contracts in accordance with the contract terms as a 'condition', English courts have granted the buyer a right to reject them for any lack of conformity. By recognising a right to reject non-conforming documents distinct from the right to reject non-conforming goods, English law gives the buyer the right to reject the former even though the goods themselves are perfectly in accordance with the contract¹². English law has also taken a further step and provided that the right to reject non-conforming goods is not necessarily impaired by acceptance of the documents¹³. Thus the buyer could still reject the goods after accepting the documents if the goods suffered from a defect which did not appear on the face of the documents. However, if the defect giving rise to both rights of rejection is a single breach, for example, the goods are shipped late and this fact appears from the documents, the buyer's acceptance of the documents has been treated as having waived his right to reject the documents as well as the goods constituting their subject and thus he is bound to accept the goods on arrival¹⁴, although he has been given an opportunity to reject the goods on arrival if a different defect, or non-conformity, not appeared by the documents, becomes apparent.

¹⁰ See in this regard, Chapter Three, Section One, 2.5.

¹¹ See, e.g., *Kwei Tek Chao v. British Traders & Shippers Ltd* ([1954] 2 Q.B. 459 and *Gill & Duffus S.A. v. Berger & Co. Inc* ([1984] 1 A.C. 382).

¹² See, e.g., *Re General Trading Co. Ltd., and Van Stolk's Commissiehandel* ([1910] 16 Com. Cas. 95); *Tamvaco v. Lucas (no. 1)* [1859] 1 E. & E 581.

¹³ See, e.g., *Kwei Tek Chao v. British Traders & Shippers Ltd* [1954] 2 Q.B. 459.

¹⁴ See, e.g., *Panchaud Freres S.A. v. Etablissements General Grain Co* ([1970] 1 Lloyd's Rep. 53). For further cases see, Atiyah, P. S., & Adams, J., (1995) at 468, fn. 79.

Shi'ah law, in contrast, seems very poor in this connection. It has not developed proper rules to regulate the seller's duties to tender conforming documents and the buyer's remedies where the seller fails to perform his duty to tender documents conforming to the contract requirements. The buyer's right to reject non-conforming documents is entirely unknown in *Shi'ah* jurisprudence. It is however, suggested that the English law rules might work in this system. As indicated before¹⁵, the seller's duty to prepare and tender documents representing the purchased goods should be analysed on the basis of the theory of *shart-e-fe'l*. Where the seller fails to tender documents in accordance with the contract terms the buyer should be given a right to refuse to accept them. The suggestion can be justified on the basis that in a documentary sale transaction the seller is under a general obligation to prepare particular documents and hand them over to the buyer in accordance with the contract terms. The buyer is obliged to accept and pay in exchange for such a performance. As long as the seller does not tender such a performance the buyer is not under any duty to accept and pay for them. It is also submitted that under such contracts the theory which justifies withholding performance on the basis of *shart-e-d̄emni* (implied stipulation) is applicable to the issue in question. It is a well-settled customary law that the seller should tender documents precisely conforming with the contract requirements. Any non-conformity gives the buyer (or his bank when the payment made by letter of credits) the right to reject and pay for them.¹⁶ Thus, unless a contrary intention appears it is quite possible to infer that the parties to such contracts impliedly agreed that the seller should tender conforming documents and any lack of conformity will entitle the buyer to reject them. It is also suggested that the buyer under a documentary sale contract should be given the right to reject documents for defects on their face, whether it relates to the goods or documents themselves or both. It should be regarded as a separate right based on breach of the duty to perform *shart-e-fe'l*, while the right to reject the goods is founded on the basis of breach of the duty to deliver conforming goods. However, it is not clear whether the buyer should be given the right to reject the goods on arrival for defects in the goods if he has already accepted documents representing them. It may be suggested that where the defect is one which was not apparent on the face of documents he should be entitled to reject, since as will be seen in respect of the right to terminate the contract, the buyer will lose his right when he was, or ought to have been, aware of the lack of conformity giving rise to the right. But if the defect was apparent on the face of documents or could be disclosed by a simple

¹⁵ See, Chapter Four, Section One, 2.2.4.

¹⁶ See, e.g., Uniform Customs and Practices for Documentary Credits (1993 Version), Article 13; Incoterms 1990 (International Commercial Terms) published by ICC.

examination he should be taken to have also accepted the non-conforming goods on the doctrines of *isqāt* (waiver) and *iqdām* (action against himself).

1.1.3. Partial Non-Conforming Delivery and Delivery of Wrong Quantity

Both English law and the Convention have set forth particular provisions for the cases where the seller has either delivered the wrong quantity, or has delivered the right quantity but not all of the goods delivered conform to the contract.

In English law, where the seller has made a partial non-conforming delivery the buyer will be entitled to reject all if the requisite requirements are satisfied (s. 35A of the Sale of Goods Act 1979). Similarly, the same Act gives the buyer the right to reject some or all of the defective goods and keep those which conform to the contract provided that the goods unaffected by the breach were included in those goods he has accepted (s. 35A (1)). In contrast, although the Convention has allocated a particular provision to the case of partial non-conforming delivery (Art. 51), it does not expressly address the question whether the buyer would be entitled to reject all the goods for partial non-conformity, or keep the conforming and reject the non-conforming part. Nevertheless, relying on Art. 51 (1) which expressly enables the buyer to exercise his remedies under Arts. 46-50 in respect of the non-conforming part, one may suggest that the same principles applicable to case where the whole goods are affected by the seller's default can be applied to case where a particular part is affected.¹⁷ However, it seems that the rules under s. 35A of the English Sale of Goods Act and that set forth by Art. 51 (1) of the Convention differ in two aspects. First is that as the language of s. 11 (4) shows, s. 35A (1) is concerned with non-severable contracts, while the position of Art. 51 (1) of the Convention is not so clear. Some commentators suggest that it is designed to regulate severable contracts but others say that it is general.¹⁸ Second is that the first applies to the case where the buyer could reject all the goods but wishes to keep some and reject the other part, while under the latter the buyer may reject the non-conforming part even though he is not entitled to reject all. It might be argued that these two differences are not substantial. This is because first, the provision under s. 35A (1) is subject to the qualification that goods accepted by the buyer should not constitute a part of single commercial unit (s. 35A (7)). Accordingly, in English law the mere fact that something is physically separate does not follow that it would necessarily appropriate to reject it separately.¹⁹ Second, as some

¹⁷ See, Chapter Three, Section One, 2.3.

¹⁸ See, *ibid.*, 3.2.3.1.

¹⁹ See in this respect, Guest, A. G., et al, (1997), Para. 12-062.

commentators suggest²⁰, Art. 51 (1) of the Convention is only concerned with severable contracts to which s. 31 (2) of the English Sale of Goods Act refers.

Partial rejection is also addressed by both systems where the contract is for delivery of goods by instalments. In both systems the buyer is impliedly empowered to reject a defective instalment even though he has accepted previous instalments.²¹ However, it is not clear what lack of conformity gives the buyer the right to refuse to accept the non-conforming instalment (s).²² One difference appears between English Sale of Goods Act and the Convention in this respect; the former extends partial rejection right to the instalments (s. 35A (2)), while the Convention provides no such provision.

In *Shi'ah* law, as shown before,²³ no jurist has disputed the buyer's right to reject goods delivered by the seller where some of them do not conform with the contract. However, no jurist has directly addressed partial rejection as a remedy. What they have discussed is the right to terminate the contract partially on the ground of the option of defect where the seller of *specific goods* has delivered goods some of which are not in conformity with the contract *quality*. However, as seen before²⁴, although some jurists have refused to accept the right of partial termination, a number of jurists have accepted to grant the buyer a right to terminate the contract (including the right to refuse to perform his obligations if he has not already done so) in respect of the non-conforming part. It was shown²⁵ that the different views are due to the lack of a clear distinction between severable and non-severable contracts. If the contract is treated as non-severable no jurist disputes that breach of *shart-e-sefat* or *sharte-e-sehhat* in respect of some portion of the purchased item should be treated as a breach of the whole contract giving rise to a right to reject it. As already shown,²⁶ those jurists who disagreed with giving a right of partial rejection refer to such a case. In contrast, where the seller under a severable contract has delivered goods some of which do not correspond to the contract the buyer will be entitled to keep the conforming and reject the non-conforming part. It seems that those jurists who support the view that the buyer has partial-rejection right²⁷ refer to such a case. Accordingly, it is quite possible to say that in *Shi'ah* law, as in English law and the

²⁰ Chapter Three, Section One, 3.2.3.1, fn. 101.

²¹ As to English law see, Chapter Two, Section One, 2.3.1. (D) and the Convention see, Chapter Three, Section One, 2.3.

²² See, Chapter Two, Section One, 2.3.1. (D), where it has been suggested that the general principles applicable to non-severable contract would be applicable to each instalment.

²³ See, Chapter Four, Section One, 2.2.3.1.

²⁴ See, *ibid.*

²⁵ See, *ibid.*

²⁶ See, *ibid.*

²⁷ See, e.g., Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 108; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 146 and *seq.*; Tabrizi, J., (1412 H. Q.) at 299-300.

Convention, the question whether the buyer should be given partial-rejection right depends on whether the contract is severable or non-severable. Where the contract is construed as severable each severable part will constitute the subject of a separate subsidiary contract within the main contract and the buyer will have the same right with respect to the severable part as he has in respect of the whole goods under a non-severable contract. It is suggested that this rule is applicable whether the contract is for sale of specific or unascertained goods. However, the jurists have not made clear what lack of conformity will give rise to the partial-rejection right. It seems that, as some academic authors suggested in English law²⁸, any severable part should be regarded as the subject of a subsidiary contract within the main contract and the general principles applicable to non-severable contract are applied to the severable part under such contracts.

Delivery of wrong quantity. Both English law and the Convention have provided particular provisions for the case where the seller has delivered the wrong quantity goods. Under English law where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them (s. 30 (1) of the Sale of Goods Act 1979). The same right is given to the buyer where the seller delivers to the buyer a quantity of goods larger than he contracted to sell. In the latter case, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. However, the right to reject the whole of the goods delivered is subject to s. 30 (2A) under which the buyer who does not deal as a consumer will not be entitled to reject the goods where the shortfall or, as the case may be, excess is so slight that it would be unreasonable for him to reject. In contrast, although the Convention has expressly empowered the buyer to refuse to take delivery of the excess quantity where the seller delivers a quantity of goods greater than that provided for in the contract (Art. 52 (2)), it does not make clear whether the buyer is entitled to refuse to take delivery of the goods delivered by the seller where they are less or greater than the contract quantity. And if so, what shortfall or excess can give rise to the right to reject. However, one may argue that since the buyer is, under certain circumstances, entitled to terminate the contract in its entirety (Art. 51 (2)) which includes the right to refuse to perform his obligations insofar as this has not taken place, the same logic justifies the buyer's right to refuse to perform until complete delivery in conformity with the contract is offered. But this provision does not make clear when the buyer can benefit from this right. A further defect of the Convention rule is that it does not make clear whether the buyer can refuse to perform his obligations in respect of the missing part. This is also the position of s. 30 of the English Sale

²⁸ See, Chapter Two, Section One, 2.3.1. (D).

of Goods Act. As far as the Convention is concerned, one may argue that since the buyer is given the right to terminate the contract with respect to the missing part if the requirements of fundamental breach or *Nachfrist* notice procedure are satisfied (Art. 51 (1)) by express reference to Arts. 46-50 including Art. 49), it can be said, by analogy, that he is entitled to withhold a corresponding portion of his own performance. The view can also be supported by Art. 58 (1) which provides that the buyer is bound to pay only when the seller places the goods at the buyer's disposal.

In *Shi'ah* law, in contrast, the question has only been addressed by the jurists where the seller of specific goods has failed to deliver the contract quantity. In that case almost all of them have suggested that the buyer is entitled to refuse to accept the wrong delivery.²⁹ However, the position of the case where the seller of a particular quantity of unascertained goods delivers to the buyer a quantity of goods larger or less than he contracted to sell is unclear: is he entitled to reject the goods delivered by the seller? If so, what shortfall or excess would give rise to this right? Finally, in the case of short delivery, is he entitled to accept the goods delivered and withhold a corresponding portion of his own performance? It seems that s. 30 of the English Sale of Goods Act 1979 would work properly in this system. This is because, as the jurists' discussions show, the seller's duty to deliver the contract quantity is placed in the category of *shart-e-sefat*.³⁰ Accordingly, the buyer's duty to accept is qualified by the seller's complete performance. As long as he has not delivered the right quantity the buyer's duty does not arise. It is also suggested that the same rule, by analogy, is applicable to the case where the buyer wishes to keep the goods delivered and demand that the seller deliver the missing part. However, the position of the latter question is not clear: Is the buyer entitled to reject for any shortfall or excess? There seems no rule such as the English *de minimis* rule or the test of "unreasonableness" provided by s. 30 (2A) of the English Sale of Goods Act. Accordingly, it might be thought that in *Shi'ah* law the buyer may reject for a minor non-conformity with the quantity stipulation. However, it seems that the rule under s. 30 (2A) would be compatible with this system, since, as suggested with respect to other forms of non-conformity, by virtue of the principle of *ufū bel u'qūd* the buyer is required to accept the seller's performance. He will be discharged of this duty only where the lack of conformity results in such a degree of seriousness that rejection is not customarily regarded as

²⁹ See, generally, Ansāri, M. (1375 H.Q.) at 286-7; Najafi, M., and Nāeini, M. H., (1358 H.Q.) vol. 2 at 142-3; Gharavi Isfahāni, M. H., (1408 H. Q.) vol. 2 at 162; Yazdi, S. M. K., (1378 H.Q) vol. 2 at 129, and 133-135; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 383-9. See also I.C.C., Art. 384.

³⁰ See the references cited above.

unreasonable for the buyer. In such circumstance, the principle of *lā ḍarar* comes into operation and allows the buyer to treat himself as discharged from the duty to accept.

1.2. Relationship Between Withholding Performance and Termination

A further question is whether a buyer who is given a right to reject the non-conforming goods should also be given an immediate right to terminate the contract. English law and the Convention have responded but in different ways.

English law has based termination on two different theories -the theory of breach of 'condition' and that of *HongKong Fir*. Where the seller's non-conforming delivery results in breach of a term properly classified as a condition the relationship between the buyer's right to reject the non-conforming goods and his right to terminate the contract is not quite clear.³¹ For this reason two different interpretations are suggested by the English commentators. A considerable number of academic writers have interpreted the language of the Act (s. 11) as providing that any non-compliance with a condition by the seller will immediately place him in breach of condition and give the buyer an immediate right to reject the non-conforming goods and treat the contract as repudiated³², while some others suggest that the mere delivery of goods which do not comply with a condition will not place the seller in breach of condition. On their view, the buyer's immediate remedy for the seller's non-conforming delivery is simply to refuse to accept it. Termination will be justified only where the seller's defective delivery amounts to a repudiation of the contract or the time for performance of contract has expired.³³ The Convention, in contrast, makes a clear distinction between the right to withhold performance and that of termination. While refusal to perform will be justified where the seller's non-conforming delivery attains a certain degree of seriousness, termination is based primarily on the doctrine of 'fundamental breach' (Arts. 49 (1) (a), 51 (1), 72 (1) and 73).

If the first construction is preferred the English approach would substantially differ from the Convention approach. The difference would appear more significant taking into account the fact that the English Sale of Goods Act 1979 has adopted an *a priori* system of classification of certain contract terms into "conditions" (ss. 13-15). Accordingly, under this construction the buyer will be entitled to reject the goods and terminate the contract (subject to s. 15A (1) of the Sale of Goods Act), even though the actual breach is minor in character,

³¹ See in this respect, Chapter Two, Section One, 2.1.2.

³² See the references cited in *ibid.*, fn. 40.

³³ See the references cited in *ibid.*, fn. 43.

while under the Convention the buyer only will be entitled to terminate the contract on account of the seller's non-conforming delivery where the breach has resulted in a "fundamental breach".

However, the traditional method of justifying termination under English law has been somewhat modified by the *HongKong Fir* doctrine.³⁴ Under this doctrine, all contract terms under a contract for sale are not necessarily divided into "conditions" or "warranties". There are some contractual undertakings which cannot be categorised as "conditions" or "warranties". Where such a contractual term is broken by the seller the buyer will not be entitled to reject the goods and terminate the contract immediately. Termination under this doctrine should be justified by reference to the severity of the breach and not turn on the *a priori* classification of the terms breached. In this way English law becomes close to the Convention approach. Despite this similarity between the two systems, some difference still remains. In English law, no authority can be found to make a clear distinction between the buyer's right to reject and that of termination and there is no decided case in which a buyer has been given a right to reject on the basis of this doctrine without being entitled to terminate the contract.

Under both systems, termination on the doctrine of severity of breach will be justified where it has resulted in serious consequences. English courts have used various expressions to describe this doctrine³⁵ and the Convention uses the term "fundamental breach" to refer to the test. In English law, three factors have been considered by the courts for the purpose of determining whether or not breach is sufficiently serious³⁶: the nature of the breach, and its actual and foreseeable consequences. Similarly, according to Art. 25 of the Convention, breach of contract will be regarded as '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". However, Art. 25 of the Convention does not make clear whether the fundamentality of breach is to be assessed by reference to the actual consequences of the default, or as in English law, by reference to its actual and/or foreseeable results, although one may argue that the phrase '... to expect under the contract' seems to suggest the latter. But neither system has made clear what degree of foreseeability is enough to justify the buyer's claim.³⁷

³⁴ [1962] 2 Q.B. 26 applied in the sale of goods cases by the Court of Appeal in *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] Q.B. 44.

³⁵ See in this respect, Chapter Two, Section One, 2.2.1.

³⁶ See, e.g., *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, per Upjohn LJ at 64, and per Diplock LJ at 66, 70 and 72; *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711, per Lord Scarman at 717.

³⁷ In English law see, Chapter Two, Section One, 2.2.2., (A).

Although the doctrine of serious breach has been explained by different wordings in English cases, as explained before³⁸ these are in fact different ways of saying the same thing. In comparison, the “fundamental breach” test, as defined in Art. 25 of the Convention can be likened to the words Diplock LJ used to describe the doctrine of serious breach in *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*³⁹ and subsequently applied to the sale of goods cases.⁴⁰ Accordingly, despite the difference in wording it seems that both the English and the Convention approaches say the same thing: the seller’s breach must result in such event (detriment) that it *substantially* deprives the buyer of what he was entitled to expect under *the contract*.⁴¹ Under both systems determination of the degree of a given detriment (or event, as expressed in the statement of Diplock L.J.) and drawing the line between substantial and insubstantial deprivation is not left to the judge’s sole and sovereign appreciation but requires him to decide in the context of the contract and the circumstances which existed at the time it was made. By qualifying the injured party’s expectation (benefits) by the phrase “he is entitled to expect under the contract” both system seem to introduce an important qualification and ensure that it is not solely the buyer's expectations which are relevant. It depends as much on the seller's expectations as on the buyer's. Thus, as long as the seller has not been informed of the buyer’s opportunity to obtain a particular benefit it cannot be said that the buyer was “entitled” to expect that benefit under the contract. However, the two tests might differ in that according to the English test, as the wording of Diplock LJ in describing the doctrine suggests, the court should only assess the degree of deprivation by reference to loss of those benefits he *should* have obtained from the contract.⁴² Whereas, such a restriction may not be inferred from Art. 25 of the Convention, the language of which provides “... he is entitled to *expect* under the contract...”

Neither approach, however, introduces any concrete factors to guide the judges to decide whether the consequences of the breach have reached the threshold of substantial deprivation. It seems that under both systems the question is left to the court to decide on the basis of the circumstances of each particular case. The courts will classify a failure in performance with an eye to the nature of the breach and its consequences, considering all the

³⁸ See *ibid.*, 2.2.1.

³⁹ [1962] 2 Q.B. 26 at 70.

⁴⁰ *Cehave N.V. v. Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1976] 1 Q.B. 44.

⁴¹ In contrast, see, Ziegel, J., (1982) at 43 who argues that the Convention test is a demanding one and goes beyond the scope of *Hong Kong Fir* doctrine and may be likened to the test of fundamental breach applied by English and Canadian courts in determining the validity of exception clauses (the latter test has been examined in detail in the charterparty case: *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] A.C. 361). Cf. with Nicholas, B., (1989) at 218 who likened the Convention test to the *HongKong fir* test.

⁴² See *HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 at 66, 70 and 72.

circumstances surrounding the contract, the subject-matter, the position of the party in breach and other relevant factors.

Nevertheless, one may argue that the Convention approach departs from the English approach in a number of aspects. First, as will be seen, the Convention has granted the seller a general right to cure (Arts. 34, 37 and 48). On this basis, the question whether or not the breach committed by the seller before the contract date has expired was fundamental must be assessed in the light of the seller's offer to cure. Where the seller has offered to cure his default in accordance with Art. 37 it would convert an otherwise fundamental breach into a non-fundamental one. Whereas, English law, as most English commentators suggest, does not recognise such a right. Thus, under the English approach a breach satisfying the requirement of seriousness may be regarded as fundamental even though the seller has offered to cure it. Second, where the seller proves that the alleged consequences of his breach was not *actually foreseen* by him or *could not have been foreseen* by a reasonable person of the same kind in the same circumstances the breach will not be regarded as a fundamental breach under the Convention, while the test of serious breach, as described in the *HongKong Fir* case, does not refer to such a limitation. Thus, it might be said that under English law where the buyer could show the court that the seller's breach has resulted in such consequences which deprived (or will deprive) him of substantially the whole benefit he was entitled to obtain under the contract the breach would be regarded sufficiently serious as to justify his termination. And the seller will not be able to excuse himself on the grounds that he did not foresee, or a reasonable person in his circumstances could not have foreseen, such consequences. However, one may argue that since the buyer is not entitled to recover damages for non-foreseeable losses, he should not be entitled to rely on such consequences for the purpose of terminating the contract.⁴³

Assuming that under both systems the buyer can only rely on foreseeable results, a number of questions are left unanswered. First, although the Convention places the burden on the party in breach to show that serious consequences were not reasonably foreseeable, the position of English law is not clear. Second, in both systems it is not clear to what degree the loss resulting from the breach must be foreseeable by the seller, although one may suggest that the criterion prescribed in the context of damages can be applicable to the present case. Likewise, it is not clear at what time is the foresight of the party in breach to be judged? Is the relevant time when the contract was concluded or when the breach was committed, or does it depend on the circumstances of each case?⁴⁴ Nevertheless, it is possible to argue in support of

⁴³ See also, Chapter Two, Section One, 2.2.2., (A).

