AN EXAMINATION OF THE LEGAL REGIME FOR NIGERIA'S INTERNATIONAL TRADE*

Abstract
International trade is a matter of vital importance for developing countries since it can stimulate growth and contribute to poverty reduction. Trade is however an increasing complex issue and policy makers in developing countries will need to understand the many ramifications of multilateral trade agreements if their countries are to benefit from this engine of growth. The laws that regulate International trade are often complex and difficult to apply. This is so because, like other branches of international law, apart from regulating the conduct of parties, deals with the choice of law, especially where sanctions are to be imposed. This study examines the legal regime relevant for Nigeria's international trade.

Keywords: Legal Regime, International Trade, Nigeria, an Examination

1. Introduction

The increase in international trade and international trade agreements as well as the growth of knowledge as a tradable asset has increased the importance of Intellectual Property Rights (IPRs) and international trade over the past two decades.[1] Free trade among nations is largely seen as the key to economic growth,[2] peace and better standards of living, leading to a happier state of human existence at a global level.[3] Indeed, many of the rapid and unprecedented changes in intellectual property law and policy over the past two decades are due to the intersection with international trade and numerous international trade agreements, negotiated and brought into force during this period.[4] The General Agreement on Traffic and Trade (GATT) 1947, which came about due to the horrors that the world witnessed in 1930s and 1940s, enshrined the philosophy of free trade using the principles of non-discrimination,[5] (also known as the most Favoured Nation Obligation). Nigeria as a member of Comity of Nations also engages in trade and trade agreements with other subjects of international law in international arena. No nation is an Island regarding trade, thus the existence of international trade agreements between nations becomes vital.

2. International Sale of Goods

International sale of goods is a situation whereby two nations enter into contract of buying of goods and services for mutual satisfaction. The United Nations Convention on Contracts for the International Sale of Goods (CISG) came into effect on January 1988, climaxing more than fifty years of negotiations. [6]The CISA supersedes two earlier conventions, the Convention Relative to a Uniform Law on the International Sale of Goods (ULIS) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF); which was over widely adopted.[7] The reason for the lack of support for the ULIS and ULF was because they were drafted without the Participation of the Third World or the Eastern bloc. The CISG on the other hand, is the work of more than 62 states and 8 international organizations.[8] It was adopted at a conference that met in 1980; it incorporates rules from all major legal systems. It has accordingly, received widespread support from developed, developing and communist countries.[9] The CISG is organized in four parts. Part I (Articles 1 to 13) contains the convention's general provisions, including rules on the scope of its applications and rules of interpretation. Part II (Articles 14-24) governs the formation of contracts. Part III (articles 25-88) governs the rights and obligations of buyers and sellers. Part IV (Articles 89-101) contains provisions for the ratification and the entry into force of the Convention. The UN Convention (CISG) applies to contacts for the international sale of goods. In particular,

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[1] Curtis, J.M. *Intellectual property Rights and international Trade: An Overview.* The Centre for international Governance Innovation (CIGI Papers) No. 3, May 2012.

[2] This view owes much to the work of Adam Smith (An Inquiry into the Nature and Causes of the Wealth of Nations, 1776, Stahn and Caldwell) and David Ricardo (On the Principle of Political Economic and Taxation, 1817, John Murray).

[3] There are trade theorists who think that free trade does not provide the best solution in economic terms. Protectionism and unfair trade practice are seen as providing greater economic benefit to a country. (See Krugman, 'Increasing returns, monopolistic competition and international trade'). *Journal of international Economics,* (1979), 9(4, 467.)

[4] Curtis, J.M. Op. cit.

[5] The principle of non-discrimination requires that a contracting party should treat all contracting states alike so that where a trade advantage has been contracted by a contracting party to another, that advantage should be granted equally to all contracting parties. Also, no discrimination should be made between imported products and domestically produced like products of the GATT 1947

[6] Vienna Convention on the International Sale of Goods, 1980. ('ISG' or popularly known as the 'Vienna Convention') came into force in 1988.

[7] Ray August, International Business Law: Text, Cases and Readings. USA: Prentice-Hall, 1993, pp. 422-423.

[8] Ibid.

[9] Ibid

the sale must be international.[10] That is, the buyer and seller must have their places of business in different states. Additionally, either (a) both of the states must be contracting parties to the Convention, or (b) the rules of private international law must 'lead to the application of the law of a contracting state'.[11] Note that the CISG may apply even if the buyer's and seller's places of business are not in a contracting state'. For example, assume that Seller has a place of business in State A (a non-contracting state) and Buyer a place of business in State B (also a non-contracting State). They enter into a contract in State C (which is a contracting state) and the seller breaches performance in state C. Buyer brings an action in State B, whose choice of law rules point to the laws of State C as applying to the contract. Because State C is a contracting party and the transaction is international, the CISC would apply. This possibility that the Convention could apply in situations where neither the seller nor the buyer had a place of business in a contracting state was a cause of concern for some of the participants involved in the drafting. They feared that the choice of laws rule might lead to the application of one state's laws for the formation of a contract and to another state's laws for its performance. This could mean that only parts of the CISG might apply, when the Convention was meant to apply as a unified whole. As a consequence, the final provisions of the Convention allow a ratifying state, if it wishes to declare that it will apply the CISG only when the buyer's and seller's business are both in the contracting states.[12] Conversely, it is a matter of consent between the two states. While either the contracting states or the choice of laws rules may direct that the CISG apply, the parties to a contract may exclude, for instance, decide to opt out or modify its application by a 'choice of law clause'.[13] Whether they can use that same clause to exclude a domestic law and adopt the CISG in its place which involves opting in, and it depends on the rules of the state where the case is heard.

