

# LECTURE FOUR

## RIGHTS AND DUTIES IN INTERNATIONAL SALES CONTRACTS

The starting point for any consideration of the reciprocal rights and duties of the parties to any contract is the content of 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, then any consideration of reciprocal rights and duties 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 terms of the contract and the convention rights and duties 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, other relevant aspects of the law of obligations include:-

- Representation (Misrepresentations Act 1967 and the Torts of Deceit and Fraud.
- Common law rules on incorporation of terms into a contract
- Rules of vitiation, such as mistake, duress and frustration.

With the above in mind, the object here is to examine the respective rights and duties of the parties to an international trade contract 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 below<sup>1</sup> 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.

<sup>1</sup> 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.

## LECTURE FOUR

### VIENNA CHAPTER II OBLIGATIONS OF THE SELLER

<b>30 VIENNA Seller's principal obligations</b>	
The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.	

<b>18 ULIS Seller's duty to deliver</b>	
The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law.	

<b>27 Duties of seller and buyer : SOGA 1979</b>	
It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.	

#### Vienna : Section 1: Delivery of the goods and handing over of documents.

<b>22 ULIS Delivery within a reasonable time</b>	
Where the date of delivery has not been determined in accordance with the provisions of Articles 20 or 21, the seller shall be bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and to the circumstances.	

<b>44 ULIS Outside Art 43, seller's right to late delivery</b>	For example?
<ol style="list-style-type: none"> <li>1. In cases not provided for in Article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.</li> <li>2. The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered to goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided.</li> </ol>	

<b>31 VIENNA Place of delivery</b>	
<p>If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:</p> <ol style="list-style-type: none"> <li>(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;</li> <li>(b) if, in cases not within the preceding sub-para, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;</li> <li>(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.</li> </ol>	

## PRIVATE INTERNATIONAL LAW

<b>19 ULIS Meaning of delivery</b>	
<ol style="list-style-type: none"> <li>1. Delivery consists in the handing over of goods which conform with the contract.</li> <li>2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer.</li> <li>3. Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to handing over the goods, sent to the buyer notice of the consignment and, if necessary, some document specifying the goods.</li> </ol>	
<b>29. Rules about delivery : SOGA 1979</b>	
<ol style="list-style-type: none"> <li>(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.</li> <li>(2) Apart from any such contract, express or implied, the place of delivery is the seller's place of business if he has one, and if not, his residence; except that, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.</li> <li>(3) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.</li> <li>(4) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf; but nothing in this section affects the operation of the issue or transfer of any document of title to goods.</li> <li>(5) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact.</li> <li>(6) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.</li> </ol>	
<b>32 VIENNA Shipping arrangements</b>	
<ol style="list-style-type: none"> <li>1. If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.</li> <li>2. If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.</li> <li>3. If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.</li> </ol>	

## LECTURE FOUR

<b>32 ULIS Default of delivery to carrier</b>	
<ol style="list-style-type: none"> <li>1. If delivery is to be effected by handing over the goods to a carrier and the goods have been handed over at a place other than that fixed, the buyer may declare the contract avoided, whenever the failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract. He shall lose this right if he has not promptly declared the contract avoided.</li> <li>2. The buyer shall have the same right, in the circumstances and on the conditions provided in paragraph 1 of this Article, if the goods have been despatched to some place other than that fixed.</li> <li>3. If despatch from a place or to a place other than that fixed does not amount to a fundamental breach of the contract, the buyer may only claim damages in accordance with Article 82.</li> </ol>	

<b>54 ULIS Seller's duty &amp; contract of carriage</b>	
<ol style="list-style-type: none"> <li>1. If the seller is bound to despatch the goods to the buyer, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed.</li> <li>2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.</li> </ol>	

<b>32. Delivery to carrier : SOGA 1979</b>	
<ol style="list-style-type: none"> <li>(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be delivery of the goods to the buyer.</li> <li>(2) Unless otherwise authorised by the buyer, the seller must make such contact with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.</li> <li>(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods are at his risk during such sea transit.</li> <li>(4) In a case where the buyer deals as consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored, but if in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to the carrier is not delivery of the goods to the buyer.</li> </ol>	

