

LECTURE FIVE

REMEDIES OF THE BUYER AND THE SELLER IN INTERNATIONAL SALES CONTRACTS

As with rights and duties, the starting point for any consideration of the remedies available to the parties for breach of contract is the contract itself. To the extent that a contract expressly or by implication incorporates other rules, those rules become part of the contractual regime.

Scenario One : Thus, if the parties contract on ULIS or VIENNA terms, any consideration of remedies for breach of contract will include an analysis of the imported terms arising out of the conventions. Even with careful drafting, there are times when the incorporated provisions do not mesh completely with the express terms of the contract. The question that then arises as to which of the contradictory provisions prevails. The usual rule is that express terms, and the first expression of a term prevail over implied / referred terms and subsequent terms.

Scenario Two : Furthermore, in as much as a contract is governed by law, the contractual regimes contained in ULIS, the VIENNA and/or the Sale of Goods Act 1979 may be incorporated into the contract by legal implication. Again, despite careful drafting there remains the potential for a miss-match between express remedies in the contract and the convention's remedies that are imposed by law. The question again arises as to which of the contradictory provisions prevails. The usual rule here is different in that the applicable law prevails to the extent that it is mandatory. However, it should be noted that many of the provisions of the Conventions and the Act are default rules which only apply if the parties do not expressly provide otherwise. It is important therefore to be aware of the facility to opt in and /or opt out of the regimes.

Scenario Three : Finally, it is possible for a contract to be governed by English Law but to be contracted on subject to Convention Terms. Where there is a conflict between the Act and the Convention, the mandatory provisions of the Act prevail, though again, in respect of default provisions within the Act, the Convention provisions will prevail as permitted express or implied terms of the contract.

Neither the Sale of Goods Act 1979 nor the Conventions purport to be all embracing codes of law for the determination of contractual rights and duties. Recourse therefore is necessary to the governing law of the contract to fill in the gaps. As far as the English Law of contract is concerned, the common law has long since provided rules in respect of the assessment of damages in both contract and where relevant in tort. Specific reference should therefore be made to *Hadley v Baxendale* and the *Victoria Laundries v Newman*, though with respect to sales of goods, it should be noted that the Sale of Goods Act 1979 contains specific provisions in respect of remedies and modes of assessment. Remember that lost profit is recoverable in contract, but by enlarge excluded by the rules of pure economic loss in tort. The Conventions make virtually no reference to recovery in tort.

With the above in mind, the object here is to examine the respective rules in respect of the recovery of damages for breach of the terms of international trade contracts arising out of the three types of scenario outlined above.

The texts of the Conventions and the Sale of Goods Act 1979 are provided in the work sheets below¹ and space is left for students to enter comments and cross reference other sources of law in order to conduct a critical analysis of the respective benefits and burdens of contracting on such terms.

This should be done each week before the sessions to enable students to engage in group evaluation during workshops.

¹ A selection of provisions on related topics are placed in juxta-position to each other – though you may identify other cross links that are not highlighted by the scheme as set out in the following texts.

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Section III Remedies for breach of contract by the seller

45 VIENNA Remedies available to buyer	Cross Ref ULIS Arts 10 & 13
<ol style="list-style-type: none"> 1. If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: <ol style="list-style-type: none"> (a) exercise the rights provided in Articles 46 to 52; (b) claim damages as provided in Articles 74 to 77. 2. The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies. 3. No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.. 	
24 ULIS Breach of delivery duty	
<ol style="list-style-type: none"> 1. Where the seller fails to perform his obligations as regards the date or the place of delivery, the buyer may, as provided in Articles 25 to 32: <ol style="list-style-type: none"> (a) require performance of the contract by the seller; (b) declare the contract avoided. 2. The buyer may also claim damages as provided in Art 82 or in Arts 84 to 87. 3. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace. 	
41 ULIS Remedy for non-conformity	
<ol style="list-style-type: none"> 1. Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may, as provided in Articles 42 to 46: <ol style="list-style-type: none"> (a) require performance of the contract by the seller; (b) declare the contract avoided; (c) reduce the price. 2. The buyer may also claim damages as provided in Art 82 or in Arts 84 to 87. 	
47 ULIS Excess delivery / pro-rata	
Where the seller has proffered to the buyer a quantity of unascertained goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with Article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.	
51. Damages for non-delivery : SOGA 1979	
<ol style="list-style-type: none"> (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. (2) 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. (3) 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 current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver. 	