3. Formation of the Contract

Before examining the details of how international contracts are formed, it is important to note that the Convention does not directly define sales Instead, it speaks of the seller's and buyer's obligations. The seller is to 'deliver the goods, hand over any documents relating to them and transfer the goods, as required by the contract and this Convention'[14] while the buyer, in exchange, is to 'pay the price'.[15] Although not stated in a single article, this is the same definition found in many domestic laws, including the American Uniform Commercial Code, which describes a sale as the 'passing of title from the seller to the buyer for the price'.[16] In the vein the Convention also does not directly define goods rather it defines sales which are not governed by the CISG. There are six specific categories excluded. Three are based on the nature of the transaction,[17] and the other three on the kind of goods.[18] This list of exclusions only describes goods which the drafters felt the CISG might cover,[19] unless they were specially excluded.[20] The drafters failed to advert their minds on the implications of liberal interpretation of statutes and its antecedent results

[10] Contracts carried out entirely within one country's borders are governed by the country's laws. In the United States. The principal domestic law governing the sale of goods is the Uniform Commercial Code (UCC); in the United Kingdom, the Sales of Goods Act of 1893 and 1979 apply; in France , sales of goods are regulated by both the law of obligations in the *Code Civil* of 1804, and the *Code de Commerce* of 1807; in Germany, the law of obligations in the *Burgerliches Gesetzbuch* of 1896 applies to Nigeria, the Sale of Goods Act 1893 and the Sales of Goods Law 1959 (Laws of Western Nigerian) 1959 Cap. 115.

[11] Article 1 of the CISG provides: '(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different states: (a) when the states are contracting states; or (b) when the rules of private international law lead to the application of the law of a contracting state. (2) The fact that the parties have their places of business in different states is to be disregarded whenever this fact does not appear either from the contract or from any dealings between or from information disclosed by the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention

[12] CISG Article 95: 'Any stale may declare at the Mine of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be hound by subparagraph (1) (b) of Article 1 of this Convention, 'The United States, for one, has so declared.

[13] CISG Article 6, 'The parties may exclude the application of this Convention, or subject to Article 12, derogate for or vary the effect of any of its provisions'.

[14] CISG Article 30.

[15] CISG Article 54

[16] See Uniform Commercial Code. ? Ss. 2-196, and see the sale Of Goods Act 1893, Section 1 (1).

[17] The excluded transactions are (i) 'goods bought for personal, family or household use,' (ii) auction sales and (iii) sales 'on execution or otherwise authority of law'.

[18] The excluded goods are: (i) 'stocks, shares, investment securities, negotiable instruments, or many, (ii) ships, vessels, hovercraft or aircraft, and (iii) electricity.

[19] CISG Article 2

[20] See John Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, (1982) pp. 85-87, for a fuller discussion on the drafters' intent on the meaning of good.

4. Legal Requirements for Valid Contract under International Trade

In international Trade, Traditional Contracts can take various forms, formal (under seal) or informal. Informal contracts can be either written or oral.[21] However, for international contracts many countries have required that such contracts be in writing starting with the English Statue of Frauds in 1677 which requires to be signed to enforce a wide variety of contracts, including contracts of the sale of goods.[22] A contract for the sale of goods is formed and the parties are bound by its provisions, when an offer to buy or sell goods is accepted, with the intention for the sale or purchase of such goods for a price.[23] And the performance of duties provided for in the contract, unless the provision contracts the law or public policy of the country, that contractual provision shall be binding as between the parties.[24] In the examination of the relationship between the parties, it is therefore necessary to extract the contents of the contract and then properly to construe them to determine the extent of that relationship. The contents of the contractual relationship may be found either in the expressly stated terms of the contract or may be elicited by the court from the surrounding.[25]Such may be the case in this era of globalization; substantial trading now have foreign element. Thus, when a matter containing a foreign element comes before a court, its duty is to apply the proper law. This has been described as the law 'by reference to which the contract was made or that with which the transaction has the most real connection.[26] In determining the proper law, regard will be had to the following:

i) Any statutory provisions, for instance, international conventions,[27]
ii) Any express choice of law in the contract,
iii) Where no systems of law is expressly concerned then the system of law with which the contract is most closely connected,[28]
iv) Some presumptions which have been developed by the courts for the purpose of ascertaining the proper law.[29]

The Lex Loci Contractus Principle

This is perhaps the strongest of the presumptions. The law of the place where the contract is made is presumed to be the proper law.[30] The presumption, may be rebutted where the place of contracting is merely fortuitous. For example, if the parties reside in different Countries and the contract is made by correspondence after offers and counter-offer, it is purely fortuitous where the final letter, i.e. acceptance, was posted. Similarly, where the contract is made on board a plane while the plane is flying over any particular territory, the lex loci contractus will not necessarily apply.

The *Lex Loci Solutionis Principle*

The general rule is that, 'if a contract is made in one country to be carried out between the parties in another country either in whole of in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country'. [31] The presumption may be rebutted if the parties are to perform their obligations in different countries, for instance, where a contract is made in Nigeria by A, an Italian to sell goods to B and the goods are to be shipped from France but payment to be made in Nigeria;[32] but where both are to perform their duties in a country other than the one in which the contract is made, the law of the place where it is to be performed will be preferred to that of the place where the contract is made.[33]

[21] Ray August, *International Business Law: Text, Cases and Readings.* USA: Prentice-Hall, 1993, p. 434

[22] Jason C.T, Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (4th Ed.) London: Sweet & Maxwell, 2009, p. 3.

[23] See generally Sagay, I, *Law of Contract,* (2nd Ed.) Ibadan: Spectrum Books Limited, 2007; Geoffrey Uwadiegwu Oputa, *Achike on Contract*, Justice Watch Publication, 2014 *and Cheschire and Fifoot's Law of Contract* (9th Ed.) Butterworth's, 1976.

[24] Ibid.

[25] Ibid

[26] See *Bonython v. Commonwealth of Australia* (1951) A.C. 201,219.

[27] For example, the United Nations Convention on Contracts for the International Sales of Goods was adopted in Vienna in March 1981. Nigeria has expressed an intention to adopt and domesticate the Convention and when this is done, the law as provided in the Convention will concern the relevant transactions.

[28] See *Re United Railways of Havana & Regea Warehouse Ltd*. (1968) A.C. 1007; (1960) 2 AII E.R>332

[29]

[30] See *peninsular and Oriental Steam Navigation Co. v Shand* (1865) 3. Moo: P.C.C. N.S: 272; and *Jacobs v. Credit Lyonhia*s (1884) 12 Q.B.D. 589.