⁴⁴ To know the history of the question under the Convention, see Chapter Three, Section One, 3.2.1.2. (C).

the first approach in both systems. As indicated in respect of the concept of the injured buyer's contractual expectations, whether or not the buyer was entitled to expect to have a particular benefit should be ascertained within the contract terms and other circumstances which came into the attention of the seller in breach at the time of making the contract. The same analysis seems to be applied to the measurement of foreseeability of the consequences of the breach. As far as the Convention test is concerned, one can even go further and argue that the language of Article 25 is in line with this approach, since it defines the consequences relevant to the determination of fundamental breach in terms of what a party "is entitled to expect under the contract" and the second sentence of the article refers to the foreseeability of "such result" by the party in breach. Accordingly, as contractual expectations are formed at the time of contracting, foreseeability of substantial deprivation of those expectations by reason of a breach should also be measured at that time.

Shi'ah jurists, in contrast, have justified termination on the basis of a complex system of *kheyārāt* (options to terminate). The jurists, instead of closely analysing the ground(s) upon which *kheyārāt* should be justified, have placed much emphasis on examination of *kheyārāt* themselves.⁴⁵ Looking at their detailed discussions under these headings shows that they seem to accept a mixed approach. Where the seller of unascertained goods has tendered non-conforming goods rejection is sharply distinguished from termination: the buyer is only given a right to reject the goods. Termination will be available for the buyer where he cannot coerce the seller to deliver conforming goods through the judicial authorities. In contrast, where the seller of specific goods has made a non-conforming delivery almost all the jurists suggest that in any case where the buyer is entitled to reject the goods he would be able to terminate the contract immediately.⁴⁶

Dealing with termination in this way causes some significant questions to be left unanswered. (a) why should the buyer have an absolute right to terminate a contract for sale of specific goods? (b) when can the buyer terminate the contract for sale of unascertained goods? To deal properly with the right to terminate the contract and its relationship with the right to reject non-conforming goods under this system, a suggestion was made⁴⁷ to analyze the grounds upon which the jurists have occasionally justified the grant of *kheyār* (the right to terminate). Likewise, it was shown⁴⁸ that basing the option to terminate on one ground rather than other would have significant effects in granting a buyer the right to terminate the contract

⁴⁵ See, Chapter Four, Section One, 3.1.

⁴⁶ See, *ibid.*, 3.2.3.

⁴⁷ See, *ibid.*, 3.2.2.

⁴⁸ See, *ibid.*, (A).

and would help to justify why the buyer should have the right to terminate the contract, and to decide what lack of conformity should entitle him to terminate the contract.

As discussed in detail⁴⁹, a thorough consideration of the jurists' arguments in justifying the grant of the option of termination reveals three general principles: *rewāyāt*, *shart-e-ḍemni* and *lā ḍarar*. When a party is given the right to terminate the contract because a particular *rewāyat* says so the scope of the right should be ascertained in accordance with the express language of that authority. It cannot be extended to analogous cases. However, as already shown⁵⁰, very few options are solely based on the *rewāyāt*. The primary principles justifying the right to terminate are, therefore, the doctrine of *shart-e-ḍemni* and the principle of *lā ḍarar*.

Doctrine of *shart-e-ḍemni*. Where a particular *kheyār* (option to terminate) is to be based on the parties' mutual intention two requirements must be satisfied. First, it has to be proved that it was the implied mutual intention of the parties that the seller should have delivered goods perfectly corresponding with the contract descriptions (*shart-e-sefat*) and quality (*shart-e-sehhat*). Second, it is to be proved that the contracting parties have agreed that any breach of those terms would give the buyer an immediate right to terminate the contract. On the basis of this doctrine, as long as the buyer could show that the seller has broken his obligations under one of these terms the buyer will be entitled to terminate the contract, no matter what actual detriment will result from the lack of conformity. If this construction is accepted termination under *Shi'ah* law would be similar to English law when it is justified on the basis of the doctrine of "condition". However, the two systems differ in that in English law some particular contract terms have been *a priori* classified as conditions by law, while in *Shi'ah* law the jurists are inclined to remit the case to the court to decide in light of particular circumstances of each case whether a particular contractual obligation is so important that any breach of which would give rise to an immediate right to terminate the contract.

The jurists seems to have applied this approach to the case of specific goods and where a *shart-e-fe'l* is broken. By analogy, it is suggested that the buyer should be given such a right in the case of unascertained goods. For this reason, in the case of late delivery, as will be seen, it is commonly said that the buyer has an immediate right to terminate the contract, whether it is for sale of specific goods or unascertained ones.

⁴⁹ See, Chapter Four, Section One, 3.2.2.

⁵⁰ See, *ibid*.

Doctrine of *lā dārar*. If the right to terminate is to be based on the principle of *lā dārar* termination should be justified on the basis of the consequences of breach. On this principle, the buyer will only be entitled to terminate the contract when the seller's breach results in a detriment such that it makes performance of the contract harmful for the buyer, since it is only in such a case that the principle of *lā dārar* comes into operation and ceases the decree of *luzūm-e-a'qd*, which orders the buyer to perform the contract, to operate. If this approach is accepted *Shi'ah* law would be more similar to the Convention than English law.

However, the jurists are not unanimous on a single view. Some are in favour of the former⁵¹ and others the latter⁵². Nevertheless, as explained in detail,⁵³ the primary ground justifying giving a right to terminate the contract is the principle of *lā dārar*. Although it is quite possible for the court to identify certain cases in which the contracting parties have agreed on an implied undertaking that any breach of *shart-e-sefat*, *shart-e-sehhat* or *shart-e-fe'l* gives a contracting party an absolute right to terminate the contract, it does not mean that all the options provided under *Shi'ah* law are to be justified on a single ground. It is perhaps for this reason that some jurists have justified termination on the first doctrine in some circumstances and on the second principle in some other occasions.⁵⁴

If the suggested interpretation is accepted, *Shi'ah* law would resemble English law more than the Convention. This is because under the Convention to decide whether the buyer is entitled to terminate the court should only look at the effects of the breach, while under both English and *Shi'ah* law the court's basic duty is to look at the terms of the contract and the surrounding circumstances to ascertain whether it was a condition of the contract that the seller had undertaken to make a perfect delivery and that the buyer should have an immediate right to reject and terminate the contract if the seller failed to make perfect delivery. If such a condition is not proved the court then should look at the breach itself and examine whether it is sufficiently serious to justify termination of the contract on the principle of serious detriment.

When termination is to be justified on the basis of the first principle the aggrieved buyer has no great difficulty; he should only satisfy the court that the broken term was of the above described character. But if termination is to be based on the second principle this crucial question arises: what degree of detriment will be sufficient for the principle to come into

⁵¹ See, Chapter Four, Section One, 3. 2. 2., fn. 74.

⁵² See, *ibid.*, fns. 75, 76.

⁵³ *Ibid.*, (B).

⁵⁴ See, e. g., Ansāri, M. (1375 H.Q.) at 253 has based the option of defect on the first doctrine, while at 235, 244 and 249 has justified the options of lesion, delay in payment and inspection, respectively, on the second principle. See also, Yazdi, S. M. K., (1378 H.Q) vol. 2 at 128, and 208.

operation? Notwithstanding that a considerable number of *Shi'ah* jurists have occasionally justified the option to terminate on the basis of this principle, they have not examined this question. Can one suggest that the English and the Convention test of "substantial deprivation" would work here? If so, how can it be justified in this system?

In the fourth chapter, by relying on what the jurists have stated in the context of the option of lesion (*kheyār-e-ghabn*)⁵⁵, it was suggested that the principle of *lā ḍarar* should come into operation to justify termination when the detriment (*ḍarar*) caused by the seller's non-conforming delivery *is of such a degree a reasonable man would not overlook it*. However, whether or not the contract becomes harmful for a reasonable person in the buyer's position must be assessed by reference to the degree of his deprivation from those legitimate benefits he *should* obtain from the contract. Although no jurist has addressed such a restriction, it seems that it is clearly inferable from the context. It is obvious that whether or not a particular *contract* becomes harmful for the buyer by reason of the seller's breach should be measured in accordance with the degree of the buyer's deprivation of those benefits he was entitled to obtain through proper performance of the contract by the seller.

But, is this the same as the test provided under English law and the Convention? It is most likely that a reasonable person would not ignore the results caused by the breach, even though they are not such to deprive the buyer substantially of his contractual benefits. Accordingly, one may argue that under the *Shi'ah* law test the buyer will be entitled to terminate the contract for breach where he could not do so under the two other systems. However, it should be borne in mind that under *Shi'ah* law, as will be seen later, the seller has a general right to cure. Accordingly, it is suggested that the question whether the seller's breach is sufficiently serious to make the contract harmful is to be assessed in light of the seller's right to cure; where the seller has offered to cure, as will be described later, the contract will not reasonably be harmful to justify the operation of the principle of *lā ḍarar*. In this way the difference between the two tests is considerably reduced.

However, two further questions remain unanswered. First, can the buyer rely not only on consequences of the breach which have actually occurred but also on those which are foreseeable as likely future consequences of it? Second, how foreseeable must the actual, and probable, consequences of the breach be? Can he rely on any detriment caused by the breach, or only on those which were foreseeable by the seller? As to the first question, it was suggested that the principle of *lā ḍarar* is broad. It covers both actual and foreseeable

⁵⁵ See in this connection, Chapter Four, Section One, 3.2.2., (C).

consequences. However, they are to be those that are *most likely* to happen. Likewise, as to the second question, as already pointed out⁵⁶, no jurisprudential statement exists in this connection. Nevertheless, it seems that the limitation provided under the Convention would be compatible with the general principles under *Shi'ah* law. Accordingly, the court should only consider those results which were or ought to have been foreseeable by the seller according to the information available to him at the time of making the contract. If there is a particular circumstance which is significant for the buyer he should bring it to the attention of the seller when the contract is made. The suggestion can be supported on the grounds that the principle of *lā ḍarar* would only negate those detriments caused by the party in breach. Any detriment caused by the party who failed to bring the special circumstances to the attention of the other party would be at his risk (the principle of *iqdām*). However, it is suggested that it is the seller's duty, as in the Convention, to show that the detriments caused were not reasonably foreseeable. This is because where the seller's non-conforming delivery has resulted in sufficiently serious breach it will bring the principle of *lā ḍarar* into operation. The seller will only be able to escape from the drastic effects of termination where he can show that it was in fact the buyer's action or omission.

Relying on what has been said above, it can be concluded that where the seller of unascertained goods fails to deliver goods corresponding with the contract requirements the buyer should be given the right to terminate the contract only where the seller is not able and willing to make a fresh tender within the contract time. The suggestion can be justified on the basis that the mere non-conforming delivery by the seller does not render the contract harmful for the buyer, since the buyer has an opportunity to reject the non-conforming delivery and require the seller to deliver conforming goods. Where the seller is ready and able to deliver replacement goods which conform to the contract within the contract time without causing the buyer unreasonable expense or inconvenience there will be no reason to justify the buyer's termination. The same is true where the seller has failed to perform his obligations under *shart-e-fe'l* such as the duty to prepare the relevant shipping documents in accordance with the contract requirements. Thus where the seller is ready and able to tender conforming documents the buyer should not be entitled to terminate the contract provided that the seller's re-tender does not cause the buyer undue detriment. In contrast, where the seller of specific goods has failed to deliver conforming goods, no matter whether it is for breach of contract description (*shart-e-sefat*) or contract quality (*shart-e-sehhat*), the buyer should be given an immediate right to terminate the contract (as almost all jurists suggest). But it must be borne

⁵⁶ See, *ibid.*

in mind that in such cases termination is not always the only means to protect the injured buyer. He can be protected by requiring the seller to cure by way of repair. If the seller is ready and able to cure the non-conformity by way of repair within the contract time without causing the buyer unreasonable expense or inconvenience he will be adequately compensated. Under such circumstances there is no reason to justify application of the principle of *lā dārar* allowing the buyer to terminate the contract. The buyer's termination in such cases would be justifiable only when the actual and/or foreseeable losses resulting from the breach makes the contract harmful for the buyer, unless it is proved that the parties' mutual intention was that any non-conformity would give rise to the right to terminate (as may be the case in consumer transactions).

(I) Termination of Severable Contracts

Both English law and the Convention have provided particular restrictions for termination of severable contract. Under both systems, the mere fact that the seller has made a defective delivery in respect of one or more severable parts will not entitle the buyer to terminate the contract as a whole, even though the requisite requirements in respect of the defective parts are satisfied (s. 31 (2) and Arts. 51, 73). In such situations the buyer can only reject the defective parts as described above. Termination of the contract as a whole will be allowed only when the seller's defective delivery in respect of one or more instalments has resulted in a serious breach. However, the language used to describe the ground justifying termination is different. On the one hand, s. 31 (2) of the English Sale of Goods Act provides that it is a question in each case depending on the terms of the contract and the circumstances of the case whether a breach of contract in respect of one instalment is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim of compensation but not to a right to treat the whole contract as repudiated. On the other hand, Art. 73 (2) of the Convention requires the buyer to prove that the seller's failure to perform one of his obligations in respect of any instalment gave the buyer good grounds to conclude that a fundamental breach of contract would occur with respect to further instalments. Despite the difference in the language of the two pieces of laws, English case law seems to suggest that the practical results will be much the same as they are likely to be under Art. 73 (2) of the Convention. As shown in detail, under English case law the seller will be treated as repudiating the contract as a whole by delivery of defective instalments if his default goes to the root of the contract by considering "first, the ratio quantitatively which the breach bears to

the contract as a whole, and secondly, the degree of probability and improbability that such a breach will be repeated"⁵⁷

However, the two systems appear to depart from each other in a number of aspects. First, while in English law it is not clear whether the buyer is entitled to reject prior instalments,⁵⁸ by virtue of Art. 73 (3) of the Convention the buyer is given an opportunity, at the same time, to declare the contract terminated "in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract". However, this difference may be more apparent than real since the rights conferred under Art. 73 (3) only arise where the deliveries are interdependent⁵⁹ in which some English authors have suggests the same right.⁶⁰ Second, although the English Sale of Goods Act 1979 gives the buyer a right of partial rejection (s. 35A), it does not clearly answer the question: is there any case where the buyer is able to terminate the contract as to the rejected part and keep it on foot with respect to the remainder where the seller has made a partially non-conforming delivery? Whereas, the Convention has expressly empowered the buyer to terminate the contract partially (Arts. 51 (1) and 73 (1) and (2), although one may argue that the English Sale of Goods Act has also impliedly accepted partial termination since it does not allow the buyer to reject those instalments already accepted, as some English commentators suggest.⁶¹

In *Shi'ah* law the position of the issue in question is somewhat complicated. The jurists have not separately examined termination of severable contracts. However, as already shown,⁶² some indications of the issue can be found when dealing with the question whether the buyer of specific goods has an option to terminate the contract in respect of the defective part and keep it on foot with respect to the sound part where the seller has delivered goods part of which is in conformity with the contract *quality*. In that case, no jurist has disputed the buyer's right to reject all of the goods and terminate the contract as a whole, but they have differed in regard to the buyer's right to terminate the contract partially. However, a number of important questions are here left unanswered: under what circumstances should the buyer be given the right to terminate the contract partially or as a whole? Is there any difference to be

⁵⁷ Lord Hewart in *Maple Flock Co. Ltd. v. Universal Furniture Products (Wembley) Ltd*[1934] 1 K.B. 148 at 157. For a detail discussion see, Chapter two, Section One, 2.3.1. (B).

⁵⁸ For academic suggestions see, Chapter two, Section One, 2.3.1., (C).

⁵⁹ This suggests that "delivery of goods by instalments" in Art. 73 has a broader meaning that it has under the English Sale of Goods Act 1979 and may encompass some types of contract that are indivisible or at least indivisible in part. See in this respect, Ziegel, J. & Samson, C., (1981) Art. 73.

⁶⁰ See in this respect, Chapter two, Section One, 2.3.1., (C).

⁶¹ See, *ibid.* See also, Guest, A. G., et al., (1997) Para. 12-061 in which the editors of Benjamin's Sale of Goods favour partial termination.

⁶² See, Chapter Four, Section One, 2.2.3.1., and, 3.2.5.1.

between termination of the contract as a whole and termination in respect of the part affected by the breach? Is he entitled to partial termination where the seller of unascertained goods has tendered goods some of which do not conform with the contract?

As was shown,⁶³ the jurists' different views in respect of specific goods are due to the lack of a clear distinction between the cases of severable and non-severable contracts. For this reason, it was suggested to distinguish between severable and non-severable contracts. Where the contract is construed as non-severable, the rules described above should be applied. But if the contract is construed as severable, as described before⁶⁴, it was suggested⁶⁵ to distinguish between partial termination and termination of the contract as a whole. Termination of such contracts as a whole is to be permitted only where the seller's defective delivery in respect of one or more instalments is such that the buyer can reasonably conclude that the contract would be harmful for him. If this construction is accepted, *Shi'ah* law would be close to English law and the Convention, although, as indicated in respect of non-severable contracts, the two tests differ in the degree of seriousness they require.

On this suggestion, no difference should be made between specific and unascertained goods. Where the required conditions of termination, as described above, are met in respect of a severable part the buyer should be given the right to terminate the contract with respect to that part, although the contract is for sale of unascertained goods.

Termination for delivery of wrong quantity. Unlike the Convention which entitles the buyer to terminate the contract as a whole or in respect of the missing part where the seller has delivered only a part of the contract goods (Art. 50), the position of English law is not quite clear. Although s. 30 of the English Sale of Goods Act enables the buyer to reject the goods where the seller delivers to him a quantity of goods less or larger than he contracted to sell, it does not make clear whether the buyer is entitled to terminate the contract in its entirety or in respect of the missing part. Even sub-section (2A) which restricts the non-consumer buyer's right to reject to the case where it is unreasonable for him does not say whether he has a separate right to terminate the contract. Accordingly, it is not clear whether the buyer's right to terminate should be based on the doctrine of condition or serious breach.⁶⁶

In *Shi'ah* law the jurists have only addressed the question in respect of the contract for sale of specific goods. In that case, it is commonly said that where a quantity term is broken the general rule explained as to breach of *shart-e-sefat* applies here, i.e., breach of which will

⁶³ See, *ibid.*

⁶⁴ See, *ibid.*, 2.2.3.1.

⁶⁵ See, *ibid.*, 3.2.5.1.

⁶⁶ For academic suggestions see, Chapter two, Section One, 2.3.3.

entitle the buyer to reject the wrong quantity and terminate the contract on the basis of the option of incorrect description (*kheyār-e-takhalluf an al-wasf*). But the question whether the buyer should be given the right to keep the contract alive as to the part delivered and terminate in respect of the missing part is controversial.⁶⁷ Similarly, they have not made clear whether the buyer should be given such a right where the seller of unascertained goods has only delivered part of the contract goods. Moreover, it is not clear what shortfall or excess will give rise to the right to terminate the contract in its entirety or in respect of the missing part.

It was, however, suggested⁶⁸ that the buyer should be given the right to terminate the contract on account of delivery of wrong quantity, whether the contract is for sale of specific or unascertained goods. But his right should be subject to some restriction. If he wishes to terminate the contract in its entirety the missing part should be such that its absence makes the contract harmful for the buyer. However, he should be given the right to terminate the contract as to the missing part where it is not so slight that it would be customarily unreasonable for him to do so. If this construction is adopted *Shi'ah* law would differ from English law in that, while under the suggested interpretation the buyer's right to terminate is to be subject to the seriousness of the lack of conformity, which is to be assessed in light of the seller's offer to cure, under English law, assuming the academic suggestion, the seller's duty to deliver the right quantity is a condition breach of which gives the buyer, subject to s. 30 (2A), an immediate right to treat the contract as repudiated. It also differs from the Convention in the degree of seriousness required, since under the Convention the missing part must be such as to result in a fundamental breach of the contract, whereas, the requirement of seriousness under *Shi'ah* law does not necessarily amount to a fundamental breach as defined under the Convention. The same is true where the buyer wishes to terminate the contract in respect of the missing part; it should be such as to render the contract harmful in respect of that part.

Termination for Breach of Time Stipulation. With respect to stipulations as to time, English law and the Convention have adopted different approaches. While the Convention provides that termination of the contract for delay in performance should in principle be based on the doctrine of "fundamental breach" - whether delivery is made beyond a specific date or period of time fixed by the contract or if delivery is made outside a reasonable time where no specific time provided by the contract (Art. 33), English law seems to base it on the theory of "the nature of contract terms". Although s. 10 (2) of the Sale of Goods Act 1979 provides that whether any stipulation as to time of performance other than time of payment is or is not of

⁶⁷ See in this respect, Chapter Four, Section One, 3.2.5.2.

⁶⁸ *Ibid.*.

the essence of the contract depends on the terms of the contract, it was for a long time assumed by case law that the seller's duty to deliver on time under commercial contracts would have to be classified *a priori* as a condition regardless of the severity of the breach.⁶⁹ Accordingly, under English law the buyer is *prima facie* entitled to terminate the contract for any delay in delivery, no matter how trivial, or whether or not it causes any loss. However, as explained before⁷⁰, this is a rule based on considerations of commercial convenience and certainty applicable in a particular context, rather than on any general principle or presumption as to time being, or not being, of the essence.⁷¹ Accordingly, where it is proved that the time for performance is not of the essence, termination should be justified on the basis of the doctrine of serious breach⁷², or on the ground of the seller's failure to deliver within the reasonable time fixed by the buyer according to the common law rule, i.e., notice-giving procedure.⁷³ The same rule is applied where the contract is silent as to the time for performance unless special circumstances of the case indicate that a failure to perform within a reasonable time is to be regarded as a breach of condition entitling the buyer to terminate.⁷⁴

In this way the English law approach comes close to the Convention approach. This is because first, the Convention has accepted the rule that where the contract (Art. 6) or a usage and the parties' established practices provide otherwise (Art. 9) the fundamental breach test is not necessary for termination on account of delay. Second, it does not leave the buyer in a sea of uncertainty. The Convention, by recognising the *Nachfrist*-notice procedure, allows the buyer to treat a delay in performance as a ground to terminate the contract if it is not cured within a reasonable time fixed in the notice in accordance with Art. 47 (Art. 49 (1) (b)). This rule comes close to the English rule of making performance of basic contractual obligations within the period fixed in the notice "of the essence" of the contract. It makes non-performance within the time so fixed the equivalent of a fundamental breach of contract and thus allows a party awaiting performance to terminate the contract regardless of whether the breach is fundamental or not.