<b>33 VIENNA Time for delivery</b>	
<p>The seller must deliver the goods:</p> <ol style="list-style-type: none"> <li>(a) if a date is fixed by or determinable from the contract, on that date;</li> <li>(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or</li> <li>(c) in any other case, within a reasonable time after the conclusion of the contract.</li> </ol>	

## PRIVATE INTERNATIONAL LAW

<b>11 ULIS Reasonable time for performance</b>	
Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed.	
<b>20 ULIS Delivery date a condition</b>	
Where the parties have agreed upon a date for delivery or where such date is fixed by usage, the seller shall, without the need for any other formality, be bound to deliver the goods at that date, provided that the date thus fixed is determined or determinable by the calendar or is fixed in relation to a definite event, the date of which can be ascertained by the parties.	
<b>21 ULIS Freedom of seller to select delivery date in a time band</b>	
Where by agreement of the parties or by usage delivery shall be effected within a certain period (such as a particular month or season), the seller may fix the precise date of delivery, unless the circumstances indicate that the fixing of the date was reserved to the buyer..	
<b>31. Instalment deliveries : SOGA 1979</b>	
<p>(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments.</p> <p>(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.</p>	
<b>34 VIENNA Documents relating to the goods</b>	
If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.	
<b>50 ULIS Delivery of documents</b>	
Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.	
<b>51 ULIS Documentary default, s 24-32 &amp; 41-49 apply</b>	
If the seller fails to hand over the documents as provided in Article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under Articles 24 to 32 or under Articles 41 to 49, as the case may be.	

## LECTURE FOUR

### Vienna : Section II Conformity of the goods and third party claims

<b>35 VIENNA Conformity of the goods</b>	
<ol style="list-style-type: none"> <li>1. The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.</li> <li>2. Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:             <ol style="list-style-type: none"> <li>(a) are fit for the purposes for which goods of the same description would ordinarily be used;</li> <li>(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;</li> <li>(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;</li> <li>(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.</li> </ol> </li> <li>3. The seller is not liable under subparagraphs a to d of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.</li> </ol>	

<b>33 ULIS Non-conforming goods</b>	
<ol style="list-style-type: none"> <li>1. The seller shall not have fulfilled his obligation to deliver the goods, where he has handed over:             <ol style="list-style-type: none"> <li>(a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;</li> <li>(b) goods which are not those to which the contract relates or goods of a different kind;</li> <li>(c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;</li> <li>(d) goods which do not possess the qualities necessary for their ordinary or commercial use;</li> <li>(e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;</li> <li>(f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.</li> </ol> </li> <li>2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.</li> </ol>	

<b>34 ULIS Art 33 rights exclusive</b>	
In the cases to which Article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods.	

<b>11. When condition to be treated as warranty : SOGA 1979</b>	
<ol style="list-style-type: none"> <li>(1) This section does not apply to Scotland.</li> <li>(2) Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.</li> </ol>	

## PRIVATE INTERNATIONAL LAW

<p>(3) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.</p> <p>(4) Subject to section 35A below where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.</p> <p>(6) Nothing in this section affects a condition or warranty whose fulfilment is excused by law by reason of impossibility or otherwise. .... (7) <i>Omitted</i></p>	
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<p><b>13. Sale by description : SOGA 1979</b></p> <p>(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.</p> <p>(1A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition.</p> <p>(2) If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.</p> <p>(3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer. (4) <i>omitted</i></p>	
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<p><b>14. Implied terms about quality or fitness : SOGA 1979</b></p> <p>(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale.</p> <p>(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.</p> <p>(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.</p> <p>(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—</p> <ul style="list-style-type: none"> <li>(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,</li> <li>(b) appearance and finish,</li> <li>(c) freedom from minor defects,</li> <li>(d) safety, and</li> <li>(e) durability.</li> </ul> <p>(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—</p> <ul style="list-style-type: none"> <li>(a) which is specifically drawn to the buyer's attention before the contract is made,</li> <li>(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or</li> <li>(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.</li> </ul>	
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## LECTURE FOUR