[31] *Chatenay v. Brazilian Submarine Telegraph Co*. (1891)1 Q.B. 79,82.

[32] *Jacobs v. Credit Lyonnais*. (1884) 2 QBD 859

[33] See *Benaim & Co. v. Debono* (1924) A.C. 514.

In Aluminium Ind. A.G. v. F.B.I.R., [34] the appellant company was a foreign company with no place of business in Nigeria, but it owned all the shares in a Nigerian company and incurred expenses outside Nigeria for the Nigerian company. It was agreed that part of the indebtness of the Nigerian company be transferred to a loan account in the foreign country. The loan was to be in the foreign currency and payable in that foreign country. The appellant was assessed to tax on interest on the loan account. The question was whether the interest was assessable to tax in Nigeria. This also necessarily raised the question of the place of payment of the debt. The Supreme Court, on appeal held that the general rule that a simple contract debt is situated where the debtor resides or is to be found, because there the debt can be enforced against him by process of law, does not appear to be displaced by a stipulation for payment elsewhere; but a Stipulation for the payment outside Nigeria by a resident of Nigeria gives no right to payment of the debt in Nigeria, but only a right to damages for breach o contract expressed in Nigerian currency, in which alone Nigerian courts give judgment; thus, where interest on a loan contracted outside Nigeria is payable only outside Nigeria and in a foreign currency, there is no right to payment of the interest in Nigeria which would make its interest deemed to be derived from Nigeria and therefore taxable in Nigeria.

The Lex Situs Principle
Where the contract relates to immovables, there is a presumption that it is governed by the law of the country where the immovables are situated.[35]

Law of the flag
In contracts for the carriage of goods by sea, there is a presumption that the law of flag of the nationality carried by the ship is the proper law. The presumption is the least strong of them all and is more readily rebutted especially where the flag is merely one of convenience. In *Compagnie d' Armment Maritime S.A* v. *Compagnie Tunsiene de Navigation S.A,* [36] it was held that where a contract specified that it was to be governed by the Laws of the flags of the vessel carrying the goods, and the parties thought that French vessels would primarily be used in carrying the goods, there was in effect an express choice of French law as the proper law, in event of conflicts between the parties.

In addition to issues of offer and acceptance, consideration and intention to create legal relations mentioned earlier, there must be no factors negativing consent, for example, mistake, misrepresentation, duress or undue influence[37]. The terms of the contract must be sufficiently certain. In *schweppe v. Harper,* [38] where there is certainty can sometimes be a difficult matter of judgment. There, in a 2-1 decision, the Court of Appeal held that the financing contract was uncertain given that there were no clear terms as to the amount of finance sought, the rate or rates of interest and any other consideration to be provided, the length of the finance and how repayment was to be made. In general, the courts would try to save a commercial deal as the presumption is that there is intention to be legally bound in a commercial relationship. Indeed, the courts, where appropriate, would imply reasonable terms into the contract to make it enforceable. However, the contract also has to be capable of being performed and this is where the courts might find the gaps in the 'contract' too cavernous to fill.

Processing the Export order
Once the offer to sell overseas has been accepted, the traders will put their management plan into action. A management plan ensures that the order is properly processed, that is, the manufacture or acquisition of the goods according to contract description, quality control, packing for export, pre-shipment inspection, shipping complete and accurate documentation, export invoicing, banking facilities, and insurance if required are vital elements of the process. A good management plan would also ensure that payment for the goods is made promptly and that legal action is taken when problems arise.[39] These and other related issues may arise between the periods of sale to delivery.

Trade Terms
There are a number of special trade terms, such as INCOTERMS 2000, that traders can apply to their contract of sale. These terms have been laid down by the relevant trade association, such as the International Chamber of Commerce (which sponsors the INCOTERMS). Traders, simply by referring to them, could legitimately be

[34] (1971) (2) N.C.L.R. 121.
[35] Halsbury Law of England (4th Ed.) para. 651.
[36] (1970) 3 All E.R.71.
[37] Orojo, J.O. *Nigerian Commercial Law and Practice,* Vo.1, London: Sweet &Maxwell, 1983, p. 1147
[38] (2008) ECWA CIV. 442.
[39] Chauah, J.C.T, *Law of International Trade: Cross –Border commercial Transactions* (4th ed) London: Sweet & Maxwell, 2009, pp.28-30.

deemed to have adopted the full range of duties and rights, these 'trade terms' imply. For example, a trader may describe quite simply in his contract that delivery is, say, 'DDU Singapore (INCOTERMS 2000)' without needing to set out in full the duties and rights of both parties because the full range of duties and rights attendants to this special term 'DDU' would have been conveniently set out in INCOTERMS 2000. Thus, as far as the courts are concerned, this description will be taken to mean that the traders have agreed to be governed by the published terms, INCOTERMS 2000, applicable to DDU contracts. Any variation of the duties or rights adumbrated in INCOTERMS 2000 must be clear and precise. Otherwise, the presumption will be that no variation was intended. In some countries, such pre-designated trade terms (such as INCOTERMS 2000) form part of their national law and cannot thus be departed from. In the United Kingdom however, these are but pure contractual terms which may be varied subject to evidence of the parties' intention to do so. INCOTERMS or similar special trade terms not only make clear to the parties where delivery of the goods is to take place but are also important in aiding the calculation of the purchase price, for example, where the contract calls 'Delivery GIF Singapore'. The seller's invoice would account for all incidental charges incurred up until the delivery of the goods at Singapore, including premium for the insurance and freight charges. INCOTERMS were first published in 1936 under the auspices of the International Chamber of Commerce. The newest set, INCOTERMS 2000, came into force on January 1, 2000 replacing the 1990 INCOTERMS. They might be contrasted against trade terms established by common law and trade practice. At the time of writing, the ICC is reviewing the INCOTERMS with a view to introducing a new set of rule, INCOTERMS 3000.[41]

Generally, it is customary practice in international commerce for parties to adopt commonly recognized or standard terms. These standardized contracts are very much the result of the growth of large-scale enterprises with mass production and mass distribution. According to kestrel:

