

REMEDIES FOR BREACH OF CONTRACT UNDER THE INTERNATIONAL SALES CONVENTION*

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Introduction

The UN Convention on Contracts for the International Sale of Goods (the CISG), adopted by diplomatic conference at Vienna in 1980, is one of the most notable of modern initiatives for the harmonisation and unification of the law of international trade.¹ Developed through the processes of the United Nations Commission on International Trade Law (UNCITRAL), the CISG has been widely adhered to by trading nations the world over.² The CISG elaborates for the international sale of goods a uniform substantive

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¹ The summary records and other documents of the Vienna conference are found in *Official Records of the United Nations Conference on Contracts for the International Sale of Goods*, Vienna, 10 March - 11 April 1980, UN Doc A/CONF.97/19, Sales No. E.81.IV.3 (1981) (hereinafter *Official Records*). Selected conference materials, as well as documents that led to the CISG, are reproduced in J Honnold, *Documentary History of the Uniform Law for International Sales*, Kluwer, Deventer, 1989. The text of the CISG is set forth in Annex 1 of the "Final Act of the United Nations Conference on Contracts for the International Sale of Goods", UN Doc A/CONF. 97/18, reproduced in *Official Records*, at 176-90 and in (1980) 19 *International Legal Materials* 668. It is also available in many other places.

² The CISG came into force internationally on 1 January 1988. As at 8 September 1997, the following forty-nine countries had become parties to the Convention: Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Estonia, Egypt, Finland, France, Georgia, Germany, Guinea, Hungary, Iraq, Italy, Lesotho, Latvia, Lithuania, Luxembourg, Moldova, Mexico, Netherlands, New Zealand, Norway, Poland, Romania, Russian Federation, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uzbekistan, Yugoslavia, Zambia.

For Australia, the CISG entered into effect on 1 April 1989, being implemented by uniform legislation in each state and territory.

law which covers contract formation, and the operation and effect of the sale contract.³ Its preamble informs that the CISG has the ultimate purpose of contributing to the removal of legal barriers in international trade and promoting the development of international trade.

A central element of the CISG is its scheme of remedies for breach of contract, the scheme being embedded in Part III (“*Sale of Goods*”, Arts 25-88). This paper explores the CISG rules for remedies and breach of contract, adopting a comparative approach so as to discern the extent to which the CISG bears the imprint of common law or civil law systems. Not surprisingly, the CISG picks up some rules found in or associated with one or more of the influential domestic sales laws, such as the Anglo-Australian *Sale of Goods Act* regime,⁴ the *United States Uniform Commercial Code* (UCC), the *German Civil Code* (*Bürgerliches Gesetzbuch*, BGB), or the *French Civil Code* (CC). But the CISG does not hesitate to modify domestic concepts or innovate fresh solutions when the needs of international trade require. The CISG remedies can be seen to be readily responsive to modern trading conditions as well as to the individual circumstances of traders.

³ There is now a large body of literature on the CISG. An UNCITRAL analysis of the 1979 draft text of the CISG is found in “Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat”, UN Doc A/CONF. 97/15 (hereinafter Secretariat Commentary), reproduced in *Official Records*, n1 at 14-66. The following are leading treatises on the CISG: J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 2nd ed, Kluwer, Deventer, 1991; P Schlechtriem, *Uniform Sales Law: The UN - Convention on Contracts for the International Sale of Goods*, Manzsche Verlags, Vienna, 1986; N Galston and H Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, Matthew Bender, New York, 1984; P Sarcevic and P Volken (eds), *International Sale of Goods: Dubrovnik Lectures*, Oceana, New York, 1986; C Bianca and M Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè, Milan, 1987; A Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, Kluwer, Deventer, 1989; F Enderlein and D Maskow, *International Sales Law*, Oceana, New York, 1992.

⁴ This refers to the largely uniform legislation, adopted by most British Commonwealth countries, based on the *Sale of Goods Act* 1893 (UK). For Australian jurisdictions, see: *Sale of Goods Act* 1895 (WA); *Sale of Goods Act* 1895 (SA); *Sale of Goods Act* 1896 (Qld); *Sale of Goods Act* 1896 (Tas); *Sale of Goods Act* 1923 (NSW); *Sale of Goods Act* 1954 (ACT); *Sale of Goods Act* 1972 (NT); *Goods Act* 1958 (Vic). Hereafter, references to specific provisions of the regime will be to those in the *Sale of Goods Act* 1923 (NSW). In the United Kingdom, the 1893 Act and later amendments were consolidated in the *Sale of Goods Act* 1979 (UK).

SOME GENERAL MATTERS AS TO REMEDIES AND BREACH

Breach of Contract⁵

Along with the various legal systems, the CISG imposes contractual liability only where a breach of contract has occurred. While not attempting a specific definition of breach of contract, the CISG allows that its remedies for breach can be resorted to where a party 'fails to perform' any of its obligations under the contract or the Convention (Arts. 45 and 61). Unlike the common law, breach of contract under the CISG is not necessarily limited to an unexcused failure in performance.⁶ In the civil law tradition it is usual for purposes of remedies to distinguish different types of breach of contract, such as delay and non-performance (as in French law) or delay, impossibility and defective performance (as in German law). On the whole, however, the common law and the CISG adopt a unified concept of breach of contract, though some remedies of their nature may only be appropriate for particular types of breach.⁷

Fault in regard to breach and remedies⁸

It is a theoretical basis of the civil law that a party in breach of contract will only be liable if the conduct of that party is legally blameworthy: fault is seen as a prerequisite for the availability of contractual remedies, such as damages. The common law, on the other hand, favours a position of strict liability for breach of contract, and in so far as fault is relevant to breach at all, it is relevant in a substantive rather than a remedial sense. But these differences between the civil law and the common law are reduced through the qualifications that each make to their general approaches. Nonetheless, the stance of the CISG more closely approximates that of the common law.