<p>(2D) If the buyer deals as consumer or, in Scotland, if a contract of sale is a consumer contract, the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.</p> <p>(2E) A public statement is not by virtue of subsection (2D) above a relevant circumstance for the purposes of subsection (2A) above in the case of a contract of sale, if the seller shows that—</p> <p>(a) at the time the contract was made, he was not, and could not reasonably have been, aware of the statement,</p> <p>(b) before the contract was made, the statement had been withdrawn in public or, to the extent that it contained anything which was incorrect or misleading, it had been corrected in public, or</p> <p>(c) the decision to buy the goods could not have been influenced by the statement.</p> <p>(2F) Subsections (2D) and (2E) above do not prevent any public statement from being a relevant circumstance for the purposes of subsection (2A) above (whether or not the buyer deals as consumer or, in Scotland, whether or not the contract of sale is a consumer contract) if the statement would have been such a circumstance apart from those subsections.</p> <p>(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—</p> <p>(a) to the seller, or</p> <p>(b) where the purchase price of part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,</p> <p>any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.</p> <p>(4) An implied term about quality or fitness for a particular purpose may be annexed to a contract of sale by usage.</p> <p>(5) The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.</p> <p>(6) As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions. (7) &amp; (8) omitted</p>	
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### *Vienna : Sale by sample*

<p><b>15. Sale by sample : SOGA 1979</b></p> <p>(1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.</p> <p>(2) In the case of a contract for sale by sample there is an implied term—</p> <p>(a) that the bulk will correspond with the sample in quality;</p> <p>(c) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.</p> <p>(3) As regards England and Wales and Northern Ireland, the term implied by subsection (2) above is a condition. ....(4) omitted.</p>	
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## PRIVATE INTERNATIONAL LAW

<b>36 VIENNA Damage to goods: effect on conformity</b>	
<ol style="list-style-type: none"> <li>1. The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.</li> <li>2. The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics</li> </ol>	
<b>37 VIENNA Right to cure up to date for delivery</b>	Cross ref 44 ULIS above
<p>If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention</p>	
<b>45 ULIS Short delivery of conforming goods 42/43 applies</b>	
<ol style="list-style-type: none"> <li>1. where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of Articles 43 and 44 shall apply in respect of the part or quantity which is missing or which does not conform with the contract.</li> <li>2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.</li> </ol>	
<b>38 VIENNA Time for examining the goods</b>	
<ol style="list-style-type: none"> <li>1. The buyer must examine the goods, or cause them to be examined, within a short a period as is practicable in the circumstances.</li> <li>2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.</li> <li>3. If the goods are redirected in transit or re-dispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or re-dispatch, examination may be deferred until after the goods have arrived at the new destination.</li> </ol>	
<b>36 ULIS Knowledge of non-conformity - waiver</b>	
<p>The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in sub-paragraphs (d), (e) or (f) of paragraph I of Article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity.</p>	

## LECTURE FOUR

<b>38 ULIS Time to examine goods</b>	
<ol style="list-style-type: none"> <li>1. The buyer shall examine the goods, or cause them to be examined, promptly.</li> <li>2. In case of carriage of the goods the buyer shall examine them at the place of destination.</li> <li>3. If the goods are re-despatched by the buyer without transshipment and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such re-despatch, examination of the goods may be deferred until they arrive at the new destination.</li> <li>4. The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.</li> </ol>	

<b>39 VIENNA Notice for lack of conformity</b>	
<ol style="list-style-type: none"> <li>1. The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.</li> <li>2. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.</li> </ol>	

<b>39 ULIS Prompt notice of non-conformity - waiver</b>	
<ol style="list-style-type: none"> <li>1. The buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in Article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.</li> <li>2. In giving notice to the seller of any lack of conformity, the buyer shall specify its nature and invite the seller to examine the goods or to cause them to be examined by his agent.</li> <li>3. where any notice referred to in paragraph 1 of this Article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.</li> </ol>	