> The stereotyped contract of today reflects the impersonality of the market. It has reached its greatest perfection in the different types of contracts used on the various exchanges. Once the usefulness of these contracts was discovered and perfected in the transportation, insurance, and banking business, their use spread into all other fields of large scale enterprise, into international as well as nation trade…[42]

The benefits of using these standardized terms include: (i) As far as the trader or businessman is concerned, the risk factor is extremely important in any business ventures. Hence with the uniformity of terms and predictability of consequences from the contractual arrangement being made pellucid right at the outset, he is able to calculate the precise risks involved. Take for example standard form insurance contracts, the commonly used terms of the cover and expected perils make the computation of tasks more efficient for both the insurer and the insured. (ii) Standard form contracts are also useful in excluding or controlling the 'illogical factor' of judicial reasoning in litigation: the conviction that being codified terms will make the contract so limpid that the court or arbitrator will have little choice but to adhere to the expressed terms. Thus, there is need for clarity in standard form. Contracts is no less an important factor in its appeal to the business person. Decision makers entrusted with the task of construing the standard form contract can take comfort in the fact that these terms are not novel, but have been addressed by precedent or practice. (iii) The use of standard form contracts also contributes to the reduction in cost and increase in efficiency of transaction. The time, and cost saved from extensive negotiation and personalized drafting of the contract are not substantial especially in respect of large-scale enterprises. While the recognition of the standard form clauses is widespread; a distinction must be made between those that have been agreed to by parties of equal bargaining power and those imposed on persons on a 'take it or leave it' basis. In *Schroeder Music Publishing Co. Lid v. Macaulay,* [43] Lord Diplock made the following illuminating analysis of standard form contracts and the attendant judicial attitude to them.

> Standard forms of contracts are of two kinds. The first of very ancient origin, are those which set out the terms on which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charter parties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affects not only, the actual parties to them but also others who may have a commercial interests in the transaction to which they relate as buyers or sellers, charterers or ship owners, insurers or bankers. If fairness, or reasonableness were relevant to their

[41] For a general analysis, see Debatista, C. (ed.) *Incoterms in Practice* (Parish: ICC, 1995); Ramberg, J. Guide to *INCOTERMS* (Paris: ICC, 1991), INCOTERMS 2000 may be found on the ICC website at www.iccwho.org.
[42] Kestrel (1943) Col. L.R. 629
[43] (1974) 3 AII E.R. 616 at 624; (1974) 1 WLR 1308 at 1316.

> enforceability the fact that they are widely used by parties fairly matched would raise a strong presumption that their terms are fair reasonable.

The same presumption, however does not apply to the other kind standard form of contact. This is of comparatively modem origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide, what, are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it or approved by any organization representing the interests of the weaker party. They have been dictated that party whose bargaining power either exercised alone or inconjunction with others providing similar goods or services enables him say 'if you want these goods or services at all, these are the only terms on which they are available. Take it or leave it'. In their unrelenting efforts to protect the consumer by limiting the scope of exemption clauses and by subjecting their application to various conditions, the courts have designed separate rules in respect of documents containing exemption clauses signed by the innocent party and those not so signed. Naturally, the rules applicable to documents not signed by the innocent or injured party are far more stringent- than those applicable to those that are signed. In other words, it is far more difficult for a party attempting to escape his contractual obligation by relying on an exemption clause to succeed if the other party did not sign the documents that we must now turn.[44]

In International trade, the problem is made complicated by the fact that the transaction might be found in a lengthy exchange of standard conditions between the parties, for instance, the battle of forms as some term it where identifying exactly what was agreed and when it was agreed is a serious problem for interpretation. The case of *Butler machine Tool Co. Ltd.*v *Ex-Cell-0Corps Ltd*[46] is illustrative. The facts of the case on May, 23, 1969, the sellers made an offer to sell a machine tool to the buyers for £75,535 delivery in 10months time. The offer was stated to be subject to certain terms and conditions which 'shall prevail over any terms and conditions in the Buyers' order'. The conditions contained a price variation clause providing for the goods to be charged at the price ruling on the date of delivery. On May 27, the buyers placed an order that was stated to be subject to certain terms and conditions. These were very different from those stated in the seller's offer. At the foot of the buyer's order was a tear-off acknowledgement slip stating 'we accept your order on terms and conditions stated thereon'. The sellers signed and returned the acknowledgement slip with a letter stating that 'this is being entered in accordance with our quotation of May 23, for delivery in 10/11 months'. At delivery- the seller demanded an increase in the price of £2, 892 on basis of the price variation clause in their offer. The case was before seasoned jurist, Lord Denning MR. who held as follows:

> The correct approach, said Lord Denning M.R., was to look at all the documents passing between the parties and glean from them, and/or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences, between the forms and conditions printed on the back of them. Using this rule, it would usually be the case that in a battle of forms, the contract is made as soon as the last of the forms is sent and received without objection. The court took the view that the sellers had signed the acknowledgement slip agreeing to the terms set out by the buyers and were, as such, bound by the buyers' terms. They were thus not entitled to rely on the price variation clause.

It might be noted that in Butler Machine Tools, [47] The court dismissed the seller's argument that the acknowledgment slip had been qualified by the letter which purported to revive the terms set out in the 'quotation' of May 23. The court was of the opinion that the letter only referred to the price and identity –of the machine and not ancillary terms set out in the initial quotation, and was therefore irrelevant. In the ultimate analysis, it boiled down to a matter of construction. It is obvious that there is need to be proper rules governing the process of contract construction. Where there is a battle of the forms, the circumstances surrounding the exchange of the forms are particularly relevant. In *LIDL UK GmbH v Hertford foods Ltd*,[48] H and L had made an oral agreement for the delivery of several consignments of corned beef. That oral agreement was confirmed by the ex-change between the parties of a number of documents. H claimed that its terms governed the contract; whilst L contended that its own terms did. Chadwick L.J. held that the common background knowledge that H and L brought to the negotiations which culminated in the agreement was vital. It is a question of proof whether there was knowledge or notice of the relevant set of terms by the parties. Where it could not be proved that the parties had relied on one or the other set of terms, the court will have no choice but to find either that there was no contract or that neither

[44] Sagay, Op. cit.pp. 160-161.
[46] (1979) 1 All E.R. 1965.
[47] Supra
[48] (2001) EWCA Civ.938

set of terms would apply. In the case of the latter, express terms which are ascertainable and implied terms would be given effect to.