⁵ A succinct discussion of breach of contract in comparative perspective is provided by K Zweigert and H Kötz, *Introduction to Comparative Law*, 2nd ed, OUP, Oxford, 1992 at Ch 43.

⁶ In particular, refer to Article 79 (excuse for non-performance) which contains the CISG response to problems of force majeure and frustration. Even if a failure in performance is excused by Article 79, the non-performing party is only exempted from liability for damages; other rights under the CISG are still available to the other party (Art 79(5)).

⁷ Honnold, n3 at 63-64, 355; Schlechtriem, n3 at 75; GH Treitel, *Remedies for Breach of Contract: A Comparative Account*, OUP, Oxford, 1988 at 129-31.

⁸ Generally, Treitel, n7 at Ch2 "Fault", esp at 7-24.

Fault is not a requirement for any remedy under the CISG.⁹ Furthermore a party may avail itself of CISG remedies if the other party fails to perform “any” of its obligations under the contract or the Convention (Arts. 45 and 61).

No requirement of notice of default¹⁰

As a consequence of the fault principle, civil law systems generally hold that a creditor must be put in default before any remedy is available for its delayed performance. This is done by sending a notice (*Mahnung, mise en demeure*) demanding performance; though notice is not required where it would be useless, or where performance is on a date fixed by the contract. By contrast, the attitude of common law systems is that performance is due without demand; even where a date for performance is not fixed by the contract, performance is due, without demand, within a reasonable time. This approach is also adopted by the CISG: Article 33 (Time for delivery by seller) and Article 59 (Payment by buyer due without request).

Fundamental Breach

The concept of fundamental breach plays a crucial role in the scheme of remedies available under the CISG. Article 25 provides:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Fundamental breach under the CISG affords an aggrieved party a basis to avoid a contract in respect of:

- (a) non-performance by the other party (Arts. 49(1)(a), 64(1)(a));
- (b) anticipatory breach (Art. 72(1));

⁹ Secretariat Commentary, in *Official Records*, n1 at 37.

¹⁰ On requirements of notice of default, see Treitel, n7 at 132-42.

- (c) instalment contracts (Art. 73(1),(2));
- (d) partial delivery or non-conformity of part of the goods (Art. 51(2)).

As well, fundamental breach can give rise to the buyer's right to require delivery of substitute goods (Art. 46(2)) and enables rights to be preserved which would otherwise be lost after the passing of risk (Art. 70).

The Article 25 definition of fundamental breach has no exact counterpart in domestic laws.¹¹ But all legal systems comprehend the idea of a serious breach of contract which will justify avoidance (or "termination", "rescission" or "cancellation") of the contract itself. Indeed, the common law has even used the expression "fundamental breach" to denote a sufficiently serious breach of an intermediate term of the contract, such as to afford a right of termination.¹² The CISG, however, does not adopt the common law classification of contract terms into warranties, conditions and intermediate terms. In accordance with a basic policy of preserving the contract, the CISG does not contemplate the contract being avoided for minor or technical breaches.¹³ By contrast, under common law systems any breach of a "condition" will give rise to a right to terminate the contract.

There are a number of elements embodied in the concept of fundamental breach in Article 25:

- (1) The aggrieved party must suffer a detriment: this does not necessarily equate to "damage", but would seem to be satisfied if some injury or negative effect is felt.¹⁴

¹¹ For the history of the drafting of Article 25, see S Michida, "Cancellation of Contract" (1979) 27 *American Journal of Comparative Law* 279; Honnold, n3 at 253-61.

¹² *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66. While this test is also one of substantial deprivation of benefit, it should not be simply equated with Article 25, which was developed in a different context and also embodies a basic element of foreseeability. See B Nicholas, "The Vienna Convention on International Sales Law" (1989) 105 *Law Quarterly Review* 201 at 218-19; JW Carter, "Party Autonomy and Statutory Regulation: Sale of Goods" (1993) 6 *Journal of Contract Law* 93 at 101-102. Fundamental breach under Article 25 of course has nothing to do with the now outmoded common law usage denoting a breach of contract for which liability could not be excluded.

¹³ The parties may in their contract provide a less strict, or even stricter, basis for avoidance by relying on Article 6, which allows parties to exclude the CISG or vary its provisions.

¹⁴ Will in *Bianca and Bonell*, n3 at 211-12.

- (2) The detriment must result in a substantial deprivation to the aggrieved party. What amounts to such a deprivation will depend on the circumstances and the terms of the particular contract.¹⁵
- (3) The deprivation must relate to the expectation interest of the aggrieved party, that interest having aspects that are subjective (the expectation of the individual) and objective (the expectation to be discerned from the contract).
- (4) The result of the breach must have been foreseen by the party in breach, or foreseeable by a reasonable person in the position of that party. It is not stipulated when foreseeability is to be considered. The required time might be thought to be the conclusion of the contract, but there is cogent argument that circumstances arising up to the time of breach can make the detriment foreseeable.¹⁶
- (5) As to burden of proof for Article 25 purposes, the aggrieved party must initially establish detriment and substantial deprivation, but a presumption of foreseeability then arises which has to be rebutted by the party in breach.¹⁷

Delay or Error in Communications

It is to be noted that in Part II (“Formation of Contract”) of the CISG, a receipt rule in Article 18 places the risks of transmission of an acceptance on the sender i.e. the offeree. But with respect to communications within Part III (“Sale of Goods”, Arts. 25-88), the CISG in general applies a dispatch rule. Thus Article 27 states that, unless otherwise expressly provided, the risk of delay or error in the transmission of any notice, request or other communication under Part III or its failure to arrive is to be borne by the addressee. Exceptions to the rule making communications effective on

¹⁵ Overall, it may be relevant to ask whether the injured party has no further interest in the performance of the contract after the particular breach: Schlechtriem, n3 at 59-60.