<b>43 ULIS Avoidance for breach - waiver</b>	
<p>The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in the case to which paragraph 2 of Article 42 applies, after the expiration of the period referred to in that paragraph.</p>	

## PRIVATE INTERNATIONAL LAW

<b>40 VIENNA Seller's knowledge of non-conformity</b>	
The seller is not entitled to rely on the provisions of Articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer	
<b>10 ULIS Breach –knowledge &amp; intent</b>	
For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.	
<b>13 ULIS Knowledge – reasonableness test</b>	
For the purposes of the present Law, the expression 'a party knew or ought to have known', or any similar expression, refers to what should have been known to a reasonable person in the same situation.	
<b>41 VIENNA Third-party claims to goods</b>	
The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by Article 42	
<b>52 ULIS Defective title</b>	
<ol style="list-style-type: none"> <li>1. Where the goods are subject to a right or claim of a third person, the buyer, unless he agreed to take the goods subject to such right or claim, shall notify the seller of such right or claim, unless the seller already knows thereof, and request that the goods should be freed therefrom within reasonable time or that other goods free from all rights and claims of third persons to be delivered to him by the seller.</li> <li>2. If the seller complies with a request made under paragraph 1 of this Article and the buyer nevertheless suffers a loss, the buyer may claim damages in accordance with Article 82.</li> <li>3. If the seller fails to comply with a request made under paragraph I of the Article and a fundamental breach of the contract results thereby, the buyer may declare the contract avoided and claim damages in accordance with Articles 84 to 87. If the buyer does not declare the contract avoided or if there is no fundamental breach of the contract, the buyer shall have the right to claim damages in accordance with Article 82.</li> <li>4. The buyer shall lose his right to declare the contract avoided if he fails to act in accordance with paragraph 1 of this Article within a reasonable time from the moment when he became aware or ought to have become aware of the right or claim of the third person in respect of the goods.</li> </ol>	

## LECTURE FOUR

<b>42 VIENNA Third-party claims based on a patent or other intellectual property</b>	
<p>1. The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:</p> <p>(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that state; or</p> <p>(b) in any other case, under the law of the State where the buyer has his place of business.</p> <p>2. The obligation of the seller under the preceding paragraph does not extend to cases where:</p> <p>(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or</p> <p>(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.</p>	

<b>53 ULIS Art 52 remedy exclusive</b>	
The rights conferred on the buyer by Article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person..	

<b>43 VIENNA Notice of third-party claim</b>	
<p>1. The buyer loses the right to rely on the provisions of Article 41 or Article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.</p> <p>2. The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.</p>	

<b>44 VIENNA Excuse for failure to notify</b>	
Notwithstanding the provisions of para 1 of Article 39 and para I of Article 43, the buyer may reduce the price in accordance with Article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice	

### VIENNA CHAPTER III OBLIGATIONS OF THE BUYER

<b>53 VIENNA Buyer's principal obligations</b>	
The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.	

<b>56 ULIS Duty to pay &amp; take delivery</b>	
The buyer shall pay the price for the goods and take delivery of them, as required by the contract and the present law.	

<b>69 ULIS Fixed payment date</b>	
The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee.	

# PRIVATE INTERNATIONAL LAW

## VIENNA : Section I. Payment of the price

<b>54 VIENNA Enabling steps</b>	
The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made	
<b>38. Unpaid seller defined : SOGA 1979</b>	
<p>(1) The seller of goods is an unpaid seller within the meaning of this Act—</p> <p style="margin-left: 20px;">(a) when the whole of the price has not been paid or tendered;</p> <p style="margin-left: 20px;">(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.</p> <p>(2) In this Part of this Act 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid (or is directly responsible for) the price.</p>	
<b>55 VIENNA Open-price contracts</b>	
Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.	
<b>57 ULIS Seller's usual price</b>	cross reference 12 ULIS
Where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract.	
<b>8. Ascertainment of price : SOGA 1979</b>	
<p>(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.</p> <p>(2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay a reasonable price.</p> <p>(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.</p>	
<b>9. Agreement to sell at valuation : SOGA 1979</b>	
<p>(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.</p> <p>(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.</p>	