In *Shi'ah* law, in contrast, the position of the buyer's right to terminate where the seller has delivered the contract goods beyond the contract time for performance is not quite clear. The jurists have only addressed the case where the seller has broken an express stipulation as

⁶⁹ See in this respect, Chapter Two, Section One, 2.3.2., (B), (I).

⁷⁰ See, *ibid.*

⁷¹ See, e.g., *Bunge Corp v. Tradax Export S. A.* [1981] 1 W.L.R. 711 per Lord Roskill at 725; per Lord Lowry at 719.

⁷² See in this respect, Chapter Two, Section One, 2.3.2., (B), (II).

⁷³ See in this respect, *ibid.*, fn. 137.

⁷⁴ See, *ibid.*, 2.3.2., (B), (III).

to the time of performance. They have not examined the case where the contract has not expressly provided a time provision. In the first case, two opposing views have been suggested. Some jurists suggest that any delay would entitle the buyer to terminate the contract on the basis of the option of unfulfilled condition (*kheyār al- takhlluf an al- shart*)⁷⁵, while others disagreed with giving the buyer an immediate right to terminate for delay.⁷⁶

As already explained⁷⁷, the difference is due to the different grounds upon which the option to terminate should be justified. However, as in other cases, it is suggested that the buyer's right to terminate the contract for the seller's late delivery should in principle be based on the serious consequences of delay (the principle of *lā ḍarar*). The same is true where the contract has not fixed a particular date or period of time for performance. Accordingly, termination for delivery beyond a reasonable time should be justified on the basis of the principle of *lā ḍarar*, unless it is inferred from the circumstances of the case that the buyer's right to terminate for performance beyond a reasonable time was impliedly agreed upon at the time of the contract. On this interpretation, a close similarity appears between English and *Shi'ah* law. In both systems, where it is proved that performance within a given time was an implied condition the buyer has an immediate right to terminate, no matter what actual loss results from delay. In contrast, where such an implied condition is not inferable termination should be justified on the basis of the consequences of delay. However, the difference appears in a number of aspects. First is the case where timely performance is not treated as of the essence of the contract. Under English law termination will be justified where the delay in performance was so grave as to frustrate the commercial purpose of the contract, while in *Shi'ah* law it will be justified where the delay is such that performance of the contract becomes customarily harmful for the buyer. Second is with respect to the making the time of performance of *the essence of the contract*. Although no jurist has addressed the question, it seems that it would be hard to reconcile this rule with the general principles already described. As indicated above, in *Shi'ah* law there are three general principles upon which termination may be justified; a particular *rewāyat*, *shart-e-ḍemni* and the principle of *lā ḍarar*. No particular authority, whether specifically or in general, can be found to allow the buyer to give the seller additional time and terminate the contract where he fails to, or announces that he will not, perform within that time. The third difference between the two systems appears in that in English law a stipulation as to the time for delivery of goods under a commercial contract is

⁷⁵ See, e.g., Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 549; Khumayni, S. R. M., vol. 5 at 334; Tabrizi, J., (1412 H. Q.) at 542.

⁷⁶ See, e.g., Najafi, M. H., (1981) vol. 23 at 99.

⁷⁷ See, Chapter Four, Section One, 3.2.5.3., (B).

prima facie treated as of the essence of the contract, while under *Shi 'ah* law in any case the buyer should satisfy the court that the term has such a character.

1.3. Seller's Right to Cure

A further question which is to be answered by any legal system is whether the buyer's right to terminate is to be subject to the seller's right to make amend by resubmitting a conforming delivery and/or repairing the defects in the goods *delivered* to the buyer, or he can terminate the contract immediately. Both English law and the Convention have responded to this question but in a different way. As already shown in detail⁷⁸, English law has not expressly recognised a general right to cure for a seller who has made non-conforming delivery. Although a number of English academic writers⁷⁹ have tried to prove that such a right is in principle compatible with the existing English law of sale and is supported by a number of judicial dicta⁸⁰, some others, rejecting their arguments⁸¹, argue that the present English law does not support such a general right for the seller. He may be entitled, they suggest, to cure his defective delivery only where the buyer consents to it. In contrast, the Convention gives the seller a general right to cure the lack of conformity. The right is broadly applicable to the case where the seller has delivered non-conforming documents (Art. 34) and goods (Art. 37). The right can be exercised by the seller before and after the time for performance has expired (Art. 48).

In comparison, English law would be similar to the Convention if the former system is seen in view of the first group of English authors; under both systems the seller would have a general right to cure his non-conforming performance before the time for delivery has expired, and the buyer has no right to reject the seller's offer, otherwise he himself will be guilty of breach of contract. Similarly, under both systems the right will be available for the seller even if the lack of conformity is serious. As far as the seller is ready and able to cure, non-compliance with the contract terms will not be treated as one giving rise to the right to terminate the contract. Despite these similarities, the two systems will differ in some aspects. First, under English law, as described by the first approach, the seller will not be entitled to cure where his conduct is such that constitutes a repudiation of the contract. One may say that it may be the case where the lack of conformity is so serious that the buyer has lost his confidence in the seller's ability and willingness to make a conforming tender. Whereas, under

⁷⁸ See, Chapter Two, Section One, 2.1.3.

⁷⁹ *Ibid.*, fn. 45.

⁸⁰ *Ibid.*, fn. 46.

⁸¹ *Ibid.*, fn. 50.

the convention, as explained before⁸², the seller's rightful offer to cure under Art. 37 would convert the character of an actual fundamental breach into a non-fundamental breach. Thus, as far as the seller is able and willing to cure under Art. 37 the buyer has no right to reject it and terminate the contract. Second, under English law cure by the seller beyond the contract time depends on the fact whether or not time was of the essence of the contract, while the seller's right to cure beyond the contract date for performance, as prescribed by Art. 48 of the Convention, is not subject to such a restriction.

Similarly, despite a clear difference between the Convention and English law, as interpreted by the second approach, one may argue that the two systems have some similarities. The first appears in respect of non-conforming documents. Under the Convention, the seller is expressly given the right to cure any lack of conformity in documents before the contract time for handing them over is expired (Art. 34). There is the argument that the seller will also be entitled to cure under English law to that extent.⁸³ As explained before⁸⁴, in English law there are certain judicial authorities which clearly state that following the buyer's lawful rejection the seller under certain circumstances has a right to make a sound tender provided that he can do so within the contract time. However, one may argue that this is only the case where the seller has not made already an unconditional appropriation. The second similarity is the case where the seller has intended by his tender to appropriate a particular cargo to the contract rather than to perform his delivery obligation. In that case, as long as his offer has not been unconditionally accepted by the buyer English law gives the seller an opportunity to withdraw his non-conforming tender and make a fresh tender.⁸⁵

The position of *Shi'ah* law, as already shown⁸⁶, is unclear. No jurist has examined the question whether the seller should be given a general right to cure his defective performance and if so, in what circumstances it should be granted. In the absence of clear jurisprudential authorities on this issue, it is suggested that the Convention provisions regulating the issue could be compatible with this system. To adapt this rule with this system, it is suggested to analyse the issue on the basis of two general criteria upon which termination of contract is justified in this system, that is, *shart-e-dēmnī* and *lā dārar*. Where it is accepted that termination is to be based on the first approach the buyer will have an immediate right to

⁸² See, Chapter Three, Section One, 3.3.

⁸³ Moreover, it is the practice in relation to documentary credits that documents rejected as not conforming to the credit are generally allowed to be represented. See also Uniform Customs and Practice for Documentary Credits (1993 Version), Art. 14 (d)).

⁸⁴ Chapter Two, Section One, 2.1.3.

⁸⁵ As explained before, a number of English authors are inclined to explain the decided cases in this way. In this respect, see *ibid.*

⁸⁶ See, Chapter Four, Section One, 3.2.4.

terminate the contract if the seller's non-conforming delivery results in breach of *shart-e-sefat* or *shart-e-sehhat*. On this view, there is no opportunity for the seller to cure the lack of conformity. The seller's right to cure may arise where the option to terminate is to be based on the principle of *lā ḍarar*. On this approach, one may argue that giving the seller a general right to cure his non-conforming delivery is a sensible rule. This is because as long as the seller is able and ready to cure the defects in the goods delivered, as described below, it is quite possible to say that breach is not sufficiently serious to make the contract harmful for operation of the principle of *lā ḍarar*.

It is suggested, however, that it is necessary to distinguish between sales of specific and of unascertained goods. In the first case, giving the seller a right to replace non-conforming goods seems difficult to reconcile with general principles.⁸⁷ But, the position of the seller's right to cure by repair is not clear. There is an argument against recognising such a right for the seller in this system.⁸⁸ Nevertheless, it was suggested that no clear reason exists to justify not giving the seller such a right.⁸⁹ In contrast, where the contract is for sale of unascertained goods giving the seller a general right to cure seems more consistent with general principles. As already pointed out, almost all jurists have said that in such cases where the seller's tender does not conform to the contract terms the buyer has only a right to reject the non-conforming delivery.⁹⁰ On this approach, it is quite reasonable to suggest that the seller should be given a general right to cure his non-conforming delivery under certain circumstances. The same suggestion seems to be applicable where the seller has tendered non-conforming documents. The right to cure, however, should be subject to the requirements that it could be done without causing the buyer unreasonable expense or unreasonable inconvenience.

On this construction, *Shi'ah* law comes close to the Convention. Under both systems the seller has a general right to cure his defective performance. As long as the seller is ready and able to cure as described above the buyer has no right to terminate the contract. If the buyer rejects the seller's offer to cure he will be guilty of breach of contract. However, *Shi'ah* law seems to depart from the Convention in that while the latter allows the seller to cure after the time for performance has expired, under the former, as indicated before,⁹¹ the time for performance may be treated as of the essence of the contract. In that event, the buyer may be entitled to terminate the contract and as a result no opportunity is left for the seller to cure.

⁸⁷ See in this respect, Chapter Four, Section One, 3.2.4.1.

⁸⁸ See, *ibid.*

⁸⁹ See, *ibid.*

⁹⁰ See the references cited in *ibid.*, 3.2.3.2. (B), fn. 109 and 3.2.3.3. (B), fn. 116.

⁹¹ See, *ibid.*, 3.2.5.3. (B).

However, this difference will not be substantial, since first, as already explained in detail⁹², under Art. 48 of the Convention the buyer's right to avoid the contract has priority over the seller's right to cure.⁹³ Second, under *Shi'ah* law, unlike English law, timely performance is not pre-classified as a "condition". Whether it is or is not of the essence of the contract depends on the true construction of the contract and the circumstances of each case. Accordingly, where it is not proved that the time stipulation is of that character the seller would be able to cure. The only difference between the two systems would be the case where the lack of conformity is not sufficiently serious to justify termination. In that case, the seller will be entitled to cure the lack of conformity in accordance with Art. 48, while under *Shi'ah* law he will be able to do so where the time provision is not construed as of the essence of the contract. However, this difference seems insubstantial, since the buyer will in practice prefer cure by repair to a claim for damages or/and price reduction (*arsh*).

1.4. Mechanism of Exercising the Right to Terminate

As already shown⁹⁴, generally, all three systems here under examination have accepted that where a breach giving rise to the right to reject the non-conforming delivery and terminate the contract is committed by the seller the buyer has an option either to terminate the contract or to continue performance if he wishes; he is not required to elect to terminate the contract or to affirm it when he wants the contrary. Likewise, in terminating the contract he is not required to apply for a court's judgment even though he may sometimes need the court's decision to the effect that he was entitled to terminate the contract. When he prefers to reject the seller's non-conforming delivery and terminate the contract he must declare his intention by unequivocal words or conduct. The question whether the notice of termination must be communicated to the seller in breach is controversial in English law.⁹⁵ But the position of the Convention and *Shi'ah* law seems clear, the buyer exercising his right to terminate the contract should declare his intention to terminate by any means appropriate in circumstances. Delay or error in the transmission of the communication or its failure to arrive will not deprive him of the right to rely on the communication (Art. 27).⁹⁶

⁹² Chapter Three, Section One, 3.3.

⁹³ However, if Professor Honnold's view (see, Honnold, (1991) at 375-376, particularly, footnote no. 6 at 376, see also, p. 259) is accepted, the Convention will differ from *Shi'ah* law in this respect, since on his view the buyer will be entitled to terminate the contract only when the seller is not willing and able to cure after the expiration of the time for delivery.

⁹⁴ See, Chapter Two, Section One, 3.1., 3.2.; Chapter Three, Section One, 3.4.1., 3.4.2., and Chapter Four, Section One, 3.3.1., 3.3.2.

⁹⁵ See the discussion in Chapter Two, Section One, 3.2.1.2.

⁹⁶ In *Shi'ah* law see, Chapter Four, Section One, 3.3.2.2.

The buyer may wish to continue the performance of the contract and resort to other remedies. Affirmation of the contract must also be announced by unequivocal words or conduct. Since where the contract is affirmed by the buyer he will be precluded from subsequent rejection and termination, a crucial issue is at what point will the buyer be deemed to have affirmed the contract and as a result have lost his right to reject the non-conforming delivery and to terminate the contract? Both English law and the Convention have set out certain circumstances in which the buyer may be deemed to have affirmed the contract. In English law the buyer may lose his right under the following circumstances: (a) intimating to the seller that he has accepted the goods, (b) after the seller's delivery doing an act inconsistent with the seller's ownership and (c) retaining the goods beyond a reasonable time without giving the seller a notice of rejection (s. 35 of the Sale of Goods Act 1979).⁹⁷ Similarly, the Convention provides that the buyer may lose his right by failure to notify the seller of the lack of conformity in accordance with Art. 39; by lapse of a reasonable time without giving notice to the seller of his avoidance (Art. 49 (2) or where by the reason of the buyer's acts or omission restitution of the goods in substantially the condition in which he received them becomes impossible (Art. 82).⁹⁸

Despite the difference in the language of the provisions, the two systems seem similar in a number of aspects. Under the Convention, as in English law, it is a general rule that it would be sufficient to result in loss of the right if the buyer was placed into a position in which he could discover the lack of conformity giving rise to the right to terminate the contract. Loss of the right does not require that the buyer has actual knowledge of breach giving rise to the right. Similarly, under both systems, the buyer may lose his right to reject when he fails to exercise his right within a reasonable time. Again, loss of the right to reject under s. 35 (1) (b) of the English Sale of Goods Act (subject to sub-section (6)) will substantially be in the same circumstances in which it may be lost under Art. 82 (1) of the Convention.

However, it is possible to say that the Convention seems more generous than English Sale of Goods Act. Although the English Sale of Goods Act provides that the buyer will not lose his right to reject merely because he has delivered the goods to another under a sub-sale or other disposition (s. 35 (6) (b)), acts such as consumption of the goods by the buyer or using them in a way which makes the physical return of the goods impossible could result in loss of the right to reject under the heading of "acts inconsistent with the seller's ownership" (s. 35 (1) (b)). Whereas, under the Convention as long as these acts are done in the normal

⁹⁷ For a detail discussion see, Chapter Two, Section One, 3.2.2.2.

⁹⁸ For a detail discussion see, Chapter Three, Section One, 3.4.3.

course of use they will not result in loss of the right (Art. 82 (2) (c)). This is perhaps for the reason that unlike English law (s. 35 (2)), the buyer may lose his right under Art. 82 of the Convention even where he has not had a reasonable time to examine the goods. Similarly, in comparing Art. 39 of the Convention with the English Sale of Goods Act 1979, one may argue that on the one hand Art. 39 (2) is more generous to the buyer in regard to the time allowed to him - this may be the case where the defect was a latent one and could not reasonably have been discovered by the buyer within a reasonable time - but on the other hand, while the Convention deprives him of all remedies (subject to Arts. 40 and 44) if he fails to notify in accordance with Art. 39, under English law his right to claim damages will survive even though he has lost his right to reject the goods and treat the contract as repudiated.⁹⁹

As already shown in detail,¹⁰⁰ *Shi'ah* law, as its two counterparts, provides certain circumstances in which the buyer may lose his right to reject and terminate the contract. *Shi'ah* jurists have gathered certain circumstances in which the buyer may be treated as having impliedly affirmed the contract. These circumstances are comprised under the heading of *isqā t-eṣāriḥ* (express intimation to the seller that he will accept the goods) and *isqāt-e-ḍemni* containing (a) *tasarruf* (any act as to the goods delivered)¹⁰¹, and (b) *ta'khir* (delay) in exercising the right to terminate. Apart from the general similarities between this system and its two counterparts, *Shi'ah* law differs from English law and the Convention in some aspects. First, unlike both English law and the Convention, which provide that the buyer's presumed knowledge of the lack of conformity giving rise to the right to terminate will be sufficient in loss of the right, according to most jurists there will be an effective deemed affirmation of the contract only where the buyer has *actually* discovered such a non-conformity.¹⁰² However, it is suggested that the buyer should be taken as having affirmed the contract if a reasonable man in his position could have discovered the lack of conformity. He should not be entitled to reject the goods and terminate the contract for a defect which could have been discovered by a simple

⁹⁹ It is to be noted that in English law "an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued" (s. 5 of the Limitation Act 1980.). Accordingly, an injured party will be entitled to take an action for damages before the court within a period of six years. The Convention, however, does not ascertain for how long the buyer could take an action for damages. This is perhaps because the issue is covered by another UN Convention, i.e., The 1974 Convention on the Limitation Period in the International Sale of Goods (New York), as amended in 1980. Under Art. 8 of the latter Convention the limitation period shall be for four years. But the position of *Shi'ah* law is not clear; no clear rule exists in this respect.

1974)

¹⁰⁰ See, Chapter Four, Section One, 3.3.3.

¹⁰¹ As explained before (Chapter Four, Section One, 3.3.3.2., (A)), *Shi'ah* jurists suggest that the buyer may be taken to have consented to the non-conforming goods by the method of *tasarruf* in three classes of case: use of the goods, dealing with them and altering them so that it is not possible to return them in the same condition they possessed at the time of delivery

¹⁰² See, e.g., Ansāri, M. (1375 H. Q.) at 254, 261; Tūhidi, M. A., and Khūei, S. A. (1368 H.S.) vol. 7 at 108, 175.

examination. The reason is clear: where the buyer who knows or could have known that the goods *may* be defective, failed to examine them he cannot be protected by the principle of *lā ḍarar*. In such a case, he has in fact acted against himself (*qāedah-e-iqdām*) and should bear the risk of his action.

Second, unlike English law and the Convention under which the buyer will lose his right if he fails to exercise it within a reasonable time, the position of *Shi'ah* law is not clear. According to some jurists the buyer will lose his right to reject and to terminate the contract if he has not exercised his right *fūran* (promptly), while others suggest that he may keep his right even after that time.¹⁰³ However, it is suggested that the buyer's right to reject the non-conforming goods and terminate the contract must be exercised within a reasonable time. Where the buyer who knows or ought to know of the lack of conformity giving rise to the right does not exercise his right, he should be deemed to have impliedly waived it. This is because the main reason for giving the buyer a right to terminate is, as already shown, the principle of *lā ḍarar*. For this purpose, he should be given only an adequate opportunity under which a reasonable person can benefit from this legal protection. In addition, where the buyer, knowing of his right and being able to exercise it, does not exercise it he will be regarded as having acted to his detriment (the principle of *iqdām*).

Position of Non-Conforming Documents. *Shi'ah* jurists have not addressed the question whether a mere dealing with documents will result in loss of the right to reject for undisclosed defects. In the absence of a clear jurisprudential authority, it is suggested that the general principle applied to the case of non-conforming goods has to be applied to the case in question. Thus, a buyer who deals with documents representing the purchased goods should not be taken to have intended to waive his right to reject unless he was actually, or should have been, aware of the non-conformity giving rise to the right to reject. Accordingly, where the buyer learns later of the fact that the documents possessed a wrong date of shipment, for instance, he should be allowed to reject them. The same is true *a fortiori* as to the buyer's right to reject the goods where it proves that they do not conform with the contract conditions.

Effects of Termination. As explained before¹⁰⁴, in all three systems, when termination for breach of contract validly takes place, it affects both the contract and relations of the parties from that time. It brings the contract to an end in respect of the unfulfilled obligations and releases both parties from their unperformed primary obligations either wholly or in part as the case may be. However, while under English law and the Convention it is expressly

¹⁰³ See the references cited in Chapter Four, Section One, 3.3.3.2. (B).

¹⁰⁴ See, Chapter Two, Section One, 4.0; Chapter Three, Section One, 3.5, and Chapter Four, Section One, 3.4.

provided that the contract survives termination for the purpose of settling any dispute between the parties including the question of damages, *Shi'ah* jurists have not addressed the question. This is perhaps due to the jurists' failure to examine the principle of compensation on the basis of breach of contract. It is, however, suggested that in this system the contract is not totally ended. Although the jurists seem to base the buyer's damages for the seller's breach on the principles applicable to tort cases, it is suggested, as will be explained later, that these two cases are to be distinguished. For the purpose of awarding the buyer damages on account of the seller's breach of contract the buyer's legitimate expectations are to be assessed by reference to the contract.

2.0. Specific Performance

The contract is made to be performed. However, it is not infrequent that the seller seeks to evade performance of his own part in order to escape from a bad bargain. In such cases the buyer who is aggrieved by the seller's failure to perform the contract may wish to have *in specie* what he bargained for.¹⁰⁵ For this purpose, he may need the assistance of the judicial authorities to issue a decree ordering the seller to carry out his contractual obligations.

Both English law and the Convention have responded to this demand, though in totally different ways. As shown before¹⁰⁶, English law favours damages over specific performance. In this system, little significance is given to the idea of compensating an injured buyer by coercing the defaulting seller to carry out what he promised. The Sale of Goods Act, placing specific performance under the heading of "Buyer's remedies", seems to recognise it as a right for the buyer who is aggrieved by the seller's breach. However, the express language of s. 52 of the Sale of Goods Act and the history of specific performance in English law shows that it is not treated as a matter of right for the aggrieved buyer seeking remedy, but is an equitable remedy whose exercise is left to the court's discretion. As already seen¹⁰⁷, specific performance of a sale contract may be granted, provided that the court thinks fit, where the contract is for sale of specific goods or, in the case of contract for sale of unascertained goods, they are already ascertained. Even in those cases, English courts do not generally order specific performance of a contract where damages can afford adequate remedy to an injured party.¹⁰⁸ In any case where the buyer is seeking the remedy of specific performance he has to

¹⁰⁵ Long before an English author had identified a number of reasons why a buyer might want to seek specific performance of the contract (Treitel, G.H., (1966) 211. See also Secretariat Commentary, (1979) at 38.