¹⁶ See J Feltham, “The United Nations Convention on Contracts for the International Sale of Goods” [1981] *Journal of Business Law* 346 at 353; Will in Bianca and Bonell, n3 at 220-21; Honnold, n3 at 256-58.

¹⁷ Will in Bianca and Bonell, n3 at 216; Honnold, n3 at 258; JG Stern, “A Practitioner’s Guide to the United Nations Convention on Contracts for the International Sale of Goods (1983) 16 *New York University Journal of International Law & Policy* 81 at 97.

dispatch are to be found in Articles 47(2), 48(4), 63(2), 65(2) and 79(4). As Schlechtriem notes, both the general rule in Article 27 and its exceptions are based on the idea that the hazard of transmission should be borne by the one who, by deviating from normal performance, caused the communication to be sent.¹⁸

Modification and Termination of Contract

Under Article 29(1), parties are able to modify or terminate their contract by mere agreement, thereby obviating any need for consideration. Article 29(2) establishes that a written contract which provides that any modification or termination by agreement also be in writing, cannot otherwise be modified or terminated, except that a party by its conduct may be precluded from asserting such a provision to the extent that the other party has relied on that conduct.¹⁹

THE REMEDIES FOR BREACH OF CONTRACT

Generally

The CISG deals with the remedies for breach of contract available to the buyer and seller in Articles 45-52 and 61-65 respectively. These articles disclose that the CISG offers a broader array of remedies than do many domestic laws.²⁰ Its remedial scheme represents an amalgamation of approaches adapted from both the civil law and the common law. Nonetheless, the scheme is closely focussed on the legal pitfalls in international sales and aspires to strike an appropriate balance between the

¹⁸ Schlechtriem, n3 at 61.

¹⁹ See generally, R Hillman, "Article 29(2) of the United Nations Convention on Contracts for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of No Oral Modification Clauses" (1988) 21 *Cornell International Law Journal* 449.

²⁰ For a detailed comparative discussion of remedial systems including the CISG, refer to Treitel, n3 passim. Some general discussions in the law journals of the CISG remedial provisions include: S Fisher, "International and Domestic Sale of Goods Remedies" (1994) 8 *Commercial Law Quarterly* 19; HM Flechtner, "Remedies under the New International Sales Convention: The Perspective from Article 2 of the UCC" (1988) 8 *J. L. & Com.* 53; O Gonzalez, "Remedies under the UN Convention for the International Sale of Goods" (1984) 2 *International Tax and Business Lawyer* 79.

interests of seller and buyer. Underlying the articulation of many CISG remedies are the basic policies of upholding the contract and promoting performance by the parties. The flexible nature of the remedial scheme is enhanced by the ability of the parties to modify or adapt remedies to their own needs; this is possible because Article 6 expressly permits the parties to opt out of the CISG or derogate from or vary its provisions.

Specific Performance²¹

In civil law systems it is a basic postulate that a creditor is entitled to obtain what was bargained for in its contract with the debtor. Specific performance is seen as the primary remedy, with damages only available as a substitute. Common law systems, on the other hand, place emphasis on compensatory relief. The claim for damages is the usual remedy for breach of contract, and specific performance is granted only exceptionally, where damages would not provide adequate compensation. It appears, however, that the gap between the two systems is more pronounced in theory than in practical outcomes. Civil law systems seldom coerce performance of obligations, and a creditor can, in general, switch to a claim for damages where a debtor is not willing or able to perform.²² Even in civil law jurisdictions, traders tend to prefer damages whenever a failure to perform can be made good by payment of money.²³ The CISG does confer a formal precedence to specific performance over damages in the elaboration of its remedial regime. But it will be found that damages are readily available under the CISG for breach of contract: see “damages”, below. This, coupled with certain limits to specific performance, means that in reality the claim for damages is the dominant remedial institution of the CISG.

Like the civil law, the CISG starts with a broad view of specific performance. The buyer (under Art. 46) or the seller (under Art. 62) has

²¹ See Treitel, n3 at Ch3; Zweigert and Kötz, n5 at Ch42; EA Farnsworth, “Damages and Specific Relief” (1979) 27 *AJCL* at 247; A Kastely, “The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention” (1988) 63 *Washington Law Review* 607; S Walt, “For Specific Performance under the United Nations Sales Convention” (1991) 26 *Texas International Law Journal* 211.

²² Indeed, Enderlein and Maskow, n3 at 177, go so far as to suggest that claims for performance are rare in civil law systems.