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53. Remedy for breach of warranty : SOGA 1979	
<p>(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of a 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—</p> <p>(a) set up against the seller the breach of warranty in diminution of extinction of the price, or</p> <p>(b) maintain an action against the seller for damages for the breach of warranty.</p> <p>(2) 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.</p> <p>(3) In the case of breach of warranty of quality such loss is prima facie the difference between 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.</p> <p>(4) 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.</p> <p>(5) This section does not apply to Scotland.</p>	
46 VIENNA Buyer's right to compel performance	
<p>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.</p> <p>2. If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.</p> <p>3. If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.</p>	
25 ULIS No specific performance of commodities	
<p>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 purchases should be effected.</p>	
47 VIENNA Buyer's notice fixing additional final period for performance	
<p>1. The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.</p> <p>2. Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.</p>	

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27 ULIS Non-delivery – warranty – extension of time	
<ol style="list-style-type: none"> 1. Where failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller. 2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.. 	
30 ULIS Reasonable time communicate election for breach of delivery - waiver	
<ol style="list-style-type: none"> 1. Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. The buyer shall inform the seller of his decision within a reasonable time; otherwise the contract shall be ipso facto avoided. 2. If the seller requests the buyer to make known his decision under paragraph 1 of this Article and the buyer does not comply promptly, the contract shall be ipso facto avoided. 3. If the seller has transported the goods to the place fixed before the buyer has made known his decision under paragraph 1 of this Article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided. 	
48 VIENNA Cure after date for delivery; requests for clarification	
<ol style="list-style-type: none"> 1. Subject to Article 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. 2. If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller. 3. A notice by the seller that he will perform within a specified period of time is assumed to include a request under the preceding paragraph, that the buyer make known his decision. 4. A request or notice by the seller under paragraph 2 or 3 of this Article is not effective unless received by the buyer. 	
28 ULIS Non-delivery on due date in commodity market a condition	
Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.	

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31 ULIS Outside 30 right to deliver	
<ol style="list-style-type: none"> 1. In cases not provided for in Article 30, the seller shall retain the right to effect delivery at the place fixed and the buyer shall retain the right to require performance of the contract by the seller. 2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period at the place fixed shall amount to a fundamental breach of the contract. 	

49 VIENNA Buyer's right to avoid the contract	
<ol style="list-style-type: none"> 1. The buyer may declare the contract avoided: <ol style="list-style-type: none"> (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph 1 of Article 47 or declares that he will not deliver within the period so fixed. 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: <ol style="list-style-type: none"> (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: <ol style="list-style-type: none"> (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 Article 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 Article 48 or after the buyer has declared that he will not accept performance. 	

37 ULIS Early short delivery – top up by due date	
<p>If the seller has handed over goods before the date fixed for delivery he may, up to that date, deliver other goods which are in conformity with the contract or remedy any defects in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense..</p>	

35. Acceptance : SOGA 1979	
<ol style="list-style-type: none"> (1) The buyer is deemed to have accepted the goods subject to subsection (2) below— <ol style="list-style-type: none"> (a) when he intimates to the seller that he has accepted them, or (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. (2) Where goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose— <ol style="list-style-type: none"> (a) of ascertaining whether they are in conformity with the contract, and (b) in the case of a contract for sale by sample, of comparing the bulk with the sample. (3) Where the buyer deals as consumer or (in Scotland) the contract of sale is a consumer contract, the buyer cannot lose his right to rely on subsection (2) above by agreement, waiver or otherwise. 	