¹⁰⁶ See, Chapter Two, Section Two, 1.0.

¹⁰⁷ See, *ibid.*, 2.0.

¹⁰⁸ see, *ibid.*, 3.0.

satisfy the court that damages are an inadequate remedy.¹⁰⁹ Leaving the remedy to the discretion of the court may cause some uncertainty; the buyer cannot predict under what circumstances the court would be satisfied to accept this remedy. For instance, in *Societe Des Industries Metallurgiques S.A. v. The Bronx Engineering Co. Ltd.*¹¹⁰, notwithstanding that the evidence showed that it would have taken the plaintiffs between nine to twelve months to obtain similar goods from an alternative source, the Court of Appeal was not satisfied that the case was a proper one for grant of specific performance, for the Court was of the view that the goods were of a type obtainable on the market in the ordinary course of business¹¹¹ and the additional loss suffered by the plaintiffs as the result of the delay would have been covered by an increased award of damages. In view of the fact that an order for specific performance under this system is only likely to be available in exceptional circumstances, it is even less likely that an order will be granted where the buyer has demanded that the seller cure his non-conforming performance by replacement or repair.

As far as the remedy of specific performance is concerned, the Convention substantially differs from English law. First, unlike English law, the Convention gives the buyer a general right to require the seller to perform what he has undertaken under the contract (Art. 46). Second, in contrast to English law, specific performance under the Convention has been treated as a *right* (Art. 45 (1)). Accordingly, where the buyer applies for it the court is bound to give a judgment ordering the seller to perform his obligation where the requisite requirements are satisfied (although Art. 28 of the Convention gives the national courts a discretion to depart from the Convention rules if under their national law they do not grant specific performance in similar contracts of sale not governed by the Convention). Third, as shown in the light of the legislative history¹¹², the buyer, unlike in English law, is not required to show the court that damages are an inadequate remedy; he need not demonstrate inability to procure the contract goods elsewhere prior to obtaining specific performance. Likewise, unlike in English law, in the case of sale of unascertained goods, identification of the goods to the contract is not treated as a pre-requisite to a claim for the remedy of requiring performance under the Convention.

The remedy of specific performance under the Convention has a broad scope. The buyer may be entitled, subject to the restrictions provided by the Convention¹¹³, to this remedy when the seller fails to procure or produce the goods or to deliver them, hand over any

¹⁰⁹ See, e.g., *CN Marine Inc. v. Stena Line (The Stena Nautica (No. 2))* [1982] 2 Lloyd's Rep. 336 at 348.

¹¹⁰ [1975] 1 Lloyd's Rep. 465.

¹¹¹ [1975] 1 Lloyd's Rep. 465, Lord Edmund Davies at 468, 469.

¹¹² See, Chapter Three, Section Two, 4.6.

¹¹³ See in this respect, *ibid.*, 4.0.

documents relating to them at the right place or date fixed in the contract (Arts. 31, 33 and 34). He may also apply to the court for this remedy where the seller refuses to deliver goods, hand over any documents relating to them (Art. 30), or where part of the purchased goods are missing or does not conform to the contract (Art. 51) and do all other acts necessary to fulfil the contract as originally agreed. Similarly, the Convention gives the buyer the right to apply to the court to enter a judgment ordering the seller to deliver substitute goods or repair the lack of conformity in accordance with Art. 46 (2) and (3). When applying for replacement goods, what he is required to prove is that the seller's non-conforming delivery is serious enough to constitute a 'fundamental breach' (Art. 46 (2)). In contrast, when he applies for an order requiring the seller to repair the lack of conformity he should only show that his request is not unreasonable "having regard to all the circumstances" (Art. 46 (3)). Although according to the wide language of this provision the buyer will have a general right to require the seller to cure any form of lack of conformity by way of repair, the buyer who contemplates resorting to these remedies obviously takes the risk that, if the matter comes to litigation, the court may hold that to require repair is unreasonable or that the lack of conformity is not sufficiently serious to constitute a fundamental breach. Accordingly, although specific performance under the Convention may be regarded as the logically prior remedy, in practice the buyer would likely prefer the certainty and simplicity of damages, unless repair or replacement is very difficult for the buyer to obtain otherwise.

In comparing *Shi'ah* law with the two other systems, it seems that this system has close similarities to the Convention. As already seen,¹¹⁴ requiring the defaulting seller to perform his contractual obligations is a well-settled remedy amongst *Shi'ah* jurists. Because of the jurists' failure to address damages as a remedy for breach of contract, one might conclude that they appear to regard specific performance as the only primary remedy available in this system for an aggrieved party.

As in the Convention, in *Shi'ah* law almost all jurists have recognised specific performance as a legal remedy. As shown before¹¹⁵, apart from a few jurists who disagreed with giving the buyer a broad right to apply for specific performance¹¹⁶, most of them hold that in any case in which the seller fails to fulfil one of his contractual obligations the buyer has a right to apply to the court for specific performance and the court is bound to give effect to his application. Under this interpretation, the court has no power to refuse to accept the buyer's application for specific performance and request him to terminate the contract and/or

¹¹⁴ See, Chapter Four, Section Two, 2.0.

¹¹⁵ See, *ibid.*

¹¹⁶ See the references cited in: 3.0., (B) fn. 212.

accept damages in lieu. Under this view, an order requiring the seller to supply and deliver the subject of sale will be granted unless requiring the seller to perform is impossible. No matter whether or not the costs considerably exceed the contract price, or whether or not the buyer is able easily to obtain the goods from another source. Likewise, although the jurists have not expressly addressed the issue, it seems that their interpretation does not distinguish between minor and substantial breaches where the buyer rejects the non-conforming goods and demands that the seller deliver conforming replacement. The buyer may be entitled, under this view, to demand that the seller deliver replacement goods even if the seller's non-conforming delivery does not amount to a substantial breach. According to this view, the court, in fact, protects religious rules against the seller's violation and thus is not allowed to ignore the infringement of Islamic instructions merely because supply of the goods would considerably exceed the contract price.

On this interpretation, specific performance is a broad remedy and may cover cases where the buyer is not entitled to obtain it under the Convention. Under this approach, as long as the seller can be compelled to perform, the court has to give effect to the buyer's application. Since these jurists have not ascertained the degree of impossibility of performance, one may conclude that the court, according to them, should give effect to the buyer's application unless the performance of the contract becomes impossible. Moreover, this view seems to suggest that the buyer may be entitled to apply for specific performance for any lack of conformity. Whereas, under the Convention, in giving effect to the buyer's application for specific performance, the court should look at the circumstances of each case to ascertain whether or not the buyer's request is reasonable.¹¹⁷ Likewise, under the Convention the buyer will not be entitled to demand substitute goods where the lack of conformity does not result in a fundamental breach of contract.

However, by introducing a new reading of the main authorities relied on for this purpose¹¹⁸, it was suggested that the above interpretation cannot be accepted in its entirety. Under this suggestion, specific performance, contrary to the few jurists who disagreed with it, should be regarded as a legal remedy in this legal system but not as an absolute remedy applicable in every circumstance, as most jurists seem to suggest. Likewise, the remedy of specific performance is not provided in this system only to preserve the pure religious decrees. It is set forth to protect the aggrieved party's legitimate expectations under the contract.

¹¹⁷ The Convention only refers to this qualification in respect of the buyer's demand to cure by repair (Art. 46 (3)), but it is also applicable to demand to cure by delivery of replacement goods. See in this respect, Chapter Three, Section Two, 3.2.

¹¹⁸ See in this respect, Chapter Four, Section Two, 3.0. (c).

Accordingly, it is submitted that giving the buyer the right to obtain specific performance should be assessed according to the degree of losses and hardship caused to any party by giving or refusing specific performance. Under this suggestion, where insisting on specific performance is unreasonable in the sense that it inflicts a greater loss on the seller in breach than the loss suffered by the buyer for non-performance the court should have power to refuse to accept the buyer's application for performance and leave him to his remedy of terminating the contract and/or claiming for damages. The suggestion can be supported by the principle of *lā ḍarar*. The Islamic order to respect contractual obligations does not mean that they must be performed specifically under any conditions. It is subject to the restriction that it does not violate the cardinal principle of *lā ḍarar*. On this interpretation, specific performance has, in general, no priority over the remedy of termination, as most jurists seem to suggest¹¹⁹, but is one of the remedies available for a buyer who is aggrieved by the seller's breach. Accordingly, the court in any case should look at all the circumstances, in particular any hardship which would be caused to both parties by giving or refusing specific performance, for the purpose of implementation of justice. For this purpose, it is the seller in breach who has to satisfy the court that specific performance would place him in a difficult position and impose on him hardship not the buyer who is given a right to have *in specie* what the seller has promised under the contract.

Having accepted that the buyer has a right to require the seller to perform what he has undertaken under the contract, it is suggested that the Convention provisions giving the buyer a right to require the seller to cure his non-conforming delivery by delivery of substitute goods and/or repair is consistent with general principles and the authorities authorising the buyer to obtain specific performance. However, it is suggested¹²⁰ that the buyer's right to demand cure should be analysed on the principle described above. Thus, the buyer's demand to cure by the seller should not be accepted where it causes the seller unreasonable expense or unreasonable inconvenience. In such cases, the buyer is to be left to his right to terminate the contract and/or claim for damages. Similarly, the buyer should not be given a right to demand delivery of replacement goods where the contract was for sale of specific goods, although he may be entitled to demand cure by repair. Demanding delivery of substitute goods should be available only where the contract is for the sale of unascertained goods. Likewise, it was suggested that in giving the buyer a right to demand cure, a distinction should be made between the right to demand replacement goods and to demand cure by repair. The right to demand substitute

¹¹⁹ See, Chapter Four, Section One, 3.2.3.4.

¹²⁰ See also, Chapter Four, Section Two, 5.0.

goods should be given only where the lack of conformity results in sufficiently serious consequences. But the right to demand cure by repair is to be available unless it is unreasonable having regard to all the circumstances.¹²¹

Although on the suggested interpretation the circumstances in which a buyer may be entitled to apply for specific performance are considerably reduced, there are still important differences between *Shi'ah* and English law. Under this suggestion, the buyer is not required, as he is under English law, to satisfy the court that damages are an inadequate remedy for him or that the subject of sale is unique which cannot be obtained from another source. What he has to show is that the seller has failed to perform his obligations under the contract. It is the seller's duty to show that the contract goods are such that alternatives can be obtained from another source, and that requiring him to procure and deliver them under the contract would place him in a position worse than the buyer would be placed if specific performance is not granted. Likewise, unlike in English law, in *Shi'ah* law where the criterion, as described above, is met the court has no discretion; it has to enter a judgment for specific performance.

Similarly, although this suggestion, as described above, shows a close similarity to the Convention in a number of aspects, it seems that they differ in that, while under the Convention delivery of substitute goods will be available for the buyer only where the lack of conformity constitutes a fundamental breach of contract, under *Shi'ah* law the buyer may be given a right to demand replacement goods where the lack of conformity is, as in the case of termination, such that it is not customarily unreasonable for him having regard to all the circumstances including the possibility of repair by the seller.

3.0. Right to Claim for Damages

As was shown in detail, both English law and the Convention have recognised damages as a primary remedy which can be obtained with any of the other remedies previously discussed. Under both systems, a breach of contract, no matter what form it takes, always entitles the buyer to sue the seller for any loss he has sustained.¹²² Likewise, under both systems the plaintiff must show that he has suffered loss, caused by the seller's breach of contract, which is not too remote. Similarly, both systems have adopted the rule that the injured party is under a duty to mitigate his loss and that failure to do so will result in reduction of damages recoverable from the party in breach.¹²³ English law and the Convention are also similar in recognition of a subjective as well as an objective test of foreseeability. A party who seeks to

¹²¹ To justify this distinction, see *ibid.*

¹²² Chapter Two, Section Three, 2.1 and 2.2.; Chapter Three, Section Three, 2.1. and 2.2.

¹²³ See, Chapter Two, Section Three, 2.3.; Chapter Three, Section Three, 2.3.

recover normal damages will not face much difficulty under English law and the Convention. Both systems regard the party in breach as having foreseen the loss causing such damages according to the standard of a reasonable man. Accordingly, the injured party is not required to prove that the loss in question was actually foreseeable by the party in breach at the time of contract.¹²⁴

The other similarity appears as to the time of determining whether or not a particular loss was foreseeable by the party in breach. In this respect, both systems require that the time for determining what is foreseeable is the time of making the contract (Art. 74).¹²⁵ In addition to the foregoing similarities, under both systems an injured party can recover damages for the loss incurred without being required to prove any form of fault, negligence or intentional breach. Under both systems, the party in breach will be regarded as liable even he can prove that he did not commit the breach intentionally or he was not at fault or negligence.¹²⁶

Despite the similarities in general principles, the two systems depart from each other in their detailed provisions. The first difference appears in the degree of foreseeability of consequential losses. As explained before,¹²⁷ under English law, as the House of Lords made clear (though by using different terminology) in *The Heron II*¹²⁸, the Convention criterion is applicable to tort cases rather than contract ones. According to the rule under *The Heron II*, in contract cases, the losses will not be recoverable unless there is a “serious possibility” of their occurrence and not merely ‘foreseeable’. Thus, the Convention criterion that provides that losses only need to be ‘foreseeable’ certainly ought to narrow the limitations of *Hadley v. Baxendale* and widen the scope of recovery. For this reason, the House of Lords explicitly rejected the use of the term “foreseeability” in the context of contract-damages claims and suggested that the term should be confined to tort cases. Accordingly, the language of the English standard makes it less likely that the seller will be held liable for consequential damages than does the Convention test. However, one may argue that the English approach seems more favourable for the buyer than the Convention one, since in English law, provided that the type of loss could reasonably be contemplated as a serious possibility, the seller would be liable for all losses of that type, even though they may be far greater in extent than what was expected.¹²⁹ Whereas, under the Convention the test of recoverable loss is, as the language of Art. 74 suggests, that the seller did, or could have foreseen the precise amount of

¹²⁴ Chapter Two, Section Three, 2.3.2.2.; Chapter Three, Section Three, 2.3.2.

¹²⁵ As to English law see, Chapter Two, Section Three, 2.3.2.3., particularly, fn. 316.

¹²⁶ Chapter Two, Section Three, 2.3.4.; Chapter Three, Section Three, 2.3.4.

¹²⁷ Chapter Two, Section Three, 2.3.2.3.

¹²⁸ [1969] 1 AC 350.

¹²⁹ See, *Parsons (Livestock) Ltd. v Uttley Ingham & Co Ltd* [1978] QB 791.

it at the time of the contract.¹³⁰ But, as already pointed out¹³¹, the rule under *Parsons (Livestock) Ltd. v Uttley Ingham & Co Ltd*¹³² in English law has been criticised by academic writers and it is possible to say that the rule has not resolved the problem which arises in cases such as *Victoria Laundry (Windsor) v. Newman Industries Ltd*¹³³. In that case, notwithstanding that the type of loss (loss of profits) was foreseeable, the Court of Appeal held that some lost profits were not recoverable.

The second possible difference between the Convention and English approaches appears in the presumed state of knowledge of the seller in breach. In English law, as in the Convention, knowledge of the ordinary course of events is imputed to the party in breach. But in the case of consequential losses he must, as the judgment of Asquith L.J shows, have *actual* knowledge “of special circumstances outside the ‘ordinary course of things’ of such a kind that a breach in those special circumstances would be liable to cause more loss.”¹³⁴ Under the Convention, however, it appears to be sufficient if a man in the position of the seller in breach exercising reasonable care would have known of those special circumstances, even though the seller in breach in fact did not know of them. If a reasonable man would have learnt of those circumstances, the seller in breach would be held liable for any loss which, had he known of these circumstances, he ought as a reasonable man to have foreseen that loss as a possible consequence of his breach.¹³⁵

A further difference between these two systems appears in the context of computation of normal damages. As already seen in detail,¹³⁶ under English sale of goods law, the buyer’s normal damages are to be measured by reference to the market price where the goods of the contract description are available for the buyer (s. 51 (3) of the Sale of Goods Act 1979). Under this rule no great significance is in principle given to the resale or substitute purchase price. In contrast, under the Convention the buyer’s normal damages are first to be measured by reference to the actual price he has paid for purchase of substitute goods (Art. 75). Under this rule, the market price should not be relied on even where the substitute transaction price is higher or lower than the market price.¹³⁷ The market price will be relied on where the buyer has not made an actual substitute transaction according to the requirements of Art. 75.

¹³⁰ See in this respect, Chapter Three, Section Three, 2.3.2.2.

¹³¹ Chapter Two, Section Three, 2.3.2.3.

¹³² [1978] QB 791.

¹³³ [1949] 2 KB 528 at 539.

¹³⁴ Asquith L.J. in *Victoria Laundry (Windsor) v. Newman Industries Ltd* [1949] 2 KB 528 at 539.

¹³⁵ See also, Sutton, K. C., (1977) at 102.

¹³⁶ See, Chapter Two, Section Three, 2.4.1.1.

¹³⁷ This would be in favour of the seller in breach and will give him a chance to benefit from a good bargain made by the injured buyer. However, the buyer will be entitled to recover damages for further loss he may sustained as a consequence of the seller’s breach (Art. 75).

Despite this difference, it seems that in practice the difference between English and the Convention tests is not likely to be considerable, since it would be the case under the Convention only where the buyer has made the substitute transaction in a reasonable manner, and within a reasonable time after avoidance of the contract as described before.¹³⁸ If the buyer has made a substitute transaction at a price substantially different from the market price, he will have difficulty in showing that he acted reasonably.¹³⁹ Likewise, the Convention only applies the substitute-transaction formula where the buyer has *bought* the replacement goods. It does not make clear whether his damages are to be measured by reference to this formula or the market price rule where he has *re-sold* the contract goods. Since Art. 75 of the Convention makes express reference to the case of buyer's purchase, one may argue that the other case is excluded. Accordingly, as in English law, under the Convention rule the seller will not be entitled to rely on the buyer's actual sub-sale to reduce his liability to pay damages, as the buyer will not be entitled to rely on the sub-sale price to increase the seller's liability if he resold them in a price lower than the market price. In this way, it can be said that the buyer under the Convention, as in English law¹⁴⁰, may be entitled to recover the market price where he resold the contract goods at a price less or higher than the relevant market price.

However, some differences between the two tests would remain. First, under the Convention, the injured party who has made substitute transaction is deemed as have acted in reasonable manner (according to market price) unless the party in breach shows that the sub-contract price is unreasonably higher than the available market price, while in English law it is the injured party who has to satisfy the court that he has acted according to the market which was available for him. Second, the distinction is likely to be significant where there is a market and the substitute contract actually made by the aggrieved buyer is more favourable to him than one which he could have made in the market.

Another difference between the two systems may appear in respect of the time at which the market price is to be determined. In the Convention, it is in general the time at which the

¹³⁸ See, Chapter Three, Section Three, 2.4.2.1.

¹³⁹ See also, Nicholas, B., (1989) at 231; Treitel, G. H., (1988), Para. 102.

¹⁴⁰ In English law, as already seen (see Chapter Two, Section Three, 2.4.1.2.), the market price rule is a *prima facie* rule and will not apply if there is no available market for the contract goods or its application is seen as inappropriate. For this reason it has been accepted that where the buyer has bought to sell to his sub-buyer the very same goods he purchased from the seller as specific goods (see *R. & H. Hall Ltd. v. W. H. Pim (Junior) & Co. Ltd.* [1928] 33, Com. Cas. 324; see also *Williams Bros v. Ed. T. Agius Ltd.* [1914] A.C. 510 at 523; *The Arpad* [1934] 40 Com. Cas. 16 at 24), or he has fixed the same delivery date in the contract of resale as in the original contract (*Kwei Tek Chao v. British Traders and Shippers*, [1954] 2 Q.B. 459 at 489-490), his damages are to be measured by reference to sub-transaction price if such special circumstances were reasonably contemplated by the seller at the time of original contract.

contract has been declared avoided by the buyer (Art. 76 (1), whereas the moment under the Sale of Goods Act is broadly the time at which the seller's duty to deliver becomes due (s. 51 (3)).¹⁴¹ It seems that the divergence between the two criteria would not in fact be substantial in the ordinary case. This is because first, an injured buyer who delays in avoiding the contract at a time when the market is changing may under the Convention be held to have failed to perform his duty to mitigate the loss. Second, the buyer will lose his right to avoid the contract if he does not do so within a reasonable time after he knew or ought to have known of the lack of conformity (Art. 49 (2)). Moreover, the Convention, by providing that where the buyer claiming damages has avoided the contract after taking over the goods the current price is to be determined by reference to the time of such taking over rather than the time of avoidance (Art. 76 (1) sent. 2), has in fact prevented the buyer from speculating at the expense of the seller by holding non-conforming goods until a fall in the market makes avoidance advantageous. In one case, however, the practical divergence between the two formulae may seem substantial, that is, in that of anticipatory repudiation. The Sale of Goods Act rule, as seen previously¹⁴², has given rise to difficulties in this case and it was suggested by the decided cases that the time-default formula should not be extended to the case of anticipatory repudiation. Whereas, the Convention time of avoidance-formula, as some commentators suggest¹⁴³, seems applicable to the case of anticipatory breach.

A further divergence may appear between the two formulae in respect of the time for determining the market price where documentary sales are involved. Although the English Sale of Goods Act does not expressly address the point, English case law provides that damages are to be measured at the time of tender of documents¹⁴⁴, whereas under the Convention the general rule is the time when the buyer declares the contract avoided. However, with a broad interpretation of the phrase "taking over" in Art. 76 (2), one may argue that in such a case damages are to be measured from the time of taking over the documents, since the term does not refer only to the physical possession of the goods but also includes control over them.

Another possible divergence between the two formulae appears in respect of the time for determining the value of conforming and non-conforming goods. While the English Sale of Goods Act 1979 provides that it has to be determined by reference to the difference between the value of the sound and defective goods at the time of delivery to the buyer (s. 53 (3)),¹⁴⁵

¹⁴¹ See also, DTT's Consultative Document, (1989) at 46.

¹⁴² See, Chapter Two, Section Three, 2.4.5., fn. 415.

¹⁴³ See e.g., Nicholas, B., (1989) at 231-2; DTT's Consultative Document, (1989) at 46.

¹⁴⁴ See, Chapter Two, Section Three, 2.4.5.