²³ Zweigert and Kötz, n5 at 519.

the right to require performance by the other party of its obligations under the CISG. This right is lost if the aggrieved party resorts to any remedy which is inconsistent with requiring performance. Included within the CISG notion of specific performance are such types of performance *in specie* as delivery of substitute goods and repair by the seller (Art. 46(2), (3)) and payment of the price by the buyer (Art. 62). But Article 28 concedes much to the common law position by providing that a court is not bound to enter a judgment for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by the CISG. The availability of specific performance thus will be dependent upon the attitude of the forum in which such remedy is sought.²⁴ However, even where the domestic law of the forum would not allow specific performance, the court still seems to have a discretion under Article 28 to enforce the full CISG right to performance.²⁵

The remedies of delivery of substitute goods (Art. 46(2)) and repair (Art. 46(3)) are unknown to the common law though they are sometimes offered by a seller.²⁶ Under the CISG, the remedies can only be required by the buyer where the goods do not conform with the contract. In each case the buyer must request the remedy either in conjunction with a notice of lack of conformity under Article 39 or within a reasonable time thereafter. The CISG does not permit the remedies to operate so as to cause hardship to the seller. Thus the remedy of repair is excluded where it would be unreasonable having regard to all the circumstances (Art. 46(3)). Presumably repair is unreasonable where technically impractical or where the cost exceeds the diminution in value to the buyer caused by the defect.²⁷ A delivery of substitute goods can only be required by the buyer where the lack of conformity of the goods is so serious as to constitute a fundamental breach (Art. 46(2)) and the buyer loses this remedy where it is not able to return the defective goods to the seller in accordance with Article 82.

²⁴ As well, the mechanism for enforcement of any judgement of specific performance is left to the local procedural law: Lando in Bianca and Bonell, n3 at 238.

²⁵ If it were otherwise, the Article 46 (3) remedy of repair would be severely curtailed, as many domestic laws do not recognise a right to repair: Kastely, n21 at 635-37.

²⁶ Practically speaking, the buyer would only demand these remedies in the rare cases where it would be difficult to obtain qualified repair or equivalent goods. Usually the buyer would prefer a claim for damages (Art. 74) or reduction of price (Art. 50).

²⁷ Kastely, n21 at 619.

Seller's Right to Cure²⁸

Like the common law, the CISG permits a seller to cure an early, but non-conforming, tender of documents (Art. 34) or of goods (Art. 37) up to the time fixed for performance. As well, however, the CISG enables a seller even after the date for delivery to remedy at its own expense "any failure to perform" its obligations (Art. 48(1)). For all cases of cure under the CISG, the exercise of the right must not cause the buyer unreasonable inconvenience or expense, and the buyer retains the right to claim damages. Any cure after the delivery date is also required to be exercised without unreasonable delay and subject to the buyer's right to avoid the contract under Article 49. An unsettled issue is whether the right to cure under Article 48(1) can survive where a buyer has hastily avoided the contract for fundamental breach before the seller has any opportunity to cure.²⁹ To facilitate use of the right to cure, the seller can request the buyer to make known whether it will accept late performance within a period of time indicated by the seller (Art. 48(2), (3)).³⁰ If the buyer does not respond within a reasonable period of time, the seller may perform within the time indicated and the buyer may not for the duration resort to any remedy inconsistent with the seller's performance.

Additional Time for Performance (Nachfrist)³¹

Either party is permitted under the CISG to fix an additional period of time of reasonable length for performance by the other (Arts. 47(1), 63(1)). This remedial device is often termed a Nachfrist, being adapted from a German procedure of that name. Having fixed an additional period for performance,³² a party cannot during that period resort to any remedy for breach of contract, unless the other party gives notice that it will not perform

²⁸ See Treitel, n7 at 370-75; RJ Ahdar, "Seller Cure in the Sale of Goods" [1990] LMCLQ 364; EC Schneider, "The Seller's Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods" (1989) 7 *Arizona Journal of International & Comparative Law* 69.

²⁹ For the contending arguments and their proponents, see Kritzer, n3 at 364.

³⁰ The request is not effective unless received by the buyer: Article 48(4).

³¹ See Treitel, n7 at Ch 9 esp at 327-34, 338-39.

³² The term "fix" implies oral or written communication as governed by Article 27, and requires that the deadline must be clear and unequivocal: Will in Bianca and Bonell, n3 at 344-45.

(Arts. 47(2), 63(2)). However, the party fixing the *Nachfrist* is not thereby deprived of any right to claim damages for delay in performance. The main advantage of a *Nachfrist* to an aggrieved party awaiting performance is that it can remove uncertainties as to whether non-performance is serious enough to justify avoidance of the contract. Where the defaulting party still fails to perform or declares it will not perform within the *Nachfrist*, the aggrieved party has the option of avoiding the contract, irrespective of whether or not the original breach was fundamental (Arts. 49(1)(b), 64(1)(b)). But the option of avoidance is expressly limited to the cases where a seller has failed to deliver, or a buyer has failed to take delivery or pay the price. In other cases, the *Nachfrist* procedure is only of use in confirming the continuing desire of the aggrieved party for performance and in protecting a defaulting party who is preparing to perform within the additional period.³³

Reduction of Price³⁴

Article 50 of the CISG provides a buyer with the self-help remedy of reduction in price. When the goods do not conform with the contract, and whether or not the price has already been paid, the buyer is entitled to reduce the price “in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time”. But price reduction cannot be obtained if the seller remedies the non-conformity by cure under Article 37 or Article 48, or if the buyer unjustifiably refuses to accept the cure (Art. 50). Derived from civil law antecedents,³⁵ the remedy of reduction in price has no general analogue in the common law and could be misunderstood as merely a variety of claim for damages.

The Article 50 remedy differs from a claim for damages under Article 74 in the following respects:

³³ Nicholas, n12 at 225; also refer to Secretariat Commentary in *Official Records*, n1 at 39-40, 49-50.

³⁴ See Treitel, n7 at 107-11; E Bergsten and A Miller, “The Remedy of Reduction of Price” (1979) 27 *American Journal of Comparative Law* 255.