5. Rules as to the choice of law in specific cases[49]

Capacity

This relates to matters such as the power of infants, persons of unsound mind married women and corporations! The law which applies here is certain. In the old case of *Male v. Robert*,[50] where an infant entered into a contract in Scotland, it was held that the law of Scotland applied, being the law of the country where the contract arose. Since the case was decided before the doctrine of the proper law was developed, it is doubtful if it will be law today. Indeed, both Dr. Cheshire [51] and Dicey and Morris [52] have argued that the application law is the law with which the contract has the closest connection that is proper law.[53] In the case of immovable, the capacity of the parties has been said to be governed by the '*lex situs*'.[54]

Interpretation

The meaning of the words used in a contract is governed by the proper law. Thus if a technical term is used in the contract and has a different meaning in each of the different counties involved in the transaction, the law will be applied to construe the meaning of such term.[33]

Legal Effect: This deals with the rights and obligations of the parties under the contract, for example the conditions and warranties, if any, implied in the contract, the place, time and method of performance the implied duties and obligations of the master and the servant, the principal and the agent, or the seller and buyer. All these are governed by the proper law of the contract.[55]

Discharge

This will include such matters as performance, accord and 15.17 satisfaction, frustration or breach of contract. The validity of such matters is governed by the proper law of the contract.[56]

Monetary Obligation

The payment of money in international commerce is of course, of the utmost importance. Anyone who is paying or receiving money under a contract which involves a foreign element would like to know.

(a) How much money the debtor has to pay: is the amount; measured in terms of an agreed currency which is legal according to that currency and is called the money of account; and

(b) in what currency the debtor must pay the agreed amount: This is called the money of payment.

Money of Account[57]

Some contracts do state the currency with which the transaction is to be discharged; for example, English pound, Nigerian pound, French Frances, or American dollars. Where however they do not specify the currency, when they intend is determined by reference to the proper law of the contract. Thus in *Bonython v. Commonwealth of Australia*, [58] the Government of Queens land issued debentures in 'pound sterling' which were repayable at the holders naturally wanted to be paid in English pounds or its equivalent in - Australian pounds. It was held that the proper law being Australian, the currency was Australian and the value playable whether in Australia or England was the value of the Australian pound. After determining what currency is intended, the next question is how much is the debtor to pay. This is governed by the currency which is agreed. This is however, liable to create hardship where the value of the currency has depreciated or the currency devalued. To reduce the effect of such hardship, two methods have been applied. The first is 'revalorization'. In Germany, for example, the law is that where a debt is payable in a currency which has depreciated since the debt was incurred, the debtor must revalorize

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[49] See generally,Orojo, J.O.Op.cit.

[50] (1800) 3 Esp. 163.

[51] *Private International Law*, 9th edition, p.228.

[52] *Conflict of laws*,9th edition, p.766-770.

[53] But see *Baindail v. Baindail* [1946] 1 ALL E.R. 342,346,WHERE LORD Greene said Obiter that in case of infants, where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicile but by the *lex loci*; see also 8 hals,4th ed;pare 599

[54] See *Bank of Africa v. Cohen*[1909] .2 Ch.129

[55] See *Benamin & Co. V. Debono* [1924]A.C. 514.

[56] See *Jacobs v. Credit Lyonnais* (1884) 12 Q.B.D; *Re helbert wagg & Co. Ltd. S.A.* (1956) 1 ALL E.R.129;(1956) 1 Ch. 323;*Adams v. National Bank of Greece S.A.* (1960) 2 ALL E.R.421;(1961) A.C. 255; 8 Hals., 4th ed,para.609.

[57] See generally, Dicey & Morris, Op. cit. pp. 894-903; Cheshire, Op. cit. pp. 247-252

[58] (1957) A.C.201

the debt that is, he must revalue the debt so as to take account of the depreciation, in the currency. Thus, suppose that a Nigerian trader owns some money to a German company in Germany and that German law is the proper law. If there is depreciation in the 'value of the German currency, the Nigerian trader will have to make additional payment; but this will not be so if German law is not the proper law since there is no rule of revalorization under the laws of Nigeria. The second method is more common and is generally adopted in most countries. This is what is called 'a gold clause'. Again, this may take the form of requiring the debtor to pay in gold (the gold coin clause),or the pay an amount equivalent to a given quantity of gold (the gold value cause). Where the parties do not expressly specify whether they intend a gold-coin clause or a gold value clause, the proper law will be applied to determined which it is on the proper construction of the contract[59] and also whether effect can be given to it[60]

Money of payment[61]
This is the currency in which money of account is to be paid, that is, the actual currency which is to be tendered. This is governed by the country in which payment is to be made,[62] and what is legal tender is governed by the law of the country whose currency it is, that is, the *lex pecuniae*.[63] Thus where the currency in which the debt is to be paid is Nigerian Naira, if the existing Nigerian naira is replaced by a new Nigerian currency, it is Nigerian law which will determine what is or will amount to a naira of Nigeria currency. The UN Convention provides for remedies that are: (a) unique to the buyer, (b) unique to the seller, and (c) available to either party. While the buyer's and seller's remedies relate to their specific needs, they are also interrelated, and any studying the CISG's remedies must keep this in mind.[64]

Buyer's Remedies
The buyer's remedies are cumulative. That is to say, the right to recover damages is not losing if a buyer exercises any other available remedy.[65] They are also immediate. In other words, unlike the rules in some civil law countries, the CISG forbids a court or arbitral tribunal from granting the seller a period of grace {*dalai de grace*} in which to comply with a-buyer's demand for a remedy.[66] The remedies which are unique to the buyer are: (1) to compel specific performance,(2)to avoid the contract for fundamental breach or non delivery, (3) To reduce the price, (4) to infuse early delivery and (5) to refuse excess quantities. Most of these remedies are common to virtually every legal system, but the right to set an additional time in which to perform and the right to reduce the price are not. All are applicable whether the seller's breach affects the whole contract or only a part.