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<p>(4) The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.</p> <p>(5) The questions that are material in determining for the purposes of subsection (4) above whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned in subsection (2) above.</p> <p>(6) The buyer is not by virtue of this section deemed to have accepted the goods merely because—</p> <p style="margin-left: 20px;">(a) he asks for, or agrees to, their repair by or under an arrangement with the seller, or</p> <p style="margin-left: 20px;">(b) the goods are delivered to another under a sub-sale or other disposition.</p> <p>(7) 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; and in this subsection 'commercial unit' means a unit division of which would materially impair the value of the goods or the character of the unit. <i>(8) omitted</i></p>	
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<p>35A. Right of partial rejection : SOGA 1979</p> <p>(1) If the buyer—</p> <p style="margin-left: 20px;">(a) 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, but</p> <p style="margin-left: 20px;">(b) accepts some of the goods, including, where there are any goods unaffected by the breach, all such goods,</p> <p>he does not by accepting them lose his right to reject the rest.</p> <p>(2) In the case of a buyer having the right to reject an instalment of goods, subsection (1) above applies as if references to the goods were references to the goods comprised in the instalment.</p> <p>(3) For the purposes of subsection (1) above, goods are affected by a breach if by reason of the breach they are not in conformity with the contract.</p> <p>(4) This section applies unless a contrary intention appears in, or is to be implied from, the contract.</p>	
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<p>50 VIENNA Remedy of reduction of price</p> <p>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. However, if the seller remedies any failure to perform his obligations in accordance with Article 37 or Article 48 or if the buyer refuses to accept performance by the seller in accordance with those Articles, the buyer may not reduce the price</p>	
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<p>46 ULIS Reduction of price to value of non-conformity</p> <p>Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.</p>	
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47 ULIS Excess delivery / pro-rata	
Where the seller has proffered to the buyer a quantity of unascertained goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with Article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.	
30. Delivery of wrong quantity : SOGA 1979	
<p>(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.</p> <p>(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. <i>(2A) – (2E) omitted</i></p> <p>(3) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell and the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.</p> <p>(5) This section is subject to any usage of trade, special agreement, or course of dealing between the parties.</p>	
51 VIENNA Non-conformity of part of the goods	
<p>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.</p> <p>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.</p>	
42 ULIS Repair or replacement of non-conforming goods	
<p>1. The buyer may require the seller to perform the contract:</p> <p>(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 a position to remedy the defects;</p> <p>(b) if the sales relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;</p> <p>(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.</p> <p>2. If the buyer does not obtain performance of the contract by the seller within a reasonable time, he shall retain the rights provided in Articles 43 to 46.</p>	
52 VIENNA Early delivery; excess quantity	Cross ref s30 SOGA 1979
<p>1. If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.</p> <p>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. if the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate..</p>	

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29 ULIS Early delivery	
Where the seller tenders delivery of the goods before the date fixed, the buyer may accept or reject delivery; if he accepts, he may reserve the right to claim damages in accordance with Article 82.	

Section III Remedies for breach of contract by the buyer.

37. Buyer's liability for not taking delivery of goods : SOGA 1979	Cross ref ULIS 10 & 13
(1) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.	
(2) Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.	

61 VIENNA Remedies available to seller	
1. If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a) exercise the rights provided in Articles 62 to 65; (b) claim damages as provided in Articles 74 to 77.	
2. The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.	
3. No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.	

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

39. Unpaid seller's rights : SOGA 1979	
(1) Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law – (a) a lien on the goods or right to retain them for the price while he is in possession of them; (b) in the case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them; (c) a right of re-sale as limited by this Act.	
(2) Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies) a right of withholding delivery similar to and coextensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.	

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49. Action for price : SOGA 1979	
<p>(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.</p> <p>(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in goods has not passed and the goods have not been appropriated to the contract.</p> <p>(3) Nothing in this section prejudices the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.</p>	
50. Damages for non-acceptance : SOGA 1979	
<p>(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.</p> <p>(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyer's breach of contract.</p> <p>(3) 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 current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.</p>	
62 VIENNA Seller's right to compel performance	
The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.	
ARTICLE 16 ULIS Specific performance	REMEDIES
Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods.	
63 VIENNA Seller's notice fixing additional final period for performance	
<p>1. The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.</p> <p>2. Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.</p>	
62 ULIS Non-payment – avoidance / extension of time	
1. Where failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be ipso facto avoided.	

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<p>2. where the failure to pay the price at the date fixed does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or provided that he does so promptly, declare the contract avoided.</p>	
64 ULIS Buyer not entitled to litigate an extension of time	
In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace for the payment of the price.	
66 ULIS Failure to take delivery – avoidance / extension of time	
<p>1. Where the buyer's failure to take delivery of the goods in accordance with the contract amounts to a fundamental breach of the contract or gives the seller good grounds for fearing that the buyer will not pay the price, the seller may declare the contract avoided.</p> <p>2. Where the failure to take delivery of the goods does not amount to a fundamental breach of contract, the seller may grant to the buyer an additional period, the seller may declare the contract avoided, provided that he does so promptly.</p>	
64 VIENNA Seller's right to avoid the contract	
<p>1. The seller may declare the contract avoided:</p> <p>(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or</p> <p>(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph 1 or Article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.</p> <p>2. However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:</p> <p>(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or</p> <p>(b) in respect of any breach other than late performance by the buyer, within a reasonable time:</p> <p>(i) after the seller knew or ought to have known of the breach; or</p> <p>(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph 1 or Article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.</p>	
65 ULIS Buyer must facilitate delivery	
Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over.	
73 ULIS Insolvency and outstanding duties : stoppage in transit	
1. Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations.	