³⁵ The remedy originates in the *actio quanti minoris* of Roman law. In the civil law, reduction of price provides a monetary remedy where damages are otherwise unavailable because the seller is not guilty of fault or fraud. For provisions in the modern civil law, see CC, Article 1644 and BGB, ss 462,472.

- (1) Price reduction can be invoked by unilateral declaration of the buyer, there being no requirement of confirmation by a court.³⁶
- (2) The Article 50 formula for price reduction preserves the proportion between the contract price and the objective value of the goods, whereas damages under Article 74 are assessed by reference to foreseeable loss, including loss of profits.³⁷ It may be more advantageous to the buyer to seek the Article 74 remedy where non-conforming goods have been delivered, and the market value of conforming goods has risen between the date of the contract and date of delivery. But if the market value of conforming goods has declined before the date of delivery, the buyer might obtain a larger recovery under Article 50. Where, however, the non-conformity of the goods is so serious as to amount to fundamental breach, the buyer would want to avoid the contract and recover the price.
- (3) Price reduction under Article 50 can protect the buyer in circumstances where a claim for damages is unavailable because of defences in regard to foreseeability of loss (Art. 74) and impediments excusing performance (Art. 79).
- (4) The exercise of the price reduction remedy does not deprive the buyer of a claim for damages (Art. 45(2)). As a result, the buyer can combine the remedies, claiming both price reduction and damages for consequential losses.³⁸

Avoidance of the Contract³⁹

The remedy of avoidance of the contract is made available to buyer and seller in Articles 49 and 64 respectively. Because of the drastic effects of avoidance, the CISG restricts the circumstances in which the remedy is to operate. In this regard it will be recalled that the CISG does not accept

³⁶ If the contract price has not already been paid, the buyer can merely tender the reduced price.

³⁷ For practical illustrations of the possible advantages/disadvantages of the price reduction formula, see Will in Bianca and Bonell, n3 at 370-73; Honnold, n3 at 392-95.

³⁸ But Article 45 should not be read to permit double recovery based on the reduced value of the goods: Honnold, n3 at 395.

³⁹ In regard to avoidance generally, see Treitel, n7 at Ch 9; Zweigert and Kötz, n5 at Ch 43.

the common law idea of “conditions”, any breach of which, however minor, will allow the contract to be repudiated. Under the CISG, an aggrieved party may declare the contract avoided where:

- (a) the failure by the other party to perform any of its obligations under the contract or the CISG amounts to a fundamental breach of contract (Arts. 49(1)(a), 64(1)(a))⁴⁰; or
- (b) the other party - being a seller who fails to deliver the goods or a buyer who fails to pay the price or take delivery - fails to perform or declares it will not perform, within a *Nachfrist* fixed by the aggrieved party (Arts. 49(1)(b), 64(1)(b)).

In line with the common law approach, Article 26 of the CISG states that a declaration of avoidance is effective only if made by notice to the other party.⁴¹ The CISG thus rejects any civil law support of:

- (a) *ipso facto* avoidance;
- (b) formal advance notice of an intention to declare avoidance; or
- (c) requirements that avoidance be sought in legal proceedings.

The right to declare the contract avoided by way of Articles 49 and 64 is lost if it is not exercised within a reasonable time. In cases of late delivery by the seller or late performance by the buyer, such time runs from when the aggrieved party has become aware that delayed performance has been rendered (Arts. 49(2)(a), 64(2)(a)). In the case of any other breach, the reasonable time for avoidance runs from when the aggrieved party knew or ought to have known of the breach (Arts. 49(2)(b)(i), 64(2)(b)(i)), or, if a *Nachfrist* has been fixed, from when the period expires or when the defaulting party declares it will not perform within that period (Arts. 49(2)(b)(ii), 64(2)(b)(ii)).⁴²

⁴⁰ The right to declare the contract avoided for fundamental breach is elaborated upon in the special circumstances of anticipatory breach (Art. 72), instalment contracts (Art. 73) and partial performance (Art. 51(2)).

⁴¹ The notice under Article 26 is itself effective only if it is communicated in accordance with Article 27, on which see “Delay or Error in Communications”, above.

⁴² As well, Article 49(2)(b)(iii), perhaps superfluously, states that the buyer’s right to avoid where the seller has indicated an additional period of time for cure under Article 48 must be exercised within a reasonable time after that period expires or after the buyer declares it will not accept the cure.

Avoidance under the CISG has the main effect of releasing both parties from their obligations to carry out the contract,⁴³ though damages may still be claimed and any clauses of the contract regarding dispute settlement or consequences of avoidance remain intact (Art. 81(1)). Another effect of avoidance is that a party who has performed the contract in whole or in part may claim restitution of whatever it has supplied or paid (Art. 81(2) first sentence). But where both parties are bound to make restitution, they have to do so concurrently (Art. 81(2) second sentence). Any refund of the price by the seller must include interest from the date on which the price was paid, and the buyer must account to the seller for any financial benefits derived from the goods (Art. 84).⁴⁴ The restitutionary requirements of the CISG are wider than those found in many legal systems,⁴⁵ but they are ultimately subject to domestic laws in regard to bankruptcy and transfer of goods. Under Article 82(1) of the CISG, a buyer will in general lose the right to declare the contract avoided (or to require delivery of substitute goods) where it is impossible for the buyer to make restitution of the goods substantially in the condition in which they were received.⁴⁶ However, the buyer will retain all its other remedies under the contract and the CISG (Art. 83).

⁴³ The Secretariat Commentary in *Official Records*, n1 at 57, declares: "The seller need not deliver the goods and the buyer need not take delivery or pay for them".