¹⁴⁵ The rule, as prescribed in the English Sale of Goods Act, has been criticised as being too strict and give rise to possible injustice in a number of ways. See in this respect, Greig, D.W., (1974) at 272. One may argue that the language of s. 53 (3) which suggests that in the case of non-conforming delivery the moment of

the Convention seems to leave the issue to the arbitrators to decide what they see an appropriate in any particular case.¹⁴⁶ However, as explained before,¹⁴⁷ the rule that the buyer's damages should be assessed by reference to the market price at the time of delivery is only a 'prima facie' rule from which the English courts have departed in a number of cases as an inappropriate time.

The Convention also differs from English law in relation to the place for determining the market price. While the Convention expressly recognises the place of delivery as a place for determining the current price (Art. 76 (2)), the English Sale of Goods Act does not make any reference to the place at which the market price is to be measured. Despite the silence of the Act, it has been suggested that damages are generally to be measured by reference to the market price of the place at which the goods were to be delivered under the contract.¹⁴⁸ However, this test may be too rigid if the place of receipt of the goods and the place of delivery are different, as they often are. In English law, it has been suggested that if it was to the knowledge of both buyer and seller that goods are bought c.i.f. and f.o.b. for shipment to a particular market, the relevant values to be taken into consideration are the values of the goods upon that market on arrival there.¹⁴⁹ In the case of the Convention it can be said that presumably there is some flexibility in Art. 76 (2) and a court may be able to substitute the price obtaining at the place of arrival of the goods where that is more reasonable market for a hypothetical covering purchase.¹⁵⁰ Where there is no market at the place of delivery the Convention provides that damages are to be measured by reference to the market of an alternative place which serves as a reasonable substitute. A similar suggestion has been made in English law.¹⁵¹

As seen above, both English law and the Convention have given great significance to damages. But due to the failure of *Shi'ah* jurists to address 'damages' as a remedy for breach of contract, the position of this remedy in *Shi'ah* contract law is so unclear that it makes a comparative treatment impossible. However, in the *Shi'ah* law chapter it was shown that there are general principles which could be applied to the case.¹⁵² In light of what was discussed

assessment is the time when the seller has made actual non-conforming delivery may include delivery before the time for delivery of contract goods. Accordingly, it may be slight difference between non-delivery and non-conforming delivery cases.

¹⁴⁶ See in this respect, the suggestion of the UNCITRAL Secretariat cited in: Chapter Three, Section Three, 2.4.1., fn. 246.

¹⁴⁷ See, Chapter Two, Section Three, 2.4.5.

¹⁴⁸ See the references cited in: Chapter Two, Section Three, 2.4.6., fn. 429.

¹⁴⁹ See e.g., Diplock L.J. in *Aryeh v. Lawrence Kostoris & Son Ltd.* [1967] 1 Lloyd's rep. 63 at 71 and 73-4.

¹⁵⁰ See also, Ziegel, J. & Samson, C., (1981) Art. 76.

¹⁵¹ See, *Attorney-General Rep of Ghana v. Texaco Overseas Tank Ships Ltd. (The Texaco Melbourne)* [1993] 1 Lloyd's Rep, 471; Bridge, M., (1994) at 157.

¹⁵² See Chapter Four, Section Three, 2.2.

there, it can be said that, as in English law and the Convention, in *Shi'ah* law an injured buyer has a general right to claim damages for any loss he has suffered as a consequence of the seller's action (breach of contract) and this right can be exercised with any of the remedies previously discussed.¹⁵³ Similarly, as in its two counterparts, in *Shi'ah* law the buyer seeking damages must show that he has suffered loss, caused by the seller's breach¹⁵⁴, which must have been foreseeable by the seller in breach when the contract was made.¹⁵⁵ He is also not required to show any kind of *ta'ddi* or *tafrit*.¹⁵⁶

Despite the similarities between *Shi'ah* law and its two counterparts in general aspects, this system, as described in the fourth chapter, seems to depart from English law and the Convention in its detailed provisions. First, as was shown¹⁵⁷, according to *Shi'ah* law, the seller should only be held liable when in light of information actually given to him or which he could reasonably have obtained from the facts and circumstances which exist at the time of the contract he did actually foresee or could reasonably have foreseen it as a *most likely* result of his breach of contract. This criterion would surely be stricter than the Convention test and much closer to the English test. However, *Shi'ah* law will differ from English law in that while in English law making the seller in breach liable will be sufficient if the occurrence of the type of loss is seriously possible to result, in *Shi'ah* law, as under the Convention, the whole amount of the loss must be foreseeable as most likely.¹⁵⁸

One may argue that *Shi'ah* law also differs from both English law and the Convention in respect of the duty to mitigate loss. This possibility can initially be supported on the ground that no *Shi'ah* jurist has addressed 'duty to mitigate' as a requirement for recoverability of loss caused by breach, even where dealing with tort cases (the typical place for discussing the law of damages). Accordingly, the buyer may be entitled to claim damages even for losses he could have avoided if he had acted reasonably. However, although in this system it is difficult to say that an injured party is under a 'duty to mitigate' his loss,¹⁵⁹ it is suggested that the seller should not be held liable for losses the buyer could have avoided if he had acted reasonably. The suggestion, as discussed before¹⁶⁰, can be supported on the ground that a

¹⁵³ See, Chapter Four, Section Three, 2.2.

¹⁵⁴ See, *ibid.*, 2.3.1.

¹⁵⁵ See, *ibid.*, 2.3.2.

¹⁵⁶ See, *ibid.*, 2.3.4.

¹⁵⁷ See, *ibid.*, 2.3.2.2.

¹⁵⁸ See, *ibid.*

¹⁵⁹ On this basis, it can be said that the buyer will not be able to recover damages for losses he sustained when taking reasonable measures to minimise his loss. In any case, the general criterion for recovery of damages is that the loss sustained is customarily attributable to the seller, which was foreseeable to him at the time of the contract.

¹⁶⁰ For further arguments in favour of this restriction in this system see, Chapter Four, Section Three, 2.3.3.

defaulting seller, as indicated above, will be responsible for those damages *caused by his actions* provided that they were foreseeable by him when the contract was made. Where damage is customarily attributable to the buyer rather than the seller in breach it is the buyer who must bear the consequences of his conduct. On this basis, the “causation” principle might be found to operate in the same way that the mitigation principle does in English law and the Convention. Accordingly, the explicit mitigation principle under English law and the Convention strengthens results that one could reach by the principle of causation under *Shi‘ah* law.

Further differences may appear between *Shi‘ah* law on the one hand and English law and the Convention on the other hand in the detailed provisions on quantification of damages. As was already pointed out¹⁶¹, relying on the rules the jurists have developed in the context of tort claims¹⁶², it was suggested that the English rules are more compatible with this system. Accordingly, damages for breach of contract are basically to be assessed by reference to the ‘difference in value’ rule and that this basic rule should be implemented by the ‘market price’ rule where the contract goods have an available market. On this suggestion, *Shi‘ah* law would be more similar to English law than the Convention. As in English law, the buyer’s damages are in principle to be measured by reference to the market price if the contract goods have an available market. Accordingly, neither should the buyer be entitled to rely on the substitute transaction price (if he has for example purchased the replacement goods or resold the purchased goods in a price higher than the market price) nor should the seller in breach have an option to rely on the actual price (if the buyer, for instance, purchased or resold in a price less than the market price). However, the rule may cease to work in certain cases. This is the case where the purchased goods have no sufficient equivalent in the market (i.e., *qimi*) or application of the rule becomes inappropriate. In such cases, the buyer’s damages are to be measured by reference to the general principle, that is, an estimate of the sum which will place the aggrieved buyer into the same position as if the seller had performed the contract rightly. In those cases, the court has to decide the case in accordance with relevant factors such as the contract price or the price which a second purchaser paid or was prepared to pay for it. On this rule, if the buyer’s sub-sale was foreseeable by the seller when the contract was made the actual price offered by the sub-buyer should be used for the measurement of the buyer’s damages.

¹⁶¹ See, Chapter Four, Section Three, 2.4.2.

¹⁶² See, *ibid.*, 2.4.1.

As explained before, the point of time for determining the market price is not clear in *Shi'ah* law. However, relying on the different time points the jurists have suggested in tort cases¹⁶³, it was suggested that the proper rule applicable to breach of sale contracts should in principle be the time of breach, that is, the time when the seller fails to perform his duty to deliver goods conforming to the contract requirements. However, since the “time of breach criterion” may give rise to injustice in some cases, it was suggested¹⁶⁴ that, as in English law, it should be regarded as a *prima facie* rule from which the court could depart in appropriate circumstances.

A further gap in *Shi'ah* law is at what place the value of the contract goods should be ascertained. Relying on the various solutions suggested by the jurists in tort cases.¹⁶⁵, it was suggested that the question is to be answered by reference to the place at which the seller should have performed his delivery obligation. However, the case will be unclear where the place of delivery lacks an available market for the purchased goods. No jurisprudential statement can be found in this respect. It is, however, suggested that the Convention solution can be a useful one, that is, “the price at such other place as serves as a reasonable substitute” (Art. 76 (2)). Likewise, as in English law, it is suggested that where it was to the knowledge of the parties to the contract when it was made that the purchased goods will be shipped to a particular place the buyer's damages should be measured by reference to the market of that place.

4.0. Right to Reduce the Contract Price

In some jurisdictions, an injured buyer is given a further monetary relief. Under this remedy he is given a right to reduce the contract price unilaterally where the seller has delivered non-conforming goods. The buyer may be entitled to reduce the price without being required to prove that he has suffered loss as a consequence of the seller's breach; price reduction is not compensatory, but primarily restitutionary in nature and is designed to prevent the seller from unjust enrichment.

In this respect, *Shi'ah* law departs from English law and becomes closer to the Convention. English law, as seen before,¹⁶⁶ has not recognised such a remedy. The closest English law counterpart may be the ‘set-off’ rule provided in s. 53 (1) (a) of the Sale of Goods Act 1979. But price reduction, as prescribed under the Convention and *Shi'ah* law, is

¹⁶³ See, Chapter Four, Section Three, 2.4.3.

¹⁶⁴ See, *ibid.*

¹⁶⁵ See, *ibid.*, 2.4.4.

¹⁶⁶ See, Chapter Two, Section Three, 1.0, 2.4.2.3.

substantially different from the English law rule. Under the Convention and *Shi'ah* law, the remedy of reduction in price is available even where the buyer has already paid the price, while the English rule applies only where the buyer has not paid the price in advance. Another important difference between this remedy and s. 53 of the English Sale of Goods Act is that price reduction under the Convention and *Shi'ah* law covers cases in which he may be unable to claim damages but nevertheless wish to keep goods that do not conform to the contract. For this reason, the buyer can reduce the price without having to be concerned with Art. 74 defences such as foreseeability of damages, force majeure (i.e., Art. 79 exemptions) or failure to mitigate losses under Art. 77. Whereas, the set-off rule can be relied on only where the buyer is entitled to claim damages. This is perhaps the reason why s. 53 of the English Sale of Goods Act has not placed the set-off rule under a separate section, as it did in respect of the other remedies. This shows that the set-off rule is not a separate remedy but it is, in fact, a particular means of exercising the right to damages. Under this rule, the buyer is given an option either to claim damages as described above or to withhold a part or all of the contract price as a self-help where the seller sues him for the price.

In contrast, as was shown in detail¹⁶⁷, both the Convention and *Shi'ah* law have recognised reduction in price as a separate remedy. Under both systems, price reduction can be effectuated by the buyer's unilateral declaration. Thus, no court action or even seller's agreement is required, unless the seller disagrees with the buyer as to the existence of a non-conformity or to the monetary consequences of that non-conformity. Similarly, both systems provide that reduction of price is to be measured by reference to the proportional reduction of the price of goods according to the ratio of the value of conforming goods to that of the goods actually delivered.¹⁶⁸

However, despite the similarity of *Shi'ah* law with the Convention in some general aspects, considerable differences can be found between the Convention and *Shi'ah* law, as described in the present *Shi'ah* jurisprudence, in their detailed provisions. Under the Convention, as already discussed in detail,¹⁶⁹ according to the general language of Art. 50, price reduction may be made either where the seller has delivered but "the goods do not conform with the contract" in quantity, quality and description or are not contained or packaged in the manner required by the contract (Art. 35 (1)), while most jurists in *Shi'ah* law suggest that the buyer can only claim *arsh* (price reduction) where the seller has delivered

¹⁶⁷ See, Chapter Three, Section Three, 3.2., 3.3. and 3.5.; Chapter Four, Section Three, 3.1.

¹⁶⁸ *Ibid.*, 3.4., respectively.

¹⁶⁹ Chapter Three, Section Three, 3.3.

defective goods.¹⁷⁰ Second, under the Convention the right of price reduction does not preclude the buyer from claiming damages for any consequential losses he has sustained (Art. 45 (2)), while under *Shi'ah* law the position is unclear. No jurist has addressed the relationship of *arsh* and damages. Third, as was explained¹⁷¹, Art. 50 of the Convention seems also to cover cases where the seller has rendered a partially non-conforming delivery, while the position of *Shi'ah* law is unclear. Fourth, price reduction under the Convention may be claimed whether the contract is for sale of specific or unascertained goods, while almost all *Shi'ah* jurists suggest that it can be claimed only where the seller of specific goods has delivered defective goods.¹⁷² A further difference between the two systems appears in respect of the time for determining the value of conforming and non-conforming goods. While the Convention expressly provides that the decisive time for calculation of the price difference between conforming and non-conforming goods is the time of delivery of the goods, in *Shi'ah* law there is no settled view amongst the jurists. Various criteria have been suggested.¹⁷³ However, both systems are silent in respect of the place at which the value of the non-conforming goods must be determined. It seems that in both systems the case is left to the court to decide the appropriate place according to the special circumstances of any particular case.¹⁷⁴ A further significant difference between the two systems appears in that under the Convention price reduction is distinguished from the right to terminate the contract. For this reason, it is not subject to the various limitations applicable to termination of the contract, such as exercising it within a reasonable time, and fundamentality of breach, whereas in *Shi'ah* law, as it now stands, the jurists, treating price reduction as a part of the 'option of defect', extend almost all the requirements applicable to the right to terminate the contract to the right to claim *arsh*. For this reason, the buyer will be entitled to claim *arsh* only in cases where he is given the right to terminate the contract and he will lose the first under the same circumstances in which he will lose the second.

However, in light of the analysis of the *rewāyāt* authorising the buyer to claim *arsh* and general principles, it was suggested that *arsh* should be regarded as a general remedy¹⁷⁵ and distinct from the right to claim damages¹⁷⁶ and that of termination.¹⁷⁷ It should be given to the buyer in any case where the seller benefits from his non-conforming delivery at the expense of

¹⁷⁰ Chapter Four, Section Three, 3.2.2.

¹⁷¹ Chapter Three, Section Three, 3.3.

¹⁷² Chapter Four, Section Three, 3.2.2.

¹⁷³ See, *ibid.*, 3.4.1.

¹⁷⁴ See, Chapter Three, Section Three, 3.4.2. and , Chapter Four, Section Three, 3.4.2.

¹⁷⁵ Chapter Four, Section Three, 3.2.2.

¹⁷⁶ See, *ibid.*, 3.6.

¹⁷⁷ See, *ibid.*, 3.3.

the buyer. This suggestion would bring *Shi'ah* law close to the Convention. In this event, as in the Convention, the buyer will be able to claim *arsh* where the seller has delivered goods which do not conform with the contract in quantity, quality and description required by the contract. It would also be available for the buyer even in the case of sale of unascertained goods. Similarly, *arsh* in this system will, as in the Convention, be subject to the requirements appropriate to itself. On this basis, unlike the right to terminate, the right to claim *arsh* will not be lost if the buyer has not exercised it promptly. There must, however, be some time limit after that the buyer should not be entitled to claim *arsh*. This can be a point of difference between *Shi'ah* law and the Convention. Although the Convention provides that where the buyer fails to notify the seller of any lack of conformity within a reasonable time after he discovered or ought to have discovered it he will not be entitled to rely on the lack of conformity (including reducing the contract price), it fails to provide a time limitation for exercising the right to claim price reduction. Whereas, in *Shi'ah* law it seems that the buyer should be required to use his right within a reasonable time.¹⁷⁸ On the basis of the suggestion made in this study, the right to claim *arsh* should also, as in the Convention, be subject to the seller's right to cure the lack of conformity of the goods delivered to the buyer within a reasonable time (Art. 50 of the Convention).¹⁷⁹

¹⁷⁸ To justify the suggestion, see Chapter Four, Section Three, 3. 5. 2.

¹⁷⁹ See, *ibid.*

CHAPTER SIX

CONCLUSION

In the introduction of this thesis it was said that the primary purpose of this study is to answer the question: could *Shi'ah* law be used as a system to govern modern sale transactions? At the outset, it was claimed that because of a number of areas of uncertainty and substantial gaps, current *Shi'ah* law is not capable of being an appropriate system in this regard. This actually proved to be true in the course of an extensive study of this system in one of the areas in which the jurists have done a great deal of work. This study shows that present *Shi'ah* law suffers from two substantial deficiencies.

(1) Gaps and Areas of Uncertainty in the Law

For instance, although a close interpretation of the jurists' statements in respect of the buyer's right to reject non-conforming goods reveals that the current *Shi'ah* law recognises the right as a remedy distinct from the right to terminate the contract,¹ it does not address the question: what lack of conformity will give rise to the right to reject?² It is also not clear whether the buyer has a partial rejection right and if so, under what circumstances he can exercise this right.³ More importantly, present *Shi'ah* law does not deal with the question whether under a documentary sale contract the buyer is entitled to reject documents where the seller has failed to hand them over in accordance with the contract and if so, what relation is there between this right and the right to reject non-conforming goods.⁴

Further substantial gaps and uncertainty exist in respect of the buyer's right to terminate the contract. Although the jurists have made a sharp distinction between the right to reject and that of termination in the case of a contract for sale of unascertained goods, no *Shi'ah* jurist has addressed whether the seller has a right to cure, and if so, how this right could work in this system? More importantly, no jurist has made clear when the buyer can terminate a contract for sale of unascertained goods? Moreover, it is not clear why the buyer should have an absolute right to terminate a contract for sale of specific goods. Substantial gaps also exist in respect of remedies for breach of severable contracts and late performance.⁵

¹ See, Chapter Four, Section One, 2.2.2.1., 2.2.2.2.

² See, *ibid.*, 2.2.2.3.

³ See, *ibid.*, 2.2.3.

⁴ See, *ibid.*, 2.2.4.

⁵ See, *ibid.*, 3.1.

There is further uncertainty and gaps in relation to the remedy of specific performance. Despite the fact that the jurists give priority to the remedy of specific performance,⁶ it is not clear to what extent the court should give effect to the buyer's application for specific performance. Similarly, no jurist has examined the question whether the aggrieved buyer is entitled to require the seller to make a substitute delivery or to repair defects in the case of defective delivery? If so, is there any difference between these two forms of requiring performance?⁷

A further substantial gap exists in relation to damages and price reduction (*arsh*). Although current *Shi'ah* law recognises price reduction as a separate remedy, surprisingly, no jurist has even addressed damages as a remedy. Under present *Shi'ah* jurisprudence, it is difficult to say that an injured buyer has a right to claim damages. Assuming that he has such a right, it is not clear under what circumstances can he exercise his right? What losses are recoverable? How are the recoverable damages to be measured?⁸ Moreover, the position of the right to claim *arsh* is not clear. While a few jurists suggest that the remedy is to be recognised for any form of lack of conformity, a substantial number suggest that it is an exceptional remedy which can be available where the seller of specific goods has delivered defective goods.⁹ In addition, no jurist has examined properly the relationship between this remedy and the right to terminate the contract.¹⁰ Likewise, at the present situation it is not clear how this remedy could be related to the right to claim damages.

(2) Inadequacy of the Way This System Currently Deals with the System of Remedies

In addition to uncertainty and substantive gaps, this study reveals that current *Shi'ah* law also suffers from a significant weaknesses in relation to the way this system deals with the remedies available to the injured buyer. At the present time, almost all jurists suggest that an immediate right to terminate the contract is available only where the seller of specific goods has delivered non-conforming goods. The right to reduce the contract price is also confined to the sale of defective specific goods. But in the case of sale of unascertained goods (which is often the case in the context of commercial contracts) the dominant opinion amongst *Shi'ah* jurists is that where the seller has made a non-conforming delivery the buyer has only a right to reject and demand delivery of conforming goods. Neither he is entitled to accept non-conforming goods and reduce the contract price nor is he entitled to terminate the contract. Termination will be allowed only

⁶ See, Chapter Four, Section Two, 2.0.

⁷ See, *ibid.*, 1.0.

⁸ See, *ibid.*, Section Three, 2.1.

⁹ See, *ibid.*, 3.2.2.

¹⁰ See, *ibid.*, 3.3.

when compelling the defaulting seller to perform is impossible. Since the concept and degree of impossibility of compulsion on which termination will be justified has not been clearly determined, it may give an uncontrolled discretionary power to the court in deciding whether or not the seller can be compelled. Such a broad discretionary rule would in turn lead to great uncertainty. Moreover, the jurists' unwillingness to address damages as a remedy for breach of contract may signify that they do not attach significance to this remedy.

It is submitted that insisting on the remedy of specific performance and failure to provide an adequate law of damages is inconsistent with the realities of the commercial world. Damages are a commercially vital remedy. Although specific performance may be a useful remedy in some cases, in the context of commercial contracts the buyer needs goods at the agreed time. If the seller does not render a correct performance at the agreed time later performance, or cure, will often cause the buyer substantial loss. The buyer must then be compensated. If this system could not provide an adequate law of damages it will not be capable of being a proper system in this regard.

It seems to the writer that the origins of the current situation of *Shi'ah* law lie in two main factors. The first is due to the method of inferring legal rules from the relevant sources. Historically, this system was primarily developed by *Shi'ah* jurists in the context of theoretical discussions rather than by judges in resolving the factual problems referred to them. The jurists over centuries have constantly dealt with hypothetical cases, or those cases reflected in the texts of *rewāyāt* and jurisprudential statements of the eminent jurists in the early centuries of development of *Shi'ah* law. This method has constantly been repeated by the jurists. Even at the present time it is difficult to find a jurist who is inclined to deal with the legal issues actually involved in society. They still prefer to proceed in this way to infer detailed provisions.¹¹

The second, by far the most important factor, is due to a particular understanding of the sources upon which a legal view is to be based. The common practice of the jurists, although it is not expressly referred to, is that both the legal issues and the solution are to be inferred from the sources of *feqh*. By definition, the main sources would in actual fact be the Quranic rules and those contained in *rewāyāt*, a mass of dispersed texts containing various general and specific rules.¹²

¹¹ This is the reason why the jurists over centuries have been dealing with the similar issues to infer detailed provisions and little development can be seen in *Shi'ah* jurisprudence during the two later centuries.