## LECTURE FOUR

<b>56 VIENNA Net weight</b>	
If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.	
<b>58 ULIS Net weight pro rata price</b>	
If the price is fixed according to the weight of the goods, it shall, in case of doubt be determined by the net weight.	
<b>30. Delivery of wrong quantity : SOGA 1979</b>	
<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.</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>	
<b>57 VIENNA Place for payment</b>	
<p>1. if the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:</p> <p style="margin-left: 20px;">(a) at the seller's place of business; or</p> <p style="margin-left: 20px;">(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.</p> <p>2. The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.</p>	
<b>59 ULIS Place of payment</b>	
<p>1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place.</p> <p>2. Where in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller.</p>	
<b>58 VIENNA Time for payment; inspection of the goods</b>	Cross ref s32 SOGA 1979
<p>1. If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.</p> <p>2. If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.</p>	

## PRIVATE INTERNATIONAL LAW

3. The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity	
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<b>60 ULIS Fixed payment date</b>	
Where the parties have agreed upon a date for the payment of the price or where such a date is fixed by usage, the buyer shall, without the need for any other formality, pay the price at that date.	

<b>71 ULIS Delivery &amp; payment concurrent unless otherwise provided</b>	
Except as otherwise provided in Article 72, delivery of the goods and payment of the price shall be concurrent conditions. Nevertheless, the buyer shall not be obliged to pay the price until he has had an opportunity to examine the goods.	

<b>96 ULIS Price due when risk passes unless damage seller's fault</b>	
Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible.	

<b>59 VIENNA Payment due without request</b>	
The buyer must pay the price on the date fixed by or determinable from the contract and this convention without the need for any request or compliance with any formality on the part of the seller	

<b>72 ULIS Proforma payment / Reservation of title / payment against documents</b>	
<ol style="list-style-type: none"> <li>1. Where the contract involves carriage of the goods and where delivery is by virtue of paragraph 2 of Article 19, effected by handing over the goods to the carrier, the seller may either postpone despatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. In the latter case, he may require that the goods shall not be handed over to the buyer at the place of destination except against payment of the price and the buyer shall not be bound to pay the price until he has had an opportunity to examine the goods.</li> <li>2. Nevertheless, when the contract requires payment against documents, the buyer shall not <i>be</i> entitled to refuse payment of the price on the ground that he has not had the opportunity to examine the goods.</li> </ol>	

### Vienna : Section II Taking delivery

<b>90 ULIS Delivery costs to seller : post delivery to buyer</b>	
The expenses of delivery shall be borne by the seller; all expenses after delivery shall be borne by the buyer.	

<b>60 VIENNA Buyer's obligation to take delivery</b>	
<p>The buyer's obligation to take delivery consists:</p> <ol style="list-style-type: none"> <li>(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and</li> <li>(b) in taking over the goods.</li> </ol>	

## LECTURE FOUR

<b>65 ULIS Buyer must facilitate delivery</b>	
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.	

### VIENNA : CHAPTER IV PASSING OF RISK

<b>6. Goods which have perished : SOGA 1979</b>	
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.	

<b>7. Goods perishing before sale but after agreement to sell : SOGA 1979</b>	
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.	

<b>66 VIENNA Loss or damage after risk passed to buyer</b>	
Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.	

<b>97 ULIS Risk passes on delivery / rejection non-conformity/waiver</b>	
<ol style="list-style-type: none"> <li>1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provision of the contract and the present Law.</li> <li>2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement.</li> </ol>	

<b>98 ULIS Risk passes on due date of delivery where buyer in default of delivery</b>	
<ol style="list-style-type: none"> <li>1. Where the handing over of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.</li> <li>2. Where the contract relates to a sale of unascertained goods, delay on the part of the buyer shall cause the risk to pass only when the seller has set aside goods manifestly appropriated to the contract and has notified the buyer that this has been done.</li> <li>3. Where unascertained goods are of such a kind that the seller cannot set aside a part of them until the buyer takes delivery, it shall be sufficient for the seller to do all acts necessary to enable the buyer to take delivery..</li> </ol>	

<b>100 ULIS Risk of un-appropriated goods remains with seller</b>	
If, in the case to which paragraph 3 of Article 19 applies, the seller, at the time of sending the notice or other document referred to in that paragraph knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document.	