⁴⁴ According to Article 84(2), this obligation on the part of the buyer applies only if (a) the buyer must make restitution of the goods or part of them or (b) it is impossible to make restitution of all or part of the goods, but the buyer has nonetheless declared the contract avoided or required the seller to deliver substitute goods.

⁴⁵ For further detail here, refer to Treitel, n7 at 385-92; Honnold, n3 at 562-64.

⁴⁶ Article 82(2) allows for exceptions to the general rule, where :

- (a) the impossibility of making the restitution is not due to the act or omission of the buyer;
- (b) he goods or part of them have perished or deteriorated as a result of the examination by the buyer provided for in Article 38; or
- (c) the goods or part of them have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use, before the buyer discovered or ought to have discovered the lack of conformity.

Remedies for Partial Performance⁴⁷

In cases where the seller delivers only a part of the goods, or where some of the goods delivered are non-conforming, Article 51(1) provides that the array of remedies in Articles 46-50 may be applied in respect of the quantity which is missing or which does not conform. It is of special note that the CISG here permits a buyer to avoid only a part of the contract under Article 49. Such partial avoidance is more readily contemplated by the civil law and the UCC than by the *Sale of Goods Act* regime.⁴⁸ Under the civil law, partial or defective performance by the seller does not generally enable the buyer to avoid the contract as a whole. Both the UCC, s2-601(a) and the *Sale of Goods Act* (s33, NSW) can accord the buyer the option to terminate the contract as a whole where delivery or conformity of the goods is partial. The CISG allows the buyer to declare the whole contract avoided, but only when the partial delivery or partial non-conformity amounts to a fundamental breach of contract (Art. 51(2)). The use of the word “only” in Article 51(2) means that where a partial delivery by the seller does not amount to a fundamental breach, the buyer cannot employ the *Nachfrist* procedure in Article 47 to avoid the entire contract.⁴⁹

Remedies for Excessive Performance

Where the seller delivers the goods before the date fixed, the buyer may refuse to take delivery (Art. 52(1)). But exercise of this right does not preclude the seller from retendering the goods at the time for delivery under the contract. A buyer refusing early delivery may be required to take possession of the goods on behalf of the seller, provided this can be done without payment of the price and without unreasonable inconvenience or expense (Art. 86(2)). Having thus taken possession, the buyer must take such steps to preserve the goods as are reasonable in the circumstances (Art. 86(1)). If the seller delivers an excess quantity of goods, the buyer may

⁴⁷ Generally, see Treitel, n7 at 375 et seq.

⁴⁸ For a civil law example: BGB, s469. The UCC, s2-601(c) allows that if the goods or tender of delivery fail in any respect to conform to the contract, the buyer may accept any commercial unit or units and reject the rest. *The Sale of Goods Act* 1923 (NSW), s16(3) impedes any partial avoidance by its rule that where the buyer has accepted the goods or part thereof, the buyer cannot reject them and treat the contract as repudiated. But this rule does not apply where the contract is “severable”. Section 33(3) (NSW) has been interpreted as allowing a partial avoidance where the contract quantity is delivered but contains goods of a different description not included in the contract.

⁴⁹ Secretariat Commentary in *Official Records*, n1 at 44.

refuse to take all or part of the excess, though if any of the excess is accepted it must be paid for at the contract rate (Art. 52(2)).⁵⁰ In some circumstances where it is not feasible to reject only the excess amount, the delivery of the excess could constitute a fundamental breach allowing the buyer to avoid the contract as a whole.⁵¹ The buyer can claim damages suffered as a result of early delivery or delivery of excess goods, unless acceptance of the goods amounts to an agreement to modify the contract under Article 29.

Seller's Right to Supply Specifications

Article 65 is intended to prevent the buyer making performance of the contract impossible by failing to supply required specifications as to "the form, measurement or other features" of the goods ordered.⁵² If the buyer has failed to specify on the agreed date or within a reasonable time of receipt of a request from the seller, the seller itself may, without prejudice to its other rights, make the specification in accordance with the requirements of the buyer that may be known to it (Art. 65(1)). A seller wishing to make the specification must inform the buyer of the details thereof and fix a reasonable time to enable the buyer to make a different specification; failure by the buyer to respond within the time so fixed renders binding the specification made by the seller (Art. 65(2)).

Anticipatory Breach⁵³

The notion of anticipatory breach delineated in the CISG is comparable to that prevailing in common law systems. By article 72(1), an aggrieved party may declare the contract avoided if prior to the performance date it is

⁵⁰ As with partial performance, the UCC s2-601 and the *Sale of Goods Act* regime (s33(2) NSW) also allow the buyer the option of rejecting the whole delivery.

⁵¹ The Secretariat Commentary in Official Records, n1 at 44, instances the case where the seller tenders a single bill of lading covering the total shipment in exchange for payment for the entire shipment.

⁵² There is a similar provision in the *German Commercial Code* (s 375). On the controversy at the Vienna Conference in regard to Article 65, see Nicholas, n12 at 229-30; Knapp in Bianca and Bonell, n3 at 476; Schlechtriem, n3 at 85-86.

⁵³ See Treitel, n7 at 379-81; JC Gulotta, "Anticipatory Breach - A Comparative Analysis" (1976) 50 *Tulane Law Review* 927; MG Strubb, "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries" (1989) 31 *International & Comparative Law Quarterly* 475.

clear that the other party will commit a fundamental breach of contract. But the party intending to declare the contract avoided must, if time allows, give reasonable notice to permit the other party to provide an adequate assurance of performance, unless the other party has declared that it will not perform (Art. 72(2), (3)). The prospective fundamental breach may be clear either from the words or actions of the defaulting party or because of an objective fact such as to render future performance impossible.⁵⁴ In the absence of an express repudiation by the defaulting party, an aggrieved party should proceed with caution, as a wrongful declaration of avoidance could amount to a repudiation entitling the other party to avoid the contract.