¹² See in this respect, Chapter One, 2.2.

The author believes that if the existing jurisprudential method is used to deal with the legal issues *Shi'ah* law will never be able to meet the modern situations. Legal issues are due to the legal life of individuals and human community. They are to be identified through scientific methods and human experiences. The sources of *feqh* such as Quran and *Sunnah* (tradition)¹³ will never explain to a jurist what the legal issue is. The author also believes that this *per se* will not be adequate. Tradition and Quranic rules will certainly not suffice a jurist to infer the needed detailed provisions.¹⁴

It is therefore suggested to reconsider both the way of dealing with the legal issues and the reliability of the secondary sources of law. It seems to the writer, the best, and most practical, way to deal with new situations is to rely on *banā'āt al- u'qalā* (traditions of the learned). The author believes that legal solutions suggested in developed legal systems could be regarded as clear instances of *banā'āt al- u'qalā*, since developed legal systems reflect the attitudes of judges, lawyers and the results of scientific researches. Accordingly, if no contrary rule, whether expressly or impliedly, can be found those rules could be accepted in the jurisprudence (*feqh*) as legitimate rules.¹⁵ On this basis, in any legal context, whether sale of goods or other areas of law, it is suggested to examine first the issue in question under developed systems of law to identify the questions and the way they are dealt with and then to deal with how those questions could be answered under *Shi'ah* law.

The author believes that if the suggested method is used *Shi'ah* law could properly be developed and answer the new questions which arise in any particular area of law. This actually demonstrated to be true in the field of the law of remedies. In light of this method, the author dealt with first the law governing the buyer's remedies under English sale of goods law and the Convention in order to identify the relevant questions and the way they are dealt with and then under *Shi'ah* law. On this basis, the author could systematise the law governing the buyer's remedies for the seller's non-conforming delivery, fill in the substantive gaps and cure substantially the areas of uncertainty which exist in current *Shi'ah* law in the following.

(1) Gaps Filling

A close analysis of the jurists' jurisprudential statements and general principles demonstrates that in *Shi'ah* law an aggrieved buyer should be given a separate right to reject the seller's non-

¹³ For a detail discussion of these two sources of *Shi'ah* law see, *ibid.*, 2.1.1.1., and, 2.1.1.2.

¹⁴ For more detail see, *ibid.*, 3.0.

¹⁵ For more detail see, *ibid.*, 4.0.

conforming delivery only when it is not customarily unreasonable for the buyer unless it is proved that it was the mutual intention of the contracting parties that any lack of conformity should give rise to the right to reject.¹⁶

Similarly, despite the jurists' failure to examine the buyer's right to reject non-conforming documents, it seems to the writer that the English law rules¹⁷ could work in this system, since this right is consistent with the settled customary law¹⁸ as well as with general principles already examined.¹⁹ Under such a contract the buyer should be given two separate rights: to reject non-conforming documents and non-conforming goods and in some cases he may be entitled to benefit from one after he has lost the other.²⁰

Likewise, it is suggested that in *Shi'ah* law termination should primarily be based on the serious breach (*lā ḍarar*); the buyer should be given the right to terminate the contract when the actual or/and foreseeable detriment (*ḍarar*) caused by the seller's non-conforming delivery is of such a degree that a reasonable man would not overlook it. However, where the court is satisfied that it was a condition of the contract that the seller had undertaken to make a perfect delivery the buyer will have an immediate right to reject and terminate the contract even though the breach is not actually substantial.²¹ The same rule is also applicable where the seller has rendered a late delivery.²² This would, however, be the case where the contract is non-severable. Where the contract is construed as severable, termination of the contract as a whole is to be permitted only where the seller's defective delivery in respect of one or more instalments is such that the buyer can reasonably conclude that the contract would be harmful for him, otherwise he can only terminate the contract in respect of the severable part provided that the required conditions of termination are met in respect of a severable part.²³ The same rule applies to cases where the seller has only delivered part of the contract goods; termination of the contract in its entirety is to be

¹⁶ For a detailed discussion see, Chapter Four, Section One, 2.2.2.2., 2.2.2.3. For a detailed discussion about the application of the same criterion to breach of severable contracts and delivery of wrong quantity see, *ibid.*, 2.2.3.1., and, 2.2.3.2., respectively. For the application of s. 30 of the English Sale of Goods Act 1979 to the case of delivery of wrong quantity in *Shi'ah* law see, Chapter Five, 1.1.3. (Delivery of wrong quantity).

¹⁷ For a detailed discussion of these rules see, Chapter Two, Section One, 2.3.4.

¹⁸ See e.g., Uniform Customs and Practices for Documentary Credits (1993 Version), Article 13; Incoterms 1990 (International Commercial Terms) published by ICC.

¹⁹ See in this respect, Chapter Four, Section One, 2.2.4.

²⁰ For a detailed discussion see, *ibid.*, 2.2.4.2., 2.2.4.3., and, Chapter Five, 1.1.2.

²¹ See, Chapter Four, Section One, 3.2.2. (C), 3.2.3. 2., 3.2.3.3., and, 3.2.3.4.

²² See, *ibid.*, 3.2.5.3.

²³ See, *ibid.*, 3.2.5.1.

allowed only where the missing part is such that its absence makes performance of the contract harmful for the buyer.²⁴

Furthermore, although the jurists have not expressly examined the seller's right to cure, it seems to the author that the Convention provisions²⁵ regulating the issue are in principle consistent with this system; it accords with general principles and the jurists' arguments that the buyer has no right to terminate for mere non-conforming delivery. Accordingly, where termination is justified on the theory of serious breach the seller should be given a general right to cure his non-conforming delivery. However, a distinction should be made between sales of specific and of unascertained goods. In the first case, he should only be allowed to cure his non-conforming performance by repair. In contrast, where the contract is for sale of unascertained goods he has a right to cure either by delivery of replacement goods or/and by repair. The seller should also be given the right to re-tender where he has tendered non-conforming documents. The right to cure, however, should be subject to the requirements that it could be done without causing the buyer unreasonable expense or unreasonable inconvenience. However, cure by the seller beyond the contract time depends on the nature of time provision.²⁶

As regards the remedy of specific performance, it is submitted that a close examination of the main authorities authorising an aggrieved buyer a right to require the seller to perform his obligations suggests that specific performance should be regarded as a legal remedy in this legal system but not as an absolute remedy applicable in every circumstance, as current *Shi'ah* law suggests²⁷. Giving the buyer the right to obtain specific performance should be assessed according to the degree of losses and hardship caused to any party by giving or refusing specific performance. Accordingly, where insisting on specific performance is unreasonable in the sense that it inflicts a greater loss on the seller in breach than the loss suffered by the buyer for non-performance the court should have power to refuse to accept the buyer's application for performance and leave him to his remedy of terminating the contract and/or claiming for damages. Specific performance has, therefore, no priority over the remedy of termination, as current *Shi'ah* law suggests²⁸, but is one of the remedies available for a buyer who is aggrieved by the seller's breach.²⁹

²⁴ See, Chapter Four, Section One, 3.2.5.2.

²⁵ See, Chapter Three, Section One, 3.3.

²⁶ See, Chapter Four, Section One, 3.2.4., and Chapter Five, 1.3.

²⁷ *Ibid.*, Section Two, 3.0., (a), (d).

²⁸ See, *ibid.*, Section One, 3.2.3.4.

²⁹ See, *ibid.*, Section Two, 3.0., particularly, (d).

Having accepted that the buyer has a right to require the seller to perform the contract, it is submitted that the Convention provisions³⁰ entitling the buyer to demand that the seller cure his non-conforming delivery by delivery of substitute goods and/or repair are consistent with general principles and the authorities authorising the buyer to obtain specific performance. However, it is suggested that the right to demand substitute goods should be given only where the lack of conformity results in sufficiently serious consequences. But the right to demand cure by repair should be available unless it is unreasonable having regard to all the circumstances.³¹

Similarly, despite the jurists' failure to examine 'damages' as a remedy for breach of contract, it seems to the writer that an injured party should be given a general right to claim damages. This is because awarding damages as a remedy is consistent with general principles the jurists have primarily developed in tort cases.³² Second, it is a commercially vital remedy. Third, almost all modern legal systems have adopted damages as a significant remedy, which signifies that the rule is an obvious instance of *banā't al-u'qalā*. Accordingly, an injured buyer should be given a general right to claim damages for any loss³³ the seller did actually foresee or could reasonably have foreseen as a *most likely* result of his breach of contract³⁴ and this right can be exercised with any of the remedies previously mentioned. According to the language of the general principles allowing the buyer to claim damages,³⁵ they are to be awarded to compensate the injured buyer. This is the main point which distinguishes this remedy from the remedy of price reduction. For this reason, unlike the remedy of *arsh* which is based on the unjust enrichment doctrine, an award of damages must be justified on the grounds of loss to the plaintiff and not of gains and benefits to the defendant.³⁶

As regards the assessment of the recoverable damages under *Shi'ah* law, it seems to the writer that the English rules³⁷ are more compatible with the rules the jurists have developed in tort cases.³⁸ Under this finding, it is suggested that they are basically to be assessed by reference to the 'difference in value' rule and that this basic rule should be implemented by the 'market price' rule where the contract goods have an available market. In the absence of an available market for the contract goods, the buyer's damages should be measured by reference to the general principle,

³⁰ Chapter Three, Section Two, 3.0.

³¹ See, Chapter Four, Section Two, 4.0., 5.0., and, Chapter Five, 2.0.

³² See, *ibid.*, Section Three, 2.2.

³³ See, *ibid.*

³⁴ For a detailed discussion of these requirements see, *ibid.*, 2.3.2.

³⁵ See, *ibid.*, 2.2.2., 2.2.3., and, 2.2.4.

³⁶ See also, *ibid.*, 3.2.1., and, 3.6.

³⁷ Chapter Two, Section Three, 2.4.

³⁸ See, Chapter Four, Section Three, 2.4.1.

that is, an estimate of the sum which will place the aggrieved buyer into the same position as if the seller had performed the contract rightly.³⁹

Similarly, although current *Shi'ah* law suggests *arsh* in a very restricted range of circumstances, in light of the analysis of the *rewāyāt* authorising the buyer to claim *arsh* and general principles, it seems that *arsh* should be regarded as a general remedy⁴⁰ and distinct from the right to claim damages⁴¹ and that of termination⁴². It should be given to the buyer in any case where the seller benefits from his non-conforming delivery at the expense of the buyer. However, the right to claim *arsh* is to be exercised within a reasonable time and should be subject to the seller's right to cure the lack of conformity of the goods delivered as described before.⁴³

(2) General Balance of the Remedies

In addition to filling the substantive gaps, this study has also demonstrated that in the general balance of the remedies, in *Shi'ah* law significance should be given both to damages and specific performance. However, damages are to be awarded more easily than specific performance. While damages should be awarded for any loss resulting from the seller's breach, specific performance is not to be awarded where insisting on it is unreasonable in the sense that it inflicts a greater loss on the seller in breach than the loss suffered by the buyer for non-performance. Nevertheless, the buyer is not required to show that damages are an inadequate remedy for him or that the subject of sale is a unique item which cannot be obtained from another source. It is the seller's duty to show that the contract goods are such that alternatives can be obtained from another source, and that requiring him to procure and deliver them under the contract would place him in a position worse than the buyer would be placed if specific performance is not granted. Likewise, the buyer should be given a right to reduce the contract price where the seller has delivered non-conforming goods. This remedy is not compensatory, but primarily restitutionary in nature and is designed to prevent the seller from unjust enrichment. On this basis, it does not depend on that the seller's breach has caused the buyer loss. It will be an efficient remedy particularly where the buyer is not entitled to claim damages. In addition to that, although an aggrieved buyer should be given a general right to refuse to accept non-conforming delivery, termination of the contract should in principle be permitted only where the lack of conformity has resulted in serious breach.

³⁹ See, Chapter Four, Section Three, 2.4.2.

⁴⁰ See, *ibid.*, 3.2.2.

⁴¹ See, *ibid.*, 3.6.

⁴² See, *ibid.*, 3.3.

⁴³ See, *ibid.*, 3.5.

At the level of comparison, it seems that *Shi'ah* law departs from English law and becomes closer to the Convention. In English law primacy is given to damages as a remedy and specific performance is rarely awarded as a remedy. In contrast, both *Shi'ah* law and the Convention give significance both to damages and specific performance. Similarly, while price reduction, as a separate remedy, is unknown in English law, both *Shi'ah* law and the Convention give the buyer a right to reduce the contract price. However, although English law has restricted the right to terminate the contract for breach, by developing the "theory of serious breach" and the 1994 Sale of Goods Act reforms, it still seems to permit termination more easily than the Convention. Nevertheless, *Shi'ah* law seems to permit termination more easily than the Convention but less easily than English law. Despite this general similarity and difference, an extensive comparison of the detailed provisions shows that *Shi'ah* law departs from the Convention in some parts and becomes closer to English law and vice versa. This shows that neither English law nor the Convention could be used as a sole model for *Shi'ah* law. In order to make a comprehensive study of *banā't al-u'qalā*, it is therefore necessary to examine this undeveloped system in light of different well-developed systems of law.

The most appropriate conclusion to this work must be, very broadly, to underline the fact that this comparative study of the buyer's remedies for the seller's non-conforming delivery has revealed that although English sale of goods law and the Convention suffer in turn from a substantial amount of uncertainty, gaps and uncertainty in the current *Shi'ah* law are so fundamental that they render this system inappropriate to govern modern sale transactions. The only way to adapt this system to the changing circumstances is to reform the method of inferring the needed laws. This study is first step to show how this system could work in the modern world and how it could be developed. It reveals that if the suggested method is applied it could be developed and fill in the gaps and remedy the areas of uncertainty in the law. It is suggested that this method could be used in other parts of this system to develop the relevant law.

Bibliography

N.B. A particular method is used in this work in referring to the materials used throughout the thesis. To make small the volume of footnotes and to ease for reader to trace the full address of the references used, in any case the second name of the author(s), year of publication(s) and number of volume, if any, is mentioned. Full address of the references used in the text can be easily found in the following bibliography set out chapter by chapter.

1. Sources of Law and Methodology

(I) Arabic Materials

Ansāri, M.: *Farāed al- Usūl (Rasāel)*, (Mua'ssasah al- Nu'mān, Lebanon, 1991). vol. 1.

Hurr Āmeli, H. M.: *Wassāel al- Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 15.

Khurāsāni, M. K.: *Kefāyah al- Usūl (with explanations of Meshkini)*, (Ketābfurūshi Islamiyah, Tehran, 1364 HQ.), vol. 1.

Khurāsāni, M. K.: *Kefāyah al- Usūl (with explanations of Meshkini)*, (Ketābfurūshi Islamiyah, Tehran, 1364 HQ.), vol. 2.

Majlesi, M. B.: *Behār al- Anwār*, (Dar al- Kutub al- Islamiyah, Beirut) vols. 71, 74 and 97.

Nūri Tabarasi, M. H.: *Mustadrak al- Wassāel*, (Mua'ssasah Ālul- Bait Le Ehyā al- Turāth, Lebanon) vol. 12.

(II) Persian Materials

Daftar Hamkāri Huzah wa Dāneshgāh: *An Introduction to Islamic Law*, (Inteshārāt Samt, Tehran, 1368 H.S.).

Ezzati, A.: "The Role of 'Reason' in Western and Islamic Legal Systems", 6 Nāmeḥ Mufid, (1375 HS) 123.

Fayz, A.: "The Efficacy of Feqhi Sources", 1 Naqd wa Naẓar, (Oct. 1994) No. 1 167.

Gurgy, A.: *Maqālat Huqūqi*, (Wazārat Irshād Publications, Tehran, 1365 H.S.) vol. 1.

Gurgy, A.: *History of Jurisprudence and Jurisprudents*, (Samt Publications, Tehran, 1997).

Gurgy, A.: "A Proposal", 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 15.

Hakimi, M. R.: "Religious Laws and Religious Objectives", 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 107.

Hāeri, S. M. K.: "A Proposal", 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 15.

- Jannāti, M. E.: *Adwār-e-Ijتهād*, (Mua'ssasah -e- Kayhān, Tehran, 1372 HS).
- Jannāti, M. E.: *Manābe' -e- Ijtihād*, (Inteshārāt -e- Kayhān, Tehran, 1370 HS).
- Ma'rafat, M. H.: "A Proposal", 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 15.
- Mara'shi, S. M. H.: "A Proposal", 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 15.
- Mehrizi, M.: "Justice as a Jurisprudential Principle", 3 Naqd wa Naẓar, (1997) Nos. 2-3, 184.
- Mujtahid Shabastri, M.: "A Proposal" 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 15.
- Mutahhari, M.: *Mabāni-e-Eqtesād-e-Islami*, (Inteshārāt-e-Hekmat, Tehran, 1409 HQ, 1st ed.).
- Mutahhari, M.: *Āshenāi bā U'lūm-e-Islāmi (Part 3: Usūl -e-Feqh and Feqh)*, (Inteshārāt Sadrā, Qum, 1361 HS 1st ed.).
- Sadr, S. M. B.: "The Legal Importance of Rational Norms (Sira -e- U'qalā)", 1 Naqd wa Naẓar, (Oct. 1994) No. 1, 195.
- Shahābi, M.: *Adwār-e-Feqh*, (Inteshārāt Wazārat Irshād, Tehran, 1372 4th ed.) vols, 1, 2 and 3.
- Urdūni, A. H. Y.: *Barrasi-e-Naẓariyah-e-Adālat-e-Sahābi* (Persian Translation of "Naẓariyahtu Adālah al- Sahābi", (Gum, 1372 H.S.).

(III) English Materials

- Al- Balagh Foundation: *Ahlul-Bait (The Prophet's Household)*, (The Ahlul-Bait World Assembly, Tehran, 1992).
- A'mid Zanjāni, A. A.: "The Development of Political Fiqh", 1 Message of Thaqalyn, (1993) 129.
- Anderson, J. N. D.: *Islamic Law in the Modern World*, (Stevens & Sons Ltd., London, 1959).
- Badr, G. M.: "Islamic Law: Its Relation to Other Legal Systems", 26 Am. J. Comp. L. (1978) 187.
- Coulson, N. J.: *A History of Islamic Law*, (Edinburgh University Press, 1964).
- Ezzati, A.: *An Introduction to Shi'ah Islamic law and Jurisprudence*, (Ashraf Press, Lahore, 1976).
- Fazlur R., "Towards Reformulating the Methodology of Islamic Law", 12 N. Y. U. Int'l L. & Po. (1979) 219.
- Fyzee, Asaf A. A.: *Outlines of Muhammdon Law*, (Oxford University Press, Bombay, 1974 4th ed.).

- Khadduri, M., "The Maslaha (Public Interest) and 'Illa (Cause) in Islamic Law" 12 N. Y. U. Int'l L. & Po. (1979) 213.
- Mallat, C.: *The Renewal of Islamic Law*, (Cambridge University Press, 1993).
- Muslehuddin, M.: *Philosophy of Islamic Law and the Orientalists*, (Islamic Publications Ltd., Lahore, Pakistan).
- Owsia, P.: *Formation of Contract: A Comparative Study Under English, French, Islamic and Iranian Law*, (Graham & Trotman, London, 1994).
- Sachedine, A. A.: *The Just Ruler (al- Sultan al- Adil) in Shi'ite Islam*, (Oxford University Press, Oxford, New York, 1988).
- Tabātabāei, S. M. H.: "Methods of Religious Thought According to Shi'ah", 2 Message of Thaqaalayn, (1995) 93.
- Ura'ee, G. R.: "Science of Jurisprudence and Verstehen Sociology", 3 Message of Thaqaalayn, (1996) 63.
- Weiss, B.: "Interpretation in Islamic Law: The Theory of Ijtihad", 26 Am. J. Comp. L., (1978) 199.
- Zaki Yamany, A., "The Eternal Shari'ah", 12 N. Y. U. Int'l L. & Po.(1979) 205;
- Zweigert, K.; Kotz, H.: *An Introduction to Comparative Law*, (Clarendon Press, Oxford, 1987, 2nd ed.) vol. 1.

2. English Law

(I) Books and Articles

- Adams, J.: "Waiver Redistributed", 36 Conv. (NS), (1972) 245.
- Adams, J.: "*Hadley v Baxendale* and the Contract/Tort Dichotomy", 8 Anglo-Am. L.R. (1979) 147.
- Ahdar, R. J.: "Seller Cure in the Sale of Goods", L.M.C.L.Q., [1990] 364.
- Albery, M.: "Mr. Cyprian William's Great Heresy" 91 L.Q.R. (1975) 337.
- Apps, A.: "The Right to Cure Defective Performance" L.M.C.L.Q. [1994] 525.
- Atiyah, P. S. & Adams, J.: *The Sale of Goods*, (Pitman Publishing, London, 1995, 9th ed.).
- Beale, H.: *Remedies for Breach of Contract*, (Sweet & Maxwell, London, 1980).
- Beale, Bishop and Furmston, *Contract: Cases and Materials*, (Butterworths, London, 1995 3rd ed.).

- Berryman J.: "The Specific Performance Damages Continuum: an Historical Perspective", 17, *Ottawa L. Rev.* (1985) 295.
- Bishop, W.: "The Choice of Remedy for Breach of Contract", 14 *J. Leg. Stud.* (1985) 299.
- Bradgate and White in: Birds, Bradgate and Villiers: *Termination of Contract*, (Wiley Chancery, London, 1995).
- Bradgate, R.: *Commercial Law*, (Butterworths, London, 1995 2nd ed.).
- Bridge, M.: "Discharge for Breach of the Contract of Sale of Goods", 28 *McGill L.J.* (1983) 868.
- Bridge, M.: *Sale of Goods*, (Butterworths, Toronto, 1988).
- Bridge, M.: "Mitigation of Damages in Contract and the Meaning of Avoidable Loss", 105 *L.Q.R.* (1989) 398.
- Bridge, M.: "Market Damages in Sale of Goods" *J.B.L.* [1994] 152.
- Bridge, M.: *The Sale of Goods*, (Clarendon Press, Oxford, 1997).
- Brownsword, R.: "Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract", 5 *J. C. L.* (1992) 83.
- Burrows, A. S.: "Specific Performance at Cross-roads", 3 *Leg. Stud.* (1984) 102.
- Burrows, A.S.: *Remedies for Torts and Breach of Contract*, (Butterworths, London, 1994 2nd ed.).
- Carter, J.W., Hodgekiss, C.: "Conditions and Warranties: Forebears and Descendants", 7 *Syd. L.R.* (1977) 31.
- Carter, J.W.: "Classification of Contractual Terms: the New Orthodoxy"?, 40 *C.L.J.* (1981) 219.
- Carter, J. W.: "The Effect of Discharge of a Contract on the Assessment of Damages for Breach or Repudiation", 1 *J.C.L.* (1988) 113 and 246.
- Carter, J. W.: *Breach of Contract*, (The Law Book Company Ltd., Australia, 1991 2nd ed.).
- Carter, J. W.: "Conditions and Conditions Precedent", 4 *J.C.L.* (No. 2) (1991 A) 90.
- Carter, J. W.: "Problems in Enforcement", 5 *J.C.L.* (1992) 199.
- Carter, J. W.: "Buyer's Remedies of Rejection and Cancellation under the UCC and the Convention" 6 *J.C.L.* (1993) 93.
- Cheshire Fifoot & Furmston: *Law of Contract*, (Butterworths, London, 1996 13th ed.).
- Clarke, M.: "Time and the Essence of Mercantile Contracts: The Law Loses its Way", *C.L.J.* (1991) 29.
- Cooke, R.: "Remoteness of Damages and Judicial Discretion" *C. L. J.*, (1978) 288.
- Coote, B.: "The Effect of Discharge by Breach on Exception Clauses", *C.L.J.* (1970) 221.