## PRIVATE INTERNATIONAL LAW

<b>101 ULIS Passing of risk not linked to contractual expense clauses</b>	
The passing of the risk shall not necessarily be determined by the provisions of the contract concerning expenses.	
<b>67 VIENNA Risk when the contract involves carriage</b>	
<ol style="list-style-type: none"> <li>1. If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.</li> <li>2. Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.</li> </ol>	
<b>99 ULIS Risk – delivery to carrier : pre-contract loss of goods</b>	
<ol style="list-style-type: none"> <li>1. where the sale is of goods in transit by sea, the risk shall be borne by the buyer as from the time at which the goods were handed over to the carrier.</li> <li>2. where the seller, at the time of the conclusion of the contract, knew or ought to have known that the goods had been lost or had deteriorated, the risk shall remain with him until the time of the conclusion of the contract.</li> </ol>	
<b>68 VIENNA Sale of goods during transit</b>	
The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer, from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time or the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller	
<b>69 VIENNA General residual rules on risk</b>	
<ol style="list-style-type: none"> <li>1. In cases not within Articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.</li> <li>2. However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.</li> <li>3. If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.</li> </ol>	

## LECTURE FOUR

<b>74 ULIS Risk lies where contract places it</b>	
<ol style="list-style-type: none"> <li>1. where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.</li> <li>2. where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.</li> <li>3. The relief provided by this Article for one of the parties shall not include the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible..</li> </ol>	

<b>70 VIENNA Risk when seller is in breach</b>	
If the seller has committed a fundamental breach of contract, Articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.	

<b>35 ULIS Conformity tested when risk passes</b>	
<ol style="list-style-type: none"> <li>1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes. However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.</li> <li>2. The seller shall be liable for the consequences of any lack of conformity occurring after the time fixed in paragraph 1 of this Article if it was due to an act of the seller or of a person for whose conduct he is responsible.</li> </ol>	

### Vienna : Section VI Preservation of the goods

<b>85 VIENNA Seller's duty to preserve goods</b>	
If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer,	

<b>91 ULIS Recovery of costs of preserving goods in buyer's default</b>	
Where the buyer is in delay in taking delivery of the goods or in paying the price, the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer.	

## PRIVATE INTERNATIONAL LAW

<b>86 VIENNA Buyer's duty to preserve goods</b>	
<ol style="list-style-type: none"> <li>1. If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.</li> <li>2. If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorised to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.</li> </ol>	

<b>92 ULIS Buyer's duty to preserve rejected goods</b>	
<ol style="list-style-type: none"> <li>1. Where the goods have been received by the buyer, he shall take reasonable steps to preserve them if he intends to reject them: he shall have the right to retain them until he has been reimbursed his reasonable expenses by the seller.</li> <li>2. Where the goods despatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without reasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorised to take charge of the goods on his behalf is present at such destination..</li> </ol>	

<b>87 VIENNA Deposit of goods in warehouse</b>	
A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.	

<b>93 ULIS Recovery of warehouse costs of preservation</b>	
The party who is under an obligation to take steps to preserve the goods may deposit them in the warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.	

**EXAM QUESTION**

1(i) In what circumstances would a judge or arbitrator consider respectively the provisions of :-  
 (a) ULIS,  
 (b) The VIENNA convention, or  
 (c) The Sale of Goods Act 1979  
 with regard to the respective contractual rights and duties of the parties to an international sale of goods dispute?  
 and

1(ii) Which of these regimes, or combination of regimes, do you consider provides the most appropriate contractual mechanism for the governance of international sales contracts?