Instalment Contracts

The CISG in Article 73 admits the remedy of avoidance in the case of contracts for the delivery of goods by instalments.⁵⁵ An aggrieved party is able to declare the contract avoided in respect of a single instalment where the other party has committed a fundamental breach with regard to that instalment (Art. 73(1)). A similar outcome can be obtained under Article 51(1) (partial performance), though only in cases where it is the seller who breaches the contract. Where a failure to perform with respect to any instalment gives the aggrieved party good grounds to conclude that a fundamental breach will occur with respect to future instalments, the aggrieved party may declare the contract avoided for the future, provided it does so within a reasonable time (Art. 73(2)). This provision applies to future deliveries, the anticipatory breach rule of Article 72.⁵⁶ A buyer who avoids with respect to any delivery may also avoid as to past or future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time the contract was concluded (Art. 73(3)).

⁵⁴ Secretariat Commentary in *Official Records*, n1 at 53.

⁵⁵ For a comparison of Article 73 with UCC, s2-610, see Flechtner, n20 at 88-93. Under the *Sale of Goods Act* regime (s34(2), NSW), the test is whether a breach of one or more instalments is a repudiation of the whole contract or a severable breach only giving rise to a claim for compensation. See also Treitel, n7 at 376-77.

⁵⁶ It has been suggested that the standard required by Article 73(2) is less strict and more subjective than for avoidance under Article 72 or suspension of performance under Article 7: Honnold, n3 at 501. An argument against this is made by Fisher, n20 at 29.

Suspension of Performance⁵⁷

Under Article 71(1), a party is able to suspend performance of the contract if it becomes apparent that the other party will not perform a substantial part of its obligations as a result of either:

- (a) a serious deficiency in ability to perform or in creditworthiness; or
- (b) conduct in preparing to perform or in performing the contract.

Suspension permits the seller the right to stop goods in transit, a right spelt out in Article 71(2) in terms familiar to various national laws. A party suspending performance under the CISG must immediately give notice to the other party, and must continue to perform if the other party provides adequate assurance of its performance (Art. 71(3)). To be “adequate”, the assurance must provide reasonable security to the aggrieved party either that the other party will perform in fact or that the aggrieved party will be compensated for all losses in case of non-performance.⁵⁸

The Article 71 remedy is available for a party who still holds some hope of obtaining performance or who is uncertain whether any possible non-performance will amount to a fundamental breach so as to allow the contract to be avoided.⁵⁹ Remedies of similar type are found in the BGB, s321 and the UCC, s2-609, but the *Sale of Goods Act* regime (ss 43, 46, NSW) provides only limited seller rights in regard to retention of goods and stoppage in transit. A suspension of performance under Article 71 appears easier to obtain than the more stringent Article 72 remedy of avoidance of the contract for anticipatory breach. Resort can be had to suspension when it “becomes apparent” that a party will not perform, whereas avoidance is justified only when it is “clear” that a party will commit a fundamental breach. For avoidance, the non-performance must amount to a fundamental breach; for suspension it need only be of a substantial part of the obligation. It is unfortunate that Article 71 does not expressly resolve the issue of whether a failure to provide the adequate assurance will

⁵⁷ See generally, Treitel, n7 at 403-409; Strubb, n53.

⁵⁸ Secretariat Commentary in *Official Records*, n1 at 53.

⁵⁹ For accounts of the lengthy deliberations concerning Article 71 at the Vienna Conference, see Honnold, n3 at 486-88; Strubb, n53 at 491-92; Schlechtriem, n3 at 92-93.

enable the aggrieved party to avoid the contract for anticipatory breach under Article 72.⁶⁰

Damages⁶¹

As observed before, damages are the dominant remedial institution under the CISG. An aggrieved party may claim damages as provided in Articles 74-77 where the other party fails to perform any of its obligations under the contract or the CISG (Arts. 45(1)(b), 61(1)(b)). There is no requirement that damages be predicated on the fault of the party who fails to perform. By exercising a right to other remedies, the aggrieved party is not necessarily deprived of any right to claim damages (Arts. 45(2), 61(2)).

The general concept of damages for CISG purposes is outlined in Article 74:

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

This formulation clearly owes much to common law modes of thought. Article 74 covers consequential as well as direct losses, and implicitly protects expectation as well as reliance claims.⁶² The basic design is to place the aggrieved party in the same economic position as if the contract had been performed.⁶³ As to remoteness of damages, Article 74 second sentence

⁶⁰ Honnold, n3 at 494 argues that failure to provide adequate assurance could on occasion justify avoidance under Article 72. But Ziegel doubts this, holding that a party's failure to provide an assurance of performance is not to be regarded as unequivocal evidence of its unwillingness to perform: J Ziegel, "The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives", in Galston and Smit, n3 at 9-31.

⁶¹ See generally, Treitel, n7 at Chs 4,5 and 6; Farnsworth, n21; J Sutton, "Measuring Damages under the United Nations Convention on the International Sale of Goods" (1989) 20 *Ohio State Law Journal* 737; D Philippe, "Concerning Consequential and Unforeseeable Damages and Clauses Relating to Them" (1995) IBLJ 171.

⁶² Ziegel, n60 at 9-37; Farnsworth, n21 at 249.