- Coote, B.: "The Second Rise and Fall of Fundamental Breach", 55 A.L.J. (1981) 788.
- Corbin, A. L.: "Conditions in the law of contract", 28 Yale L.J. (1917) 739.
- Davies, P.J.: "Economic Stringency and the Recovery of Damages" J.B.L. [1982] 20.
- Davies, I.: *Commercial Law*, (Blackstone Press Ltd., London, 1992).
- Dawson, F.: "Specific performance in France and Germany", 57 Mich. L.R. (1959) 495.
- Dawson, F.: "Rescission and Damages", 39 M.L.R. (1976) 214.
- Dawson, F.: "Metaphors and Anticipatory Breach of Contract" 40 C.L.J. (1981) 83.
- Derham, S. R.: *Set-Off*, (Clarendon Press, Oxford, 1996 2nd ed.).
- Devlin, Lord: "Treatment of Breach of Contract", C.L.J. (1966) 192.
- Fridman, G. H. L.: *The Law of Contract in Canada*, (Carswell, Toronto, 1986 2nd ed.).
- Furmston, M.: *Sale and Supply of Goods*, (Cavendish Publishing Ltd., London, 1995 2nd ed.).
- Goetz, C. J., Scott, R. E., "The Mitigation Principle: Toward a General Theory of Contractual Obligation" 69 U. Vir. L.R. (1983) 967.
- Goode, R. M.: *Commercial Law*, (Penguin Books, London, 1995, 2nd ed.).
- Goode, R. M.: *Legal Problems of Credit and Security*, (Sweet & Maxwell, London, 1988 2nd ed.).
- Greig, D.W.: *Sale of Goods*, (Butterworths, London, 1974).
- Guest, A. G.: *Anson's Law of Contract*, (Clarendon Press, Oxford, 1984, 26th ed.).
- Guest A.G. et all: *Chitty on Contracts*, (Sweet & Maxwell, London, 1994, 27th ed.) vol. 1.
- Guest A.G. et all: *Chitty on Contracts*, (Sweet & Maxwell, London, 1994, 27th ed.) vol. 2.
- Guest A.G. et al: *Benjamin's Sale of Goods*, (Sweet Maxwell, London, 1997, 5th ed).
- Hadjihambis D. H.: "Remoteness of Damages in Contract", 41 M. L. R. (1978) 483.
- Harris, D.: *Remedies in Contract and Tort*, (Weidenfeld & Nicolson, London, 1988).
- James, P. S.: "Measure of Damages in Contract and Tort-Law and Fact", 13 M.L.R. (1950) 36.
- Law Commission: *Sale and Supply of Goods (WP No. 85)*, (Her Majesty's Stationery Office, London, 1983).
- Law Commission: *Sale and Supply of Goods (No. 160)*, (Her Majesty's Stationery's Office, London, 1987).
- Lord Hailsham of St. Marylebone: *Halsbury's Laws of England*, (Butterworths, London, 1983 4th ed.) vol. 9.

- Lord Hailsham of St. Marylebone: *Halsbury's Laws of England*, (Butterworths, London, 1983 4th ed.) vol. 41.
- Macdonald, E.: "The Inadequacy of Adequacy: The Granting of Specific Performance", 38 Northern Ireland Leg. Q. (1987) 244.
- MacIntosh J. G.; Frydenlund, D. C.: "An Investment Approach to a Theory of Contract Mitigation", 37 U. T. L. J. (1987) 113.
- Mann, F.A.: "The Relevant Date for the Assessment of Compensation", 85 L.Q.R. (1969) 516.
- Mark, M.: *Chalmers' Sale of Goods*, (Butterworths, London, 1981 18th ed.).
- McGarvie, R.E.: "The Common Law Discharge of Contracts upon Breach (Part II)", 4 Melb. Univ. L. R. (1964) 305.
- McGarvie, R.E.: "Contractual Concepts of the Credit Bills" 53 A. L. J. (1979) 687.
- McGregor, H.: *McGregor on Damages*, (Sweet & Maxwell, London, 1997 16th ed.).
- Montrose, J. L.: "Some Problems about Fundamental Terms" C.L.J. [1964] 60 and 254.
- Murphey A.G.: "Consequential Damages in Contracts for the International Sale of Goods and the Legacy of *Hadley*", 23 Geo. Wash. J. Int'l. L. & Econ. (1989) 415.
- Ogus, A., in: Harris, D.; Tallon, D.: *Contract Law Today (Anglo-French Comparison)*, (Clarendon Press, Oxford, 1989) 243.
- Ogus A. I.: *The Law of Damages*, (Butterworths, London, 1973).
- Ontario Law Reform Commission: *Report on Sale of Goods*, (Ministry of the Attorney-General, Canada, 1979) vol. 2.
- Opeskin, B. R.: "Damages for Breach of Contract Terminated under Express Terms", 106 L.Q.R. (1990) 293.
- Perell, P. M.: "Putting Together the Puzzle of Time of the Essence", 69 Ca. Bar. Rev. (1990) 417.
- Pickering, M.: "The Remoteness of Damages in Contract" 31 M.L.R. (1968) 203.
- Priest A. J.: "Hardship and Specific Performance" 134 N. L. J. (1984) 927.
- Reynolds, F. M. B.: "Warranty, Condition and Fundamental Term", 79 L.Q.R. (1963) 534.
- Reynolds, F. M. B.: "Discharge of Contract by Breach", 92 L.Q.R. (1976) 17.
- Reynolds, F. M. B.: "Loss of Right to Reject", 104 L.Q.R. (1988) 16.
- Sassoon, David M.: *C.I.F. and F.O.B. Contracts*, (Sweet & Maxwell, London, 1995, 4th ed.).
- Schmitthoff, C. M.: "The Duty to Mitigate", J.B.L. [1961] 361.

- Schmitthoff, C. M.: *The Sale of Goods*, (Stevens & Sons Ltd., London, 1966, 2nd ed.).
- Sealy, L.S. & Hooley, R. J. A.: *Text & Materials in Commercial Law*, (Butterworths, London, 1994).
- Sharpe, R. J.: *Injunctions & Specific Performance*, (Canada Law Book Ltd., Toronto, 1983).
- Shea, A. M.: "Discharge from Performance by Failure of Condition", 42 M.L.R. (1979) 623.
- Smith, F. E.: "The Rule in *Hadley v Baxendale*", 16 L.Q.R. (1900) 275.
- Spry, I. C. F.: *Equitable Remedies*, (Sweet & Maxwell, London, 1990, 4th ed.).
- Stoljar, S. J.: "The Contractual Concept of Condition", 69 L.Q.R. (1953) 485.
- Stoljar, S.J.: "Untimely Performance in the Law of Contract", 71 L.Q.R. (1955) 527.
- Street, H.: *Principles of the Law of Damages*, (Sweet & Maxwell, London 1962).
- Sutton, K.C.T.: "Sales Warranties under the Sale of Goods Act and UCC", 6 Melb. U.L.R. (1967) 150.
- Swinton, K., in: Reiter, B. J.; Swan, J.: *Studies in Contract Law*, (Butterworths, Toronto, 1980) 61-91.
- Thomson, J. M.: "Effect of Repudiatory Breach", 41 M. L. R. (1978) 137.
- Thornely, J. W. A.: "Effects of Resale by Unpaid Sellers of Goods - Sale of Goods Act 1893, S. 48", C.L.J. (1967) 168.
- Treitel, G. H.: "Specific Performance in the Sale of Goods", J.B.L. [1966] 211.
- Treitel, G. H.: "Some Problems of Breach of Contract", 30 M.L.R. (1967) 139.
- Treitel, G. H.: *Remedies for Breach of Contract*, (Clarendon Press, Oxford, 1988).
- Treitel, G. H.: "Conditions and Conditions precedent, 106 L.Q.R., (1990) 185.
- Treitel, G. H.: *The Law of Contract*, (Sweet & Maxwell Stevens, London, 1991, 8th ed.).
- Treitel, G. H.: *The Law of Contract*, (Sweet & Maxwell Stevens, London, 1995, 9th ed.).
- Treitel, G. H.: "Damages for Breach of Warranty of Quality", 113 L.Q.R. (1997) 189.
- Waddams, S.M.: "The Date for Assessment of Damages", 97 L.Q.R., (1981) 445.
- Waddams, S. M.: *The law of Damages*, (Canada Law Book Ltd., Toronto, 1983).
- Weir, T.: "Contract- The Buyer's Right to Reject Defective Goods", C.L.J. (1976) 33.
- Whincup, M.: "Remoteness Reconsidered", N.L.J. (1992) 389, 433.
- William B.: "The Contract-Tort Boundary and the Economics of Insurance", 12 J. Leg. Stud. (1983) 241.
- Wilson, J.F. and Slade, C.J.: "A Re-Examination of Remoteness", 15 M.L.R.(1952) 458.
- Wright W. M.: "Lost Profits and *Hadley v. Baxendale*" 19 Washburn L. J., (1980) 488.
- Zweigert, K.; Kotz, H.: *Introduction to Comparative Law*, (Clarendon Press, Oxford, 1987, 2nd ed.) vol. 2.

(II) Statutes

European Parliament and Council: "Directive on the Sale of Consumer Goods and Associated Guarantees", 1996.

Limitation Act 1980.

Sale of Goods Act 1979, as amended in 1994 and 1995.

U.C.C. (Uniform Commercial Code), Article 2 Sales 1992, prepared by The American Law Institute and the National Conference of Commissioners on Uniform State Laws (see: [http://www.law.cornell.edu/ucc/2/overview.html#PART 6](http://www.law.cornell.edu/ucc/2/overview.html#PART%206)).

3. The Convention**(I) Books and Articles**

NB. A number of the following articles are cited from Internet. These materials are earmarked in the parenthesis.

Alejandro M. G.: "Reconciliation of Legal traditions in the UN Convention on Contracts for the International Sale of Goods", 23 *The Int'l Law*. (1989) 443.

Babiak, A.: "Defining "Fundamental Breach" under the UN Convention on Contracts for the International Sale of Goods", 6 *Temple Int'L & Comp. L.J.* (1992) 113.

Behr, V.: "Commentary on Oberlandesgericht Frankfurt AM Main, 17 September 1991", 12 *J. L. & Com.* (1993) at 271-275 (recorded in Pace University School of Law Home Page, Bibliography Section).

Bergsten, E. E. ; Miller, A. J.: "The Remedy of Reduction of Price," 27 *Am. L. J. Com. L.* (1979) 255.

Bianca, C. M.; Bonell, M. J.: *Commentary on the International Sales Law*, (Giuffre, Millan, 1987).

Booyesen, H.: "The International Sale of Goods" 17 *Sou. Afr. Yearbook of Int'l. L.* (1991-1992), 71.

Berman H.J.; Kaufmann C.: "The Law of International Sale Transactions (Lex Mercatoria)", 19 *Harv. Int. L. J.* (1978) 221.

Campbell, D., and, Rohwer, C.: *Legal Aspects of International Business Transactions*, (Elsevier Science Publishers B.V. North-Holland, 1984) 225-286.

Clement Ng' Ong' Ola: "The Vienna Sales Convention of 1980 and the Sales Law of Southern. Africa." 7 *AF. J. Int'l. & Comp. L.* (1995) 227.

- Cook, V. S.: "The UN Convention on Contracts for the International sale of Goods: A Mandate to Abandon Legal Ethnocentricity", 16 J. L. & Com. (1997) 257-263 (recorded in Pace University School of Law Home Page, Bibliography Section).
- Curran, V. G.: "The Interpretative Challenge to Uniformity" (Book Review), 15 J. L. & Com. (1995) 175-199 (recorded in Pace University School of Law Home Page, Bibliography Section).
- Darkey, J. M.: "Damages Provisions under the UN Convention", 15 J. L. & Com. (1995) 139.
- Diederichsen, E.: Commentary to Journal of Law and Commerce Case 1; Oberlandesgericht, Frankfurt AM Main, 14 J. L. & Com. (1995) at 177-181 (recorded in Pace University School of Law Home Page, Bibliography Section).
- DTI: *Consultative Document on UN Convention on Contracts for the International of Goods*, (DTI, London, 1989).
- Enderlein; F.; Maskow, D.: *International Sales Law; UN Convention on Contracts for the International Sale of Goods*, (Oceana Publications Inc., New York, 1992).
- Eörsi G.: "A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods", 31 Am. J. Com. L. (1983) 333.
- Farnsworth, A.: "Damages and Specific Relief", 27 Am. J. Comp. L. (1979) 247.
- Feltham, J. D.: "The United Nations Convention on Contracts for the International Sale of Goods", J. B. L. [1981] 346.
- Ferrari, F.: "Comparative Ruminations on the Foreseeability of Damages in Contract Law", 53 La. L. R. (1993) 1259.
- Fisher, S. and Hains, M.: "Futures Market Law and Practice and the Vienna Sales Convention", L.M.C.L.Q. [1993] 531.
- Fitzgerald, J.: "CISG, Specific Performance, and the Civil Law of Louisiana and Quebec", 16 J. L. & Com. (1977) 291-313 (recorded in Pace University School of Law Home Page, Bibliography Section).
- Flechtner, H. M.: "Remedies under the New international Sales Convention: The Perspective from Art. 2 of the UCC"; 8 J. L. & Com. (1988) 53.
- Flechtner, H. M.: "More US Decisions on the UN Sales Convention: Scope, Parol Evidence, "Validity" and Reduction of Price under Art. 50" 14 J. L. & Com. (1995) 153.
- Gabriel, H.: *Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)*, (New York, London, Rome, Oceana Publications, Inc., 1994).

- Goldenhielm, B.: "Some Views on the System of Remedies in the Uniform Law on International Sale", 10 Scan. Stud. in L. (1966) 9.
- Gonzalez, O.: "Remedies under the UN Convention for the International Sale of Goods", 2 Int'l Tax & Bus. Law. (1984) 79.
- Graham C.: "Obligations and Remedies under the 1980 Vienna Sale Convention", 23 Queensland L. Soc'y. J. (1993) 37.
- Graveson, C. G.: *Uniform Law for International Sale of Goods Act 1967*, (Butterworths, London, 1968).
- Guest A.G., et al: *Benjamin's Sale of Goods*, (Sweet Maxwell, London, 1997, 4th ed).
- Hancock, W.: *Guide to the International sale of Goods Convention*, (Business Laws Inc., 1990).
- Herber, B. H.: *Symposium: Problems of Unification of International Sales Law: Working Papers Submitted to the Colloquium of the International Association of Legal Science, Posdam, August 1979 (Problems of Unification of International Sales Law)*, (7 Digest of Commercial Laws of the World, Oceana Publication, 1980), at 104-129.
- Honnold, J.: "Uniform Law of the International Sale of Goods: The Hague Convention of 1964", 30 Law & Con. Prob. (1965) 326.
- Honnold, J.: "The International Sale of Goods (Draft Convention, Force Majeure and Frustration)", 27 Am. J. Int. L. (1979) 223.
- Honnold, J. : *Uniform Law for International Sales Under the 1980 UN Convention*, (Kluwer, Deventer, Boston, 1991, 2nd ed.).
- Horn R.; Schmitthoff C. M.: *The Transactional Law of International Commercial Transactions, Studies in Transactional Economic Law*, (Deventer, Kluwer, 1982) at 89-124.
- Karollus, M.: "Judicial Interpretation and Application of The Convention (CISG) in Germany 1988-1994", Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 51-94 (recorded in Pace University School of Law Home Page, Bibliography Section).
- Kastely, A. H.: "The Right to Require Performance in International Sales: Towards an Interpretation of the Vienna Convention" 63, Washington L. R., (1988) 607.
- Kritzer, A. H.: *Guide to Practical Application of the UN Convention on Contracts for the International Sale of Goods*, (Kluwer-Deventer Boston, 1989).

- Lookofsky, J. M.: "Fault and Non-Fault in Danish, American and International Sales Law. The Reception of the UN Sales Convention", 27 *Scan. Stud. L.* (1983) 109.
- Lookofsky, J. M.: *Consequential Damages in Comparative Context*, (Jurist- og Okonomforbundests Forlag, 1989).
- Michida, S.: "Cancellation of Contract" 27 *Am. J. Comp. L.* [1979] 279.
- Murphey A.G.: "Consequential Damages in Contracts for the International Sale of Goods and the Legacy of *Hadley*", 23 *Geo. Wash. J. Int'l. L. & Econ.* (1989) 415.
- Nicholas, B.: "Force Majeure and Frustration", 27 *Am. J. Comp. L.* (1979) 231.
- Nicholas, B.: "The Vienna Convention on International Sales Law" 105 *L.Q.R.*, [1989], 201.
- Nicholas, B.: *The French Law of Contract*, (Clarendon Press Oxford, 1992, 2nd. ed.).
- Nina, M.; Galston and Hans Smit: *International Sales: The UN Convention on Contracts for the International Sale of Goods (Proceedings from the 1983 Conference Held by the Parker School of Foreign and Comparative Law)*, (Matthew Bender, New York, 1984).
- Ndulo, M.: *The UN Convention on Contracts for the International Sale of Goods (Explanatory Documentation prepared for Commonwealth Jurisdictions)*, (Commonwealth Secretariat, London, 1991).
- Rabel, E.: "A specimen of Comparative law; The Main Remedies for the Seller's Breach of Warranty", 22 *Revista J. Univ. of P. R.* (1953) 167.
- Sanhuri, A. R.: *Al- Wasit*, (Dar Ihya'a al-Torath al-Arabi, Lebanon, 1952) (in Arabic), vol. 4.
- Sarcevic, P.; Volken, P.: *International Sale of Goods (Dubrovnik Lectures)*, (New York-London-Rome, Oceana, 1986).
- Schlechtriem, P., *Uniform Sales Law*, (Manzsche Verlage- und Universitätsbuchhandlung, Vienna, 1986).
- Schlechtriem, P.: "The Borderline of Tort and Contract-Opening a New Frontier" 21 *Cornell Int'l L. J.* (1988) 467.
- Schlechtriem, P.: "Commentary on Oberlandesgericht Düsseldorf 2 July 1993", (a short comment on A German court's decision attached to the abstract of the Convention case recorded in Pace University School of Law Home Page, Case Law Section).
- Schneider, E. C.: "Consequential Damages in the International Sale of Goods: Analysis of two Decisions" 16 *U. Pa. J. Int'l Bus. L.* (1995) 615.
- Shen, Jianming, S.J.D.: "The Remedy of Requiring Performance under the CISG and the Relevance of Domestic Rules", 13 *Ariz. J. Int'l & Comp. L.* (1996) 253.

- Speidel, R.E.: "A Brief Analysis of Honnold's Uniform Sales Law (Book Review)", 5 N.W.J. Int'L. L. & Bus. (1983) 432.
- Strub, M. G.: "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries" 38 I.C.L.Q. (1989) 475.
- Sutton, K. C.: "The Draft Convention on the International Sale of Goods (Part II)", 5 A. Bus. L. R. (1977) 28.
- Sutton, K. C.: "The Draft Convention on the International sale of goods (Part III)," 5 A. Bus. L. R. (1977) 92.
- Sutton, J.: "Measuring Damages under the UN Convention on the International Sale of Goods", 50 Ohio State L. J. (1989) 737.
- Szakats, A.: "The Influence of Common Law Principles on the Uniform Law on the International Sale of Goods", 15 I.C.L.Q. (1966) 749.
- Thomas S. U.: "The Efficiency of Specific Performance: Towards a United Theory of Contract Remedies", 83 Mich. L. R. (1984) 341.
- Treitel, G. H.: *Remedies for Breach of Contract*, in: 7 International Encyclopaedia of Comparative Law, vol. 7 (Chapter 16), (Mouton, The Hague, Paris, 1976) at 1-153.
- Treitel, G. H.: *Remedies for Breach of Contract*, (Clarendon Press, Oxford, 1988).
- Tunc, A.: Commentary on the Two Hague Conventions of 1st July 1964 (reprinted in: Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, (The Ministry of Justice of the Netherlands, the Hague, 1966), Vol. 1 (Records), at 357-391).
- Voskuil C.C.A.; Wade J.A.: *Hague-Zagreb Essays 4 on the Law of International Trade*, (T.M.C. Asser Institute/Nijhoff, The Hague, 1983).
- Walt, S.: "For Specific Performance Under the United Sales Convention", 26 Tex. Int. L. J. (1991) 211.
- Winship, P.: "New Rules for International Sales", 68 Am. B. A. J. (1982) 1231.
- Ziegel, J., & Samson, C.: "Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods", (Ottawa, July 1981, recorded in Pace University School of Law Home Page, Bibliography Section).
- Ziegel J., & Graham, W. C.: *New Dimensions in International Trade Law: A Canadian Perspectives*, (Butterworths, Toronto, 1982) 38-57.
- Ziegel, J. S.: "Canada Prepares to Adopt the International Sales Convention", 18 Can. Bus. L. J. (1991) 1.

- Zimmermann, R.: *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (Clarendon Press, Oxford, (1996).
- Ziontz M. L.: "A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?", 2 N. W. J. Int'l L. & Bus. (1980) 129.
- Zwart, S. G.: "The New International Law of Sale: a Marriage between Socialist, Third World, Common, and Civil Law Principles", 13 N. C. J. Int'l. L. & Com. Reg. (1988) 109.
- Zweigert, K.; Kotz, H.: *An introduction to Comparative law*, vol. 2, (Clarendon Press, Oxford, 1987, 2nd ed.).