Specific Performance: As we have already seen, the availability of a decree of specific performance depends on the domestic rules applicable to the court hearing the suit. Assuming it is available, a buyer can ask that a seller either: (a) deliver substitute goods or (b) make repairs. In either case, the buyer must first notify the seller that the goods are nonconforming and if he is asking for substitute goods, the non conformity must amount to a fundamental breach. Also, the buyer cannot have avoided the contract or resorted to some other inconsistent remedy[67].

Avoidance: The CISG's provisions for avoidance by a buyer are patterned after German law, especially in the convention's adoption of the German Nachfrist notice. A comparative analysis of several different approaches to avoidance is given in reading 9-1. Under the CISG, a buyer may avoid a contract if either: (a) the seller commits a fundamental breach or (b) the buyer gives the seller a notice and the seller rejects it or does not perform within the period it specifies.[68] A buyer's Nachfrist notice is the fixing of 'an additional period of time of reasonable length of time for performance by the seller of his obligations.[69] The period must be definite and the obligation to perform within that period must be- clear. Once the *Nachfrist* period has run, or once the fundamental breach

[59] See *Feist v. Societe Intercommunale Belge D' Elctricite* [1934] A.C. 161
[60] *R. v. International Trustee* [1937] A.C. 500;[1937], ALL E.R. 164
[61] See generally, Dicey & Morris, Op. cit. pp. 903-907; Cheshire, Op. cit. pp. 252-253
[62] Dicey & Morris, Op.cit. p. 903
[63] Ibid, p. 904.
[64] Ray August Op. cit.
[65] Article 45(2). Untill the 1904s, American case law and the American Uniform Sales Act of 1906 required 'buyers to make ah election-of-remedies rule was overturned with the adoption of Ss.2-711(1) of the Uniform Commercial Code.
[66] Article 45 (3). See G. Treitel, 'Remedies for Breach of Contract', *International Encyuclopedia of Comparative Law*, Vol. 7, Chap. 16, Ss. 147-148 (1976) for a discussion of the deilai de grace.
[67] Article 46.
[68] Article'-49(1)
[69] Article 47(1).

becomes clear, the buyer has a reasonable time in which to avoid the contract[70].During the Nachfrist period the seller is entitled to correct (i.e 'cure') the non conformity at his own expense. Even if there has been a breach the seller is entitled to make a cure unless the circumstances -including the circumstance of the offer to make the cure indicate that the breach is fundamental and the buyer chooses to avoid the contract.[71]

Reduction in price: If a buyer is not entitled to damages when a seller delivers non confirming goods, the buyer will be entitled to a reduction in price.[72] This remedy has its origins in the Roman law of action *quanti minoris*, a remedy common place in civil law countries, but generally unknown in the common law world. At the proceedings leading up to the adoption of the CISG, many delegates argued that the price reduction remedy is little different from damages, and therefore served no real purpose. Nevertheless, most representatives from the civil law countries felt that it was different, and eventually it was incorporated in the convention. The price reduction remedy is different from damages because it applies to a very special situation. First, the buyer must have accepted goods that are non conforming. Second, the seller must not be responsible for the nonconformity. An example of such a case is one where the goods were damaged by force majeure or an act of nature. Consider the following situation seller in New Orleans agrees to deliver grade I corn to Buyer at the buyer's mill in Karachi for a price of $100,000. While the corn is in transit on the S.S skipper, a war breaks out and the ship is detained by one of the warring countries for three months. When the S.S. Skippers arrives in Karachi, the corn is moldy and graded only No. 3. Buyer is happy to have the corn even though it is moldy, because the war has interrupted all of its orders, under the damage provisions of the CISG; Buyer is not entitled to damages[73]. Buyer is, however, entitled to a price reduction. The amount of the reduction is determined by a formula that looks at the relative price of conforming and nonconforming goods at the time of delivery. That is:… the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of delivery bears to the value that conforming goods would have had at that time.[74] The above example in case let us assume that the price of No.1 corn in Karachi at the time of delivery is $120,000, and the price of No. 3 coins is $80,000. The original price ($100,000) will therefore be reduced by the difference ($40,000). Accordingly, buyer will pay only $60,000.

Refusing Early Delivery and Excess Quantity*:* If the seller delivers early, the buyer is under no obligation to take delivery.[75] If the Seller delivers more than the amount agreed, the buyer may also accept or reject the excess part. However, if the buyer does accept, he must pay for the excess goods at the contract rate.[76]

The Effect of Nonconformity in a part of the goods: Assume the following facts. Seller agrees to sell Buyer 1,000 bags of flour. At the time of delivery, 100 bags are vermin infested and totally unusable. May buyer reject the 100 bags and accept the balance? May buyer reject the entire contract? As to the defective part, the CISG provides that the buyer may seek specific performance, obtain a price reduction, or avoid that part of the contract. In doing so, however, he must comply with the CISG's rules for those particular remedies.[77] As for avoiding the whole contract, a buyer may do so only if the partial delivery amounts to fundamental breach of the whole.[78] Therefore, it depends on the terms and wordings of the contract.

Seller's Remedies

The seller's remedies in the CISG mirror those of the buyer. Like the Buyer's remedies, the seller's remedies are both cumulative and immediate. That is, the right to recover damages is not lost if a buyer exercises any other available remedy, and courts will not grant the buyer a grace period in which to perform.

[1379]The remedies which are unique to the seller are (1) to compel specific performance, (2) to avoid the contract for a fundamental breach of failure to cure a defect, and (3) to obtain missing specifications. Again each of these remedies are meant to mirror the buyer's remedies.

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[70] Article 49f2): '…..incases 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; [or] (ii) after the expiration if the additional period of time fixed by the buyer…… or after the seller has declared that the he will not perform his obligations within such an addit8ional period.

[71] Article 48.

[72] Article 50.