⁶³ Secretariat Commentary in *Official Records*, n1 at 59.

expresses a principle of foreseeability of loss close to that in the well-known case of *Hadley v Baxendale*.⁶⁴ Articles 75 and 76 operationalise Article 74 by providing a means for measuring damages in some cases where the contract has been avoided. But the supplementary rules of these articles do not preclude the recovery of any further damages recoverable under Article 74.

Article 75 obtains when the aggrieved party has avoided the contract and effected a substitute transaction, i.e. a replacement purchase by the buyer or a resale of the goods by the seller. In such a case, the aggrieved party may recover the difference between the contract price and the price in the substitute transaction. But this method of assessment can only be relied upon where the substitute transaction is made in a reasonable manner and within a reasonable time after the contract has been avoided. The Article 75 method of assessment, based on actual loss, has been described as “concrete”, in contrast to an “abstract” measure based on market price.⁶⁵ There is no exact equivalent to Article 75 in the *Sale of Goods Act* regime, but similar provisions are found in many domestic laws, including the UCC (ss2-706, 2-712).

An aggrieved party, having avoided the contract, can resort to Article 76 when no substitute transaction has been made and there is a current price for the goods.⁶⁶ In this case, the CISG follows the *prima facie* rule which is accepted by the *Sale of Goods Act* (ss 52(3), 53(3) NSW) in regard to all sales: damages are assessed abstractly, by reference to the current (or market) price of the goods.⁶⁷ So far as the time for calculating the price is concerned, Article 76(1) first sentence refers to the time of avoidance of the contract. While the *Sale of Goods Act* generally has regard to the time at which performance is due, this difference has been thought to be of practical significance only in the case of avoidance for anticipatory breach.⁶⁸ In any

⁶⁴ (1854) 9 Ex. 341. See F Ferrari, “Comparative Ruminations on the Foreseeability of Damages in Contract Law” (1993) 53 *Louisiana Law Review* 1257.

⁶⁵ Refer to Treitel, n7 at 111-15.

⁶⁶ Article 76 applies both where it is impossible to determine which was the resale or purchase contract in replacement of the contract breached and where the resale or purchase was not made in a reasonable manner or within a reasonable time as required by Article 75: Secretariat Commentary in *Official Records*, n1 at 60-61. See also Knapp in Bianca and Bonell, n3 at 554.

⁶⁷ A comparable position is adopted by the UCC, s 2-708 and s 2-713.

⁶⁸ Nicholas, n12 at 231. Under the UCC, usually the seller’s damages are measured at the time for tender (s 2-708(1)) and the buyer’s damages at the time the buyer learned of the breach (s 2-713(1)): see Flechtner, n20 at 99-100.

event, when a party avoids the contract after taking over the goods, Article 76(1) second sentence requires that damages be based on the price at the time the goods were taken over, not at the time of avoidance. As for the place where the current price is to be determined, Article 76(2) looks to the place at which delivery of the goods should have been made.⁶⁹

Mitigation

The rule that an aggrieved party mitigate its loss is known in various aspects in both the common law and the civil law.⁷⁰ Article 77 of the CISG requires a party relying on a breach of contract to take reasonable measures to mitigate the loss, including loss of profit, resulting from the breach. As under the common law, a failure to take such measures enables the party in breach to claim a corresponding reduction in the damages due. At the Vienna Conference, the United States delegation unsuccessfully argued that the duty to mitigate damages be extended to include a modification or adjustment of other remedies available under the CISG.⁷¹

Interest⁷²

Without prejudice to any claim for damages, interest is due under Article 78 of the CISG if a party fails to pay the price or any other sum that is in arrears.⁷³ Article 78 overrides those domestic laws which would deny interest and perhaps also those which would admit of only nominal recovery.⁷⁴ But

⁶⁹ If there is no current price at that place, Article 76(2) refers to the price at such other place as serves as a reasonable substitute, due allowance being made for differences in the cost of transportation of the goods. If no such price exists, damages will have to be determined on the basis of Article 74.

⁷⁰ See Treitel, n7 at 179-92 for a broad overview of the approaches of the different legal systems.

⁷¹ Official Records, n1 at 396-98.

⁷² See generally, F Ferrari, "Uniform Application and Interest Rates under the 1980 Vienna Sales Convention" (1995) 24 *Georgia Journal of International & Comparative Law* 467.

⁷³ Since Article 78 conceives the obligation to pay interest as a general rule, a debtor is liable for interest even if payment of the sum in arrears is suspended because of the operation of Article 79 (excuse for non-performance): Schlechtriem, n3 at 100.

⁷⁴ As to the situations where interest may be available under Article 78, see Honnold, n3 at 526-28 for more detail.

it does not determine the rate of interest or the time over which interest must be calculated. These matters are left to whatever domestic law the forum considers appropriate.

CONCLUDING REMARKS

Any scheme of remedies, whether domestic or international, is a product of compromise, and will have some imperfections. Nonetheless, the scheme offered by the CISG represents a reasonably systematic and coherent attempt to meet the needs of international trade. There is a preference for upholding the bargain struck by the parties, to prevent too easy an avoidance of the contract. CISG remedies are carefully framed to enhance the security and regularity of the sale transaction, by encouraging the performance of contractual obligations. The detailed balancing and adjustment of remedies achieves fair outcomes for both seller and buyer. And the flexibility of the remedial scheme, founded on the CISG adherence to party autonomy, allows the parties, if they wish, to work out remedies to suit their specific contract circumstances. In sum, the remedial scheme of the CISG contributes positively to the overall success of the convention as a practical and principled contribution to the unification of international sales law.