(II) Documents

- Commission on European Contract Law: "Principles of European Contract Law (Version 1996)", (recorded in Commission on European Contract Law Home Page).
- Honnold, J.: *Documentary History of the Uniform Law for International Sales*, (Kluwer Law and Taxation Publishers, Deventer/Netherlands, 1989).
- International Chamber of Commerce (ICC): "Uniform Customs and Practices for Documentary Credits (1993 Version)".
- International Chamber of Commerce (ICC): "International Contract Terms (INCOTERMS) (1990 version)".
- Official Records, The.: *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods (Official Records)*, (The Ministry of Justice of the Netherlands, the Hague, 1966), Vol. 1 (Records).
- Official Records, The.: *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods*, (The Ministry of Justice of the Netherlands, the Hague, 1966) Vol. 2 (Documents).
- Official Records, The.: *United Nations, UN Conference on Contracts for the International sale of Goods Vienna, 10 March-11 April 1980 (Official Records)*, (United Nations, New York, 1981).
- Secretariat Commentary, The.: *United Nations Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat*, (Document A/Conf. 97/5, 1979, reprinted in the Official Records (1981) at 14-66.

Secretariat, (Document A/Conf. 97/5, 1979, reprinted in the Official Records (1981) at 14-66.

UNCITRAL Arbitration Rules 1976 (GENERAL ASSEMBLY RESOLUTION 31/98) (recorded in UNCITRAL Home Page).

UNIDROIT Principles of International Commercial Contracts” proposed by International Institute for the Unification of Private Law (UNIDROIT) in 1994 (recorded in UNIDROIT Home Page).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. I (1968-1970), (United Nations, New York, 1971).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. II (1971), (United Nations, New York, 1972).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. III (1972), (United Nations, New York, 1973).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. IV (1973), (United Nations, New York, 1974).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. V (1974), (United Nations, New York, 1975).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. VI (1975), (United Nations, New York, 1976).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. VII (1976), (United Nations, New York, 1977).

United Nations Commission on International Trade Law (UNCITRAL): *Yearbook*, Vol. VIII (1977), (United Nations, New York, 1978).

(III) Statutes

French Civil Code (as amended to July 1, 1976): (Translated by Crabb, John H., Fred B. Rothman & Co., South Hackensack, New Jersey, 1977).

German Civil Code (as amended to January 1992): (Translated by Simon L. Goren, Littleton, Colorado, 1994).

Uniform Law on the International Sale of Goods (ULIS), April 1964.

United Nations Conference on Contracts for the International Sale of Goods, 11 Apr. 1980, A/CONF. 97/18, 19 I.L.M. (1980) 668-695.

United Nations Convention on the Limitation Period in the International Sale of Goods 1974, as amended in 1980

(IV) Web Site Addresses

N.B. A number of references, documents and case law on the Convention are taken from the following Internet addresses:

Commission on European Contract Law Home Page:

<http://www.ufsia.ac.be/~estorme/PECL2en.html>

International Institute for the Unification of Private Law (UNIDROIT) Home Page:

<http://www.agora.stm.it/unidroit/welcome.htm>

Pace University School of Law Home Page: <http://www.cisg.law.pace.edu/>

UN Commission on International Trade Law (UNCITRAL) Home Page, Case Laws on UNCITRAL Texts (CLOUT): <http://www.un.or.at/uncitral/noframe.htm>

4. Shi'ah Law

N.B. H. Q. is used to refer Hejri Qamari (Lunar Calendar) and H. S. is used to refer to Hejri Shamsi (Solar Calendar).

(I) Arabic Materials

Āle Bahr al- U'lūm, S. M.: *Bulqah al- Faqih (with Explanations by Āle Bahr al- U'lūm, S. M. T.)*, (Najaf, Iraq, 1396 H.G.) vol. 1.

Āle Kāshef al- Qetā, M. H.: *Tahrir al- Majallah*, (Tehran, Nejāh Publication, 1359 H. Q.) vol. 1.

Āle Kāshef al- Qetā, M. H.: *Tahrir al- Majallah*, (Tehran, Nejāh Publication, 1359 H. Q.), vol. 3.

Āmeli, Zain al- Din Ibn Ali (Shahid Thāni): *Masālek al- Afhām fi Sharh Sharāye' al- Islam*, (Maktabah Basirati, Qum) vol. 1.

Āmeli, Zain al- Din Ibn Ali (Shahid Thāni): *Masālek al- Afhām fi Sharh Sharāye' al- Islam*, (Maktabah Basirati, Qum) vol. 2.

Āmuli, M. T., and, Nāeini, M. H.: *Al- Makāseb wal Bay'*, (Mua'ssasah -e- Nashr -e- Islami, Qum, 1413 H.Q.) vol. 2.

Ansāri, M.: *Makāseb*, (edited by Tāher Khūshnewis, Matbah al- Ittelāāt, Tabriz, 1375 H.Q. 2nd ed.).

Ansāri, M.: "Qāedah Nafy-e-Ādarar", reprinted in: Ansāri, M.: *Makāseb*, (edited by Tāher Khūshnewis, Matbah al- Ittelāāt, Tabriz, 1375 H.Q. 2nd ed.) 372-376.

- Ardabili, A. (Muqaddas Ardabili): *Zubdat al- Bayān fi Ahkām al- Quran*, (Al- Maktabt al- Raḍawiyah le Ehyā al- Turāth al- Jafariyah).
- Bahrāni, Y.: *Hadāeq Al- Nāẓerah*, (Inteshārāt Jamā 'ah al- Mudarresin, Qum) vol. 19.
- Bashrāwi, A. (Fāddel Tūni): *Al- Wāfiyah fi Usūl al- Feqh*, (stone edition, Matba'ah Ithnā A'shari, Laknuh, 1309 H.Q.)
- Bujnūrdi, M. H.: *Al- Qawāed al- Feqhiyah*, (Mua'ssasih Matbūāti Ismāeiliān, Qum, 1389 H.Q) vol. 1.
- Bujnūrdi, M. H.: *Al- Qawāed al- Feqhiyah*, (Mua'ssasih Matbūāti Ismāeiliān, Qum, 1389 H.Q.) vol. 2
- Bujnūrdi, M. H.: *Al- Qawāed al- Feqhiyah*, (Mua'ssasih Matbūāti Ismāeiliān, Qum, 1389 H.Q) vol. 3
- Fayz Kāshāni, M.: *Mafātih al- Sharāye'*, (edited by, Rajāei, Sayyed Mehdi, Qum, 1401 H.Q.) vol. 3.
- Gharavi Isfahāni, M. H. (Kumpani): *Hāshiyah to Ketāb al- Makāseb*, (Dār al- Zakhāer, Qum, 1408 H.Q. 2nd ed) vol. 1.
- Gharavi Isfahāni, M. H. (Kumpani): *Hāshiyah to Ketāb al- Makāseb*, (Dār al- Zakhāer, Qum, 1408 H.Q. 2nd ed) vol. 2.
- Hakim, S. M.: *Qāedah Nafy-e-Ārar, Its History and Development*, (Mua'ssasih al- Hādi, Qum, 1373 H.S.) (A Paper Presented in: Universal Conference for the Memory of Shaykh Ansāri).
- Helli, A. N. Jafar Ibn al- Hassan (Muhaqqeq Helli): *Sharāye' al- Islam*, (Al- Maktabah al- E'lmīyeh al- Islāmiyeh, Tehran, 1377 H.Q.).
- Helli, M. Ibn H. M. (Allāmah Helli): *Tahrir al- Ahkām*, (stone edition, Tehran).
- Helli, M. Ibn H. M. (Allāmah Helli): *Tadhkerah al-Fuqahā* (Tehran: Offset), vol. 1.
- Helli, M. Ibn H. M. (Allāmah Helli); Āmeli, S. M. J.: *Meftāh al- Kerāmah fi Sharh al- Qawāed lel Allāmah*, (Mua'ssasih Ālul Bait, Qum), vol. 4.
- Helli, M. Ibn H. M. (Allāmah Helli); Āmeli, S. M. J.: *Meftāh al- Kerāmeḥ fi Sharh al- Qawāed lel Allāmah*, (Mua'ssasih Ālul Bait, Qum) vol. 6.
- Helli, A. M. Ibn H. Ibn Y. Ibn M. (Fakhr al- Muhaqqeqin): *Idāh al- Fawāed, fi Sharh al- Qawāed*, (E'lmī Publication, Qum) vol. 1.
- Hurr Āmeli, M.: *Wassāel al- Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 6.
- Hurr Āmeli, M.: *Wassāel al- Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 12.

- Hurr Āmeli, M.: *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 13.
- Hurr Āmeli, M.: *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 14.
- Āmeli, Hurr, *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 15.
- Hurr Āmeli, M.: *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 16.
- Āmeli, Hurr, *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 17.
- Hurr Āmeli, M.: *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 18.
- Hurr Āmeli, M.: *Wassāel al-Shi'ah*, (Inteshārāt-e-Islāmiyah, Qum) vol. 19.
- Irawāni, M. A.: *Hāshiyah al-Makāseb*, (Matbah Rushdiyah, Tehran, 1379 H.Q., 2nd ed.) vol. 2.
- Isfahāni, S. A.; Gulpāyagāni, S. M. R.: *Wasilah al-Nejāt*, (Dār al-Taāruf Lel matbūāt, Lebanon, 1977 3rd ed) vol. 1.
- Isfahāni, S. A.; Gulpāyagāni, S. M. R.: *Wasilah al-Nejāt*, (Dār al-Taāruf Lel matbūāt, Lebanon, 1977 3rd ed) vol. 2.
- Karaki, A. (Muhāqqeq Thāni): *Jāme' al-Maqāsed fi Sharh al-Qawāed*, (stone edition, Thehran) vol. 2.
- Karimi, S. J.; Āmuli, M. H.: *Kashf al-Hāqāeq*, (Matba'ah al-Najaf, Najaf, 1380 H.Q.) vol. 4.
- Khalkhāli, S. M. K.; Rashti, M. H.: *Feqh al-Imamiyah*, (Matba'ah al-Haydari, Tehran, 1395 H. Q., 1st ed.) vol. 1.
- Khalkhāli, S. M. K.; Rashti, M. H.: *Feqh al-Imamiyah*, (Maktabah al-Dāwari, 1407 H.Q., 1st ed.) vol 2.
- Khumayni, S. R. M.: *Tahrir al-Wasileh*, (Matbah al-Adab, Najaf), vol. 1.
- Khumayni, S. R. M.: *Tahrir al-Wasileh*, (Matbah al-Adab, Najaf) vol. 2.
- Khumayni, S. R. M.: *Ketāb al-Bay'*, (Mua'ssasih Matbūāti Ismāeiliān, Qum), vol. 4.
- Khumayni, S. R. M.: *Ketāb al-Bay'*, (Mua'ssasih Matbūāti Ismāeiliān, Qum), vol. 5.
- Khunsāri, S. A.: *Jāme' al-Madārek*, (Mua'ssasih Matbūāti Ismāeiliān, Qum, 1364 H.Q., 2nd ed.) vol. 3.
- Khurāsāni, M. K.: *Kefāyah al-Usūl (with explanations of Meshkini)*, (Ketābfurūshi Islamiyah, Tehran, 1364 HQ.), vol. 2.
- Khurāsāni, M. K.: *Hāshiyato Ketāb al-Makāseb* (edited by Shams al-din, S. M, (Wazārat Irshād Islāmi, 1406 H.Q. 1st ed.).

- Makki, M. Ibn J. al- Din (Shahid Awwal); Āmeli, Zain al- Din Ibn Ali (Shahid Thāni): *Al-Rudāh al- Baheiyah fi Sharh Lum'ah al- Demashqiyah (Sharh al- Lum'ah)*, (Maktabah al- Tabatabaei, Qum, 1309 H.Q.) vol. 1.
- Makki, M. Ibn J. al- Din (Shahid Awwal): *Al- Durūs al- Shari'ah*, (edited by Sadeq al- Hussaini, 1269 H.Q.) vol. 1.
- Makki, M. Ibn J. al- Din (Shahid Awwal): *Al- Qawā'ed wa al- Fawā'ed*, (with explanations by Hakim, S. A., Maktabah al- Dāwari, Qum) vol. 2.
- Māmāqāni, A.: *Nehāyatu al- Maqal*, (Manshūrāt al- Dhakhāer al- Islamiyah, Qum, 1345 H. Q.).
- Māmāqāni, A.: *Manāhej al- Muttaqin*, (al- Matbah al- Raḍawiyah, Najaf, 1344 H. Q.).
- Marāghei, M. F.: *Anāwin al- Usūl wa Qawānin al- Fusūl*, (stone edition, Tabriz, 1274 H. Q.).
- Muqniyah, M. J.: *Feqh al-Imām Jafar al-Sādeq*, (Dār al- Jawād, Beirut, 1402 H. Q.) vol. 3.
- Muhaqqeq Tehrāni, M. R.: *Haqāeq al- Feqh fi Sharh -e- Sharāy' al- Islam*, (al- Matbah al- E'lmiiyyh, Qum, 1414 H. Q.) vol. 24.
- Nāeini, M. H.: "Qāedah-e- Lā Ḍarar", reprinted in: Najafi, M.; Nāeini, M. H.: *Munyah al- Tāleb* (edited by Tabrizi, M. A., Al- Matbah al- Murtaḍawi, Najaf, 1358 H.Q.) vol. 2 at 191-228.
- Najafi, M.; Nāeini, M. H.: *Munyah al- Tāleb*, (edited by Tabrizi, M. A., Al- Matbah al- Haydaryah, Tehran, 1373 H.Q.) vol. 1.
- Najafi, M.; Nāeini, M. H.: *Munyah al- Tāleb* (edited by Tabrizi, M. A., Al- Matbah al- Murtaḍawi, Najaf, 1358 H.Q.) vol. 2.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 22.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 23.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 24.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 25.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 27.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 37.

- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, vol. 42.
- Najafi, M. H.: *Jawāher al-Kalām*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon, 1981 7th ed. edited by Akhūndi, Ali), vol. 43.
- Narāqi, A.: *Mustanad al- Shi'ah fi Ahkām al- Shari'ah*, (Al- Maktabah al- Murtaḍaweyyah, Tehran), vol. 2.
- Narāqi, A.: *Awāḍ al- Ayyām*, (Maktabah-e-Basirati, Qum, 1408).
- Qumi M. A. (Muhaggeq Qumi): *Qawānin al- Muhakkamah*, (Stone Edition, edited by Tāher and Abdurrahim, Qum) vol. 2. (1205 H.Q. (1785 AD).
- Rashti., M. H.: *Al- Ijārah*, (ston edition, Tehran.).
- Rashti., M. H.: *Ketāb al- Ghasb*, (stone edition, Tehran, 1322 H. Q.).
- Sanhūry, A.: *Al- Wasit fi Sharh al- Qānūn al- Madani*, (Dār al- Ehyā al- Turāth al- Arabi, Lebanon) vol. 1.
- Sanhūry, A.: *Masāder-al-Haq fel Feqh al- Islāmi*, (Mu'assasat al- Tārikh al- Arabi, Dār al- Ehyā al- Turāth al- Arabi, Lebanon , vol. 6.
- Sayūri, J. al- Din M. ibn A. (Fādel Meqdād): *Kanz al- Erfan fi Feqh al- Quran*, (Murtaḍawi Publication, 3rd ed., 1343 H.S.) vol. 1.
- Shahidi, M. F.: *Hedāyat al- Tāleb ela Asrār al-Makāseb*, (edited by Khūshnewis, T., Matbah al- Ittelāāt, Tabriz, Iran, 1375 H.G.).
- Shāhrūdi, S. A.; Khūei, S. A.: *Muhadarāt fel Feqh al- Jafari*, (Dar al- Ketāb al- Islāmi, Qum, 1409 H.Q., 1st ed.) vol. 2.
- Shari'ah al- Isfahāni, F. (Shaykh al- Shari'ah): *Qāedah Lā Ḍarar wa Lā Ḍerār*, (Tabesh Publication, Qum).
- Shirāzi, N. M.: *Anwār al- Feqāhah*, (Madrasah al- Imām Amir al- Mu'menin, Qum, 1413 H.Q. 2nd ed.) vol. 1.
- Shirāzi, N. M.: *Al-Qawāḍ al-Feqhiyah*, (Madrasah al- Imām Amir al- Mu'menin, Qum, 1410 H.Q.) vol. 1.
- Shirāzi, N. M.: *Al-Qawāḍ al-Feqhiyah*, (Madrasah al- Imām Amir al- Mu'menin, Qum, 1410 H.Q.), vol. 2.
- Systāni, S. A.: *Qāedah Lā Ḍarar*, (Mehr Pulication, Gum, 1414 H.Q.).
- Tabātabāei, S. A. (Sāheb Reyād): *Reyād al- Masāel fi Bayān al- Ahkām bie Dalāel*, (Mua'ssasah Ālul Bait, Qum, 1404 H.Q.) vol. 1.

- Tabātabāei, S. M. (Sāheb Manāhel): *Ketāb al- Manāhel*, (Mua'ssasah Ālul Bait, Qum).
- Tabrizi, M. J.: *Ershād al- Tāleb*, (Mua'ssasah Matbūāti Ismāeiliān, Qum, 1412 H.Q., 1st ed vol. 4.
- Tūhidi, M. A.; Khūei, S. A.: *Mesbāh al- Feqāhah*, (Inteshārāt Wajdāni, Qum, 1368 H.S., 1st ed.) vol. 3.
- Tūhidi, M. A.; Khūei, S. A.: *Mesbāh al- Feqāhah*, (Inteshārāt Wajdāni, Qum, 1368 H.S., 1st ed.) vol. 6.
- Tūhidi, M. A.; Khūei, S. A.: *Mesbāh al- Feqāhah*, (Inteshārāt Wajdāni, Qum, 1368 H.S., 1st ed.) vol. 7.
- Tūsi, M. Ibn H. (Shaykh al- Tāefah): *Al- Mabsūt*, (Haydari Publication, Tehran) vol. 2.
- Tūsi, M. Ibn H. (Shaykh al- Tāefah): *Kitāb al Khelāf*, (Inteshārāt Islāmi, Qum, 1407 H. Q.).
- Yazdi, S. M. K.: *Hāsheiyeh al- Makāseb*, (Mua'ssasah Matbūāti Ismāeiliān,, Qum, 1378 H.Q.) vol. 1.
- Yazdi, S. M. K.: *Hāsheiyeh al- Makāseb*, (Mua'ssasah Matbūāti Ismāeiliān, Qum, 1378 H.Q.) vol. 2.
- Yazdi, S. M. K.: *U'rwatu al- Wuthqā* (Mua'ssasah al- Ā'alami Lel Matbūāt, Lebanon, 1988) vol. 2.

(II) Persian Materials

- Amiri Qāemmaqāmi, A.: *The law of Obligations*, (Tehran, 1347 H.S.) vol. 1.
- Bahrāmi, H.: *The Theory of Abuse of Rights in Islam and Other Systems*, (Ittelāāt Publications, Tehran, 1366 H.S.).
- Brūjerdi Abduh, M.: *Civil Law*, (Tehran, 1329 H.S.) vol. 3.
- Gurgy, A.: "A Legal Comment on the Concept of Loss of profit", (published by the Bureau of International Legal Services, Tehran, 1984).
- Gulpāygāni, S. M. R.: *Tawāh al- Masāel*, (Intesharat Dār al- quran al- Hakim, Qum, Iran, 1371 H.S., 68th ed.).
- Qumi, M. A.: *Jāme' al-Shetāt*, (edited by Radavi, Murtaḍā, Mu'assas-e-Kyhān, Tehran, 1371 H.S. 1st ed.) vol. 2.
- Imāmi, S. H.: *Civil Law*, (Kitāb Furūshi Islāmi, Tehran, 1363 H.S. 4th ed.) vol. 1.
- Kātūziān, N.: *Iranian Civil Law (Specific Contracts)*, (Sharkat Inteshar, Tehran, 1992, 4th. ed.) vol. 1.

- Kātūziān, N.: *Iranian Civil Law (Civil Liability)*, (University of Tehran Publication, Tehran, 1995) vol. 1.
- Kātūziān, N.: *Iranian Civil Law (Civil Liability)*, (University of Tehran Publication, Tehran, 1995) vol. 2.
- Kātūziān, N.: *Elementary Studies in Civil Law (Juristic Acts)*, (Sharkat Inteshar, Tehran, 1992, 2nd ed.).
- Kātūziān, N.: *The Law of Contracts*, (Behnashr Publications, Tehran, 1987) vol. 2.
- Kātūziān, N.: *Kātūziān, N.*, (Behnashr Publications, Tehran, 1989) vol. 3.
- Kātūziān, N.: *The Law of Contracts*, (Behnashr Publications, Tehran, 1990) vol. 4.
- Kātūziān, N.: *The Law of Contracts*, (Behnashr Publications, Tehran, 1990) vol. 5.
- Khumayni, S. R. M.: *Tūđīh al- Masāel*, (Kānūn Inteshārāt Payām Mehrāb, Tehran, 1369 H.S. 8th ed.).
- Owsia, P.: "Tadlis, A Comparative Study under English, French, Islamic and Iranian Laws", in: Katouzian, N.: *Developments of Private Law*, (Tehran University Publications, Tehran, 1992).
- Shahābi, M.: *Qawāed -e- Feqh*, (E'Imi Publication, Tehran, 1326 H.S. 2nd ed.).

(III) English Materials

- Amin, S. H.: *Remedies for Breach of Contract in Islamic and Iranian law*, (Royston Limited, Glasgow, 1984).

(IV) Statutes

- Iranian Civil Code (1307, 1313 and 1314 H.S./ 1928, 1934 and 1935, as amended in 1361 (1982) and 1370 (1991), translated by Taleghani, M.A.R., Littleton, Colorado, 1995).
- Iranian Civil Code (1307, 1313 and 1314 H.S./ 1928, 1934 and 1935, as amended in 1361 (1982) and 1370 (1991), edited by: Nikfar, M., (Kayhan Publication, Tehran, 1372 H.S.).
- Iranian Civil Procedure Code (passed in 1318, 1939, as amended in 1970 and 1983).
- Iranian Constitution (1358 H.S./1378, as amended in 1367/1988).
- Iranian Islamic Penal Law Code (1370 H.S./ 1991, as amended 1375/1996, Deyat Section - Blood Money-).