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<p>2.</p> <p>3.</p>	<p>If the seller has already despatched the goods before the economic situation of the buyer described in paragraph I of this Article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.</p> <p>Nevertheless, the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods unless the document contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the document when he acquired it, knowingly acted to the detriment of the seller.</p>	
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65 VIENNA Seller's notice supplying missing specifications		
<p>1.</p> <p>2.</p>	<p>If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be blown to him.</p> <p>If the seller makes the specification himself he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.</p>	

68 ULIS Damages for failure to take delivery/specify		
<p>1.</p> <p>2.</p>	<p>Where the contract is avoided because of the failure of the buyer to accept delivery of the goods or to make a specification, the seller shall have the right to claim damages in accordance with Articles 84 to 87.</p> <p>Where the contract is not avoided, the seller shall have the right to claim damages in accordance with Article 82.</p>	

70 ULIS Catch all remedies for breach outside 57-68		
<p>1.</p> <p>(a)</p> <p>(b)</p> <p>2.</p>	<p>If the buyer fails to perform any obligation other than those referred to in Sections I and II of this Chapter, the seller may:</p> <p>where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with Articles 84 to 87; or</p> <p>in any other case, claim damages in accordance with Articles 82.</p> <p>The seller may also require performance by the buyer of his obligation, unless the contract is avoided.</p>	

CHAPTER V PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I Anticipatory breach and instalment contracts

71 VIENNA Suspension of performance		
<p>1.</p> <p>(a)</p> <p>(b)</p>	<p>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:</p> <p>a serious deficiency in his ability to perform or in his credit worthiness; or</p> <p>his conduct in preparing to perform or in performing the contract.</p>	

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<ol style="list-style-type: none"> 2. If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller. 3. A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance. 	
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48 ULIS Anticipatory rejecting of non conforming goods	
The buyer may exercise the rights provided in Articles 43 to 46, even before the time fixed for delivery, if it is clear that goods which would be handed over would not be in conformity with the contract.	

49 ULIS 1 year time bar to notify non-conformity	Semble HVR
<ol style="list-style-type: none"> 1. The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in Article 39, unless he has been prevented from exercising his right because of fraud on the part of the seller. 2. After the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. Nevertheless, if the buyer has not paid for the goods and provided that he has given due notice of the lack of conformity promptly, as provided in Article 39, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages. 	

78 ULIS Avoidance releases both parties from outstanding obligations	
<ol style="list-style-type: none"> 1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. 2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently. 	

72 VIENNA Avoidance prior to date for performance	
<ol style="list-style-type: none"> 1. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. 2. If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. 3. The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations. 	

76 ULIS Anticipatory repudiation allowed	Compare <i>Mihalis Angelos</i>
Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided.	

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6. Goods which have perished : SOGA 1979	
Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when a contract is made, the contract is void.	
7. Goods perishing before sale but after agreement to sell : SOGA 1979	
Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided.	
73 VIENNA Avoidance in instalment contracts	
<ol style="list-style-type: none"> 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. 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. 3. A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided 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.. 	
75 ULIS Default in instalment and cancellation contract	
<ol style="list-style-type: none"> 1. Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party of his obligations under the contract in respect of any instalment, the other party has good reason to fear failure of performance in respect of future instalments, he may declare the contract avoided for the future, provided that he does so promptly. 2. The buyer may also, provided that he does so promptly, declare the contract avoided in respect of future deliveries or in respect of deliveries already made or both, if by reason of their interdependence such deliveries would be worthless to him. 	
31. Instalment deliveries : SOGA 1979	
<ol style="list-style-type: none"> (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments. (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, or the buyer neglects or refuses to take delivery of or pay for 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. 	

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Section II Damages

74 VIENNA General rule for measuring damages	
Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.	
77 ULIS Damages for 75 & 76	
Where the contract has been avoided under Article 75 or Article 76, the party declaring the contract avoided may claim damages in accordance with Articles 84 to 87..	
82 ULIS Damages based on foreseeable lost profit	
Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract..	
84 ULIS Damages – market price on date of avoidance	
<ol style="list-style-type: none">1. In the 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 para 1 of this Article the current price to be taken into account shall be that prevailing in the market in which the transaction took place, if there is no such current price or if 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 goods.	
86 ULIS Damages 84/85 include reasonable costs	
The damages referred to in Arts 84 and 85 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract, in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract.	
75 VIENNA Measurement of damages when contract avoided	
If the contract is avoided and it in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under Article 74.	
90 ULIS Delivery costs to seller : post delivery to buyer	
The expenses of delivery shall be borne by the seller; all expenses after delivery shall be borne by the buyer.	

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76 VIENNA Measurement of damages when contract avoided – additional rules	
<ol style="list-style-type: none"> 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 or resale under Art 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under Art 74. If 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 the current price at the time of avoidance. 2. For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods 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. 	