[73] Article 79.

[74] Article 50.

[75] Article 52 (1). The buyer, however, may have an obligation under Article 86 to take possession of the good on behalf of the seller to prevent the seller from suffering injury.

[76] Article 52 (2)

[77] Article 51 (1)

[78] Article 51 (2)

[1379] Article 61.

Specific Performance: Assuming that a decree of specific performance is available under local law, a seller may require a buyer to (a) take delivery and pay the contract price or (b) perform any other obligation required by the contract. [1380] This rather unusual remedy is included in the Convention primarily for symmetry, as a balance – to the buyer's specific performance remedy. Its inclusion stresses the fact that the CISG required both parties to perform their obligations. However, because Article 28 of the Convention limits the availability of specific performance decrees to cases where the domestic court has power to grant a similar decree, the likelihood that it will be used very often is small. In common law countries, a suit to recover the full price from the buyer is not a form of 'specific performance.' Historically, specific performance was a decree issued by a court of equity. A suit to recover the price, normally called an action in 'debt' was obtained from a different court, a court of law. An action in debt, moreover, was only available on a *quid pro quo* basis. The seller could only recover the price for the things actually received by the buyer, and the buyer (at least in a court of law) could not be compelled to take delivery of the goods. This Tradition survives both in the United Kingdom's Sales of Goods Act of 1893, Ss 49), the American Uniform Commercial Code (Ss. 2-709), and in other common law statutes. The seller may recover the price, but only after 'the property in the goods has passed to the buyer'. [1381] Unlike the common law countries, the sales codes in civil law countries do have provisions that can require the buyer to take delivery and pay the full price. As a practical matter, however, they are seldom used. [1382] Rather, when a buyer refuses to take delivery, the seller commonly resells the goods on the buyers account and brings an action to recover any deficiency. Such a remedy for damages is – also allowed under the Convention. [1383] Therefore, this depends on the applicable laws governing the parties, seller and buyer.

Avoidance: the seller's avoidance remedy truly is the mirror image of the buyer's remedy. Like the buyer, the seller may only avoid the contract if there has been a fundamental breach or, following a Nachfirst notice, the buyer refuses to cure any defect in his performance. [1384] The rules applying to fundamental breach and the Nachfirst notice, discussed early, apply here as well.

Missing Specifications*:* The missing specifications remedy applies to a special problem that can face sellers obtaining specifications for goods which the buyer fails to supply. If the buyer does not reasonable produce the measurements that seller needs by the date specified in the contract or within a reasonable time after seller asks for them, the CISG allows the seller to ascertain them himself 'in accordance with the requirements of the buyer that may be known to him.' [1385] The seller must then inform the buyer of what he has done, and set a reasonable time period for the buyer to supply different specifications. However, if the buyer does not respond, the seller's specifications becomes 'binding.' [1386]

Remedies' Available to Both Buyers and Sellers

The remedies available to both buyers and sellers are: (1) suspension of performance, (2) avoidance in anticipation of a fundamental breach, (3) avoidance of an installment contract, and (4) damages.

Suspension of Performance: By the virtue of Article 71 of the Convention, the remedies of suspension of performance are as follows: (i) 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 his credit worthiness; or (b) his conduct in preparing to perform or in performing the contract. (ii) 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 entitled him to obtain them. The present paragraph relates only to the right in the goods between the buyer and the seller. 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. Paragraph (1) applies to threats of non- performance; paragraph (2) to threats of non-payment discovered after the goods are in transit; and paragraph – (3) required a suspending party to give notice and to resume his obligations under the contract if the other provides adequate assurances of his capability to perform. The drafting of paragraph (1) involved extensive negotiation. Reading 9-2 reviews the history of those negotiations, and compares article 71(1) with similar

[1380] Article 62.
[1381] United Kingdom, Sales of Goods Act of 1893, S. 49
[1382] See Dawson, J. 'Specific Performance in France and Germany', *Michigan Law Review*, Vol.57,p. 495 (1989); and G. Treitel, 'Remedies for Breach of. Contract', International Encylopedia of Comparative Law, Vol.7,Chap 16,Ss. 10-29, (1976).
[1383] Article 75
[1384] Article 64
[1385] Article 65 (1)
[1386] Article 65 (2)

provision in several domestic codes. Paragraph (2) of Article 71 applies to a special set of circumstances. The threat that the buyer will not pay must be discovered, after the goods are shipped, but before they are handed over by the carrier, and the seller must not have retained control over the goods (for example, he may have turned over a negotiable bills of lading to the buyer). [1387] In this situation; the seller can prevent the carrier from delivering the goods to the buyer. This right, however, 'relates only to the rights in the goods as between the buyer and the seller.' Should a third person acquire legal rights in the goods (e.g as the holder in due course of a negotiable Bill of lading), the CISG will not apply. [1388] Instead, the matter is left to domestic law; and in most cases, the third party right will prevail.

Anticipatory Avoidance: Anticipatory avoidance is different from the avoidance remedies that apply specification to buyers and sellers. Those remedies only apply after an offending party has committed a fundamental breach. The remedy provided in Article 72 arises as soon as. 'It is clear' that the other party 'will commit a fundamental reach. There seem to be only a few cases where this remedy can be invoked. These include: (a) The specific foods promised to the buyer are wrongfully sold to a third party, (b) The seller's only employee capable of producing the goods dies or is fired, (c) The seller's manufacturing plant is sold. [1389] In most other cases, the breach will already have occurred, or the circumstances will be such that a suspension of performance is the appropriate remedy. If a party opts to anticipatorily avoid, the CISG requires him, 'if time allows 'to notify the other party so that latter can provide adequate assurance of his performance' [1390] In practice, this is worth doing, both to comply with the Convention's general requirement of 'good faith' and to` minimize any challenges to the use of the remedy. [1391]

Avoidance of Installment Contracts: The CISG's rule for avoiding installment uses the same logic found in its other avoidance provisions. First, as to the particular installment if there was a 'fundamental breach with respect to that installment,' then the other party may declare the contract avoided with respect to installment.' [1392] Second, if the breach of one installment gives a party 'good grounds' to believe that a fundamental breach of later installments 'will occur,' then those later installments may be anticipatorily avoided. [1393] Finally, if the installments are interdependent, a fundamental breach of one installment will allow a party to avoid the entire contract (past and future installment included). [1394]

Damages: The basic rule on damages in the CISG is common to both the civil law common law worlds. Article 74 provides that:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the 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 arid matters of which he then knew or ought to have known, as possible consequence of the – breach of contract.