77 VIENNA Mitigation of damages	
A party who relies on a 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.	

85 ULIS	
If the buyer has bought goods in replacement or the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price paid for the goods bought in replacement or that obtained by the resale.	

86 ULIS	
The damages referred to in Articles 84 and 85 may be increased by the amount of any reasonable expenses incurred as a result of the breach or up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract, in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract.	

Section III Interest

78 VIENNA Interest on sums in arrears	
If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.	

81 ULIS Repayment & interest : accounting for benefits	
<ol style="list-style-type: none"> 1. Where the seller is under an obligation to refund the price, he shall also be liable for the interest thereon at the rate fixed by Art 83, as from the date of payment. 2. The buyer shall <i>be</i> liable to account to the seller for all benefits which he has derived from the goods or part of them, as the case may be: <ol style="list-style-type: none"> (a) where he is under an obligation to return the goods or part of them; (b) where it is impossible for him to return the goods or part of them, but the contract is nevertheless avoided.. 	

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83 ULIS Late payment & interest	
Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as in arrears at a rate equal to the official discount rate in the country where he has his place of business, or if he has no place of business, his habitual residence, plus 1 %.	

Section IV Exemptions

79 VIENNA Impediment excusing a party from damages	
<ol style="list-style-type: none"> 1. A party is not liable for a failure to perform any of his obligations 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. 2. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: <ol style="list-style-type: none"> (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. 3. The exemption provided by this Article has effect for the period during which the impediment exists. 4. The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. 5. Nothing in this Article prevents either party from exercising any right other than to claim damages under this Convention. 	

89 ULIS Rules not applicable to fraud	
In case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present law.	

80 VIENNA Failure of performance caused by other party	
A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.	

Section V Effects of avoidance

81 VIENNA Effect of avoidance; restitution	
<ol style="list-style-type: none"> 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. 	

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78 ULIS Avoidance releases both parties from outstanding obligations	
<ol style="list-style-type: none"> 1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. 2. If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently. 	
82 VIENNA Buyer's inability to return goods in same condition	
<ol style="list-style-type: none"> 1. The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. 2. The preceding paragraph does not apply: <ol style="list-style-type: none"> (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in Article 38; or (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity. 	
79 ULIS Buyer cannot avoid if return of goods not possible / exceptions	
<ol style="list-style-type: none"> 1. The buyer shall lose his right to declare the contract avoided where it is impossible for him to return the goods in the condition in which he received them. 2. Nevertheless, the buyer may declare the contract avoided: <ol style="list-style-type: none"> (a) if the goods or part of the goods have perished or deteriorated as a result of the defect which justifies the avoidance; (b) if the goods or part of the goods have perished or deteriorated as a result of the examination prescribed in Article 38; (c) if part of the goods have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered; (d) if the impossibility of returning the goods or of returning them in the condition in which they were received is not due to the act of the buyer, or of some other person for whose conduct he is responsible; (e) if the deterioration or transformation of the goods is unimportant. 	
80 ULIS Loss of return does not take away other rights	
The buyer who has lost the right to declare the contract avoided by virtue of Article 79 shall retain all the other rights conferred on him by the present Law.	
47 Effect of sub-sale etc by buyer : SOGA 1979	
<ol style="list-style-type: none"> (1) Subject to this Act, the unpaid seller's right of lien or retention or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented to it. (2) Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, then- 	

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<p>(a) if the last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transit is defeated; and</p> <p>(b) if the last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transit can only be exercised subject to the rights of the transferee.</p>	
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Rescission: and re-sale by seller

48 Rescission: and re-sale by seller : SOGA 1979	
<p>(1) Subject to this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit.</p> <p>(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transit re-sells the goods, the buyer acquires a good title to them as against the original buyer.</p> <p>(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.</p> <p>(4) Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is rescinded but without prejudice to any claim the seller may have for damages.</p>	

83 VIENNA Preservation of other remedies	
A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with Article 82 retains all other remedies under the contract and this Convention.	

84 VIENNA Restitution of benefits	
<p>1. 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.</p> <p>2. The buyer must account to the seller for all benefits which he has derived from the goods or part of them:</p> <p>(a) if he must make restitution of the goods or part of them; or</p> <p>(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods..</p>	

EXAM QUESTION

- 1(i) Compare and contrast the remedies available to the parties to an international trade contract for breach of contract contained in (a) ULIS, (b) The VIENNA Convention, and (c) The Sale of Goods Act 1979 and the common law.
- and
- 1(ii) Which of these regimes, or combination of regimes, do you consider provides the most appropriate outcomes for breach of contract?