This rule that a breaching party is liable for any foreseeable damages, is derived from Section 1150 of the French Civil Code, which limits damages to those 'which were foreseen or which could have been foreseen at the time of the contract.' In England, the French law was referred to with favor in the landmark 1854 case of Hadly V Basendale, which established the 'foresee ability' or 'improbability' test as a common law rule. [1395] A similar, but slightly different test is followed in Germany and the Scandinavian countries.[1396] To calculate the damages, the Convention uses two different rules avoiding party that has entered into a good faith substitute transaction – the

[1387] Similar provision ^ can be found in many domestic codes. E.g., the US Uniform Commercial Code, Ss. 2-704; the Swedish Sales Act, Ss. 39; and the United Kingdom's Sale of Goods Act of 1893, as amended in 1979 Ss. 44-46. The German Democratic Republic's Intentional Commercial Contracts Act, Ss. 231 (1) had such a provision, but the Federal Republic of Germany's Civil Code does not. *Confirm* H. Dolle *et at, Kommentar zum Einheittichen Kaufrecht*, Art. 73 at p. 29 (1976)
[1388] Article 4 (h)
[1389] See Gulotta @ Anticipatory Breach – A Comparative Analysis'. *Tulane Law Review* Vol. 50, (1976)p. 932
[1390] Article 72 (2)
[1391] *See John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention* p. 402, not 2 (1987).
[1392] Article 73 (1)
[1393] Article 73 (2)
[1394] Article 73 (3)
[1395] *English Reports*, Vol. 156, p. 145. The English rule codified in the United Kingdom's sales of Goods Act of 1893 in Ss, 50 (2), 51 (2); however, the phrase 'loss directly and naturally resulting in the ordinary course of events' any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know'.
[1396] Treitel, G. 'Remedies for breach of Contract, '*International Encyclopedia of Comparative Law, Vol. 7* Cap. 16, Ss. 91 – 93 (1976), examines the extent to which the German concept of 'adequate causation' approximates the 'foreseeability' test. The Scandinavian countries' adoption of the German rule is discussed in Heller, 'The Limits of Contractual Damages in the Scandinavian Law of sales,' *Scandinavian Studies*, Vol. 10, pp. 40-79 (1978)

by substitute goods or the seller reselling the goods to another party – then measured by the difference between the contract price and the price ree substitute transaction. [1397] Alternatively, if the avoiding party did not enter into transaction, then the damages are calculated by taking the difference between price and the, current price at the time of avoidance. [1398] The current price is the price prevailing at the place when delivery of the goods should have been there is not current price at that place, the price at such other places as reasonable substrate.'[1399]

Excuses for Non-Performance

Two excuses are provided by the UN Convention for a party's failure to perform, force majeure, the other is 'dirty hands'.

Force Majeure: A party is not liable for any damages resulting from his failure to perform if he can show: (a) that his failure was 'due to an impediment beyond his control, (b) that the impediment was not something he could have reasonable taken into account at the time of contracting, and (c) that he remains unable to overcome the impediment or its consequences. [1400] This excuse, commonly known as force majeure, is not only narrowly defined; also it is limited in its application. [1401] It applies to situations – such as natural disasters, war, embargoes, strikes, breakdowns, and the bankruptcy of a supplier – that frustrates both the party attempting to perform and the party expecting performance because neither party is really at fault, the breaching party is excused from paying damages. He is not, however, exempted from the application of any other appropriate remedy (such as suspension of performance or avoidance).A party seeking to use the CISG's excuse of force majeure is also under some additional limitations. First, he has a duty to promptly notify the other of the impediment and its effect on his ability to perform. [102] Second, if his claim is based on failure to perform by a third party (such as supplier), the third person must himself be able to claim the excuse.[103] Finally, the excuse may only be used as long as the underlying impediment continues in existence.[104]

*Dirty Hands***:** The dirty hands excuse is based on a very simple premise, succinctly stated in Article 80 of the Convention that: 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 mission. For instance, if a seller agrees to deliver goods to buyer at buyers' warehouse, but buyers warehouse is locked and inaccessible at the time that seller is supposed to make delivery. Buyer cannot complain that seller failed to deliver on time. This provision presents a mutual ground for both parties to transact without much ado.

6. Conclusion

International trade is a matter of vital importance for developing countries since it can stimulate growth and contribute to poverty reduction. Trade is however an increasing complex issue and policy makers in developing countries will need to understand the many ramifications of multilateral trade agreements if their countries are to benefit from this engine of growth. The laws that regulate International trade are often complex and difficult to apply. This is so because, like other branches of international law, apart from regulating the conduct of parties, deals with the choice of law, especially where sanctions are to be imposed. Similarly, International trade issues have always been a source of serious controversy among nations. This is natural as every country very often tries to protect and put in place restrictive policies that would guarantee their citizens well being. This work examined also the structure, basic rules of contract while analyzing the rights and obligations of the parties. In addition, issues of performance of the contract and remedies available to the parties were discussed.

[1397] Article 75

[1398] Article 76 (1)

[1399] Article 76 (2)

[1400] Article 79 (1)

[1401] The CISG rule, based on civil law practice, is however, than the taile followed in common law countries. For example, US Uniform Commercial Code, Ss. 2-615 only applies, to a seller, and only in respect to two aspects of his performance: delay in delivery and nondelivery. For a Comparison of the CISG provision with various domestic rules, see John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, pp. 425-427 (1987).

[102] Article 79(4)

[103] Article 79(2)

[104] Article 79(3), and Ocean Tramp Tankers Corp VO Sovfracht (The Eugenia) UK, Ct of App. Civil Div. (1963) AJI E.R. p. 161 (1964).